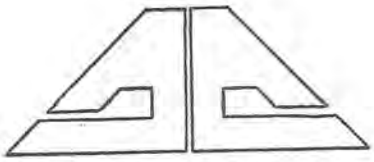

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Table of Contents

General Articles

Business Information

Ethics and Law Librarianship: A Panel Discussion*

Moderated by Giuliano Chicco**

A panel consisting of a law professor, a theologian, and a practicing librarian, all experts on ethics, discusses the ethical, moral, and legal aspects of three situations representative of daily work in law librarianship.

The idea for the program on which this article is based began several years ago, when ethics was very much in the news and the time for an ethics program seemed right. Anyone familiar with the process for getting an AALL annual meeting program approved and marshalling the talent for the program knows the amount of advance work required. What a shame it would have been to find out after all this work that the issue in question had ceased to be of concern. This topic, however, has been blessed. The issue of ethics is still with us, and, if anything, has grown to become a national obsession. It is easy to understand why stories about ethical malfeasance are so popular. It is easy to find interest in a clergyman with feet of clay or in a fallen congressman or presidential hopeful.

How do ethical considerations affect our work as law librarians? Of what ethical considerations must we be aware? My favorite ethical quote is by Lord Molton: "True civilization is measured by the extent of obedience to the unenforceable." Civilization is what this article is about. At the program, we did not discuss the law librarian who is convicted of dealing on inside information. There are laws to cover that kind of activity. We dealt more with the realm of honor and propriety.

Some synonyms that come to mind for a discussion on professional ethics are honesty, integrity, fidelity, fairness, and responsibility. We did not have all the answers, but we hope our audience realized that the ability to recognize that there is a problem is key. We hope also that the airing of these concerns shows that our problems as law librarians are not unique. In fact, they are all too common.

What follows is an edited transcript of the discussion and questions at the program held in Reno in 1989. I narrated short stories to illustrate

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* This is an edited transcript of a program presented at the 82nd Annual Meeting of the American Association of Law Libraries, Reno, Nevada, June 19, 1989.

** Manager of Legal Resources and Law Librarian, Corporate Legal Library, General Electric Company, Fairfield, Connecticut.

specific ethical situations. The stories all are true. The events described actually happened to someone. Our purpose was to analyze the events and reach a decision on how someone faced with a similar situation should proceed. After hearing the facts, the panel discussed, analyzed, defended, and criticized the actions of the various characters. There were questions from the audience.

Our first panelist was Robert Hauptman, the token librarian on our panel. He has worked in many areas of library operations, and is currently a reference librarian at St. Cloud State University, where he is on the teaching faculty in both the bachelors and masters programs. He is the author of *Ethical Challenges in Librarianship*.[1]

Our second panelist, Professor Quintin Johnstone, celebrated fifty years in the law in 1989. He went from private practice to the U.S. Office of Price Administration during World War II, then into teaching after the war. He spent thirty years on the faculty at Yale, if you discount the two years he spent as Dean at the Law Faculty at Haile Selassie University in Addis Ababa. Professor Johnstone is currently the Justice K. Hotchkiss Professor Emeritus of Law and Harvey L. Karp Lecturer at Yale. He has spent many years on the Connecticut State Ethics Committee, and he is now Professor of Law at New York Law School, where he teaches real property and professional responsibility.

Our third panelist was Harlan Stelmach. He received his M.A. from Harvard and his Ph.D. from the Graduate Theological Union in Berkeley. His specialty is business and professional ethics. He has served as Executive Director of the Center for Ethics and Social Policy at the Graduate Theological Union and as the Associate Dean of GTU. He is now director of Vesper International and head of the International Conference on Business and Social Ethics.

Case 1: The Non-Attorney Patron

Sam is a reference librarian at a large law school library. The law school is located in a metropolitan area and has superb community relations. It runs a legal clinic for indigent neighbors; the school grounds are open to the community; and the law library is open to the public. Jane Q. Public is a local resident. She has applied at the legal clinic for help with her custody problem but was rejected because she did not qualify under the income requirement. Jane decides to handle her matter pro se, and has gone to the law library for help. She approaches Sam and explains her situation, and Sam obligingly helps. He takes her over to the local statutes

1. Phoenix: Oryx Press (1988).

and regulations, pulls the appropriate volumes, and gives them to her. He also volunteers some form books. After spending some time with the materials, Jane comes to the realization that she does not have a clue where to begin, so she seeks out Sam for some additional help. It is quiet in the library, so Sam sits down with her and begins explaining the law: what her options are, how to deal with courts, and how to follow the various pro se rules. While this is going on, the head librarian walks by. She overhears the discussion and rapidly sizes up the situation. She calls Sam into her office and tells him in no uncertain terms that he has crossed the line. Where exactly is that line, and when did Sam cross it?

Professor Johnstone: One question to begin with is whether Sam is admitted to practice law. This is a discussion on ethics and morality, but law plays a part. And in my view, whether one chooses to violate the law or does so negligently, it is an ethical problem. If Sam is admitted to practice law, then a whole additional frame of reference applies: the lawyer's code or rules of professional conduct. So I throw that back, and I think it makes a difference whether or not Sam is admitted to practice in approaching this problem. Many of you out there are librarians who are admitted to practice and your problems may be different if you are members of the bar than if you are not, particularly if you are admitted in the state in which you are working.

