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# Contrasting the Vision and the Reality: Core Ethical Values, Ethics Audit and Ethics Decision Models for Attorneys<sup>1</sup>

Arthur Gross Schaefer

Leland Swenson

## I. INTRODUCTION

Behind the confident exterior of highly trained and competent attorneys are sometimes sad, exhausted human beings feeling empty and disillusioned.<sup>2</sup> Certainly this mood of despair does not affect them all to the same degree or at the same time, for there are legal professionals who will not resonate at all to the concerns raised in this article. However, have you noticed that many attorneys are no longer laughing at lawyer jokes? Shared laughter has given way to increased anguish and a sense of growing congruence between many lawyers' self perception and the negative standing in which they are often viewed by the general public. The public's negative feelings towards lawyers date as far back to the famous Shakespeare quote, "The first thing we do, let's kill all the lawyers."<sup>3</sup> The law profession has historically had a public relations problem regarding the public's view of them. Nevertheless, lawyers are increasingly demoralized

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1. Pepperdine Presentation. Reprinted with permission of The Journal of the Legal Profession.

2. Nancy McCarthy, *Pessimism for the Future*, CAL. B.J., Nov. 1994, at 1, 6, 16.

3. WILLIAM SHAKESPEARE, *THE SECOND PART OF HENRY THE SIXTH*, act 4, sc. 1 (Sylvan Barnet ed., Signet 1989) (1623).

by an increased feeling of devaluation and dishonor by the public and the profession itself.<sup>4</sup>

In the past, lawyers disregarded the public's perception that attorneys had less professional integrity, as compared to other professionals. The legal profession chose to neglect its public image for two reasons. First, the profession understood that the complex legal system required them to act in ways the public could not adequately understand. Attorneys were aware that society was understandably misled regarding the function of lawyers, given that society viewed attorneys as seekers of truth and justice. Lawyers knew all too well that the truth finding function was reserved for the adversarial process as a whole, while the ultimate arbiters of justice were judges and juries. However, communicating that point to lay persons seemed to be a losing battle.

The second reason the legal profession chose to neglect the public's image of it was that attorneys also understood that those outside the legal profession could not fully appreciate the adversary system. The American adversarial process requires lawyers to aggressively present their client's case, even if such representation is contrary to the lawyer's own personal beliefs. Such a professional demand is easier for some practitioners than others, as evidenced by advocates who often take unpopular cases based on the belief that everyone who comes through their door is entitled to legal representation. These two public misconceptions have clearly added to the nefarious reputation for lawyers. "The lawyer whose client or cause is unpopular is not going to be well liked, no matter how capably or ethically he [or she] performs."<sup>5</sup>

Unquestionably, the public is frustrated by the perceived nastiness of the adversarial process. Lay persons seethe in disgust at the ability of attorneys to articulate a defense for the most repulsive actions, as well as at the seemingly endless and costly legal process. It is as if society thinks that all attorneys place their own pecuniary and egotistical needs ahead of the client and even society itself. Yet, even with an understanding of the public's view of advocates in the legal profession, such an observation does not seem sufficient in and of itself to dispel an increasingly nagging feeling that a key societal belief may indeed be accurate for many legal practitioners—that they lack integrity. Lawyers throughout the legal profession are exiting the practice in droves and those that choose to stay feel trapped in a disabling situation that is overwhelming, and from which there appears no escape.

Perhaps this feeling of being involved in a profession that frequently forces its practitioners to act in ways inconsistent with their own personal values is a key reason why an increasing number of attorneys feel that they lack integrity and have thus become dissatisfied with the legal field. For example, in 1994, a RAND study commissioned by the California Bar

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4. See Mary Ann Glendon, *Law in a Time of Turbulence*, 60 VITAL SPEECHES OF THE DAY 620 (1994).

5. Susan Wolf, *Ethics, Legal Ethics and the Ethics of Law*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 38-59 (David Luban ed., 1993).

Association found that two thirds of the attorneys polled believed that those who will leave the practice of law will do so “because of dissatisfaction with their jobs.”<sup>6</sup> Moreover, the headline unveiling the study read, “Given a second chance, half of the state’s attorneys would not become lawyers.”<sup>7</sup> Such an overwhelming ratio of discontentment deserves significant inquiry into the causes of the vexation, stress, and frame of mind of the many individuals within the legal field. There has not been sufficient discussion in public or even among lawyers on this important topic. Rather, lawyers, like many other professionals in our culture, try to tough it out themselves. It is our contention that much of this growing sense of frustration and disillusionment is generated by conflicting expectations.

The point of this piece is to help lawyers understand, manage, and cope with both the moral and ethical demands of lawyering, as well as their career dissatisfaction with the practice in general. This paper does not simply use the various ethics rules to deal with such issues, but rather integrates psychological principles to help explain and manage career dissatisfaction among practitioners, and ethical and moral constructs to produce workable ethics solutions for practitioners. To that end, this paper will first discuss the six most common areas where lawyers experience conflicting expectations within the practice of law. Second, this article will search for solutions to enhance lawyer morality and career satisfaction. Finally, the article will provide a workable ethics decision model and ethics audit, which seeks to help lawyers work through ethical and career frustrations.

## II. CONFLICT OF EXPECTATIONS: THE THEORY OF COGNITIVE DISSONANCE

Too often, legal practitioners do not take sufficient time to step back and truly look to see if there is a gap between their expectations of the profession and the reality of their practice. During reflective time-outs, attorneys may find that their actions are repeatedly at a distance from their moral, ethical, and lifestyle principles. The distance between an attorney’s value structure and actual law practice can be explained through the theory of cognitive dissonance. The theory of cognitive dissonance is used in psychology to express the uneasiness that a person feels when he or she does not act in accordance with his or her values and beliefs.<sup>8</sup> Lawyers risk losing sight altogether of what they sought to accomplish by joining the legal profession by not taking time to identify and understand the reasons for the distance between their individual expectations, convictions, and actions. When a person acts outside the boundaries set by his or her value structure, the individual’s character and self-image become compromised. Ultimately, his

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6. McCarthy, *supra* note 2, at 1.

