The Origins of Legal Ethics

*Or, Don’t Do What They Did

Introductions

- Common Law - Curt Edmondson
- Contemporary Legal Issues vs. the Old Stuff
  - Sexual Relationships with Clients - John Carley
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  - Securing Client Funds - David Sorek
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Common Law

Origin of *Ethics*

Greek Philosophers - Plato's Republic - Concept of Justice -
Aristotle - fixed habits of behaviour that lead to good outcomes

Middle Ages - Thomas Aquinas - Nature of humans determines what is right and wrong. For example, murder is wrong because life is essential to humans so depriving someone of it is inherently an evil.

"Modern" Views - Immanuel Kant, a command that, of its nature, ought to be obeyed. An action is only truly moral if done from a sense of duty, and the most valuable thing is a human will that has decided to act rightly.a command that, of its nature, ought to be obeyed. An action is only truly moral if done from a sense of duty, and the most valuable thing is a human will that has decided to act rightly.

More Modern Views from "Legal Ethics and the Restatement Process" (Oklahoma Law Review, Vol 46, Number 1, Charles M. Wolfram" - "An aspect of a life scheme which, at any moment, an actor employs to assess whether what she is doing as a lawyer is appropriate"

"Zealous Advocacy"

Lord Broughman's Speech

Context - Queen Caroline was accused of adultery against the King. Critics argued that Broughman's defending the Queen was tantamount to treason against the state.

Broughman's Response - ...An Advocate, in the discharge of his duty knows but one person in all the world, and that person is his client.

This view was contrary to Blackstone's view.

In the US.

David Hoffman's 1817 treatise "A Course of Legal Study"

Resolution XV - "... a lawyer's conscience must remain a 'distinct entity' from his client's..."

In criminal cases - " ...when the evidence is against the client...the lawyer must not 'impede the course of justice...".

Source - Hoeflich, Legal Ethics in the Nineteenth Century: the "Other Tradition"47 U. Kan. Law Review 793,(1998-1999)

1830's - *Simon Greenleaf*

Appointed as Royal Professorship at Harvard Law School

Conduct of a lawyer -

"...[a lawyer] concerns himself with the beginnings of controversies, not to inflame but to extinguish them..."

Lawyers must exercise their own moral judgment in carrying out their tasks as lawyers.

Source - Hoeflich, Legal Ethics in the Nineteenth Century: the "Other Tradition"47 U. Kan. Law Review 793,(1998-1999)

Job Tyson - 1839 Lecture - “The Integrity of Legal Character”

[T]he character of an upright lawyer shines with mild but genial lustre. He concerns himself with the beginnings of controversies, not to inflame but to extinguish them. He is not content with the doubtful morality of suffering clients, whose passions are aroused, to rush blindly into legal conflict. His conscience can find no balm in the reflection, that he has but obeyed the orders of an angry man. He feels that his first duties are to the community in which he lives . . . . I look with pity on the man, who regards himself as a mere machine of the law;—whose conceptions of moral and social duty are all absorbed in the sense of supposed obligation to his client, and this of so low a nature as to render him a very tool and slave, to serve the worst passions of men . . . .[24]

Source - Hoeflich, Legal Ethics in the Nineteenth Century: the “Other Tradition”47 U. Kan. Law Review 793,(1998-1999)

Lincoln - 1850's

Lincoln gave a short, five page lecture on the practice of law on July 1, 1850.

Litigation

".. Discourage litigation. Persuade your neighbors to compromise whenever you can..."

Fee Agreements

"...An exorbitant fee should never be claimed. As a general rule never take your whole fee in advance, nor anymore than a small retainer. When fully paid beforehand, you are more than a common mortal if you can feel the same interest in the case..."

Diligence

"..When you bring a common-law suit, if you have the facts for doing so, write the declaration at once. If a law point be involved, examine the books, and note the authority you rely on upon the declaration itself, where you are sure to find it when wanted. The same of defenses and pleas. In business not likely to be litigated,—ordinary collection cases, foreclosures, partitions, and the like,make all examinations of titles, and note them,and even draft orders and decrees in advance. This course has a triple advantage ; it avoids omissions and neglect, saves your labor when once done, performs the labor out of court when you have leisure, rather than in court when you have not. ...

