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Bruce A. Green

Fordham University School of Law

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THERE BUT FOR FORTUNE: REAL-LIFE VS. FICTIONAL "CASE STUDIES" IN LEGAL ETHICS

Bruce A. Green*

INTRODUCTION

Lawyers learn vicariously as well as through personal experience. That, of course, is the theory of the Socratic Method: the professor asks a series of questions that engages one law student in a process of reasoning and analysis, while the rest of the students in the class participate vicariously. In the words of the late Harvard Law School professor, Phillip E. Areeda, the others "silently pretend that they must answer the question."¹

No doubt, legal ethics is a subject that most lawyers would prefer to learn vicariously. That is one reason why legal periodicals pay such close attention to lawyers who get into trouble, whether with courts, disciplinary agencies, or criminal authorities. The stories of other lawyers' ethical dilemmas serve as moral tales. We hope to learn from them, and thereby avoid other lawyers' mistakes.²

The problem with these real-life tales, however, is that they are often incomplete. When lawyers' questionable professional conduct becomes the subject of embarrassing news stories, precisely what the

* Louis Stein Professor, Fordham University School of Law. This article expands on an essay that previously appeared in the Federal Bar Council News. Brian Hufnagel, Fordham Law 2002, provided valuable research assistance.

1. Phillip E. Areeda, *The Socratic Method*, 109 Harv. L. Rev. 911, 916 (1996).

2. Certainly, lawyers in practice should also learn about professional responsibility from the experience they and their colleagues accumulate. Within law schools, at least, there are opportunities to do so, both in the context of law school clinical settings, see, e.g., Thomas L. Shaffer, *On Teaching Legal Ethics With Stories About Clients*, 39 Wm. & Mary L. Rev. 421 (1998), and in simulation courses. See, e.g., Robert P. Burns, *Teaching the Basic Ethics Class Through Simulation: The Northwestern Program in Advocacy and Professionalism*, Law & Contemp. Probs., Summer/Autumn 1995, at 37; Robert P. Burns, *The Purposes of Legal Ethics and the Primacy of Practice*, 39 Wm. & Mary L. Rev. 327 (1998); Carol Bensinger Liebman, *The Profession of Law: Columbia Law School's Use of Experiential Learning Techniques to Teach Professional Responsibility*, Law & Contemp. Probs., Summer/Autumn 1995, at 73. It is unclear whether and to what extent lawyers in practice draw on their own experience and the experience of their colleagues as an occasion for similar, systematic self-reflection. Cf. Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 Fordham Urb. L.J. 607, 641-42 (1999) (suggesting the importance for prosecutors of learning from mistakes).

lawyers did and why they did it may never become fully apparent. The result is that, at times, the moral of the story is itself ambiguous.

As an alternative to a real-life "case study," one might create a fictional one, drawing for inspiration on a real-life account. Continuing legal education programs often take this approach. Sometimes, the events forming the basis of the "hypothetical" are intentionally ill-disguised, in which case participants may draw on their own knowledge of the real-life events to add color to the fictional narrative.

Through an imagined portrayal of lawyers' inner motivations and private exchanges, the fictional account provides a vehicle for fleshing out a reported story's broad outline of events. Of course, different imaginations may yield different accounts. Moreover, different accounts may yield different morals. A fictional version may reflect its author's best effort to imagine what went on in the minds of the lawyers, and how the lawyers interacted with each other. On the other hand, the author may specifically tailor his narrative to make particular points.

When an account is fictional rather than genuine, however, lawyers may not take it as seriously or identify with it as strongly. Knowing that the events are, to some extent, untrue, lawyers may be less willing to put themselves in the place of the lawyers in the tale.

To illustrate the comparative shortcomings of real-life versus fictional accounts, this Article offers parallel case studies. The first is based on publicly reported events involving lawyers of the brokerage firm, Morgan Stanley Dean Witter, and other lawyers with whom they interacted. Those who wrote about these events sought to draw lessons from them, but because the reported story was factually incomplete, the moral to be drawn from it was distressingly ambiguous. The second case study is a fictional retelling of the first. It offers a fuller picture, yet may be less effective for being untrue.

I. THE REPORTED ACCOUNT

Real-life accounts of lawyers' professional dilemmas tend to be told in a series of news stories. Each story reveals only a small amount of information. Over time, as more information surfaces, earlier accounts prove to be untrue or, at least, inconsistent with later ones. Even when all the stories are collected and an attempt is made to find the lowest common denominator, some facts will remain disputed and many more will remain omitted. Unrevealed facts are often far more significant than those disclosed, and their absence may render any search for a meaningful moral lesson a fruitless endeavor. Consider, for example, the following tale.

A. The Lawyers' Tale

The story begins around April of 1998, when Morgan Stanley fired an analyst named Christian Curry shortly after nude photographs of him appeared in a pornographic magazine.³ The firm's explanation for the termination was that Curry had filed false expense reports.⁴ Curry, however, claimed that he was dismissed because he is black, and because the firm wrongly believed him to be gay.⁵ In response to the firm's allegation that Curry filed false expense accounts, Curry claimed the existence of a corporate culture that permitted expense account abuse.⁶

What happened next is in dispute. According to press accounts, Morgan Stanley was approached some months later by an individual, C. Joseph Luethke, who had been acquainted with Curry since college.⁷ Luethke claimed that Curry was plotting to plant racist e-mails in the firm's computers in hopes of bolstering his civil lawsuit.⁸ Luethke volunteered to assist Morgan Stanley in thwarting Curry's plans.⁹

In July of 1998, the Manhattan District Attorney's Office learned about Curry's alleged plot and commenced an undercover investigation.¹⁰ Luethke arranged a meeting between Curry and an undercover police officer posing as a computer hacker.¹¹ During that meeting, Curry offered the undercover officer \$200 to break into Morgan Stanley's computers and plant racist and sexually charged e-mails.¹² Curry was subsequently arrested and charged with forgery, conspiracy, attempted trespass of a computer, and attempted coercion.¹³

It was then that Morgan Stanley's lawyers engaged in the questionable conduct that is at the heart of this tale. Several days

3. David A. Kaplan, *Financial Exposure, Career in Brief*, Newsweek, June 21, 1999, at 52. According to one account, three years earlier Curry was interested in modeling and decided to create a portfolio. *Id.* The photographer agreed to waive his \$1,000 fee if Curry posed nude, and Curry signed a consent form giving up control of the photos. *Id.*

4. Joseph Kahn, *No Explanation on Payment as Yet by Morgan Stanley*, N.Y. Times, May 21, 1999, at C10.

5. Joel Cohen & Kevin Curnin, *The Risks of Using Paid Informers: Review of the 'Morgan Stanley' Case*, N.Y. L.J., July 9, 1999, at 1.

