HOW A PROFESSIONAL'S PERCEPTIONS, BELIEFS & VALUES GUIDE ETHICAL BEHAVIOR

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I. Introduction

On December 23, 2003, Governor Edward G. Rendell signed House Bill No. 88, resolving finally much of the confusion precipitated by the Commonwealth Court in the infamous *Caso*[2] matter. As part of the legislative process, which always involves a certain degree of compromise or *quid pro quo*, the Pennsylvania Legislature included in the new law a provision that many observers viewed, initially at least as benign – the amended Section 306(b)(2) of the Act now provides that during the vocational interview process at the very least, the "vocational expert shall comply with the Code of Professional Ethics for Rehabilitation Counselors[3] pertaining to the conduct of expert witnesses.[4]" Seizing upon that requirement, rather than focusing upon other potential avenues for potential litigation, such as the meaning of "job availability" as it pertains to the

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[2] Caso v. Workers' compensation Appeal Board (School District of Philadelphia) 790 A.2d 1078 (Pa. Cmwlth. 2002). Ironically, one week after House Bill No. 88 was signed into law, the Pennsylvania Supreme Court reversed the Commonwealth Court holding in Caso, ruling that vocational counselors need not be individually interviewed and approved by the Department of Labor & Industry as a condition precedent for conducting vocational interviews in anticipation of the Labor Market Survey process. See Caso v. Workers' Compensation Appeal Board (School District of Philadelphia), ___ Pa. ___, 839 A.2d 219 (12/30/03).

[3] There are numerous professional organizations that certify rehabilitation practitioners throughout the United States, or that have issued Codes of Ethics, including the Certification of Disability Management Specialists Commission, which has issued a "Code of Professional Conduct," the American Counseling Association, which has issued the "ACA Code of Ethics and Standards of Practice," the National Board for Certified Counselors, and the American Board of Vocational Experts, both of which have issued a "Code of Ethics" and of course, Commission on Rehabilitation Counselor Certification, which has issued the "Code of Professional Ethics for Rehabilitation Counselors." Query whether the language of the newly crafted Section 306(b)(2) refers only to the Code issued by the Commission on Rehabilitation Counselor Certification, or whether the language in the new provision is more generic in nature, referring to all of the legitimate organizations listed above? Recently, WCJ John W. Liddy, speaking at the March, 2004 Meeting of the Philadelphia Workers' Compensation Claims Association, urged that the language is not generic but requires that all vocational specialists adhere to the requirements of the "Code of Professional Ethics for Rehabilitation Counselors."

[4] 77 P.S. §512.

identification of suitable employment in the geographic confines of the injured worker and what, if any, "good faith response" to a Labor Survey will defeat an employer/insurer's effort to modify or suspend the injured worker's entitlement to disability benefits, the claimants' bar seems to have brought the issue of "ethics" and professional responsibility and conflict of interest to the forefront of the workers' compensation litigation process.

The urgency and intensity of the claimants' bar's response to House Bill No. 88 will likely cause many professionals in the workers' compensation business to engage in the oftentimes agonizing process of searching for symmetry between the practical role of advocate and the more theoretical role of "professional."

Clearly House Bill No. 88 requires all workers' compensation practitioners to carefully review the language of whatever Code of Ethics or Code of Professional Responsibility will be deemed applicable to the Pennsylvania workers' compensation vocational regime.

In the meantime, this portion of today's Workshop will seek to explore how the values and beliefs of professionals impact upon their efforts on behalf of clients in the context of personal injury litigation and whether those values and beliefs affect the manner in which or exstent to which professionals honor their own ethical rules.

II. The Confluence of Client Representation and Professional Ethics

The word "ethics" has been defined by the Oxford Dictionary as the "science of morals in human conduct" or more generally "moral conduct." It has been suggested that "morality concerns how one ought to live one's life, and ethics refers to the codes of conduct governing social interaction. To live morally or ethically is to adhere to standards of right conduct, to act well, to be a good person"[5].

