AGAINST THE RULES*

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I entered law school in 1976, part of the first class ever to be required to take a course in ethics. Immediately upon learning of the requirement, I petitioned to have it waived in my case, arguing that ethics isn't something that can be taught in law school; that instead, it is a habit born of strong character. I wasn't against the rules, I just wasn't for them. From what I knew, the legal profession's ethical code seemed to involve such trivial questions as whether sending Christmas cards to a prospective client amounts to an improper attempt to solicit business. (You think I'm kidding? The Alabama State Bar has opined that a law firm's Christmas cards are okay only if their circulation is confined to lawyers, personal friends, former and current clients, and relatives.)[1]

At The University of Chicago Law School, my alma mater, arguments of moral superiority were greeted sympathetically, and my petition to avoid the ethics course was granted.

Soon I was a litigation associate at a Chicago law firm, when it came time to visit the client's office to learn what his employee would say about him. The client was a successful surgeon who our law firm represented in a malpractice case, and I have changed the facts slightly for obvious reasons. Two years earlier, another lawyer had interviewed the employee; the lawyer said that "Ms. Nurse's" comments about "Dr. Client" had been glowing. But Dr. Client warned us that his nurse/receptionist might not be so enthusiastic now; he had just given her two weeks notice because of problems

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1. *See* Ala. Comm. on Ethics and Professional Responsibility, Formal Op. 118 (1985).

with her performance.

Dr. Client's guess about Ms. Nurse was right on target. In fact, Ms. Nurse claimed that Dr. Client has recently become high-handed with patients, often waiting days to return calls and refusing patients' reasonable requests for pain killers following surgery. At the same time, Ms. Nurse professed to have no knowledge about the patient who had sued Dr. Client, although she looked very coy when she said this. Equally ominous, Ms. Nurse also claimed that Dr. Client occasionally accepted cash payments from patients and did not report them as income.

And I, a third-year associate, was the only person who knew this. But, I worked for a law firm with layers of partners above me, so I sought help. "Settle the case," said one partner. "That sounds terrible; I don't want to hear about it," said another. In desperation, I headed for the library to look at the ethical rules, wondering how smart it had been to skip the legal ethics course.

I looked for the *Illinois Rules of Professional Conduct*, which were then based on the American Bar Association's *Model Code of Professional Responsibility*. When the American Bar Association (ABA) supplanted this Byzantine set of rules with the *Model Rules of Professional Conduct* in 1983, Illinois and most states eventually revised their rules to incorporate the structure or substance of the *Model Rules*. Also, since the early 1980s, many individual courts, local bar associations, and others have adopted their own rules of conduct, most based on the ABA rules, some going much farther afield. Also, codes of civil procedure for both federal and state court now have their own quasi-ethical mandates, such as those embodied in Rule 11 of the *Federal Rules of Civil Procedure*.[2] But the ABA rules, and the state codes based on them, are the fundamental guiding rules for any practitioner. The references in this Essay are to the current versions of the rules.

In consulting the rules, I first faced the question of what to do about the possibility that Dr. Client was mistreating his patients and committing tax fraud, leaving aside the role of this alleged misconduct in the malpractice suit. (Even for litigators, the underlying transaction can become a matter of ethical concern.)

A lawyer's duty upon learning that a client intends to commit a

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2. FED. R. CIV. P. 11.

crime is certainly the most hazardous exception to the duty of confidentiality. The ABA *Model Rules of Professional Conduct* and the rules of most states allow (but don't require) the lawyer to reveal information reasonably believed necessary to prevent future crimes that are "likely to result in imminent death or substantial bodily harm."[3] Illinois is stricter. It *requires* the lawyer to reveal information to prevent such serious crimes and *allows* disclosure to prevent any other crime.[4]

Even if Ms. Nurse's allegations were true, those allegations, standing alone, did not lead me to believe that Dr. Client's conduct was likely to cause death or substantial bodily harm (or that he was acting with criminal intent), so I was not required to reveal his conduct to outsiders or to take other steps to halt it. Under the Illinois rules, if I believed that the doctor was committing a crime, I was allowed to report it. But I didn't know for certain, so the rules did not allow me to report what I had learned, and they placed no duty on me to learn more.

That same uncertainty made another rule I consulted inapplicable. Illinois' equivalent of Model Rule 1.2, Scope of Representation, forbids a lawyer from assisting a client in conduct that the lawyer knows is criminal or fraudulent.[5] However, that rule also did not apply because Dr. Client was not seeking our assistance in the conduct Ms. Nurse had described.

Another possible concern was whether, if the malpractice case went to trial, we could allow Dr. Client to testify, given the clear proscription against a lawyer's presenting perjured testimony. But, again, because of the questions about Ms. Nurse's veracity (and the likelihood that Dr. Client's statements contradicting her would not be materially relevant to the case), the rules provided no answer.

There was also the question of whether we could prevent Ms. Nurse from talking to the plaintiff, even if her testimony was not directly relevant to the malpractice case. The first question, again, was whether there is an affirmative duty to disclose damaging information, in this case, to our opponent. Again, the answer was no. For

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3. MODEL RULES OF PROFESSIONAL CONDUCT ANNOT. Rule 1.6(b)(1) (1992).

