Living with Integrity

Navigating Everyday Moral Dilemmas

Course Syllabus

Due to the nature of the legal profession, an attorney's goals—acting with integrity while zealously working for the interests of a client—can become very complex and nuanced. This course will discuss a number of very common ethical dilemmas that attorneys routinely face, many of which are exclusive to the legal profession. Using the Model Rules of Professional Responsibility, various cases, and scholarly articles as discussion points, this course surveys and discusses frequent ethical issues relevant to lawyers. As comparative law sharpens one's knowledge and gives perspective about how to deal with intricate questions, this course also incorporates the traditional Jewish legal approach to these ethical dilemmas.

Lesson One: **Client Confidentiality**

The importance of not betraying a client's confidences has been a paramount ethical imperative to lawyers as long as lawyers have been practicing their craft. But why is this the case and to what extent must an attorney protect his client's confidences? Presently, as this lesson will discuss, either the Model Rule of Professional Conduct 1.6 or Model Code of Professional Responsibility DR 4-101 provides the basis for state rules governing an attorney's ethical obligation of confidentiality to his client.

Put simply, the difference between these two sets of rules is that the Model Rule takes a much stricter approach to confidentiality, almost never allowing a client's information to be revealed, except in very narrow circumstances, as opposed to the more liberal approach taken by the Model Code. Despite the fact that almost all of its other conventions have been replaced by the Model Rules, the Model Code's relevance today on the issue of confidentiality indicates that there are issues and concerns with the Model Rule's approach and

that this subject is neither clear-cut nor easy, all of which will be examined in this lesson.

This lesson will also discuss other aspects of the ethics of confidentiality, such as how it relates to the work product rule, as laid out in *Hickman v. Taylor*, 329 US 495 (1947) and codified in Fed. R. Civ. P.26(b)(3), and the evidentiary attorney-client privilege. See, Fed. R. Evid. 501. Model Rule 3.3, which deals with an attorney's candor toward a tribunal, will be compared and contrasted to the rules on client confidentiality as it is applied in different forums.

This lesson will address the reasons, the scope, and the mechanics of these rules. Further, this lesson analyzes the various issues with the different approaches taken in the legal rules on client confidentiality. This lesson also looks at the traditional Jewish, more liberal, position on this issue and will discuss the merits and demerits of such an approach.

Lesson Two: **Restorative Justice**

In the various models of attorney-client relationships, the restorative justice model focuses on the needs of victims and offenders. It plays down the need to satisfy the principles of law and the need of the community to exact punishment. One of the primary aspects of such a model presupposes that the guilty party seeks forgiveness by apologizing to his victims, so the victims can begin healing their wounds and the offender can become a contributing member of society. See, Douglas B. Ammar, *Forgiveness and the Law: A Redemptive Opportunity*, 27 Fordham Urb. L.J. 1583, 1585 (2000).

But should forgiveness play a role in the criminal justice system if the only way for a defendant to be forgiven is to essentially confess guilt? Can an attorney ethically encourage or support such a model of justice for his client? This les-

son will examine the issue of an attorney's ethical role in his client's confessions and search for forgiveness and Jewish law's perspective on this.

This lesson will discuss the cases of *State v. Taylor*, 947 P.2d 681 (Utah 1997) and *O'Neal v. State*, 228 Ga. App. 162 (Ct. App. 1997), which both highlight problems with the forgiveness aspect of restorative justice as applied in the legal setting. *Taylor* and *O'Neal* demonstrate the minefield a lawyer and a client must walk through if they seek forgiveness from the client's victims—primarily whether an apology is the same as self incrimination. What is an attorney's role if such a model is being used? Can he ethically have his client seek forgiveness if it may ultimately be considered a confession of guilt?

Further, the admissibility of a criminal defendant's confession has long been subject to judicially sanctioned safeguards meant to ensure that it indeed was voluntary, starting with *Spano v. New York*, 360 U.S. 315 (1959) eventually leading to *Miranda v. Arizona*, 384 U.S. 436 (1966) and its progeny. But, the lesson asks, won't the restorative justice model prejudice the defendant by pressuring him to confess? Moreover, if a defense attorney is acting as an agent of the state, e.g., as a public defender, can he ask his client to seek forgiveness from his alleged victims without violating the Fifth Amendment of the Unites States Constitution?

We will also examine cultural, ethical, and practical problems a lawyer should consider if she seeks to use the restorative justice model. In the Jewish legal context, a defendant's confession has absolutely no admissible value. See, Irene Merker Rosenberg & Yale Rosenberg, *In the Beginning: The Talmudic Rule Against Self-incrimination*, 63 N.Y.U. L. Rev. 955, 976 (1988). But if a defendant ever wants to achieve a proper repentance, they must seek forgiveness from the victim. As such, the issues of liability and forgiveness are separate and distinct in the Jewish tradition. Whether this is more or less ethical and desirable than the restorative justice model will be discussed in this lesson.