7. *Id.*

8. ROBERT A. BARON, PSYCHOLOGY 638 (1995).

or her goals and effectiveness can be undermined. Rather than pursuing a direction charted by his or her principles, a person often allows the gale of pressing problems or presumed professional exceptions to control his or her destiny and values. This disparity, even if not fully apparent, can produce antagonism, hostility, disenchantment, and simple frustration.<sup>9</sup>

In addition, when an attorney does not act in accordance with his or her moral values, especially over a prolonged period of time, a dangerous situation results for both the attorney and the legal system. When the goals and values of the individual lawyer get lost, the effectiveness of the legal system diminishes. Our legal system has core values that are either enhanced or diminished by the actions of its prominent players, the attorneys. Over time, the advocate's actions can corrupt and impair the legal system's ability to follow its own principles. Thus, to avoid such corruption within the legal system, practitioners need to take precious time to reflect and decide upon their priorities in the practice of law. Once this assessment has been made, the individual lawyer then needs to evaluate whether the articulated priorities correspond to his or her basic values. This assessment and evaluation process is critical for both the legal profession and the legal system because no lawyer practices law in a vacuum. A person's activities as a lawyer are necessarily influenced by how others practice law and the general attitude within the profession. Therefore, lawyers must first recognize how the changing legal environment affects their ability to follow their own moral principles.

#### A. *The Changing Legal Environment*

The practice of law has increasingly conformed to a business model of conduct, as opposed to the traditional professional model which granted established attorneys the power to socialize new attorneys into the practice. Certainly the general society, along with many professions, appears to be heavily motivated by business considerations in light of the globalization of the American economy. The legal profession is not immune from these trends. There are two factors that have driven this change within the practice of law. The first is the Supreme Court decision of *Bates v. State Bar of Arizona*,<sup>10</sup> and the second is the dramatic influx of new attorneys.

Twenty-five years ago, in order for newly-admitted practitioners to gain clientele, they were either required to work with or be in the good graces of established attorneys, or in the alternative, work for an established legal outfit. However, the 1977 U.S. Supreme Court case of *Bates v. State Bar of Arizona* changed the traditional power structure of the legal profession.<sup>11</sup> The decision practically overnight moved the profession into the business model of conduct by granting all lawyers direct access to potential clients

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9. See generally Arthur Gross-Schaefer & Eric Weiss, *Clergy Burnout: A Matter of Conflicting Expectations*, CONGREGATIONS, Mar.-Apr. 1995, at 13-16 (discussing the stresses associated with the clerical profession).

10. 433 U.S. 350 (1977).

11. *Id.*

through advertising.<sup>12</sup> As a direct outgrowth of *Bates*, the traditional model's socialization process of new attorneys ceased. No longer were established practitioners able to impart traditional legal edicts, which sought to preserve the integrity of the law profession, to the masses of newly-admitted lawyers. Such newcomers saw no need for this socialization process and instead began to create their own rules of edict, which deviated from those traditional edicts which sought to preserve the integrity of the practice.<sup>13</sup> This new group of practitioners did not feel tied to the wall of integrity built by the previous generations of practitioners, and were instead more interested in capitalizing on the economic gains available through mass advertising. Therefore, decisions such as *Bates*, aimed at enhancing the legal profession, have in a sense backfired by giving rise to the greedy, ambulance-chasing perception of lawyers; this perception tears away at the integrity of the law profession.<sup>14</sup>

The second factor that caused the profession's adoption of the business model of conduct was the marked increase in the number of new attorneys. With the loss of older professional control, the entrance barriers into the practice of law fell. With such low-entry barriers, it became a survival of the fittest in order for the more than 1,000,000 attorneys in the United States, plus the more than 50,000 nationwide bar-takers each year, to survive economically.<sup>15</sup> Based on a study published in the California Bar Journal, sixty-three percent of California lawyers polled believed that there are too many lawyers in California.<sup>16</sup> The resulting heightened competition among lawyers for securing and retaining clients has shifted legal advocacy from the traditional duties of forming legal arguments that uphold the interests of the profession, society and justice, to an emphasis on building cases that cater to the client's or law firm's financial demands.

Furthermore, as the number of lawyers increases, the probability of repeatedly encountering the same opponents decreases. Such an adversarial system results in increased anonymity and a loss of professional accountability among the profession. As relationships between attorneys become more depersonalized, the recipients of rude or otherwise needlessly aggressive behavior can no longer be counted on to act as an internal mechanism for punishing such behavior in future encounters. With less effective peer sanctions for dishonorable and discourteous conduct, it is foreseeable that such conduct will increase. As a consequence of these changes to the legal environment, "what used to be a gentleman's profession, relying upon a code of honor more stringent than the

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12. *Id.*

13. McCarthy, *supra* note 2, at 1, 3.

14. *Id.* at 1.

15. Howard Erichson, *Strengthening Ethics in a Million-Lawyer World*, NAT'L L.J., Aug. 3, 1998, at A24.

16. McCarthy, *supra* note 2, at 1, 3.

professional ethics, has degenerated into a hostile, backbiting environment, with particular emphasis on the bottom line.”<sup>17</sup>

Such an observation about the integrity of the legal profession raises questions relating to whether law firms are accumulating hours so they can bill larger amounts to their clients, or actually seeking to be fairly compensated for the value of their services. Criticism surrounds law firm billing structures, which reward an attorney’s contributions to the firm based upon the billable hour.<sup>18</sup> In particular, pressure upon junior associates to rack-up billable hours certainly works to the detriment of their long-term professional development as lawyers, while minimally increasing their short-term productivity.<sup>19</sup> The ensuing increased focus on the bottom line has contributed to an insatiable demand for more billable hours and has forced many practitioners into moral lapses as they rush to obtain these hours. Such billing practice elevates both stress levels and the moral conflicts involved with being a lawyer, while decreasing the integrity of the law profession.<sup>20</sup>

One of the best insights into giving up personal integrity is found in the Bible in the story of Balaam.<sup>21</sup> Balaam was a professional curser who was hired to destroy the Jewish tribes escaping ancient Egypt. Balaam was one of those special people whose reputation was so well established that the Bible records the King of Moab’s statement that “he whom thou [Balaam] cursest is cursed.”<sup>22</sup> However, the source of Balaam’s power was his special relationship with God, who had instructed him, “[T]hou shalt not curse [the Jewish] people.”<sup>23</sup> Balaam did not tell his employer that he had been ordered by God not to fulfill his commission, thus lying to his employer and, in a deeper sense, to himself.<sup>24</sup> Although Balaam knew he could not curse the Jewish people as he had promised, he was blinded by his need to please his employer and obtain the large retainer given to him by the King of Moab.<sup>25</sup> Balaam attempted to ignore God’s divine command and planned to meet with the King of Moab; however, God sent an angel to impede his progress.<sup>26</sup> While in route to Moab, Balaam was blind to the fact that an angel wielding a sword blocked his path.<sup>27</sup> Although Balaam could not see the angel’s threat, Balaam’s donkey did see the angel and spoke to Balaam, warning him of the angel’s presence.<sup>28</sup> It took the experience of a talking

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17. Deborah L. Aaron, *Running from the Law*, LEGAL ECONOMICS, Sept. 1988, at 46.

