

## THE “CHARLES STIMSON” RULE AND THREE OTHER PROPOSALS TO PROTECT LAWYERS FROM LAWYERS

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Lawyers can be “at the edge” for many different reasons. For purposes of this Article, I define “at the edge” to mean lawyers who for one of two reasons encounter risks of, or actual harm to, their career, freedom, physical safety, reputation, or income. The two reasons are the identity of the lawyer’s client, or the nature of the claim the lawyer is making in court, or both. Lawyers may also be at risk for tactics that bring sanctions. But that is a different kind of risk, a risk of crossing an ethical or legal boundary, and not part of my definition. I will focus on lawyers who risk or suffer harm doing the job they are authorized or required to do. Some of these risks can be addressed and perhaps eliminated or minimized through rules. Some cannot.

At a minimum, lawyers who are at the edge simply because they are doing their job can be offered the protection of rules that aim to deter other lawyers from interfering with their professional relationships. I will suggest four such rules, each of which is firmly grounded in the American adversary system of justice. I recognize that my proposed rules have limited value. Lawyers find themselves at risk from individuals who are not lawyers, too. Many of these risks no rule can eliminate. One example is illustrated by the “Buried Bodies” case in upstate New York.<sup>1</sup> Two lawyers, Frank Armani and Francis Belge, suffered because of who their client was and how they represented him. They were assigned to represent Robert Garrow, who was charged with

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1. *People v. Belge*, 372 N.Y.S.2d 798 (Onondaga County Ct. 1975), *aff’d*, 376 N.Y.S.2d 771 (App. Div. 1975), *aff’d*, 359 N.E.2d 377 (N.Y. 1976).

murdering a young man. The alleged crime stoked strong passions in the rural community in which the case was tried. To make matters worse, the client told the lawyers that he had killed three other young people, too, and gave them the location of the bodies. Belge found the body of one young woman in Onondaga County, New York, but he did not move it. Nor did the two lawyers initially reveal the three other bodies because the discovery would likely have implicated their client in additional murders. Later, they did reveal the three other murders as part of an unsuccessful insanity defense.<sup>2</sup>

Prior to and during the murder trial, the lawyers received anonymous threats of harm if Garrow went free. Public Television told the story of these two lawyers and revealed how the practice, health, and marriage of one of them, Frank Armani, suffered even though the lawyers were just doing their job.<sup>3</sup> Indeed, confidentiality rules prohibited them from revealing the bodies except as that might benefit their client's strategy.<sup>4</sup> Then, compounding the harm, the elected district attorney of Onondaga County indicted Belge for violating two obscure health code statutes.<sup>5</sup> One statute provided:

In case of any death occurring without medical attendance, it shall be the duty of the funeral director, undertaker or any other person to whose knowledge the death may come, to give notice of such death to the coroner of the county, or if there be more than one, to a coroner having jurisdiction, or to the medical examiner.<sup>6</sup>

The indictment was ultimately dismissed, but not without a fight all the way to the New York Court of Appeals.<sup>7</sup>

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2. *Id.* at 799.

3. *Ethics on Trial* (WETA-TV broadcast 1986).

4. N.Y. CODE OF PROF'L RESPONSIBILITY DR 4-101(B) (1975).

5. *Belge*, 372 N.Y.S.2d at 801-02. The grand jury refused to indict Armani. *Id.* at 799. The indictment cited only one of the victims apparently because hers was the only body found in the county in which the case was brought. *Id.*

6. N.Y. PUB. HEALTH LAW § 4143(1) (McKinney 1971). Belge was also charged with violating N.Y. PUB. HEALTH LAW § 4200(1) (McKinney 1971), which requires a decent burial of the dead. *Belge*, 372 N.Y.S.2d at 799.

