Federal Bar Council News

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A Chat With:

E. Robert (Bob) Wallach

By Kevin J. O'Brien

Prominent San Francisco litigator E. Robert (Bob) Wallach was tried in 1989 and again in 1993 in the Southern District of New York on criminal charges arising out of the Wedtech scandal. Wedtech, a now-defunct manufacturing company, allegedly had hired Mr. Wallach to lobby Edwin Meese III, Mr. Wallach's friend and at the time an adviser to President Reagan, for federal contracts. Mr. Wallach was prosecuted on fraud, conspiracy, and RICO charges in connection with two letters he sent to Wedtech, relating to $425,000 in legal fees, that allegedly misdescribed the true nature of Mr. Wallach's services on

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Legal Ethics

Moral Ambiguity/Ambiguous Morals: Morgan Stanley And The $10,000 Payment

By Bruce A. Green

Lawyers learn vicariously as well as through personal experience. That, of course, is the theory of the Socratic Method: the professor asks a series of questions that engage one law student in a process of reasoning and analysis, while the rest of the students in the class participate vicariously. In the words of the late Harvard law professor Phillip E. Areeda, the others "silently pretend that they must answer the question."

No doubt, legal ethics is a subject that most lawyers would prefer to learn vicariously. That is one reason legal periodicals pay such close attention to lawyers who get into trouble, whether with courts, disciplinary agencies, or criminal authorities. The stories of other lawyers' ethical dilemmas serve as moral tales. We hope to learn from them, thereby avoiding other lawyers' mistakes.

The problem with these tales, however, is that they are often incomplete. When lawyers become the subject of embarrassing news stories dealing with their questionable professional conduct, precisely what the lawyers did and why they did it may never become fully apparent. The result is that, at times, the moral of the story is itself ambiguous.

An illustration is the tale about lawyers of the brokerage firm Morgan Stanley Dean Witter. Their professional

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Lawyers' Risks Post-Central Bank

By C. Evan Stewart

Even pre-dating Shakespeare, lawyers have not always been a popular group. More recently, in the wake of federal regulators' attempts to address the fallout of the savings and loan debacle(s), lawyers and law firms have often been the liability and monetary scapegoats; Judge Sporkin's rhetorical cry, "Where were the lawyers?" still resounds to many.

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travails made news several months ago. But because the story of these lawyers' morally ambiguous conduct was incomplete, the moral of the story was ambiguous.

The Lawyers' Tale

The story began around April 1998 when Morgan Stanley fired an analyst named Christian Curry shortly after nude photographs of him appeared in a pornographic magazine. The firm's explanation was that Curry had filed false expense reports. Curry, however, claimed that he was dismissed because he was black and because the firm wrongly believed him to be gay.

What happened after that is contested. According to press accounts, some months later, Morgan Stanley was approached by an individual, C. Joseph Luethke, who had been acquainted with Curry from college. Luethke claimed that Curry was plotting to plant racist e-mail in the firm's computers to bolster his civil lawsuit. Luethke was willing to assist Morgan Stanley.

In July 1998, Morgan Stanley brought its evidence to the Manhattan District Attorney's Office, which commenced an undercover investigation of Curry. Luethke arranged a meeting between Curry and an undercover police officer who was posing as a computer hacker. During the meeting, Curry offered the undercover officer $200 to break into Morgan Stanley's computers and plant racist and sexually charged e-mail. Curry was arrested and charged with forgery, conspiracy, attempted trespass of a computer, and attempted forgery.

It was then that Morgan Stanley's lawyers engaged in the questionable conduct at the heart of this tale. Following Curry's arrest, and without telling the District Attorney's Office, they authorized a $10,000 payment for Luethke's benefit. Although one of Morgan Stanley's lawyers first spoke with a partner of Davis Polk & Wardwell, the brokerage firm's outside counsel, who advised (with possible caveats) that it would be lawful for Morgan Stanley to pay Luethke a gratuity, the lawyers never checked with the prosecutors to see whether they had any objections. Nor did the lawyers tell the prosecutors about the payment after it was made. Thus, the prosecutors were unaware that Morgan Stanley's witness, who had now become the prosecution's witness, was being compensated for his assistance.

Time passed. In May 1999, the District Attorney's Office finally learned about the payment from Luethke after he was arrested on an unrelated charge. That's when Curry's fortunes rose and Morgan Stanley's fell. In criminal court, an assistant district attorney announced that his office was dropping all the charges against Curry because Morgan Stanley had withheld information about the payment to Luethke. At the same time, the prosecutors announced that they had begun an investigation of Morgan Stanley itself.

The fortunes of several Morgan Stanley lawyers also took a turn for the worse. The firm suspended three of its senior lawyers who apparently had played a role in authorizing the payment to Luethke or in failing to tell the prosecutors about it. The firm retained a different outside counsel to commence an internal investigation. Meanwhile, Curry filed a civil lawsuit against Morgan Stanley and its officers, claiming that he had been wrongly terminated and falsely arrested.

In June, Morgan Stanley's outside counsel reported that there was no satisfactory explanation for why Luethke had been paid without the prosecutors' knowledge. Morgan Stanley's leaders called the payment "a mistake in judgment." But it was a costly mistake. One of the three senior lawyers stepped down from her job, while another resigned; outside counsel, Davis Polk & Wardwell, suffered embarrassment in the press; and Morgan Stanley lost its prosecutorial allies and had to defend itself against a criminal investigation. Compounding the prosecutors' suspicions was the fact that the payment to Luethke was not clearly and directly accounted for on Morgan Stanley's books, and the fact that the firm was not fully and immediately cooperative when prosecutors first learned about the payments from Luethke and then inquired of the firm.

In mid-July, the District Attorney's office announced that it, too, had concluded that Morgan Stanley's failure to disclose the $10,000 payment resulted from poor judgment and inexperience, not criminal misconduct, and that charges would not be brought against the firm. The District Attorney's investigation of Luethke, the informant, was still ongoing, however. So was Curry's civil lawsuit against Morgan Stanley.

Moral Ambiguity

Does the story show professional misconduct or simply an error in judgment and, if so, by whom?

The press accounts tended to lay the blame at the feet of Morgan Stanley. There were even suggestions that the firm may have engaged in criminal wrongdoing. That, of course, was the implication of the prosecutors' decision to open an investigation of Morgan Stanley. There was nothing in the press accounts, however, to suggest that the firm had bribed Luethke to influence his testimony or had deliberately withheld

information from the prosecutors with an intent to defraud them or somehow to obstruct justice, and the prosecutors' initial suspicions were eventually allayed.

Blame also was placed at the feet of the firm's lawyers, particularly, although not exclusively, its in-house lawyers. Yet it is unclear whether they acted improperly. For example, did they cross the line between permissible and impermissible witness payments? The answer is uncertain not only because the news stories are incomplete, but also because the ethical lines are themselves so uncertain. As a general rule, lawyers may not arrange to pay witnesses for their testimony, but lawyers may arrange payments for information or pay investigators to gather additional evidence. Was the payment to Luethke an unethical payment for testimony or a permissible payment for Luethke's "information" or "investigative services"?

Likewise, although in hindsight it was certainly a mistake for the lawyers not to tell the prosecutors about the payment, it is uncertain that this was anything worse. Here, too, the story is incomplete and the ethical lines are unclear. Lawyers generally may not lie, but there is nothing to suggest that anyone affirmatively lied to the prosecutors. More likely, this was simply a case of nondisclosure. Was there a duty to disclose? Here, it's unlikely there would have been unless it can be said that the lawyers' failure to disclose the payments would comprise "conduct involving dishonesty, fraud, deceit, or misrepresentation." The line between permissible silence and deceitful withholdings is an ambiguous one, however.

The Prosecutors

In covering this morality tale, the press entirely overlooked the ambiguous moral conduct of the prosecutors. It was they, after all, who authorized the arrest of a man whom they decided, many months later, did not deserve to be prosecuted. In the meantime, Curry was put to the considerable anxiety and expense that comes from facing felony charges, a personal ordeal to which few would voluntarily submit.

Whether and to what extent the prosecutors are to blame is unclear, not only because of the absence of a complete public narrative of what happened, but also because of the prosecutors' failure to give a complete public explanation for why, after having arrested Curry, they dismissed the charges against him. Their silence permitted an inference that Morgan Stanley, not the District Attorney's Office, was principally to blame: that the arrest and prosecution were warranted based on the information that was initially before the prosecutors, but that the prosecutors' later discovery of the undisclosed witness payment required them to dismiss an otherwise appropriate prosecution. It is unclear, though, why this would have been so.

To begin with, the prosecutors could not have been troubled by the mere fact that Luethke had been compensated. Prosecutors and the police routinely compensate their witnesses. Besides making cash payments to "informants," prosecutors often give "cooperators" something even more valuable: leniency or complete forbearance from criminal prosecution for past crimes.