6. Curry v. Morgan Stanley & Co., 193 F.R.D. 168, 169 (S.D.N.Y. 2000).

7. Joseph Kahn, *Wall St. Victim or Young Rogue?: Christian Curry Found Trouble at Morgan Stanley*, N.Y. Times, June 7, 1999, at B1.

8. Alison Frankel & Krysten Crawford, *Next Time, Don't Take Yes For an Answer*, Am. Law., July 1999, at 22.

9. Joseph Kahn, *Mystery Grows Over Payment by Morgan Stanley*, N.Y. Times, May 26, 1999, at C1.

10. Kaplan, *supra* note 3, at 52.

11. *Id.*

12. Cohen & Curnin, *supra* note 5.

13. David Barstow, *In Twist, Charges Against Former Morgan Stanley Analyst Are Dropped*, N.Y. Times, May 19, 1999, at B7.

after Curry's arrest, they authorized a \$10,000 payment to Luethke without notifying the District Attorney's Office.¹⁴ The payment followed a conversation between one of Morgan Stanley's lawyers and a partner in the New York City law firm, Davis Polk & Wardwell, the brokerage firm's outside counsel, who advised that it would be lawful for Morgan Stanley to pay Luethke a gratuity as long as Luethke would not be a prosecution witness.¹⁵ The Morgan Stanley lawyers never checked with the prosecutors, however, either to confirm that Luethke would not be a witness or to see whether the prosecutors had any general objections.¹⁶ Moreover, the lawyers failed to tell the prosecutors about the payment immediately after it was made.¹⁷

More than a month passed before the District Attorney's Office first learned of the payment to Luethke. One press account implied that the prosecutors first learned about the payment from Luethke after he was arrested in a separate matter.¹⁸ A later, and presumably more accurate account indicated that the Assistant District Attorney who was then responsible for the investigation learned about the payment in a meeting with Morgan Stanley representatives, including its outside counsel.¹⁹ Afterward, some time passed during which, presumably, the District Attorney's Office continued its investigation. Then, one day, an Assistant District Attorney announced that his office was dropping all charges against Curry because Morgan Stanley had withheld information about the payment to Luethke.²⁰ At the same time, the prosecutors announced that they had begun an investigation of Morgan Stanley itself.²¹ Apparently, this came as a shock to both Morgan Stanley and its lawyers, none of whom appear to have received notice that the prosecution had shifted its focus to them.

At that point, the fortunes of several Morgan Stanley lawyers took a turn for the worse. The firm suspended two of its senior lawyers

14. Laurie P. Cohen, *Securities Firm Suspends Two in Curry Case*, Wall St. J., May 28, 1999, at C1 [hereinafter Cohen, *Securities Firm*]. According to one article, prosecutors have said that the \$10,000 payment was wired "within days of" Curry's arrest. *Id.*

15. Frankel & Crawford, *supra* note 8, at 22.

16. *Id.*

17. Cohen & Curnin, *supra* note 5.

18. Laurie P. Cohen, *Chief of the Legal Team at Morgan Stanley Resigns*, Wall St. J., June 11, 1999, at C1 [hereinafter Cohen, *Chief of the Legal Team*]. According to some accounts, knowledge of the payment from Morgan Stanley came "after Luethke sent what Morgan Stanley in-house lawyers regarded as an extortion threat to firm chairman Phillip Purcell." Frankel & Crawford, *supra* note 8, at 22. One report suggests that Luethke made several phone calls and sent numerous letters harassing Morgan Stanley officials for money. Cohen & Curnin, *supra* note 5.

19. Frankel & Crawford, *supra* note 8, at 22.

20. Barstow, *supra* note 13. In a television interview following news of the payment to Luethke, Curry's attorney claimed that Curry was entrapped. See *CNN Moneyline News Hour With Lou Dobbs* (CNN television broadcast, May 28, 1999).

21. Barstow, *supra* note 13.

who apparently had played a role either in authorizing the payment to Luethke, or in failing immediately to tell the prosecutors about it.²² The firm retained a different outside counsel to commence an internal investigation.²³ Meanwhile, Curry filed a civil lawsuit against Morgan Stanley and its officers, claiming that he had been wrongly terminated and falsely arrested.²⁴

In June of 1999, Morgan Stanley's outside counsel reported that there was "no satisfactory explanation" for why Luethke had been paid without the prosecutors' knowledge.²⁵ Morgan Stanley's leaders called the payment a "mistake in judgment."²⁶ It was a costly mistake at that. One of the two suspended lawyers stepped down from his job;²⁷ Morgan Stanley's chief legal officer also resigned;²⁸ its outside counsel suffered embarrassment in the press;²⁹ and Morgan Stanley lost its prosecutorial allies and had to defend itself against a criminal investigation which appeared to have been prompted, in part, by Morgan Stanley's failure to clearly and directly account for the payment to Luethke on its books.³⁰

In mid-July of 1999, the District Attorney's Office announced its conclusion that Morgan Stanley's failure to disclose the \$10,000 payment resulted from poor judgment and inexperience, not criminal misconduct, and that charges would not be brought against the firm.³¹ The District Attorney's investigation of Luethke continued, however,³² as did Curry's civil lawsuit against Morgan Stanley.³³

22. Cohen, *Securities Firm*, *supra* note 14.

23. *Id.*; see also Press Release, Morgan Stanley Dean Witter & Co. (June 10, 1999) [hereinafter Press Release] (on file with the Fordham Law Review). Paul, Weiss, Rifkind, Wharton & Garrison conducted the internal investigation and is also defending Morgan Stanley in the civil suit filed by Curry. *Today's News*, N.Y. L.J., June 8, 1999, at 1.