18. See ABA COMMISSION ON BILLABLE HOURS, ABA COMMISSION ON BILLABLE HOURS REPORT (2002), available at <http://www.abanet.org/careercounsel/billable/toolkit/bhcomplete.pdf>.

19. See *id.*

20. McCarthy, *supra* note 2, at 1.

21. See *Numbers 22* (Jewish Publication Society).

22. *Numbers 22:6* (Jewish Publication Society).

23. *Numbers 22:12* (Jewish Publication Society).

24. See generally *Numbers 22* (Jewish Publication Society).

25. See generally *id.*

26. *Numbers 22:21-40* (Jewish Publication Society).

27. *Id.*

28. *Numbers 22:28-40* (Jewish Publication Society).

animal and an angel wielding a sword to get Balaam's attention and open his eyes to see that his contemplated actions went against a divine command.<sup>29</sup>

In a metaphoric way, this ancient story is about giving up one's personal nature, truthfulness, and integrity to please the expectations of others. Similarly, many of those in the legal profession have likewise been aware that what they are doing goes against their personal code of honesty and integrity, yet still continue with their practice because of their need to please their clients and their desires for financial gain. Like the Biblical Balaam, difficult decisions are unavoidable when living in a society with seemingly endless choices which invoke internal moral conflicts. The moral choices of advocates have continually been used as examples to form modern moral ideals and values. From prophets like Balaam to modern heroes like Martin Luther King and Mahatma Gandhi, we as individuals have learned the power of making the difficult, but morally right decision. An individual's decision to act in accordance with his or her inner voice may go against the popular choice, or it may be contrary to the beliefs and desires of those in power, yet it is the good decision for the individual. Today, the difficulty of making a decision that goes against popular choice is a well-understood experience for attorneys.

### *B. More Time and More Family Disruption*

This question is for attorneys. Think back to your first year of practice. What were your personal expectations about professional time commitments, compensation, community status, family disruption, and personal integrity? Now think about your current law practice, lifestyle and ethical values. How far is your reality from your expectations? How about your expectations during your third, seventh, and tenth year of practice? Is your reality that the hours are longer, the family disruption greater, your values system frustrated, and your career dissatisfaction at an all-time high? Based on my discussions with many practitioners, there appears to be a growing trend in the last ten years of even established law firm partners spending longer hours at work and less time with their families and friends. Ironically, ten years ago the professional goal of making partner within a law firm entailed obtaining increased compensation and social status, all with less pressure to actually practice law. Partnership track was a perceived easy street, since partners made more money simply advising on junior associate cases and pursuing new clientele. However, in today's law firm life, becoming a partner does not carry the rewards it once did.

Many lawyers I interviewed also noted that they did not expect the extent of the discourteous and needlessly aggressive abuse from their peers. While many knew upon entrance into the profession that law could be hard

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29. See *Numbers 22* (Jewish Publication Society).



on one's personality and values, they were unprepared for the moral conflict of their personal ethics with those within the profession. In short, for many of those interviewed, the reality of the practice of law was even more stressful than their expectations initially assessed. For most of the lawyers I interviewed, the issue of professional ethics and personal moral integrity seemed to be the most difficult aspect of their career. Therefore, beyond the long hours and deflated expectations, perhaps the biggest problem facing the legal profession is the question of how lawyers are to deal with ethical conflicts.

### *C. Increased Level of Ethical Conflicts*

Attorneys are advocates for their clients, their firms, the legal profession, and, in a general sense, society. For ethical consideration we can classify the focus of their advocacy as acting for the few, or as acting for the many. Lawyers are advocates for the few when they act solely in the interest of the individual client or firm they represent. However, attorneys become advocates for the many when they act as officers of the court, promoting the interests of the legal profession, the legal system, and society as a whole. Oftentimes, the interest of the client or the firm will not align with the best interests of the legal profession and society. Today's legal practice involves complex choices that frequently ask the attorney to compromise the moral imperatives of the many, for the moral imperatives of the few. For example, should an attorney represent a client who he or she thinks is guilty or is lying?<sup>30</sup> Decisions such as this one pose the greatest amount of dissonance because they may directly oppose the lawyer's personal value structure.

As the pressures of the practice increase, the need to be successful, or merely survive, may start to compromise a lawyer's professional integrity. The resulting compromise not only forces lawyers to forget why they chose to become a lawyer, but also who they are in relation to whom they wanted to be. The contention here is that attorneys are faced with certain moral decisions that cause an inordinately high degree of conflict within the particular individual, which translates into dissatisfaction with his or her career. It is difficult to hold two or more conflicting beliefs or ideas without discomfort. Stress results when a person is forced to confront the conflict. Such confrontation usually occurs when the person is forced to behave in a way inconsistent with his or her strongest beliefs. Lawyers are required to behave in ways that are sometimes inconsistent with their beliefs on a daily basis. Such stress was not created by the practice alone, but began in the institution of law school.

