
ESSAY

ETHICS FOR ADVOCATES: AN OVERDUE CONVERSATION

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INTRODUCTION

Before we get to the easy talk, let me tell you “where I come from.” I believe the first year of law school should be restructured, renamed, and devoted primarily to “The Ethics of Law.” Yes, a whole year for what I believe is a missing essential foundation.

Years ago, my letters to the deans of Mississippi’s law schools suggesting radical change were politely dismissed. Curricula at both schools have since been revised without such bold idealism, retention of American Bar Association (“ABA”) accreditation being used as one excuse. After all, a single three-hour course in ethics is required by the third year, and some professors treat the subject to some extent in other courses. Neither school chose to be the first in the nation to require demonstration of a thorough acceptance of objective ethical standards as a foundation for a legal education and the powerful license that routinely follows without meaningful moral screening. They do not think our profession is in that much trouble. I believe it is. Measurable understanding and acceptance of published ethical standards would immeasurably enhance professional use of the legal knowledge and persuasive skills taught in law school.

Some enter law school with truly altruistic motives and admirable social goals, and some graduate with the same idealism. To mold or weed out the naturally avaricious students based upon an objective demonstration of knowledge and acceptance of ethical standards would take serious curriculum overhaul. First-year courses would have to include extensive study of comparative professional ethics, historical foundations of various professional standards, origin and application of codes and

rules of conduct, former and current disciplinary systems in various professions, applied ethics of law in litigation and non-litigation settings, etc., and testing would be a new challenge. Sadly, this will not happen soon, but meanwhile could we not at least raise the bar from eighteenth century levels by aggressively teaching the frankly onerous standards of our own Code of Professional Responsibility and other similar standards? Could we not at least feature ethics during the *first* year, preferably in at least two separate three-hour courses covering the topics just mentioned?

The Mississippi Rules of Professional Conduct (“MRPC,” not to be confused with the similar abbreviation for the highly regarded Model Rules of Professional Conduct) and the ABA Model Rules of Professional Conduct, along with enforcement theory and practice, and the related role of the individual attorney, should be exhaustively explored at the peak of students’ idealism, during year one, before 1L eyes become fixed on potential power and monetary rewards. Otherwise, we will continue to increase numbers in the legal business but continue to lose ground in the legal profession. I base this on a decade of large firm insurance company defense practice, two decades in small firm and solo general practice, and a term on the bench in the hardest and best job I ever had. I know I am not alone in my grave disappointment over the justified erosion of public trust of our profession during this period. I hope you will agree that we should do something about it, not just talk. Perhaps this conversation will help push you into action.

By now it is obvious that I am an idealist and not a politician (otherwise, I might still be a popularly-elected Mississippi trial judge, but that is another story). I confess to being a conservative, small-town boy, gung-ho Eagle Scout, proud Mississippi State graduate, first husband to my first wife, father of four fine professionals with children of their own, retired Air Force Colonel with a few military habits, survivor of ten years in frustrating telephone company management and three years of challenging night law school, a fairly widely experienced litigator, now an aging and balding Collaborative Lawyer at heart. You may suspect some prejudices. All of this is intended to make sure you know where I come from. Oh, relax! This con-

versation is just a sample, not nearly so radical as my doomed recommendation to the Deans, I promise.

A. *The Ethical Client-Lawyer Relationship*

1. First of all, almost *half* the rules and comments in our MRPC come under “Client-Lawyer Relationship”! Before entering into a client-lawyer relationship, you should always show prospective clients the voluminous set of rules designed to protect them from unscrupulous lawyers *unlike you*. Would that tell them something? Clients should appreciate how hard it is to do your job for them while complying with your *superior duty to the court* and your concomitant duties to your client’s opponent, opposite counsel, witnesses, etc., as well as your professional obligation to seek justice. Tell a new client up front that there are rules of ethics restricting your handling of a damage or slander suit or a child support problem. Make it clear you cannot and will not just do “whatever it takes” (you’ve heard it!), even when he says, “money is no object” (ever heard that?), or she wants “to see him suffer” (did she say it or was it just in her eyes . . .).

