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FEATURE ARTICLE

Are Lawyers "Enablers"?

This month, David Enrich released a book called Servants of the Damned: Giant Law Firms, Donald Trump, and the Corruption of Justice. Enrich, who is The New York Times' Business Investigations Editor, has produced a somewhat sensational account of the growing political and economic power of America's largest law firms and called into question both the growing influence of these mega-firms on American life and the ethical standards by which they operate. It is a book sure to evoke lively debate across the profession and the general public. While there is much in the book that one might question, it does raise some extremely important issues that all lawyers should consider.

A term Enrich introduces early in the book is particularly striking. He refers to some lawyers as "enablers" of their clients' "bad behavior." The term "enabler" is one that we rarely use when we discuss lawyers and their ethical duties. More often, we hear the term used in the context of addiction and codependency. But it is a thought-provoking term when applied to lawyers.

Although the lawyer-client relationship is central to the Rules of Professional Conduct, the Rules never specifically that relationship. Instead, they define various aspects of that relationship and set bounds to it. The underlying basis of the Rules is that lawyers have a fiduciary responsibility to their clients and that, above all, this responsibility manifests itself as the duty to be loyal to their clients and to maintain their clients' confidences.

The duty of loyalty is most importantly expressed in the duty of diligence. KRPC 1.3 states:

> A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment 1 to KRPC 1.3 explains that:

> A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. A lawyer's workload

should be controlled so that each matter can be handled adequately.

According to this fundamental ethical rule, a lawyer "may take" whatever measures are required to represent his client's cause within the law and ethical rules that exist. The key word here, of course, is "may." The Comment makes it quite clear that a lawyer is not ethically required to take every step a client wishes to achieve the client's goals but, rather, has discretion as to the means she uses to achieve these ends. Indeed, this idea is contained in the rule pertaining to scope of representation:

> (a) A lawyer shall abide by a client's decisions concerning the lawful objectives of representation, subject to paragraphs (c), (d), and (e), and shall consult with the client as to the means which the lawyer shall choose to pursue. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.
>
> (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

KRPC 1.2.

The real question, one that is central to Enrich's new book, is how lawyers ought to behave in the gray area of discretion permitted to them by the Rules—especially whether lawyers should use their skills and power as aggressively as possible without crossing the line into illegal or unethical behavior. Put more practically, should lawyers find ways for their clients to avoid legitimate laws that restrict their behavior? If so, how aggressive should they be in doing so? As an example of this, Enrich cites the current controversy over a technique known as the "Texas Two Step," designed to limit corporate mass tort liability using Chapter 11 in bankruptcy.[1] Enrich is equally bothered by law firms using overly aggressive litigation to achieve openly political goals for clients.

Enrich is clearly nostalgic for a time (which may not actually have existed) when lawyers chose to decline representing clients in what they considered "dishonorable" causes as opposed to today, when some large firms will take on any represen-

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1 D. Enrich, *Servants of the Damned: Giant Law Firms, Donald Trump, and the Corruption of Justice* (2022), 305.

tation that is not manifestly illegal or violates the Rules if the potential fees are great enough. Enrich puts it quite dramatically:

> The decision to defend giant corporations for a living required you to either embrace their worldviews or to consistently subordinate your core beliefs.[2]

For Enrich, the bottom line is that some law firms have become no different from any other profit-maximizing business.

Even though one may disagree with Enrich's concerns, the idea that lawyers have become not simply advocates for their clients, but enablers of their clients' questionable behavior, is worth considering. So, too, is it worth considering what Abraham Lincoln wrote in a manuscript draft of a lecture on the law:

> Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser — in fees, expenses, and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough.
>
> Never stir up litigation. A worse man can scarcely be found than one who does this. Who can be more nearly a fiend than he who habitually overhauls the register of deeds in search of defects in titles, whereon to stir up strife, and put money in his pocket? A moral tone ought to be infused into the profession which should drive such men out of it.[3]

Enrich quotes one lawyer who stated: "The life of a lawyer is that you defend the clients that come to you."[4] This may well be a statement of economic reality, but it is not reflective of American ethical requirements.

Rule 1.3 and Comment 1 in particular explicitly state that a lawyer has discretion as to the means she adopts in advocating for a client. Rule 1.2(a) also makes it clear that a lawyer has the final say in choosing the means to represent a client, albeit after consultation. Further, lawyers in the United States have the liberty to refuse to represent a client for any reason—except in very limited cases, such as when a lawyer is appointed by a judge to represent a client. And, in fact, Rule 1.16 provides a justification for withdrawing from representation in certain circumstances. KRPC

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2 Ibid, 93.