Law schools make lawyers out of members of the general public. Most law students enter law school with the same belief systems held by mainstream society. When law school focuses on the aiding of justice, the law student's preexisting morality is not jeopardized. However, when law

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30. Arthur Gross-Schaefer & Peter S. Levi, *Resolving the Conflict Between the Ethical Values of Confidentiality and Saving a Life: A Jewish View*, 29 *LOY. L.A. L. REV.* 1761 (1996).

school turns to teaching absolute advocacy, instead of general moral and social ideas, the original beliefs held by law students are significantly challenged and altered. As one of the authors remembers,

I still recall my first day of law school when a graduating senior told us that in spite of his education, he had not lost his passion for justice. I did not know what he meant until I entered the classroom the next day. Then I knew all too well what he meant.<sup>31</sup>

After law school, young lawyers learn career survival techniques primarily from partners and/or supervising attorneys. Such authority figures can strongly encourage behavior that is incompatible with the young attorney's personal beliefs, ultimately resulting in cognitive dissonance very early on in the practice of law. Cognitive dissonance can be a very stressful event and can severely hamper a young attorney's enjoyment of his or her new practice.

At this juncture, it is important to recognize that there are some lawyers who do not experience cognitive dissonance when engaging in what others may believe are morally conflicting situations. For instance, lawyers who score high on the Myers-Briggs Type Indicator psychological test (a test which measures extroversion and thinking versus feeling) experience less stressful dissonance according to a recent study.<sup>32</sup> According to a psychological study using the Myers-Briggs Type Indicator test, attorneys who are morally sensitive and ethically conscious are more likely to experience dissonance, higher levels of stress, and have the highest likelihood of withdrawing from the legal profession. The practical impact of such a study rests with the exit levels within the practice of law. If ethically sensitive lawyers withdraw from the practice of law, then it is logical to assume that the competitive and abrasive attorneys remain, increasing the stressful and abusive environment within the practice of law. This evolutionary process within the practice breeds an environment where only ethically desensitized lawyers prevail.

#### *D. Loss of Social Utility*

From the public's perspective, lawyers have lost their social utility. The old public perception that lawyers were instrumental in the envisioning, founding, building, and maintaining of America's democratic values has been unable to withstand today's tireless (and often tasteless) jokes regarding lawyers' lack of utility. Historically, many of our elected and appointed leaders were lawyers. Often law was perceived as a prerequisite

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31. Reflections of Dr. Gross-Schaefer's first day at Boston University School of Law.

32. See LELAND C. SWENSON, *PSYCHOLOGY AND LAW FOR THE HELPING PROFESSIONS* 18 (2d ed. 1997).

to running for public office. Today, this tradition continues as many civic leaders, government representatives, and charitable organizers retain a large percentage of members from the legal profession. However, with recent scandals involving lawyers in politics (most notably the President Clinton/Monica Lewinsky scandal), the belief that lawyers help maintain the value structure of America is quickly eroding.

Notwithstanding the profession's political self-image, the most common and traditional way in which attorneys are sought to add value to society is through pro bono work and community involvement. By providing free legal representation and participating in community functions, the legal profession as a whole gains public approval, while simultaneously providing social utility. However, in recent years, fewer and fewer law firms require their members to engage in pro bono activities, which resultantly encourages their attorneys to shy away from public service.

Recent discussions with entering law students strongly suggest that the current impetus for many legal aspirants appears to lack any significant societal perspective.<sup>33</sup> Perhaps it has always been a naive belief that the law profession had an admirable purpose, such as helping to create a society where all people are equal in the sight of the law and fairness is to be guaranteed, no matter what a person's social standing or political affiliation. Maybe the vision of the legal profession was overstated as a noble calling which sought for the betterment of society. Certainly today the practice of law has increasingly become one of the many career options focused on protecting and increasing individual ambition, as opposed to providing social utility.

#### *E. Working Within an Adversarial System*

The combative nature of the adversarial process intimidates many attorneys because many attorneys are not equipped to deal with the moral conflicts of fighting, especially when they believe less in their own cause, than in the cause of the opposing side. For the purposes of this paper, the adversarial process as a means of resolving disputes, and the extensive literature debating its effectiveness, will not be an issue. We assume that the adversarial process guarantees that each party will be represented by an advocate, "not that each party's rights will be successfully protected by that advocate."<sup>34</sup> Rather, we focus on the effects that participating in the adversarial process produces for individual attorneys. There is a double-edged sword here. If the attorney is caught in a moral dilemma, performance for the client may suffer. If the attorney ignores a moral dilemma, he or she will be compromising self worth, basic moral values, as well as the ethics rules that govern lawyer conduct.

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33. *Id.* at 14.

34. Alan Donagan, *Justifying Legal Practice in the Adversary System*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 123, 127 (David Luban ed., 1993).

Among the first and most important things a law student learns in law school is the skill of advocacy.<sup>35</sup> Prior to learning all of the analytical skills that will be used in the professional world, the law student tries to perfect the ability to form a convincing argument.<sup>36</sup> The term advocacy in and of itself is a rather simplistic way of referring to a very complex and morally challenging concept. A more in-depth look at the term reveals that the art of advocacy was debated in Socratic times as the individual's ability to produce a conviction in his or her argument that he or she was right.<sup>37</sup> This concept implies that the attorney's duty is one of conviction instead of knowledge of the truth.<sup>38</sup> Under such a theory, the "indifference to truth is consistent with a strong interest in persuading himself of the truth of the beliefs he wants others to accept."<sup>39</sup>

It is true that the attorney, who is not convinced of the beliefs that he or she is trying to impart onto others, will be a poorer advocate than the one who is convinced, unless the lawyer is a great actor. How is an individual to deal with the fact that he or she must be indifferent to truth, and sometimes disregard societal norms of moral judgment, simply to be the perfect advocate? A dichotomy is automatically imposed from the beginning of the student's journey through law school. This indifference to truth has certain effects on a person's character, especially that of the law student, who will question whether or not he or she will lose sight of what is wrong or right in order to be able to convincingly and effectively advocate a position.<sup>40</sup>

Realistically, this is an exaggeration of the process of learning advocacy. However, the cultivation of the effective advocate can make a person either less inclined to reach for the truth or more cynical about truth. "The cynicism of the advocate is not the product of his [or her] having attempted to discover the truth about human affairs and failed; rather, it is the product of his [or her] having become accustomed to disregard[ing] the truthfulness [] to the practice of [this] craft."<sup>41</sup> In essence, the process of becoming an effective advocate hardens the moral arteries and personality of the attorney. If an attorney learns such ethically numbing principles and such principles are reinforced over and over in his or her professional life, it becomes easier for the individual to ignore his or her ethical responsibilities.<sup>42</sup>

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35. Anthony T. Kronman, *Foreward: Legal Scholarship and Moral Education*, 90 YALE L.J. 955, 959 (1981).

