

“ETHICS” AT THE MOVIES

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Not since Atticus Finch have lawyers been able to take ethical cues from lawyers portrayed in the movies. After all, screen writers get paid big bucks to ensure that lawyers in movies face issues that will entertain, not enlighten. But sometimes the lawyers in movies are faced with the same types of ethical issues that real practitioners face. What choices do celluloid lawyers make when confronted with ethical dilemmas from real life? It is fair to say that the Hollywood choices are not reliable guides for real lawyers. In the hit movie *The Client*, John Grisham’s depiction of a lawyer who will do anything to protect her client presents but one example – and an interesting ethical reality check for lawyers.

In the movie, the Mafia have killed a Louisiana U.S. senator, whose body has not been found. The prosecutor, a flamboyant and politically ambitious U.S. attorney from New Orleans, is desperate to find the body. The only people who know the whereabouts of the body are the murderer and his lawyer.

The action commences when the lawyer, sure that the Mafia will ultimately kill him because of his knowledge, drives to Memphis to commit suicide. He has a chance encounter with an 11-year-old boy, Mark Sway, who unsuccessfully attempts to prevent the impending suicide. Before he dies, the lawyer confides the ultimate lawyer-client confidence – the location of the dead body – to Mark, who then becomes the target.

Mark eventually seeks the assistance of a lawyer, Reggis Love, when he learns how dangerous a little knowledge can be, at least when it comes to dead bodies. The story develops as both the Mafia and the Louisiana prosecutors attempt through either illegal or unethical measures to ascertain what the boy knows – the prosecutors trying to force him to tell, and the mobsters threatening to kill him if he does. It’s a movie, so it all ends up more-or-less happily-ever-after for the young client and his family, who literally fly off into the blue wrapped in the arms of the Federal Witness Protection program. But for Ms. Love, one must pause to wonder what her fate, professionally speaking at least, would be after the credits fade to black.

For Ms. Love has committed a number of professional ethics violations, all in an earnest effort to help her client. Some are violations that real lawyers not infrequently stumble over. Others are not often encountered beyond the silver screen, but do still occur.

From the outset of her professional relationship with Mark – the fee agreement – Love has tripped over ethics. Mark retains Love for the fee of one dollar – all the money in his pocket. The fee discussion is appealing in its simplicity:

MARK: “How much do you cost?”

LOVE: "How much have you got?"

Mark hands over a crumpled \$1 bill, and the deal is struck.

Recognizing that tantalizing dialogue is difficult to create around fee agreements, and that even if written, any further discussion of the point would have been scrapped in the editing room, take a minute to reflect on what would actually be required. First, Rule 1.5(b), MRPC, requires that where a lawyer has not represented a client before, "the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation." It would appear that the film dialogue is inadequate for a non-Hollywood lawyer. Is the dollar a flat fee? Advance fee? What about costs?

It's a movie, so it can be assumed that the dollar is the whole fee Reggie expects to get. Under the circumstances, her client is not likely to have more money for payment of additional fees. Collecting the fee up front is certainly consistent with the practices of many practical and ethical lawyers, particularly in criminal law. So where's the problem? Look to Lawyers Board Opinion 15. Unless there is a written fee agreement (and there certainly is no evidence to support the existence of one in the movie) funds paid by a client at the beginning of the representation are presumed to be an advance fee payment. Advance fees, of course, must be deposited into a trust account, and withdrawn only when earned.[Ftn 1](#) Of course, considering the amount of the fee, it's difficult to say Love didn't earn it during the first meeting. But retainers aren't usually a dollar, and real lawyers must know the requirements.

If the dollar was intended to be a flat fee, or nonrefundable retainer (which does not have to be deposited into a trust account), there must be a written agreement that includes the language specified in Opinion 15.[Ftn 2](#)

At what point does Love next run afoul of professional ethics? By directing her client to secretly tape-record his initial interview with the prosecutors.