Little Masterpieces, Abraham Lincoln, edited by Perry Bliss, Doubleday, Page & Company, 1907.

Robber Baron Era - 1870's - Return to Lord Broughman

Erie Railway War - Philosophy of David Dudley Field - Lawyer for Vanderbilt

lawyers: "[T]he lawyer, being intrusted by the government with the exclusive function of representing litigants before the courts, is bound to represent any person who has any rights to be asserted or defended."[126] Field reiterated in his letters that he had not lied or misled a court in the course of his representation of Fisk and Gould, in spite of the popular belief that he had done so.[127] What was important to Field was that, in his opinion, he was bound to represent his clients regardless of their actions or character and, furthermore, that he was bound to use all means possible—within the law—to further his clients' cause as part of his representation.[128]

The issue bounced between numerous judges in several jurisdictions. Field's "advocacy" was to try and modify a refused injunction, via a bribe

office. In a short time Dudley Field came back, and handed me this book [producing a book], with his written modification of the injunction, as I believe, in his own handwriting, saying, "If you will get that signed by Judge Barnard, I will give you five thousand dollars; if that sum is not sufficient, I will make it more." I declined the offer; and having occasion to go to the City Hall to see Judge Barnard, I went, and met him at the Astor House, where he had gone with some friends, — John R. Hackett, Mr. Thomson, one of the directors of the Erie Railroad Company, and some others whom I do not recollect. I told him incidentally of this application to me, and he said: "Dudley Field must be a dirty fellow to apply to you for this modification in this way, for he applied to me in court this morning for this same modification, and I refused to grant it."

Q. Did you see Dudley Field again?

A. I did not see him again.

Q. Did you accept the retainer?

A. I did not accept the retainer or undertake the service.

The resulting controversy resulted in the cementing of power by Boss Tweed and Tam See https://en.wikipedia.org/wiki/Erie_War

Contemporary Legal Issues

Sexual Relationships with Clients

https://www.youtube.com/watch?v=VBe_quezGGc

ORPC 1.8(j)

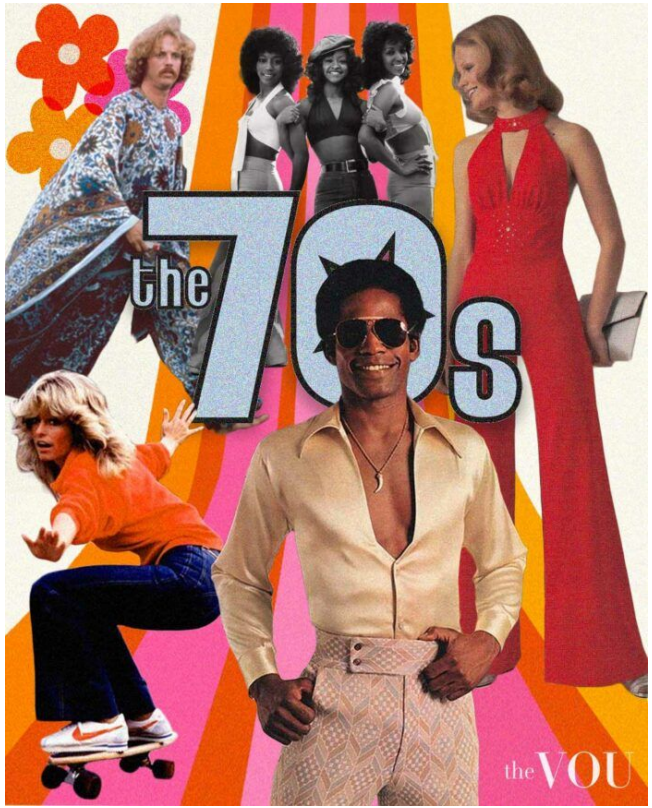
A lawyer shall not have sexual relations with a current client of the lawyer unless a consensual sexual relationship existed between them before the client lawyer relationship commenced; or have sexual relations with a representative of a current client of the lawyer if the sexual relations would, or would likely, damage or prejudice the client in the representation.

