

## ETHICS BY EXAMPLE

When examples of ethical beings cannot be found  
Men make up Rules to regulate society  
When Rules fail them,  
They turn to Religion.

– Larry J. Doherty on the Tao

When they lose their sense of awe,  
People turn to Religion.  
When they no longer trust themselves,  
They begin to depend upon authority.

– The Tao<sup>1</sup>

### The Be/Do Paradigm:

Who are you? What are you going to do when faced with an ethical “choice?” You cannot even begin to know how to act ethically until you know who you really are, your authentic self. Studying the Rules of Ethics or even applying them correctly will not make you an ethical being. Once you have a mastery of self you may not even need the Rules. Until then, the purpose of this paper and presentation will be to give you some practices that can be used for insight to ethical questions arising from the relationships inherent in your practice. Ethics is about relationships. It is

also about knowing who you are. It is merely reflected in what you do. Knowing the ethical answer is easier if you first know the question. These techniques can help resolve the question: "What do I do now?" Ethical questions arise regardless of whether the duty owed to another is ordinary or fiduciary. I trust you know that difference if you are a licensed attorney. For the others of you in attendance, a duty of ordinary care simply means to treat others in a reasonably prudent manner according to what an "ordinary man" would be expected to do. A fiduciary must place the interest of the "others" to whom a duty is owed above their own interests. Fiduciaries owe "Radical Honesty"<sup>2</sup> to their clients: the truth devoid of any deception, no matter how slight.

Although there are no firsthand writings by Socrates, he is reported to have trained lawyers to be ethical "examples" for the citizens of Athens to emulate. So, they could see how a good citizen was supposed to behave in an ethical manner. The first lawyers were teachers to everyone, not just their clients. They represented a professional integrity that formed the foundation of public trust. They lived ethically so that the rest of their society could see ethics in action. Ideally, the Be/Do was one and the same.

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<sup>1</sup>Lao-Tzu. *Tao de Ching*. New York: Harper & Row, Translation 1988. p. 72.

<sup>2</sup>Blanton, Brad. *Radical Honesty, How to Transform Your Life By Telling The Truth*. New York: Dell, 1996.

The refinement of Anglo Saxon western jurisprudence has taken its toll on Socrates' standards of conduct.

In fact, it is not even recognizable in the current Rules, the Code of Professional Responsibility. Today's lawyer is even insulated by the Privity Doctrine in a few arcane jurisdictions like Texas. Thus, he/she can have no duty to a non-client even, if there is professional contact. And, of course, there is no civil responsibility for social or societal influences regardless of how egregious an example is set by the lawyer. The Texas State Bar is still debating whether a Rule (5.07) is needed to proscribe sex between an attorney and a client. Today's lawyer is a schizo-ethical-phrenic. No longer constrained to be a good person all of the time, he/she is free to be complete jerks in non-professional life. Professionally, the trial lawyer is merely a hired gun called a "zealous advocate." He or she is free (and often encouraged) to wreck havoc in the name of protecting a client's interests. Society is catching up to lawyer's abuses by reining in certain types of litigation, such as class action suits, and trying to limit the power of so-called "activist judges."

No one should wonder why the public literally hates the legal profession and no longer holds judges in the highest esteem.<sup>3</sup> Ethics as a subject at this seminar is even isolated and relegated to a mere forty-five minutes of the last hour on the last day. But, enough ranting! What are we going to do about it? What can I show you in forty-five minutes that might make a difference? Many have already fled for fear that I will give some scintillating recitation of rules or perhaps, worse, a sermon. No, the Rules only serve as a minimum standard, below which no lawyer is allowed to fall. They serve no useful purpose for the non-lawyers at this seminar.

Common to all of us, however, is and should be an interest in ourselves. Self interest, not "interests," and concern for the happiness or suffering of others are ironically conjoined in the real, ethical world. Some rule or statement of duty is NOT what ought to make us concerned about the suffering of others or promoting their happiness. We ought to BE concerned because such expression is good for us, whether or not we are lawyers.<sup>4</sup> If, however, the only reason you help others is to make yourself feel good about yourself, you've missed the ethical point completely. Our "clients" or "wards" are not the means to an end, or they become

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<sup>3</sup>See Attachment A.