Nor could the prosecutors have been concerned simply because Morgan Stanley may have engaged in sneaky, or even unlawful, conduct. Prosecutors often proceed with their cases after learning that wrongdoing occurred in the course of the investigation (e.g., Fourth Amendment violations by the police). Indeed, prosecutors do not hesitate to make use of illegally obtained evidence where the defendant lacks "standing" to suppress the evidence or there is an applicable exception to the exclusionary rule.

Nor is it clear that the undisclosed payment would have made it significantly harder to prove the case against Curry. Luethke's testimony would have been admissible even if the payment to him was improper. Although the prosecutors may have judged him to be a less credible witness because of his demonstrable financial motive, prosecutions are routinely brought based on the testimony of witnesses with all kinds of motives, biases, and prejudices that defense counsel can explore on cross-examination. Further, the prosecution did not entirely depend on Luethke's credibility as a witness. The most important prosecution witness was, in all likelihood, the undercover officer whom Curry asked to plant the phony e-mail.

There were two better reasons for dismissing the charges, but these suggest that the prosecutors may have made errors of judgment, if not abused their discretion, in prosecuting Curry in the first place.

One possibility, suggested by Curry's lawyer, was that Curry may have been entrapped. Of course, the fact that Luethke was paid does not in itself establish an entrapment defense. Paid informants and salaried police officers frequently gather evidence by inducing the target of the investigation to commit a crime. An entrapment defense, which ordinarily requires proof that the defendant had no predisposition to commit the crime, is rarely successful. In Curry's case, however, Luethke may have "set Curry up" at the very outset in the hope of obtaining a reward.

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If this was the prosecutors' concern, though, then shouldn't they have made efforts at the outset of the investigation — and certainly before authorizing Curry's arrest — to discover whether Luethke had a financial motivation to manufacture a crime? Morgan Stanley's lawyers may not have recognized the importance of this fact, but certainly any capable prosecutor would have. This is precisely the sort of information that prosecutors are constitutionally obligated to disclose to the defense. Had the prosecutors asked about Luethke's expectations of a reward or about his dealings with Morgan Stanley, can it be doubted that they would have received truthful answers, if not from Luethke, then certainly from Morgan Stanley's lawyers?

The second possibly good reason for dropping the charges was that, whether or not Curry's conduct was criminal, this was not a worthy case on which the District Attorney's Office should expend limited resources. In the beginning, it may have looked like a case in which Curry, the defendant, had acted improperly to gain an advantage in a civil disagreement with Morgan Stanley. But, with the discovery of the undisclosed payment, it began to look like a case in which Morgan Stanley, the supposed victim, had acted just as badly for its own civil advantage. Although prosecutors don't necessarily make charging decisions based on the moral worthiness of the victims, it would have been easy here for the prosecutors to feel "used" and to decide, "a plague on both their houses."

But, if this was the prosecutors' conclusion, why did it arrive so late? Could they possibly have believed in the beginning that Morgan Stanley was acting out of eleemosynary motivations? Or because the firm needed the prosecution's protection? Morgan Stanley brought them the case precisely because a criminal conviction would set back Curry's efforts to bring a civil lawsuit. If the prosecutors felt "used" at the end, then why not at the start?

Ambiguous Morals

In the legal press, this was called a "cautionary tale." Reading press accounts, other lawyers may have sought to gain some wisdom from the woes of Morgan Stanley's lawyers. But what lessons could they draw? Because the tale was incompletely told, the obvious teachings are probably not the most important ones.

Some observers suggested, for example, that private lawyers ought to deal cautiously with witnesses who offer to provide information and, especially, those who seek financial reward. The same advice might be offered, of course, to prosecutors. These are not weighty moral lessons, however.

Another kernel of wisdom, perhaps offered self-servingly by lawyer-commentators, was that in-house corporate lawyers should hire outside counsel to conduct investigations. Along the same lines, though perhaps no less self-servingly, it might be suggested that all lawyers who have questions about the propriety of their professional conduct should seek assistance from an objective lawyer with expertise in the area of legal ethics, e.g., an in-house ethics advisor, a member of the ethics committee of a state or local bar association, or a practitioner or academic who concentrates in this area, rather than relying on their own intuitions or on another lawyer's off-the-cuff advice.

In all likelihood, though, a more complete account would have yielded a more interesting and more important lesson.

Consider some of the unanswered questions about Morgan Stanley's lawyers: How did it happen that experienced and capable in-house lawyers and outside counsel allowed their corporate client to engage in conduct that, in hindsight, seems so clearly to have been ill-advised, regardless of whether it was lawful or ethical? Did a lawyer engage in a deliberate, albeit erroneous, weighing of the benefits and risks before authorizing the witness payment? Or, did outside counsel too narrowly confine his role to advising about the lawfulness of the proposed conduct, without regard to its wisdom; and did Morgan Stanley's in-house lawyers just acquiesce in a decision made by non-lawyers at Morgan Stanley or otherwise fail to consider reasons this conduct might be imprudent? Did a lawyer make an affirmative decision to keep the prosecutors in the dark? Or was this simply a matter of inaction by a number of lawyers, none of whom saw it as their responsibility to decide or act? Was outside counsel under pressure from the in-house lawyers; were the in-house lawyers under pressure from nonlawyers; or were they all simply too busy to identify relevant concerns and evaluate them carefully?

Unanswered Questions

Now, consider some of the unanswered questions about the lawyers in the Manhattan District Attorney's Office: How did it happen that experienced and capable prosecutors brought criminal charges against someone who presumably would not have been charged if one additional, easily ascertainable fact had been known? Why didn't prosecutors learn

before authorizing the arrest that its witness expected to be rewarded? Why did months go by before they learned of the payment? What more could have been done and why wasn't it done? Should the prosecutors who made the decisions have been better trained? Should they have been better supervised? Did they rely too heavily on the police or on Morgan Stanley, or were they simply too busy? Was it fair for prosecutors to make Morgan Stanley the "fall guy" for their dismissal of Curry's prosecution (if that's what they did), or should they have acknowledged that they should never have authorized Curry's arrest in the first place and that the mistake in doing so was primarily their own?

Answers to these questions would yield some understanding of how mistakes are made by lawyers within a law office or prosecutor's office. In turn, some lessons might be derived about how to structure decision making to reduce the risk of mistaken judgments and ethical lapses. These are the moral lessons from which all lawyers would benefit and which all should have an opportunity to learn . . .vicariously.

The Legal Profession

Unauthorized Practice

By Nancy Savitt

Suppose a lawyer in the Second Circuit represents the east coast office of a corporation headquartered in California. Suppose, too, that that office is involved in an American Arbitration Association arbitration in California, with a California adversary. Suppose the lawyer counsels the client, negotiates with the adversary (either in person or via fax and phone to California), and eventually resolves the issue before arbitration hearings commence. Shouldn't the lawyer expect congratulations and kudos? Think again. The lawyer may have just committed the unauthorized practice of law in California. And if so, the client may not have to pay the lawyer under the retainer agreement, at least for some of the lawyer's work.

In this multi-jurisdictional world, lawyers do not even think twice about taking on a matter involving out-of-state parties. Maybe lawyers know not to go into court without local counsel, but in non-court proceedings, lawyers will phone, send faxes, and e-mail, and fly to other jurisdictions to hammer out agreements. This could be hazardous. Indeed, even in court with local counsel, some jurisdictions may still hold that their unauthorized practice of law statutes have been violated.

State Statutes

Each state has its own statute, and few if any lawyers know what they say. But when lawyers handle a matter occurring in another state, they would do well to do some research before investing too much time and expense. These issues are popping up in the brave new world of websites (such as the onset of rules and ethics decisions concerning when lawyers can offer to perform legal services — such as filing copyright applications — though their firm's website), but they can also hit hard in the everyday world of multi-state transactions and disputes. One New

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York law firm found this out the hard way.

Last year, in *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, the California Supreme Court held that "an out-of-state law firm, not licensed to practice law in [California], violated [Business and Professional Code] section 6125 when it performed legal services in California for a California-based client under a fee agreement stipulating that California law would govern all matters in the representation." Although this holding was very specific, the court's decision could have wider-ranging implications.

Fee Agreement

The facts of this case were as follows: ESQ, the California client, retained Birbrower in New York, and signed the fee agreement there. Birbrower was retained to investigate and prosecute ESQ's claims against a company called Tandem, arising from a software development and marketing agreement between the parties, which agreement was governed by California law. Birbrower's attorneys went to California to meet and strategize with the client and its accountants, and to have discussions with Tandem in an effort to resolve the dispute. Birbrower discussed settlement options with its client, and made recommendations. Birbrower's attorneys also had filed an arbitration demand with the San Francisco office of the AAA, and they interviewed potential arbitrators during one trip to California. The dispute was settled prior to arbitration. After the settlement of the dispute between the client and the adversary, the client sued the firm for malpractice. The law firm counterclaimed for fees due under a fee agreement.

The California Supreme Court ruled that the New York firm's fee agreement was void, and the firm had committed the unauthorized practice of law in California under California law. One key question was the meaning of the phrase "in California." The court made clear that it was not merely discussing physical presence in the state:

[O]ne may practice law in the state in violation of section 6125 although not physically present here by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means . . . [although] we do reject the notion that a person automatically practices law "in California" whenever that person practices California law anywhere, or "virtually" enters the state by telephone, fax, e-mail or satellite.