For purposes of this rule: (1) **"sexual relations" means sexual intercourse or any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party**; and (2) "lawyer" means any lawyer who assists in the representation of the client, but does not include other firm members who provide no such assistance. (emphasis added)

ABA MRPC 1.8(j)

A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

Regulation of sexual relations with clients in Oregon Part 1



- **1979**: OSB issues Legal Ethics Opinion No. 429 - *per se* unethical for an attorney to have sexual relations in a divorce case.*
    - Withdrawn in 1982 and replaced by:
- **1982**: OSB issues Legal Ethics Opinion No. 475: attorney-client sexual relations in divorce cases are *per se* unethical.

* except where there are no children and the divorce is amicable

Regulation of sexual relations with Clients in Oregon Part 2

- 1991: OSB replaces Legal Ethics Opinion No. 475 with Formal Opinion 1991-99 **AND** appointed a committee to draft a rule specifically addressing the attorney-client sex issue.
- 1991 OSB Business Meeting: proposed rule is voted down.
- But then along came a big bad wolf…

In re Conduct of Wolf **312 Or. 655 (1992)**

- In 1988, Mr. Wolf negotiated a $200,000 settlement for 16 year female old client in personal injury case.
- Afterwards he rented a limo to take his client around Portland to celebrate. That afternoon after serving her wine, he engaged in sexual intercourse with her in the back seat of the limousine.
- Oregon Supreme Court ruling: 18 month suspension overturning original 3 year suspension stayed after 1 year if certain conditions are met.

Regulation of sexual relations with clients in Oregon Part 3

- 1992: OSB Annual Business Meeting, a new rule is adopted prohibiting attorney from engaging in sexual relations with clients.
    - The new rule is approved by the Oregon Supreme Court on December 31, 1992.
- Oregon becomes the first state bar to voluntarily pass a discplinary rule prohibiting sexual relations with clients.

Meanwhile at the ABA...

- **2002**: ABA adopts Model Rule 1.8(j) prohibiting sexual relations between attorneys and clients.*

  * In **1992** the ABA issued Formal Opinion 92-364 which cautions that sexual relations with clients may involve unethical conduct.

Working with Clients with Diminished Capacity

Diminished Capacity: Personal Injury

Emergency Legal Assistance

[9] In an **emergency** where the **health, safety or a financial interest** of a person with seriously diminished capacity is **threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship** or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency **should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action**. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

Diminished Capacity: Estate Planning

Rules to Consider

- RPC 1.14 (Clients with Diminished Capacity)
- RPC 1.6 (Confidentiality of Information)
- ORS 112.225 (Requirements for Testamentary Capacity)

Diminished Capacity Hypothetical

- Potential client and adult daughter/caretaker walk in asking to create estate plan
- Potential client has been formally diagnosed with Alzheimer's Disease
- Potential client has a power of attorney that appoints adult daughter as her Agent

May the attorney draft an estate plan for this person?

Conflicts of Interest

Video - Conflicts of Interest

Brief History of Conflicts of Interest

- Arose as early as 13th Century Common Law - Ambidexterity
- First Code of Ethics Adopted by ABA in 1908 Expressly Prohibited Attorney from Representing Conflicting Interests Unless All Parties Consented After Full Disclosure
- 1970 Code of Professional Responsibility (ABA) adopted even stricter rules
    - Required lawyers to always “exercise professional judgment solely on behalf of his client”
    - Certain conflicts of interests barred lawyer’s participation even with full consent
    - Conflicts of interest expanded beyond representing certain parties to lawyer’s own interests
    - ORPC are largely modeled after this Code

Client Conflict - Real World Example #1

“The Case of the Cunning Employee,” or “Why Having a Good Conflict Screening System is Imperative”

RPC 1.18 (Duties to Prospective Client)

> “Prospective Client” is a “person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter.”
>
> A lawyer cannot represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter.