Dr. Stelmach: I come on this panel from a theological school to provide a fresh point of view. When I first read this, given the scandals that have gone on in the clergy recently, I thought there was some hanky-panky going on, and that is why it was an issue that crossed the line. But coming from a nonlegal ethics point of view, I look at this in broader terms. What responsibilities does a law librarian have, and to which constituencies? I would err, although I am sure I will be challenged, on the side of the person who is self-represented here, and needs some kind of access to information. In terms of professional ethics, I would look for other kinds of responsibilities to apply to the profession itself. But in this case I would err in the direction of the person who was trying to represent himself.

Professor Johnstone: Even if Sam has a J.D. and is admitted to practice law, would that make a difference if the policy of the university is that there is a point beyond which it will not provide legal opinions, but only legal information?

Dr. Stelmach: I will go further out on the limb, I guess. In this case, there are certain rules that govern how much legal advice you can give in a particular situation. Those have to be looked at in the context of whether there is some broader good for society, and the whole concept of how law is practiced. It is important to offset some of that for the people who do not have access to legal advice or want to represent themselves.

Professor Hauptman: Law librarians are stipulated to help and guide, but never to interpret or to advise. Because this type of thing comes up fairly frequently, at one point in 1975 it reached the Supreme Court in *Faretta v. California*.[2] The Supreme Court of the United States ruled that a pro se litigant has the right to defend himself or herself. Gerome Leone, in a 1980 *Law Library Journal* article,[3] indicates that if one has the mandated right to be a pro se litigant, one rather obviously also has the right to the information, the tools, the very items that one's opposing attorney would have. And in cases like the one that has been articulated here, a roadblock is put up for pro se litigants who are not lawyers. This seems to me and to some more radical sociologists to be very unfair, to be something that is promulgated by the groups of people who are in power. In this case, I am sorry to say, it would be the ABA, the people who conjoin together in order to defend their profession.

Professor Johnstone: It's not the ABA; it happens to be the courts that have the final say in these matters. And I question whether a person has a right to go to a law library and get legal interpretations from a layperson. There is a doubt whether the person is competent to give the information. Should this be a market matter? If the layperson does a bad job, will the market take care of it, and people will not come back anymore? Should that suffice? There also is a question of whether or not the library or the organization running the library should be responsible for malpractice or negligence in this instance. The same problem applies in medicine. Should you be permitted to go to just anybody to have an operation? Suppose a hospital orderly decides to freelance and perform major surgery in his home at cut rates. Should the courts or the medical profession or whoever is licensing and controlling this field say, "Fine, let the market take care of it; if the surgery turns out badly, the word will get around and no more patients will come to him." Is that how the problem should be dealt with?

Dr. Stelmach: That is not the issue, though. There are two protection issues. One is protection of the consumer, which you just raised. The other is where protection of the profession is used so as *not* to provide access where one should have a right to it. Isn't that part of the competing rights and responsibilities in this case?

Professor Johnstone: I think the law of professional responsibility in part is an effort to create limited monopoly benefits for lawyers, but not predominantly, and not in most instances. In this instance, I think it makes a lot of sense to say that lay parties should not be practicing law.

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2. 422 U.S. 806 (1975).
3. Leone, *Malpractice Liability of a Law Librarian?*, 73 LAW LIBR. J. 44 (1980).

Professor Hauptman: I would agree with you: lay parties should not be practicing law. But my understanding of the case, and I know we disagree on this, is that it should not matter if one is a lawyer, or if one is a member of the bar of the state in which one is acting as a reference librarian. Robin Mills in a somewhat earlier *Law Library Journal* article[4] insisted that it does not matter whether one is a member of the bar. If a librarian is in a reference position in a law library dealing with the public and perhaps even dealing with other lawyers and judges and law school students, one crosses the line if one goes from mere guidance to interpretation or advice.

Professor Johnstone: If that line is a legal line, I have some questions about it, and I will take my legal authority from a higher source than the *Law Library Journal*. There are problems if someone who happens to be a law librarian starts giving opinions and begins to represent parties. I think that what these articles on the subject are getting at is the risk of the organization itself being held responsible for the accuracy and correctness of the opinions given by the lawyer-librarian. That is a risk; there is no doubt about it. What if the librarian is a lawyer admitted in the state who says, "Now quite apart from my job here (and if it is agreeable with that person's supervisor), I'm giving legal opinions." I have known some rather top law librarians who did this in certain libraries. In one instance it happened to be the supreme court of the state, which knew that the librarian was doing this and did not object. I think it was perfectly proper, although perhaps not advisable, for that individual to give an opinion to a layperson—even if the opinion happened to be wrong. With enough disclaimers, the organization would not be responsible. The risks may be small. However, if I were running a library (and I know there are some people here who work in libraries that I have worked in who would say, "God forbid!"), I would have a rule that the librarians could not give legal opinions. In the first place, it takes a lot of time and effort, and in many law libraries the librarians are too busy to engage in opinion giving. Further, if the advice is wrong, there is a risk of malpractice; if the advice seems sound, library patrons are going to be lining up to get free advice. As a matter of library policy, I think that it would be undesirable to permit this sort of thing. But I think it would be legally permissable under some circumstances.

