

# **A LAWYER'S PERSPECTIVE ON PROFESSIONAL ETHICS, CLIENT SECRETS & CONFLICTS OF INTEREST —**

## **CS401/501 Seminar: "Contemporary Issues in Computer Science**

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### **SECTION A: Philosophical Thoughts and Practical Considerations**

#### **I. Initial Thoughts**

a. From *The Gold Coast*, by Nelson DeMille, (1991). An FBI agent is trying to convince a lawyer not to represent a Mafia Boss: "Evil is seductive, and virtue is boring. Evil seems to pay better than virtue, but virtue is its own reward." The lawyer objected: "I am an honest man. I am doing nothing dishonest." To which, the FBI agent responded: "But being involved with Mr. Bellarosa is unethical, immoral and unwise."

b. In the Palouse Empire Mall parking lot, there are several four-way stop signs that are completely in the private Mall and do not lead to city thoroughfares. If a car runs one of the stop signs (without stopping), it is possible that the conduct was not illegal. But was the conduct unethical, immoral, or unwise?

#### **II. Initial Questions:**

- a. If one's conduct is completely legal – i.e., not illegal – can it still be wrong?
- b. By "wrong," do you mean sinful ... unethical ... immoral ... evil ... "against one's principles or personal code?"
- c. What would convince you to do something illegal (lie, cheat or steal)? To do something unethical?
- d. What are the consequences of one's actions, even if the actions are legal and not dishonest? Will there be monetary rewards or monetary losses? Will it injure one's reputation?
- e. Murphy's Law: "If anything can go wrong, it will go wrong." What could go wrong?
- f. What keeps a person honest? Is it only the fear of getting caught?

### **SECTION B: The Lawyer's Professional Ethics – not to be confused with ethics and morality**

#### **I. The Lawyer-Client relationship**

A lawyer is not required to take any case and represent any client, unless legally ordered by a court.

Once a lawyer agrees to represent a client, the lawyer owes the client the duties of competent representation, reasonable communication, candid advice, independent judgment, reasonable diligence and promptness, as well as the duty of confidentiality.

But a lawyer cannot knowingly assist criminal or fraudulent conduct, but may discuss with the client what consequences might result from the client's conduct and ask the client to consider moral, economic, social, political, and other factors.

And a lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct, such as duties to others, duties to the profession, duties to the court, and potential conflicts of interest.

#### **II. Client Confidentiality**

A lawyer is especially licensed to protect a client from the power of the state. So the confidential communications between lawyer and client are protected by an evidentiary privilege: the "attorney-client privilege." Similar to the spousal communication privilege and the doctor-patient privilege, a court of law cannot force one party to the communication to reveal the confidences or secrets. That "evidence" is just not permissible in the court of law.

But the ethical rules of the legal profession go even further and apply the "ethical duty of confidentiality" even outside of the context of court proceedings. According to this confidentiality rule: an attorney cannot disclose "information relating to representation" unless the client gives informed consent, or unless impliedly authorized, or unless otherwise permitted or required by ethical rules. For example, if the client commits perjury in court, some states require his lawyer to reveal client confidential information in order to remedy (and prevent) the perjury, if no other remedy is available.

A lawyer is not permitted to lie on behalf of a client, but a lawyer can refuse to answer questions if those answers are likely to reveal client confidential information.

The duty of lawyer to protect the client's confidential information continues even after the legal representation ends – i.e., protecting the confidences of "former clients" – and may even continue after the client has died.

A lawyer also has a duty to protect confidential information obtained from a "prospective client:" a person who has consulted with the lawyer for the purpose of obtaining legal assistance or representation.

#### **III. Conflicts of Interest**

A lawyer has a duty to her client. But a lawyer also has duties to the public, to the courts, to the administration of justice, to the legal profession, to opposing counsel in a case, to witnesses, and to "third parties."

The lawyer's duty to the client generally takes precedence, but it can be limited by duties to others. A lawyer must represent her client "zealously," but "within the bounds of law." For example, the basic rules against lying, cheating and

stealing constrain the lawyer. But as long as the lawyer does not violate duties to these other parties, the lawyer is obligated to place her client's interests first.

Of course, a constant concern is the fact that the interests of the client may be in conflict with the lawyer's own interests. But this issue should be resolved by the lawyer before she agrees to take the job. And if the conflict arises later, then the lawyer must take steps to resolve the conflict, which may include termination of the lawyer's employment and taking steps to protect the client's interests.

Another potential conflict of interest can arise between two clients. For example, a lawyer might be in a situation where one client's interests are directly adverse to the interests of another client. A second example is where there is a "substantial risk that representation of client will be materially limited by the lawyer's responsibilities to another client or to a third person," or materially limited by the lawyer's own interests. In these situations, a lawyer can continue to represent the affected client – or all the affected clients – if the lawyer obtains informed consent in writing and the lawyer "lawyer reasonably believes he is able to provide competent & diligent representation."