ABA Comment 2 to Model Rule 1.18

> “a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a “prospective client.”

Two Duties Owed to Prospective Clients

- **Confidentiality**: a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

- **Avoid conflicts**: a lawyer shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter

Preventative measures

Limit the initial consultation to:

- information reasonably necessary to allow you to determine if you can take on the matter

Because a prospective client conflict can

- Disqualify the entire firm

If you have already received confidential information

You might still be ok. Here’s what to do:

- Screening

AND

- Notice to former prospective client

Securing Client Funds

Lawyers Must Secure Client Funds

A single act of intentional misappropriation of client funds to the lawyer's own use in violation of DR 1-102(A)(3) generally warrants disbarment.

- In re Pierson, 280 Or 513, 571 P2d 907 (Or 1977)
    - Plaintiff was the beneficiary of three life insurance policies on his daughter, Toni Wolf. Plaintiff retained Pierson to prepare a trust for the proceeds of the policies for the benefit of Plaintiff's two minor grandchildren, Toni Wolf's daughters.
        - Pierson used a portion of these proceeds for his own use. Pierson repaid fully the converted funds. Nevertheless, the gravity of Plaintiff's legal injury, the court *held,* warranted Pierson's permanent disbarment.

Intentional, Knowing Conversion violates Disciplinary Rules

DR 1-102 Misconduct
(A)(3) It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

Conversion of client funds may violate DR 1-102(A)(3). However, finding a lawyer is guilty of conversion does not lead inevitably to conclusion conduct involved dishonesty, as “dishonesty” implies knowledge or intention. *See In re Eads*, 303 Or 111, 122, 734 P2d 340 (1987) (DR 1-102(A)(3) contains as an element the culpable commission of certain acts).

May a lawyer convert client funds without dishonesty?

1) What if the conversion is not done intentionally? In *in re Mannis*, 295 Or 594, 668 P2d 1224 (1983) the lawyer inadvertently used client funds for personal purposes when, unbeknownst to the lawyer, his employees had deposited client funds in his general account. The court stated the funds were taken by an act of conversion, but that lawyer's act was not "conduct involving dishonesty" under DR 1-102(A)(3).

2) Also, when the lawyer lacks capacity to appreciate the wrongfulness of the act. See *In re Holman*, 297 Or 36, 682 P2d 243 (1984).

When may a lawyer withdraw client funds from trust?

Oregon Code of Professional Responsibility
DR 9-101 Preserving Identity of Funds and Property of a Client

(A)(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein but the portion belonging to the lawyer or law firm may be withdrawn **when due** unless the right of the lawyer or law firm to receive it is disputed by the client in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

Disbarment protects the public and the courts

- *In re Bach*, 273 Or 24, 529 P2d 1075 (Or 1975)
  - "We are not operating a reform institution. The court's duty is to compel compliance with the highest standards of conduct imposed on any profession business or occupation. No one who is admitted into the legal profession may be permitted to sully or destroy the right and need of the public to impose absolute confidence in the integrity of the lawyer."
- Negligent record-keeping is not a defense
  - Oregon Supreme Court has suggested merely negligence conversion, as opposed to knowing or intentional action, may lack the requisite intent to amount to conduct involving dishonesty under DR 1-102(A)(3), but this defense has not been found to be credible. See, e.g., *In re Phelps*, 306 Or 508, 514-15, 760 P2d 1331 (1988) and *In re Weidner*, 320 Or 336, 340-41, 883 P2d 1293 (1994).

Conversion of Client Funds?

Client is threatened with litigation by former landlord for an alleged debt arising from client's tenancy. Client disputes debt and alleges counterclaims. Client hires lawyer on contingent basis ($0/hr) and conveys $400 to lawyer for anticipated filing fees and court costs. Client signs lawyer's fee agreement that recites lawyer's usual hourly rate is $200. Lawyer deposits client's fees in trust account.

