

Opinion Article

ETHICAL CHALLENGES IN A CORPORATE CLIMATE

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Introduction

*How can a man know what is good or best for him, and yet chronically fail to act upon his knowledge?*² -Aristotle

Most people have the general understanding that the law and ethics are not identical. The law can be defined as a coherent set of rules, made by judicial systems to govern the whole society. It is the creation of national and international governments with the intention of maintaining social order, peace and justice in society as well as providing protection to the general public. Therefore, it doesn't seem very odd that the law is universally accepted, recognized and enforced.¹ The law has a binding nature, and breaching it results in punishments. On the other hand, ethics provide a softer approach, being a moral philosophy that guides people's behaviour and decision-making in particular occasions. The term could be considered as a collection of the fundamental principles and conducts of an 'ideal' human character.

On a professional level, both law and ethics are brought into alignment in order to not contradict each other. The overlapping area, also referred to as legal ethics, contains minimum standards of appropriate conduct within the legal profession. The several codes of conduct that have been established, indicate the behavioural norms and morals for judges and lawyers. Still, each and every corporate scandal highlights once again the ongoing shortfall in the incorporation of ethics within the corporate culture, the increasing demand for the 'right' correspondence between legal duties and ethical duties and the need for familiarity with ethics for corporate lawyers. It also raises the question to what extent a lawyer can be ethically correct while representing a client. Particularly, when the client is involved in fraudulent actions and demands manipulation of the legal system to avoid penalties. Should lawyers still zealously represent their client's interests?

This paper will outline the desirability of ethics within the corporate climate. It will present an ethical dilemma and respond to the questions raised above whilst also incorporating several points of views of scholars. Finally, it will challenge the series of possibilities that deal with this problem, the most promising of which is the "*moral dialogue*" between lawyer and client presented by Pepper².

I. An Ethical Dilemma in Broader Perspective

An innocent woman died in a car crash which resulted from her trying to avoid a stalled car. LEC Car Company, the manufacturer of the stalled car, had already received several complaints by purchasers about the instant total power failure. After the terrible accident, LEC Company hired the best litigation team of Tiger Law Firm. One of the LEC representatives accidentally mentioned that its engineers had

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¹ W. Bradley Wendel, *Ethics and Law: An Introduction*, Cambridge Press University, 2014, p.7.

² Stephen L. Pepper, '*The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*', American Bar Foundation Research Journal 613, 1986, p. 613-615.

discussed the possibility of a power cut during a client meeting. However, the company still wanted to avoid all liability and did not wish to recall its (potentially) damaged cars. Now, imagine being a junior associate who, as part of the litigation team is instructed by one of the partners to remain silent about the comment and to design the best litigation strategy. To what extent would you go, as a junior associate, to challenge the unethical behaviour of the partner and of the client?

First of all, it is important to briefly explain the traditional view of the role of legal professionals described by Wasserstrom. He stresses that the traditional role of legal professionals is to put the interests of a client above those of other individuals. In other words, subordinating all interests, including your own, to the interests of those in need of your service. Also, a quick look at the ABA's Model Code of Professional Responsibility, the governing code of conduct in The States, reveals that the legal professional should put the client's interests above that of the lawyer. It is argued, however, that this is designed to protect the client's interests from a lawyer's self-interest. Still, if lawyers are always instructed to favour their client's interests, does it not make them just an instrument of the legal system? Are lawyers not much more than that? Wasserstrom also stresses this narrow position of lawyers. He illustrates that once a lawyer enters into a 'professional' relationship with a client, it eventually boils down to a 'simple' agent-principal relationship. Particularly, because lawyers are hired just to design the best strategy that complies with the client's interests. They are not installed to morally challenge the interests. Therefore, lawyers are able to distance themselves from any moral accountability as long as the conduct is lawful.³

