2011 Mart Vogel Lecture on Professionalism and Legal Ethics

Virtue Ethics, Earnestness, and the Deciding Lawyer:
Human Flourishing in a Legal Community

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II. Breakout Discussion Session

HYPOTHETICAL #1

Facts

> Suppose that you are an attorney in a divorce proceeding, and your client seeks custody of the two young children of the marriage. In the course of your representation your client gives you a bundle of documents that inadvertently contains a letter bearing on the fitness of your client to have custody of the children. The information in the letter is not known and is not likely to become known by the other side. Without disclosure of the letter, you believe your client will win the custody battle; you're equally confident that the other party will prevail if the letter is revealed.[1]

Two additional facts: (1) The information in the letter suggests, but does not specifically state, that past bodily harm to the two children has occurred at the hands of your client; and (2) your client will be testifying in court at the custody hearing in two days.

Law

The Preamble to the North Dakota Rules of Professional Conduct provides that "when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek

[1] RAND JACK AND DANA CROWLEY JACK, MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS 78 (1989).

legal advice, and thereby heed their legal obligations, when they know their communications will be private."

North Dakota Rule of Professional Conduct 1.6(a) provides that "[a] lawyer shall not reveal information relating to the representation of the client unless the client consents, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is required by paragraph (b) or permitted by paragraph (c)."

North Dakota Rule of Professional Conduct 1.6(b) provides that "[a] lawyer is required to reveal information relating to the representation of a client to the extent the lawyer believes reasonably necessary to prevent reasonably certain death or substantial bodily harm."

North Dakota Rule of Professional Conduct 1.6(c)(3) provides that "[a] lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to secure legal advice about the lawyer's compliance with these Rules."

North Dakota Rule of Professional Conduct 3.3 provides:

> A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or (3) offer evidence that the lawyer knows to be false. If the lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal unless the evidence was contained in testimony of the lawyer's client. If the evidence was contained in testimony of the lawyer's client, the lawyer shall make reasonable efforts to convince the client to consent to disclosure. If the client refuses to consent to disclosure, the lawyer shall seek to withdraw from the representation without disclosure. If withdrawal is not permitted, the lawyer may continue the representation and such continuation alone is not a violation of these rules. The lawyer may not use or argue the client's false testimony.

Questions

(1) What legal and moral dilemmas do you perceive in the facts set forth in the hypothetical?

(2) From a legal standpoint (i.e., your mandatory obligations under the North Dakota Rules of Professional Conduct), what additional facts, if any, would help you to resolve the question of what you should do in the two days leading up to the custody hearing? Is there more than one legally correct resolution to the dilemmas you face?

(3) Assuming that you have more than one legally viable alternative under the Rules, from a moral standpoint, how will you go about deciding what to do in the two days leading up to the custody hearing? For example, will you focus primarily on questions of your moral duties to your client and/or other persons? Will you make your decisions using consequentialist or utilitarian reasoning? Is there an ethically and morally correct resolution to your dilemmas using these approaches?

(4) How would a lawyer of virtuous character go about deciding how to act under these circumstances? What actions would this lawyer undertake? What impact could those decisions and those actions have the lawyer's character as a professional and as a person?

HYPOTHETICAL #2

Facts

> Mr. Warren . . . died and left a very prosperous unincorporated paper business. Mr. Warren wanted his widow and five children to have the benefit of the business [and he] set up a trust in such a way that Sam Warren, the oldest son, was one of the trustees and also manager and lessee of the plant. The arrangement was that the lessee would give a share of the profits to Sam and to the other four Warren children and the widow. Everything in this complicated plan hinged on the family's confidence in Sam—a confidence that existed when the trust was created. The family thought Sam was the most capable member of

the family and happily turned the business over to him. Then, as sometimes happens in families, with the passage of time there was a falling out between Sam and his brother Ned. Ned was regarded as something of a dilettante, living in England and spending his share of the income on antiques. Ned resented Sam's patronizing him, and finally he began to suspect Sam of bad faith in engineering the entire arrangement. . . .

[Ned's] lawyer filed a complaint in equity charging Sam with breach of trust. At the same time Ned wrote Sam a letter in which he stated:

> The phrases are such as in a legal document **I have felt obliged to sign**, but are very far from representing my feelings toward you. . . . Let us try to agree; it would be much pleasanter.
>
> Your affectionate brother,
> E.P. Warren.

. . . The upshot was both dramatic and sad. Sam was offended deeply by being accused of breach of trust when he knew he had acted in an honorable fashion. He refused to settle, and the case went to trial. Ned's first lawyer, who had given the trouble between the brothers its formal shape, engaged a formidable trial lawyer, Sherman Whipple, to conduct the trial. Sam was put on the witness stand, and of course Ned's lawyer began to dig away. After days of Whipple's keen cross-examination, Sam died.[2]

Questions

(1) Judge John T. Noonan, Jr. has offered the following commentary on these facts: "In this simple letter two stages of thought are established. Ned wants to be an affectionate brother, but he also has a sense of compulsion to use harsh legal formulas. Because he is caught in the

