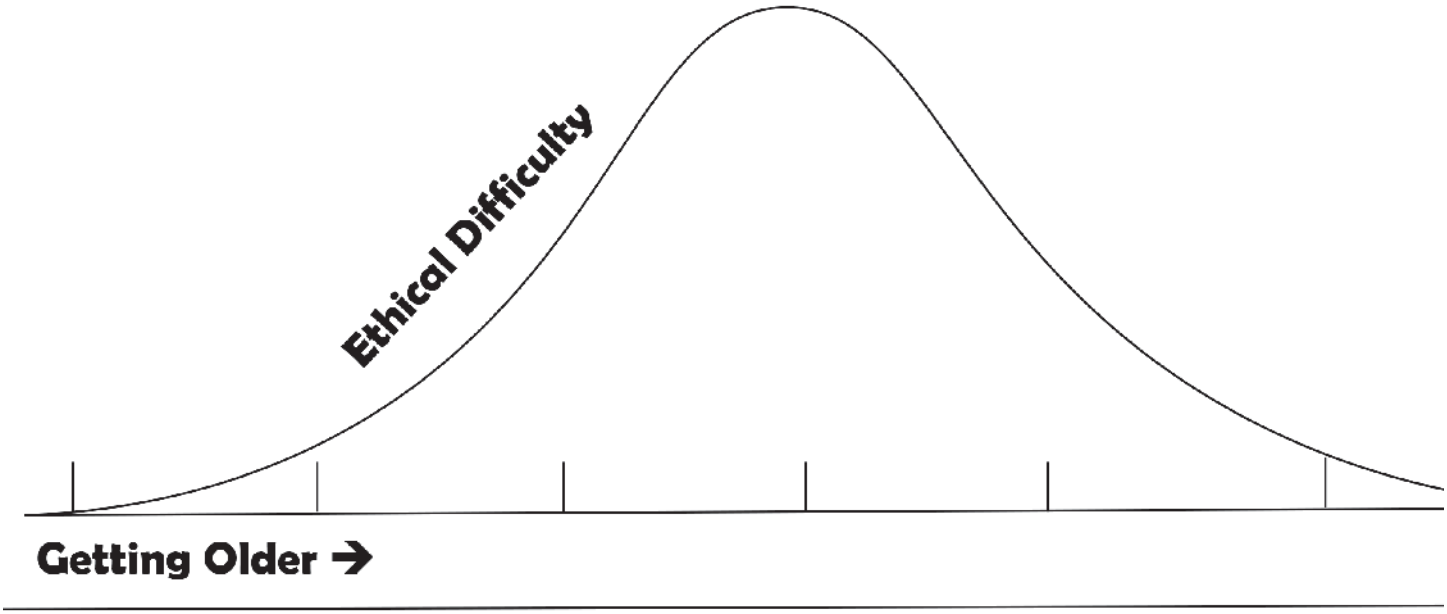
Ethics is Easier When You're Older



By Johnny Myers

The Preamble to Pennsylvania's Rules of Professional Conduct says this about ethical behavior and a certain conflict of interest:

> [9]...Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living.

It's a typical provision. And as every practicing lawyer comes to quickly understand, the personal consequence resulting from decisions and advice weighs hugely in our decision-making processes. We almost always claim to put those considerations aside. We refer to them, sensitively, as "misaligned financial incentives." But I think it's worth reflecting that this is much easier at the end of one's career than the beginning. Simply put, age is a difference that makes a lot of things different; it's more than just a number. It makes ethical decision-making less complicated and pressured.

Part of this is that we get more reflective; and I have been thinking about whether my present (perceived) ease in making ethical decisions may have changed as part of my own aging process. I'm not talking about maturity here; I'm just thinking about the fact that I am much nearer the end than the beginning of a career.

I'm pretty clear the answer is "yes"—it's become easier.

Of course, the ethical rules are pretty clear: loyalty is required; personal interests can't get in the way of proper legal advice; civility is called for; and the need for truthiness invades most legal contacts.

We lawyers are "professionals," so we are expected to adhere to the ethical rules and other higher ideals, even when contrary to our own professional and economic interests. But we also have to eat. The quoted preamble describes the problem. We worry about professional survival and advancement; and we —hardly alone among professionals—like to avoid the risk of enormous personal consequence to ourselves.

The problem with ethics is that the questions don't arise when it's easy—except in law school, where the real pressures of life are nearly impossible to replicate. We are usually able to process the balance of competing interests, and how to deal with our own, when we are actually doing it. I have usually known when there is a difference between what a client wanted to hear, and what they needed to hear. The complicator has always been the client volatility factor: many are willing, ready, and able to "shop" for advice until they get what they want. Some just won't hear "no." We read

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often about high-profile clients changing "teams" because of "differences." Difficult, but we can't live without them. And it's almost always viewed as a good thing if we keep them, so long as they pay the bills.

