

THE CLIENT FRAUD PROBLEM: A JUSTINIAN QUARTET

Geoffrey C. Hazard, Jr.

Its a welcome opportunity to be with you. In following the model set by my predecessors, I take the opportunity to say some things that are completely irrelevant to the stated topic. First of all, I believe the prosecutors and the police and the judges and the defense attorneys are, under our present system, unmeshed in a legal system and an administrative system, referring now to the practical facts that Monroe was talking about, that virtually compels them to cheat upon their formal obligations under the law. I think that the exclusionary rule is an engine that drives the police to do much of what they do. My impression is that the police forty years ago were much more inclined to be more nearly truthful in their reports of an arrest transaction because they were aware then that they might get an administrative slap on the wrist but that their cases would not be dismissed because of infraction.

I don't overlook for a moment all the injustices that led the Supreme Court to adopt the exclusionary rules. I was brought up in the near South. Some of you may have even heard of the Sykeston Lynching, which occurred when I was a child. I didn't really understand what it was, except that it was horrible. So I don't yield to anybody on awareness of the social conditions that gave rise to the exclusionary rule. As a former President of the United States said, I'm talking about "a condition." I would say that the same is true of judges. The judges get fed this stuff. The example of Judge Beyer illustrates what can happen, what does happen, what judges who are sensible know will happen. Judges on the state bench are not in there for life. They don't want to choke, but they don't want to lose their jobs, and they do what they do.

The defense lawyers are also in the condition that Monroe described. Systemic malpractice because they don't have time to listen all the way through to what's relevant in a narrow sense, let alone listen in the way that a true legal counsellor would, to hear the inner voice of this person who is now emeshed in the criminal law, which is as bad a fate as can happen to anyone; to try at least to convey a sense of sympathy, to understand human to human what the defendants face. "We don't

have time," the defender would say, and he would be right. He's looking at another bunch of files that might include a case where, as luck would have it, he might be able to get somebody off as distinct from cutting their sentence. I adopt everything that Monroe said about that condition. I adopt everything that Marvin said about the sentencing guidelines. I think we - the legal profession in particular - are trapped in a system that drives us to evil conduct.

Much the same thing exists in civil litigation. My friend, Bob Cummins, wondered why we didn't talk about that too. I participate a lot in civil litigation as a consultant and as an advocate and as an expert witness. I can tell you that across a wide part of it, it stinks just as much as criminal justice. I'm participating in hearings now that I don't quite believe are happening. People are denying that up is "up." It's astonishing then that judges and lawyers are now obfuscating, lying, denying, because they can't deal with the fact that they have committed grave professional offenses. And some of these offenses are on the record. They're not back room.

Why are these occurring? For roughly the same kinds of reasons that prosecuting lawyers and defense lawyers are doing what they are doing. Because the pressures have become so severe to get results for clients, while staying within the rules requires us to produce documents, to be fully truthful in the evidence we present, etc., etc., etc.

One could say, and people have said, that the criminal law system is breaking down because it is trying to accomplish more in social virtue, particularly in the drug field, than our human institutions have capacity to achieve the results. The same is true of much of our civil regulation and our regulatory scheme. We are emeshed in a legal system whose ambitions, substantive and procedural, far outrun the capacity of our political order to sustain them in a way even approximately conforming to the norms we profess. Hence, we find ourselves a despised profession and rightly so. We are monumentally hypocritical in pretending that we can bring it off when we are demonstrably not pulling it off.

With that happy preface, I want to say I am not ashamed to be a lawyer. I try to be a virtuous one. I've made mistakes. I make a lot of judgment calls, some of them are wrong. I think I know what the rules are. I think I have an idea of the limitations of administered justice and the limitations of fairness in transactions and I do what I can when I'm called upon to help in them. I think a lot of my colleagues in the bar do not have the ability and the sensitivities that measure up to the task. However, I am deeply sympathetic with the condition that many of them find themselves in, for reasons I've just suggested.

It is that social condition in which I have been commissioned now and then. Presently, in the Law Governing Lawyers and other work of the ALI, we confront identical problems for the practitioners.

My paper speaks about several different viewpoints of the law. I want to start with the one that's last in my paper, which is the legislator's viewpoint. The legislator is the one who is called upon to write rules, which is what Marvin's and Monroe's and Alan's talk is prefatory to doing. "After you're all done with the speeches, fellas, what are you gonna put down in the book?" Many of the issues I think are much more difficult than the speeches admit. If you take my view, most everything that was said in all parts of the speeches was correct. If it is all true, then the draftsman has a real problem.