7. *People v. Belge*, 359 N.E.2d 377 (N.Y. 1976). The case has an interesting procedural history. The County Court dismissed the indictment on two grounds: the attorney-client privilege and in the interest of justice, which is a discretionary ground. *Id.* at 377. The Appellate Division affirmed on the first ground. *People v. Belge*, 376 N.Y.S.2d 771 (App. Div. 1975) ("We believe that the attorney-client privilege attached insofar as the communications were to advance a client's interests, and that the privilege effectively shielded the defendant-attorney from his actions which would otherwise have violated the Public Health Law."). The Court of Appeals concluded that, while it had jurisdiction, it lacked power to review the County Court's dismissal in the interest of

The decision to indict Belge was indefensible. The district attorney should have known better. But that aside, what can be done to protect lawyers in a situation like this one, lawyers who are the targets of public anger for doing a job that the public may not understand? Not a whole lot. Other lawyers and bar groups can and should come to the defense of lawyers who face public hostility for doing their job, but a defense from within the profession is not likely to count much with the public. Peer support will offer comfort, but it cannot protect against economic threats to the lawyer's practice. In smaller communities, that threat is especially acute.

Partial remedy or deterrence is possible in some other situations in which lawyers are threatened with harm, or harmed, for doing their job or for meeting professional aspirations.

One example can be found in efforts during the 1960s to use the federal courts to secure the civil rights of minorities in the American South. In *Dombrowski v. Pfister*,<sup>8</sup> lawyers working with a civil rights group in Louisiana were harassed and ultimately indicted for subversive activities. They turned to the federal district court. Eventually, the Supreme Court's opinion in *Dombrowski* led to an injunction against the state prosecutions on constitutional grounds.<sup>9</sup> Here, I am not interested in the intricate—and important—federalism issues for which the case is justly famous. I am interested in how state officials used state legal process to interfere with the right to counsel. Here is what was done to the indicted lawyers as recounted by Judge Wisdom dissenting in the lower court and whose description is quoted in the Supreme Court's opinion:

At gunpoint their homes and offices were raided and ransacked by police officers and trustees from the House of Detention acting under the direct supervision of the staff director and the counsel for the State Un-American Activities Committee. The home and office of the director of Southern Conference Educational Fund were also raided. Among the dangerous articles removed was Thoreau's Journal. A truckload of files, membership lists, subscription lists to SCEF's newspaper, correspondence, and records were removed from SCEF's

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justice and affirmed without addressing the privilege question. *Belge*, 359 N.E.2d at 377 (“To the extent that the dismissal, affirmed by the Appellate Division, was granted in the interest of justice, only questions with respect to the exercise of discretion would be tendered for appellate review. Our court's jurisdiction, however, with exceptions not material here, is limited to review of questions of law.”).

8. 380 U.S. 479 (1965).

9. *See id.* at 497.

office, destroying its capacity to function. At the time of the arrests, Mr. Pfister, Chairman of the Committee, announced to the press that the raids and arrest resulted from “racial agitation.”<sup>10</sup>

Then there is the story of Richard Sobol, an Arnold & Porter lawyer, not admitted in Louisiana, who went to the state to do civil rights work. Sobol worked alongside lawyers admitted in Louisiana. Leander Perez was the district attorney of Plaquemines Parish, where Sobol was doing some of his work. Sobol was about to appear in state court for Gary Duncan, a black man charged with assault.<sup>11</sup> (Gary Duncan’s case would later result in the Supreme Court decision applying the Sixth Amendment’s jury trial right to the states.<sup>12</sup>) Eugene Leon, the state judge hearing Duncan’s case, told Daryl Bubrig, the assistant district attorney, of Sobol’s imminent appearance in his court.<sup>13</sup> Bubrig alerted Perez. “Perez signed a bill of information charging Sobol with practicing law without a license.”<sup>14</sup> When Sobol appeared, Judge Leon “issued a bench warrant for [his] arrest.”<sup>15</sup> In other words, the judge and the prosecutors cooperated to impede Sobol’s civil rights work. As the federal court described the situation in its ruling on Sobol’s request for an injunction against prosecution:

