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Commentary

By Rodney M. Confer*

Professional Tenure as a Means to Promote Ethical Compliance in the Civil Discovery Process

Professor Kalish suggests that a lawyer should be allowed to sue an organization which was formerly his employer or client, but which wrongfully discharged him for his refusal to commit an ethical violation in the organization's interest. The goal of his proposal is to encourage attorneys to uphold the integrity of the legal system by obeying the ethical canons of the bar, rather than to act out of loyalty to the organization in disregard of ethical considerations.

This essay examines the proposal and its underlying premises by putting them in a context in which such ethical violations might occur: the civil discovery process. It is believed the analysis here is equally applicable to other situations in which the lawyer must decide whether to act in the best interest of an organization although that interest conflicts with a rule of ethics which promotes the integrity of the legal system.

I. ETHICAL VIOLATIONS IN THE DISCOVERY PROCESS

Professor Kalish's essay provides two illustrations of the conflict between the organization and the lawyer's duty to the legal system: an attorney in a large law firm disagrees with her senior partner over whether she may represent both parties in a divorce, and a corporate attorney is ordered to negotiate directly with a competitor whom the lawyer knows to be represented by legal counsel. While these examples illustrate the point, it seems unlikely that ethical infractions would result in these situations since any such violation would probably be discovered by an attorney representing the adverse party or by the court. An organization which understood the risk of exposure would not persist in a suicidal act, nor would it make sense for the organization to find a

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different attorney who would commit the violations described, since discovery and punishment would be too likely.

In the discovery process, on the other hand, it is doubtful that ethical violations will often come to light. Consequently, this would seem to increase the chance that such infractions may occur. Discovery depends for its effectiveness on the good faith and honesty of the litigants. When large organizations are involved in litigation, requests for discovery of the contents of internal files or records concerning the case are routinely made. The request may be by interrogatory, motion to produce, request for admissions, or during deposition testimony. Records are likely to be voluminous, and painstaking search must be made to retrieve the information. The stakes are likely to be high in contract, products liability, anti-trust or other complex lawsuits against organizations and in which large law firms are commonly involved. The information must be produced, even though it is not admissible in evidence, if the request is reasonably designed to lead to discovery of admissible evidence.¹

If the requested information is damaging to the case, there is a great temptation to suppress it. The adversary may suspect that it exists, but he probably does not know. Where a great deal of material is provided, it may be less likely that suppressed damaging material will be missed. Moreover, it is easy to rationalize the deed by reasoning that the other side may be doing the same thing, the information is not really relevant, or a jury of laymen would not understand it and place it in its proper light.²

Suppression of such information violates the rules of ethics.³ It

1. FED. R. CIV. P. 26 (b)(1).
2. For an example of the suppression of discovery materials, see Brill, *When a Lawyer Lies*, *ESQUIRE* Dec. 19, 1978, at 23. Mr. Brill tells how a prominent New York attorney, who defended Kodak in an antitrust suit brought by Berkeley Photo, withheld information in discovery. The lawyer later admitted what he had done and served a prison sentence for contempt of court. His act of withholding documents was used against Kodak at trial and a verdict of \$113 million was returned against the defendant. This was later reduced to \$87 million.
3. ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANONS, DR 1-102 (A) (1978); "A lawyer shall not: . . . (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. (5) Engage in conduct that is prejudicial to the administration of justice. . . ."

DR 7-102 (A) provides:

 - (A) In his representation of a client, a lawyer shall not:
 -
 - (3) Conceal or knowingly fail to disclose that which he is required by law to reveal.
 -
 - (5) Knowingly make a false statement of law or fact.
 -

also deprives the adversary and society of a just result. If evidence at trial does not square with the facts because the adversary was not allowed to know the facts, then the dispute is never heard and the real issue is never decided.

II. SECURING THE INTEGRITY OF THE LEGAL SYSTEM

Professor Kalish's goal in allowing a wrongful discharge remedy to lawyers is to encourage them to act in ways which do not undermine the legal system. Perversion of the discovery process prevents the fair resolution of disputes between members of our society. The role of the civil law is to do justice in a peaceful way when disagreements occur. If this function is thwarted, society will ultimately suffer because this method of settling conflicts will not be considered a reliable way of obtaining justice. A more just and probably less peaceful alternative will be preferable in the eyes of the grievant. In other words, society needs to have confidence in its legal system before the system can work.⁴ Society's confidence in the legal system and the proper functioning of the system are two sides of the same coin. Neither can exist without the other. When lawyers act in ways which are detrimental to the legal system, a secondary effect is that society's respect for law is shaken. This, in turn, weakens the system more.

