

1

Lawyering in a Time of Great Change Don't Panic and Get Help

Lucian T. Pera

Lawyers today live and practice law in a time of great change. The way we practice law has changed rapidly, and it continues to change. So has—and does—legal ethics.

Most lawyers understand that the rules and law regulating how we practice—legal ethics and lawyering—have evolved significantly over the last generation. These changes have rippled through most aspects of the way we are regulated as lawyers, including the content and source of that regulation, and consequences of that regulation, and our appropriate daily response to that regulation.

Most importantly for practicing lawyers, the day-to-day importance of legal ethics and the law of lawyering has grown, and the need for practicing lawyers to recognize and get help on these issues has increased.

Not every environmental lawyer needs to be an ethics expert. Now more than ever, though, every environmental lawyer needs to be able to quickly identify the moment she faces an ethics or lawyering

issue and know where and how to get the help she needs to successfully address it. Taking an ethics CLE in your field every so often might help. Having an ethics lawyer in your firm or knowing one who can help is immensely valuable. Owning and using a resource like this book, aimed at bringing practical guidance to environmental law practitioners, can also help, especially for lawyers who, in advance of trouble, use it to become familiar with the issues that lie in wait for them.

In today's world, more than ever before, lawyers must be mindful of legal ethics and lawyering issues and thoughtfully and directly address them.



When I started practicing law in Memphis in 1986, fresh from a judicial clerkship, the business of law looked a lot more like 1956 than 2016.

Few lawyers had computers; older lawyers thought they *might* be OK for secretaries; and laptops (weighing in at 13 pounds or more) were little more than expensive toys for geeks. We all still knew what carbon paper and typewriters were, even if secretaries were using fancy new electronic typewriters with memory. “Word processing” was still a department in many larger law firms, not a software package. Faxes were a strange new technology, and getting a FedEx package was a big event in a lawyer's week. Most law firms still had human telephone operators and no voicemail.

As I write in 2016, virtually every lawyer is inseparable, wherever she goes, from a handheld device with more computing power than a room-sized computer of three decades ago or the computers that ran guidance on the space shuttle. Armed with a smartphone and a laptop (or even a tablet), she can comfortably practice law from almost anywhere on Earth with an internet connection; her phone number tells her clients nothing about where she lives, works, or takes phone calls; and a physical office and a secretary are purely optional.

Of course, much more than her technology has changed.

In 1986, in response to a letter—an actual paper letter, delivered by the U.S. Postal Service—from opposing counsel or a client, she might have done legal research (maybe even in books), drafted a memo or letter or contract, and replied by letter a few days or even a week later. In 2016, the contact from opposing counsel or a client is far more likely to come by email or even text message, and a response

delayed for a few days or a week might well lead the client to find replacement counsel or opposing counsel to file a motion demanding a response. Her 2016 clients frequently expect her to be available virtually every moment of every day, by phone or text or that elderly technology, email, and expect that her response time should be measured in minutes or hours, not days.

In 1986, a few lawyers did represent clients a great distance from their law offices, and some lawyers did handle matters involving transactions or litigation in faraway jurisdictions. In 2016, it's not unusual for a client, even in the smallest town in rural America, to have a problem that requires a lawyer to address legal problems that cross many state lines and even international boundaries—small local businesses may have disputes with Chinese suppliers, and domestic-relations matters with interstate implications are commonplace. Increased globalization of clients' businesses, more complex relationships between clients and their business partners, and developments in the law have all led to increasing complexity in the nature of today's legal solutions to environmental problems.

Layer on top the effects of the Great Recession and broader, longer-term changes in the business of delivering legal services. Clients are less willing to allow lawyers to staff work deeply, less willing to pay for many hours of research, and generally much more focused on controlling the "value proposition" of their legal services. And, by the way, they want that better, cheaper work delivered faster, too.

These are just a few of the effects of new technology and the powerful forces of economic globalization, drawing first our clients, and then their lawyers, further and further into the modern world. This is not your mother's law practice.

Whether we like it or don't, most of us believe these changes are nowhere near done, and that the same forces will continue to drive change in the business and practice of law for years to come.



Legal ethics is largely about *how* we are permitted to practice law, and the dramatic changes in the *ways* we practice law have implications for legal ethics. So it should surprise none of us that legal ethics has changed significantly.

For those of us who practice in the field of legal ethics and the "law of lawyering"—that's how we sometimes describe the somewhat broader area of legal malpractice, privilege and confidentiality,

and loss prevention—the field has gone from infancy to a burly adolescence, much as the field of environmental law did in the 1970s. Legal malpractice has a longer history as a field of expertise, but, in 30 years, the rest of this field has gone from the virtually unknown province of a law professor or two in every state, bar disciplinary counsel, and a few nerdy private lawyers, to a specialty including lawyers in every jurisdiction who spend a considerable part of their professional time advising their partners or lawyers outside their firms and law departments on these ethics and lawyering issues.

