

12-15-2009

Avoiding Pitfalls

Dale A. Whitman

Follow this and additional works at: http://digitalcommons.law.byu.edu/life_law_vol2



Part of the [Ethics and Professional Responsibility Commons](#)

Recommended Citation

Whitman, Dale A., "Avoiding Pitfalls" (2009). *Vol. 2: Service & Integrity*. Paper 21.
http://digitalcommons.law.byu.edu/life_law_vol2/21

This Be Professional is brought to you for free and open access by the Life in the Law at BYU Law Digital Commons. It has been accepted for inclusion in Vol. 2: Service & Integrity by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

Avoiding Pitfalls

Dale A. Whitman

My dear friends, I am happy to be with you on this joyous occasion. I have a great love for this law school and for many of its students in past years. I regret that I haven't had the opportunity to get to know you, the graduates of 2003, but I am sure you have received a first-rate legal education. I know most of your faculty as close friends, and I have the highest regard for them. They combine faith with the best of professional accomplishment. The J. Reuben Clark Law School is highly thought of among legal educators. I began law teaching in 1967—a mere 36 years ago—and this law school opened its doors six years later, in 1973. I am reluctant to give credence to the *U.S. News* rankings of law schools, which are deeply flawed in many ways. But in general those rankings are quite accurately reflective of the reputations of law schools. Of all the law schools that have opened during my professional lifetime—and it is a large number of schools—none has a higher *U.S. News* ranking than BYU. I think it fair to say that none is better on the merits.

There are several standard law school commencement speeches. You can guess what they are: the “lifetime of learning” speech, the “let’s restore civility to the profession” speech, the “balance your professional life and your personal and family life” speech, and one of my favorites, the “why you should give money to your alma mater” speech. These are all grand speeches, but I have decided to take my remarks in a different direction today. I want to talk about how lawyers get into trouble and how you can avoid doing so.

I know that none of you expect to get into professional trouble. You think of yourselves as ethical and moral people, and you have all taken a class called “professional responsibility.” You know the rules, and you expect to live by them. Nonetheless, you are at risk of getting into

trouble—typically in ways that have little to do with the subject matter of your professional responsibility course.

The key to staying out of trouble is to act professionally. This means something much more than simply staying within the bounds of the technical rules. At its core it means that you—and only you—must make decisions on how you will practice law and that you must sometimes make decisions that are difficult, painful, and at least in the short run, contrary to your economic self-interest.

The challenges you will face in this area will depend a great deal on whether you practice on your own or in a small firm on the one hand, or in a large, highly structured firm on the other. In many ways, these situations are as different as night and day, even though they both involve the practice of law. Let me begin with the small firm or solo practice situation. The principles for staying out of trouble here are quite simple. There are three of them:

1. Don't accept work you can't handle.
2. Communicate constantly with your clients.
3. Don't touch their money for your personal use.

These three principles are connected: they all involve money. If you are a solo practitioner or in a firm with one or two other lawyers, your biggest concern will be paying the bills and making a living. For a good while, economic security will seem out of your reach. As a result, every potential client who walks into your office will seem to have a slightly green tinge and to have a large dollar sign emblazoned on his or her forehead! Clients represent income, and as a result it is almost impossible to turn a client away. Unfortunately, this means that you will be tempted to accept clients whose ethics are far from your own and who intend to use you to accomplish their unworthy goals. You will be tempted to take on matters in which you have no expertise and no time to develop it. Above all, you will be tempted to take work that you simply don't have time to do.

The right response to all of these situations is simply to say no, even though saying yes will seem to have the potential for making money. It is easy to identify a lawyer who is inundated with work that she or he doesn't know how to do and doesn't have time to do. Just look on the desk for that stack of unanswered telephone messages. Lawyers in this situation practice what the psychologists call "avoidance behavior." They don't return calls from clients because then they would have to admit that a client's pleading isn't filed or a client's contract isn't drafted or a client's deposition isn't scheduled.

This desire for more money sometimes manifests itself in an even worse and more reprehensible way—the lawyer who holds the client's funds and decides that it would be permissible to "borrow" them, just for a

little while, to pay some pending expenses, without mentioning the “loan” to the client.

Sadly, this is the pathway to bar discipline and attorney malpractice actions. State bar journals are full of cases in which all of these things occurred, and someone lost his or her license to practice law as a result. You simply must temper your desire for a good income with your desire to be a good lawyer. Sometimes the need for income must take second place. Again, the rules are simple:

1. Don't accept work you can't handle.
2. Communicate constantly with your clients.
3. Don't touch their money for your personal use.

Now let me turn to the big-firm lawyer. Oddly enough, the same considerations of time and money get these lawyers into trouble, but usually through a far different route. Young associates in big firms are unlikely to take their clients' funds, and they are largely protected by the firm's structure from undertaking work they can't perform. But often they are caught up in the desire to make the partners happy in order to keep a job that pays well. Let me illustrate their dilemma with three little vignettes.