Preventing conduct which is detrimental to the legal system is certainly a worthy goal. To aid in attainment of this goal, it is helpful to look at how this activity manifests itself. A clear instance is violation of ethical standards which have been developed to insure the integrity of the legal process, and it is this facet of the problem which Professor Kalish's proposal addresses. Withholding information in discovery is but one example of this type of harmful conduct.

However, some things lawyers do are clearly damaging to the legal system and yet may not violate ethical standards. A lawyer's ethical conduct which is not understood by the public may be destructive when it lessens society's confidence in the system. Incompetence, stupidity or immorality of the bar or bench also have this effect. Constructive criticism of the legal system by those

(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

4. The bar's recognition of the importance of society's confidence in its legal system is reflected by the adoption of standards designed to insure that lawyers' conduct will not undermine that confidence. *E.g.*, ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANONS, No. 9 (1978); State *ex rel.* Nebraska State Bar Ass'n v. Richards, 165 Neb. 80, 93, 84 N.W.2d 136, 145 (1957) ("An attorney should not only avoid impropriety but should avoid the appearance of impropriety.").

within it should strengthen the legal system, but public criticism by lawyers and judges can also be viewed by laymen as a sign of weakness. These destructive effects upon the system, while not the evils at which a tort action for wrongful discharge is aimed, are mentioned here for a reason. The proposal to give attorneys tenure may activate these forces while aiming at another cause of the problem. From time to time in history, society has interceded to insure that organizations would not subvert society's best interests by an untrammelled exercise of their power to advance the organizations' self-interest. Social legislation has been enacted and judicial remedies created to protect the worker, the business competitor, the consumer and others. One does not have to be a cynic or a reactionary to recognize that some of these necessary and well-meant reforms have created new societal ills similar to the ones society sought to prevent: big labor, acting in its self-interest; governmental bureaucracy, acting in its self-interest; consumer groups, environmental groups and other special interest groups which may seek to advance their self-interest at the expense of society's interests. Similarly, there may be a danger that in seeking to prevent damage to the legal system by organizations, the wrongful discharge solution may adversely affect the legal system and organizations which have acted properly with respect to the system.

Professor Kalish states that his proposed solution will not protect a lawyer from being fired for some reason other than his refusal to violate ethical standards, and it is not designed to limit the employer's freedom to rid itself of incompetent professionals. However, we cannot assume that discharged attorneys will exercise the self-restraint to refuse to bring spurious lawsuits. After all, attorneys are responsible for most of the spurious suits we have now. Lawyers are only human. Incompetent lawyers do not realize they are incompetent. Those who do wrong probably do not admit it even to themselves; attorneys discharged because their personalities are repugnant will not likely be told or realize the reason. The natural consequence is that lawyers who are fired for good and legitimate reasons will imagine that they have been wronged and will search for a way to bring their case within the wrongful discharge framework if such a remedy is available.

One effect of granting tenure to lawyers might be that an organizational employer would be hesitant to discharge an inferior attorney for fear of a lawsuit. Marginally competent or otherwise inefficient attorneys would thus be insulated, rather than culled out. The legal system would suffer from the entrenchment of practitioners in employment for which they were unfit. In addition, while there would probably not be a large volume of lawsuits

brought by discharged attorneys relative to the total number of cases, these lawyers' lawsuits would add to the burdens of an already struggling court system.

As mentioned above, a certain number of suits brought by discharged attorneys would undoubtedly lack merit. In these instances, the incompetents, crackpots and other undesirables of the bar would be in the public spotlight, since these lawyers are the most likely to be discharged, and probably the least likely to understand when they had been fired for good reason. To defend against a frivolous lawsuit, the former employer could be expected to present every action of the plaintiff, its former employee, in the worst light. Moreover, an attorney who brought suit after being discharged by a law firm would attempt to paint his former employers as somewhat less than admirable. With attorneys on either side trying to discredit the attorney on the other side, the worst aspects of law practice and the worst elements of the bar would be most visible to the public, despite the fact that these are the rare exceptions and not the rule. Before we air our dirtiest laundry in public view, we should carefully weigh whether the benefits which might accrue would make this price worth paying.