It would seem that this Workshop's definition of "values" refers to a far less structured regime of behavior when compared to "ethics," since it speaks of freely chosen behavior that is shaped not so much by rulemaking but by interaction with people in various social and professional contexts.

It has been observed that morality, ethics and the law all govern how individuals may act or what they may do, but in different ways[6]. That an act may be immoral or unethical may by itself cause a person to refrain from certain actions, while the threat of punishment or monetary damages afforded by enforceable laws, may direct behavior[7]. A fundamental debate that has been engaged in by political scientists and those who study public policy is whether law and morality or ethics should coincide or whether the concept of codified law and morality should remain separate and distinct concepts[8].

[5] The Oxford Companion to American Law, Ethics, Morality and Law, p. 275.
[6] Id.
[7] Id.
[8] Id.

Commencing in the late 1800s, when the first formal code of lawyers' ethics was adopted by the Alabama Bar Association[9], the modern American legal profession has operated in the context of a structured self-government – a Code of Ethics or Rules of Professional Responsibility, that codify attorney "values" but which in most instances do not seek to direct behavior on the basis of any penal or monetary consequences for the ethical violation.

Lawyers face ethical issues all the time. Most attorneys act in good faith as they try hard to perform their duties in accordance with their State Bar's Code of Ethics. Many, if not most, attorneys ignore the most utopian aspects of the Code or, at the very least, act in good faith without understanding or appreciating many of its rules. And, of course, a few blatantly disregard even the most sacrosanct Rules of Professional Responsibility and in doing so, violate regulations and crime codes. The same can probably be said of physicians and vocational professionals.

It has been suggested that adherence to ethical standards of conduct is at an all-time low in this country.

In a recent publication entitled "The Cheating Culture: Why More Americans Are Doing Wrong to Get Ahead," political scientist, David Callahan observes that while there have always been those who have refused to play by the rules, the prevalence of "cheating" has become far more pronounced in the last twenty years. He cites examples from every walk of life - corporate scandals like the Enron and Arthur Andersen cases, doping in sports, plagiarizing by journalists and even cases where members of the clergy have been caught lifting sermons off the Internet.

He blames this unfortunate cultural phenomenon on what he characterizes as a "dog-eat-dog" economic climate that Americans have had to traverse over the last two decades, where those with substantial financial advantage have cheated with presumed impunity[10] while those less fortunate, view cheating as the only way to escape from their financial and social disadvantage and succeed in a "winner-take-all world."

All of this has occurred in an environment of unprecedented governmental regulation that has seemingly invaded virtually every aspect of American life – a development that has, according to author Philip K. Howard[11], choked the tradition of American problem solving through individual creativity and responsibility.

Mr. Howard maintains that, more now than ever, law and regulation scrutinize and constrain our everyday lives to such an extent that doctors are afraid to treat, school officials are afraid to install playground seesaws and judges are afraid to dismiss frivolous lawsuits.

So, it seems we have the worst of all worlds – we are regulated more closely than we have ever been in our history, yet we are cheating at unprecedented levels.

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[9] The Oxford Companion to American Law, Ethics and Professional Responsibility, p. 278. The American Bar Association adopted its first set of professional standards known as the Cannon of Ethics, in 1908.
[10] Some would say that Martha Stewart falls into this category.
[11] See "The Death of Common Sense: How Law is Suffocating America"; See also "The Lost Art of Drawing the Line: How Fairness Went Too Far."

Clearly the "law" itself is not always the answer.

II. Being Professionally Responsible But Wanting to Win

"Getting ahead" or pursuing what some have viewed as the American ideal that "winning isn't everything, it's the only thing", probably does explain why Americans seem to cheat today more than ever. Al Pacino's character in the motion picture, "And Justice For All," explains so well that those professionals engaged in the litigation game day after day, face the ultimate dilemma – the law and professional responsibility should both control behavior and there should be "justice for all." But, there's a problem - "both sides want to win!" And it's not surprising because winning can be very lucrative.

