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Exceptions

Lawrence Raful

Touro Law Center, lraful@tourolaw.edu

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Rules, rules, rules.

From rules governing the confidentiality between an attorney and a client to rules associated with observance of the Sabbath.

While some rules may be golden, should they be absolute?

Or can we come to a greater appreciation for and understanding of the ultimate purpose behind our rules by allowing for exceptions?

Exceptions

By Lawrence Raful, Professor of Law

For the past three years, I have been thinking a lot about rules. I have been thinking about ethical rules of responsibility for lawyers and, in particular, rules of confidentiality. And I have been thinking about rules regarding activity on the Sabbath.

Because I have spent so much time lately thinking about rules, I have also been thinking a great deal about exceptions to rules. If a rule has no exceptions at all, what would happen to such an absolute position when one finds a need to deviate just once? On the other hand, if you build too many exceptions into a rule, what do you have left? The exceptions may not only swallow the rule, but also the reason for the very existence of such a rule.

Professional Ethics and Confidentiality

I have been honored to serve as the chair of the Nebraska committee to write a new code of ethics for Nebraska lawyers.

Perhaps the most controversial rule our committee debated deals with the duty of lawyers to keep client information confidential and inviolate. This is one of the oldest canons of ethics for the legal profession. An exception to this rule exists if the client intends to commit a crime in the future. Rule 37 of the 1908 Canons of Professional Ethics, the first ethics code, makes this clear:

It is the duty of a lawyer to preserve his client's confidences. ... The announced intention of a client to commit a crime is not included within the confidences which [the lawyer] is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened.

You'll quickly note that this first set of ethical regulations allowed that a lawyer "MAY" disclose the confidence of the client if the client intends to commit a future crime. Notice the word used is "MAY," not "MUST" or "SHALL," or not even "MUST NOT."

A lawyer probably is more likely to reveal that a client intends to dump cancer-causing chemical waste into a river to avoid the expense of hazardous waste disposal, than to reveal that her

client intends to drive 80 mph on the freeway. Because the rule allows the lawyer to decide when to disclose, the quandary, of course, is for each lawyer to set in his or her mind what activities should be disclosed.

The American Bar Association wrote a new set of rules in the 1960s, and for many years lawyers in Nebraska have used the language of the 1969 Model Code as our standard: A lawyer MAY reveal the intent of the client to commit a crime in the future, without fear of being sanctioned by the State Bar. Then, in 1982, the ABA suggested a narrowing of the rule, so that a lawyer could only report those future crimes that might lead to imminent death or substantial bodily harm.

State supreme courts reacted to this narrowing of the exception with varying results. In one or two states, there is NO exception allowing a lawyer to reveal future crimes — if your client is going to dump hazardous chemicals, you MAY NOT disclose. In a number of other states, however, you MUST disclose the intent of your client to commit certain kinds of future crimes. Nebraska kept the 1969 rule — a lawyer MAY reveal the client's intent to commit a future crime.

In 2002, the ABA approved a new set of ethics rules, including yet another revision of the exception to the confidentiality rule. The word "crime" was removed from the requirement, so that a lawyer MAY now reveal any confidential information about any activity that might lead to imminent death or substantial bodily harm, whether it involves criminal activity or not.

This past year, while our committee was debating the rules of confidentiality and exceptions in Nebraska, the Enron house of cards collapsed. The ABA approved a new amendment, widening the future crimes exception to the rule of confidentiality to include financial fraud.

So how does the story end? What do Nebraska lawyers want — and more importantly, what do the citizens of the great state of Nebraska demand of their lawyers?

Should we require disclosure of future crimes — use MUST? If so, will criminal clients wise up and never tell

us of their plans? Or do we value confidentiality so dearly that we never want to allow any disclosure of any client confidence — use MUST NOT? Do we want to leave the rule discretionary, because that seems to have worked for the past 30 years — use MAY? Or are times so different now in a post 9-11, Patriot Act world, that we value disclosure and prevention over the confidential relationship between a lawyer and a client?

Perhaps the most controversial rule our committee debated deals with the duty of lawyers to keep client information confidential and inviolate.

In my mind the greatest question is, does the discussion and public debate about exceptions lead to a greater understanding about the role of confidentiality in the practice of law?

In the end, our committee voted to continue to use the discretionary "may" and the Nebraska State Bar House of Delegates voted to approve our choice.

Activity on the Sabbath

Around the same time I was working on the ethics rules project, I was also finally working my way through Abraham Joshua Heschel's masterpiece *The Sabbath*, written by Rabbi Heschel in 1951.