Lesson Three: **Working Pro Bono**

The form of charity most associated with attorneys is legal work done "*pro bono publico,*" i.e., free legal work done for the public good. But is there something unique to attorneys that calls for them to do such work, as opposed to individuals in other professions? Under Jewish law, no professions require its workforce to give charity per se, because giving charity is an obligation everyone has, assuming one can afford it. Also, if a state requires an attorney to perform legal work pro bono, is it truly charity? And does pro bono work make sense at all? These, and other issues, will be discussed in this lesson on charity.

There has historically been a dearth of legal services available to the poor; as such, the ABA first took up the matter of pro bono work in the Model Code of Professional Responsibility EC 2-25 in 1969, by stating that lawyers should help the disadvantaged. Then, in the first two versions of Model Rule 6.1, the ABA stated a lawyer should "render public interest legal services," and subsequently the ABA quantified the amount of time by stating a lawyer should aspire to render at least fifty hours of pro bono service per year. The present version of the Model Rules, enacted in 2002, states that an attorney has a "professional responsibility" to donate legal services to individuals unable to afford them. The lesson analyzes why a version of the last two revisions of the Model Rules are endorsed in a majority of states. The history and reasons behind the contemporary push for pro bono services will be discussed in this lesson.

Despite making pro bono work a professional responsibility, however, there is still a lack of legal services for the poor, and most attorneys do not perform fifty hours of such work per year. In fact, unlike in Jewish law, the IRS does not allow an attorney to deduct the fair market value of his donated services. This means that even if one desires to do pro bono work, in this economy it makes little sense for a lawyer to give his time away for free. As such, presently there are proposals to make pro bono work *required* for all lawyers, and not

just optional. Another suggested alternative is to require, or strongly encourage, attorneys to annually inform their state bar of the amount of pro bono work they performed, which has been shown to increase the amount of pro bono work performed. See, Leslie Boyle, *Meeting the Demands of the Indigent Population: The Choice Between Mandatory and Voluntary Pro Bono Requirements*, 20 Geo. J. Legal Ethics 415.

But if it is required, is it truly charity? More so, wouldn't forcing attorneys to do work without compensation run into a Thirteenth Amendment roadblock? Further, what type of services will the indigent receive if an attorney is forced to serve them? Also, can requiring pro bono backfire and end up hurting other areas of the law and indigent individuals in the long run? See, Samuel R. Bagenstos, *Mandatory Pro Bono and Private Attorneys General*, 101 N.W.U. Law Rev. 101 1459 (2007).

Lesson Four: **Filial Responsibility**

The law in all states is that, up to a certain age, parents are obligated to take care of their children. But is there ever a time that a child is legally required to provide filial support? If that is the case, to what extent is it necessary? For the attorney, a delicate balance is often required to satisfy both filial responsibility and the fiduciary duty to his or her clients.

Traditionally, families have lived with multiple generations of extended family under one roof or in close proximity to each other. This enabled an informal system where the elderly were cared for by their children. In most states, the practice of children caring for their elderly parents was actually codified by the state legislature; thus many states actually required a child to provide filial support. See, e.g., Conn. Gen. Stat. § 46b-215 and Mass. Gen. Laws ch. 273, § 20. In fact, even today, some states still require children to take care of their parents, with potential civil and criminal repercussions if they fail to do so. See,

e.g., Cal. Fam. Code § 4400; Cal. Penal Code § 270(c); and *People v. Heitzman*, 886 P.2d 1229 (1994). Such statutes and cases will be discussed in this lesson.

Lately, for a variety of reasons, such a multigenerational family dynamic has been increasingly less common. Further, a number of social programs enacted in the past century—such as the Social Security Act, the Medicare Act, and the Medicaid Act—have transferred a significant amount of the traditional filial responsibility to the government. The question this lesson addresses—after explaining the legal aspects of what the above acts have accomplished—is whether, and to what extent, a child's *legal* obligation to their parents has been changed in light of all of the above. Also, to the extent they still exist, filial responsibility laws are hardly ever enforced. The questions of why are they not enforced is discussed in this lesson.

This lesson also discusses the parameters of a child's obligation to his parents under Jewish law, beginning with the Fifth Commandment and other traditional sources. This lesson will ask whether an initiative inspired by the Fifth Commandment should be enacted here in the United States, both legally and in terms of policy. The answer to this will be dependent on the parameters of such a law and on the *Lemon* Test, as laid out in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which details the requirements for legislation concerning religion under the First Amendment to the Constitution.

Lesson Five: **Telling the Truth**

Is it ever permissible for a lawyer to lie, deceive, mislead, or misinform for the sake of a client? Due to the inherent tension in the dual roles a lawyer plays in zealously advocating for a client while, at the same time, acting as an

officer of the court, this subject is ripe for discussion. This lesson engages in a comparative discussion of the above question according to both Jewish law and ethics and secular legal ethics. Further, it asks whether the current trend, found in most states, of categorically banning all types of attorney misrepresentations and lying is fair and just, or whether a less categorical ban is in order. This lesson also asks what the limits are of the adversary system's quest for truth and what an attorney's role in the adversary system should be.

