Climbing the Ladder of Success

In a free market economy, industry leaders sometimes believe that value-based thinking and efficiency-based thinking are at odds with each other. With a constant emphasis on winning, how can CEOs, lawyers, and students also stay true to their core beliefs? This contribution explores The Code of Professional Conduct and how trading virtue for success is perhaps the most fundamental mistake made by professionals today. Can honesty and success go hand in hand?

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Our capitalist system is built on competition. We extol its virtues, we teach it as a discipline in our business schools, we have enacted federal and state laws to ensure its vigor. It is certainly a major driver of our prosperity. But like all virtues, it has a darker side.

The intensity of competition is increasing. In a laboratory or classroom setting, that might seem like a good thing. But in the real world, that is not necessarily so. The globalization of markets, propelled by advances in processing and communication technologies, is exerting enormous pressure on prices and related margins. The ubiquity of information makes it more difficult to arbitrage price and quality differences. There is a smaller margin for error. Each competitive loss seems to be more important and competitors feel less able to absorb them.

In that environment, there is far more emphasis on winning. To be clear, I am very much in favor of winning. But winning for winning's sake, without due emphasis on the values that are embodied by the process, is potentially dangerous.

The supercharged, outcome-driven marketplace is not limited to product markets. It has found its way into the marketplace for professional services as well. In my part of that market—the legal profession—we pride ourselves on having a well-developed set of rules. The Code of Professional Conduct purports to tell lawyers what they may and may not do. So, in a sense, the pressure to trade virtue for success should be easier to resist for a group that has effectively promised to obey a set of rules in exchange for obtaining a license to compete.

But it is important to understand that it is not that simple. If the point was only that lawyers have rules and that they should obey them (and if they don't they should pay the consequences), then there would not be much else to say. However, the challenge resides not in the black-and-white space, but in the gray. Consider these illustrations:

—Your adversary has served a request that your client produce a number of categories of documents. The request is poorly drafted. In the course of reviewing thousands of potentially responsive documents, you come across one that is quite harmful to your case. You go back and review your opponent's document demand and discover that it could be read so as not to call for the production of this document. However, that conclusion is not clear because of the poor quality of the draftsmanship and, of course, you are quite sure that your adversary would love to receive this document, if she knew it existed.

—Your client has a huge volume of e-mails that may be relevant to the case. In order to make the job of finding the ones your opponent wants achievable, the court orders you and your adversary to agree on search terms that will be used electronically to search the documents before the search is actually done. In an effort to exert control over the process, your opponent insists upon giving you a set of search terms for your use. Upon receiving them, you realize that they will not uncover a small group of documents you have come across that are particularly unhelpful to your case and good for the other side.

—The relevant evidence in a case centers largely around a series of meetings that took place inside your client's company 10 years ago. If a particular subject was discussed at those meetings, your opponent's case will be strengthened; if the subject was not discussed, that will help you. There is only one employee left at your client who was at the meetings. He claims not to recall if the subject was discussed but you don't believe him. Your opponent has the burden to prove whether the subject was discussed and without the employee's recollection, it is unlikely that he will be able to satisfy that burden.

My goal here is not to provide answers to these dilemmas. That is the stuff of law school ethics courses (assuming they go down that far into the weeds). Rather, my point is to underscore that the opportunities

to trade virtue for success abound, the incentives to do so are great and growing, and the "right answers" are far from clear.

So what is to be done? At the risk of giving unsolicited advice (a dubious practice for any lawyer), it is critical to recognize that "how you played the game" still matters. It may not be true in the real world that winning or losing is largely beside the point. But how you played the game counts for a lot. It must be value-driven or you are not adding the value you are there to provide.

I believe that quality clients actually still want lawyers for whom "close to the line" is not the place they wish to be. To be sure, there are clients who are willing and able to pay handsomely for lawyers who are comfortable in that location. But lawyers with values can and should find other clients.

I have found that, quite often, the most important value a lawyer can provide is saying "no". People charged with achieving a mission understandably get caught up in getting to the goal. They see questions about the goal as obstacles to be overcome. They look upon those who raise the questions as challengers to be repulsed.

Now, some of this is nothing more than routine group dynamics. And it is also true that one responsibility of the lawyer is to facilitate the achievement of his client's goals within the boundaries of the law. But every once in a while, the answer is "no" and it falls to the lawyer to deliver that message. It is not an easy or popular position to be in and the outcome determinative forces at work in today's marketplace only serve to make the task even more daunting. But those are not justifications for trading values for success. Indeed, they are precisely the circumstances in which those values must be on display.

At those moments, the ability to deliver bad news and be listened to depends fundamentally on the credibility of the messenger. And if the messenger has not consistently exhibited a value-based approach to problem solving, she won't have the required credibility.

I remember taking geometry in high school. On the first day of class, the teacher, a rumpled man with chalk dust in his hair and on his fingers, told us that he loved geometry because it taught an important lesson about life: that it was often more important to know how you got to an answer than to know what the answer is. So he insisted that we adhere to what seemed at the time to be an overly formalistic, stylized methodology. He even insisted that we fold our work papers in a particular way, placing diagrams on one side of the fold and the written "proofs" on the other, and he routinely lowered the grades of students who got the right answers but failed to show how they got them. I can still remember his often repeated admonition, "you didn't show me how you got there."

So my point is that competitors in general, and lawyers in particular, need to infuse values into the process of getting the answer. From my experience, I am confident that any lawyer will get the wrong answer from time to time. But that will not hurt the system. What will endanger the system is getting to the answer, whether right or wrong, by the wrong route. We must each constantly ask ourselves, "How did I get there?" We must each challenge those who work for us to show us the proofs. Since the answers are often obscure, it is critical that the process of getting to the answers is one of unassailable integrity. BT

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