2. It is your responsibility, not your client’s, to *identify conflicts of interest*. No ethical precaution is any more important than avoiding violation of Rules 1.7 through 1.9 of the MRPC. In any initial telephone conversation, before any private conference, long before any talk of client relationship, always at least *fully identify* the opposing parties. Some conflicts cannot be discovered before taking on representation, and some can be accommodated ethically by full disclosure in writing to all concerned parties. Initial intake information should include as much potential conflict data as humanly possible (by the way, watching people fill out an intake form reveals something about their literacy that should be noted by any assistant who does this for you). The continuing inquiry must reach potential witnesses. Suppose in an irreconcilable differences divorce (fault and behavior irrelevant) childless parties settle all property distribution except who gets the condo. Suppose during the easy trial on that limited issue you are surprised by an opposing witness (testifying about past occupancy and investment in the condo) who is the long-time paramour of your best friend, de-

voted classmate of your sainted mother, and/or beloved Sunday school teacher of your daughter. Will you be perceived as doing the required hatchet job on cross-examination? Maybe you should have known before taking the case . . .

3. Your relationship with a client should be based upon a *contract in writing*. A constructive contract grows out of your implicit agreement even just to speak to a person concerning a legal problem, so what are its terms—what you recall, or what the client recalls? Proceeding without a contract is just not smart. Set forth your precise fee arrangement using language from Rule 1.5(a) of the MRPC. Go over every proposed contract with every prospective client, word for word. This is not a job for your secretary or legal assistant. Do not let the client say, “oh, I don’t need to read it.” It may be unethical to not mention potential advantages of alternative dispute resolution (“ADR”), so include a reference to this discussion. Get it signed before the client leaves. Consider a Collaborative Law contract, which includes that wonderful provision disqualifying the attorney if the matter is not resolved without litigation (call me, or call Sid Davis in Mendenhall)!

4. The *engagement letter* may be the second most important document of the relationship. What if the client presents an emergency and you dive in deep and get in a royal hurry before you know it? No excuse. Do the letter as soon as possible. Attach your detailed contract or repeat its provisions in the letter. Remind the client about the often preferable avenues of ADR, and enclose your firm brochure and a flyer advertising your mediation practice, even if the client has one already.

5. Is a “*retainer*” the agreement itself or the money paid for professional services in advance? Technically, it can be both. See BLACK’S LAW DICTIONARY 1341-42 (8th ed. 2004). Most authorities agree that even if you only interview someone, a small fee is reasonable to compensate you for being conflicted out of possible representation of the opposite party, while a telephone inquiry by a lawyer-shopper may take you out for nothing! State in your contract that a certain amount of non-refundable fee is required in advance, fully earned as consideration for accepting the case but to be credited toward any charges. If you

take a \$1,000.00 advance but settle the case in one hour without expense, offer a partial refund.

6. “A lawyer’s fees shall be reasonable,” as measured by at least eight factors spelled out in MRPC Rule 1.5(a). The venerable opinion in *McKee v. McKee* and its progeny include some of these factors. 418 So. 2d 764 (Miss. 1982). Misunderstanding about fees is one of the most frequent sources of serious ethical complaints. The burden of proof that a fee was reasonable rests upon the attorney, and that is very difficult if you cannot show your client’s written agreement to your hourly rate, billing practice, expense reimbursement, right to hire experts or pay court reporters, etc. Document your efforts on a time sheet and disbursement record, even in contingency cases, so that you can satisfy the findings set forth in *McKee*. Do not rely on *Gardner v. Gardner* (suggesting that the *McKee* factors were unnecessary). *Gardner*, 795 So. 2d 618, 619 (Miss. Ct. App. 2001). Bottom line: you will be embarrassed if you have no records to refute an irate client’s allegation of unreasonable charges in that ethics complaint you hope never comes.

7. Contingency fees: Is 40% ethical? 50% (your interests same as the client’s)? The late Tommy E. Furby, the generous former Chair of the Mississippi Bar Professional Responsibility Committee, often spoke about the ethics of fees as one aspect of client relationships. He reminded us that there are some specific prohibitions, such as entering “into an arrangement for, charg[ing], or collect[ing] any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof.” MRPC R. 1.5(d)(1). (*But see* Miss. State Bar Ethics Comm., Op. 88 (explaining when a lawyer may ethically accept past due alimony or support on a contingent fee basis)). What if your poor client’s wealthy husband left her but agreed to pay her \$2,000 condo rent in a property settlement signed January 2, 2009, and incorporated in a judgment of divorce July 15, 2009, but was six months behind when divorced? Is a contingency fee on a contempt or collection action okay? Just checking to see if you are awake . . .