Professor Hauptman: I'd like to just make one more comment, then stop because I don't want this simply to be an argument between us.

Professor Johnstone: I rather like it.

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4. Mills, *Reference Service vs. Legal Advice: Is It Possible to Draw the Line?*, 72 LAW LIBR. J. 179 (1979).

Professor Hauptman: I am on the side of the pro se litigant, the person who needs some help. The analogy to medicine is a fair one, but it is not entirely valid, because with law you *can* do things on your own. I was quite astonished today to see in the exhibition hall a booth from Nolo Press, which now has sixty books in print, every single one of which helps laypersons to solve whatever problems they have in the legal field. Some may do it themselves, some may do it conjunction with a lawyer, some may just want to understand what a lawyer is doing for them. But the point is that very few people are interested in learning how to do brain surgery; if they are interested, they go on to medical school. But many people want to work through their own divorce, or change property on their own, and so on. The analogy to medicine is invalid, and the pro se litigant who wants to work on his or her own problems has a right at least not to have walls placed in his or her path.

Professor Johnstone: A pro se litigant should be able to represent himself or herself in a number of different kinds of matters if the courts are agreeable and if the person is sane. Some who want to do this sort of work are not mentally competent, however, and some really are very borderline. Some of you may have found such persons coming into your law libraries. There are ways of taking care of this problem. In some places where parties can represent themselves in divorce cases, the court clerk and the judge have to carry the ball on these matters. In Connecticut, where I live, the legal aid organizations, the women's organizations, and others hold seminars for aiding people who are interested in representing themselves in divorce cases. Laypersons clearly are not permitted to give advice in these group sessions to prospective pro se parties. I believe in pro se and pro se help, but it should be by persons who are qualified to give assistance, not just anybody who comes along, and not by laypersons.

Question from the Floor: Do you mean it when you argue that pro se patrons have a right to all this information and to receive opinions? The whole point of being pro se is that you are representing yourself. When you rely on the opinions of someone else, even a librarian, you are no longer representing yourself. You are doing it through another party. My question is, does anyone ever consider that sort of thing when laying down the policy of whether or not the librarian should assist?

Professor Hauptman: It is not really a policy; it's illegal for a person who does not have a law degree to interpret the law. And it is also considered unethical within the law community. It is very unfair, however, to say that a pro se litigant has to run the course on his or her own. Some top-notch lawyers may have a hundred people backing them up doing research, carrying their satchels, and so on. But all that the pro se patron may want is a little bit of guidance, a little bit of help, maybe even a little

bit of interpretation. And it could change things. I think that according to the Supreme Court ruling in *Faretta v. California*, the pro se patron is entitled to whatever his or her opposing attorney would be entitled to. That is not the actual case in practice, as you probably know a whole lot better than I do.

Question: In the City of New York, at the civil court level, you can go in and handle things yourself below a certain dollar amount. In the judicial system, it does change, and you have to have a lawyer to go before the Supreme Court in New York City. At what point, then, does the pro se patron really need an attorney?

Professor Johnstone: It will be up to the court and the court rules. In criminal cases generally a person is entitled to represent himself in any kind of matter. You are talking about civil cases, and I don't know where they draw the line in New York. A judge generally has the right to say, "I am just not going to let this person represent him or herself. This person is not competent, mentally or otherwise. It may be a complicated case; the person doesn't understand it; it might take weeks for me, the judge, to educate this individual; the jury would never understand what the defendant is doing." And it may well be that these would be factors to take into consideration. A person is entitled to practice law only if admitted to practice in the jurisdiction where practicing. Merely graduating from law school is not enough. Every year there are a lot of people who have graduated from law school but who do not pass the bar examination. Some don't pass it after three or four tries.

Question: To what extent does a reference librarian practice law by distributing materials and reference tools to various patrons?

Professor Hauptman: That is probably a question that is not really answerable. That is the dilemma: where do you draw the line? That was actually the case study wherein we started. Various people who take a scholarly interest in this particular aspect have said some very strange things. I think it is Kirkwood and Watts who indicate that if you have a particular patron in front of you, you have to ascertain who he or she is and what his or her goals are.[5] If it happens to be a judge or a legislator who has a law degree, then you treat that person in one way. If the person is a law student, you treat that person slightly differently, and finally, if it is a layperson, you may actually hold back information. And I think the phrase they use is something to the effect that you do not want them to have harmful information. It seems to me that it flies in the face of everything that the ALA promulgates.

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5. Kirkwood & Watts, *Legal Reference Service: Duties v. Liabilities*, LEGAL REFERENCE SERVICES Q., Summer 1983, at 67.