36. *Id.*

37. *See id.* at 959-64.

38. *Id.* at 960.

39. *Id.* at 961.

40. *See id.* at 961-64.

41. *Id.* at 965.

42. *See id.*

Consequently, it becomes more difficult for the attorney to make decisions that are consistent with traditional moral values and beliefs. Therefore, despite the ease of disregarding certain moral convictions, the attorney will still be faced with his or her individual dissonance and will be more likely to be dissatisfied with his or her current standing within society. For attorneys experiencing dissonance, what was once a promising career to champion causes has in essence become a detriment to the moral standing of the individual.

Another prevalent source of professional dissatisfaction stems from the way in which attorneys engage with their colleagues and their clients on the other side of the courtroom.<sup>43</sup> While spending years trying to perfect the necessary skills to compete in a combative environment, social skills can take a back seat, giving way to a hardened, more egotistical personality. When extreme at-any-cost tactics are associated with winning, personality traits not dissonant with using these maneuvers are reinforced. For the lawyer as an individual, it is a matter of facing a conquer-or-be-conquered situation while in the courtroom.<sup>44</sup> "Lawyers must extract their egos from their work, and avoid the temptation to internalize the quested 'win' thus obscuring the real merits of the case and overlooking practical alternatives for addressing them."<sup>45</sup> This is not to say that most attorneys get so caught up with internal moral agony that they become a detriment to the client or the case. On the contrary, lawyers often get so caught up in the case and the constant combat that exists in the legal arena that they begin to doubt if the pursuit of justice has any relation to their activities. The first warning sign of disillusionment among attorneys is when they begin to say to themselves: "This isn't worth it." Such an indicator is not only a sign of career dissatisfaction, but also of personal dissatisfaction with their personal lives.

Frequently lawyers will extend the combative nature outside of the courtroom. Most lawyers, but most intensely those with the greatest emotional sensitivity<sup>46</sup> will eventually have the stresses of courtroom combat reduce the joy in their lives, harm their intimate relationships, and give rise to doubts about their abilities to maintain high standards for their legal practices.

Lawyers often discover that their combative and abrasive courtroom tactics permeate into their personal relationships, causing them to become less sensitive and emotionally detached from family and friends. This desensitizing experience is consistent with what is too often learned during law school: avoid the emotion so that you can be the consummate advocate. Relationships with loved ones become based on combat and logic, rather than understanding and caring. If not held in-check, such combative traits will promote job dissatisfaction and family conflict. Although no reliable

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43. McCarthy, *supra* note 2, at 1.

44. Annette J. Scieszinski, *Return of the Problem Solvers: The Profession Needs to Focus on Helping People, Not Just Fighting Battles*, A.B.A. J., June 1995, at 119.

45. *Id.*

46. Debra C. Moss, *Lawyer Personality*, A.B.A. J., Feb. 1991, at 34.

data is available, it may be the case that attorneys have such a high divorce rate due to an unchecked combative personality.

Two of the most difficult ethical dilemmas a lawyer may face are either being pressured to advance an unfair claim, or being pressured to humiliate a witness on the stand, all in the name of zealous representation. The idea of intentionally harming another individual is dissonant to the basic moral codes of most individuals. Furthermore, when the legal system itself gives the lawyer the opportunity to win a case on some technicality, even though the lawyer knows the client should lose, such a system makes it difficult for the lawyer to reconcile professional standards with personal ideals. Such a legal system makes lawyers question whether their work produces any societal good. With this dilemma within the practice of law, it makes it difficult to justify how lawyers live with themselves. It is indeed disturbing to compare the morality of the legal profession as a whole with traditional societal values, which view the legal system as producing too many unfair results.

### III. THE SEARCH FOR SOLUTIONS: ENHANCING LAWYER MORALITY

In order for an attorney to place a proper perspective on his or her career, the attorney must first attempt to grasp an understanding of his or her conflicting career expectations. With such an understanding, lawyers will be able to pinpoint the source(s) of their dissatisfaction. For instance, the lawyer who is either disillusioned because he is not making enough money, or is frustrated with his firm because he is continually ignored for a partnership position, must first identify that these respective sources create career dissatisfaction. Likewise, the attorney who does not fully appreciate the many long hours required for the practice of law, as compared to the marginal time spent with family, will experience dissatisfaction if time spent with family is a priority for his life. Similarly, the attorney who wants to affect change and champion causes, but instead encounters futility within the practice of law, will be dissatisfied with his career if he does not attempt to identify the conflicting expectations he holds regarding the legal system. It is critical for practitioners to first take time to analyze their various conflicts of expectations, for only with a better sense of one's own frustrations, successes, hopes, and fears can an individual seek solutions.

Once a lawyer has analyzed the various conflicts of expectations held, he or she will have many questions regarding his or her ethical direction. The lawyer may be juggling such questions as: What does justice dictate? What about the client contract? Will I feel right about myself during the course of representation? What about my obligations regarding confidentiality? For guidance on such issues, a lawyer might turn to the American Bar Association's Rules of Professional Responsibility, or he or she may also turn to a colleague, a friend, or ultimately to his or her own

moral constructs for advice. However, as a supplement to these avenues, psychologists note that the best way for professionals to deal with such stress is through displaying moral responsibility. "According to cognitive developmentalists, the reasoning skills and dispositions related to moral responsibility are best acquired in formal and informal environments in which there is opportunity for critical reflection and dialogue about common problems."<sup>47</sup>

In the practice of law there is rarely any critical reflection between the client and the attorney when a moral conflict arises, primarily because clients and attorneys do not communicate from the same perspective. The client has his or her own interests to deal with because he or she is the one with the legal problem, and hence the one with the most to lose. The attorney, on the other hand, as a paid legal advisor, must address his or her legal responsibilities first because that is what he or she is being paid to perform. Yet, the attorney has an additional concern, which takes into account the repercussions the representation may create. The attorney must also represent the client's interest knowing that he or she must still interact with other legal professionals, as well as live with his or her own conscience, once the representation of the client has ceased.

