

DON'T DRINK COFFEE WITH YOUR CLIENT

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I. INTRODUCTION

Today, I want to share with you some personal observations about how lawyers manage to get themselves into trouble, lose their effectiveness, run afoul of the Rules of Professional Conduct, and do harm to their clients, themselves, their causes, the legal profession, and the processes of the law. I do not intend to talk about the Rules of Professional Conduct except to the extent that you have specific questions. I assume that you have access to the Rules. I also assume that you desire to, and intend to, abide by those Rules. I also do not intend to talk about the fascinating ethical dilemmas that arise from time-to-time. I assume that when those moments arise, you will look to the literature, confer with colleagues, and resolve the matter in accord with your conscience and professional duties.

What I want to discuss with you are some underlying behaviors that lead lawyers not to recognize ethics issues when they come along, and that cause lawyers to lose the will to do the right thing even when they know what that right thing is. Lawyers ordinarily do not get into trouble with the Rules of Professional Conduct because they cannot find the Rules, or because the Rules are too complicated to understand, or because the lawyer cut into the ethics portion of a seminar. No. For the most part, lawyers get into trouble with ethics because they lose sight of what is important in life and what is important in the law, and, thereby, they lose the will to be ethical.

If I had to put a sub-title on this discussion, it would be: "One Lawyer's Speculations on the Underlying Causes of Unethical Behavior." Or, I might call it, "Four Rules for Avoiding Unethical Behavior that I believe can help us, as lawyers, retain the will to recognize ethics problems and resolve them in an appropriate way. I have gleaned these from my day-to-day experiences practicing law, from observing others in the practice, and from my years on the State Bar Council and its Ethics Committee. And while my experience

has been on the defense side of the courtroom, I believe these rules apply equally to lawyers on both sides of the courtroom. I am pleased to share them with you in the hope that you will carry them with you and find them helpful.

III. RULE ONE: "DON'T DRINK COFFEE WITH YOUR CLIENT"

When I first began practicing law in Raleigh in 1968, there was a coffee shop named Honaker's right next to the Wake County Courthouse in downtown Raleigh. Lawyers from all fields, including solicitors and criminal defense lawyers, gathered there at mid-morning to drink coffee. One morning, I went there with a client, sat at a table near where the lawyers were gathered, and drank coffee. The next day, one of my heroes in the Bar, Mr. Robert L. McMillan, approached me from across the lobby of the courthouse. He said, in a firm tone of voice, "Don't drink coffee with your client."

And this is the first of the four rules: "Don't drink coffee with your client."

This rule simply means: keep yourself physically and emotionally separated and apart from your client, the victim, your witnesses, all the principals on your side of a case. If you get too close, you may start to care too much. There is then a real danger of falling into unethical conduct. Closeness can bring in your own heart and mind a real fear about how the case is going to come out. One can become paralyzed and unable to act. Deadlines are missed. Research is not done. It is too frightening to put the case on the calendar and prepare to deal with it realistically. It is just too scary to pick up the file and confront the prospect of a possibly unsatisfactory outcome.

It also hurts too much to give the client, the victim, the witnesses, or other interested parties, bad news about the reality of the evidence and the case and the risks ahead. It hurts too much to look at the case and communicate honestly with these people. It becomes much easier to simply avoid the truth and to over-promise and give false hope. And it becomes much easier to step over the lines of propriety and improve the evidence or the applicable law by cheating just a little bit in an effort to please this person, or these people, whom you have come to know, like, respect, and pull for.

Keep your distance. For years, conferring with a client, I referred to "our position," and "the charges we face," and "our court date." Now, somewhat wiser, I consciously refer to "your position," "your charges," and "your court date."

Rule One, then, is, "Don't drink coffee with your client."

The wisdom of this rule has become clearer to me as the years have passed. And during those years, I have added three more rules to Mr. McMillan's original admonition.

IV. RULE TWO: "DRINK COFFEE WITH YOUR COLLEAGUES"

I have had a running battle with my partners over the matter of keeping time sheets - daily records of phone calls, conferences, court appearances, research, and other activities, all carefully noted with the appropriate case number, time spent, and tasks performed. I detest these things and have deeply suspected that my partners insist that I keep them because they have to - they always charge by the hour - and they want me to be as miserable as they are. But I have knuckled under and do the best I can to keep a time-sheet every day. One of our entry choices in this great age of computers is Code Number 920: "Education and Seminars." In fact, that is the code I will use to account for this time we are spending right now. I make an entry under this code almost every day for 3/4 of an hour. It is the code that comes closest to describing what I do at about 10:00 A.M. I go to the sixth floor of the Courthouse and drink coffee with defense lawyers, prosecutors, and judges in the Coffee Shop. It is one of the most important things that I do. It is how I keep in touch with my colleagues.

And that is Rule Two: "Drink Coffee With Your Colleagues."