Professor Johnstone: I'm not worried, but I think this is a hard question that you asked, and an important one, and I think the line is difficult to draw. It seems to me that you would be entitled to say, "Here are the relevant materials on the question as you have presented it to me. I cannot give you an opinion or an interpretation or tell you what you ought to do; it is up to you to use these materials. If you find you are unable to do so, you had better obtain a lawyer. There is always legal aid for persons who cannot afford a lawyer. There are lawyer reference services, if you do not know a lawyer," and so on. In reading these problems, it occurred to me—something that had never occurred to me before, I must say—that it would be highly desirable if AALL were to appoint a committee that would handle requests for opinions on ethical matters pertaining to the profession. Bar associations in every state have committees that give opinions to lawyers, and you would be amazed at the number of requests they receive. The American Bar Association also has an opinion committee of this sort. I would think it would be very useful for AALL to have such a committee, even though you wouldn't have sanctions to impose, other than publishing the opinions as guides to others. It would very useful if an opinion on this kind of a problem, when it actually came up, would be published in your journal as a guide to all of you.

Question: If the members of this committee would give an opinion, or if they were giving opinions to a particular person on a particular set of facts, would members of that committee themselves have to be lawyers?

Professor Johnstone: No, unless questions of law are being answered.

Question: If this is an ethical problem, why aren't you discussing the codes of ethics adopted by library organizations? The ALA has a code of ethics.

Mr. Chicco: The AALL has a set of ethics also; it is one page long and is very general. Unauthorized practice of law appears in it, but it does not really help.

Dr. Stelmach: Part of the issue is whether or not that code is in fact adequate. I am still not clear as to when you want to send them on to legal aid. Quintin wants to do that before Bob does, and certainly before I do. Who are we protecting?

Professor Johnstone: You are protecting your consumer.

Dr. Stelmach: But is there some way the consumer can waive his or her rights? Does that make a difference? Can they sign a paper saying, "I realize that I might be getting bad advice, but you can give me all the advice you want."

Professor Johnstone: Morally, perhaps they can; legally, they cannot.

Dr. Stelmach: What is the moral basis of that legal decision?

Professor Johnstone: The moral bases are that you should not be wandering into an area in which you are going to hurt yourself, or be

encouraging people to engage in practices that might draw others who are not qualified.

Question: I think we forgot about the person who needed the advice. We totally forgot about the person who went to Legal Aid and was told that she did not fit their criteria. She has a personal problem with a custody issue, and now we have forgotten her.

Mr. Chicco: Unfortunately, although there is a Supreme Court mandate that says that you are entitled to represent yourself, stupidity is not a suspect class. I do not know what the answer is. We are looking at it from the librarian's perspective, and the reason that the issue has not come up is that most of us work in offices and in libraries that are not open to the public. It is only a relatively small portion of our constituency that is presented with this problem.

Question: Still, it is an issue. I think we need more help deciding what is legal advice and what is not legal advice. If I choose a book off a library shelf, and hand it to a pro se patron, am I giving that person advice because the answer may be in the book? Do I become liable?

Mr. Chicco: My rule of thumb has always been that you can take the Texas Rules of Court off the shelf and hand them to someone who asks you for it, but you can not tell her that she has thirty days to file in Texas. She has to look that up and read it for herself. That second step, in my opinion, is an opinion of law. The first is providing the information: the thirty days is in there; the patron has to pull it out for herself. If she is unable to do it, you can point her to the page and show her.

Dr. Stelmach: On what basis do you stop there? I am not sure about the argument behind that rule of thumb. Is it to protect the organization? Is it to protect the profession? Is it to provide the best kind of information for the rule of law in our culture? What are the larger goods served in a society that tries to live by law and some canons of justice if you stop at that point? I have heard today that the consumer needs to be protected, but it seems to me that that is really a ruse for protecting the profession or the organization.

Professor Hauptman: It is not merely that we live in a society that tries to live by the law. Most civilized societies do at least attempt that. But we live in a society where law plays such an incredibly important role. In Japan, a typical citizen, regardless of what kind of class the person falls into, almost never consults a lawyer. I remember a case where a Japanese man sued someone because his son was killed. He won $17,000 and received thousands of letters from his fellow Japanese indicating to him that he should return the money, and he did. In our country we cannot walk down the street more than a couple of miles before we have to consult a lawyer. So it should be possible for people at least to attempt to represent themselves without having extraneous roadblocks put up.

Professor Johnstone: If someone totally ignorant about the law came into a law library and sought advice, he or she is very likely to respect and follow the advice given. If the person giving advice is unqualified, the individual to whom the advice is given is usually not in a position to determine intelligently whether to follow that advice. I think that is a real ethical question.

Dr. Stelmach: I think just a little notice—"This advice may be hazardous to your something"—might be sufficient. I realize there are higher levels of operating in the professions when you move into medicine and law, but for the life of me, I can not figure out what the big issue here is, in terms of providing certain kinds of information.

Question: I think the point is that, even if you do have a J.D., you do not keep up with every area of the law. What if the woman loses her children because she followed my advice, and my advice was wrong because of a case a month ago that just slipped by me without my noticing it?

Professor Hauptman: Is not your job then to attempt to help her the same way any typical reference librarian searches out material? If you feel incompetent, you can simply say that. But there should not be any regulations, rules, or ethical dicta that prevent you from doing it if you happen to be an expert.