So, the conflict that the litigator faces today – helping the client win, while maintaining the core values of the profession – is nothing new.

Add to the pressure of winning, the daily pressure that lawyers and other litigation professionals face with the advent in the last two decades of instant communication - fax machines, e-mail, and cell phones – and one can quickly see how the litigation environment has become more competitive and contentious than ever – bringing a greater degree of urgency and prompting lawyers to be more inclined to ignore the profession's ethical rules.

The evolving work environment has yielded for many litigators an emotionally unsatisfying workplace even with and perhaps partly because of "dress down days," e-mail jokes, and colloquial interaction between lawyers, judges, clients, and expert witnesses. Indeed, the computer-age culture appears to have detracted from the civil and more academic character of the legal profession that presumably made the law such an attractive vocation in the first place.

So, the litigation process, more compressed than ever by advances in technology, presents a forum where the goal is ostensibly the achievement of "justice," but where the reality is far more sobering - it is a very competitive arena that attracts very competitive people who want to win, sometimes at the cost of legal ethics. Or, as is discussed below, in some instances, the ethical rules are never even an issue.

Moreover, the desire to win probably plays a role in how lawyers approach a person like John Jones and how they address the information generated during the litigation process.

III. Rules of Procedure as a Hindrance to Professionally Responsible Interaction

A few years ago two sporting events occurring within weeks of each other - an Ocean apart - prompted me to seriously consider the role that values play in competition, and whether written rules of conduct actually hinder rather than promote the process of competition.

In Great Britain, the Premier Football[12] League took the unprecedented step of replaying a game between two very competitive teams who had staged a controversial play-off match two weeks

[12] In most of the world "football" is the reference term for "soccer."

earlier. In deciding to play the game, the League sought to honor the spirit of an unwritten rule that has prevailed in British Football for years.

Apparently, when an injury to a player occurs during a Premier League game, the game official is obligated to allow the match to continue until there is a "stoppage of play" prompted by a rule infraction or the ball crossing the endline or sideline out-of-bounds. In the spirit of sportsmanship, when a Premier League player suffers an injury during a match, the team in possession of the ball will kick the ball out-of-bounds in order to prompt a stoppage of play in order to allow the injured player to received medical attention. Once the injured player is taken from the field, the team awarded possession of the ball following the out-of-bounds play, in the spirit of sportsmanship, immediately kicks the ball out-of-bounds, thereby allowing the team that originally possessed the ball at the time of injury, to re-take possession.

In the first match between the two Premier League teams, an injury to a member of Team#1 occurred, prompting a member of Team#2 to kick the ball out-of-bounds. After the injured player was removed from the field, Team#1 took possession of the ball. But, instead of immediately kicking the ball back out-of-bounds, the player for Team#1 maintained possession, advanced the ball down the field and scored the game-winning goal.

Nothing in the Premier League Rule Book prohibited Team#1 from doing what it did. In other words, despite the fact that Team#1 acted in strict conformity with the written laws of the game, it violated a sacred unwritten rule and in doing so won an important match.

I found it truly remarkable, given my absorption in the American legal system and my consciousness of that unfortunate American credo that "winning isn't everything, it's the only thing." I was truly dumbfounded when Premier League officials decided to void the first match and play the game over again to vindicate the spirit of the unwritten rule and to, in essence, promote good sportsmanship.

A few weeks later during the Thanksgiving Holiday, I was home watching the traditional NFL Thanksgiving Day game between the Detroit Lions and the Pittsburgh Steelers. The Lions, who always play at home on Thanksgiving, were having a bad season, while the Steelers were playing well and hoping to make it to the Super Bowl. On that particular day, the Lions played very well, taking the Steelers down to the wire. The game moved to Sudden Death Overtime.