8. Should you maintain client relationships with *e-mail*? It is awesomely efficient, but there is a tendency for e-mails to

be truncated, publicized, or overly informal and brief, much like hallway greetings in a busy office. I fear my clients may send a virus, and I hate it when that happens. Casually composed communications can capriciously come calling, costing counsel cash concessions. Never rely on e-mail for important directives or to memorialize final understandings and always get confirmation of receipt. Always remember and never forget (*The Godfather?*): e-mails last longer than you think, in cyberspace and on hard drives including your digital copier! Include on every fax and email signature precautionary warnings, such as:

NO REPRESENTATION is undertaken, expressed, or implied (absent a written agreement by the attorney) to any recipient(s) of this fax or email. Viewing or using the contents hereof does not constitute an attorney-client relationship. This may contain confidential or privileged information. If you received it in error, please reply to sender only, advise us of the error, and delete and destroy all copies of it and any attachments. Information is based on Mississippi law and no other jurisdictions. Circular 230 Disclosure: To ensure compliance with IRS, we inform you that any tax advice contained herein, including attachments, was not written to be and cannot be used for (i) avoiding tax-related penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any tax-related matters. Got that? If not, please call me. Thanks. –R.C.C.

Such routines speak loudly of your concern for ethical confidentiality.

9. “It goes without saying” that a pleasant relationship with a client is good, but getting too cozy is not. Representing individuals often involves vulnerable people with problems from which you may be their perceived or actual savior. Do not allow even an oblique suggestion that you may become their lover. Such inappropriate relationships are tempting, but they lead to your interests conflicting with those of your client and to having your independent judgment impaired—ethical violations of the first order. Remember Jimmy Stewart’s valiant resistance toward the tempter in “An Anatomy of a Murder.” This is a profession, and you live in Zero Tolerance City.

10. Liking your client, while preferred, is optional, but not liking what she wants you to do should make you decline or withdraw from representation. Sure, be good to your client, polite, complimentary, send copies of everything, bill monthly, return every call promptly, etc., etc., but do not fail to understand motives as well as objectives. Some of them may have been only subtly revealed early on, and some may hit you in the face later. *Understanding client motivation* is essential to avoid creating or tolerating a conflict of interest. Consider the practical implications of advancing a cause that you really think is imprudent. If you are right about your client's folly but pursue it, does this not set you up for a legitimate complaint that you should have advised the client to *not* pursue the imprudent goal? No amount of disclaimer language in your contract will insure that your client will not come to her senses and turn on you for helping her in the wrong direction. You are ethically obligated to decline the case, or withdraw from it, if your "representation will result in violation of the rules of professional conduct or other law." MRPC R. 1.16 (a)(1).

It is not always easy to predict in the beginning, but I suggest that ethical civil practice (as distinguished from criminal defense) requires some degree of approval of your client's motives. How can you perform with undivided and undiminished loyalty (which is required professional conduct) if your client's agenda is against your own principles or offensive to your sense of smell? Read MRPC Rule 1.16(b)(3). It anticipates withdrawal if your client insists upon pursuing an objective that you consider "repugnant" or "imprudent." I reject that awful proposition that "every attorney has his price." No fee can be worth the sacrifice of your principles as an ethical professional.

11. Is advertising the beginning of a relationship with prospective clients? It may create intended and unintended expectations long before they walk in the door. You probably hope clients are influenced by the reputation that precedes you, which should be affected by any advertisement you pay for. Advertising is permitted within the bounds of the MRPC, especially Rule 7.2, whether some of us like the resultant cheapening of our professional image or not. I am just suggesting that if your advertising brought you a client, she is entitled to expect the

relationship to be like your advertisement implied. Prior to prematurely promising potential profit, prevent possible popularity problems by pondering how public pronouncements have prepared the person paying (groan). Okay, maybe that is enough for now about ethical client relationships.

