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Oh, What a Tangled Web They Weave When Clients Practice to Deceive

By Norman Pattis*

I know a thing or two about murder. My practice is principally devoted to criminal defense, but it is family law that scares me. When I wander into a family law case, it is usually a high-conflict case. I am not sure the law is prepared to deal with high-conflict cases, but I see no other forum prepared to take on the furies and try to tame them.

In some cases, your clients are so bent by rage and fear that they choose courses of conduct you find repugnant. What should the lawyer do?

The easy answer is move to withdraw. But suppose the court denies your motion, and you find yourself in the well of the court with a client who insists on lying, who has hidden assets, or has otherwise engaged in conduct you cannot condone or endorse?

What about the case in which your client is at the very cusp of competence? Again, the criminal courts make things easy. If I suspect a client either cannot understand the nature of the case against him or cannot assist in his own defense, I can ask the criminal court to conduct a competency hearing.

There is no such vehicle in the civil system. If my client is so impaired as to be unable to manage her own affairs, I can seek a conservator. But that means a side trip to the probate court and a potential evidentiary trail a mile wide that my adversary can follow, all the while gathering nuggets to be used against my client in the family courts.

I can counsel the so-called reasonable person, the fictive citizen of the community of reasonable minds inhabiting the law's textbooks. It is the man next door, crushed by anger or too impaired to appreciate what reason suggests, that causes me sleepless nights.

The "Evil" Client

I am often asked how I can defend a man accused of raping his minor child or murdering a neighbor. The answer is simple. I follow what I call the Jimmy Hoffa Rule: I will defend you for anything you have done up until the moment you knock on my door. Yes, you can murder, dispose of a body, and boast about it. You need a defense. But do not ask me to help you hide the body. In other words, I draw a line between past and present.

I suppose that is a convenient line in the criminal courts, but it is not so simple in family law matters where the crisis that brings a client to your door is ongoing. Suppose your client insists on hiding assets, and you know she is hiding those assets. How do you satisfy your duty of candor toward the tribunal, your duty of fairness to third parties, and your duty of zealous advocacy to your client?

I am deeply suspicious of what I see going on in the family courts. In Connecticut, and I suspect many other places, there is a vast infrastructure of social workers, psychologists, counselors, and visitation workers all standing by to provide support for the parties in crisis. These workers strive mightily to arrive at consensus about the best interests of the children. Lawyers are often co-opted into the process, becoming less an advocate for the client than part of the therapeutic team aiming to resolve the conflict on "reasonable" terms.

Even the criminal courts are experimenting with this therapeutic jargon. We have drug courts, domestic violence courts, and psychiatric diversion programs. The wary practitioner can easily be seduced and encouraged to turn against the "unreasonable" client. It sometimes seems as though the world will not be safe until we're all safely consigned to one program or another, the rough edges of our psyches rubbed smooth by those who know best how we are to live.

How can you survive in a world of social workers, psychologists, and bar regulators bent on transforming the practice of law into an adjunct of the therapeutic state? How does one satisfy the competing imperatives of duty of loyalty and zealous advocacy to a client, the duty of candor toward the tribunal, and the duty of fairness to third parties?

A good metaphor helps: Consider yourself an ambassador serving the interests of your client. You needn't endorse, adopt, or even approve of the client's objectives. You need merely to understand her goals and be willing to serve them to the extent your professional responsibilities permit.

What should you as a lawyer do when a client insists on a path you cannot follow? He lies about his taxes, for example, or insists that you engage in a fraud on the court or a third party?

The answer: Always counsel a client to be truthful. The moment you advise deceit, your effectiveness as an advocate is compromised. Whatever else the law may be, it is a set of neutral principles designed and intended to resolve foreseeable and recurring conflicts in our society.

Clients are afraid and angry about what an unknown future holds. You serve as guide and counselor about the best potential choices and outcomes given the facts and circumstances of the case. You simply cannot reflect well the client's options if the mirror you hold is distorted by your needs. Ambassadors must be honest. The very essence of a conflict for the lawyer is being unable to disentangle your own interests from those of your client.