Question: But there should be such rules because the urge is always there to try to help these people as much as you can. You feel sorry for them because you know that they are in a lot of trouble and they really need help. But you cannot help them without practicing law. You cannot keep up with every area of the law when you are a law librarian. We are generalists, and it is wrong to give expert advice that might have very significant consequences on someone's life.

Professor Hauptman: That is also true of a lawyer.

Dr. Stelmach: That is true of any profession: what about a therapist?

Question: But at least those professionals are keeping up with a specific area, and a person goes to them expecting them to keep up with that area. For a pro se person to come in and look to a law librarian for advice and to get maybe some shoddy, maybe some good advice is morally unacceptable. I agree with Professor Johnstone.

Professor Hauptman: Despite my somewhat iconoclastic perspective here, I tend to agree with what you are saying. If you are going to put your trust in someone who may be in the position to save your life, then that person should certainly be competent. But at the same time, I still think that one should not have unnecessary roadblocks put in one's way, if one does wish to pursue pro se litigation work.

Case 2: The Library Partner

Beatrice is the librarian for a large national firm with a general practice. The firm has more than three hundred attorneys nationwide, but resources are shared and purchasing is coordinated through the main office. Beatrice regularly reviews requisitions and pays invoices for books. Arthur Boswell III is a senior partner at the firm. He is a lawyer in the grand tradition; he reads poetry, collects first editions, and can converse on a variety of nonlegal topics. He is also the library partner and has a good working relationship with Beatrice. He takes a genuine interest in the library and staff and comes in periodically to chew the fat. Beatrice responds in kind by keeping him up to date and sending him various legal and general sales catalogs that come into the library. One afternoon while reviewing some bills, Beatrice finds an invoice from an out-of-town rare book dealer for some items sent to Mr. Boswell and charged to one of the firm's major clients. Since it is clear to Beatrice that the items were not for the client, she is disturbed. She has a problem. She does not want to jeopardize what has a been a good working relationship with the person in the firm who is, in effect, her boss. Yet it does not seem fair to the client. Will the managing partner think of her as a whistle-blower if she reports Boswell, and will it make her job miserable in the long run? What should she do?

Professor Johnstone: It may make a difference whether Beatrice is a lawyer. Is it part of her job, when bills are received, to review them as well as to pay them? And if she does approve this bill, does this indicate that she is saying, "Yes, this is okay"? It may make a lot of difference whether Arthur Boswell III is just someone who is doing something wrong that she happens to find out about, or is doing something wrong in which she becomes a participant by approving the bill as part of her job. As this problem is presented, unless there is a mighty good explanation, Boswell is engaged in fradulent activity and defrauding a client, and if Beatrice approves the bill as part of her job, she is a participant in that fraud. If she is just a busybody or an observant person and is aware of illegal conduct going on in the office, that is another problem. If she is a lawyer, then both the Code and the Rules say to turn Boswell in. It is a rarely enforced provision, however, and I would be interested in our professional ethicists here giving an opinion on this. If you know about a lawyer who is engaged in wrongful conduct, your obligation is to turn that person in. She certainly would be entitled to do so. If she does so and gets into trouble with her job, there are half a dozen states that say, lawyer or nonlawyer, she can sue to get her job back.

Professor Hauptman: My first response to this case was that perhaps it is a mistake. Maybe there is a misinterpretation here, and Beatrice should

simply approach Boswell and check the facts. Of course, that could be a mistake, too, if it turns out that there was fraud.

Let me take a two-minute detour here. There are two basic ways in which one can orient oneself ethically. If one only cares about ends or results, rather than means, then sometimes if something does not have any detrimental consequences it appears to be okay, and it may be okay. People who orient this way are called consequentialists. The consequences are what is important, and sometimes the ends do justify the means.

The other way of orienting oneself is by some basic rule or law, statute or principle, any type of authority. It could be legal, it could be biblical, it could be koranic, it could be anything: any principle that orients. Think of Kant and his major principle, *duty*. The principle, or the means, can often become more important than the consequences, or result. As long as you follow your duty, even if the person dies as a result, you have done what you were supposed to do.

Applying these two types of methods in a particular instance like this Beatrice-Boswell case, you could say that if no ill results occur and Beatrice is not a lawyer (because that complicates matters), then really no one is hurt, especially if the books only cost a couple of dollars apiece. Now, if they cost five thousand dollars apiece the client is being bilked badly. But the client probably would not even care if they cost three or four dollars, right? But a deontologist, someone who orients deontologically, would say it is irrelevant whether the books cost a nickel or a hundred thousand dollars. The principle indicates one should not aid and abet, should not participate in fraud; it does not matter what the results are. So it depends on how you orient.

Mr. Chicco: Let's change the facts just a little bit. Suppose Beatrice finds out that, instead of buying first editions for his personal collection, Boswell is destroying evidence?

Professor Hauptman: Obviously, it is unethical, but it is also absolutely illegal from a lawyer's point of view, so I defer.