The court stated that the resolution of this dichotomy depended on the specific facts of each case. "The primary inquiry," the court stated, "is whether the unlicensed lawyer engaged in sufficient activities in the state, or created a continuing relationship with the California client that included legal duties and obligations."

Arguments Rejected

Rejecting arguments made by the New York attorneys, the court held that section 6125 is not limited to courtroom appearances, and its prohibition cannot be avoided by making full disclosure to the client of lack of a California license. The court also noted that section 6125 can be violated even if the out-of-state attorneys associate local California counsel.

On the only bright note for the law firm, the court permitted the law firm to be paid under its fee agreement for legal services performed in New York, its home state, and did not rule on the firm's quantum meruit claim.

Several months later, California's intermediate appellate court decided an unauthorized practice of law case, analyzing it in light of the *Birbrower* decision. In that case, *Estate of Condon*, the court ruled that an out-of-state attorney could collect fees for representing a co-executor of a California estate.

The Condon Case

The deceased, Evelyn Condon had retained the Elrod firm, Colorado attorneys, to prepare her will. When Condon died, she lived in California, where her daughter Caroline lived. Two of Condon's children — Caroline and her son Michael, who lived in Colorado — were named co-executors. Michael hired the Elrod firm to represent him in the probate proceedings. The Elrod firm did most of its work in Colorado, communicating by mail, telephone, and fax with Caroline's California counsel. Their attorneys were not admitted to the California bar, and had not applied for *pro hac vice* admission. Michael also had hired a California law firm to file papers and make appearances in the probate proceedings.

The court noted that the Elrod firm had billed for 10 hours worth of work it performed while physically in California. It also noted that the remaining 300 plus hours of work involved, among other matters, resolution of litigation and related disputes, including settlement negotiations and preparation of settlement documents. There was no dispute between the parties that the Elrod firm had "practiced law" and had done so in the State of California, whether physically or "virtually." But

had it violated section 6125? The court said no.

The court of appeal distinguished *Birbrower* on at least two grounds. The most important was its conclusion that (except for appearances in California courts), section 6125 only applies when the law firm's client is a "California client." The court defined a California client as "one that either resides in or has its principal place of business in California," noting that "the State of California has no interest in disciplining an out-of-state attorney practicing law on behalf of a client residing in the lawyer's home state."

The court also noted that the Elrod firm had not had to practice "California law" — those laws unique to California is enacted by the legislature or articulated by California's courts. This was further evidenced by the lack of a California choice of law clause in the agreements drafted by the Elrod firm. (Additionally, there also were probate statutes and case law on point that permitted out-of-state executors to retain independent counsel of their choice, who were entitled to compensation.)

Hawaii's Decision

One other state has reached a similar conclusion — that its unauthorized practice of law statute only will come into play (in a non-court context) when the client is a resident of the state. In *Fought & Co. v. Steel Engineering & Erection, Inc.*, the Supreme Court of Hawaii permitted a party to recover counsel fees for work performed by its Oregon general counsel.

In *Fought*, a complex litigation was only resolved by appeal, and the issue was whether the losing party had to pay counsel fees. The parties to the dispute were from several different jurisdictions. Fought had its headquarters in Oregon, where its general counsel, Kobin, also was located and admitted to practice. For the litigation, Fought retained local Hawaii counsel. The Kobin firm never appeared in court in Hawaii on Fought's behalf. The Hawaii court rejected the argument that this fact was sufficient to bar the application of Hawaii's unauthorized practice of law statute. The Hawaii court looked to the *Birbrower* decision and adopted a similar broad definition of the "practice of law." The Oregon firm had indeed practiced law, the court found, because it had reviewed and analyzed the opposing parties' appellate briefs, done legal research, and otherwise advised the client and consulted with local Hawaiian counsel.

Within The Jurisdiction

However, the court found that the Oregon firm had not practiced law "within the jurisdiction" of Hawaii. Without discussing the full extent of that phrase (although the court quoted with approval the *Birbrower* discussion of that issue), the court noted the following facts that informed its conclusion:

Fought and Kobin [the general counsel] are both located in Oregon. Hence, Kobin did not represent a "Hawaii client." Furthermore, all of the services rendered by Kobin were performed in Oregon, where the firm's attorneys are licensed. Kobin did not draft or sign any of the papers filed during the appeal, did not appear in court, and did not communicate with counsel for other parties on Fought's behalf. Finally, Kobin's role was strictly one of consultant to Fought and Fought's Hawaii counsel . . . [which was] at all times "in charge" of Fought's representation within the jurisdiction so as to insure that Hawaii law was correctly interpreted and applied.

It of course remains to be seen how the courts of other states will interpret their own unauthorized practice of law statutes. For now, lawyers need to be aware of these issues, make sure they know where their corporate clients are headquartered if they are handling out-of-state matters for them, and proceed with caution lest they find that they have been practicing law "in" some other jurisdiction.

Advice Of Counsel

The Kansas City Case

By Brian Cogan

Rule 1.2(d) of the Model Rules of Professional Conduct provides that a lawyer "shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent." A narrow reading of this rule would subject a lawyer to discipline only in circumstances where he or she has taken an active role in assisting a client's known criminal or fraudulent purpose. The courts, however, as well as the ABA Committee on Ethics and Professional Responsibility, have interpreted this rule much more broadly. Under their interpretation, attorneys have been deemed to have violated the rule by failing to inquire into their client's purpose where there is a reasonable suspicion that their advice will be used to commit a crime or perpetrate a fraud.

Until recently, lawyers could safely assume that if they complied with both the plain meaning and the historical interpretation of the Model Rules, they

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would be shielded from criminal prosecution. A recent case, however, raises the distinct possibility that lawyers may no longer enjoy this safe harbor and may need to be additionally circumspect in providing legal advice to their clients.

In *United States v. Anderson*, two prominent Kansas City health care attorneys were indicted for facilitating their client's violation of anti-fraud and abuse provisions of the federal Medicare and Medicaid laws. The charges stemmed from a tripartite suspect financial arrangement among several area hospitals, a medical group, and two physicians who owned the medical group. Pursuant to the arrangement, each participant received financial payments or referrals in exchange for utilizing the other's services, which services were sometimes never even provided, and which violated the law. Although the attorneys were not actually parties to the arrangements, they drafted various agreements that effectuated the arrangement, and were charged, along with their clients, with facilitating the fraudulent transactions.

Inconclusive Facts

The facts presented by the prosecution were inconclusive as to whether or not the attorneys had knowledge of their clients' illegal conduct. For example, a letter written by one of the attorney defendants to her client stated: "It is absolutely essential that we adopt . . . referral neutral language in describing the proposal. . . . [I]t is absolutely essential that there be no documentation of any intent to refer patients for services or items for which Medicare or Medicaid might pay." The government argued that this was an attempt to conceal illegal referrals. The defense argued that this indicated her intention to instruct her clients to comply with the law.

Ultimately, the attorneys were acquitted because the prosecution could not prove beyond a reasonable doubt that the attorneys had actual knowledge of the ongoing fraud, which was required for a conviction under the law. In fact, the district court judge who presided over the case said he was convinced that the evidence showed nothing more than the attorneys' attempt to advise their clients on how to comply with the law. Nevertheless, *Anderson* shows that an attorney's conduct is no more immune from prosecutorial discretion than that of his or her client.

Some Comfort

Although the verdict provides some measure of comfort to attorneys, it also raises many troubling concerns. Will an attorney who believes he or she has complied with the ethical rules no longer be assured of freedom from prosecution? Will attorneys now be forced to police their clients rather than simply providing advice and counsel to them? How far must an attorney go to make sure there is no "reasonable suspicion" of assisting his or her client in criminal conduct? And how does the attorney reconcile that obligation with his or her obligation to zealously represent a client?

A lawyer can take precautions to reduce the risk of exposure to prosecution for facilitating the commission of a fraud or a crime when providing a client with legal advice. Obviously, a lawyer cannot give a client advice on how to commit a crime or fraud or how to conceal criminal or fraudulent acts. It is critical, however, that lawyers also recognize that they cannot avoid prosecution by looking the other way when a reasonable person — or a zealous prosecutor — might conclude that a client is using their advice to engage in criminal or fraudulent conduct. On the other hand, while looking at every client transaction from a prosecutorial perspective is the lawyer's best self-protection, it is hardly going to help promote the attorney's relationship with the client.

The ABA Commission on Ethics and Professional Responsibility addressed the issue in an Informal Opinion in 1981. The opinion discusses a hypothetical in which a client approaches a lawyer seeking "advice as to a lawful means of bringing . . . funds to the United States in a manner [that would] minimize his United States tax liability." The hypothetical further poses that the lawyer has reason to suspect that the funds are in fact "unlawful bribes or kickbacks." The opinion concludes that in such a situation, the lawyer has a duty to inquire further into the client's questionable purpose, notwithstanding the client's assertion of an ostensibly lawful objective.