The opportunity to handle moral questions properly, that is, taking time out, weighing all of the options, and selecting the right solution, is often difficult to seize with deadlines, client demands, court dates, and the traditional demands of one's personal life. The complexity of moral problems in today's Internet-speed practice makes searching for a solution to lawyer morality a difficult personal journey for practitioners. To illustrate an attorney's search for solutions, we examine two basic theories of lawyer morality and how they relate to moral conflict and dissonance as attorneys make decisions in their daily professional lives. The two basic theories to be evaluated are the amoralist view of morality and the utilitarian approach to morality.

Amoralists "assume[] that the morality is already in the law, . . . [and that] anything legally right *is* morally right."<sup>48</sup> This ethical stance is dangerous because it assumes that laws alone can bring about justice without the intervention of moral interpretations from the legal community and society itself. The amoralists' view of morality ignores that fact that "lawyers are not *just* lawyers, but human beings with a range of moral and personal commitments and values into which their professional commitments and values must be made, as comfortably as possible, to fit."<sup>49</sup> Ethically sensitive attorneys who choose to shut out moral decisions by adopting the amoralists' view of morality will experience internal conflict

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47. W. Wesley Tennyson & Sharon M. Strom, *Beyond Professional Standards: Developing Responsibility*, 65 J. COUNSELING & DEV. 298, 299 (1986).

48. David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 4 AM. B. FOUND. RES. J. 637, 638 (1986).

49. Wolf, *supra* note 5, at 53.

and unhappiness about themselves and their legal career.<sup>50</sup> Thus, in searching for solutions that enhance lawyer morality, the amoralist view of morality does not provide a workable solution.

Another view of lawyer morality is the utilitarian explanation. This approach asks the question, "Will the lawyer's role further the good of society?"<sup>51</sup> In determining whether the lawyer's role furthers a societal good, the lawyer's professional role must be defined. One societal definition of the lawyer's role is that the lawyer "helps to preserve and express the autonomy of his client vis-à-vis the legal system."<sup>52</sup> A second view of the lawyer's societal role is also the "lawyer as a legal friend" model.<sup>53</sup> This model states that the lawyer acts as a friend to the client to further the client's interests.<sup>54</sup> Underlying both of these societal views of the lawyer's role is that the lawyer is an aid to society providing a beneficial function, hence furthering the good of society. In searching for a solution to lawyer morality, the utilitarian explanation of lawyer morality provides a workable framework because it forces the lawyer to ask the question "whether . . . a decent and morally sensitive person can conduct himself according to the traditional conception of professional loyalty and still believe that what he is doing is morally worthwhile."<sup>55</sup>

Realistically, however, the legal profession has taken the position that lawyers should not be held personally accountable for the moral stance of their clients. Hence, when a lawyer is evaluating whether or not to represent a potential client, moral concerns tend to be the last factor in the decision making process. Yet, for the legal profession to fulfil their societal role and resultantly enhance their individual morality, a lawyer must be willing to take the moral high road by not automatically accepting every financially appealing case. By this process, both the profession, as well as society as a whole, will be better served.

Attempting to define the lawyer's role on such simple theoretical terms is not a complete analysis of legal ethics. After all, a lawyer's professional duties to his or her client dictate that the lawyer strive not to be a good person, but instead a good lawyer. Yet, what lawyers fail to realize is that being a good lawyer specifically entails a reasonable adherence to the moral virtues of our society. Therefore, when attempting to understand the idea of cognitive dissonance among attorneys based upon moral conflict, we must understand how the person integrates professional life with personal ideals.

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50. *See id.*

51. Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 *YALE L.J.* 1060, 1067-68 (1976) (explaining the utilitarian point of view).

52. *Id.* at 1074.

53. *Id.* at 1065.

54. *Id.* at 1065-66.

55. *Id.* at 1065.



There is the assumption here that the reason we as people choose a particular career is because we identify with the ideals of the chosen profession. The morality choices of the lawyer and the dilemmas that lawyers face are social problems in and of themselves, rather than intraprofessional problems. "They are among the questions that we as citizens must ask if we are to make and maintain our society as one in which the principles of justice are satisfied and morally important goals are achieved."<sup>56</sup> Each attorney has his or her own obligation to satisfy professional duties to their clients and the legal system, as well as fulfill general societal morality requirements of honesty and faithfulness. This obligation is necessary for attorneys to maintain their collective and individualistic self worth. Although the moral obligations of honesty and faithfulness vary with each individual's moral parameters, society's values taken as a whole provide the ultimate pressure on the lawyer's moral accountability.

#### A. *The ABA Rules of Professional Responsibility and Ethics Decision Models*

In taking a more practical approach to a search for lawyer morality, the American Bar Association's Rules of Professional Responsibility ("the Rules") and two available ethical decision models will be evaluated next.<sup>57</sup> Yet, before delving into analysis, it is first important for lawyers to recognize their responsibilities as leaders within their respective communities and as such realize the importance of their personal moral codes. In order for lawyers to recognize their ethical responsibilities, applicable ethics codes must be made relevant and valuable while making professional decisions. The ABA Rules of Professional Responsibility can be a guide for lawyers making ethical decisions, and should be followed with relative certainty.<sup>58</sup> Such ethical rules and codes were produced to define appropriate behavior within the practice of law. Nevertheless, simply following the Rules "can also have the unintended effect of creating the belief that all the answers are in the [Rules]."<sup>59</sup>

The lawyer has particular roles outlined in the Rules, which dictate what must be disclosed, what may be disclosed and what cannot be disclosed.<sup>60</sup> Yet, the Rules are silent regarding how the lawyer is to act when balancing conflicting rules within the Rules.<sup>61</sup> For example, the Rules state that the lawyer has a specific duty to promote the interests of the client, as well as a

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56. Wolf, *supra* note 5, at 57.

57. See generally MODEL RULES OF PROF'L CONDUCT (2002), available at [www.abanet.org/cpr/publications.html](http://www.abanet.org/cpr/publications.html).

58. *Id.*

59. George Thomson, *Personal Morality in a Professional Context*, 34 CANADIAN PUB. ADMIN. 21 (1991).

60. See MODEL RULES OF PROF'L CONDUCT (2002).

61. See *id.*

duty to not mislead the court.<sup>62</sup> While overt lying is clearly forbidden, selective silence can easily violate the spirit of an attorney's duty to the court. Based on a specific situation, the lawyer must use his or her best judgment based on education, as well as traditional notions of what is right, in order to come to a decision.