I was deeply moved by the way Heschel wrote of the rich spiritual experience he finds in Sabbath celebration. I was struck when Heschel wrote the following about the Sabbath:

"The glorification of the day, the insistence upon strict observance, did not, however, lead the rabbis to a deification of the law. ... The ancient rabbis knew that excessive piety may endanger the fulfillment of the essence of the law. ... Even when there is the slightest possibility that a life may be at stake one may disregard every prohibition of the law. One must sacrifice mitzvot (commandments) for the sake of man rather than sacrifice man for the sake of mitzvot."

Rules, and exceptions to rules — THIS I understand. What I quickly realized was that, like the lawyer ethics rules project, perhaps I could better understand the nature, the essence, of the Sabbath if I understood the exceptions to the rules about the Sabbath.

What do we know about the Sabbath? First and foremost, God instructs us: **שְׁמוֹר וּזְכוֹר** (transliterated: *Shamor v' Zachor*), from the Deuteronomy and Exodus versions of the fourth commandment, meaning "observe" and "remember." And Heschel tells us that the very first time the word **קָדוֹשׁ** (*kadosh* — "holy") is used in the Bible is early in Genesis in regard to the Sabbath: "And God blessed the seventh day and made it holy." Rabbi Heschel teaches us that joining the words Sabbath and *kadosh* is to show us the representation of the divine in the Sabbath, that there is both mystery and majesty.

And what do we know about how to "observe and remember" the Sabbath? The traditional answer comes from Exodus 31:1-13: "The Lord spoke to Moses: See, I have singled out by name Bezalel ... that they may make everything that I have commanded you: the Tent of Meeting, the Ark for the Pact and the cover upon it and all the furnishings ... (N)evertheless, you must keep my Sabbaths, for this is a sign between Me and you."

The ancient rabbis read this passage to say that even though God instructed Moses to build the Tent of Meeting, also included was the warning to not work on the Tent on the Sabbath. From this warning, the rabbis of the Talmud deduced 39 tasks completed by those who built the Meeting Tent, and because

More about the Sabbath

The Sabbath, a day set aside to rest and refrain from work in order to spend time in prayer, introspection and spiritual growth, has been thought of as one of the greatest gifts of Judaism to mankind. The concept comes from the opening chapters of Genesis. God worked six days and rested on the seventh. The Sabbath concept is later codified in the Ten Commandments.

Jews today celebrate the Sabbath, which begins at sundown on Friday and concludes at sundown on Saturday, in a myriad of ways. The four major Jewish movements and secular Jews around the world share commonalities of observance: lighting of Sabbath candlesticks on Friday night, perhaps a festive meal for the entire family, and maybe prayers over the bread and wine. Jews might attend Sabbath services Friday night and Saturday morning at local synagogues, and listen to the reading of the Torah portion of the week.

The most traditional Jews will walk rather than drive or ride on the Sabbath and typically will not light a fire, use electricity or engage in any form of "mundane" activity that one might perform during the rest of the week.

While Jewish observance of the Sabbath takes a variety of forms around the world, its purpose remains the same — setting aside a special day to concentrate on God, on your life the preceding week, and on your family and friends.

those types of tasks would have been prohibited on each Sabbath, we now come to understand that these are the general categories of prohibited work even in our time. Here's the list of prohibited Sabbath activities that traditional Orthodox Jews have used as a guideline for thousands of years:

Sowing, ploughing, reaping, binding sheaves, threshing, winnowing, cleansing crops, grinding, sifting, kneading, baking, shearing wool, washing or beating, combining, dyeing, spinning, preparing for weaving, separating into threads, weaving two threads, separating two threads, tying a knot, loosening a knot, sewing two stitches, tearing in order to sew two stitches, hunting, slaughtering, skinning, tanning, scraping it, marking lines, cutting to shape, writing two letters, erasing in order to write two letters, building, pulling down, putting out a fire, lighting a fire, striking with a hammer, and carrying from one domain into another.

You see the list reprinted here, and while it's not this simple, you get the idea. But, in modern times, there are obviously many ways to interpret each of these 39 tasks. For instance, Rabbi Heschel explained that not only must you refrain from lighting a "fire throughout your habitations on the Sabbath day," you must also therefore "kindle no fire of controversy nor the heat of anger. You shall kindle no fire — not even the fire of righteous indignation." Heschel believed we are to spend the Sabbath in "charm, grace, peace and great love."

But are there exceptions? Maybe "exceptions" is the wrong word — maybe other duties "supersede" the requirements of Sabbath observance. I'll use the word "exception" for want of a better word. The Talmud and other rabbinic texts have an extensive treatment of acts that are not considered a desecration of the Sabbath.

One of the most famous exceptions is the *brit milah*, a ritual circumcision on the eighth day of a baby boy's life. If a *brit milah* falls on the Sabbath, may we carry (medical equipment) and cut and tie? Yes, the commandment of the *brit* "trumps" the commandment to keep the Sabbath.