24. Joseph Kahn, *Morgan Stanley Suspends 2 Over Payment to an Informer*, N.Y. Times, May 28, 1999, at A1. The size of the lawsuit may grow—Curry's lawyer reportedly has been contacted by others who may have claims against Morgan Stanley. See Andrew Cave, *Morgan Stanley Faces Second Racial Discrimination Lawsuit*, Daily Telegraph (London), Aug. 19, 1999, at 25.

25. Press Release, *supra* note 23.

26. Joseph Kahn, *Inquiry is Ordered at Morgan Stanley; 2 Suspended Over \$10,000 Payment*, Int'l Herald Trib., May 29, 1999, at 9.

27. Cohen, *Chief of the Legal Team*, *supra* note 18. But see Anna Snider, *Will Morgan Fallout Affect Davis Polk?*, N.Y. L.J., June 14, 1999, at 1 (suggesting that the lawyer who stepped down was forced to resign).

28. Cohen, *Chief of the Legal Team*, *supra* note 18.

29. Snider, *supra* note 27.

30. Randall Smith, *Morgan Stanley Won't Face Charges in Case Involving Curry*, Wall St. J., July 15, 1999, at C1. According to one account, Morgan Stanley lawyers initially advised that the cost of the payment be allocated to the department where Curry worked. *Id.* Despite these instructions, a mix-up caused the expense to be placed in an unallocated account. *Id.*

31. *Id.*

32. Jesse Angelo, *Feds Probe Luethke for Perjury in Curry Case*, N.Y. Post, Jan. 28, 2000, at 28.

33. Curry v. Morgan Stanley & Co., 193 F.R.D. 168 (S.D.N.Y. 2000).

B. The Search For Insight

1. Moral Ambiguity—The Firm And Its Lawyers

Does the above story show professional misconduct—and if so, by whom—or simply an error in judgment?

The press tended to lay blame at the feet of Morgan Stanley. There were even initial suggestions that the firm may have engaged in criminal wrongdoing. That, of course, was implied by the prosecutors' decision to investigate Morgan Stanley. There was nothing in the press accounts, however, to suggest that the firm had bribed Luethke in order to influence his testimony, or that the firm had deliberately withheld information from the prosecutors with an intent to defraud them or somehow to obstruct justice. Indeed, the prosecutors' initial suspicions were eventually allayed.

Blame also fell at the feet of the firm's lawyers—particularly, although not exclusively, its in-house lawyers. Yet it is unclear whether they acted improperly. For example, did they cross the ethical line between permissible and impermissible witness payments? The answer is uncertain not only because the news stories are incomplete, but also because the ethical lines are themselves so unclear. As a general rule, lawyers may not arrange to pay witnesses for their testimony.³⁴ Lawyers may, however, arrange payments for information or pay investigators to gather additional evidence.³⁵ Was the payment to Luethke an unethical payment for testimony or a permissible payment for Luethke's "information" or "investigative services?"

Likewise, although in hindsight it was certainly a mistake for the lawyers not to confer with prosecutors about the payment, or at least not to tell them about it immediately afterwards, it is uncertain that the lawyers acted unethically. Here, too, the story is incomplete, and

34. Model Code of Prof'l Responsibility DR 7-109(C) (1981) ("A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case.")

35. Ala. State Bar, Ethics Op. RO-83-77 (1982); Md. State Bar Ass'n, Comm. on Ethics, Ethics Dkt. 83-38 (1982); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 668 (1994) (discussing whether an attorney may pay an individual a fee for assistance in the fact-finding process); *see* Jamaica Time Petroleum, Inc. v. Fed. Ins. Co., 366 F.2d 156, 158 (10th Cir. 1966) (holding that, in action on insurance policy on an airplane, witness was not barred from testifying because insurance company's attorney and investigator provided him a \$1,000 reward for information concerning who destroyed a plane; the payment simply "affects the credibility of the witness and the weight to be given his testimony"); *United States v. Medina*, 41 F. Supp. 2d 38, 53-55 (D. Mass. 1999) (recognizing distinction in criminal law between paying money for information and paying money for testimony, and finding that cash payments of over \$100,000 and other benefits to witness were received for her investigative work and not for her testimony).

the ethical lines are unclear. While lawyers generally may not lie,³⁶ there is nothing to suggest that anyone affirmatively lied to the prosecutors. More likely, this was simply a case of nondisclosure. Was there a duty to disclose? It is unlikely that there would have been unless it can be said that the lawyers' failure to disclose the payments would comprise "conduct involving dishonesty, fraud, deceit or misrepresentation."³⁷ The line between permissible silence and deceitful withholding is, however, an ambiguous one.³⁸

2. Moral Ambiguity—The Prosecutors

In its coverage of this morality tale, the press entirely overlooked the ambiguous moral conduct of the prosecutors. It was the prosecutors, after all, who authorized the arrest of a man who, many months later, they decided did not deserve to be prosecuted. In the meantime, Curry was put through the considerable anxiety and expense that result from facing felony charges—a personal ordeal to which few would voluntarily submit.

Whether and to what extent the prosecutors are to blame is unclear, not only because a complete public narrative of what happened is absent, but also because the prosecutors failed to explain adequately why, after having arrested Curry, they ultimately dismissed the charges against him. Their silence permitted an inference that Morgan Stanley, not the District Attorney's Office, was principally to blame: the arrest and prosecution were warranted based on the prosecutors' initial information, but the prosecutors' later discovery of the undisclosed witness payment required them to dismiss an otherwise appropriate prosecution. It is unclear, however, how this inference could have been accurate.

