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> **In the nature of law practice, … conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.**

This passage from the preamble of the American Bar Association's Model Rules of Professional Conduct is an unambiguous reminder of the tightrope on which WE, Defence Lawyers, find ourselves every day as we endeavor to advocate our client's case zealously and to the fullest extent and yet not beyond the ethical boundaries that are not always clear.

We generally know – or can easily discern – the bright lines which must never be crossed; the conduct that cannot be condoned, where right from wrong is obvious, where instinctively one knows – as a matter of personal ethics and morality – what is the right action to take and just how far the envelope can be pushed.

The professional codes of conduct in our respective national jurisdictions and at the international tribunals articulate these bright lines quite succinctly. Yet, when it comes to the more nuanced issues – the sort of problems that even practice and experience cannot readily solve with certainty – these codes of conduct offer only the bare bones of guidance, at best. And therein lies the rub.

It might just be that we should be guided by our instincts or feelings: if we think that there is a conflict of interest and it gives us pause, then most likely there *is* a conflict of interest. If we think that doing something or not doing something may be crossing an ethical red line, then we are probably about to cross an ethical red line if we are not careful. This precautious approach might provide an easy way to address ethical issues, but does it lead into the equally dangerous ethical waters of inadequate representation?

Or it might just be that when we find ourselves rationalizing our doubts away about the correctness or legitimacy of our conduct, we are at the cusp of committing an ethical breach; in which case it is best to refrain and consult. And herein lies the next rub: where do you go to consult – and just how reliable or defensible can the advice be?

In many national jurisdictions this may not be a dilemma. The Bar Association – or Bar (as it is called in the civil law traditions) may offer ethics advice and opinions on a confidential basis. You simply pose a hypothetical fact pattern that resembles your predicament. It is about as safe as you can play it. Of course, that may not always be possible. A situation may arise which may

not provide the lawyer (or his or her staff) with the luxury of running it by the Bar ethics counsel for an advisory opinion. And then, of course, a court or disciplinary body might not agree with the advice you've followed, however official and proper the process you followed might be.

Lawyers practicing at the international tribunals are generally more handicapped. There is no Tribunal-dedicated Bar to consult. At the ICTY there is the ADC-ICTY, an Association officially recognized by the Tribunal, which has an ethics committee that can provide ethics opinions on a confidential basis – though it is questionable whether following the advice of an ADC-ICTY ethics opinion would shield a lawyer from disciplinary action. My suspicion is that it would not. One is likely to fare better were he or she to be acting consistent with an ethics opinion from his or her national Bar, although, again, while the armor of an ADC opinion and one from your local bar might reduce the security of any potential sanction, the chamber might still find an ethical breach, despite your caution and reliance.

What if there is a conflict between your national code and the code of the tribunal? Which do you follow – or should you follow?

I am sure during the course of the panel discussions these and other such questions will be explored and – if we are fortunate – some best practices will be identified.

But let's get back to where we started with the American Bar Association Preamble to the Model Rules of Professional Conduct.

In thinking of moral conflicts versus ethical obligations, or fidelity to the client versus obedience to the law and applicable codes of conduct, we all recognize that a zealous, effective and ethical advocate – by virtue of the applicable professional codes of conduct – must engage to some extent in ***situational*** or ***discretionary ethics***.

Joseph Fletcher in his seminal and controversial book *Situation Ethics* reasoned that ethical issues should be determined in their relative context. What may be morally wrong in one context may be entirely right in another. Of course, this method of *situational* or *contextual* decision-making invokes risks; risks that need to be appreciated because of the consequences resulting from selecting a particular action.

The ends may justify the means in achieving what may be perceived as or what may even be a socially correct result, but that is hardly a satisfying answer. Defence Lawyers are on the front line – as it were – in confronting ethical dilemmas that have serious consequences for their clients, themselves, their colleagues, the profession and even society in general.