Professor Johnstone: If she is a lawyer, pretty clearly she should turn him in. There was a major firm in New York that got in serious trouble along these lines. Fortunately, no librarian was involved; there were partners and associates involved in the destruction of evidence. If you are a party to it in any way you are wrong; if you are aware of it and a member of the bar you should turn them in. Ethically, what do you do under these circumstances if the information destroyed is key to the litigation? I am not a philosopher, or an ethicist, but I would think it is a very serious problem. I would think she should turn him in.

Professor Hauptman: Did not one of our presidents resign his presidency for destroying evidence? Perhaps had the evidence not been destroyed he would not have been threatened with impeachment.

Dr. Stelmach: Oftentimes as an ethicist, I am not sure how people look at you. Either you are thought of as someone who is ethical, or as someone who can understand certain fancy words and make distinctions to help people do something that you would not do if you were in their situation.

I will get down to bare bones myself and say, "All right, now if I am Beatrice here, what do I do?" Clearly, I have got some qualms about upsetting a career that I have had for a long time; I have some obligations to my family; I have obligations not to ruin the career of a good attorney. The issue is not that easy, in terms of the actual existential moment of making that kind of decision. It seems to me that there is also the issue of obligation not just to the principle, not just to some larger consequences, but also our responsibility to a system, to certain patterns of relationships. If we do not hold the line on those patterns or relationships and fulfill our obligation to them, then we undermine the way in which people can function in the system. I would say that one of the issues that you have to look at here is the whole system to which you have a responsibility. That is not easy. I would probably throw the paper in the wastecan and not let anybody see it. It is just a two-dollar book; I mean who is going to find out? No one is going to get caught, right?

Professor Johnstone: What if she is destroying evidence that is crucial to a lawsuit?

Dr. Stelmach: Well, obviously, I would hope that I would not act that way, but clearly it is not that easy. If it is evidence, the matter appears to be more serious, but maybe not. That makes it a tougher case for us, but in a sense, I think even the first case is tough. There is a moral dilemma there in your responsibility to your own integrity. You begin to undermine your own credibility to yourself as you begin to function in these sorts of white lies and cover-ups. One cover-up is just the precursor for the next cover-up.

Professor Johnstone: What about the system? The system of justice. Destroying important evidence is highly destructive of the system of justice, is it not?

Question: I have a comment. If it involves books, then why not suggest to that attorney that he cover the charges instead of going through an elaborate process? If you have the kind of relationship with him that was described and you know that it is not a mistake, you can bring it up to him and say, "Why don't you cover the charges?" and carry it from there. If it involves evidence, if you have a working relationship with him, try to bring it back to him, put the responsibility on him and not onto you.

Mr. Chicco: How would you broach the subject with Mr. Boswell? You can be Beatrice; I will be Boswell. The client is a major bank, or a major manufacturing outfit. The client is not interested in first editions of some poet. You know that Boswell collects first editions; you know that he is a

fan of poetry. It does not gel; there is something that doesn't smell right about it, and your worst impulse is that he is buying these books and charging them to the client. Because the billing codes are on them, you can tell which client is being billed for these materials. Do you go to Mr. Boswell and say, "I found this invoice. This must have been a mistake. You couldn't possibly mean to charge these poetry books to the client, isn't that so?"

Question: Well, why not say, "I have come across this invoice, and I'm not quite sure what it implies or what it means; could you explain it to me?" And put the burden on him to explain himself: "Oh, I'm charging these books to my client." That puts the burden on him. Once he explains it, you have to deal with it from there, but the burden of proof is on him, and he knows that you know what is going on.

Mr. Chicco: If you back him into a corner, isn't that going to put a damper on what you thought was a good working relationship? Is it worth it? It is not going to cost you; it's not your money that is being affected here. This is a big corporation; they can afford these books. It should not be a problem for them.

Let's change the facts just a little bit. The books were not very expensive; it was a forty dollar charge for two books. Beatrice sees what's going on, and she realizes that Boswell is billing a client for personal books, and she says, "Well, it's not worth affecting my relationship, and I really don't want to corner him and put him on the spot. What I will do is take forty dollars off the next LEXIS bill for this client."

Question: You open a whole other can of worms when you do that. Most places insist on having the LEXIS bill where the client or the lawyer can look at it. How are you going to explain when the client says, "Well, the bill says it's twenty dollars more; why didn't you bill me for that?"

The one thing to note and bring up on this is that your first step should be to see Boswell. In this state, if a carbon was invoiced, it could be a very honest mistake. I have many times written a client charge on an invoice, picked it up and said, "Oh, my gosh! There was no invoice under there; it was carbonless, and there it is!" It could very easily be that this man didn't notice it. You owe it to yourself; you owe it to him to talk to him first and say, "Look, this doesn't gel. Can you tell me what happened?" If it upsets your relationship with him, then you really didn't have that good a relationship with him in the first place.

Professor Hauptman: That was my first impulse when I read this case. I also thought that a person of his stature just would not do something like that.

Question: I'd like to ask the panel about destruction of evidence. What is the obligation of a librarian who does not have a J.D. in a situation

where he or she discovers destruction of evidence within the firm?

Dr. Stelmach: A legal obligation or a moral obligation?

Question: Both.

Dr. Stelmach: The legal one is easy, right?