There has been considerable development in the area of teaching law students the various legal ethics rules. Such courses seek to teach students ethical problem solving skills by forcing students to apply their knowledge of various legal ethics codes and rules to real world situations. Yet, despite such education, there is still the institutional law school culture that teaches prospective lawyers that "there is not a choice against morals, but only against regarding morals as having intellectual importance."<sup>63</sup> Such an institution, as psychologists might contend, creates an atmosphere "where students begin to learn how to separate themselves emotionally from what they are doing intellectually."<sup>64</sup> Therefore, despite such efforts in academia, attorneys need ethical decision models to help navigate through the tormenting issues raised by conflicting expectations.

It is critical to teach law students and practicing attorneys a mechanism to help them think through complex ethical decisions.<sup>65</sup> Ethical decision models are a useful method by which one analyzes a given situation and moves along a cognitive process that reviews various considerations in order to come to a decision. The goal of such a model is to facilitate decision-making that, at a minimum, takes into account various ethical values.

The least complicated ethics decision-making model for a lawyer to use is to presume that a given decision will be made public on national television and that the lawyer's parents and colleagues will be watching. If the lawyer still feels comfortable with his or her decision after the make-believe broadcast, then the lawyer's actions will probably have some ethical validity. However, this simplistic model does not utilize one's core ethical values, nor does it really help one think through various options and understand the conflicting ethical considerations at play. In most complex ethical decisions there are conflicting values that cry out for attention. Accordingly, a more developed decision model is required. Such an advanced model should incorporate an evaluation of the core ethical values under deliberation.

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62. See MODEL RULES OF PROF'L CONDUCT R. 3.3 (2002) (explaining a lawyer's duty of candor).

63. THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER 167 (B.Y.U. Press 1981).

64. Barbara Gotthelf, *From the Courtroom to the Couch*, N.J.L.J., Oct. 24, 1994, at 5, 6.

65. The term ethics is subject to many interpretations. For purposes of this paper, the following definitions may be helpful. Basic definitions: *values* - beliefs which guide, direct and motivate opinions, attitudes, and actions; *ethics* - the study of good and bad, of moral duty and moral obligations; *ethical standards* - principles of conduct, how people ought to behave in a certain situation.

In addition, it is critical for the attorney to recognize that others, such as colleagues, clients, or even the State Bar Association's Disciplinary Committee, may have their own points of view that should be taken into account. Taking a little time to understand how others view the situation may prevent additional problems from occurring. Unfortunately, some professionals believe that a quick and forceful decision will project a sense of strong leadership. This approach is shortsighted and often leads to antagonistic relationships. Time and energy is then wasted apologizing and attempting to mend the broken fences that might not have broken if the original decision had been made more carefully.

The following ethics decision model is offered simply as an option for lawyers. The model helps practitioners take into account such indicia as the lawyer's core ethical values, outside viewpoints, and the need to review additional alternative actions. However, this model should be used only as a guide, since each professional should take time to create a model that is personally comfortable and useful. A user-friendly decision model is much more practical than a complex and cumbersome model that looks good, but is rarely used.

### *B. A Suggested Strategy for Ethical Decision Making*<sup>66</sup>

1. Define the problem carefully and be certain that all pertinent information has been gathered. Too often we act without taking time to obtain the necessary information.
2. List all the parties that you believe may be affected by the decision (stakeholders). A decision that does not take into account the way in which it will affect others is not an ethical one regardless of its actual consequences.<sup>67</sup>
3. List all the personal and work related values that are involved in the decision.<sup>68</sup> These values may include:
  - Honesty (truth telling, candidness, openness)

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66. This model was creatively derived after reading these three major sources: MICHAEL JOSEPHSON, *MAKING ETHICAL DECISIONS* (1996); TOM L. BEAUCHAMP & NORMAN E. BOWIE, *ETHICAL THEORY AND BUSINESS* (2d ed. 1983); MANUEL G. VELASQUEZ, *BUSINESS ETHICS: CONCEPTS AND CASES* (1982).

67. See JOSEPHSON, *supra* note 66. This part of the Decision Model is based on stakeholder analysis, under which responsible ethical decisions involve considerations of the impact of the decision on the network of persons who have a stake in the decision. Accordingly, a decision that does not take into account the way in which it may affect others is not ethical regardless of its actual consequences.

68. *Id.* This part of the decision model is based on a theory of absolute values. This theory believes that there are certain ethical principles that are universal and that impose an absolute duty on a person. Kant referred to such duties as categorical imperatives because they allow for no exception.

- Integrity (acting on convictions, courageousness, advocacy, leadership by example)
  - Promise keeping (fulfilling the spirit of commitments)
  - Fidelity (loyalty, confidentiality)
  - Fairness (justice, equal treatment, diversity, independence)
  - Caring (compassion, kindness)
  - Respect (human dignity, uniqueness)
  - Citizenship (respect for law, societal consciousness)
  - Excellence (quality of work)
  - Accountability (responsibility, independence)
4. List all the possible alternatives of what you can or cannot do. Often we believe that we have only a limited number of options when in fact there are several others that may resolve the situation in a way that produces either the greater good or the least harm.<sup>69</sup>
5. Choose and prioritize.
- A. Of all the parties you listed above, select the one that you believe is most important for purposes of making this decision.
  - B. Of all the values you listed above, select the one you believe is most important for purposes of making this decision.
  - C. Of all the options you listed above, select the one you believe will cause the greatest good, or least harm.
6. Make a decision based on the above priorities.
7. Devise a strategy that will effectively implement your decision.

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69. See JOSEPHSON, *supra* note 66. This part of the decision model is based on utilitarianism, a theory that requires the ethical person to evaluate the likely consequences of contemplated conduct and weigh the good the act may produce against the harm it may cause. Simplified, this theory calls for the greatest good for the greatest number.