To begin with, it is unlikely that the prosecutors were troubled by the mere fact that Luethke received compensation. Both prosecutors and police routinely compensate their witnesses. Besides making cash payments to "informants,"³⁹ prosecutors often give "cooperators"

36. See, e.g., Model Rules of Prof'l Conduct R. 8.4(c) (1983).

37. *Id.*

38. Compare Phila. Bar Ass'n Prof'l Guidance Comm., Op. 94-21 (1994) (stating that disclosure of a client's incarceration, which may cause cessation of worker's compensation benefits, is not required), with Ill. Formal & Informal Opinions, Op. 95-10 (1996) (stating that in a contract negotiation, a lawyer for one party must disclose to the other party when he has made a change in the document).

39. See *United States v. Febus*, 218 F.3d 784, 796 (7th Cir. 2000) (stating that the government's cash payments to two witnesses is not per se outrageous but rather is evidence that the jury can consider when weighing credibility); cf. Bruce A. Green, *After the Fall: The Criminal Law Enforcement Response to the S&L Crisis*, 59 Fordham L. Rev. S155, S180-81 (1991) (noting that when payment to informant is contingent on recovery of a reward, the informant's testimony could be influenced).

something even more valuable: leniency or complete forbearance from criminal prosecution for past crimes.⁴⁰

Similarly, the prosecutors would not have been discouraged simply because Morgan Stanley may have engaged in sneaky, or even (as they may first have thought) unlawful conduct. Prosecutors often proceed with their cases after learning that wrongdoing occurred in the course of the investigation—for example, when the police violate a suspect's Fourth Amendment rights. Indeed, prosecutors do not hesitate to make use of illegally obtained evidence where the defendant lacks "standing" to suppress the evidence or where there is an applicable exception to the exclusionary rule.⁴¹

Moreover, it is unclear that the undisclosed payment would have made it significantly harder to prove that Curry engaged in criminal conduct as charged. Luethke's testimony would have been admissible even if the payment to him was improper. While the prosecutors may have judged him to be a less credible witness because of his demonstrable financial motive, prosecutions are routinely brought based on the testimony of witnesses with all kinds of motives, biases, and prejudices that defense counsel can probe on cross-examination in order to discredit the witness. Further, the prosecution did not entirely depend on Luethke's credibility as a witness. The most important prosecution witness was, in all likelihood, the undercover officer who Curry asked to plant the phony e-mails.

There was a better reason for dismissing the charges, but one that suggests that the prosecutors may have made errors of judgment, if not abused their discretion, in prosecuting Curry in the first place. Following Curry's arrest, his lawyer suggested that Curry may have been entrapped.⁴² Of course, the fact that Luethke received compensation does not in itself establish an entrapment defense.⁴³ Paid informants and salaried police officers frequently gather evidence by inducing the target of the investigation to commit a

40. See, e.g., Daniel C. Richman, *Cooperating Clients*, 56 Ohio St. L.J. 69 (1995); Ian Weinstein, *Regulating the Market for Snitches*, 47 Buff. L. Rev. 563 (1999); Ellen Yaroshefsky, *Cooperation With Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 Fordham L. Rev. 917 (1999).

41. See *Rawlings v. Kentucky*, 448 U.S. 98, 105-06 (1980) (holding that the individual had no "standing" to challenge admission of the evidence because he had no legitimate or reasonable expectation of freedom from governmental intrusion into another person's purse); *United States v. Adamo*, 742 F.2d 927, 947-48 (6th Cir. 1984) (stating that "a guest at a party has no expectation of privacy and therefore no standing to raise a fourth amendment claim regarding the search of the premises or the seizure of items found there").

42. Cohen & Curnin, *supra* note 5.

43. See *United States v. Grimes*, 438 F.2d 391, 395-96 (6th Cir. 1971) (holding that paying an informer on a contingent-fee basis does not establish an entrapment defense); see also *United States v. Cresta*, 825 F.2d 538, 545-46 (1st Cir. 1987) (stating that payment of a large sum to an informer does not render testimony inadmissible); George E. Dix, *Undercover Investigations and Police Rulemaking*, 53 Tex. L. Rev. 203, 289 (1975) (same).

crime.⁴⁴ An entrapment defense, which ordinarily requires proof that the defendant had no predisposition to commit the crime, is rarely successful.⁴⁵ In Curry's case, however, Luethke may have "set Curry up" at the very outset—even before his meetings with Morgan Stanley and the prosecution—in the hope of obtaining a reward. Further, even assuming that the prospect of financial gain did not motivate Luethke's behavior, or that Luethke's behavior simply was not sufficiently coercive to establish entrapment as a matter of law, Curry could nonetheless gain strategic mileage by focusing his defense on entrapment, calling Luethke as a witness, and impeaching Luethke with proof of the \$10,000 payment.

The undisclosed payment to Luethke made prosecuting Curry much more difficult. Even if an entrapment defense seemed implausible under the law, the case could no longer easily be portrayed as one in which Curry, the defendant, had acted improperly to gain an advantage in a civil disagreement with Morgan Stanley. With the discovery of the undisclosed payment, it began to look like a case in which Morgan Stanley, the supposed victim, had acted just as badly for its own civil advantage. Although prosecutors do not necessarily make charging decisions based on the moral worthiness of the victims, it would have been justifiable for the prosecutors to wish "a plague o' both your houses!"⁴⁶ Even if the prosecutors did not themselves feel that way, a jury might. Even worse, the jury (not to mention the general public) might see this as a case of the state and corporation teaming up against "the little guy." Given the likely legal difficulties and the prosecution's lack of public appeal, the District Attorney's Office might have concluded that, even if Curry's conduct was criminal, this was not a worthy case on which to expend limited resources.

If using resources efficiently was the prosecutors' main concern, however, then should they not have made efforts at the outset of the investigation—and certainly before authorizing Curry's arrest—to discover whether Luethke had a financial motive for manufacturing a crime? Morgan Stanley's lawyers may not have recognized the importance of this fact, but certainly any capable prosecutor would have. This is precisely the sort of information that prosecutors are constitutionally obligated to disclose to the defense.⁴⁷ Had the

44. See *United States v. Myers*, 692 F.2d 823, 829-30 (2d Cir. 1982) (discussing elaborate undercover "Abscam" investigation where four United States Congressmen and three other defendants were convicted after accepting bribes from investigators); see also *United States v. Trejo*, 136 F.3d 826, 828 (D.C. Cir. 1998) (rejecting defendant's claim that the government induced him to sell guns by providing him with drugs which caused him to become intoxicated and thus made him incapable of resisting the informant's suggestions of engaging in illegal activity).