This lesson looks to Model Rules of Professional Conduct 8.4(c) which categorically states that it is "professional misconduct for a lawyer to: . . . engage in conduct involving dishonesty, fraud deceit, or misrepresentation," in all facets of a lawyer's life, not only legal matters. So, for instance, this lesson discusses *People v. Pautler*, 35 P.3d 571; 2001 Colo. Discipl. LEXIS 10, a Colorado case where a district attorney was disciplined under Rule 8.4(c) after holding himself out as a public defender in telephone negotiations with a confessed murderer, rapist, and kidnapper in hostage negotiations. The Colorado Supreme Court found that "justification" was not a defense for the district attorney's misrepresentation in light of the categorical ban of the same found in Model Rule 8.4(c). This lesson will also discuss *In re Gatti*, 8 P.3d 966 (Or. 2000) a case where the Oregon Supreme Court found that under Oregon's version of Model Rule 8.4(c) and the federal McDade Amendment (28 U.S.C. § 530B (2001), a prosecutor, or any other type of attorney, may not advise, conduct, or supervise legitimate law enforcement activities or any activities that involve deceit or covert operations.

But, this lesson will ask, how can Model Rule 8.4(c) be considered ethical when it would, for example, ban a lawyer from misrepresenting facts to a person who is a "ticking time bomb" when deadly force would be permissible against the very same person, and ban legitimate investigations? Next, the lesson will ask, why are exceptions made to Model Rule 1.6, allowing an attorney to betray his client's confidence, but not to Model Rule 8.4(c)? Further, how can Model Rule 8.4(c) be reconciled with: (1) permissible cross-examination

techniques that are meant to deceive or trip up the cross-examinee; (2) permissible deceptive and less-than-fully-truthful trial strategies; (3) attorney negotiation where, under Model Rule 4.1 and Comment 2 to that rule, it is understood that attorneys can make deceptive statements. The lesson analyzes the Talmudic approach to some of these issues and discusses whether it is more or less ethical and desirable than our contemporary model.

Lesson Six: **Attorney-Client Commitment**

The attorney-client relationship entails commitments from both the attorney and the client. For instance, the attorney commits to zealously represent the client and the client commits to pay the attorney for the services rendered. But, especially at the margins and in difficult circumstances, the boundaries of this commitment can become problematic. The subject of this commitment is discussed in this lesson.

First, this lesson will examine when and how the attorney-client relationship begins. The case of *Disciplinary Proceedings Against Kostich*, 793 N.W.2d 494 (2010) will be cited to demonstrate that whether an attorney-client relationship is created depends upon the intent of the parties and is a question of fact. Ultimately, however, the existence of such a relationship is determined principally by the reasonable expectations of the potential client. Exactly what constitutes a "reasonable expectation" will be discussed here, as well as what facts are important in establishing an attorney-client relationship. In addition, this lesson provides an overview of the Talmudic rules that pertain to binding commitments that appear to be more rigid and formalistic. Next, this lesson will discuss Model Rules 1.2-1.3, which elucidate under what circumstances a lawyer may minimize the scope of his representation or make his commitment to the client contingent on certain conditions.

Assuming an attorney-client relationship is established, can a client terminate his lawyer willy-nilly? This lesson will discuss Model Rule 1.16 and Comment 4 thereto, which allows a client to discharge a lawyer at any time, with or without cause. But why can a client do this for any reason at any time? Further, what can an attorney do if the client broke his commitment to pay for the legal services he received? Model Rules 1.8(i) and 1.16(d) give guidance on this, but does not eliminate the potential problem of how an attorney may protect his rights while not prejudicing his former client. *In re Arneja*, 790 A.2d 552 (2002), a case on point, will be discussed.

Conversely, should the attorney desire to terminate his representation of a client, can he rescind his commitment to represent a client without finishing the representation? The issue of when an attorney can terminate a client will be discussed in this lesson by looking at Model Rules 1.2, 1.4, 1.16, and 2.1 and relevant cases, including *Estevez v. Estevez*, 680 A.2d 398 (D.C. 1996) and *Crane v. Crane*, 657 A.2d 312 (D.C. 1995). The issue of when an attorney *must* withdraw from his commitment to represent his client under Model Rule 1.16 will also be discussed together with the following cases: *In re Hager*, 812 A.2d 904, 921 (D.C. 2002); *In re Hunter*, 734 A.2d 654 (D.C. 1999); *In re Lopes*, 770 A.2d 561 (D.C. 2001); and *In re Roxborough*, 775 A.2d 1063 (D.C. 2001).

After the representation is over, does the attorney's commitment have any residual effect on what he can do vis-à-vis the client or the information he has learned? Looking at *In re Gonzalez*, 773 A.2d 1026 (D.C. 2001), again at *Kostich*, and Model Rules 1.6, 1.9, and 1.16, we see that an attorney's obligation does not really ever end, as will be discussed here.