Hence, the lying client needs to be confronted. "I cannot permit you to lie to the court." Say it. If the client insists on lying, the first line of defense is a motion to withdraw as counsel. But be careful. Your client's secrets are still privileged. Most states permit a lawyer to make an ex-parte motion to withdraw. The preferred form of such a motion is simply to assert in as broad a set of terms as possible the nature of the conflict. In the case of the lying client, it may be enough to say simply that you cannot satisfy your duty of loyalty to the client and your duties to the court simultaneously.

Although the proceedings are ex parte, never state the actual basis of the conflict in pleadings. Don't say, "my client wants to lie about his taxes," for example. Sure, the pleading may be ex parte in state court, but tell a federal prosecutor armed with a grand jury subpoena that this pleading cannot be coughed up. It doesn't work. You hurt your client's chances when you betray these secrets.

Suppose the court does not let you out of the case, and the client persists in fraud. You are in lawyer's hell now. Get used to the heat. Ambassadors often are called upon to deliver bad news and to take heat.

Explain to your client that you cannot participate in the fraud. Period. Be prepared to be offered a bonus, to be stroked, cajoled, and even threatened. You might even be tempted to play the most dangerous game of all: pretending not to know the truth.

Consider the following: A lawyer cannot serve as a witness in a case. Thus, you might be tempted to claim an unhealthy agnosticism about larger truths. In a criminal case, it works like this: Your client claims an alibi when you first meet. He could not have murdered in Toledo because at the time the shots were fired he was in Los Angeles. Months later, he tells you the shots he fired were in self-defense. Both cannot be true. What should a lawyer do?

One way out is to say that because you are not a witness, you cannot say whether either is true. For all you know, there is a third, and even better, defense. You look at the client and say, in effect, "Whatever you say, I wasn't there." That might be defensible, but I cannot do it. It smacks of the sort of moral nihilism that will result, ultimately, in a form of moral madness or, at a minimum, disbarment. There are truths in the world in the form of provable facts. If, as a philosophical matter, there are no such truths, all I can say is that I earn my living as a lawyer, not a philosopher.

Your client insists on telling what you have every reason to believe is a lie. He wants you to offer a bogus financial affidavit or to permit him to testify to a fact that you have every good reason to believe is false. What now?

You refuse to participate in the fraud. You do not tender, for example, the bogus affidavit. If your client instructs you to do so, you tell him you will not. You recommend that he hire other counsel. If he does obtain new counsel, you keep your client's secrets and do not inform new counsel of your beliefs and conclusions about your client's veracity. Recall the attorney-client privilege?

Of course, you cannot knowingly stand by and permit your client to commit a fraud on the court. But neither do you have a duty to attend a court proceeding once another lawyer has replaced you. I am uncomfortable with my conclusion here, but it strikes me as sensible: Once the lying client leaves your firm, the privilege is still sacrosanct. Because you are no longer engaged as counsel, your duties to the court, incident to this case, are over.

Suppose the client will not get a new lawyer. He wants to go to court with you and only you. He takes the stand to testify, as is his right. He raises his hand to take the oath. He swears to tell the truth. He then sits down, and you are to begin your questioning. Now what?

Ask the questions you can ask, consistent with your duties. Avoid the questions that will lead to lies. Tell him you will not lead him down the liar's path.

Of course, this is too simple. You ask where he works, and he answers: I am self-employed and last year I earned $50,000. (You, of course, know that his earnings were $200,000.) If you move to strike the answer as nonresponsive, eyebrows will be raised, of course.

I have sometimes heard it said that you can lead a client to the courthouse, but you cannot make him think. It might just happen that after you cover the questions you can ask, your client insists on adding additional commentary, in this case blatant lies.

You are in one of hell's lower circles now. My recommendation is that you tell the court you are not claiming these responses and then sit down. Your adversary will smell blood and move in. Before the cross-examination begins, ask for a recess. Find the presiding administrative judge, not the judge hearing your case. Renew your ex-parte motion to withdraw. Assert simply that you cannot continue as counsel.

Now you have entered the lowest circle of hell, the very home of the Devil. Your motion is denied, and you are sent back into court to defend a lie. What now? I say simply tell the trial court you cannot perform your duties as counsel and you intend to sit mute. Yes, you risk contempt and a claim of malpractice. But at this point you have a choice to make. You either defend a lie or betray your client. Either option requires you to violate your duties as a lawyer. Because you cannot act, do nothing. Now the trial court must act: No judge, after all, wants a messy record going up on appeal.