45. Roger Park, *The Entrapment Controversy*, 60 Minn. L. Rev. 163, 266 (1976).

46. William Shakespeare, *Romeo and Juliet* act 3, sc. 1.

47. See *United States v. Bagley*, 473 U.S. 667, 683-84 (1985) (reversing conviction

prosecutors asked about Luethke's complete dealings with Morgan Stanley, or even about his expectations of a reward, can it be doubted that they would have received truthful answers, if not from Luethke, then certainly from Morgan Stanley's lawyers? Likewise, if the prosecutors' ultimate conclusion was that the case lacked jury and/or public appeal, why did this insight materialize so late? Could they possibly have believed in the beginning that Morgan Stanley needed the prosecution's protection? Would it not have been obvious from the outset that, from the public's perspective, the prosecutors might appear to be allied with Morgan Stanley in its efforts to undermine Curry's civil claim?

3. Ambiguous Morals

In the legal press, this was called a "cautionary tale."⁴⁸ Reading press accounts, other lawyers may have sought to gain wisdom from the woes of Morgan Stanley's lawyers. But what lessons could they draw? Because the tale was incompletely told, the most important teachings are probably not the most obvious ones.

Some observers suggested, for example, that private lawyers ought to deal cautiously with witnesses who offer to provide information, especially those who seek financial reward.⁴⁹ Of course, the same advice might also apply to prosecutors. Another kernel of wisdom, perhaps offered self-servingly by lawyer-commentators, is that in-house corporate lawyers should hire outside counsel to conduct investigations.⁵⁰ These are not, however, weighty moral lessons. In all likelihood, a more complete account would have yielded a more interesting and more important lesson.

Consider some of the unanswered questions about Morgan Stanley's lawyers: How did it happen that experienced and capable in-house lawyers and outside counsel allowed their corporate client to engage in conduct that, in hindsight, seems so clearly to have been ill-advised, regardless of whether it was lawful or ethical? Did a lawyer engage in a deliberate, albeit erroneous, weighing of the benefits and risks before authorizing the witness payment? Did outside counsel too narrowly confine his role to advising about the lawfulness of the proposed conduct without regard to its wisdom? Did Morgan Stanley's in-house lawyers simply acquiesce in a decision made by non-lawyers at Morgan Stanley, or otherwise fail to consider reasons why this conduct might be imprudent? Did a lawyer make an affirmative decision not to consult with the prosecutors before making

because prosecutor failed to disclose to the defense that key witnesses had been compensated for their role in the investigation of defendant).

48. Catherine Aman, *Lessons of Morgan's Scandal*, Nat'l L.J., June 14, 1999, at B1.

49. Cohen & Curnin, *supra* note 5.

50. Aman, *supra* note 48.

the payment, or was this simply a matter of inaction by a number of lawyers, none of whom saw it as their responsibility to pick up the phone?

Now, consider some of the unanswered questions about the lawyers in the Manhattan District Attorney's Office: How did it happen that experienced and capable prosecutors brought criminal charges against someone who presumably would not have been charged at all if one additional, easily ascertainable fact had been known? Why did prosecutors fail to learn, before authorizing the arrest, that their informant expected a reward? Why did weeks go by before they learned of the informant's apparently mercenary intent? Should the prosecutors who made the decisions have been better trained? Should they have been better supervised? Did they rely too heavily on the police or on Morgan Stanley, or were they simply too busy to perform a thorough investigation themselves? Was it fair for prosecutors to make Morgan Stanley the "fall guy" for their dismissal of Curry's prosecution, or should they have acknowledged that they should never have authorized Curry's arrest in the first place and that the mistake in doing so was primarily their own?

Answers to these questions would yield some understanding of how mistakes are made by lawyers individually and collectively within a law office or prosecutor's office. In turn, these answers might yield some lessons about how to structure decision-making to reduce the risk of mistaken judgments *and* ethical lapses. Unfortunately, the real-life case study is unlikely to yield answers to questions such as these, and thereby diminishes the value of the case study as a vehicle for learning vicariously about legal ethics.

III. THE FICTIONAL ACCOUNT

If the Morgan Stanley situation is illustrative, then real-life lawyer tales tend to be both incomplete and unreliable. To some extent, press accounts may be inconsistent with each other and disputed by the parties. More importantly, they may omit most of what one would need to know about the lawyers' conduct, knowledge, motivations and interrelationships in order to resolve the moral ambiguity of the situation. This is predictably so, because lawyer protagonists generally have little incentive to publicize their conduct, and because the obligation of client confidentiality might prevent them from doing so even if they were willing. The famous "buried bodies" case is a rare example of a real-life professional dilemma that was eventually exposed in all its gory detail.⁵¹ It is highly valued among legal ethics

51. See, e.g., Richard Zitrin & Carol M. Langford, *The Moral Compass of the American Lawyer* 7-26 (1999) (describing dilemma of lawyers whose client confided that he had murdered two young women whose bodies had not been found and disclosed to the lawyers the whereabouts of the bodies).

teachers precisely for this reason. More often, however, legal ethics teachers attempt to compensate for the apparent factual shortcomings of real-life stories by developing fictional accounts.⁵² By doing so, teachers can fill in some (but by no means all) of the gaps so that the tale is more likely to reveal lessons applicable to lawyers' practice. Whether lawyers will actually derive such lessons from fictional accounts is, however, questionable. Precisely because the stories are contrived, lawyers will be less inclined to empathize or identify with the "characters," and therefore will be less likely to recognize the fictional lawyers' situation as relevant to their own. Consider, for example, the following tale.

A. *The Lawyers' Tale*

Arnold Inhouse is an assistant general counsel at a prominent national brokerage firm, Broker Inc. Inhouse loves his job—the hours are good, and the benefits are many. He is a real go-getter, and voraciously seeks out added responsibility. Unfortunately for him, the most interesting—and potentially the most praiseworthy—work is often given to attorneys at large corporate law firms in the city. Much to Inhouse's aggravation, his superiors seem to have more respect for the judgment of outside attorneys than for his own, and even the associates at law firms sometimes ooze disdain for his ideas despite the fact that he himself was once an associate at a prestigious law firm.