12. How does it end? It's up to you. Or is it? In most chancery and some federal court matters, you have a "relationship" with your client as attorney of record until otherwise ordered. Consider including in every final judgment a paragraph dismissing you as attorney of record. Some clerks and court administrators keep us on some informal list of contacts even after cases go stale or get dismissed, so advise them accordingly. An *exit letter*, stating that you and the client are now past tense, can head off misunderstandings about your obligations after finishing what you were paid to do (appeal? collect?). If your relationship was good, include sincere solicitation for future work, thereby adding finality to the current relationship. By the way, most malpractice insurers insist that you end the client relationship in writing.

B. The Required Ethics of Advocacy

1. There are many ethical requirements, but let's concentrate on a few. In several romance languages, "advocate" is the noun for your chosen profession. In English, the term is used for anyone asserting a cause for another. As an ethical advocate and proud member of what I call the Dispute Avoidance and Resolution Profession, you might want to try standing and reciting the oath we took as attorneys, brought forward from the Code of 1930, and most recently re-enacted on July 1, 1999:

I do solemnly swear (or affirm) that I will demean myself, as an attorney and counselor of this court, according to the best of my learning and ability, and with all good fidelity as well to the court as to the client; that I will use no falsehood nor delay any person's cause for lucre or malice, and that I will support the constitution of the State of Mississippi so long as I continue a citizen thereof. So help me God.

MISS. CODE ANN. § 73-3-35 (2006).

Every phrase is an equally important requirement. I recall fondly the honor of being asked to admit new members to the bar: I would stand behind the bench and ask all lawyers in the courtroom to join with the new attorneys and me in repeating these words. We did not take them lightly when we first said them, did we? May we never forget that they bind us today and every day.

2. Can you believe that there are even more Mississippi statutes that govern our advocacy? All attorneys are required “[t]o abstain from all offensive personalities, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which they are charged.” MISS. CODE ANN. § 73-3-37(5) (2006).

Under the judicially created license for freewheeling cross-examination, how often do we violate this law in the heat of zealous advocacy, allowed by wimp judges? In addition, the law—not just self-imposed ethical standards, but also the black letter law—requires us “[t]o encourage neither the commencement nor continuance of an action or proceeding from any motives of passion or personal interest.” MISS. CODE ANN. § 73-3-37(6) (2006). Would we need so-called tort reform if we obeyed this statutory requirement?

3. Then there is the additional statutory command to all lawyers “[n]ever to reject, for any consideration personal to themselves, the cause of the defenseless or oppressed.” MISS. CODE ANN. § 73-3-37(7) (2006).

Our meager legal aid offices are undermanned and snowed under, while most of us seldom even take a single case from the Mississippi Volunteer Lawyers Program, claiming that we do *pro bono* work when some of our clients do not pay their bills. Wrong! And now under the new MRPC Rule 6.1 (adopted a couple of years ago over strenuous written objections from me and perhaps others), any Mississippi lawyer can pay a lousy two hundred bucks (\$200.00) a year to satisfy a sacred *pro bono* obligation! As Joan Rivers used to say—“can we talk?” Less than one hour’s worth of generosity per year from a partner in a big firm now satisfies a fundamental, honorable, traditional, indi-

vidual responsibility enjoyed by every member of our honorable profession. How embarrassing! And letting lower paid associates do your part for you? Shame! Oh, and if you report forty hours you can just bank twenty and next year have no obligation! No obligation? What about the spirit of the statutory law set forth above? What is our profession coming to? Merely business? Purchasing a pass by donating to a fund that may ultimately serve the public is not personal discharge of our duty, and it may even be a violation of the above statute. Maybe a change to MRPC Rule 6.1 will someday redeem our profession. Meanwhile, I hope you will never be satisfied with the unprofessional cop-out allowed by the rule or the comments that seek to justify this travesty. Hey, just my opinion, but come on now . . .