<sup>4</sup>Harris, Sam. *The End of Faith: Religion, Terror, and the Future of Reason*. New York: W. W. Norton & Co., Inc., 2004. p. 185-187.

dehumanized as mere objects of our satisfaction. The joy of helping others is about your “self” image. It makes and shapes it because you know that understanding yourself is the first critical step to understanding others, and, without understanding them, you cannot truly help them. However, this self-ish-ness is often viewed with the justifiably popular connotation of being “greedy.” Thus, what we need to “be” sounds all too much like what we are trying to avoid. There is no dilemma if you let actions speak louder than mere words and develop an authentic, true, real self-image that is not a phony reflection of what you think others want you to be. You cannot fulfill someone else’s expectation of who/what you should be, if that is not who you are. Even if others never catch on, you know the truth and self deception corrodes the vessel that contains it and will not acknowledge it. A keen appreciation of one’s own ignorance, not knowing, is essential to being in touch with the truth. We cannot make people happy, really happy, by lying to them about what we know even if we know that they do not want to hear otherwise. All this seems rather obvious, but ignoring the obvious is most often the root cause for unethical behavior and/or malpractice. It is the polar opposite of experience for direction in knowing what to do. Nonetheless, it leads to the sense of satisfaction and gratification that only knowing that you’ve done the honest, the right/ethical thing can achieve. Thus, by treating others more with concern with their happiness, as fellow

humans, not as objects, we improve our own condition. We elevate our levels of happiness "...becoming more loving and compassionate and hence more ethical<sup>5</sup>."

### Public Esteem - The Problem Barometer

Love is really an ethical standard. Without love, there is no justice. When applied to a fiduciary it does not proscribe but rather depends on self love. Sam Harris describes its essence as "...wishing that others experience happiness rather than suffering; ...."<sup>6</sup>

The poet Robert Burns observed that it would be an awesome power if we had the gift given to us "To see ourselves as others see us!"<sup>7</sup>. He is, of course, right, but where can we look for public reflection? Go online even if the Supreme Court gets criticized for looking at the internet. An example is attached (See Attachment A). A 2005 Gallup Poll shows that 82% of the public do not grade lawyers high or very high in trust. Business executives only garner 20% of the public trust. Judges fair appreciably better even though they are just lawyers in robes (53%). Nurses ranked highest (79%). Why? If you want to change the perception you have to know where to look. Fundamental change requires just that. It starts with self, self-

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<sup>5</sup>*Id.* at p. 191.

<sup>6</sup>*Id.* at p. 186-187.

awareness. It requires participation within a community that reflects a conscious concern for the happiness and best interests of the community, not just the individual success of a zealous advocate.

Watergate sparked the requirement for teaching ethics in law school that had not previously been compelled. Good! But why? Ans: Because Nixon was a lawyer. Conversely, the whole affair could have been avoided had one lawyer, John Dean, had the ethical courage to say "no." Our community wants, demands, that we be concerned with its happiness and its laws. We in turn should serve that concern because it is good for the community and good for us.

**Who are you?** Have you ever **done** anything to answer that question? You do know the answer. I suggest an exercise that you should do on a routine basis: Go before sunrise to some place in nature on this planet where you cannot see or be seen by another human being. Take writing material and other comforts that do not make noise. Make no noise, listen. Listen to yourself and the sounds of life around you. As the sun "rises," concentrate and contemplate two questions, (1) Who am I and (2) What am I going to do for the rest of my life? Write down the answers regardless of what they are. Do not be in a hurry. Quit when you are done. Share your answers with loved ones, but do not let anyone else change your

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<sup>7</sup> Burns, Robert. "**To a Louse**, On Seeing One On a Lady's Bonnet at Church", 1786.

answers. You are your experiences not someone else's judgment of them. Do not be afraid to share the truth about who you are. That truth is the essence of authenticity that you can use to create reality.<sup>8</sup>

Knowing yourself is "selfish." That's okay. It is a state of being, not doing. "Selfless" is doing things that ultimately diminish you because there is less self left once you have done the deed that you think others will judge so valuable. You only think that this self perception will make you a "good" person in their eyes. A couple of thousand years of practical experience should have taught us otherwise. Selflessness and selfish are not, however, mutually exclusive.