Illustration 1 Your firm represents the plaintiffs in a complex construction litigation case. Discovery, which seems to have taken forever, has now been completed and the trial is only two weeks away. One day the partner to whom you report comes bouncing into the office and says enthusiastically, “I just found a terrific expert witness. This guy has impeccable credentials, and he will make mincemeat out of the defense's experts. I talked to him on the phone last night, and he is happy to appear at trial. I want you to fly to Cleveland tomorrow to meet with him and prep his testimony.”

“Fine,” you say. “I'll just phone defense counsel and let them know about this new witness.”

“Wait a minute,” says the partner. “The time for exchanging witness lists has long since passed us by. There's no need to tell the other side. If we do, they will just want to take another deposition, and that could throw the whole trial schedule off. They can just deal with him at trial.”

Illustration 2 Your firm represents a high-profile criminal defendant accused of homicide. There are no eyewitnesses, and the evidence is entirely circumstantial. One day as you return from visiting the client in jail, the partner in charge of the case asks you, “Have you prepped the testimony of the alibi witnesses—you know, the ones who say our client was at their house watching a football game when the crime took place?”

“Well, we have a problem with that,” you say. “The client just confessed to me this morning. I didn't even ask him; he just blurted out that he did

the killing and that it was bothering his conscience terribly. Under the circumstances, we can't use those alibi witnesses."

"Wait a minute," says the partner. "You may say that you know he did it, but I don't know that. I didn't hear him say it, and I'm not bound by his statement. Now get busy with those alibi witnesses. We're going to put them on the stand and get our guy an acquittal."

Illustration 3 One morning as you are rushing out the door for the office, your spouse says, "Dear, did you remember the church breakfast on Saturday? Our daughter is counting on your being there."

"Oh, gosh," you reply, "I forgot to tell you. I'm taking depositions in Atlanta on Friday, Saturday, and Sunday. I guess I'll have to miss it. By the way, would you call Brother Archer in the Sunday School presidency and let him know that I won't be able to teach my class this week? Oh, and honey, I'll be late again tonight. We're going over all the testimony in the Perkins case, since we have the pretrial conference tomorrow. I probably won't be home until after 10."

What's happening in these three cases? One might say that it is an excess of obedience. Now obedience to the right people and the right principles is a wonderful thing. We might paraphrase Nephi: "To be obedient is good if you hearken to the counsels of God" (see 1 Nephi 1:29). But a lawyer is a professional, and professionals must be obedient to the principles of the profession to which they belong, not to other people—even the ones who sign their paychecks. These are principles that have been worked out over years—indeed, centuries—to protect the public and the integrity of the legal system. They may interfere with an attorney's short-term gain, but they will protect his or her long-term ability to serve the public.

So what is a young lawyer to do when faced with a conflict between obedience to professional standards and obedience to a senior partner? Is it conceivable that a partner in a highly regarded law firm could actually ask a young associate to do something unethical? It is not only conceivable but fairly predictable. Some of you are going to have that experience.

Your natural reaction will be twofold: First, you'll respond, "I'm new around here, and I don't know much about how things are done. Maybe those professional responsibility principles that I studied in law school aren't really followed here. I don't have much standing to give advice about ethics to this partner, who has been practicing for 30 years." Second, you'll say, "If I raise a fuss about this, I'll quickly become known as a troublemaker. At best, I will not be well thought of when it's time to make partner. At worst, it's goodbye to my job."

The very essence of being a professional is that you—not a partner, not a client, not anyone else—must decide what is right. You and only you are in charge of your professional life. "The partner made me do it" is not a viable defense. Yes, there are risks in doing the right thing, but when you

do, you will have the satisfaction of knowing that you cannot be bought or bullied, that you stand for something valuable and right.

Perhaps the worst toll taken on young lawyers by big firms is the firm's total domination of their personal lives. If you bill 2,400 hours a year, you will essentially have no life outside the firm. Do you really want to be burned out for \$150,000 per year? Do you want to know that your children are growing up without you and that your spouse is, in effect, a single parent? Do you want the relationship with your spouse—a relationship that you prize and honor, and that in many of your marriages has the blessing of eternal duration—to dwindle and atrophy while you make large sums of money? The answer, once again, is that you must do what is right, even if the firm tells you differently and even if you must risk your income and your job to do so.

These decisions are not easy ones, and they call for the blessings of the Spirit to help you make them. It is my hope and prayer that, whether in a small firm or a big one, you will have the strength and wisdom to do what is right. In the name of Jesus Christ, amen.

This J. Reuben Clark Law School convocation address was given at the Provo Tabernacle on April 24, 2003. Reprinted from the Clark Memorandum, fall 2003, 20–23.

Dale A. Whitman received his LLB from Duke University in 1966. He served as a law professor 1973–78, visiting professor 1979–80 and 1989, and Guy Anderson Professor of Law 1992–98 at J. Reuben Clark Law School. He served as law dean 1982–88 and James E. Campbell Missouri Endowed Professor of Law at the University of Missouri in Columbia 1998–2007. He served as co-reporter of the American Law Institute's Restatement Third of Property 1991–97 and president of the American Association of Law Schools 2002. He has been a visiting law professor at various schools, with the most recent as D&L Strauss Distinguished Visiting Professor of Law at Pepperdine University in Malibu, California, in 2009.