

## Ignorance Is Not an Excuse

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Ethics

If you “do” ethics or are on your firm’s or agency’s ethics committee, you will recognize the following scenario.

At a pleasant social setting, a colleague engages you in discussion about an ethical issue. Another colleague approaches, about to join in the conversation—until she realizes what you’re talking about. Then there’s a quick backing away, usually accompanied by something like the following apology: “I don’t know anything about that, and I’m anxious to keep it that way.”

If you ask why the colleague is so determined to remain blissfully ignorant of the issue, she will tell you that if a lawyer unwittingly commits an ethics violation, she may be hauled up on charges, but at least she could not be tagged with a knowing or willful violation.

This notion may stem from a kernel of truth concerning the efficacy of pleading ignorance of the law in general. Ignorance can sometimes form a legal excuse, despite the maxim of 17th century thinker John Selden that “Ignorance of the law excuses no man.”

Indeed, despite Rule 1.1’s admonition that lawyers represent their clients competently—in other words, with such care, skill, preparation, and legal knowledge as is necessary for the undertaking—there are decisions that say no person can be presumed to know all the law.

We are indebted to John Mueller of Cincinnati and Jerome Fishkin of San Francisco for a number of such decisions cited in a recent discussion on the new listserv of the Association of Professional Responsibility Lawyers (APRL). The case of *Hillegass v. Bender*, 78 Ind. 225 (1881), for example, holds that:

A lawyer is not liable for every mistake. He is not liable for a mistake committed in matters where the law is doubtful and uncertain. . . . The man who professes to act as a lawyer must be acquainted with the settled rules of law and the practice of the courts prevailing in the locality wherein he practices.

The California Business and Professional Code similarly states that: “An attorney may be disciplined for a violation of his oath to discharge his duties to the best of his knowledge and ability, but mere ignorance of the law in conducting the affairs of a client in good faith is not cause for discipline.”

Mueller and Fishkin cited a number of other cases to much the same effect. These authorities were marshaled in answer to a request from another subscriber involved in a disciplinary proceeding in a Western state, in which the bar’s position had been that lawyers must be irrebutably presumed to know the law.

Hence, this bar had contended, any lawyer who counsels or assists a client in something that turns out to be illegal automatically violates the prohibition, found in the District of Columbia’s Rule 3.3(a)(2), against “counsel[ing] or assist[ing] a client in conduct that the lawyer knows is criminal or fraudulent.”

That is nonsense, of course—especially since the bar counsel in question wanted to require such omnibus knowledge as to the law generally.

This argument was quickly dropped. But there certainly is authority that lawyers have an obligation to inform themselves about the ethics rules. This is a learned profession, after all. And since it is a profession, the subject of ethics is of special importance.

It would appear, therefore, that ignorance of the ethics rules, particularly willful ignorance—and given the existence of such a duty, wouldn’t it almost always be willful?—is a very weak plea in mitigation. It is hard to avoid the conclusion that one would be as culpable as if one actually knew the rule and acted in violation of it.

Even as to ignorance of the law, a common theme in the authorities is good faith. More than a label, good faith has a burden of meaning and a distinctly moral dimension. Thus, a lawyer who genuinely tries to equip himself or herself as much as is reasonably necessary for the case in hand will ordinarily not be punished merely for getting it wrong.

But since the head-in-the-sand attitude is by no means unusual in this town, it is worth analyzing. We might pose the question as follows: Why would a lawyer deliberately and consciously choose to be ignorant of what the ethical rules of the profession require?

There is the rationale offered above— that if a lawyer doesn't know what the Rules of Professional Conduct require in certain circumstances, it would not be fair to say that a violation was deliberate and the sanctions would thus be less severe.

There is also a more cynical approach: If the lawyer takes the trouble to learn what the rules require, he may miss out on a piece of business or a fee that, absent such knowledge, he would be free to take. Chances are excellent that he won't get caught, and if he does, well, he didn't know, right?

Wrong. The D.C. Court of Appeals in *In Re Millstein*, 667 A.2d 1355 (1995), commended the Board on Professional Responsibility's hearing committee's recognition "that the respondent's misconduct was aggravated by his ignorance of the Rules of Professional Conduct" and approved its recommendation that, in addition to other discipline, he be required to take a course in professional responsibility. The court cited *In re Robinson*, 635 A.2d 352 (D.C., 1993) and *In re Spaulding*, 635 A.2d 343 (D.C., 1993). See also, *In re Ray*, 675 A.2d 1381 (D.C., 1997).

While no one expects universal knowledge of a lawyer, it is entirely appropriate for our profession to expect from each of us

a conscientious effort to learn as much as we reasonably can about the standards that the bar has articulated for us and to attempt to conform our conduct to them.

So the next time a friend or colleague starts backstroking as soon as the realization hits that it's ethics you're talking about, take some time to remind him that lawyers are supposed to be ethical and that this entails a reasonable effort to know what the rules require.

After all, under Rule 5.1 (Responsibilities of a Partner or Supervisory Lawyer), you have an obligation to see to it that your colleagues and subordinates conform to the rules. This obligation even extends to nonlawyer subordinates under Rule 5.3.

In other words, you have to tell them, and they have to listen. What more could a lawyer ask for?

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