3 "Abraham Lincoln's Notes for a Law Lecture," available at https://www.abrahamlincolnonline.org/lincoln/speeches/lawlect.htm.

4 D. Enrich, *Servants of the Damned: Giant Law Firms, Donald Trump, and the Corruption of Justice* (2022), 101.

1.16(b)(2) states that a lawyer may withdraw from representation if:

> a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent…

Given our freedom as lawyers to choose whom we represent and how we represent them, should we, in Enrich's terms, be enablers for our clients? Should a lawyer advocate for his client by every means available, even though such means might be distasteful to us personally and expose us and our profession to the criticism that we are simply "hired guns" who care about nothing other than winning and reaping large fees?

I think that most lawyers, certainly lawyers in Kansas and Missouri, would answer this with a resounding "no." Instead, I believe that most lawyers would endorse the notion implicit in the Rules that lawyers should not violate their personal moral codes in their practice; nor should they engage in tactics such as those Lincoln condemned.

There can be no question that the practice of law is a business and that lawyers need to earn a living from their professional work. Certainly, Lincoln understood this; he was one of the highest paid lawyers of his time. But the law is more than a business; *it is also a profession*. And public respect and trust is an essential component of success in any profession. When I teach law students, I try to instill in them pride in the legal profession. I tell them that they should seek to earn a good living, but to do it ethically, legally, and in accordance with their own core beliefs.

The Enrich book does raise (again) an important and long-standing question: are the Rules of Professional Conduct in need of revision to deal with the kinds of behaviors detailed in Enrich's book? Has the role of lawyer as an "enabler" of clients' dubious behavior gone too far in some cases? Has the profession become too much of a business and lost its sense of being more than a means to maximize personal wealth? These are questions that have arisen before, and they have broad impact.

An example of the broad impact of how far the law has become a business like investment banking, where wealth maximization is the principal goal, partially underlies the current debate whether non-lawyers should be able to invest in or own law firms. Today such non-lawyer ownership is not permitted in most U.S. jurisdictions.[5] However, there has been a strong push to change this rule.

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5 See, R. Minkoff, "Looking for Trouble and Finding It: The ABA Resolution To Condemn Non-Lawyer Ownership," Professional Responsibility Law Blog (August 16, 2022), https://professionalresponsibility.fkks.com/post/102huz1/looking-for-trouble-and-finding-it-the-aba-resolution-to-condemn-non-lawyer-own.

Clearly, one reason for wanting such change is the desire to increase law firm financial resources and partner profits. However, by allowing non-lawyer ownership interests in law firms, lawyers will come under increasing pressure to maximize profits and, in order to do so, push the line ethically. Such a loss of professional independence worries many in the profession. In August 2022, the ABA House of Delegates expressed its strong concern with states that might be considering changing their rules to permit such investment.[6]

In spite of the sensational nature of Enrich's new book, it is a worthwhile read for every lawyer concerned with the future of the legal profession. It has been much on my mind this week as I taught a group of first year law students. In the first weeks of the semester, I deliberately spend time talking to my students about the long, proud history of the law and lawyers and of the importance of law and lawyers to maintaining the republic of which we are all blessed to be a part. I reassure them that, with a bit of luck and hard work, they will have successful careers as lawyers and that it will provide them and their families with economic security. But I also tell them that the law as a profession will give them something just as important: the conviction at the end of the day that they are engaged in something worthwhile and greater than themselves. I should hate to think that someday it will be impossible to say such things to my students.

OLD AUTHORITY

Excerpt from Abraham Lincoln's "Notes for a Law Lecture"

Abraham Lincoln is one of the most iconic figures in the history of American law. He was a successful lawyer and politician, one of the greatest Presidents

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6 This would be a change to Rule 5.4, which prohibits lawyers from sharing fees with non-lawyers; but, see, J. Henry & B. Love, "Change Is Coming: Despite ABA Vote, Law Firms Will Face More Rivals Outside the Legal Industry," in LawBlog.com (August 10, 2022), https://www.law.com/americanlawyer/2022/08/10/change-is-coming-despite-aba-vote-law-firms-will-face-more-rivals-outside-the-legal-industry/?slreturn=20220821174231.

our republic has had, and idolized for his simple country wisdom and high ideals. After his death, his secretaries found this fragment among his papers. It is dated July 1, 1850, though it may be from a later date. Regardless of its date, intended use, or incompleteness, it is a gift from a great lawyer to every lawyer fortunate enough to read it. Hence, we reprint it here this month.