III. LIMITED TENURE AS A MEANS TO SECURE THE INTEGRITY OF THE LEGAL SYSTEM

In order for the proposed tort of wrongful discharge to help insure the integrity of the legal system, it must attack a cause of the problem. The proposal to grant tenure to lawyers is based on a premise that lawyers who are employed by organizations are under pressure from their employers to act in the organizations' interest rather than ethically: in society's interest. The discovery process is one area where ethical violations can and do occur, and it is probable that some such violations are the employer's idea. Nevertheless, there is reason to suppose that organizational employers are not a significant cause of ethical violations.

On balance, organizations' management is made up of people who are probably no more corrupt than their nonorganizational counterparts. Sometimes they may act in the interest of the organization and at society's expense, but we know they often do not. In the discovery context, we know that the "smoking pistol" is often produced when requested, even when the consequences are dire to the organization. Organizations, too, act altruistically, decently and fairly, for no other reason than it is recognized as the right thing to do by the altruistic, decent and fair people within the organization.

A second reason, complementing the first, that organizations act in ethical ways and want their attorneys to do so, is the fear of

exposure of unethical conduct. It is easier to do the honorable thing if we know the less honorable thing will be discovered and punished.⁵ Organizations in litigation often have much to lose if caught in a lie; thus, even a small risk of the discovery of wrongdoing is not worth running. Withholding discovery materials is probably considered frequently, and rejected.

It cannot be denied, however, that there are violations of discovery rules and other ethical standards by lawyers representing or employed by organizations. If these violations might be curtailed by instituting a right to sue for wrongful discharge, at least there would be fewer ethical infractions and the system would be better off. But this argument is based on two doubtful assumptions. One is that a lawyer who acts unethically at his employer's command would act differently if there were a tort of wrongful discharge; the other is that the organizational employer is the motivating force behind the violation in the first place.

In some instances an organization probably does pressure its lawyers into acting in unethical ways. Some attorneys, on the other hand, undoubtedly resist such influences to the point that they are discharged or forced to withdraw unless the organizational employer is convinced that the lawyer's ethical solution to the problem is preferable. Yet it seems unlikely that the first lawyer, who lacks the courage of his convictions, would gain the courage to resist the organization because of the assurance that he would be free to take on a corporate giant or his former law firm in litigation, and have his professional reputation shredded by a defense of justifiable discharge in the bargain.

Most attorneys, it is hoped, would refuse an order which would violate ethical standards. Presumably, such a person would refuse regardless of whether a possible remedy of wrongful discharge action existed; tenure is not needed to ensure this group's adherence to the canons of ethics. There might be a deterrent effect acting upon an organization if it realized that its insistence on unethical behavior would result in a lawsuit against the organization. It is doubtful, however, that such a deterrent would be effective against an organization which was not deterred by the knowledge that its attorney would report the violation if it occurred, even after the lawyer's discharge or withdrawal.⁶

5. For example, in the discovery area sanctions are available for refusal or failure to make discovery, including award of the movant's expenses, considering the refused information to be an adverse admission, foreclosing the presentation of claims, or contempt of court citation. FED. R. CIV. P. 37. See also note 2 *supra*.

6. ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANONS, DR 7-102(B) (1978) requires a lawyer to report his client or ex-client who wrongfully withholds information in discovery:

It seems unlikely, then, that the availability of a cause of action for wrongful discharge would cause many lawyers or organizations to act differently than they do presently, when faced with a conflict between professional ethics and the organization's self-interest. Beyond that, the proposed tort of wrongful discharge would not be effective in promoting the integrity of the profession because most violations of ethical standards are not caused by an organization's coercion of its attorney.⁷

It is convenient for the legal profession, concerned with its integrity and that of the legal system, to shift the blame to a vague and impersonal concept such as "the organization." However, in the common situation the attorney who violates an ethical standard does so of his own volition for a simple reason: he wants to win.⁸ Beginning with the first day of law school, the legal profession is litigious, competitive, argumentative and adversarial. The advocate's duty in the adversary system is to press every legal advantage for the client's benefit.

Every lawyer knows that to be effective, one must believe in the cause he advocates. Since the facts in any given case are seldom clear, the advocate adopts the version most to his liking.⁹ It is pos-

(B) A lawyer who receives information clearly establishing that:

- (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.
- (2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

See also ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANONS, DR 1-102 (A) (4), (5); DR 4-101(C) (2) (1978).