Inhouse has been looking into the company's discharge of a broker, Peter Pinkslip. It seems pretty clear that Pinkslip had been inflating his expenses. But Pinkslip has hired a lawyer, who insists that Pinkslip was fired because he is black, and because, having posed nude for photographs that were later published in a magazine catering to gay men, he was mistakenly believed to be homosexual. Inhouse relishes his control over the case, although he recognizes that it will likely soon be transferred to outside counsel.

One day, Fabian Fink, a gentleman who describes himself as Pinkslip's "friend," comes to Broker Inc. and finds his way to Inhouse. Fink explains that Pinkslip solicited his assistance in a plot to plant racist e-mails in the brokerage firm's computer system in hopes of bolstering his discrimination claim. Moreover, Fink valiantly volunteers his assistance in exposing Pinkslip's devious plan, then further volunteers that he is down on his luck financially. Inhouse eagerly accepts Fink's assistance, but explains that Fink cannot be compensated because his credibility might then be subject to attack. With a wink and a nod, however, Inhouse asks Fink to trust that Broker Inc. will do right by him.

52. E.g., Lawrence J. Fox, *Legal Tender: A Lawyer's Guide to Handling Professional Dilemmas* (1995); Zitrin & Langford, *supra* note 51.

Shortly thereafter, Fink independently contacts the District Attorney's Office, which assigns the matter to Patricia Peerless, a righteous young Assistant District Attorney. Peerless immediately arranges for investigators in the District Attorney's Office to debrief Fink. She then arranges a meeting with Inhouse and others from his company to learn whatever she can from them. Afterward, she is thrilled about the possibility of pursuing a conviction in what may turn out to be a well-publicized case. She consults with her supervisors, and all agree that planting e-mail in a corporation's computer system is a gravely serious crime meriting assiduous investigation, and that the most effective way to proceed is through an undercover operation.

Working with the police, Peerless devises a plan for Fink to introduce Pinkslip to an undercover investigator posing as a computer hacker. Investigators carry out the plan, Pinkslip offers the undercover officer \$200 to plant e-mails in the Broker Inc. computers, and the police arrest Pinkslip on the spot. Inhouse learns about the arrest from the press, and is annoyed and embarrassed not to have had better and more timely information.

Shortly after the arrest, Fink arranges to meet with Inhouse. Fink fervidly describes the "sting operation," boasting that Pinkslip is "dead to rights" because the \$200 offer was made to an undercover investigator. He predicts with confidence that Pinkslip will have to plead guilty, then casually raises the issue of his own financial difficulties and wonders whether Broker Inc. might pay him, say, \$10,000 as a reward for his past assistance. Inhouse is sympathetic for several reasons. He has grown fond of Fink over the course of their dealings. He recognizes that Fink played a difficult role, that Fink may be criticized for turning against a friend, and that Fink's willingness to do so was of great value to the company. Further, Inhouse recalls that, in the course of their prior dealings, there may have been some tacit understanding that Fink would receive compensation for his services.

Inhouse does not give much thought to how paying Fink might affect any future civil litigation Pinkslip might bring against Broker Inc.; that is now outside counsel's responsibility. Inhouse also disregards how the prosecutors might perceive the payment. It was they, after all, who rejected his participation in the investigation in the first place. But, congratulating himself on his alertness and prudence, Inhouse does wonder whether there might be some legal impediment to paying Fink a financial reward, and decides to get a quick opinion from Samuel Sage, a partner in an outside law firm with which Inhouse is dealing in another matter.

Inhouse telephones Sage and summarizes what he regards as the relevant facts, including that in the unlikely event that Pinkslip goes to trial, Fink most likely will not have to testify. Inhouse asks whether, under these circumstances, there is any law against making a payment

to Fink. Although Sage does not have a background in criminal investigations, he considers himself perfectly competent to deliver a simple legal opinion based on the given set of facts. A man of his considerable accomplishment certainly would not want to suggest to Inhouse that he was unqualified to give the requested assistance. Besides, with the hard-working junior partners demanding an increasingly large share of the firm's profits and an increasingly expansive role in firm governance, he can hardly afford to cede responsibility for an important client to another lawyer in the firm.

Sage does not probe to determine whether Inhouse's factual understandings are correct. Further, he does not request any additional information that might be necessary to consider fully the non-legal implications of the payment, or that might be helpful in determining whether the proposed payment is prudent in light of the brokerage firm's civil dispute and the pending criminal prosecution. It does not occur to Sage to give advice about the manner in which the payment should be made, or about whether the Assistant District Attorney should be consulted in advance or given notice immediately afterwards. After all, Inhouse knows what services he wants and needs, and is surely aware of the limits of those services. If Inhouse requests a mere legal opinion, that is all he will receive. Thus, after enlisting his associate to conduct the necessary research, Sage advises Inhouse that, assuming that Fink will not be a witness, the payment would be lawful.

Armed with Sage's advice, Inhouse asks his superiors in the general counsel's office to authorize a \$10,000 payment to Fink. Although the general counsel wonders whether the payment will "smell fishy," Inhouse assures him that Sage concluded that the payment would be perfectly legal and expressed no misgivings about making it. Comforted by outside counsel's apparently comprehensive review of the matter, Inhouse's superiors provide their authorization.

Meanwhile, although Pinksip is under indictment, Peerless sees no need to prepare the case for trial. She assumes that, like most defendants, Pinksip will plead guilty, and she knows that if the case does go to trial, there will be time enough to prepare the case later on. Besides, she has a lengthy backlog of cases to address, and this one seems all but in the bag. It does not occur to her to meet with Fink, much less to inquire into Fink's background and motivations. This is so for any number of reasons, including that if Fink testifies at trial, his role will be a minor one. Moreover, Fink's credibility is not really at issue, because Pinksip offered a payment directly to an undercover investigator.