I urge you to do that. One of the most difficult aspects of what we do for a living is knowing whether we are doing okay; whether we are on the right track. There's not much science to trying cases. It's mostly art. There are at least a thousand ways to pick a jury, make an opening statement, put on evidence, cross-examine a witness, and make a final summation. Since we cannot try a case one way and then, if we are unsuccessful, go back and try it another way, there's not much opportunity to learn, with any degree of certainty, what works and what does not work. Did the jury come back with an unfavorable verdict because my method was somehow fatally flawed, because I used a poor approach, or because, no matter what I did in the case, the evidence and the law were such as to doom my effort from the beginning. Since the jury apparently was not moved by my effort, should I abandon the new approach to opening statement that I tried? It made sense and seemed like a really good idea at the time.

With no way to try different approaches to the same case, it is very difficult to determine whether we are on the right track. In this setting, it is easy to expect too much of oneself.

If we have unrealistic expectations about our ability as lawyers to affect outcomes, it is easy to cheat just a little. It is easy to subtly suggest that the witness change that one little troublesome aspect of "the story." It is easy to over-reach and misrepresent one small fact to the court, to hold back on one

little piece of information that the defense probably would like to have but which probably is not really favorable to the defendant; and, besides, the defense lawyer probably would not know what to do with it anyway.

Communism with colleagues helps one keep in touch with reality. Is Judge Bailey giving you hell in court? Drink coffee with your colleagues and learn that he is giving everybody, prosecutors and defense lawyers, hell. A defense lawyer can go to coffee and learn what to say at sentencing on behalf of the miserable defendant who has never been employed and has wasted his life immersed in crime. It was at coffee that I learned that you can say, "Your Honor, he has a wonderful mother." Suppose his mother is not wonderful. At coffee, I learned that you can say, "Your Honor, I understand that when his mother was a young woman, she could whistle really well."

You don't have to drink coffee on the sixth floor, of course. Wherever you are, you can commune with your colleagues and gain insights that help you to have reasonable expectations of yourself. If you are in another city, another part of the country, or another part of the world, you can go to the courthouse and listen to the lawyers and commune with them. I have heard lawyers groan about not being able to win a DWI case all over this country and on three continents.

Clearly, there is much that we as lawyers can do to affect the outcome of the cases in which we are involved. Indeed, I believe that the impact of the lawyers in a case is often underestimated. But there also are limits to what we can accomplish in any case. Forces beyond our control often are overwhelming and deterministic. A friend and colleague of mine had an experience that dramatically illustrates the role that forces beyond our control, including the force of pure chance, often play in our work. He represented a man whose scheduled surrender to authorities at the magistrate's office was postponed by a winter storm that shut down everything, including the courthouse. Two days later, when the snow and ice had melted, my friend contacted the investigating officer to reschedule the surrender. The officer explained that, during the interim, while the city lay paralyzed, he thought about the case a lot, realized that he was not at peace with the prosecuting witness's account, and wanted to investigate some more before making a final decision. A week later, the officer contacted my friend, the lawyer, and told him that he had completed his investigation and had decided not to charge the man. As my friend says about that outcome when he recounts this incident, "Now that's great lawyering."

Lawyers involved in criminal trial work have always faced impossible tasks. On my office wall are a series of popular woodcuts by Daumier depicting moments in a lawyer's life. One of my favorites shows a lawyer in court extolling the virtues of a down-trodden, hapless wrong-doer. It is entitled, "A Respected Citizen." Another shows a lawyer referring to an unfortunate sinner as, "This

Saintly woman." I take great comfort from these pictures. The challenges we face as lawyers, the difficult arguments we have to make, the moments when we must make a reasonable argument when there is no reasonable argument to be made, have been faced by the members of our profession for hundreds of years.

You can be aware of, and take comfort from, the timeless universality of these impossible tasks if you drink coffee with your colleagues. Commune with them. Commune with your profession, and its history, and stay in touch with reality.

A lawyer isolated from colleagues is far more likely to have unreasonable expectations, to cheat a bit to meet those expectations, and run afoul of the Rules of Professional Conduct. In all my years on the State Bar Council, I don't believe a discipline case ever came before us involving a lawyer who was engaged on a day-to-day basis in close relationships with colleagues in the profession.

Early in my career, I represented a man charged with common law robbery. He could have received a maximum of ten years in prison. The client and his family were hoping for, and expecting, probation. I made my very best argument at sentencing, pointing out every redeeming quality I could think of - including the goodness of this man's mother. At the end of all that, the judge sentenced the man to nine years in prison. The bailiff let me have a few minutes in the jury room with the defendant and his family. The defendant cried, his family cried - they were sad, angry with the solicitor, the judge, and mostly me - and I cried. (In those days, I expected too much of myself.) I watched the bailiff lead the defendant away to begin his sentence. I walked the family to the door of the courthouse and said an apologetic good-bye, and went to the sixth floor coffee shop. When I walked in, the defense lawyers gathered there for morning coffee greeted me with applause and congratulations. "Great job," they said. "You saved that man a year a year in prison."