Duty Of Inquiry

The lawyer's duty of inquiry, moreover, applies not only in the provision of advice to the client, but also in the general dealings with that client. In a 1972 decision by the Colorado Supreme Court, *People v. Zelinger*, a lawyer received a stolen vehicle as a fee from his client. Somewhat suspicious, the lawyer inquired of the client whether the vehicle was in fact stolen, and the client flatly denied that this was the case. Satisfied with this answer, the lawyer did not inquire further and accepted the car as payment — and became subject to disciplinary proceedings. The Grievance Committee of the Supreme Court of Colorado found that in light of the lawyer's suspicions, the lawyer "should have made

further inquiry as to the actual source of the vehicle" and that his "failure to do so . . . constituted a [violation of his] obligations as a member of the Bar."

Crucial Lesson

Anderson teaches that transactional lawyers need to have a full understanding of their client's contemplated deal before they document it. This is particularly crucial where there are warning flags, such as when the lawyer's relationship with the client is relatively new; the client is doing business in a heavily regulated industry; the client pays a retainer with funds out of a corporate or non-personal account; or the client has been a defendant in civil or criminal proceedings. Knowing as much as possible about the client's business will help to protect the lawyer from civil, disciplinary, or as *Anderson* shows, even criminal exposure.

Book Review

The Crime Of Sheila McGough

By Stephan Landsman

As Janet Malcolm tells it in her new book, *The Crime of Sheila McGough*, Sheila McGough was a middle-aged single woman living at home with her parents and working as an editor and administrator in the publications department of the Carnegie Institute when she decided to switch careers and go to law school. She applied and was admitted to the law school at George Mason University. After graduation, she began a solo practice in northern Virginia that involved a significant amount of appointed state court criminal defense work.

In 1986, approximately four years after her graduation from law school, McGough received a call requesting assistance from an incarcerated arrestee named Bob Bailes. From the very start, McGough's assistance to Bailes was unorthodox. Immediately upon meeting him at the Fairfax County, Virginia, lockup, she decided that his apparent poor health warranted her taking the unusual step of personally signing as guarantor for his bail. McGough thereafter began preparing to represent Bailes at his upcoming federal court trial on charges that he had provided false information to secure a bank loan and used a false social security number in that transaction.

While Bailes was awaiting trial, he conducted a number of business transactions out of McGough's office. These involved negotiations to sell certain allegedly still valid nineteenth-century insurance company charters that were claimed to excuse the holder from the constraints of state regulation or review. On June 18, 1986, two men named Manfredi and Boccagna agreed, through their attorney, Morris, to buy two of the charters for $900,000 each with a down payment of $75,000 for both. They were not really the principals in this deal but were "brokers" for an investment banker named MacDonald. The down payment was wired into Sheila McGough's attorney trust account. McGough immediately drew the funds out of that account, transferring $70,000 to Bailes and keeping $5,000 for herself.

Bank Fraud

In the late summer of 1986, Bailes, represented by McGough, went on trial in the bank fraud case. He was convicted and sentenced to five years in federal prison. The story, however, was far from over. McGough redoubled her efforts on Bailes's behalf. She sought his release from prison by a variety of means. These included what one federal district judge found to be a frivolous attack on the sentence imposed upon Bailes as well as the instigation of a bankruptcy proceeding. In the bankruptcy action, one set of corporations owned by Bailes sought bankruptcy protection while another set of his shell companies requested that the court release him from prison so he could facilitate the payment of their alleged claims. Although it would appear these claims were nothing more than a sham, Sheila McGough worked tirelessly to effectuate the scheme.

Bankruptcy Court Judge George Benson eventually consented to Bailes's release. This, however, could only be accomplished if a federal district court judge would agree to enter an order setting the defendant at liberty. The first judge McGough approached, Judge Charles Richey, agreed to the release on condition that the United States Attorney's office assent. The United States Attorney was then preparing a second, much more serious case against Bailes and apparently would have opposed freeing the prisoner. Rather than accept this decision or enter negotiations with the United States Attorney's office, McGough approached a second federal district court judge, Stanley Harris, concerning the matter. McGough did not inform Judge Harris of Judge Richey's prior ruling and Harris issued an order releasing Bailes into McGough's custody. Judge Harris rescinded this order as soon as he learned of the prior, undisclosed, Richey ruling. Judge Harris was so disturbed by McGough's behavior that he sought to

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have her disciplined by the District of Columbia Bar for her conduct.

In 1988, Bailes was tried in a North Carolina federal court for his efforts to sell insurance company charters. The government's case proved so strong and Bailes's defense so weak that in midstream he shifted to an insanity plea. That claim was rejected by the jury and, upon conviction, Bailes was sentenced to twenty-five years in prison. In the meantime, a number of those either injured or affronted by McGough's behavior during her efforts on Bailes's behalf began pursuing her personally.

McGough Sued

The first to proceed was the investment banker, MacDonald, who had lost $75,000 in the escrow deposit incident in June 1986. He brought suit against McGough in 1987 to recover his lost funds. Included as a defendant in this action was the insurer that had provided McGough with Errors and Omissions insurance. Shortly before trial, in the fall of 1988, the MacDonald suit was settled with the insurance company agreeing to pay MacDonald $75,000. One remarkable event in the civil action was the proffer of apparently forged documents by the defense immediately before the case was to go to trial. Who had forged the documents was never clear but the most likely candidate was Bailes. Later disclosures, however, suggested that Sheila McGough may have been involved, at least in so far as seeking to get the forgeries notarized long after their alleged execution date.

In October 1988, MacDonald took the next step in his campaign against McGough by seeking her disbarment in Virginia. Other bar-related complaints were then being processed including that made by Judge Harris. The United States Attorney's office in Alexandria, Virginia, responded to all this by initiating a grand jury inquiry into McGough's conduct. The grand jury proceedings resulted in McGough's being indicted on 15 felony charges.

McGough's criminal trial took place in 1990, and addressed charges related to the withdrawal of funds from her escrow account, her behavior in the bankruptcy proceedings, and a number of other matters. The federal prosecutor, Mark Hulkower, subpoenaed more than fifty witnesses for the case (although not all were called to testify). Among those who gave evidence against McGough were four judges including Judges Richey and Harris, who had been entangled in the bankruptcy scheme.

McGough Prosecuted

At the heart of the case against McGough was the withdrawal of the $75,000 MacDonald deposit from her trust account. The "brokers" Manfredi and Boccagna, as well as their attorney, Morris, all testified that this withdrawal was in direct violation of their understanding with McGough that the funds would be held in escrow until the two $900,000 deals were consummated. The credibility of these three witnesses was open to question since each was serving or had served time in prison and two (Manfredi and Morris) were disbarred attorneys. Moreover, as Malcolm notes, but as McGough's defense counsel failed to observe, the key telephone conversation concerning the escrow arrangement lasted but one minute — a suspiciously short time to conduct all the business the government witnesses claimed was handled.

Prosecutor Hulkower's overarching theory was that Sheila McGough had joined with Bailes in a series of illegal scams designed to benefit both the attorney and her erstwhile client. In the government's case, however, the motive for McGough's choosing to forsake the role of honest attorney and join forces with her con man client was never made entirely clear. There was some evidence (albeit thin) of a romantic attraction as well as the more prosaic suggestion that the motive might have been greed.

Defense Strategy

The defense strategy was to attack the credibility of the prosecution's key witnesses and to argue that McGough had done no more than act as a zealous lawyer on behalf of her client, Bailes. This may not have been a particularly effective defense but counsel were impeded from any other choice by McGough's refusal to take the stand in her own defense or sanction any sustained attack on Bailes. Her justification for these choices was an assertion that she owned Bailes a continuing duty of loyalty and confidentiality.

The jury did not buy the defense's arguments and on November 21, 1990, the day before Thanksgiving, convicted McGough on 14 of the 15 felony charges. Malcolm says that she, after arduous investigation, came to agree with McGough's charges regarding her conviction. McGough set these out in a letter which stated:

I was a defense lawyer who irritated some federal judges and federal prosecutors in the course of defending a client. The federal prosecutors in my hometown [Alexandria, Virginia] investigated me for four years, and when they failed to turn up anything illegal in what I was doing, they made up some crimes for me and found people to support them

with false testimony. . . . I didn't commit any of the 14 felonies I was convicted of. The U.S. Government office in Alexandria "framed" me.

In the end, Malcolm concluded that McGough was an "exquisite heroine" and "a woman of almost preternatural honesty and decency," who through "the heedless selflessness that propelled her downfall has thrown into relief the radicalism of her vision of defense law as a calling for the incorrigibly loyal."