[2] THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS AND MORAL RESPONSIBILITY 5-6 (2d ed. 1994) (emphasis added) (quoting John T. Noonan, Jr., *Distinguished Alumni Lecture—Other People's Morals: The Lawyer's Conscience*, 48 TENN. L. REV. 234-36 (1981) (emphasis added). Judge Noonan's account describes the facts of an actual case that arose in Boston in the early 1900s, *Warren v. Warren*, No. 14630, Mass., *filed* Dec. 13, 1909, in which Louis Brandeis, then a lawyer and later a Justice of the Supreme Court of the United States, was the drafter of the family trust (and not the lawyer for Ned).

legal process, he feels he must sign the hostile document with its terrible charges. The letter shows how Ned shifted responsibility for the document to his lawyer, while his lawyer had shifted the responsibility to Ned."[3] He then described the sad conclusion to the case as "the tragic outcome of a client's ceasing to be a loyal brother and of a lawyer's view of himself as a depersonalized instrument of aggression."[4] Are you inclined to agree or disagree with Judge Noonan? Why or why not? Are there additional facts you would like to have before answering this question? If so, what are they?

(2) How would a lawyer of virtuous character proceed when advising and representing a client such as Ned regarding prospective litigation against his brother? Does this differ from how you have inferred Ned's lawyer approached the matter, and, if so, how?

HYPOTHETICAL #3

Facts

> Johnson, the owner of a well-established family business which bears his name, brought in Warren, his son-in-law, as a partner and manager of the business. Johnson and Warren soon had a falling out and Fred, an old friend of Johnson's, helped them to reach a settlement whereby Johnson purchased all of Warren's interest in the business. The experience left Johnson "gruff and embittered." Shortly after the settlement, Warren and Johnson's daughter went through an angry divorce, which added to the hostility between the two men.
>
> Several years later, Johnson told business lawyer Robert Whitfield that he had been "raped" in the partnership settlement and that he intended to sue both his former son-in-law and his old friend Fred. Johnson was working on the lawsuit with another attorney, described as "mercenary, cold-blooded." Several months later Johnson again met with Robert Whitfield and told him he was about to unleash his lawsuit but was feeling ambivalent. Upset, Johnson talked about his "family's affair" with Warren and his betrayal by his friend Fred. As Robert recalls,

[3] SHAFFER & COCHRAN, *supra* note 2, at 6 (quoting Noonan, *supra* note 2, at 235).

[4] *Id.* (quoting Noonan, *supra* note 2, at 236).

> At the end of the story he asked me what I thought. I asked him whether he really wanted to know. He said that he did. I told Johnson that he seemed seriously agitated, and that the litigation would exaggerate his agitation and continue it far into the future [and that] threats are ineffective with Warren. I judged Warren a lonely and hurt person, who would respond a lot more to care and understanding than to ultimatums.

Robert also told Johnson that the lawsuit had little basis, that Fred may, in fact, have been of great service to Johnson in avoiding a long, acrimonious and public airing of family laundry, and that the litigation would be both trying and exposing for Johnson, his family, and his business. Johnson did not enjoy hearing those things. "Johnson interrupted me several times while I spoke. More than twice we raised our voices at one another. At the end I told him to think about it and if he wanted to talk to me more he could contact me next week."

> I thought constantly about the people and my strategy for resolving the problem over the weekend. The more I thought, the more I wanted it to work and believed it could. I wanted it to work for Johnson because I felt that a man whose entire past impelled him to vengeance might be setting that aside. . . . I wanted it to work for Warren for the sake of his children, who must be suffering from the bitter enmity which has existed between their father and their grandfather for several years now.

Johnson called on Monday and again rehearsed his grievances. Robert told him he could either spend the rest of his life stewing about it or he could move on. Begrudgingly Johnson enlisted Robert's help. . . . Robert secured Johnson's promise to call off the lawsuit, thus substituting a process of compromise for one of conflict. In this new process, assertion of rights would be secondary to accommodation. This suited Robert, for in his words, "I am not a street fighter."

After several meetings first with one party and then with the other, and after a number of intervening complexities that threatened collapse of discussions, a settlement was finally reached. At one point, with $1,690 separating the parties, Robert told Warren that the deal was set. When asked how he could be so sure, Robert said he would bill Johnson that amount and use the payment to cover the difference if need be. The deal done, Robert reflected:

> I have accomplished nothing more satisfying in the ten years of my practice than this. If I were not paid a penny for the work, I would have no complaint. . . . I hope this brings Johnson some peace and that it purges him of his obsession with the financial losses that he suffered in 1983, coupled with the betrayal which he believes was perpetrated by Warren and Fred. I hope

> that Johnson and Fred can restore their friendship and Warren's children can forget, over time, the hatred which has existed between Warren and Johnson as [Warren and Johnson's] relationship possibly recovers.[5]

Questions

(1) Do you agree or disagree with Robert Whitfield's approach in advising and representing his client Johnson? Why or why not? Are there additional facts you would like to have before answering this question? If so, what are they?

(2) How would a lawyer of virtuous character advise a client such as Johnson with regard to prospective litigation against his former son-in-law Warren and his old friend Fred? Does this differ from how Robert Whitfield approached the matter, and, if so, how?

[5] SHAFFER & COCHRAN, *supra* note 2, at 42-43 (quoting JACK & JACK, *supra* note 1, at 89-92).