My search for other such "exceptions" proved to be fascinating, and in the end, the unifying theme became clear. Here are a few examples:

There are exceptions to prohibited work. You may perform prohibited

tasks to help another — the sick, the infirmed, the helpless and the weak. For instance, you may not extinguish a lamp for it causes new cinder to be formed, but you may do so if those in the house are in fear of robbers or to allow a sick person to sleep. If someone has an illness that is dangerous to life, it is actually considered a commandment to desecrate the Sabbath for that person. We may even slaughter meat on the Sabbath if the dangerously ill patient must have meat to survive. In spite of Sabbath prohibitions, we may put out fires, rescue people from collapsed debris and even resist an armed attack on our village.

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Jesus, born a Jew, also understood the Sabbath and the “exceptions.” In Matthew 12:11-14, Jesus is asked: “Is it lawful to heal on the Sabbath day?” Jesus answers the question with a parable: Since any man will obviously save a sheep which had fallen into a pit on the Sabbath, doesn’t it obviously follow that we should also save humans who might have somehow fallen into the pit of despair on the Sabbath? Jesus then answers the question by restoring a man’s withered hand to become whole again. There are similar incidents in the Gospels of Mark, Luke and John when Jesus “desecrates” the Sabbath in order to heal a blind man and to cure an

invalid and an infirmed. Certainly Jesus “kept” the Sabbath day, but he also chafed at the rigid interpretation laid down by the Pharisees.

Now, what do we make of these exceptions to “observe and remember,” to keep the Sabbath day holy? And what about today’s observances of Sabbath? Should we go to work? To the mall? To the movies? Or are these activities not proper “exceptions”?

It is clear, I think, that while the rules of Sabbath celebration have a purpose — an important purpose, to be sure — God does not expect us to follow these rules blindly. Nor should we follow legal ethics rules of confidentiality blindly. The Good Lord gave us brains and free choice, as well as the guidelines of how to live a good life. If we were to blindly follow either set of rules, what use would there be to brains and choice — and the Torah?

God not only wants us to observe the Sabbath, but to actually think about what that means. There is real beauty and compassion in the very nature of the exceptions to observing the Sabbath, and therefore it follows that there should also be beauty and compassion in the overarching observance of the Sabbath.

It seems clear that we are to not only HONOR the Sabbath, but to THINK about the Sabbath and what it means in our daily and weekly lives.

Listen to Rabbi Heschel explain it: “The meaning of the Sabbath is to celebrate time rather than space. Six days a week we live under the tyranny of things of space; on the Sabbath we try to become attuned to *holiness in time*. It is a day on which we are called upon to share in what is eternal in time, to turn from the *results* of creation to the *mystery* of creation; from the world of creation to the creation of the world.”

Creighton theology professor Wendy Wright, Ph.D., who holds the John C. Kenefick Faculty Chair in the Humanities, once wrote to me on Rabbi Heschel: “In this incredibly pragmatic production- and consumer-driven culture, the hallowing of a day of genuine leisure is radical. ... (Heschel) recognizes that time itself can take on a different quality, a ‘taste of eternity’ as he says, in which all our relationships,

activities and the quality of time itself initiate us into a sense of the sacred. ... Heschel brings a poetic sensibility to our experience of being human. His wonderful evocative language (even in translation) stirs up our innate longing for the ‘more,’ for a sense of the divine surrounding, permeating our lives. We are reminded we are made for this and not for our capacity to produce. This hallows (makes holy) our very lives. It makes us mindful that we are created in the divine image and likeness, a biblical concept that both Jews and Christians share.”

Heschel suggests that the most important way to observe the Sabbath is found in one word — we must learn to love the Sabbath.

And this makes sense, doesn’t it? For if the Good Lord is a God of love and compassion, then it follows that we, too, must live a life of love and compassion. And if we live a life of love and compassion, then we must celebrate the Sabbath, and at times even desecrate the Sabbath, with love and compassion. And if you understand that God commands us to supersede the Sabbath regulations when matters of life, of caring, of helping, of “repairing the world” are involved, then maybe you will gain a new understanding of what the Sabbath is really all about. The key is in *thinking about the meaning* of the Sabbath, so that you will come to love the Sabbath.

It seems to me that if we better understand the exceptions, we better understand the Sabbath. And if we better understand the Sabbath, we will better understand our relationship to God. And if we better understand our relationship to God, we will better understand that first and foremost, what God asks of us is to bring peace to the world. And may it be speedily, in our days. Amen. ☺

Editor’s note: Professor Raful has accepted an appointment as dean of the Touro Law School in Long Island, N.Y., effective July 1. Raful has been a member of Creighton’s law faculty for 16 years, serving as dean from 1988 to 1999.