Shortly after leaving the Judge’s chambers and while still in the courthouse Sobol was arrested and charged with practicing law without a license. Sobol was incarcerated in the Plaquemines Parish Prison for approximately four hours. He was fingerprinted and photographed several times, his belt and tie were taken away, and his brief case containing all the Duncan case papers was taken over his objection. Bail was set at \$1500.00, without his ever appearing before the Judge in regard to it, and Sobol was released upon posting that bond later in the day on February 21, 1967.<sup>16</sup>

In enjoining the prosecution, the court concluded:

The circumstances surrounding the arrest and charge against Sobol, and the course of the Duncan case, convince us that Sobol was prosecuted only because he was a civil rights lawyer forcefully representing a Negro in a case growing out of the desegregation of the

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10. *Id.* at 487 n.4 (citation omitted).

11. *Sobol v. Perez*, 289 F. Supp. 392, 395-98 (E.D. La. 1968).

12. *Duncan v. Louisiana*, 391 U.S. 145, 147-58 (1968).

13. *Sobol*, 289 F. Supp. at 398.

14. *Id.*

15. *Id.*

16. *Id.* at 398-99.

Plaquemines Parish school system.

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This prosecution was meant to show Sobol that civil rights lawyers were not welcome in the parish, and that their defense of the Negroes involved in cases growing out of civil rights efforts would not be tolerated. It was meant also as a warning to other civil rights lawyers and to Negroes in the parish who might consider retaining civil rights lawyers to advance their rights to equal opportunity and equal treatment under the Equal Protection Clause of the Fourteenth Amendment.<sup>17</sup>

To meet such situations, which we may hope are rare, I propose an addition to the comment following ABA Model Rule of Professional Conduct 8.4(d), which prohibits lawyers from “engaging in conduct prejudicial to the administration of justice.” The comment would say:

It is prejudicial to the administration of justice for a lawyer holding public office to use or threaten to use legal process against another lawyer, including by filing criminal charges, institution of discipline, arrest, or search of a law office, where a motive for doing so is to prevent or interfere with the lawyer’s lawful representation of a current or a prospective client.

Or as an alternative to amending the comment to the Model Rules, courts, in interpreting Rule 8.4(d), should view such acts as within the prohibition against conduct prejudicial to the administration of justice. For convenience, I will call this the “Leander Perez” Rule.

Another situation that can benefit from an interpretation of the same model rule is unfortunately more recent. Charles Stimson, a lawyer, was the deputy assistant secretary of defense for detainee affairs. He had responsibility for conditions at Guantanamo Bay, Cuba, where the Bush Administration was holding alleged terrorists.<sup>18</sup> In a radio interview, he said:

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17. *Id.* at 401-02. Lawyers who think they have had a hard day at the office may not be able to imagine the conditions under which civil rights lawyers in the south worked before and during the 1960s. Black lawyers had it especially hard because of the limited number of hotels and restaurants that would serve them. For a description of these conditions, see generally Constance Baker Motley, *EQUAL JUSTICE UNDER LAW* (1998).

18. Neil A. Lewis, *Official Attacks Top Law Firms Over Detainees*, N.Y. TIMES, Jan. 13, 2007, at A1.

I think the news story that you're really going to start seeing in the next couple of weeks is this: As a result of a FOIA request through a major news organization, somebody asked, "Who are the lawyers around this country representing detainees down there?" and you know what, it's shocking.<sup>19</sup>

Stimson then named "more than a dozen of the firms listed on the 14-page [FOIA] report . . . describing them as 'the major law firms in this country.'"<sup>20</sup> He added:

I think, quite honestly, when corporate C.E.O.'s see that those firms are representing the very terrorists who hit their bottom line back in 2001, those C.E.O.'s are going to make those law firms choose between representing terrorists or representing reputable firms, and I think that is going to have major play in the next few weeks. And we want to watch that play out.<sup>21</sup>