You sit silently as all hell breaks loose. You sit and say as little as possible, and you realize that the law is not the domain of reasonable people bargaining in the law's shadow. You are now walking in the shadow of evil. No one said it would always be easy. There are no bargains you can strike here.

What is success?

Philosophers sometimes draw a distinction between pluralists and monists. A "monist" is someone who believes that there is one truth, one vision of what makes life worth living. We were trained as lawyers to believe in monism: The vision of reasonable people bargaining to reach "the" reasonable solution serves monism.

But we "pluralists" know better. There are many truths and many alternative visions of the good life. It may be that an impaired client arrives at a conception of good that you cannot accept. In such cases, your role is not to persuade the client to adopt your point of view. A good lawyer serves the client's interests. Always ask a potential client the following questions: What does success look like? How will I know if I have succeeded in representing you? If you do not like the answers, then don't take the case. Nothing obliges you to represent every person who calls.

But once you have signed on to a client's vision of the good, serve it with abandon. Call upon psychologists, social workers, and counselors of all sorts if you must, both to understand the client and to provide the client with information about what is reasonable to expect in your jurisdiction. As an ambassador, you fight for your client's version of the good.

In easy cases, a conservator or guardian may be appointed. These sorts of cases make me shudder. What they have in common is the substitution of one person's judgment for another. Recall, however, that in these cases you are not both counsel and conservator. You are still serving the interests of the other, even if, in these comparatively rare cases, the other is someone acting on your client's behalf.

The ethical issues are easier in these cases than in the case of the "evil" client. You are not asked to pit your duty to the court against your duty to a client. You are asked simply to adopt the humbling role of serving another's interest. I suspect that in a therapeutic context that role too often encourages an unhealthy contempt for those who are simply different.

If I have learned one thing practicing law, it is this: The law is silent on life's larger values and aims. Our role is simply to resolve conflicts, leaving clients to find their own answers as to what makes life worth living. Forget that lesson and you will be an unhappy lawyer because, as experience shows, there simply is no consensus on what reasonable people should do in a crisis. There are only answers conscientiously found after life-defining struggles. We lawyers are mere handmaidens.

Sidebar:

The Impaired Client: Beyond Good & Evil

The advocate's world is no less perilous when the client is beyond good and evil, but simply impaired. Again, recall the fiction: The law governs the Garden of Eden, reasonable people bargaining in the law's shadow. But what of clients who cannot bargain? Their impairments might not rise to the level of out-and-out insanity or incompetence. They may suffer a character disorder; perhaps they are borderline or sociopathic. Hold the mirror of truth up to them, and the image is always distorted.

These are far harder cases than mere evil, and this is where the metaphor of an ambassador will guide you through many a sleepless night. I have been reduced to tears in trying to counsel clients whose perception of their own interests seemed utterly self-destructive. I have sat with them, listened to them, and tried to rebut the assumptions

that l considered detours from any vision of what I recognized as good, true, and beautiful. There are clients who simply live in parallel universes that you will regard as unreasonable and uninhabitable. The advocate's role is not to substitute his or her own judgment for that of the client. Sometimes you accept the hand you are dealt and play it, knowing full well that you would never be willing to advance your own interests with such cards.

I tell clients seeking my representation that I have two roles. Before the world at large, I am their advocate. Their enemies become my foes. I will fight for them, risking all that they ask me to risk. But behind closed doors, I tell them that they are family. Some smile at the thought, but I remind them that family members speak bitter truths and sometimes are far from friendly. My job is to present options for my clients and to advise them on the course they should take, barring damage to my license and my integrity.

With impaired clients, that often means sending them for an evaluation to determine the extent of their impairment. An evaluation is work product. It need not be disclosed to the other side unless you intend to use the evaluator as an expert. The evaluation may assist you in helping to identify an impaired client's strengths and weaknesses. It can yield a referral to a therapist or counseling that can help you manage a client with expectations informed from a parallel sense of reality you do not share.

In the case of clients who are simply different, there is little cause to seek withdrawal from a case. Of course, the differences may be so vast that you find the client's objectives repugnant. In such cases, you can move to withdraw. But don't be surprised if the court denies your motion should the client claim that your departure will prejudice him. It is at such junctures that you define yourself as a lawyer.

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