American Legal Ethics: A Look Back and Forward
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Introduction

Much of the original impetus behind the modern legal ethics movement did not stem from positive developments within the profession. It came in response to the number of lawyers involved in the Watergate scandal of 1972-74. The coming thirtieth anniversary of this scandal therefore provides a good time for attorneys to look not only at what has been accomplished but also at what has not been accomplished. When we do, I believe we will have to conclude that we have only been working on the tip of the iceberg.

Rates of Bar Complaints and Attorney Discipline

Consider, for example, the rates at which bar complaints are filed or at which attorneys are disciplined. One possible result of a significantly increased emphasis on legal ethics might have been that the incidence of complaints, or at least the incidence of discipline, would decrease. Unfortunately, there do not appear to be any data to support this result. Unlike the overall crime rates of recent years, the rates at which bar complaints are made and lawyers are disciplined do not appear to have declined.

This development, or lack of development, is unquestionably open to differing interpretations. One might assert, for example, that the number of complaints is up because the public, which makes most of the complaints, is more aware of its rights and more willing to believe that filing a complaint is not a waste of time. One might also assert that the number of actual disciplinary cases is up because of increased resources being devoted to the prosecution of errant lawyers and not because of an increase in errors by lawyers. Alternatively, one might assert that the disciplinary numbers are artificially inflated by expanded definitions or interpretations of disciplinable conduct. If, for example, the disciplinary standards of prior periods did not require written conflicts waiver letters and if we believe that written conflicts waiver letters represent a positive development, the fact that lawyers can now be disciplined in some states for the absence of such letters represents an improvement, and not a decline, in the system.

Or one might take a different approach altogether. Some commentators have argued, for example, that the average level of ethical practice in the profession has been in decline for decades. If one were to accept such contentions, one could argue that the success of the post-Watergate reforms lies in the absence of further deterioration or in a decreased rate of deterioration. In other words, one might argue that but for the post-Watergate reforms, the disciplinary numbers would be much worse. If so, one could then assert that the post-Watergate changes have indeed had significant beneficial effects.

A third approach could also be taken. Any significantly large group of human beings, whether they are doctors, lawyers or just plain citizens, will have its share of liars, thieves and incompetents. To at least some extent, then, the continuing presence of bar complaints and

attorney discipline reflects the fact that lawyers are human beings and that human beings are fallible. And since there is no way to end human fallibility, there is no way to end the need for attorney discipline. Seen from this perspective, the question is how close to a world of "zero complaints" or "zero discipline" we can reasonably come.

My guess is that the post-Watergate changes have had some effect in reducing the levels of bar complaints and attorney discipline, but I also think we need to ask ourselves why we have not had more bang for our collective buck. Do we need to find better and different ways to "preach" to those who are not already "in the choir"? Are our professional conduct rules sufficiently clear and user-friendly to lawyers? Granted that rules against stealing client trust funds are necessary, are there other rules that do less to advance client protection than they do to advance lawyer or non-lawyer frustration with the system? These are the kinds of questions that the legal ethics movement should address.

Interactions Between Opposing Counsel

Rates of bar complaints and attorney discipline are not the only means by which to assess the level of ethical behavior. For example, one could also ask whether working lawyers report a general change in how they regard their interactions with opposing counsel. If enough lawyers reported increases in ethical behavior or in professionalism and civility, one might assert that the post-Watergate changes have borne significant fruit.

Once again, however, it does not appear that an empirical case to this effect can be made. For example, the available data on the number of lawyers who leave the profession in disgust is arguably one indication of a lack of change for the better. Similarly, one might argue that the growth of state or local movements to encourage professionalism does not so much show true improvement as it shows a recognition of the presently low levels of conduct in far too many communities and situations.

It may be that the arguable decline in, or at least arguably low levels of, lawyer civility or conduct toward other lawyers reflects general societal declines that lawyers have little, if any, power to affect. In a world in which we are all served a steady diet of rude or dangerous behavior on a 24/7/365 basis by the media, in the form of "road rage" and in the form of thousands of other actual or imagined ills, can anyone be surprised if such behavior spills over into the practice of law?

Nevertheless, and to the extent that poor relationships between opposing counsel constitute a significant problem for lawyers and clients, we would be well advised to increase the search for alternative modes of regulating attorney conduct. What is critical here is not just a matter of labels but a matter of how to regulate personal interactions. If all that happens is a change in wording, it will make no difference that the phrase "zealous advocacy" is not a part of the ABA Model Rules and that the official commentary to the model rules uses the term "zeal" only with respect to litigators rather than business lawyers. We need better, and better-articulated, models. We need to rethink how lawyers interact as a matter of both substantive duties and ethics rules.

Conclusion

After a quarter century in private practice, I am convinced that the private bar is made up primarily of hard-working and decent human beings who generally try very hard to do what they believe to be right by their clients and themselves while also doing what they believe to be the right thing. On the other hand, most of us in private practice and in the legal ethics community would reject the proposition that we live in the best of all possible worlds. We need a realistic across-the-board reevaluation, from the ground up, of what we can reasonably hope to accomplish and how we can reasonably hope to accomplish it.

Time spent thinking about some alleged halcyon period in the past when life was supposedly better is time wasted. In fact, one problem with a good portion of today's academic writing is that it often pursues subjects of little value to practicing lawyers. If, as I said at the beginning, the true test of the success of the legal ethics movement lies in its having an identifiable and positive effect on the way that actual lawyers actually practice law, we have much to do before we can rest on our laurels.

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If you would like to suggest one or more issues for future topics, please contact me at: Peter Jarvis via e-mail.

An ethics article by attorney Peter R. Jarvis appears each month in the Oregon Law Journal . Peter gives advice to and represents lawyers who have matters of discipline before the Oregon State Bar. E-mail your questions directly to Peter R. Jarvis. Prior articles by Peter can be seen by going to the Archives navigation button on the left, above.