Most firms of any size today have some lawyer designated to help firm lawyers address ethics questions. Indeed, in the last decade or so, the role of general counsel to a large law firm has become an accepted and well-known role, practiced by a small, but growing, group of lawyers and even studied by academics. In addition to these in-house law firm ethics lawyers, hundreds of lawyers across the country now focus their practice on professionally advising lawyers not in their own law firms on these issues.

Much more importantly, over the last 30 years, legal ethics and the law of lawyering has changed dramatically for ordinary lawyers in a number of ways:

The Ethics Rules Are Better and Clearer. Since 2002, the American Bar Association has significantly improved the ABA Model Rules of Professional Conduct, answering more everyday questions lawyers face, and answering them more clearly in the black letter and the text.

The Ethics Rules Have Started to Address Problems Driven by Recent Technology and Business Changes. One way the ethics rules have gotten better and clearer is that they have (though slowly) responded in real ways to changes driven by technology and globalization. For example, in the last decade, most jurisdictions have provided meaningful guidance on the extent to which a lawyer licensed in one state may practice, temporarily or permanently, in another state without getting fully licensed in the second state. The ethics rules, ethics opinions, and case law of most jurisdictions also now have at least a framework within which regulators, courts, and lawyers may address all manner of new ethics and lawyering issues created by new media, from cellphones, to email, to texting, to Facebook and LinkedIn. The

guidance is not perfect, but we lawyers today have a decent chance of finding a sound answer to guide our conduct.

The Ethics Rules Are Vastly More Uniform across American Jurisdictions. Every American jurisdiction except California now bases its rules on the ABA Model Rules. Thanks largely to the widespread adoption of the 2002 Model Rule amendments drafted by the ABA Ethics 2000 Commission, legal ethics rules in U.S. jurisdictions are today more uniform than they have been since the early 1970s. For example, the ABA's excellent comments to ABA Model Rule 1.7 that lay the foundation for the law of conflicts of interest are either adopted or authoritative in the vast majority of American jurisdictions; many jurisdictions have adopted this ABA guidance on conflicts of interest verbatim, laying the foundation for an unprecedented common development and sharing of case law. In an age of greatly increased mobility of lawyers and vastly increased geographic scope of client legal problems, more uniformity is a great blessing. And it's no accident: many jurisdictions, spurred on by the Conference of Chief Justices, have made very clear that their adoptions of many ABA versions of ethics rules have been specifically intended to lead to greater uniformity on these issues.

More and Better Guidance Is Available. Thirty years ago, case law and ethics opinions on legal ethics issues were sparse and often impossible to find and use. For example, in my home state of Tennessee in 1990, the 150 or so Formal Ethics Opinions then in existence were unpublished and available in fewer than a half-dozen locations across our 440-mile-long jurisdiction. (That year, they were published in paperback format for the first time.) By contrast, lawyers in 2016 have instant, usually free access to ethics opinions from their own and other jurisdictions. It's not just that more ethics opinions are being published, but they are up on the internet, available to anyone, usually free, and usually without even the need for Westlaw or LEXIS access.

Secondary sources on ethics are dramatically more useful. Any lawyer can now have on his desk (or device) one of several comprehensive source on ethics, ranging from *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility 2016–2017*, by Ronald Rotunda and John S. Dzienkowski (West/ABA 2016), to books that explore

ethics issues in particular practice areas such as this very volume, most at a reasonable cost for a practicing lawyer. With their primary jurisdiction's rules and a source like this, most of a lawyer's ethics questions can be answered with confidence.

More and Better Human Help Is Available from a Growing Number of Ethics Lawyers. Thirty years ago, most firms didn't have—and didn't know they needed—an in-house ethics lawyer; today, most larger law firms have someone in that role, so help is just down the hall for their lawyers. For firms without in-house ethics counsel, the growing cadre of lawyers who professionally advise lawyers is more readily available and better-known, so that real, professional help on complex problems is never more than a phone call or an email away.

Robust, Practice-Area-Specific Ethics Guidance Is Now Widely Available. Over the last 30 years, as some practice areas have grown more robust and well developed, so, too, have the resources that bring expert guidance directly to bear on ethics issues that specialized practitioners see daily. While I do not practice environmental law, one of my favorite ethics books is Irma Russell's wonderful *Issues of Legal Ethics in the Practice of Environmental Law* (ABA 2003). The volume in your hands is a superb successor and supplement to Professor Russell's earlier work. Environmental lawyers with their own local ethics rules, Professor Russell's book, and this book on a nearby shelf could answer most ethics questions that might come up in their day-to-day practice.



Law practice is more dangerous today than ever before, and that means that good loss prevention and aggressive, proactive identification and treatment of ethics and lawyering issues is more important than ever before.

Consider just a few trends we ethics lawyers have seen.