### Walking the Walk

Once you know who you are, you are ready to treat others like you would want to be treated. The great western philosopher/frontiersman David Crockett's motto was "Be sure you're right, then go ahead." I also value the anonymous admonition: (1) Show up; (2) Pay attention; (3) Tell the truth; (4) Let go of the outcome. You should also realize that what you do is not who you are. Mistakes are natural. It's okay to make mistakes, to fail. Both are necessary to growing and developing. Being an ethical being in a relationship with others is not just about doing law honestly. Serving the

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<sup>8</sup>Zukov, Gary. *The Seat of the Soul* New York: Simon & Schuster, 1989.  
Zukov, Gary and Francis, Linda. *The Heart of the Soul, Emotional Awareness*. New

interests of others, even as a fiduciary, elevates your self esteem and transcends the value of money and the result of being "the winner."

Though, I must admit that my own experiences dictate the observation that nothing feels better than having a jury agree with you, and nothing hurts worse than losing. Losing can be an even more valuable ethical experience if you are conscious.

Consciousness is an endless vigil that is its own reward. The ecstasy of comprehension will never be fully appreciated in an alcoholic fog. Use and abuse of alcohol and drugs is a common way for dealing with the loss of self esteem. For lawyers the loss results from being no more than "zealous advocates." Being a "jerk" privately or professionally is soul killing. Even when other do not recognize it, we know it about ourselves. It hurts, and we handle the pain with pain killers, alcohol and drugs. When you have a deserved reputation for sobriety, society buttresses your standing in the community and recognizes your integrity. You become the example they need and respect even if that reputation is not publically acknowledged. You will not need a public accolade for such a "sacrifice," because you are a better balanced ethical being whose knowledge of self is sufficient. Life enhancing or altering experiences do not often warn of their advent even though a reasonably prudent person may reasonably foresee their coming

and their consequences. The impaired cannot. Your consciousness is your choice. With it you can think about what you are feeling, and more importantly, you can choose to feel about your thoughts. Truth and knowledge are not solely reposed in your intellect. They also come from your feelings. If you ignore your feelings, you may be playing with less than half of your capacity.

Your proximity to the consequences of your conduct do not alter the ethics of your actions. A personal stake in the outcome does not justify advising the President that torture or burglary are acceptable in this community. The warrior lawyer is ethical mythology not born of experiencing a “justified” end to life as collateral damage.<sup>9</sup> The zealous advocate of today is not required to be concerned with his community nor to understand its happiness. He/she is rewarded with ethical accolades for studious compliance with the “Rules.” No wonder lawyers have so much distaste for “The Rules.” The Rules are merely a placebo for the absence of an ethical being living life as an example for his community.

### Using the Drama

What can I do as an alternative to reading rules that can make a difference in how I perceive the “appropriate” ethical response to a problem?

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<sup>9</sup>Harris, Sam. *The End of Faith: Religion, Terror, and the Future of Reason*. Supra at p. 192-197.

Let's do an exercise: First, we construct the scenario of a problem. To be relevant to your industry, that problem will involve brokers, underwriters, lawyers, insureds, and adjusters. After a broker has provided coverage to an insured through an underwriter, the insured experiences a loss. Any insured loss will do. Insured notifies broker and broker gives notice to underwriter. The underwriter appoints an adjuster to evaluate. During the adjuster's evaluation of the facts, a coverage question arises. The adjuster advises the underwriters to hire coverage counsel. Defense counsel for the insured has already been hired. Obviously, coverage counsel does not represent the insured. Both sets of lawyers, however, may deal with the broker, and coverage counsel needs information from the insured. The broker becomes a conduit for information. Typically, coverage counsel will bypass the broker when sensitive information adverse to the insured needs to be reported to the underwriter. However, in this scenario the broker is carbon copied inadvertently and comes to possess serious information potentially adverse to the interests of the insured, broker's client. What does the broker do?