Now, why would Stimson do this? Despite his effort to backpedal in the face of overwhelming criticism following his comments,<sup>22</sup> let me suggest that there really is only one logical explanation. By naming the firms representing Guantanamo detainees pro bono, and through his reference to "corporate C.E.O.s" whose companies employ those firms, Stimson invited the C.E.O.s to pressure the firms to withdraw from their legal work for "the very terrorists who hit their bottom line." The C.E.O.s were encouraged to make the firms "choose between" working for the companies or working for "the terrorists." Many of the clients of the eminent law firms Stimson named were likely directly or indirectly dependent on the good will of the government and Stimson, of course, was a high government official. So an additional layer to Stimson's strategy would be the implication of what the government expected of the C.E.O.s. It did not work, thankfully. Instead, Stimson was forced out of his job.<sup>23</sup>

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19. *Id.*

20. *Id.*

21. *Id.* at A1, A13.

22. Karen Mathis, the President of the American Bar Association, said:

Lawyers represent people in criminal cases to fulfill a core American value: the treatment of all people equally before the law. To impugn those who are doing this critical work—and doing it on a volunteer basis—is deeply offensive to members of the legal profession, and we hope to all Americans.

*Id.* at A13; see Sarah Abruzzese, *Pentagon Aide Regrets Stance on Law Firms for Detainees*, N.Y. TIMES, Jan. 18, 2007, at A18.

23. *Official Quits After Remark on Lawyers*, N.Y. TIMES, Feb. 3, 2007, at A12.

But Stimson's conduct leads to my next proposed comment to Rule 8.4(d), or alternatively to a proposal for judicial interpretation of the rule. It is this:

It is prejudicial to the administration of justice for a lawyer holding public office to threaten or to cause economic harm to another lawyer directly, or to encourage clients and prospective clients of the other lawyer to do so, for the purpose of preventing or interfering with the other lawyer's lawful representation of a current or prospective client [and which, under the circumstances, has a substantial likelihood of doing so].

I will call this the "Charles Stimson" Rule. Admittedly, unlike the "Leander Perez" Rule, it penalizes speech and may be seen to run afoul of the Supreme Court's decision in *Gentile v. State Bar of Nevada*,<sup>24</sup> which addressed the constitutionality of rules that curtail public speech by lawyers about their pending cases. Addition of the bracketed language in my proposal, or equivalent language, is intended to save it from First Amendment challenge for limiting the speech of public officials.<sup>25</sup> However, *Gentile* addressed and protected the speech of a private lawyer defending a private client charged with crime. I suggest that government lawyers may not enjoy the same First Amendment protection,<sup>26</sup> which may make the limitation in the bracketed language unnecessary.

I offer two other standards for interpreting the prohibition in Rule 8.4(d). The law recognizes the torts of abuse of process and malicious prosecution. The *Restatement (Second) of Torts* defines the tort of malicious prosecution as follows:

One who takes an active part in the initiation, continuation or procurement of civil proceedings against another is subject to liability to the other for wrongful civil proceedings if  
(a) he acts without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based, and

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24. 501 U.S. 1030 (1991).

25. I am grateful to Michael Tigar, who successfully argued *Gentile* in the Supreme Court, for suggesting the bracketed language.

26. See *Levine v. U.S. Dist. Court*, 764 F.2d 590, 602 (9th Cir. 1985) (Sneed, J., concurring); *United States v. Simon*, 664 F. Supp. 780, 796 (S.D.N.Y. 1987).