Professor Johnstone: The legal one is easy if the person participates in the action in any way, and is not a lawyer. I doubt there is an obligation to turn in the lawyer. There is a famous case in New York, however, in which a lawyer failed to disclose the location of the body of someone whom his client had killed. The law in New York was that you are bound to report whenever you know that someone has been killed and there was not appropriate medical attention. They tried to stick this lawyer for nondisclosure under that particular law, but it didn't work. The lawyer was held obligated not to disclose client confidences. There well could be some sort of a strange law out there applicable in some states, that if you're aware of a fraud on the court, you are obligated to make this known. I don't know of any such law, but this is a strange field, and there could be.

Mr. Chicco: The facts change dramatically if the librarian is an attorney, because then the bar requires you to report malfeasance.

Professor Hauptman: It would be incumbent upon any individual ethically, whether or not he or she is a lawyer, to disclose this. That is sometimes called whistle-blowing, but not everyone has the nerve or the gumption to put himself on the line and perhaps lose his job or be killed because he has done something like that. It is easy to say in theory that one should do this, but in practice, even a person who is made of really stern stuff may hold back because of fear of personal repercussions. Ethically, it seems to me that one has the moral obligation to disclose.

Professor Johnstone: But in our society, from the time we are small children we are taught not to squeal. How many times have you parents told your child, "Don't go telling on your sister this way," for some trivial or not so trivial offense. We sort of inbreed it.

Professor Hauptman: I agree one hundred percent, and the result is that this is a real moral dilemma. You are pulled in two directions. Some of the other cases that we might discuss are not really ethical dilemmas: there is either a correct mode of action or an incorrect one. Here you are really pulled in both directions. We are taught socially that you are not supposed to just turn around and, as you said, "squeal on someone." And at the same time we have another obligation to society to indicate that something is wrong, that someone is doing something dishonestly. So it is a real dilemma. You have to make the choice on an individual basis.

Dr. Stelmach: I am trying to think of situations where you can justify some greater good by not turning someone in. I suspect there are cases where that could be true, particularly if you had knowledge that more

people might be hurt and, that in fact, very little good was going to come out of disclosure. There might be a situation where you could argue morally *not* to whistle-blow. When I tell my kids not to squeal, what am I really telling them? I am not telling them not to squeal, but oftentimes I am telling them to stay out of someone else's business. But I do want them to tell me when something is going on that is morally abhorrent, where someone's life is at stake. I do want them to tell me things in those situations. Even though we use that analogy, my sense is that we really don't mean it as a blanket statement. At some point, other issues override it.

Case 3: The Enterprising Clerk

Swifty is a penurious law student working hard to get ahead. To make ends meet, he works part-time in the law school library doing a variety of tasks. The law school has blanket contracts with both LEXIS and WESTLAW to provide access to their respective systems for the student body. The contracts provide unlimited access to the database to students and the faculty for educational purposes. The school is charged a flat fee. The vendors provide some training, but the bulk of the assistance is provided by the library staff. Consequently, librarians have earned a reputation for being savvy searchers. The library, because of its location, is used by many of the local practicing attorneys. Although there is no formal policy, use of the library is not discouraged unless a particular user abuses what is regarded as a privilege. Fred is a solo practitioner; he uses the law school library regularly, and values his ability to do so. He cannot afford to subscribe to either LEXIS or WESTLAW, but every once in awhile does have need for their unique research capabilities. One day, while in the library, he overhears Swifty complaining about the high cost of course books. He approaches Swifty, explains that he is a struggling attorney with limited means, and that he would be most grateful if Swifty could do a quick search on the computer for him. He realizes that this is an imposition and would gladly give Swifty ten bucks for his time. As Swifty contemplates a cottage industry, a little voice in the back of his head whispers "character committee." Should he listen to it?

Professor Hauptman: I would think almost any organization would have some rule or regulation on this. I know that every academic organization that I have worked for has had rules. If a person from the outside comes in, you may or may not do searches and you do or do not charge, more or less depending on the situation. If this particular entity or organization does not have any rules, it needs to get on the ball and put some together. As the case stands, it seems to me that it is highly unethical for him to do a search and then pocket the money. It may be okay for him

to do a search and then give the money, if there is any, to the organization, or it may be okay to do the search and not take any money. But in actuality it is unethical in its entirety because a presupposition that was read along the way is that LEXIS and WESTLAW give a highly reduced rate for educational purposes. This is just the opposite of educational purposes; this is some practicing attorney working on a case for which he will bill his client. So it seems to me that it is not really an ethical dilemma.

Professor Johnstone: There are two aspects to this problem. One is the one Bob raises. The other is whether Swifty would be engaged in unauthorized practice of law if he takes up this assignment for the lawyer in question. The answer to the latter is obviously not, because he would be working for a lawyer, and nonlawyers may work for lawyers if the nonlawyer is not giving advice directly to clients. So that problem does not exist. The other problem is a difficult one. It seems to me that Swifty would be violating the contractual restriction that the law school has with the supplier. The law school, if it were aware of Swifty's action, would likewise be violating that particular agreement. And as I happen to think compliance with agreements is ethical, that violation would be an unethical act.