Surreptitious tape-recording of a conversation is not illegal (according to federal law and in Minnesota) as long as one party consents. It is, however, unethical for an attorney to secretly tape-record a conversation. The fact that it was the client, and not the attorney who did the tape-recording, does not excuse Love in this instance, as she directed the client to do so.[Ftn 3](#)

Minnesota follows the position of ABA Formal Opinion 337 (August 10, 1974), that "no lawyer should record any conversation whether by tapes or other electronic device, without the consent or prior knowledge of all parties to the conversation." The rationale is that the secret tape-recording is misleading and deceitful, and therefore a violation of Rule 8.4(c). The ABA opinion and Minnesota practice make an exception for prosecutors who are in compliance with statutory and constitutional law. The majority of states that have considered the issue agree with the ABA that secret tape-recording is unethical.[Ftn 4](#) The position of the Director's Office has been set out in the past, (*see Bench & Bar*, "Advisory Opinions.," July 1986) but there have been a number of recent admonitions issued on this point, so it bears repeating.[Ftn 5](#)

The most serious of Love's professional ethics dilemmas is one that few lawyers ever face. But it has happened, even in Minnesota. In the movie, Mark has been placed in "protective" custody after the prosecutors filed a juvenile delinquency petition alleging he was obstructing justice by refusing to tell what he knew about the dead lawyer's revelations (if any). He escapes and calls Love to assist him in the get-away. As one would expect, she picks him up and acquiesces in his desperate request to drive him to New

Orleans to make sure that the dead body is still where the dead lawyer said it was.

Love's intensely personal decision to help unearth the location of the body was good for a movie thriller, but was it professional? Think about trying to explain that decision in the cold, hard, rational light of day. Was the decision to help Mark the "right" choice? Was it the "ethical" choice?

A Minnesota lawyer was indefinitely suspended after being convicted of knowingly and willfully aiding the escape of a federal prisoner. The client called the lawyer from prison and said he was being released and had to go out east for a job interview. Could the lawyer please come to the prison with some clothes and cash? An altogether reasonable request? Neither the criminal authorities nor the Minnesota Supreme Court in the lawyer discipline proceeding agreed with the lawyer's decision to assist in that request.^{Ftn 5}

There is a final ethical issue for Love to consider. Mark was only 11 years old. Love was acting in everything but name as Mark's guardian as well as his lawyer, as his mother was busy elsewhere. Mark was entitled to legal representation. But should Love have helped carry out her client's wishes (to assist him in his plan to go dig up the body), or what she felt was in his best interest? What if the answers to those questions weren't the same? These are questions that a lawyer representing a client with a disability (in this case, a minor) must address under Rule 1.14, MRPC.

Luckily for attorney and client, the frantic race to New Orleans works out a la Hollywood endings. Indeed, as the movie wraps up it's even pretty clear that, in return for the tape recording implicating the prosecutors, Love will not be charged with any crimes for assisting in Mark's escape. She might, however, have other professional problems with which to contend . . . unless the lawyer discipline proceeding footage is lying on the cutting room floor.

NOTES

¹ *Opinion 15 states that advance fees can be withdrawn provided the client is given: 1) written notice of the time, amount, and purpose of the withdrawal; and 2) an accounting of the client's funds in the trust account.*

² *Opinion 15 provides: "All availability or non-refundable retainer agreements must include a final paragraph immediately above the client signature line which informs the client that: 1) the funds will not be held in a trust account; and 2) the client may receive a refund of the fees if the client later chooses not to hire the lawyer or chooses to terminate the lawyer's services."*

³ *Lawyers must also remember that they have a responsibility to ensure that a nonlawyer assistant's (e.g., an investigator's) conduct is compatible with the professional obligations of the lawyer. Rule 5.3(b), MRPC. A lawyer shall be responsible for the conduct of a nonlawyer assistant that would be a violation of the Rules if the lawyer "orders or, with the knowledge of specific conduct, ratifies the conduct involved." Rule 5.3(c)(1).*

⁴ *But see New York County Lawyers' Association, Opinion 696 (9/93); Oklahoma Bar Association Legal Ethics Committee, Opinion 307 (2/18/93).*

⁵ *The lawyer was convicted of the crime of knowingly and willfully aiding the escape of a federal prisoner. Following completion of his criminal sentence, he was indefinitely suspended from the practice of law. See In re Nordstrom, 374 N.W.2d 263 (1985); Nordstrom was recently reinstated to practice law in Minnesota. 508 N.W.2d 774 (1993).*