During the Overtime Coin Toss, the Steelers, as the visiting team, were given the right to call the coin in the air. The Steelers captain called "heads" – because the ceremony was "miked," the stadium crowd and the TV viewing audience all heard the Steelers player make the call. But, for whatever reason, the Referee indicated that the player had called "tails" and awarded the Lions the ball. None of the Lions players who were present during the coin toss advised the Referee that he had made a mistake. Neither did any of the Lions coaches. The Detroit offense promptly moved the ball downfield and quickly kicked the game-winning field goal.

Despite the Referee's obvious mistake, the NFL did not declare the game a nullity and did not insist that it be played again. Rather, the League decided to issue a new rule, requiring that for every coin toss ceremony before every game and before every overtime, the team calling the

coin had to do so before the toss – the Referee would now have to hold the coin while listening to the call and would have to thereafter repeat the call before actually tossing the coin.

My first reaction to the new legislation was confusion. Didn't the old rule require that the call be made while the coin was in the air in order to prevent the Referee from somehow manipulating the coin and assisting one of the two teams? Didn't the new rule make it easier for the toss to be manipulated? I also questioned whether the new rule would necessarily prevent the same mistake from happening since the Referee could just as easily forget the call made before the toss.

My second response was more sociological. I thought, isn't it typically American that in response to a pathetic show of bad sportsmanship by the Lions players and coaches, the League seeks to solve the issue by drafting new legislation? Isn't it remarkable that in the face of poor sportsmanship the English Premier League did not write a new law, but penalized a fundamental lapse in sportsmanship by simply playing the game again and giving the aggrieved team a chance to correct the lapse on the field of play.

My third thought was just plain cynical. What if one of the Detroit captains had come clean during the coin toss ceremony and admitted that the Steelers player had, in fact, called "heads"? What would have happened? I presumed that the player's teammates would have physically hazed him in the locker room after the game. I presumed that he would have been cut from the team by an angry coach or general manager.

But, another thought occurred to me. The honest player would probably be picked-up by another team fairly quickly. He would probably be signed to a series of endorsement deals with either a razor blade company or a tire manufacturer or perhaps, "Wheaties – The Breakfast of Champions." I began to envision the honest player stumping for the "Mach-Three Blade" with dialogue like, "Hey, you know me, I cannot tell a lie – nothing tops Mach-Three!"

Of course none of what I envisioned should ever have been necessary. And neither was the new NFL law. Had the League simply vindicated good sportsmanship by playing the game over again, or at least playing some of the game over again, maybe the right message would have been sent – that values do count – that sometimes values, not the rule of law, better facilitate human beings getting along in both competitive and non-competitive contexts. Maybe the written rules of procedure do not always promote effective interaction either on a personal level or in the context of litigation. Perhaps unwritten rules of decorum better facilitate the process of advancing the position of a client.

IV. The Values and Beliefs of the Personal Injury Defense Practitioner

I have oftentimes been asked why it was that I chose to pursue a career as a personal injury defense attorney. And I have wondered every once in awhile, "Why didn't I decide to represent injured workers and plaintiffs?"

The answer may be explained by the beginnings of my legal career as a prosecutor – a job that inspired me to take a more "public interest" approach to the law, as well as a more socially

libertarian view of the law and the legal profession that caused me to view those who would abuse the law or "the system" with disapproval. I recall that my job as a prosecutor was not necessarily to win the case, but to make certain that "justice was done" in every instance. From the start of my career, I was not really motivated by money but by what my boss at the time referred to as the "psychic income" of helping those who had been victimized by criminal activity. I gather that I found the prospect of representing the employer or the accused the most palatable means of vindicating my perception of "law and order" and advancing the civil morals and values that caused me to become an assistant district attorney in the first place.

Or, it could be that making money was a motivating factor to a certain but not significant degree, and that I took a job with a large defense law firm because I thought it would provide me with an acceptable income level and a stable work environment and because a very good friend of mine was already working for the firm.