Wasserstrom points out that from the traditional view, even if the client's goals or means are morally unacceptable and legally possible, it is the client who should feel morally responsible, not the lawyer. This means that the moral accountability shifts to the client.⁴ But what do clients know about 'ethics' within the corporate field? Is it not the lawyer's task to be familiar with ethics? Wendell argues that the lawyer-client relationship is in itself created by the legal system where duties imposed on lawyers are justified by the social function of the law. Herein, one must understand that lawyers have a different role than judges and clients. Judges are institutionally charged with the task of remaining impartial and clients approach the law from a self-interested perspective. The role of lawyer is something of an *amalgam* of the judge's and client's roles: it serves as a bridge between the biased position of clients and the ideally neutral position of judges. Lawyers are not only caretakers of their clients' interests but also custodians of the law in an important sense. They have a responsibility to build the interests of third parties into their interpretation of law, even when working on behalf of private clients.⁵

The traditional view presented by Wasserstrom is most likely the kind of atmosphere at the Tiger Law Firm. Due to the partner's action, it is clear that there is no hint of ethical knowledge within the firm. The lawyers are not safeguarding the legal system at all. Rather, they are instructed to keep silent and zealously pursue the interests of their client. These actions also resemble the '*Holmesian bad man*' attitude towards legal norms mentioned by Wendell. The '*bad man*' is actually a metaphor for people who are only interested in avoiding legal penalties.⁶ When lawyers consider it as their duty to protect the client's interests, meaning keeping secrets and structuring the legal system in the clients benefit, the danger arises that it could go hand in hand with avoiding penalties. This would eventually turn lawyers into business partners whose only service is to regulate and facilitate their client's transactions. Therefore, Wendell wishes to defend the '*interpretive attitude*' of professionalism: a stance towards the law which accepts that the lawyer is not simply an agent of the client. The lawyer should, according to

³ Stephen L. Pepper, '*The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*', American Bar Foundation Research Journal 613, 1986, p. 616.

⁴ Stephen L. Pepper, '*The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*', American Bar Foundation Research Journal 613, 1986, p. 614-616.

⁵ W. Bradley Wendel, '*The Jurisprudence of Enron: Professionalism as Interpretation*', Cornell Law University, 2014, p. 15-16.

⁶ Idem, p. 12-13.

Wendel, apply the law (and the underlying legal norms) in its substantive meaning and not merely in its formal expression.

The positive outcome of this demand is that lawyers will recognize and interpret the law in good faith rather than viewing it as an obstacle to the client's goals. Lawyers will be able to actually maintain the institution of law in good working order as custodians and defenders.⁷

Wendel's view stands in stark contrast to the vision of the litigation team at Tiger Law Firm. Their vision (excluding the junior associate) appears to be that excellence in lawyering means engaging in "*creative and aggressive*" structuring of transactions for the benefit of client. Sadly, due to this tunnel vision, it might be difficult for them to distinguish the moral aspects of their 'legal' profession⁸, let alone recognizing and dealing with ethical dilemmas.

Fortunately, Pepper has tried to present two solutions for lawyers who do acknowledge ethical dilemmas. He believes that lawyers always have the possibility to refuse an unethical client and most importantly, to engage in a moral dialogue.⁹ It is questionable whether Pepper's resolution could be used by the junior associates. This small group, usually completely absorbed by the firm's atmosphere, is required to live up to the standards within the firm and thus follow the more experienced lawyers. If the firm's standards have not incorporated (familiarity with) ethics, it is perhaps obvious to suggest that the junior associates are likely to be the last ones to refuse an unethical client or to engage in a moral dialogue.

Conclusion

After having discussed several points of view, it can be said that there is actually no algorithmic way for lawyers to deal with ethical dilemmas. For this reason, some lawyers tend to be more aggressive than others in pushing the boundaries of the rules. However, this paper did emphasize the unethical aspect to zealously pursuing the client's interests and attempted to challenge Wasserstrom's claim that shifts moral accountability from lawyers to clients. Finally, the '*interpretative attitude*' of professionalism defended by Wendel and the ethical solutions presented by Pepper, are definitely food for thought in a corporate climate.

⁷ Idem, p. 5-6.

⁸ Alan H. Goldman, '*Professional Ethics*', p. 43.

⁹ Stephen L. Pepper, '*The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*', American Bar Foundation Research Journal 613, 1986, p. 634-635.