Notes for a Law Lecture[7]

> I am not an accomplished lawyer. I find quite as much material for a lecture in those points wherein I have failed, as in those wherein I have been moderately successful. The leading rule for the lawyer, as for the man of every other calling, is diligence. Leave nothing for tomorrow which can be done to-day. Never let your correspondence fall behind. Whatever piece of business you have in hand, before stopping, do all the labor pertaining to it which can then be done. 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. Extemporaneous speaking should be practised and cultivated. It is the lawyer's avenue to the public. However able and faithful he may be in other respects, people are slow to bring him business if he cannot make a speech. And yet there is not a more fatal error to young lawyers than relying too much on speech-making. If any one, upon his rare powers of speaking, shall claim an exemption from the drudgery of the law, his case is a failure in advance.
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> Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser — in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.
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> Never stir up litigation. A worse man can scarcely be found than

7 Available at: https://www.abrahamlincolnonline.org/lincoln/speeches/lawlect.htm.

one who does this. Who can be more nearly a fiend than he who habitually overhauls the register of deeds in search of defects in titles, whereon to stir up strife, and put money in his pocket? A moral tone ought to be infused into the profession which should drive such men out of it.

The matter of fees is important, far beyond the mere question of bread and butter involved. Properly attended to, fuller justice is done to both lawyer and client. An exorbitant fee should never be claimed. As a general rule never take your whole fee in advance, nor any more 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, as if something was still in prospect for you, as well as for your client. And when you lack interest in the case the job will very likely lack skill and diligence in the performance. Settle the amount of fee and take a note in advance. Then you will feel that you are working for something, and you are sure to do your work faithfully and well. Never sell a fee note — at least not before the consideration service is performed. It leads to negligence and dishonesty — negligence by losing interest in the case, and dishonesty in refusing to refund when you have allowed the consideration to fail.

There is a vague popular belief that lawyers are necessarily dishonest. I say vague, because when we consider to what extent confidence and honors are reposed in and conferred upon lawyers by the people, it appears improbable that their impression of dishonesty is very distinct and vivid. Yet the impression is common, almost universal. Let no young man choosing the law for a calling for a moment yield to the popular belief — resolve to be honest at all events; and if in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation, rather than one in the choosing of which you do, in advance, consent to be a knave.

ETHICS & MALPRACTICE RESEARCH TIP

Current Articles from *St. Mary's Journal on Legal Malpractice & Ethics*

1. John Browning, "Judged by the (Digital) Company You Keep Maintaining Judicial Ethics in an Age of Likes, Shares, and Follows," 12 St. Mary's J. on Legal Malpractice & Ethics 222 (2022), available at: https://commons.stmarytx.edu/lmej/vol12/iss2/1.

   This is a fascinating and important article by a respected former judge and now law professor. Judge Browning's analysis is of the ethical implications of social media use is important for every sitting judge.

2. Warren R. Trazenfeld & Robert M. Jarvis, "Daubert/Kumho Tire and the Legal Malpractice Expert Witness," 12 St. Mary's J. on Legal Malpractice & Ethics 372 (2022), available at: https://commons.stmarytx.edu/lmej/vol12/iss2/5.

   When the Daubert and Kumho cases were first decided, they revolutionized the use of expert witnesses in a wide variety of malpractice cases—involving scientific or engineering issues. The new standards imposed by Daubert and Kumho have been less influential in legal malpractice cases. This article explores the use of the Daubert/Kumho standards for qualification of legal malpractice cases. Every lawyer involved in legal malpractice litigation should read this timely article.

A BLAST FROM THE PAST

Excerpt from B. Fenner, *Raising the Veil; or Scenes in the Court*[8]

> After accompanying the old gentleman home, and getting comfortably seated in his cosy sitting-room, the conversation commenced on the subject of "Attornies" and "Counsellors at Law."
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> "It appears," quoth the old gentleman, "that you do not have a very exalted opinion of your city lawyer."
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> I replied, "Boston can boast of more distinguished legal gentlemen than any other city in the Union. We have quite a number of attornies that are ornaments to the profession. These are men who deal fairly and justly with their clients, who will not commence a suit in any case, unless they believe that they have a reasonable prospect of success, except where the client is some wealthy numskull, who wants to spend some four or five hundred dollars to gratify a feeling of malice, or for some other similar cause. It is of the miserable charlatans and imposters, who live by sucking the life blood from the poor and unfortunate, I complain. With many of our most enlightened citizens, it is paradoxical how so many of these pests manage to get admitted to the bar, and thus be allowed to practise in all the courts of Massachusetts. But this query is easily answered.

Fenner's work, originally published in 1865, demonstrates that the debate about a lawyer's proper role has been going on for centuries.

8 *Ball Fenner, Raising the Veil; or Scenes in the Court, p. 43.*

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