Mr. Chicco: Perhaps that was too easy. Why don't we say that, instead of Fred being a solo practitioner, he is a faculty member, and this is for his consulting business. Law school professors have been known to consult on the side from time to time. Fred is now a faculty member who goes up to Swifty and says, "I realize you are not in any of my classes this year, but I'm working on this project. Would you be available in your free time to run off searches for me? I don't have a lot of money, but I would be glad to give you a couple of bucks when I could do that." Would that change the situation?

Professor Johnstone: Only as a matter of degree. But it's a lot harder. Law faculty are prima donnas with whom librarians have to deal, much to the librarians' dismay in many instances. I sympathize with that, although on occasion I can be a prima donna, too. If I were Swifty, I would go to the head librarian and talk over the problem, and the head librarian had better talk to the Dean to see if they can't get their contract with WESTLAW or LEXIS modified. This practice of members of law faculties making use of law libraries for their own personal profit is quite prevalent, and may be considered desirable by the law school, perhaps because then the school can pay the faculty less. I think that the way to handle it is by negotiations between the law school and the computer companies.

Mr. Chicco: Would it make a difference if it is for pay or for some good cause? That may affect your coloring of the situation, but I'm not sure that it affects the actual facts.

Professor Johnstone: The professor might tell Swifty, "I'm doing this for Client X whom I'm representing, either for pay or on a pro bono basis." But Swifty knows that it is not for an educational purpose.

Dr. Stelmach: It could make a difference if the professor had that student in his class, obviously. There is some leverage there. This seems to be another one of these situations where you are faced with an issue in which a broader context puts demands on individuals to function in certain ways in very ambiguous situations. It strikes me that proper activity on the part of a faculty member, in terms of outside research or outside consulting and use of the institution's facilities, would have to be very well defined. It's not just a library decision; it's a larger institutional decision. But librarians find themselves in the situation often and have no guidance.

Mr. Chicco: Let's suppose that the research is pro bono, either for the attorney or for the law professor. Nobody is making any money on this.

Professor Johnstone: Literally, that does not change the contractual obligation, which says that the use of the computer must be for educational purposes. Whether it's for highly desirable noneducational purposes or undesirable ones is immaterial. I think, however, that if WESTLAW or LEXIS were informed, they might very well be willing to qualify their contractual arrangement under these circumstances, particularly if it was a pro bono kind of activity.

Question: What if Swifty has been asked to do research for a faculty member who is writing an article for which he is being paid? The faculty member has in his contract the requirement that in order to get tenure, he must publish.

Professor Johnstone: There are some—there certainly aren't enough of them—educational articles that some of us write for which we are paid. I have been paid for two in forty years. That does not change the educational character.

Professor Hauptman: But if he had to publish in order to get tenure, that kind of tilts things a little bit in the other direction, because that is part of the educational process generally. That makes it very difficult, and I have absolutely no idea. It is too complex to make a decision on that.

Professor Johnstone: I don't see any problem with that at all. It's still educational whether the professor is being paid or not.

Question: What if he was doing it as a consulting job for pay, but he also wants to turn it into an article or in some way incorporate it in his course work?

Professor Johnstone: That is tough. And this happens, I might add.

Mr. Chicco: How would you deal with it as a dean, if a professor came to you with that as a proposition?

Professor Johnstone: If there is a clear enough indication that the work for pay for a client is going to be turned into an article and that

information is going to be used in the article, I think one could readily argue that it is for an educational purpose. When in doubt, you could ask LEXIS or WESTLAW how they would construe it, and I have a hunch that they would say that it was okay with them.

Professor Hauptman: What it all boils down to, of course, in this case, is that Swifty is not supposed to be making money on the deal.

Professor Johnstone: No, Swifty could make money; why not? Swifty can work for somebody else. It's a question of whether the project is educational or not. Certainly, Swifty is being paid by the law school as a student assistant, or being paid by the professor on the side, to produce an educational article that would qualify under the contract with the computer companies.

Question: What about the ethical considerations involving whether Swifty should get paid for this work while he is on library time?

Mr. Chicco: We can make the assumption either way. If he works on library time, it's a no-no. If he does it on his own time, would the librarian have an objection? How do people feel about clerks moonlighting in their libraries?

Dr. Stelmach: Don't you take a percentage on something like that?

Mr. Chicco: If it is for a faculty member, is it really moonlighting? Could Swifty not do it on his own time, if it is for a faculty member? And the other question: if it is for an outside solo practitioner, it is clearly moonlighting. Swifty should be shelving books and not researching. When his duties are finished and he is on his own time, I don't think that any of us would have a problem with him using the facilities.

Question: Aren't we also assuming here that it falls within the boundaries of Swifty's responsibilities as the library assistant even to do LEXIS/WESTLAW searches?

Mr. Chicco: In my original drafting of this fact pattern, I took it for granted that this was something that he was doing on the side, which was not within his ambit. He may be skilled enough to do it, but it is clearly not library policy for him to set up shop and invent services.

Dr. Stelmach: I think you ought to socialize LEXIS and WESTLAW, put them in the public domain, and you won't have this problem.

Mr. Chicco: Someone fainted in the back.