Several weeks after Pinksip's arrest, Peerless again arranges to meet with Inhouse and his company's outside counsel. At the meeting, Peerless learns for the first time about the \$10,000 payment to Fink. She is initially indifferent; Pinksip is guilty regardless. A few

weeks later, however, when Pinksip's counsel makes a request for any evidence relevant to the defense of entrapment, she realizes that Fink is a potential witness, that the payment may harm his credibility, and that her carelessness may cost her a conviction.

Peerless apprehensively consults with her supervisors. They anticipate that once the payment to Fink is disclosed, the prosecution of Pinksip will not be a very sympathetic one from the media's perspective. The press will likely portray the District Attorney's Office as having been manipulated by a major corporation to take its side in a civil dispute against a fired employee, and as having cooperated by engaging in the kind of investigative excess traditionally reserved for snaring drug dealers and mafia kingpins. Fine points about who initiated the criminal investigation, whether the payment came before or after Pinksip's arrest, and whether Fink will take the witness stand will likely not matter much to the public. The press will have a field day.

The prosecutors conclude that Broker Inc. has provided an easy way out: drop the charges against Pinksip and announce an investigation of the brokerage firm. Perhaps the firm had some nefarious reason for making the payment without first consulting with prosecutors. The obstruction-of-justice provision is far reaching enough to justify such an investigation, regardless of whether the investigation is likely to pan out. Anyway, even if Broker Inc. did not act illegally, it surely acted stupidly and therefore deserves to be embarrassed. Most importantly, announcing an investigation of Broker Inc. will redeem and protect the prosecutor's office, placing it firmly on the side of the victimized little guy and shifting the blame to where it belongs: big business.

B. The Search For Insight

This fictional account answers some of the questions that are unanswered by the real-life Morgan Stanley story as reported in the press, because it describes in imagined fashion some of the motivations of the fictional lawyers and some of their private interactions—matters that press accounts rarely reveal. As a consequence, the fictional account may provide a better vehicle for considering what well-meaning lawyers do wrong and what they could do differently. Among other things, this particular variation on the Morgan Stanley case suggests the possible danger of “over-compartmentalization” in law offices—for example, that lawyers' roles and responsibilities in a matter may be too narrowly circumscribed by their supervisors, their clients, or themselves; that those with ultimate decision-making authority may lack sufficient access to relevant facts; or that those with the greatest access to relevant facts may not consider sufficiently the framework within which their decisions should be made.

In the fictional account, Inhouse might be criticized on several scores, most of which seem at least partly attributable to his failure to take a broad view of the possible implications of his decisions and the full array of his client's interests. Although probably without intent, he was potentially misleading in his initial dealings with Fink because he did not give full consideration at that time to the possible limits on the company's later ability to "do right by" Fink. When it then came to deciding whether to reward Fink, he did not evaluate its implications for the criminal case and his company's relationship with criminal prosecutors, and thus did not consider how prosecutors might perceive the payment. For that matter, he failed to evaluate the payment's implications for the civil litigation brought by Pinksip against Broker Inc. He did not consult others in the company who might have contributed to the decision, and was not forthcoming with supervisors with whom he did consult in that he failed to convey the conditional nature of Sage's advice.

Likewise, Sage might be criticized for providing limited and conditional advice without being certain how it would be used, and for failing to explore the company's possible need for more complete advice. Had he been more experienced in criminal matters, Sage might have recognized the importance of confirming with the prosecutors that Fink would not be a witness, and of ascertaining whether prosecutors had any other reasons for objecting to the payment. Had he been more aware of his own limitations and less possessive of the client, he might have consulted with other lawyers in his firm who had greater experience in criminal matters. Even without a background in this area, if he had conducted the research himself, rather than delegating it to an associate, he might have become more sensitive to the dangers of compensating a potential witness, and therefore more inclined to press Inhouse on his factual understandings.

Peerless might be criticized for failing to consider, at an earlier stage, how concerns about the informant's credibility might have significance for the office's exercise of prosecutorial discretion. As a matter of "seeking justice,"⁵³ perhaps she should have probed weaknesses in the case before bringing charges. Additionally, perhaps she should have considered at the outset how the public would perceive the decision to pursue the case against Pinksip, and later, whether it was fair to go after Broker Inc. for conduct that appears to have been "stupid" but, on reflection, not criminal. Her superiors might be criticized for failing to solicit facts that, early on, would have suggested that this was not an appropriate case to prosecute. Of course, the District Attorney's Office might also be criticized for

53. See Green, *supra* note 2, at 612-18 (discussing origin of prosecutors' duty to seek justice).

misusing both its investigative powers and the press to embarrass Broker Inc. and its lawyers as a way of distracting media attention from its own initial misjudgments.

The fictional account suggests much more than the real-life Morgan Stanley story about the motivations of the various lawyers who may have gone slightly astray. It is understandable why Inhouse limited the amount of information he disclosed to others and the extent to which he enabled others to participate fully in decision-making. As a matter of professional pride and professional standing within the corporate counsel's office, he would naturally seek to squirrel information and consolidate his authority. This tendency would only be exacerbated by feelings of competitiveness with others in the organization and by the sense that, as an in-house corporate lawyer, other lawyers looked down on him—including the powerful prosecutors who would not take him into their confidence, his own superiors who placed greater value on the judgment of outside counsel, and even law firm associates.

Similarly, the outside counsel's conduct is more easily understandable in the fictional version. The story suggests that, like many law firm partners, Sage was driven at least in part by economic concerns, both the firm's and his own. He would have had an individual interest in cultivating the client, in preserving that client's confidence in him, and in working personally with the client. It would be contrary to these interests for Sage to acknowledge that there were other lawyers in the firm who were much better qualified to provide the legal advice the corporate client requested.