What of Malcolm's claim that McGough was guided in her actions by a selfless loyalty to her client, Bob Bailes? It is true that McGough seems, in Malcolm's telling of the story, extraordinarily, even self-sacrificingly, loyal. Yet much of what Malcolm scribes as noble loyalty may equally well be described as muddle-headedness or downright stupidity. McGough took every opportunity to help her client sell his plainly suspect insurance charters, manipulate the system to escape confinement, and achieve a number of other self-serving ends. She let him pursue his dubious business out of her office and use her trust account without constraint or review. She told misleading stories on his behalf and did whatever seemed necessary to get the bankruptcy scheme to work. At a minimum, her conduct was careless and irresponsible. Even Malcolm is forced to concede: "It seems unbelievable that someone who had a law degree could be so credulous and so careless." Indeed, it does seem unbelievable.

Flawed Judgment

None of the numerous attorneys Malcolm questioned thought McGough had acted sensibly. Kenneth Labowitz, her civil counsel, said McGough's "judgment appeared to be flawed. It is inexplicable to me what she was hoping to accomplish when she took some of the actions she took on behalf of Mr. Bailes." He concluded that the escrow transaction, in particular, was handled in a thoroughly unprofessional way. One of her criminal defense lawyers, Gary Kohlman, thought that McGough had performed services for her client "that started stretching the boundaries — or perhaps went beyond the boundaries." Her other criminal counsel, Mark Rochon, said: "What did she do? She simply followed the directions of that idiot [Bailes]. She lacked common sense. She was brand-new out of law school, with no supporting network of lawyers to temper her judgment." William Sheffield, an attorney whom Bailes had tried to manipulate in precisely the same way as McGough, barred Bailes from wiring funds into his trust account and confronted Bailes when he disregarded Sheffield's instructions.

Gullible McGough

Sheila McGough's failure to control Bailes and her advocacy on his behalf seems far more like gullible naivete than noble self-sacrifice. It harmed not only McGough, but a number of others who had dealings with Bailes. The record Malcolm advances fairly shouts this conclusion. Moreover, when anyone other than McGough is single-mindedly or dogmatically devoted to an objective, Malcolm is immediately suspicious. This was certainly the case with respect to Malcolm's assessment of the investment banker MacDonald. His long and unrelenting pursuit of McGough is presented as questionable and he is, throughout Malcolm's book, cast in an unflattering light. His passion for revenge or justice (depending on how one looks at it) seems far less objectionable and dangerous than McGough's zeal on Bailes's behalf.

Malcolm, perhaps inadvertently, provides a number of alternatives to noble zeal to explain McGough's actions. One of the most intriguing is that McGough undertook her efforts on Bailes's behalf out of a sense of guilt at having botched his defense in the Virginia bank fraud case. As McGough, herself, put it: "Where I blundered was to take on legal matters I wasn't prepared for," she said. "I should have just said no. It was an error of pride. I was flattered by Bobby's trust in me. But I didn't have the proper experience, and I didn't represent him adequately."

Emotional Pressures

Another possibility is that McGough, because of her naivete and inexperience, was conned again and again by the artful Bailes. All her counsel, both civil and criminal, appeared to subscribe to this notion and it is amply supported by the reports of lawyers who, through bitter experience, were acquainted with Bob Bailes's modus operandi. Alternatively, or in addition, it should be noted that McGough seemed to be experiencing severe mental distress during this period. Her civil counsel, Kenneth Labowitz, said of his client during the run up to the 1987 civil trial: "She was coming apart at the time of the civil case. I mean, emotionally. It was unpleasant to watch." There is good reason to suspect that her choices in relation to Bailes's affairs were the product of emotional pressures that deprived her of sound judgment.

Editor's note: Stephan Landsman is a professor of Tort Law and Social Policy at DePaul University College of Law. A longer version of this book review is to be published in the Michigan Law Review.

Case Study

Criminal Contempt

By Wendy Mirsky

Several months ago, criminal defense attorney Lynne F. Stewart pleaded guilty to second-degree criminal contempt, a misdemeanor, for refusing to testify before a grand jury about her clients' fee arrangements. Ms. Stewart had resisted a subpoena that was issued in 1989 by the New York City Special Narcotics Prosecutor's Office. She faced the possibility of four years in prison and conviction of a felony, which would have resulted in automatic disbarment. Her plea, entered during a hearing in New York Supreme Court, carries no jail time.

Ms. Stewart's plea came a full ten years after the subpoena that she has strenuously resisted was first issued.

Drug Investigation

In the late 1980s, the New York County District Attorney's Office and the Special Narcotics Prosecutor had been investigating a massive drug ring on the Lower East Side of Manhattan, eventually making some arrests in 1989. One of those arrested became an informant for the District Attorney's Office. The informant told prosecutors that the drug ring had people working both outside, on the street, as well as on the "inside." The informant added that the gang's arrangement with those working on the inside was as follows: If they were arrested, the drug ring posted their bail and paid for their attorney. Prosecutors corroborated some of the informant's information by reviewing prior arrest records of many of the alleged drug ring's members.

Shortly after the informant was arrested and while the informant awaited arraignment with the other defendants, an attorney appeared to represent her. When the informant indicated that she did not wish to use the designated attorney, she received a telegram in jail warning her that she should not refuse to use the attorney and telling her to attend a joint defense meeting.

Some time after the informant was released from jail and back on the street, she telephoned prosecutors to inform them that the suspected leader of the drug gang had just been arrested. Ms. Stewart arrived at the precinct claiming to represent the suspect.

Although the informant had told prosecutors that the arrested suspect was widely known to be the leader of the Lower East Side drug ring, prosecutors were unable to obtain independent corroboration of the informant's testimony and thus lacked the requisite proof to obtain an indictment from the grand jury.

Subpoena Issued

To secure independent corroboration that the suspect the police had in custody was in fact the leader of the massive drug ring, prosecutors subpoenaed Ms. Stewart to appear before a grand jury and testify about the fee arrangement that she had with the suspect in custody. Prosecutors also subpoenaed the attorney who had been designated to represent the informant.

Ms. Stewart and the informant's appointed attorney moved to quash the subpoena on the basis that the testimony prosecutors sought, relating to the payment of fees, was protected by the attorney-client privilege and would "chill" their relationship with their clients. The Appellate Division, First Department, disagreed, finding that the testimony relating to the fee arrangement could not be protected by the attorney-client privilege. The court ordered Ms. Stewart and the informant's appointed attorney to appear before the grand jury.

Stewart Indicted

In 1991, after continually refusing to testify before the grand jury, Ms. Stewart was indicted for the Class E felony of criminal contempt in the first degree. Ms. Stewart claimed as the basis of her refusal to testify the attorney-client privilege, the right to counsel, and the due process rights of both her clients and herself.

When Ms. Stewart's case was before Justice Richard T. Andrias, in Criminal Term, Manhattan, it was dismissed in th interests of justice. However, in a 3-1 decision, the First Department reversed the lower court's decision. In February 1999, the New York Court of Appeals found it was without jurisdiction to review the matter, leading to Ms. Stewart's determination not to risk disbarment and to plead guilty to a misdemeanor criminal contempt.

Ms. Stewart was the first lawyer in New York to be indicted for criminal contempt for refusing to appear before a grand jury.

Case Study

Bankruptcy Disclosure

By Bennette Kramer

A lawyer from a large New York City-based law firm was found guilty i federal court of failing to disclose a conflict of interest in bankruptcy court. John G. Gellene, a partner at Milbank Tweed Hadley & McCloy, was the

lawyer appearing before the court and therefore the one subject to criminal penalties, even though the decision that there was no conflict had been discussed among several Milbank partners. Many bankruptcy lawyers have questioned whether Mr. Gellene had the requisite criminal intent for a criminal conviction, but the Seventh Circuit specifically found that intent had been established.

Potential Conflict

On March 3, 1998, Mr. Gellene was found guilty by a Milwaukee federal jury of two counts of bankruptcy fraud and one count of perjury for misleading a United States Bankruptcy Court in the Eastern District of Wisconsin about a tential conflict of interest in connection with the representation by Milbank of chapter 11 debtor Bucyrus Erie Company. On July 24, 1998, Mr. Gellene was sentenced to 15 months in prison and a $15,000 fine and on July 30, 1998 he was disbarred by the New York Appellate Division, First Department. The Seventh circuit affirmed Mr. Gellene's conviction on July 20, 1999.

Mr. Gellene, a 1979 Harvard Law School graduate, was the primary partner of Milbank in charge of the Bucyrus bankruptcy, which resulted in a 1994 reorganization. As lead attorney in the bankruptcy, Mr. Gellene had the responsibility under Bankruptcy Rule 2014 of disclosing all conflicts of interest. Although Mr. Gellene was the lead attorney in the Bucyrus bankruptcy, he was not the primary attorney representing Bucyrus at Milbank. However, in two disclosure statements filed with the ınkruptcy court, Mr. Gellene failed to ıisclose that Lawrence Lederman, another Milbank partner, was simultaneously representing one of Bucyrus' largest creditors, the investor Mikael Salovaara and South Street Funds, in another matter.