And of course, when it's a really big client (say, 1/3 or more of your practice) or you are in-house or otherwise captive, the personal consequence cloud is all the darker. We probably all do the same thing—first, we try to duck the hypo and avoid having to deliver unwelcome advice. We avoid confrontation with ideas like "possibilities," "further research," "perhaps," and "let's see." That list can be long. But we actually know how it will play out. It's so much easier when we convince ourselves that there's a way to avoid giving the not-wanted advice; but we often know, that it's either "yes" or "no," and clear either way. And we also know that will inflame the client. It takes a special relationship to keep a client to whom you have to say "no." And special relationships don't come easy.

Early in my career, I had it easy. My clients as a public defender (in the 70s) had nowhere else to go. And even if I was "fired" by one of them, it would be of no personal economic consequence; just bruised ego, perhaps. So I could be abrupt, confrontive, even at times rude, in dispensing advice. If I "knew" the answer, I was completely free to deliver it. And I did, with sufficient lack of grace and finesse that, when I left that job, my colleagues gave me a rubber hammer said to be a "retired" tool I had used in "discussing" certain recommendations. In other words, I worked really hard at delivering the tough messages to recalcitrant clients about the wisdom/necessity of a particular path, often a guilty plea.

That hammer has hung in every office I have had since, as an important reminder.

I was next a lawyer for the city of Philadelphia. My clients, no longer criminal defendants, were a mix of civil servants and elected officials. It was a time (the 80s) of governmental reform. Although the clients were different in some ways, they, too, needed straight, forceful talk. Could I deliver it without personal risk? Not always, because I was dealing with well-connected civil servants at the top of the food chain, as well as those who were elected. And I was the newbie, so to speak, and an at-will employee whose only job security was the backing of a string of strong city solicitors. I felt safe enough, but I harbored doubts from time to time, usually as a result of my own brashness. When handling a matter for a senior judge, I gave this advice as to whether to settle an employment discrimination case:

Judge, I'll tell you what I have told many Defender clients about the risks of going to trial. There are only two who know you aren't a discriminator: You and God. I can never get God into court; and you will not be believed by a jury. That's why we have to settle.

The judge actually got out of the chair and started at me, furious. I scuttled back to the office, reported what had happened, including my unforgivably brash speech, and waited for the hammer to drop. The judge called; tempers flared and were calmed; the settlement was authorized; we made up; and I continued both with my career and with my advising the judge. I think this might have been the first time that I felt the personal economic risk of putting the job-client relation on the line in order to deliver the best advice. It certainly would have been safer to just try the case and lose. But that would have been lousy lawyering.

That wasn't the last time, and it wasn't the hardest. At my next job (the 90s)— as a very junior partner in a small firm—life seemed very different. I had two children and a mortgage. Although we had two incomes, we also had real financial responsibilities. I loved what I thought was relative job security. And I loved the firm, headed by one of the city's lions. We represented all sorts: small and medium businesses, entrepreneurs, banks, individual plaintiffs and defendants. It was a wonderful practice.

Our client, a wealthy individual in a hotly contested matter, demanded that I go on the "attack" at a particular deposition. They thought that if I was aggressive and rough enough, there was a chance I could literally cause the witness to break down. My reaction to the demand was immediate and very negative, but the client was one of the firm's most important. I held my tongue with the client, but immediately talked to the Senior and said I couldn't and wouldn't do it, and would understand if I was replaced on the case. The Senior, with no hesitation, asked the client to come in, told him we would not do his bidding, and that we would help him find replacement counsel. That's just what we did.

The client was pretty surprised. I was thrilled. Not only was I still employed, but at a firm that held to its professional guns in a way that made me proud. I was working with a Senior who also took professionalism seriously.

My point—yes, I have one—is not to profess any particular wisdom or heroism or ethical purity. Have all my trial discovery tactics been the purest? Have I ever been obstreperous? Have I ever overstepped at a deposition? Ask a question I knew was improper? Did I ever settle without the other side knowing key facts? Well, "… hardly ever." We all face decisions where our personal and professional needs enter into, or at least color, our decision-making for clients. In my case, I have muddled through many decisions around the "bright lines" of professionalism, doing the best I can. I am sure I often have been too sanctimonious or aggressive; I am equally sure I have self-justified a little too often. What has been relatively constant, most of the time, is that I have kept a pretty clear image of what I should be doing. Of course, it also has certainly helped that I have been living with a law school ethics professor my entire professional life.

So, what's age got to do with it? The tensions in the early years were certainly eased by my two key facts: first, I wasn't

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