### C. Creation of a More Ethical Working Environment

An attorney working for a law firm or organization will often feel constrained and guided by the perceived values of that organization. Whether it is a multi-national corporation or a small-town legal aid office, each establishment has its own ethical environment. People know by simple observation what their organization's ethical priorities are and act accordingly. In general, people will act according to how they perceive the culture of the organization as a whole. If the organization rewards one's behavior, ethical or unethical, such a system will influence how an employee will perform.<sup>70</sup> Yet in spite of this reality, there is rarely a bona fide, agreed upon, and accepted system that allows an organization to consistently focus and refocus on whether or not it embodies the values it professes. Clearly, individuals and organizations have great difficulty implementing a holistic self-examination. One author made the following conclusions about companies in general: (1) Few organizations step back often enough to assess the character of their workplace; (2) If such an assessment were properly and objectively conducted, it could be very revealing as to the organization's character; and (3) An assessment of an organization's workplace character is probably the most serious exercise an organization will ever perform.<sup>71</sup>

Therefore, based on these conclusions, it is imperative for legal professionals, either individually or collectively within an institution, to observe their respective workplace character in order to better understand their institution's ethical environment. Also, it is important to remember that people do not exist and make decisions in isolation. Hence, it is imperative that organizations utilize internal audits that combine the context of individually based ethics with the social systems within which their employees operate. Moreover, any audit that purports to examine ethics inside an organization must look outside the organization as well, since situational and environmental factors have a significant impact upon the ethical behaviors and subsequent policies of an organization. What is clearly needed within an organization which employs lawyers is an ethics audit that goes beyond individually based ethical theory and includes the dimensions of the organization, the social system, and milieu in which the practice operates.

An ethics audit should be viewed as a firm's wellness tool.<sup>72</sup> The creation of such an audit develops a system of awareness, while simultaneously acting as a self-regulating tool.<sup>73</sup> The ethics audit raises the

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70. See generally Arthur Gross-Schaefer & Muriel A. Finegold, *Creating a Harassment-Free Workplace*, RISK MGMT., Feb. 1, 1995, at 53 (observing, for example, that offending conduct within the context of sexual harassment in the workplace will usually only discontinue when everyone in the organization understands that the company's success depends upon a harassment-free workplace).

71. See generally CLARENCE C. WALTON, *THE MORAL MANAGER* (1988).

72. Arthur Gross-Schaefer & Anthony J. Zaller, *The Ethics Audit for Nonprofit Organizations*, PM NETWORK, April 1998, at 43.

73. *Id.*

self-awareness of unethical behavior for partners, staff attorneys, paralegals, and support staff, thereby heightening ethical actions and preventing corruption within the institution. When an institution uses the audit, it can become a “very powerful force for change.”<sup>74</sup> Key categories which must be included in an ethics audit are: areas of social responsibility, open communication, treatment of employees, confidentiality, respect of employees, community values, vendor relationships, leadership by example, human investment, and ecology. The following are sample questions from an ethics audit for a law firm, which attempt to incorporate the aforementioned key categories.<sup>75</sup>

#### IV. ETHICS AUDIT FOR A LAW FIRM: SAMPLE QUESTIONS

##### COMMUNITY ADVOCACY: An Ardent Advocate for Values in the Community

1. Does the firm take public stands and contribute its resources to public issues?
2. Is the firm known as a leader in issues of social concern?

##### OPEN COMMUNICATION: Keep Firm Members Informed Honestly as to all Relevant Matters

1. Are decisions made in an open and honest manner with an opportunity for input from all relevant sources?
2. Do the firm’s members feel that they have free and open access to the firm’s leadership?

##### FAIR TREATMENT FOR ALL CLIENTS: Safeguard the Ability to Exercise Independent Judgment on all Matters by Avoiding Undue Influence and Conflicts of Interest

1. Do all clients feel that they have equal access to the professional and support staff?
2. Does the professional staff provide services equally to all clients regardless of financial status?

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74. *Id.*

75. See Arthur Gross-Schaefer, Strategic Modeling: Sample Audit of the Firm’s Core Values (1989) (unpublished manuscript, on file with the author).

**CONFIDENTIALITY AND RESPECT FOR ALL MEMBERS OF THE FIRM:** Avoidance of Gossip and Cliques, and Maintaining Confidentiality

1. Is private information about firm members (emotional stability, marriage, financial status, etc.) kept confidential and used appropriately?
2. Does the firm's leadership actively avoid engaging in gossip?

**HUMAN INVESTMENT:** The Provision for the Physical, Psychological, and Economic Welfare of Present, Potential, and Former (Retired) Employees

1. Does the firm provide fair benefits (pension, social security, medical, etc.) for all of its employees?
2. Does the firm have an employee handbook which clearly sets forth its policies for vacation, sick days, family leave, disability, etc.?
3. Does the firm handle contract negotiations in a timely and ethical manner?

**ECOLOGY:** Efforts to Minimize the Negative Impact of its Operations on the Natural Environment

1. Has the firm taken sufficient steps to conserve natural resources?
2. Does the firm attempt to support energy conservation and recycling activities?

**ETHICS:**

1. How seriously does the firm take the consideration of ethical issues?
2. Does the firm provide an ongoing ethics education program?
3. If the activities of the firm were to be made public, would you be proud of your association?

The time taken to create and implement both an ethical decision model and an ethics audit is time well spent improving the organization's workplace culture. Creating these ethical tools and using them as aids for measuring and understanding dissonance between a person's values and a person's actual activities will help curb employee frustrations and

dissatisfaction, while ultimately cultivating a healthy workforce. These internal ethics tools are not meant to be sources of guilt, but rather wellness devices that enhance the achievements of the modern legal professional.

#### V. CONCLUSION

The practice of law has drawn people from all walks of life. Each practitioner enters the practice with his or her own set of moral and ethical precepts, which must ultimately conform to both the ethics rules governing lawyers, as well his or her respective workplace culture. This reality within the practice often requires lawyers to stand against the easier, more popular ethical decisions of the masses, in order to prevent cognitive dissonance within their individual careers. The ethical decision making process is one of the most challenging aspects of the legal profession. Yet, regardless of the inherent stresses of the changing legal profession, moral challenges can be successfully dealt with and minimized using ethical decision models and ethics audits. Understanding the many conflicts of expectations and possible ways of better managing such conflicts will assist a dissatisfied attorney, and hopefully prevent him or her from abandoning this important career.



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