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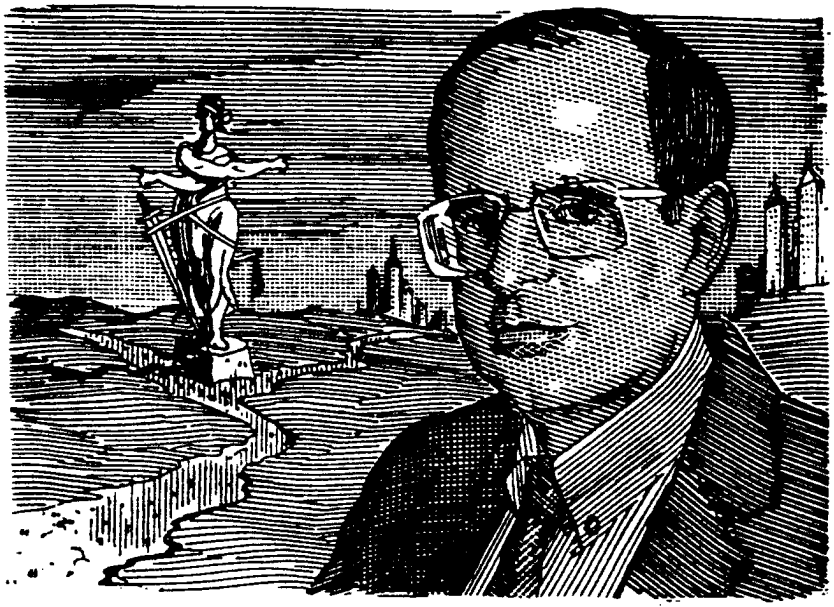
At the Bar | David Margolick

What price ethics? $41 million settlement has lawyers asking a lot more questions.



Elliott Banfield

Most weeks, Jonathan Lerner fields 15 or 20 ethics inquiries from his colleagues at Skadden, Arps, Slate, Meagher & Flom, the nation's third largest law firm, on a number of nettlesome issues.

Would accepting some new business raise questions of a conflict of interest for the firm, which has a thousand lawyers in 15 cities around the world? What should lawyers do when they think a witness is lying? When should the firm move to have opposing counsel disqualified? How can Skadden, Arps tout itself in its promotional literature?

When does zeal become sleaziness? Can the firm abandon clients in midcase when the clients fall behind on their bills? When should a lawyer blow the whistle on a client, or at least resign in protest?

It is this last question that had Mr. Lerner's phone ringing off the hook this week. For this was the week when Government officials submitted their bill for what could be the most expensive ethical lapse in history: the one that cost another New York law firm, Kaye, Scholer, Fierman, Hays & Handler, $41 million.

It may never be resolved whether, as Federal officials assert, Kaye, Scholer crossed the line from advocacy to complicity in its representation of Charles H. Keating Jr., one-time head of the failed Lincoln Savings and Loan Association. Despite agreeing to the fine, the firm stoutly maintains its innocence. One thing the episode makes clear, however, is that legal ethics is no longer some abstract, ethereal concern. It is a matter of dollars and cents, either in rising malpractice premiums or liability awards.

That is why law firms have at least begun keeping trained ethics experts on hand. And in the wake of the Kaye, Scholer settlement, those experts can expect to be called on more than ever.

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"It's hard to read on the train because lawyers in back of you, in front of you and on the side of you are discussing Kaye, Scholer," said Mr. Lerner. "The gravity of the firm's predicament and the Draconian consequences are going to sensitize people to get advice."

Mr. Lerner, 43 years old, has been dispensing such advice since 1981, when he joined the firm's ethics committee. He has been its chairman since 1984. Honing his skills further, he recently completed a seven-year hitch trying cases of lawyer misconduct before the Departmental Disciplinary Committee of State Supreme Court in Manhattan.

Mr. Lerner's position may be state of the art, but it is helpful to know what state the art has reached.

First, for all of the time and care Mr. Lerner devotes to it, legal ethics remains for him something of a sideline. He still devotes three-quarters of his days to his law practice, primarily in corporate litigation. Secondly, he is neither investigator nor policeman. Nor is he prosecutor. His relations with his peers are cordial; no one could possibly consider him the house Savonarola or buttinsky. But at the same time, he is familiar with only an infinitesimal fraction of the firm's activities.

"I worry more about the people who don't ask the questions than the ones who do," he said. "If people want to bend the rules, there's no way no how that any form of review is going to prevent them."

Indeed, given any number of factors — the size of his firm, the number of transactions it is juggling, the depth to which the adversarial culture is well-entrenched, Mr. Lerner's own level of seniority and ever-evolving standards of lawyerly conduct — it is unlikely that had a Kaye, Scholer type of problem developed at Skadden, Arps, it would have ever come to his attention.

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According to Steven Gillers of New York University Law School, ethics experts like Mr. Lerner, Sheldon Raab of Fried Frank, Harris, Shriver & Jacobson, and Norman Redlich of Wachtell, Lipton, Rosen & Katz represent a quantum leap over previous arrangements, when a semi-retired partner with a single antiquated ethics text constituted a firm's "ethics committee."

But the process, he said, is still in its Cro-Magnon stage. He maintains that a lawyer cannot handle a full caseload and still have the time to counsel, investigate, handle anonymous tips, teach, write, study and schmooze, all of which a firm's ethics guru must do to perform properly.

Why have firms acted so slowly? Mr. Gillers offered a four-pronged explanation. "Partly it's arrogance," he said. "Law firms think, 'It won't happen to us.' Partly it's self-deception: We think we know it already and we don't need someone to tell us. Partly it's complacency: We have insurance. And partly it's distraction: Lawyers spend all their time worrying about how the law applies to their clients, and don't think of themselves as clients. It's only after they get stung that they pay heed. Kaye, Scholer's settlement should sound the reveille for everyone else."