4. What if your client is or becomes incompetent? MRPC Rule 1.14 requires a normal relationship with such a client and also a guardian ad litem in appropriate cases. What if your client is both (a) a court appointed guardian of the person and estate of a ward embroiled in a divorce requiring equitable distribution and (b) the ward's statutory heir? Do you have to put the best interests of the incompetent ward ahead of your client's interests? Look up the cases regarding duty to a fiduciary client and to a related estate. While we are at it, another thought: how do you ethically advocate for a client who, as trustee exercising the discretion allowed in a private family trust set up for an incompetent beneficiary, wants to give valuable trust property to a favorite cousin because "everybody knows how ol' Bubba feels about cousin Mimi?" Folks, I am just a messenger, crying in the wilderness, and I never said life as an ethical advocate was easy.

5. My favorite example of the tightrope we walk as we adhere to the ethical standards accepted by, if not expected of our profession is found under "Candor Toward the Tribunal" in our MRPC, which states: "[a] lawyer shall not knowingly . . . 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." MRPC R. 3.3(a)(3). If your client knew about this rule, maybe she would not think you are permitted to act like some TV lawyers. Maybe she would not fire you when you say, "may it please the

Court, Your Honor, my client should lose under our Supreme Court's ruling in 1996 in *Jones vs. Jones* (gulp). That case is on all fours with the position advocated by learned opposite counsel, but unfortunately, he overlooked it in his admirable zeal for his client . . ." Is this consistent with zealous advocacy? *Yes*, because as an officer of the court, your *fidelity is owed first to the court and then to your client*. First to the court and THEN to your client. The object is justice. JUSTICE. They really ought to teach this stuff in law school. Live with it. You promised, under oath.

Of course, as your client looks at you in shock after the above declaration in open court, you might want to add (without groveling), "however, Your Honor, we expect to distinguish our peculiar facts from those that governed that old *Jones* case, in light of the passage of time and certain socio-economic developments since that decision . . ." This two-step declaration would be ethical advocacy, and we all should expect no less from each other. See why this is my favorite?

6. And what about our individual statutory enforcement roles as attorneys? "Complaints, irrespective of source, touching upon the professional conduct or conduct evincing unfitness . . . that may come to the attention of *any judicial officer* . . . shall be referred to the committee on complaints . . ." MISS. CODE ANN. § 73-3-309 (2006) (emphasis added). Are you a "judicial officer?" It is universally held that you are an officer of the court. *See Ex Parte Redmond*, 82 So. 513 (Miss. 1919). Have you helped the court comply with this statute wherever you practice law? In 1979, the legislature added that circuit and chancery "courts" (not "judges," but "courts") shall file such complaints. Is there any doubt about our personal responsibility as officers of the court?

Okay, if the above statutory directive does not move you, consider your solemn duty to inform the appropriate authority (file a complaint) if you have "knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects . . ." MRPC R. 8.3(a). You have a similar duty if you have knowledge that a judge has violated applicable rules. John Toney, Director

of the Judicial Performance Commission, promises that he will handle your confidential report discretely.

7. Just a parting thought about members of the bar and its sections and local associations: did you know that the statute placing disciplinary jurisdiction in the Supreme Court specifically preserves *the power of local bar associations to censure, suspend, or expel* members? MISS. CODE ANN. § 73-3-301 (2006). Have you ever heard of a local bar association doing this? EVER? Why not? Should your Practice Section of The Mississippi Bar take action when one of your section members has behaved unethically? Why not?

8. There are many other expectations of the ethical advocate that cannot be covered here. We cannot cover the larger arena of “professionalism,” a behavioral concept enhanced by civility, collegiality, enthusiastic engagement in ADR methods like mediation, etc. You may even have had recent continuing legal education (“C.L.E.”) on that subject instead of ethics. Personally, I am embarrassed to admit to laypersons that we have a measly one-hour annual C.L.E. requirement for ethics or professionalism. We need much more of both. Likewise, malpractice considerations are not covered here, but please remember: ethical violations and unprofessional actions alone may not be malpractice *per se*, but proof of them is usually embarrassingly admissible evidence on the issue.

CONCLUSION

The above statutes and rules by existence alone will not cure our profession. Brave adherence and action might. Conversation is not enough.

Now you know where I come from and where I am, regarding the ethics of our profession. Where are you?

Respectfully,

ROGER CLIFFORD CLAPP
Mediator, Arbitrator, Collaborative Lawyer