Situational decision-making may be permissible under certain discrete circumstances, but knowing those circumstances and knowing the extent – the parameters – of any given circumstance where situational decision-making may be permissible is not always so clear. It can be like driving in the fog; you only know you are off the road when you find yourself off the road.

The Accused's fair trial rights require our full and uncompromising efforts in meeting our duties of loyalty, confidentiality, zealousness and ensuring that there is no conflict of interest. But there are limits – limits we need to abide by and adhere to if we wish to meet our professional responsibilities and ethical obligations.

Let's be brutally honest, WE, Defence Lawyers, are expected to do things in our professional capacity, which, if done by prosecutors or judges or even ordinary people in ordinary circumstances would unquestionably be unethical or immoral.

- We are NOT required to pursue the true account of the facts of the case or to promote a dispassionate application of the law to the facts.

- We are expected – even required – to aggressively challenge both the facts and law in defending our clients. And this may, and often does, require us to advance beliefs that we may find questionable.

- We are not expected – indeed, I would say we are forbidden – to balance competing interests so that to all affected persons, such as the victims and civil parties, get what they rightly deserve. Quite to the contrary, we are expected to exclusively pursue our client's interests.

- We are expected to exploit every strategic advantage on our client's behalf, even when we think – or even know – that our client is not morally entitled to the advantage.

Rule 1.2(b) of the American Bar Association Model Rules of Professional Conduct declares that **"[a] lawyer's representation of a client … does not constitute an endorsement of the client's political, economic, social or moral views or activities."**

The same applies when it comes to the facts: a lawyer's representation of a client is not an endorsement of the client's factual or legal claims. Put differently, WE, Defence Lawyers, have an obligation to remain detached as we go about zealously exploiting every considerable opening and pressing every conceivable advantage that may benefit our client. Our obligation is to put the prosecution to its proof in every way, and present every legal and factual defense, short of knowingly false evidence.

Were WE, Defence Lawyers, to abandon this professional detachment, WE would be taking on the role of the prosecutor and judge; we would stop serving the interests of our clients. WE might be pursuing the true account of the facts of the case or even promoting a dispassionate application of the law to the facts, but this would be a misguided – indeed unethical quest – best left to others.

WE are duty-bound to serve and not judge our clients … BUT … WE are not entitled to slavishly engage in any action for the benefit of the client. A Defence Lawyer's fidelity to the client is not an unconstrained invitation, a *carte blanche*, a no holds barred approach to zealous advocacy. There are legal and ethical constraints, and for the most part when it comes to certain behavior, WE all know when something is just plain wrong. WE do not need a course in ethics or an ethics advisory opinion. WE know it is wrong because the moral or ethical conduct expected of us is something that we would have learned as children from our parents, teachers and playmates.

Basic legal ethics is like Robert Fulghum's book: ***All I Really Need To Know I Learned in Kindergarten.***

Abiding by the general red line principles set out in our codes of conduct requires discipline and a healthy dose of honesty as a counterbalance to any self-rationalization that may get us into trouble.

However, where WE, Defence Lawyers genuinely need help in meeting our responsibilities to our clients and the ethical obligations of our profession, is in identifying reasonable answers to the more nuanced issues; the ones that the codes of conduct lend mere guidance, where no hard and fast rules are readily discernible, the sorts of issues that even with caution and deliberation can be devilishly complex with huge consequences at play.

Not all answers are readily available or easily grasped. While proper questioning may sometimes only raise more questions, by and large, the process of raising questions – especially in forums such as this one – allows us to examine issues and explore proposed actions that may help us change behavior and outcomes when confronted with an ethical issue.

At the end of today's seminar on ethics we may not have answers to all, or even most, of the issues we will touch on, but I am confident that we will have had a good run at the general principles of our codes of conduct, and we will have engaged ourselves in a process that hopefully will serve us well when next confronted with an ethical conundrum.

Without further ado, let the panel discussions begin.

Thank you, and to borrow from the film *The Hunger Games*: **May the odds be ever in your favor**!