With particular regard to client fraud, when you get all done with it that the law says this: a lawyer may not "knowingly," and that's one word, "assist," and that's another word, a client in committing fraud. That's a very simple rule. It is in the general law of crimes. It is in the general law of torts. Its interdicted by the professional rules. The problem can't therefore lie in the formulation of such a standard. Rather, the problem is what does one mean by "knowingly," a subject that was talked about in different ways earlier today, and what do you mean by "assist." It turns out we have to have a very subtle idea of "knowing" and "assisting."

Having written the rule as legislature, we are therefore only at the beginning of the problem from the point of view of practitioners. After the law giver has spoken, we have to ask to what these utterances mean. And I want to quickly identify three perspectives from which the meanings are different.

One perspective much talked about today is the trial advocate. My own view is a combination I think of Marvin's and Monroe's. A lawyer has to know what's going on but a lawyer cannot acknowledge that he knows what is going on - that is whether his client is guilty - when the client goes to trial. Have in mind that most of the cases don't go to trial. They are settled with a plea bargain. Not because invariably the lawyer doesn't have time to find out what the case is about, although that is a serious problem in criminal cases. Not so much a serious problem in civil cases, because the lawyer does find out what it was about and realizes that the client would be foolhardy to go to trial. The lawyer tries to convey to the client from what is inevitably a judgmental position that the client would be insane to go to trial because you're not going to win and if you lose, you're going to be much worse off than if you, as we say, cop a plea. That's what lawyers do. We are, at the same time, judging

our clients and acting for them. To emphasize the one role in derogation of the other is to misunderstand the complexity of the role.

There has to be great subtlety in the lawyer's interpretation to the client of what the lawyer is doing. If I many quarrel briefly with Monroe, I think there's a danger in a lawyer thinking of himself as a hero or a champion. That stance addresses attention to the self of the lawyer, disregarding the function, which is to do the best job for the client, and that may well entail passing up the opportunity to look good. Thus, I may have to look rather timid in order to accomplish the objectives that would best serve my client. How do I know that will best serve my client? I have to decide that. Of course, if the client says he wants to go to trial, we go to trial. However, the client's entitled to know what I think for real and not some pretended belief cobbled together out of admonitions that I'm forever his champion. So I have a minor quarrel with Monroe, on that I think he and I would probably work that out if we went at it long enough. But that's the trial advocate.

What is the view of this situation from the judge's viewpoint? As Marvin discovered when he spent some time calling balls and strikes on the bench, the judge is served up two competing incomplete stories of a now gone reality. Reality disappeared when the event was accomplished. We now have recounts about it. They are stories obviously contrived with a view toward their plausibility to a tribunal. The judge is getting what Solomon got in the case of the two women disputing over the child. He conducted, as you will recall, a settlement conference. That is what judges get and judges can't go beyond it. The ambition to find out what really happened is a useful ideal, but the judge has to understand that it is one that she is unlikely to accomplish. There's an enormous ambivalence in that function. I am trying all the time to find out what really happened and yet I know I won't. Its a familiar experience. I have encountered it a number of times in dealing with my children.

I now move to another viewpoint, the transaction lawyer. What most lawyers do *is* transactions. Negotiating a criminal case, negotiating settlement of a civil case is transactional representation. More generally, we do the negotiation of the real estate deals, the securities statements, the environmental compliance declarations, the tax returns, etc.

Here, the viewpoint of the rule against knowingly assisting a client takes on a very different cast, for a simple reason. The lawyer is an actor in the transaction. The advocate stands away from the transaction looking at it retrospectively and participating in a show and tell about what happened. The judge witnesses the show and tell. The transaction law-

yer is doing it. Real time, real events, irreversible, risk laden. Suppose it turns out that the documents your client has provided to you are false. How do you deal with that? Any lawyer who doesn't have the ability to "know" something is dead in that situation. You have to know, apart from the interest of your client is the interest in your own reputation and sense of probity. If you don't *know* whether the deal you have smells, then you have a fatal deficiency in your olfactory skills. Read the charge to be read to a jury against the lawyer. A lawyer may be inferred to know that which someone in his calling and with his competence would be assumed to know, which is a shorthand rendition of an opinion by Judge Friendly. So the transaction lawyer has to know. He may have to abort a transaction, which is essentially to accuse the client engaged in something that the lawyer doesn't care to be associated with. Is the transaction one that's within the terms of the law or is it not? Is my client giving me the straight bill or is he or she not? "What's going on?" is the question that the lawyer has to answer for himself or herself, in conditions of incomplete knowledge, uncertainty, changing circumstances, and the possibility of very serious consequences.

When we get done with it, the question "can a lawyer know anything?", at least for the transaction lawyer, in my opinion is an empty question. Of course we have to. Thank you.