Lawyer negotiates a mutual and final release of all claims that is signed by client and opposing party, each side to bear their own costs. Lawyer spends approximately 13 hours on matter. Lawyer issues client monthly billing statements, demonstrating work performed. After matter is concluded several months pass. Lawyer writes to client asking to amend fee agreement, proposing lawyer receive $400 as payment in full for services rendered and asks for a response from client. Lawyer hears no response from client by requested deadline–two weeks.

May lawyer withdraw client funds from trust after deadline passes? If so, when?

Unauthorized Practice of Law

- Royal Rescript of 1292
  - King Edward I ordered the Lord Chief Justice “to appoint a certain number of ‘attorneys and lawyers of the best and most apt for their learning and skill, who might do service to his court and people; and that those chosen only and no other, should practice.”
- Colonial Period
  - Non-lawyers allowed in some colonial courts; prohibited from charging fees
- 19th century (pre-Civil War)
  - States had statutes expressly permitting nonlawyers to represent parties in litigation;
  - Others had statutes expressly prohibiting nonlawyer representation in court.
    - Robb v. Smith, 4 Ill. (3 Scam.) 46, 47 (Ill. 1841) - The Illinois Attorney Act works “not as a restriction upon the citizen or suitor, but for his protection against the mistakes, the ignorance, and the unskillfulness of pretenders.
- The Rise of the Modern Bar Association

UPL in Oregon - Easier to Define by What *Isn't* UPL

- ORS 9.160
  - Self-representation in cases or legal disputes;
  - Out-of-state attorneys or collection agencies sending demand letters to Oregon;
  - Out-of-state attorneys practicing in matters that are exclusively federal (immigration, patent prosecution);
  - Activities of other licensed professionals (title insurance, CPAs);
  - Sales of generic forms without personalized assistance;
  - Discussions in forums or chat groups that don't provide personalized advice or assistance
- RPC 5.5
  - Associating with an Oregon attorney who is an active participant in the matter
  - Providing legal services for the jurisdiction they're barred in
  - Providing legal services that are exclusively federal

Does Bar Membership Violate the First Amendment? *Gruber v. Oregon State Bar*

OSB TO REFUND DUES, DUE TO ILLEGAL PARTISAN TWO-PAGE STATEMENTS IN APRIL'S BULLETIN

DL

Diane L. Gruber <dlgesq@aol.com>
To dlgesq@aol.com

Reply | Reply All | Forward

Mon 4/23/2018 6:42 AM

Fellow Attorneys:

Please allow me to point you to two full-page statements in the April issue of the Bulletin, pages 42 & 43. They are so insulting to the membership that I had a hard time wrapping my head around the fact that they would be published. I had to read them many times to be sure:

Oregon State Bar

Feb. 23, 2018

Statement on White Nationalism and Normalization of Violence

As the United States continues to grapple with a resurgence of white nationalism and the normalization of violence and racism, the Oregon State Bar remains steadfastly committed to the vision of a justice system that operates without discrimination and is fully accessible to all Oregonians. As we pursue that vision during times of upheaval, it is particularly important to understand current events through the lens of our complex and often troubled history. The legacy of that history was seen last year in the streets of Charlottesville, and in the attacks on Portland's MAX train. We unequivocally condemn these acts of violence.

Does Bar Membership Violate the First Amendment? *Gruber v. Oregon State Bar*

- Right now, no
  - No exception to ORS 9.160 for attorneys who believe that bar membership is a violation of freedom of association
- Compulsory bar membership could violate freedom of association, but
  - “Neither the United States Supreme Court nor the Ninth Circuit has yet directly addressed a broad claim of freedom of association based on mandatory bar membership in "an integrated bar that engages in nongermane political activities." *Crowe v. Or. State Bar*, 989 F.3d 714, 729 (9th Cir. 2021)
  - Some degree of nongermane activity does not “run afoul of the First Amendment’s associational rights.” (*Gruber v. Or. State Bar*, No. 3:18-cv-1591-JR (D. Or 2022)
  - Plaintiffs must demonstrate that OSB’s activities are nongermane *and* that said nongermane activities “run afoul” of the First Amendment.

Thanks!

Any Questions?