Finally, the fictional version illustrates more clearly how considerations of efficiency influence both supervisors and lower-level prosecutors in a large, urban District Attorney's Office. Much of the discretion vested in the District Attorney's Office will be reserved to the supervisors, who are the more experienced attorneys. Yet the line assistants will be entrusted to gather the information on which the exercise of discretion will be based. This poses the danger that, for any of several reasons, the lower-level prosecutor will not seek relevant information or transmit it to the supervising attorneys. The Assistant District Attorney, who carries a heavy case load and must therefore herself act efficiently, may not see it as central to her role to gather information relevant to her supervisors' discretionary decisions. Not being privy to the supervisors' decision-making criteria, the Assistant District Attorney may not recognize the relevance of some information even if she is otherwise disposed to gather it. Of course, in the case of an interesting or high profile investigation, she may have even less of a personal incentive to look for reasons not to bring charges.

Lawyers who encounter this story might recognize that the lawyers in the tale were unexceptional in most respects. They were

reasonably well-intentioned and, by all appearances, reasonably competent in their fields. Their motivations and relations with other lawyers were not aberrational. That is, they were like many lawyers. Their unfortunate situation was avoidable, however, and their errors were potentially symptomatic of broader failings. Their experience might therefore suggest some lessons about lawyers' professional conduct that other lawyers can relate to their own practice.

The lawyers in this tale, however, were exceptional in one important respect: they were not real. Consequently, it is unclear how readily lawyers will draw lessons from these lawyers' experiences. Lawyers are likely to resist analyzing the motivations of fictional lawyers and exploring the dynamic among them. A plausible response will be, "No real lawyers would act that way."

Perhaps if the story were told more artfully, lawyers would be more disposed to identify with fictional lawyers in the same way they identify with lawyers in real-life tales. Unfortunately, many lawyer-ethicists who might pen these case studies lack the novelist's art. Or, perhaps the problem is not so much the inartfulness of the depiction but the narrowness of legal education. As Edmund Burke famously said, a legal education sharpens the mind by narrowing it. My colleague, lawyer-novelist Thane Rosenbaum, made this point forcefully after reading an earlier draft of this article. He observed:

The main point [this article] seem[s] to be raising incorporates a larger critique about legal education and the practice of law. Findings of fact are always treated as a cold record, concretely recited, reported matter of factly without any hint of moral or emotional complexity. Lawyers are trained this way, as if the evolution of the law and the development of rules is more relevant than the human dimension and drama that gets played out outside the courtroom, and underneath the four corners of the complaint. Lawyers and judges are never trained to think about moral lessons, only whether the legal result was correct.

This is the flaw in legal education and practice, which is why . . . lawyers will never be able to appreciate the moral lesson that comes from a contrived, hypothetical tale, not just because they realized that it was made up, but because the fictional tale is laced with nuance, ambivalence, human frailties, subjectivities, ambitions and motivations, wounded egos, raw emotions, petty jealousies and rivalries, competitive fires and thwarted dreams. Cold records, findings of fact, news reports, never show any of these dynamic features of real life.

Lawyers simply never think this way, which is why . . . these moral lessons might not serve the ultimate ends of teaching legal ethics. That's because in order to understand moral ambiguity, one has to first accept the very presence of ambiguity in the lives of human beings. As in the case that you present in this article, everyone

needs to realize that lawyers are people first, just like any other working stiff.

Facts, whether true stories or hypotheticals, are never cold and emotionless, but always dynamic, animated and volatile. That's the difference between journalism and fiction writing. Reporters merely report what happened; fiction writers don't care so much about what happened, but rather what the characters were thinking when they were making the events happen. . . . It's the difference between the outside world of flat description ("was the light green?" "who else did you see in the restaurant that night?"), and the inside world of conflict and motivation.

. . . [T]he point [is] that legal ethical conduct and moral lessons can't be taught without a deeper appreciation and sensitivity to the inner world, which is sadly not a part of a lawyer's training.⁵⁴

Fictional vignettes like those found in legal ethics case books⁵⁵ may be useful to help lawyers both identify situations where particular ethics rules may apply and explore the ambiguity in those rules,⁵⁶ but it is unclear whether they are equally useful for delineating the moral, emotional, psychological and sociological truths of legal practice. If one is trying to evoke empathy—to encourage other lawyers to experience situations vicariously—can one do it effectively with fabricated tales?

CONCLUSION

The ideal "case study" in legal ethics may well be a fully fleshed out account of how real lawyers dealt with a professional dilemma. Regretfully, such real-life stories are few and far between. One is then left with a choice between incomplete real-life stories, on one hand, and somewhat fuller fictional narratives, on the other. Each has its limitations. Compounding the limitations of case studies

54. E-mail from Thane Rosenbaum, Professor of Law, Fordham University School of Law, to Bruce Green, Louis Stein Professor, Fordham University School of Law (Oct. 12, 2000, 01:29:51 EST) (on file with the Fordham Law Review). Along similar lines, Professor Rosenbaum earlier noted that lawyers "aren't known for a particularly artistic personal style" and "are rarely thought of as elegant writers," and suggested that the ability to write great literature would be undermined by "a lawyer's training or perspective." Thane Rosenbaum, *The Writer's Story, and the Lawyer's*, N.Y. Times Book Rev., Aug. 20, 2000, at 27. He explained:

Most lawyers see the world through a much narrower lens than writers do, one that has no aperture for the emotions. Some of this has to do with training. The rest, I suspect, can be attributed to personality traits that draw many people to study law in the first place.

Id.

55. See, e.g., Thomas D. Morgan & Ronald D. Rotunda, *Professional Responsibility* (7th ed. 2000).

56. See generally Thomas D. Morgan, *Use of the Problem Method for Teaching Legal Ethics*, 39 Wm. & Mary L. Rev. 409 (1998).

themselves are the limitations of lawyers as students of human nature. If one accepts Thane Rosenbaum's critique that lawyers by training are invariably insensitive to moral nuance and complexity, one might well despair of developing lawyers' moral understanding through the use of case studies or any other methodologies. Legal ethics professors, however, being passionate about teaching this subject and indefatigable in our efforts to overcome pedagogic hurdles,⁵⁷ are unlikely to accept such a gloomy prognosis, however well-founded. Therefore, we will persevere and, as we do, encourage learning from the mistakes of other lawyers, be they real or fictional.

57. See Bruce A. Green, *Less is More: Teaching Legal Ethics in Context*, 39 Wm. & Mary L. Rev. 357, 357, 392 (1998).