Mr. Salovaara had had a relationship with Bucyrus since 1986, when at Goldman Sachs he engineered a leveraged buyout that creditors claimed left the company $130 million in debt and began the company's financial problems. Mr. Lederman began representing Bucyrus in 1986 when he was at Wachtell, Lipton, Rosen & Katz. Mr. Lederman joined Milbank in 1991, bringing Bucyrus, Mr. Salovaara, and South Street Funds with him. In 1992, as principal of South Street Funds, and represented by Mr. Lederman at Milbank, Mr. Salovaara structured the sale of all of Bucyrus' manufacturing equipment to South Street Funds for $18.4 million and arranged a leaseback of the equipment at a 23 percent interest rate charged to Bucyrus. At the same time, South Street Funds purchased $16.75 million of Bucyrus' senior secured notes. In 1993 Bucyrus announced it would default on its debt obligations and retained Milbank to represent it in a bankruptcy filing in the Eastern District of Wisconsin.

Mr. Gellene signed and filed two sworn conflict disclosure statements without disclosing the Milbank representation of Mr. Salovaara and South Street Funds as required by Bankruptcy Rule 2014. The first disclosure statement was filed the first day of Bucyrus' bankruptcy. The second addressed concerns about Milbank's connection to Goldman Sachs, a Milbank client and Bucyrus creditor. Further, in testimony in support of Milbank's fee application, Mr. Gellene failed to disclose that Milbank had represented South Street Funds and Salovaara.

The issue at Mr. Gellene's trial was not the conflicts of interest themselves, but his failure to report them to the bankruptcy court in the Rule 2014 disclosures statements that he signed and testified about. Mr. Gellene was convicted under 18 U.S.C. 152, which makes it a federal crime to "knowingly and fraudulently" make a false statement under penalty of perjury in a bankruptcy proceeding. Mr. Gellene was the first lawyer ever convicted for omitting a firm's connections under Bankruptcy Rule 2014. Mr. Gellene testified at his trial that when he filed the two disclosure statements he did not believe that Mr. Salovaara fit the definition of a creditor whose relationship with the firm needed to be disclosed. He said that Milbank partners had discussed whether there was a conflict and he had concluded there was none. While admitting that the nondisclosure was the biggest mistake he had ever made, Mr. Gellene claimed that he did not intentionally lie to the bankruptcy court. At trial, evidence of Mr. Gellene's intent included evidence of Mr. Gellene's discussions of the potential conflict with other Milbank partners; his deliberate use of his false affidavits in a court hearing; a prior misrepresentation of his admission to the New York bar; and his misrepresentations concerning a document production in another case in a Colorado court. The Seventh Circuit considered the issue of intent and determined that the government had provided sufficient evidence to support the jury's verdict.

Simultaneous Representation

Following the disclosure of the simultaneous representation, successor counsel to Bucyrus and creditor Jackson National Life Insurance Company sought disgorgement of the $1.8 million fees paid to Milbank, arguing that Milbank had failed to aggressively pursue claims against Mr. Salovaara. Jackson held $60

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million of Bucyrus 12.5% Resettable Senior Notes due January 1, 1996 which it purchased in 1990 in an exchange offer in which Mr. Salovaara was an advisor to Bucyrus. Bucyrus and Jackson further contended that Milbank obtained its position as debtor's counsel through fraud and alleged that Milbank deliberately concealed the relationship in order to negotiate a favorable outcome in the bankruptcy for Mr. Salovaara and South Street Funds.

In the reorganization of Bucyrus, the bankruptcy court allowed the secured claim of the South Street Funds arising from the sale-leaseback and confirmed a plan of reorganization that contained partial releases of Mr. Salovaara, South Street Funds, and others. Jackson claimed that it would have received more on its bankruptcy claims without the conflict. Milbank argued that the dual representation caused no harm because Jackson received $76 million from $60 million in notes when Bucyrus was sold. In December 1997 Milbank agreed to return all fees to avert an evidentiary hearing. Jackson received those returned fees.

In addition, Bucyrus and Jackson Life filed a legal malpractice suit in Wisconsin state court against Milbank seeking $100 million. That lawsuit was settled in February 1999.

John Stark, Vice President and General Counsel to PPM America, Inc., an investment management company which is an affiliate of Jackson, triggered the chain of events that resulted in the conviction of Mr. Gellene and the actions against Milbank. According to the *American Lawyer*, Mr. Stark had a grudge against Milbank that arose from Milbank's objections to Jackson's request for $3.2 million in fees in the Bucyrus bankruptcy. During the pendency of Jackson's malpractice action against Milbank, Stark put together a book of 50 news articles concerning the Milbank conflict that he distributed to selected persons, made available at a bankruptcy judges conference and e-mailed to Milbank partners. The e-mail additionally urged Milbank's partners to settle the malpractice suit. Milbank's lawyers filed a disciplinary complaint against Stark in Minnesota seeking to have him disbarred for illegally communicating with a represented client. The complaint was dismissed based on the Minnesota rule that allows a client who is a lawyer to communicate with an opposing client unless expressly directed to avoid communication or unless the other party shows a desire to communicate only through counsel.

Jackson also commenced a lawsuit against Mr. Salovaara, South Street Fund, and others in the Eastern District of Wisconsin in 1997 asserting claims of fraud, breach of fiduciary duty, civil conspiracy, and unjust enrichment. Milbank has been brought into that case by cross-claims filed by Mr. Salovaara.

First Conviction

John Gellene was the first lawyer to be convicted and sent to federal prison for failing to disclose a conflict of interest under Bankruptcy Rule 2014. Although his conviction and imprisonment should be a warning to the bankruptcy bar to take disclosure of conflicts seriously and to disclose any conflict of which a lawyer is aware, the special circumstances of this case should set it apart from an inadvertent failure to disclose a conflict. In sentencing Mr. Gellene, District Judge J.P. Stadtmueller of the Eastern District of Wisconsin pointed to the continuum of Mr. Gellene's conduct throughout the Bucyrus bankruptcy case. Mr. Gellene not only had failed to disclose the conflict in two disclosure statements that he signed and submitted to the court, he also perjured himself in a hearing before the court. Judge Stadtmueller had warned all counsel, and particularly, Mr. Gellene, that he took Rule 2014 disclosures very seriously. Moreover, Mr. Gellene had brushed off suggestions of a Milbank partner also working on the case that there might be a conflict of interest in the representation of Salovaara and Bucyrus at the same time. In addition, Mr. Gellene had had an unusual history prior to his criminal trial. He had practiced law in New York for nine years without being admitted, representing himself as a member of the New York bar and federal bar in court filings and legal publications; he had failed to disclose the ownership interest of Milbank partners in a cab company whose charges were part of the Milbank fee application; and he had made misrepresentations to a Colorado bankruptcy court about why certain disclosures had not been made. The court allowed this evidence to establish intent.

A Chat With Bob Wallach

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behalf of Wedtech. The alleged misdescription allowed the company to capitalize the fees rather than expense them, thereby inflating its earnings.

In the first trial Mr. Wallach was convicted by a jury on four out of six counts and was sentenced to six years in prison, fined $250,000, ordered to forfeit $425,000 in legal fees, and suspended from the practice of law. Mr. Wallach's conviction was overturned by the United States Court of Appeals for the Second Circuit in 1991 because of the government's reliance on perjured

testimony by its main witness at the trial. Mr. Wallach's second trial produced a mistrial when the jury, after more than four days of deliberations, could not reach a verdict. The government elected not to retry Mr. Wallach again, and he has resumed his highly successful law practice. The *Federal Bar Council News* recently spoke with Mr. Wallach.

* * *

After his seven-year ordeal at the hands of the criminal justice system, Bob Wallach remains an optimist about the jury as an instrument for justice. Coming from a litigator who has had 218 trials (mostly as a plaintiff's lawyer in personal-injury cases) and won all but 12 of them, ıch faith is not surprising, but how can .. be squared with the fact that Mr. Wallach — who eloquently professes his innocence — was found guilty at his first trial? "Juries will please judges" is his short answer. Mr. Wallach believes that his defense almost prevailed in 1989, despite the egregiously uneven field on which it was compelled to play, and that the closeness of the outcome — which ultimately hinged on the last-minute dismissal of a pro-defense juror — is itself a testament to the tenacity of the jurors' instinct to do what is right.

Juries And Justice

Still, Mr. Wallach would be the first to admit, juries can be led astray and justice can miscarry completely. That such a thing could happen in the Southern District of New York, to a highly knowledgeable defendant represented ·v elite white-collar defense lawyers, ..uggests that, by Mr. Wallach's account, the jury is considerably more fragile than his popular ideal would allow. Indeed, the lesson Mr. Wallach draws from his vindication in the second trial underscores that the process of decision in a trial is far too mysterious, interesting, and human to be squared with a simple faith in juries.

According to Mr. Wallach, in the personal-injury arena the lawyer wins who gains the jury's trust, who articulates the "hidden truths" that connect its experience to the client's. In this three-cornered relationship, in which the humanity of the client is communicated to the jury through the medium of the attorney, the attorney-client bond is crucial.