7. For example, in the instance described in note 2 *supra*, the defendant's attorney who suppressed documents was apparently acting on his own, not at his client's direction.
8. In K. HEGLAND, TRIAL AND PRACTICE SKILLS 153-55 (1978), the author cites two examples of this phenomenon from his clinical classes in trial advocacy at the University of Arizona: "The students had no clients, had no causes. They knew that they had been arbitrarily assigned to one hypothetical side. With nothing to gain other than personal victory, they were willing to engage in highly questionable behavior." *Id.* at 155.
9. Professor Hegland calls the desire to win a "distorting influence" upon beginning lawyers in their interviews of clients:

Many beginners simply want to win. They overlook the negative aspects of their client's case. The desires of the lawyer and client dangerously merge. The client wants to tell a winning story. In almost all cases he will be reluctant to disclose unfavorable material. In some cases, he will fudge truth and manufacture falsehood. Too often the client is aided and abetted in this by the lawyer. Wanting to hear a winning story, the lawyer, consciously or unconsciously,

sible to ignore the facts favorable to the other side, to discount the equity of the opponent's position.

For these reasons and others, some lawyers are able to rationalize unethical conduct, overlooking their duty to the legal system out of their desire to win. When this is the motivation, to act unethically, as it frequently is, the tort of wrongful discharge does not provide a solution to the problem.

IV. CONCLUSION

It does not appear that the proposal to provide attorneys with a limited form of tenure would contribute to the integrity of the legal system. It is doubtful that organizations which retain or employ legal counsel play a significant role in causing attorneys to violate professional standards of ethical conduct. In instances where an organization does attempt to influence its attorney to violate ethical standards, it seems doubtful that an attorney would react differently to such influences if a cause of action for wrongful discharge were provided.

Probably the major reason ethical violations occur is not because of organizational pressure on the attorney. It is the advocate's natural desire to win, magnified by certain features of the adversarial process, which makes a basically honest lawyer suppress unfavorable information in the discovery process or commit other ethical violations. The tort of wrongful discharge, which aims at the organization rather than its attorney, does not address the problem's primary cause.

One beneficial effect would result by allowing a cause of action for wrongful discharge of an attorney. Attorneys who have the courage to refuse their employers' demands to engage in unethical conduct are currently without a remedy. It is doubtful, however, that many lawyers have suffered this injustice. Any benefit of allowing the action would be outweighed by the adverse effects of the action on the legal system. Aside from protecting second rate attorneys from discharge and adding to already overcrowded court calendars, allowance of the action would result in spurious lawsuits by the least desirable members of the bar. Public confidence in the legal system would be lessened by emphasizing the faults of

may lead the client to a more agreeable version of the facts. Even where the lawyer is not an active participant in this twisting of historical fact, the desire to win may well still his rescue of it. He will allow the client to stay at the level of vague generalities and conclusions rather than forcing him to deal at the level of inconvenient fact. When he sees a contradiction, the lawyer will brush it aside and quickly forget it rather than confronting the client.

K. HEGLAND, *supra* note 8, at 206-07.

these lawyers while the virtues of the qualified practitioners who comprise the majority of the bar would remain submerged from public attention.

This essay concludes that the proposed tort of wrongful discharge will not improve or repair our system; it is feared that it may harm it. Yet it is much easier to criticize a bold and new idea than it is to suggest a better one. There are problems with our legal system which need correction. Only by initiating a dialogue, as Professor Kalish has done, will we move closer to their resolution.

The reasons for flaws in the legal system, as in society, are complex and manifold. There is no panacea which will insure the integrity of the system. It is to the bar's credit that it exerts a continuous, multi-faceted effort toward improvement of the legal process. This long-term commitment is necessary in order to realize beneficial results.

The measures already undertaken are steps in the right direction. Education of laymen concerning the tenets of the legal system, continuing legal education of the bar to insure the competence of its members, and revision and rigorous enforcement of disciplinary standards are all well suited to the task of insuring the integrity of the legal system. But one ingredient is essential to the health of the legal system: every prospective member of the bar must learn, and every lawyer must know, that he or she is the guardian of the integrity of the legal system. When each one of us accepts that responsibility, the integrity of the legal system will be assured.