I love lawyers. They define victory and success in particularly realistic ways. Your colleagues will share those definitions with you if you will give them the opportunity. Commune with the members of your profession.

So, that is Rule Two: "Drink Coffee with Your Colleagues."

V. RULE THREE: "DRINK COFFEE ALONE"

The third rule is: "Drink Coffee Alone."

This rule simply means that one should spend some time tending to one's personal self.

Through the years, I have been startled to realize the full extent of the human reality of the conflicts which we lawyers undertake to resolve. These cases in which we become embroiled are clashes of interests between and among people. At some level, I always knew that. What I didn't really appreciate was just how tightly all the interesting legal and strategic questions are bound to flesh and blood. All these people involved in our cases feel love and hate and anger and sadness. They bleed and hurt and cry. So do their families and friends. The victim feels and hurts and cries and so do the victim's family and friends. The defendant feels and hurts and cries and so do the defendant's family and friends. And so do the witnesses, judges, jurors, clerks, and bailiffs. A lawyer who enters this emotional quagmire better go in with a secure personal identity of his or her own. Otherwise, the blood and hurt and tears of the parties become the blood and hurt and tears of the lawyer.

A lawyer who permits his or her identity to drown in the identity of the parties and witnesses in the case, or who permits his or her identity to be swallowed up in the cause itself, becomes ineffective as an advocate and is a real candidate for professional wrong-doing. Lying and cheating and misrepresenting really become pretty easy in such a situation. A healthy person, as I understand it, is one who acts on his or her feelings through his or her reason. A lawyer simply cannot afford to act on the feelings of the people involved in the case.

It is crucial, therefore, that we spend time with our own personal selves, examine ourselves, understand ourselves, and work hard to keep our own separate identity intact. Feelings of self-worth come from within; from acting routinely and consistently on our own honest feelings in accord with our best lights. Feelings of self-worth do not come from success in the external world - in the practice of law or in other endeavors. A person who expects to find self-worth from success in lawyering - particularly criminal trial lawyering - is going to be disappointed. Coach Dean Smith has said: "If you make every game a life or death proposition, you're going to have problems. For one thing, you'll be dead a lot."

And so it is with the practice of criminal law. If we make every case a matter of life and death, we're going to have problems. For one thing, we'll be dead a lot. Perspective is crucial if we are to contribute enduring light to our profession and not be merely a shooting star - brilliant, but only for a fleeting moment.

So, tend to yourself. Don't look to the practice of law for your happiness. Look inside yourself for your happiness.

Rule Three, then, is "Drink coffee alone."

VI. RULE FOUR: "DRINK WINE WITH YOUR LOVED ONES"

Rule Four is, "Drink wine with your loved ones."

This simply means that you should tend to the important relationships in your life.

Our need for others, and our need to have others need us, fades quickly from conscious thought in the face of the day-to-day world of preparing, meeting deadlines, and trying cases. Those needs, however, I believe to be a basic part of the human condition.

If a lawyer ignores loving and caring relationships, and decides to go it alone, his or her ability to make sound judgments, based on genuine feelings, suffers. The lawyer then gets hurt, and so do the parties, the witnesses, the processes of the court, and the legal profession.

For the first fifteen years of my practice, I went wide open. The only limit on how long I would prepare for trial was the number of hours available between now and the trial. I suffered and my effectiveness in cases suffered. I don't do that anymore. I urge you not to do it. Lawyering is about living. You won't be very good at lawyering if you are too immersed in work, or too exhausted from work, to experience life, fully involved with people who are important to you.

So, do not isolate yourself from people. Let there always be people in your life who matter to you beyond measure. And spend time with them.

So that is the fourth, and final, rule: "Drink wine with your loved ones."

VII. CONCLUSION

We lawyers simply cannot afford to give our entire selves to our clients and the cases and causes in which we become involved. When we do that, we run the risk of caring too much and becoming paralyzed with fear, we come to have unrealistic expectations of ourselves, we lose the ability to make sound judgments based on our own honest feelings, and we lose the benefit of the wisdom that comes from being fully involved in living. If you are giving your entire self to the practice of law, I urge not to do that anymore.

So, by way of review, the rules are:

1. Don't drink coffee with your client.
2. Drink coffee with your colleagues.
3. Drink coffee alone.
4. Drink wine with your loved ones.

Life has been for me about ten times as difficult as I thought it would be. Practicing law has been about five times as difficult as I thought it would be. It's not the intellectual side of living and lawyering that is so hard; it's the personal and emotional side. If you keep your distance from the people involved in your cases, stay in touch with your colleagues, take care of yourself, and give attention to important relationships in your life, recognizing and resolving questions of ethics that arise from time-to-time will be easy.

Thank you.