The Frequency and Severity of Malpractice Claims Have Increased. This includes especially claims arising from mistakes, and claims against experienced and well-respected lawyers and law firms. Ask your malpractice carrier. In the last few years, most carriers have publicly noted this phenomenon. No one is sure exactly why this is happening, but many think it reasonable to suppose that the speed of response to client requests demanded by clients and the decline in

deep staffing may be contributing. The assignment sent 30 years ago by client letter, seeking a response in a week, after research by an associate and thoughtful review by a partner, may now be replaced by a client email asking for an immediate response by email, without delay, without research, and without another legal mind collaborating on the problem. Further, without assuming the posture of a grumpy old lawyer, it is also worth noting that the ready availability of some sources (seconds away on any smartphone) can lead some lawyers to think that Googling a client's legal problem is the same as doing thorough legal research. Of course, it doesn't help that many of our clients' legal problems have gotten significantly more complex with the passage of 30 years, and some of their problems did not exist five years ago.

Lawyer Disqualification and Sanctions Are Alive and Well. Whether there are any growth trends, clients and lawyers today understand well the weapons at their disposal to question or call to account alleged lawyer misconduct, including motions to disqualify and litigation sanctions.

A Growing Number of Lawyers Have New Regulators and New Regulations. Some government agencies have taken a more vigorous role in policing and disciplining those lawyers who practice before them. Some commentators have also noted the “creeping federalization” of some practice areas (consider Sarbanes-Oxley and its regulation of public companies and their lawyers), in which federal agencies have incrementally extended their regulations in ways that tend to sweep in lawyers for the regulated.

Loyalty Is Dead. Well, that's a bit of an exaggeration. Still, more clients are willing to hire multiple lawyers or firms, and more willing to change them more frequently, and lawyers are more mobile than ever. Consider, too, that the reigning trend driven by globalization and continued technology development is disintermediation—the use of technology and new business models to “eliminate the middleman” in delivering good and services from producers to suppliers. Uber and Lyft are currently disrupting the taxicab business; the same model is now being rolled out for doctors; can law be far behind? We already know, for example, that corporate clients are outsourcing some legal work (e.g., e-discovery document review or contract management)

and using reverse auctions and other alternative fee arrangements to disrupt the hourly-rate business model of law firms. Whatever else all this may mean, it has already led to many lawyers being judged by old and new clients more frequently and more rigorously. More opportunities for clients and others to scrutinize (and then scrutinize again) the decisions we make as lawyers seems likely to lead to more need for lawyers to be able to defend our work and decisions.

Competition in the Delivery of Legal Services Is Growing, Even from Nonlawyers. Lawyers and firms of various sizes and in various practices are seeing fiercer competition from brother and sister lawyers. In addition, nonlawyers and nonlawyers-owned companies—from Axiom Law to LegalZoom—are bidding to deliver faster, better, and cheaper legal services to corporate and individual clients alike. This competition may also be more visible to potential clients and the public at large; lawyers who represent consumers, for example, are much more likely to have their work and services reviewed publicly on internet sites devoted to just this purpose.

It should thus be no surprise that larger law firms and their carriers, with this knowledge and the resources to respond, have invested in loss prevention and human resources, including in-house ethics lawyers and general counsel.

Lawyers are also increasingly concluding that good firm culture is good loss prevention. We ethics lawyers know that one of the best indicators of a healthy firm culture, whether in a 500-lawyer firm or a solo practitioner's office, is whether, at the first sign of a possible ethics or lawyering issue, the first reaction is to surface the issue and get help. In a healthy firm culture, a legal secretary or paralegal feels free to alert others to something that looks wrong—money being deposited in the wrong account or an imminent filing deadline with no known draft in the works—even if that means going around her immediate boss to do so.

Especially today, there is no substitute for the instinct to get help, and no better prophylactic advice that any ethics lawyer can give. Environmental lawyers reaching for this volume have made a great start.



At the heart of the five-volume trilogy (yes, that's right) that was the late Douglas Adams's great work of science fiction is a kind

of electronic book called *The Hitchhiker's Guide to the Galaxy*. In the introduction to the first volume, Adams notes that the Guide was one of the most remarkable and successful books in the galaxy, and he explains one of its most prominent features—its cover:

In many of the more relaxed civilizations on the Outer Eastern Rim of the Galaxy, the *Hitchhiker's Guide* has already supplanted the great *Encyclopedia Galactica* as the standard repository of all knowledge and wisdom, for though it has many omissions and contains much that is apocryphal, or at least wildly inaccurate, it scores over the older, more pedestrian work in two important respects.

First, it is slightly cheaper; and secondly it has the words DON'T PANIC inscribed in large friendly letters on its cover.¹

“Don't Panic.” Words to live by, as we practice together in a time of great change.

On matters of ethics and lawyers, two more words to live by: Get Help. Start with this book.

1. DOUGLAS ADAMS, *THE HITCHHIKER'S GUIDE TO THE GALAXY 3* (Ballantine Publ'g Grp. 1995) (1980).