Whatever the reason for why I practice law on the defense side, as time has passed and my experiences in the profession and as a somewhat socially conscious adult have deepened, I have developed a core set of beliefs about the practice that probably affect how I approach cases and how I would tend to react to the predicament of John Jones:

(1) The Workers' Compensation Act is good legislation that for the most part, accomplishes what it was designed to accomplish;

(2) Nearly every workers' compensation claim is legitimate, meaning that as a defense practitioner I see only a small percentage of the many claims that are filed under the Act every year;

(3) The claims I see have probably been reviewed and assessed by a series of individuals who, for various reasons, have determined that there is something amiss, requiring legal intervention;

(4) Accordingly, I have come to believe there is a "hook" in every claim I am asked to review – sometimes the "hook" is obvious and sometimes it is not - sometimes the "hook" is there, but the claims representative or human resource person or third-party administrator cannot articulate it or cannot pinpoint why the claim is troubling, but knows on a visceral level that there is something wrong with it;

(5) I have come to believe that people have a tendency to attribute their troubles in life to their work, be it their boss or a co-worker or a particular job situation;

(6) I remain convinced that everybody can work, no matter how traumatic his or her injury;

(7) I have observed that even workers with legitimate work injuries tend to become too comfortable at home, while receiving disability benefits – that once the injured worker is allowed to become comfortable he or she will fight very hard to maintain the status quo;

(8) I have also come to believe that from a pure litigation standpoint, an expert witness can be secured to present just about any opinion the litigator requires in order to prevail before the judge or jury.

On a perhaps more psychoanalytical basis, I recognize that as a litigator, I have a set of inherent values that could affect how I assess a case or a claimant or how I handle the piles of information that personal injury cases generate:

(1) Litigators have a tendency to be highly competitive causing them to see cases in terms of "victories" and "losses" instead of limiting his or her role to that of "problem solver" – I may be tempted to recommend that the case go to the judge or the jury because I want to win;

(2) The need to win can cloud the litigator's advice on settlement or the credibility of the claimant or it might prompt an impulse in the litigator to withhold unfavorable information or encourage the expert consultant to modify an opinion or assessment that could prove hurtful to the client's case;

(3) On a more philosophical basis, the litigator will sometimes have a legal axe to grind – a viewpoint on a legal principal or a belief as to how the courts should assess a particular scenario, that might not benefit the interests of the client in the subject case;

(4) The desire to pursue a legal principal that I feel would benefit the society in which I live or the legal community in which I work, could affect my perception of the dispute;

(5) After a number of years, some litigators simply become "burned out" cynics who find themselves complaining that "claimants always lie" – "settling cases simply encourages more bad claims" - "something has to be done to stop the fraud" - "every case should be fought to the bitter end!"

Personal injury defense practitioners have held, to certain degrees and at certain points in their careers, all of the beliefs listed above.

V. Conclusion.

At any given point in time, the values that I have developed and the beliefs I have come to hold dear could or will cause me to assess the plight of John Jones in a certain way.

I might, as a result of my values and beliefs, find myself approaching Mr. Jones' case with a series of preconceptions:

(1) He's not a believable person.
(2) He is manipulative.
(3) He undoubtedly has talent.

(4) He is clearly capable of working in any number of capacities.
(5) He has become comfortable with his life.

I might be right. Or, I might be wrong. In every case I have to temper my values and beliefs in order to lay aside my instinctive reaction to someone like John Jones and effectively solve my client's problem, whatever it is.

During this litigation process, I might find myself wanting very much to encourage my vocational expert to adopt opinions that benefit the interests of my client but that are not based on sound social science. I might find myself wanting to withhold or destroy a medical report or surveillance report that I feel will adversely affect the vocational expert's assessment, and I might find myself rationalizing my thoughts with assurances like "everybody does it" or "all claimants are frauds" or "if I don't win, I won't be successful".

The question I have to repeatedly ask myself is this, "Will my beliefs and values cloud my ability to properly administer this case?"