In personal-injury cases, says Mr. Wallach, the plaintiff's lawyer "must become the mirror-image of the client." The lawyer does this not only by imagining what the client's life is like, but by becoming intimately familiar with the client's life and adopting him or her as a friend. Only then can the lawyer make the jurors understand the client and care, as human beings and not just players of a prescribed role, about the consequences of their verdict. Professional empathy, Mr. Wallach says, is at the heart of his remarkable trial record over nearly 40 years of practice.

Resistance Is Futile

In 1986, when Mr. Wallach began to look for an attorney to represent him, he was shocked to learn that these were not the ideals of the criminal-defense bar. Many of the lawyers he interviewed, he says now, seemed cynical or embarrassed about their clientele, and intent on maintaining a "moat" around their personal lives. In these meetings, Mr. Wallach says, he "thought he was being interviewed by prosecutors."

Moreover, Mr. Wallach learned, there was a pervasive "sense of defeat" within the white-collar bar, a presumption that, because the overwhelming majority of criminal defendants are found guilty, resistance is futile.

The key distinction between Mr. Wallach's first and second trials is that in the latter he found the functional equivalent of the empathy he has employed so effectively for others: he represented himself. Mr. Wallach has nothing but praise for the lawyers he selected to represent him at his first trial. Perhaps, he allows, a steady diet of criminal defense work requires more detachment than plaintiffs' work. Be that as it may, the second time around Mr. Wallach was able, he says, to present himself to the jury as a "worthy person" caught up in a politically motivated prosecution, without the distracting issue of "an affluent lawyer spending big money to cheat justice." This was perhaps the key "hidden truth" about his predicament that Mr. Wallach exposed for the jury. To underscore his plight, Mr. Wallach began his opening by addressing by name the judge, the clerk of the court, the judge's law clerks, the two Assistant U.S. Attorneys, the paralegal, the FBI case agent, and the two law-school interns who constituted the "army" mobilized to convict him. He also informed the jury up front of his earlier conviction and its reversal. In the end, Mr. Wallach says, even the judge softened his attitude toward the defendant.

Pro se representation will always offer an articulate and creative criminal defendant certain advantages, including testimony in the guise of lawyering and highly personal interaction with witnesses. The lessons Mr. Wallach draws from his trials have broader relevance, however. The client, like the juror, is first and foremost a human being. Lawyers may forget this fact, at their clients' peril. When a lawyer has been a criminal defendant, he or she cannot forget it.

Securities Practice

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Lawyers, and other service professionals (e.g., accountants), were thus encouraged by the U.S. Supreme Court's 1994 decision in *Central Bank of Denver v. First Interstate Bank of Denver*, which appeared to rule out aider and abettor liability under Section 10(b) of the Exchange Act of 1934. Any such encouragement was short lived, however, when concerns arose that behavior that previously might have subjected professionals to aider and abettor liability now might subject them to primary liability.

Fall-Out From Central Bank

In its 1994 decision in *In re Software Toolworks Inc. Securities Litigation*, the United States Court of Appeals for the Ninth Circuit ruled that a national accounting firm was a primary perpetrator of fraud (as opposed to an aider and abettor thereto) because it had been involved in the drafting of a disclosure document, notwithstanding that the ultimate document was neither signed by the firm, nor was its role otherwise identified to outsiders. The next year, a federal district court in Illinois ruled that primary liability could be established against an accounting firm by showing the firm's "central involvement" in the drafting of documents.

More recently, federal courts of appeals in the Second, Third, and Sixth Circuits have espoused seemingly different views as to attorney liability in such circumstances. In 1998, in *Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin*, the Second Circuit ruled that *Central Bank* barred a conspiracy to commit securities fraud claim against a law firm where the firm was not alleged to have a role in the preparation or dissemination of offering materials for notes ultimately purchased by the investor plaintiffs. That same year the Sixth Circuit, in *Rubin v. Schotenstein, Zox & Dunn*, sitting *en banc*, ruled that oral statements made by an attorney to plaintiff-investors regarding the financial condition of his client gave rise to a "duty to provide complete and non-misleading information with respect to subjects on which he undertakes to speak." And the Third Circuit, also in 1998, in *Klein v. Boyd*, ruled that a law firm that participated in the drafting of a document containing a material omission on which an investor relied may be liable under Section 10(b), even though the law firm did not sign the document nor was the investor aware of the law firm's role. This decision was later vacated, pending a review by the Third Circuit *en banc*; prior to the *en banc* decision, the case was settled.

The pre-decision settlement of *Klein v. Boyd* should not be misunderstood to mitigate the fact that the trend of post-*Central Bank* law has been very problematic, especially as to lawyers' liabilities and their relationships with clients. Indeed the SEC submitted an amicus brief to the *en banc* court arguing that a secondary actor in a securities transaction (i.e., a lawyer) may be held liable as a primary violator of Section 10(b) whenever that actor, alone or with others, "creates" a misrepresentation; the Commission has reasserted that position subsequent to the settlement of the litigation.

Additional SEC Land Mines

Wholly apart from attorney liability under the Exchange Act of 1934, the SEC recently settled an enforcement case against Orange County's bond counsel under provisions of the Securities Act of 1933. The basis of that proceeding was that the lawyer negligently participated in drafting offering documents for Orange County notes by omitting material risk information, and negligently opined as to the notes' likely tax-exempt status.

With respect to professionals' ability to practice before the SEC, the Commission's 1998 setback before the Court of Appeals for the District of Columbia Circuit in punishing alleged (mis)behavior by accountants in *Checkosky v. SEC* (the appellate court directed the SEC to dismiss administrative proceedings against two accountants; having given the commission two prior opportunities to "articulate an intelligible standard" by which to judge t[illegible] accountants' conduct, the court declined to give the SEC a third "shot"), led to the SEC adopting on October 19, 1998 new rules as to what constitutes "improper professional conduct" under SEC Rule 102(e). Three types of conduct were identified:

- intentional, knowing, or reckless conduct which violates applicable professional standards;
- negligent conduct in a single circumstance which violates applicable professional standards, where there is a substantial risk of making a document materially misleading under the securities laws; or
- repetitious, negligent conduct which violates applicable professional standards.

Although they are principally aimed at accountants, no professional who practices before the Commission should view proceedings brought under these new standards sanguinely or wi[illegible] equanimity, especially given the SEC [illegible] prior 21(a) Report in In re Gutfreund, in which the general counsel of Salomon Brothers was severely critiqued for his

actions (and non-actions) in that firm's misfeasance in the U.S. Treasury Market.

Consequences

Other than an increased likelihood of exposure to liability, the trend of the foregoing is likely to have other consequences, such as:

- The ability to have full and candid discussions between lawyers and corporate clients could be significantly impacted. Clients are not simple-minded; if they believe their lawyers have a separate and distinct disclosure obligation to third parties, query how open and forthcoming they will be. To weaken this important policy goal, which has continuously been stressed by the U.S. Supreme Court (e.g., *Upjohn*), would have a dramatic impact on the delivery of legal services.
- Lawyers' duties to their clients could be lessened, as their duties to third parties are increased; such a change would be a profound one to the current system of legal ethics.
- The securities laws' disclosure practices could likely be changed, especially in the preparation and review of prospectuses and other disclosure documents.
- As indicated by the Supreme Court in *Central Bank*, increased (and uncertain) attorney liability could increase the cost structure of our capital markets, as well as making it more difficult for "newer and smaller companies . . . to obtain advice from professionals."

Although it is perhaps understandable that highly visible and well compensated professionals should not be able to render themselves immune to responsibility and/or liability when there is wrongdoing, the direction in which we are headed may well be further cannon fodder for the law of unintended consequences. At a minimum, we lawyers have not seen the worst of it yet.

A Criminal Case

United States v. Roy Cohn

By Gerald Walpin

In 1963, a grand jury in the Southern District of New York voted an indictment against Roy Cohn for perjury, obstruction of justice, and subornation of perjury. Cohn's name and reputation had been widely known when he was indicted: a former Assistant United States Attorney who had prosecuted the Rosenbergs; counsel to the well-publicized Senator McCarthy in his investigation of subversives in government; and thereafter one of the smartest and sought after attorneys in private practice who was known to have "connections" to important people in high places. His indictment was a signal to all lawyers that no one is immune from prosecution if evidence of misuse of the lawyer's parchment exists.

Shortly after I was sworn in as an Assistant U.S. Attorney in 1961, I was assigned an already pending stock fraud indictment entitled *United States v. Dardi*. In reading the file, including a voluminous SEC report, I was baffled why four individuals, having roles in and relationships to Las Vegas casinos, were not named as defendants, despite the overwhelming evidence of their guilt and the SEC recommendation that they be included as defendants.

To attempt to answer the question, I talked with the two principal authors of the SEC Report, who had personally investigated the fraud. They informed me that they had understood the four would be indicted and then suddenly, on the eve of the indictment, the U.S. Attorney's Office had made the decision not to indict them. As far as the SEC was concerned, there was no rational basis for that decision. I proceeded to re-present the facts to a new grand jury which returned a superseding indictment which included the four Las Vegas persons as defendants.