Reconstruct the scene with the broker revisiting the circumstances of when the problem arose. Select someone to fill the roles for the other parties. If the broker has already begun to deal with the problem and only made it worse, then re-visit those events each in their own scene and

reconstruct what was said. Otherwise, the scenes of what should be said can be played out with each of the other individuals reacting to the broker as the broker tries to see how he should have handled it. These scenes are called encounters. They either actually happened and the result was not satisfactory, or they need to occur under ethical circumstances. Other people watching the encounters should be encouraged to participate as the broker if he/she becomes stuck for a response. The broker may encounter his insured first. The broker may encounter the underwriter first. Realistically, the broker may want to do an encounter with himself first. In this drama, that is not only possible, it may be preferable. Someone will be selected to play the role of the broker's other ego. As the broker encounters one or more of the other participants in the drama, questions that focus on the essence of the issue will naturally arise. The person playing the role to whom the broker explains the problem and addresses a question does not respond. In the encounter, the roles are reversed as soon as a question arises or as soon as a response is logically required from the other party. Only the broker in the role of the "protagonist" holds the key to solving or resolving the ethical conundrum. This is an exercise to show how the ethical response can be developed before the broker takes a chance of destroying either his relationship with the client, the underwriters, the lawyers, the adjusters or their agents. The encounters can take place in a group setting

or one-on-one, but each time a participant poses a question the roles are reversed and the broker steps into the role dealing with the answer to the question. The broker acting in the role of the insured will respond and probably provoke a dialogue. When that happens, roles are re-reversed. If there is a third party in the room and that party is called upon to answer the question, the broker will step into that role. The best way to experience how these roles interact is to have training as a director. All of this exercise should be done by somebody that understands the principles of psychodrama. This type of training is provided by the National Psychodrama Training Center<sup>10</sup>. Once all of the concerns and issues of each of the roles have been explored, the parties playing the roles are released from their roles and reminded that they are not who they were picked to play. They are themselves. A share-back participation is valuable to analyze and further de-construct the event. Each set of facts even involving a common scenario will have subtleties and nuances that provoke its own ethical solution. They may even have different outcomes. I hope you have learned something new from this exercise. If so, write it down before you forget it or confuse it with something else you've learned. Otherwise, you will end up forgetting them both: Doherty's Law of Seminar.

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<sup>10</sup>9700 Cumberland Street, Hartford, CT. 06106; attention John Nolte or contact Jennifer Duffy via e-mail: jenniferduffy@hotmail.com.



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## PROFESSIONAL ISSUES

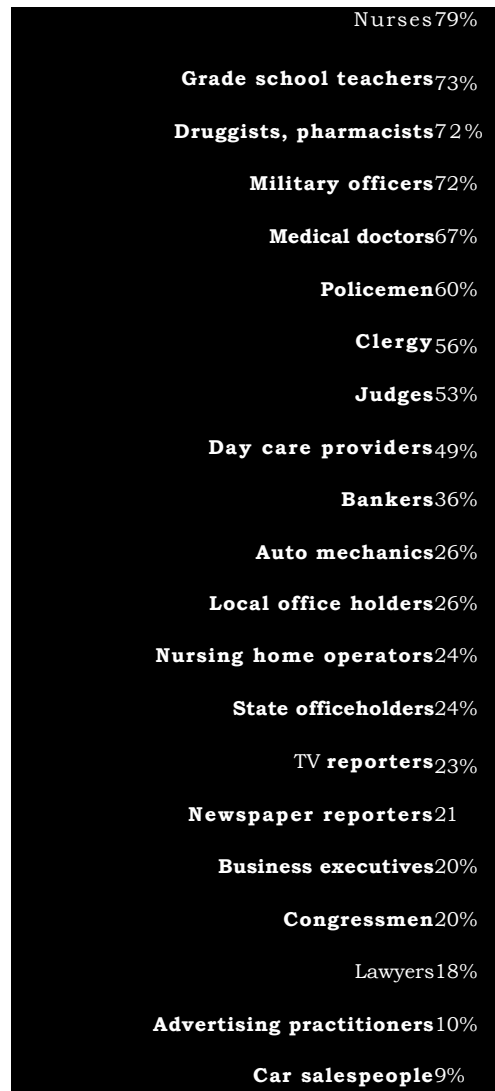
### *Which* professionals does the public trust the most, and the least?

Quick View. Jan. 3/10, 2005.

Participants in a 2004 Gallup survey ranked nurses as having the highest honesty and ethical standards. of 21 professions.

Nurses have held the top rung for five of the past six years that Gallup has conducted the poll. In 2003, physicians held the No. 2 slot -- their highest ranking since the survey was started,

#### Rated "high" or "very high"



ATTACHMENT1