(b) except when they are ex parte, the proceedings have terminated in favor of the person against whom they are brought.<sup>27</sup>

And the *Restatement* defines the tort of abuse of process this way:

One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process.<sup>28</sup>

My suggestion is that when either standard is violated *and* the forbidden “purpose” (whether abusive or malicious) is the interference with a lawful current or prospective attorney-client relationship, then in addition to whatever civil liability may attach, the actor, if a lawyer, should be deemed to have violated Rule 8.4(d). In other words, abuse of process or malicious prosecution that is also intended to disrupt a lawful attorney-client relationship will be prejudicial to the administration of justice and subject a lawyer to discipline. Cast in the language of the *Restatement* provisions, the comment to Rule 8.4 (or judicial construction of the rule) should say the following:

*The “Abuse of Process Rule.”* It is prejudicial to the administration of justice for a lawyer to use legal process to accomplish a purpose for which it is not designed and primarily to prevent or interfere with another lawyer’s representation of a current or prospective client.

*The “Malicious Prosecution Rule.”* It is prejudicial to the administration of justice for a lawyer to use legal process to prevent or interfere with another lawyer’s representation of a current or prospective client if (i) the lawyer acts without probable cause and primarily for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based and (ii) the proceedings initiated by the process have terminated in favor of the person against whom they are brought.

When might either of these rules be used? Assuming the other elements of the doctrine are present, one situation is when a defendant’s

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27. RESTATEMENT (SECOND) OF TORTS § 674 (1977).

28. *Id.* § 682.



lawyer counterclaims against the lawyer representing the plaintiff, thereby likely creating “a conflict of interest” between attorney and client “that would require a substitution of counsel;” and, in addition, causing a “negative effect . . . on the attorney-client privilege and work product immunity, both critical to effective advocacy.”<sup>29</sup> Both consequences of counterclaims against opposing lawyers have been recognized.<sup>30</sup>

I last want to emphasize that these four rules, focused on the conduct of lawyers, are solidly rooted in adversary justice. A central premise of American legal ethics rules is the nation’s system of adversary justice, which is to say that the existence and values of the adversary system (itself constitutionally, as well as historically and culturally, based) in large measure determine what we permit or allow lawyers to do or forbid them to do in representing clients. Among the clearest examples of the adversary system’s influence on lawyer ethics are: the rule prohibiting a lawyer in representing a client from communicating with another lawyer’s client on the subject of the representation;<sup>31</sup> the rule forbidding lawyers to “request” that third persons, with narrow exceptions, “refrain from voluntarily giving relevant information to another party;”<sup>32</sup> and the various rules defining what is required by way of “candor toward the tribunal.”<sup>33</sup> The general prohibition against conduct “prejudicial to the administration of justice” protects the same values. In other words, in various ways, we tell lawyers that their duty of ardent advocacy for the goals of a client is circumscribed by the interests of other institutions that compose the adversary system, including the interest in protecting the advocacy of opposing lawyers. My several interpretations of the phrase “prejudicial to the administration of justice” protect the adversary system of justice against acts of sabotage by lawyers when these acts can undermine the ability of another lawyer to pursue the lawful goals of his or her client.

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29. *Badger Cab Co. v. Soule*, 492 N.W.2d 375, 378 (Wis. Ct. App. 1992).

30. *Id.* at 378-79 (identifying these risks and dismissing counterclaim against plaintiffs’ lawyers until termination of plaintiffs’ case); *Riddle & Assocs., P.C. v. Kelly*, 414 F.3d 832, 837 (7th Cir. 2005) (defendant’s law firm sanctioned for bringing objectively “unreasonabl[e] and vexatious[]” counterclaim against plaintiff’s law firm). These two rules also protect the professional relationships of lawyers whose work does not put them “at the edge.” So in that sense they are over-inclusive. But that should pose no concern. The additional misconduct they capture should be viewed as prejudicial to the administration of justice even if the targeted lawyers are representing clients who are not controversial or employing strategies that are commonplace.

31. MODEL RULES OF PROF’L CONDUCT R. 4.2 (2007).

32. MODEL RULES OF PROF’L CONDUCT R. 3.4(f) (2007).

33. MODEL RULES OF PROF’L CONDUCT R. 3.3 (2007).