4. *See* ILL. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1990), *cited in* 2 NATIONAL REPORTER ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY 13 (1998) [hereinafter NATIONAL ETHICS REPORTER].

5. *See id*. Rule 1.2(d), *cited in* NATIONAL ETHICS REPORTER at 5.

example, ABA Formal Opinion 93-375 provides that a lawyer is under no duty to disclose weaknesses in a client's case during a bank examination, so long as the attorney does not lie or mislead agency officials.[6] The rules make clear that if the plaintiff asked for Ms. Nurse's deposition, we could not send her on an extended vacation (because that probably would constitute an unlawful obstruction of another party's access to evidence "having potential evidentiary value," under Model Rule 3.4, Fairness to Opposing Party and Counsel).[7] But since Ms. Nurse had no particular knowledge about the plaintiff's case, we might not have gotten questions that would have forced disclosure about her.

Finally, there was the question of my liability, as an associate, for a plan of action that the law firm partners adopted. I did not need to read the rules to know that I was independently bound by the *Rules of Professional Conduct*, although the *Rules* also make it clear that I could defer to a supervisory lawyer's reasonable resolution of arguable questions of duty.[8]

"Okay," I said to myself, "so I can't rat on Dr. Client, and I don't have to worry about suborning perjury. But does that end the ethical dilemma?" Even if the rules don't require it, aren't Dr. Client's lawyers ethically obliged to attempt to learn if Ms. Nurse's accusations are true and, if they are, to attempt to persuade the doctor to halt his harmful conduct? And, if the firm's partners come up with a plan that doesn't address that ethical concern, don't I have an obligation, myself, to do something? Finally, despite Ms. Nurse's lack of material knowledge about the case, won't we find ourselves considering her possible testimony as we answer interrogatories, prepare Dr. Client for his deposition, and consider the possibility of settlement?

Yes, these are all legitimate ethical questions, inextricably bound up with the strategic decisions that will be made. You can page through the *Model Rules* all day long and never find an answer to them. This isn't because the rules cover only trivial issues, as I once thought. They address true ethical dilemmas as well. The problem is, they don't solve them. However, that's not a problem with the rules, it's a problem with the problems.

Look at it this way. As a litigator, my job is to paint a good pic-

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6. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 375 (1993).
7. MODEL RULES OF PROFESSIONAL CONDUCT ANNOT. Rule 3.4(a) (1992).
8. *See id*. Rule 5.2(b).

ture of my client and a bad picture of the client's opponent. I want to know all the good facts about my client and the bad facts about my client's opponent. Of course, for strategic reasons, I need to learn the good facts about my opponent's client, so they don't come as a surprise. Also, because I know the opponent's lawyer wants to learn all the bad facts about my client, I also want to learn the bad facts and to learn them before my opponent does. Except, if there are bad facts about my client that my opponent will never discover, then I'd like not to discover them either. Because when I do, I have a problem.

In presenting my client's story at trial (or by motion), the rules provide that I have a responsibility of candor to the court,[9] even if the truth does not look good for my client. Moreover, if I ignore bad facts or twist the truth, I won't be able to face myself in the mirror. Yet, my obligation to be candid with the court and honest with myself may conflict with my legitimate obligation to give my client the best and most enthusiastic representation possible, and with the practical necessity of keeping the client relatively happy.

The rule makers acknowledged this when they wrote in the preamble to the *Model Rules*, "[v]irtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living."[10]

What the rule makers didn't say is that, while the rules provide the lawyer with an outside boundary of permissible conduct, they do not resolve most ethical issues. In fact, complying with the rules will not enable lawyers to escape making ethical decisions virtually every day.

Understanding this, I have come to think that my initial response to a law school class on ethics wasn't all wrong. Strong moral character is fundamental to being able to practice law respectably and happily. What is needed is the ability to see the ethical issues among the strategic ones, and to make strategic decisions that take account of the ethical concerns. The strength of character to make decisions this way certainly isn't all that counts in the practice of law, but it is something that always counts. It is necessary, but not sufficient, as we lawyers like to say.

Yet, determining whether a course of conduct is against the

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9. *See id*. Rule 3.3.
10. *Id*. pmbl. para. 8.

rules rarely ends the conversation about ethical issues. Certainly it didn't for me when, at the beginning of my career, I wondered what to do about the revelations of Dr. Client's nurse. By the time the team representing Dr. Client assembled with the doctor in our law firm conference room, that question had been discussed endlessly.

Red-faced, Dr. Client explained that he and Ms. Nurse had been having an affair which he had broken off. Also, he had caught her stealing from the till – not the other way around. (Later, because the senior partner pressed, Dr. Client's accountant confirmed the doctor's version of the story.) Ms. Nurse's stories about Dr. Client's harsh treatment of patients turned out to be a work of vindictiveness; she had been trying to build a case against him that would excuse her leaving his employ. When Dr. Client heard what we had to say, he terminated Ms. Nurse's employment immediately. None of us saw her again, for the plaintiff in the malpractice case never sought her deposition.

Dr. Client's malpractice case settled the day before trial, after Ms. Nurse was long gone. The ethical crisis triggered by her accusations was resolved without breaking any formal rules, and without breaking personal rules of conscience. Most are.

But, it was not resolved without the lawyers losing a few nights of sleep. In a profession in which ethical conflicts are part of every day life, that is typical too.