In early February 1962, the trial began against 33 defendants, represented by about 15 defense counsel. Two weeks into the trial, I received a weekend telephone call at home from Bill Mulligan, one of the most capable and honest defense counsel then practicing, who represented two of the Las Vegas defendants, Sam Garfield, alleged to be high in the Detroit mob, and his protege, Allard Roen, the manager of two major Las Vegas casinos. Bill said that his clients and the other two Las Vegas defendants wanted to discuss a guilty plea. Further, he said, his clients wanted to cooperate concerning the reason they had not been included as defendants in the first indictment: Garfield had arranged with Cohn to make a $50,000 payment, two-thirds of which was paid directly by Roen to an Assistant United States Attorney, and the balance to Cohn, to keep the four Las Vegas defendants out of that indictment.

Lie Detector Test

The presentation of evidence to the grand jury concerning these allegations took about one year. At the end of the presentation, my colleague Donald J. Cohn (no relation) and I agreed that there was a concerted effort by certain individuals, led by Roy Cohn, to conceal facts from, and to lie to, the grand jury. In

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an excess of caution, however, we decided to perform an extra test of Roen's sworn assertion that he had paid $35,000 to an Assistant U.S. Attorney in an elevator in his hotel: With the FBI waiting in the outside room, Roen was brought in and, without any prior notice in front of his lawyer, asked to take a lie detector test. While we knew that the results of the lie detector test were inadmissible, we believed that his reaction to the request, his willingness to take the test without hesitation, and, yes, the results would, if he passed it, give us additional comfort that his testimony was in fact truthful. Roen immediately agreed, and was taken to the FBI office, after which we were informed that the results were consistent with truthfulness.

Before asking the grand jury for the indictment, however, we met with the top officials in the Department of Justice. First, Don and I met with Nicholas Katzenbach, then Deputy Attorney General. We related to Nick all of the evidence in detail, followed by our joint view that Roy Cohn was in fact guilty, and that, based on the testimony and some corroborating evidence, there was a chance to obtain a conviction. However, we made clear that we recognized that the odds were against us because all of our major witnesses were either convicted felons or admitted perjurers. Nick agreed with us that the evidence indicated Cohn's guilt, but he did not believe that an indictment should be requested because, given the weakness of the witnesses, and the poor chances for a guilty verdict, the public would view the indictment as merely a baseless continuation of the Bobby Kennedy/Roy Cohn feud that had been well publicized during and since the McCarthy hearings. That weekend, Don and I were summoned to meet with Attorney General Kennedy, at his home in Virginia. We spent several hours with him, detailing the facts and the weaknesses in the witnesses. In the end, he asked each of us if we really believed that the evidence established Cohn's guilt. When we responded in the affirmative, he courageously said that, while he recognized he would take the brunt of the criticism, he would not invoke factors personal to him to prevent an indictment sincerely brought on evidence that established the very serious crimes of perjury and obstruction of justice.

The trial against Cohn and his co-defendant lasted about six weeks. Cohn, before the grand jury, had testified that,

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shortly before the decision was made to omit the four Las Vegas people from the indictment, he had met with Garfield, but claimed that the meeting was legitimate because Garfield had retained him as his attorney. Garfield had denied that he had ever retained Cohn; rather, his meeting with Cohn was to arrange for Cohn's help in keeping the Las Vegas people out of the indictment, and resulted in Cohn's instruction to make the illicit payments. Cohn repeated his testimony at trial in his direct examination in his own defense. Unknown to Cohn, we had uncovered testimony by Cohn, given only months after his meeting with Garfield in a totally unrelated SEC administrative proceeding, in which Cohn had denied that he had ever acted as attorney for Garfield. Toward the end of my cross examination of Cohn, I had him repeat his explanation of the meeting with Garfield — that he was acting as attorney for Garfield — and then hit him with his prior testimony which was diametrically opposite. Frank Raichle, his very competent attorney, knew he could do nothing to rehabilitate Cohn on that clear contradiction and asked no questions on redirect.

The jury deliberated for four days, with the fourth day a Sunday. It was apparent from the sequence of questions asked by the jury that the jury was heading toward conviction. By Saturday, Cohn had lost his bombastic confidence and looked ash white and nervous. When we returned from dinner on Sunday, Judge Dawson, the trial judge, waiting at the top of the courthouse steps, told us to come into his robing room. There, we found Cohn and his attorney, together with the co-defendant and his counsel. Judge Dawson told us that a juror's father had just died and he therefore could not keep the jury sitting. I proposed that all parties consent to a jury of eleven which, understandably, Cohn immediately rejected. I then pled with the Judge that, because there was very little that could be done about the father of the juror, it was a waste of judicial resources and the time put in by all parties simply to discharge the jury. Judge Dawson refused to keep the jury sitting. When I asked, in the alternative, that the jury be told it would be discharged if it was not able to bring in its verdict that evening, Judge Dawson demurred, stating that would impose unacceptable pressure on the jury. He ruled that he would bring in the jurors and ask if they were ready with their verdict and, if not, he would discharge them. When he did so, and the jury foreman replied that the jurors were not ready with their verdict, he discharged them. The foreman then exclaimed that the jury had reached a verdict, that the jurors had been eleven to one for conviction until late afternoon at which time they became unanimous, but they all felt that, because of the seriousness of the charges, the jurors should sleep on it overnight in case anyone wanted to change his or her mind before the verdict was announced in the morning. Having been discharged, there was nothing that could be done to reconstitute the jury for that purpose.

In the re-trial, Cohn was aware of his prior contradictory testimony on which he was able to hedge sufficiently to avoid the devastating impact. In addition, his mother had "found" a diary which provided him with an alibi for one crucial event. The re-trial jury acquitted him.

From The President

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were successful. In affirming the lawyer's conviction, the Seventh Circuit observed that "an individual's status as an attorney engaged in litigation-related conduct does not provide protection from prosecution for criminal conduct." The court added: "[T]he record adequately supports the conclusion that Cueto's conduct, though nominally litigation-related conduct on behalf of his client, was undertaken with . . . corrupt intent."

Of course, there is another side to the story. The lawyer in *Cueto* was personally involved in the underlying criminal acts and undertook the litigation-related conduct in question in an effort to protect himself as well as his client. In addition, the facts strongly supported the conclusion that the lawyer was using civil litigation against an undercover agent to disrupt an ongoing criminal investigation.

Bench And Bar Conference

This subject and other interesting topics — touched on in this issue of our newsletter — will be the focus of the Federal Bar Council's Winter Bench and Bar Conference, which will be held at the Phoenician Resort in Scottsdale, Arizona, from February 27 to March 5, 2000. The Planning Committee, chaired by Second Circuit Judge Dennis Jacobs, has organized panel discussions on Lawyers Under Attack, The Ethics of Witness Preparation, Contempt and Other Sanctions, Effective Communication With Juries, The Americans With Disabilities Act, and A Historical Perspective of the Law at the Millennium. In addition to many distinguished panelists and Judge Jacobs, Judges Naomi Reice Buchwald (S.D.N.Y.), Robert Chatigny (D. Conn.), Janet Hall (D. Conn.), Alvin Hellerstein (S.D.N.Y.), Lewis Kaplan (S.D.N.Y.), Loretta Preska (S.D.N.Y.), Allen Schwartz (S.D.N.Y.) and Joanna Seybert (E.D.N.Y.) will be in attendance.

For further information, contact Peggy Brown, Executive Director of the Federal Bar Council, at (212) 883-1777.

From The President

Lawyers In Jeopardy

By Steven M. Edwards



The 32nd annual Federal Bar Council Winter Bench & Bar Meeting will be held at the Phoenician Resort in Scottsdale, Arizona, from Sunday February 27 to Sunday March 5, 2000

As lawyers, we often view ourselves as above the fray. We are part of the solution; not part of the problem. Clients come to us with problems, and we help to solve them. In performing that task, we sometimes view ourselves as surrounded by an "invisible shield" that protects us from becoming a target or subject of the underlying litigation.

That invisible shield manifests itself in a number of ways. There are privileges that keep our communications and trial preparation efforts secret. There are ethical rules that require us to represent our clients zealously within the bounds of the law. Our clients have a constitutional right to effective assistance of counsel, which in turn obligates us, as lawyers, to try as hard as we can to win our cases.

Recently prosecutors have been poking holes in that invisible shield. The lawyer who tries to organize a coordinated defense may be deemed "house counsel" and disqualified as a result. The lawyer who represents a person charged with a crime may find that his or her fees are subject to forfeiture because (alleged) criminals, not surprisingly, pay their lawyers out of the proceeds of their (allegedly) criminal acts. A lawyer who aggressively asserts a privilege, or "prepares" a witness to testify in a manner that is helpful to his or her client, may end up on the receiving end of an obstruction of justice charge.

The 1998 decision by the United States Court of Appeals for the Seventh Circuit in *United States v. Cueto* is a case in point. In *Cueto*, a lawyer was convicted of obstruction of justice for making various arguments and motions in a case, some of which

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