A lawyer also owes a duty to "former clients" as well as "clients of a law firm with which the lawyer was formerly associated." These rules are more complex, basically because they are written to be less restrictive of lawyers and to allow lawyers some flexibility to move to different law firms. Basically, a lawyer owes a duty of "loyalty" to former clients and cannot represent a new client in the "same or substantially related matter" adverse to the former client, unless the former client gives informed consent in writing. In the case of lawyers moving to a different law firm and representing a new client against a client of the former law firm, the conflict of interest restrictions only apply if the lawyer "has actual knowledge" of protected confidential information, and only then if the matters are the same or substantially related and the client has not consented.

### **SECTION C: HYPOTHETICAL SITUATIONS THAT LAWYERS MIGHT ENCOUNTER**

1. Attorney agrees to help Client out of his financial distress, including thousands of dollars of credit card debt. Client has several assets that can be sold, including a beach cottage on which Client owes back taxes. Attorney advises Client to sell the cottage on the market or at a public auction in order to pay off most of the debt. Is it ethical for Attorney to have her brother secretly buy the cottage for her? Would it be ethical for Attorney to just buy the cottage directly from Client?
2. Two years ago, Lawyer represented Mr. W in acquiring several properties. That work was completed two years ago and Lawyer no longer represents Mr. W. Now Mrs. W asks Lawyer to represent her in divorce proceedings against Mr. W. Would it be ethical, professionally, for Lawyer to represent Mrs. W against Mr. W?

### **SECTION D: SITUATIONS THAT ENGINEERS, SCIENTISTS &-DEVELOPERS MIGHT ENCOUNTER**

1. Employer asks you to write a program that searches the web for social security numbers.
2. Employer asks you to write a program exactly like the program you wrote for your previous employer.
3. Employer asks you to comply with the FBI agents request for personal, private information about employer's customers – for example, the times the customers have downloaded internet files, the times the customers have purchased certain items over the internet, or the times the customers have visited certain internet sites.
4. Employer asks you to write a program that will assist the client in manufacturing and prescribing more efficiently contraceptive and "abortion" pharmaceuticals.
5. Employer asks you to sell a program to clients before the program is completely finished and "bug-free," explaining that the employer will provide fixes and updates later.
6. What professional duties do you owe to your employer ... to your clients ... to your customers ... to your colleagues at work ... to colleagues in your profession working elsewhere ... to your profession ... to society in general?

### **SECTION E: SELECTIONS FROM OTHER PROFESSIONAL CODES OF ETHICS**

#### **A. Association for Computing Machinery (ACM) Code Of Ethics And Professional Conduct 1992**

##### **1. GENERAL MORAL IMPERATIVES.**

- 1.1 Contribute to society and human well-being.
- 1.2 Avoid harm to others.
- 1.3 Be honest and trustworthy.
- 1.7 Respect the privacy of others.
- 1.8 Honor confidentiality:

The principle of honesty extends to issues of confidentiality of information whenever one has made an explicit promise to honor confidentiality or, implicitly, when private information not directly related to the performance of one's duties becomes available. The ethical concern is to respect all obligations of confidentiality to employers, clients, and users unless discharged from such obligations by requirements of the law or other principles of this Code.

## **B. IEEE Code of Ethics February 2006**

We, the members of the IEEE, in recognition of the importance of our technologies in affecting the quality of life throughout the world, and in accepting a personal obligation to our profession, its members and the communities we serve, do hereby commit ourselves to the highest ethical and professional conduct and agree: 1. to accept responsibility in making decisions consistent with the safety, health and welfare of the public, and to disclose promptly factors that might endanger the public or the environment;

1. to accept responsibility in making decisions consistent with the safety, health and welfare of the public, and to disclose promptly factors that might endanger the public or the environment;
2. to avoid real or perceived conflicts of interest whenever possible, and to disclose them to affected parties when they do exist;
3. to be honest and realistic in stating claims or estimates based on available data;
4. to reject bribery in all its forms;
5. to improve the understanding of technology, its appropriate application, and potential consequences;
6. to maintain and improve our technical competence and to undertake technological tasks for others only if qualified by training or experience, or after full disclosure of pertinent limitations;
7. to seek, accept, and offer honest criticism of technical work, to acknowledge and correct errors, and to credit properly the contributions of others;
8. to treat fairly all persons regardless of such factors as race, religion, gender, disability, age, or national origin;
9. to avoid injuring others, their property, reputation, or employment by false or malicious action;
10. to assist colleagues and co-workers in their professional development and to support them in following this code of ethics.

## **C. Software Engineering Code of Ethics and Professional Practice -- 1999**

### **Principle 1 PUBLIC**

Software engineers shall act consistently with the public interest. In particular, software engineers shall, as appropriate:

- 1.01. Accept full responsibility for their own work.
- 1.02. Moderate the interests of the software engineer, the employer, the client and the users with the public good.
- 1.03. Approve software only if they have a well-founded belief that it is safe, meets specifications, passes appropriate tests, and does not diminish quality of life, diminish privacy or harm the environment. The ultimate effect of the work should be to the public good.
- 1.04. Disclose to appropriate persons or authorities any actual or potential danger to the user, the public, or the environment, that they reasonably believe to be associated with software or related documents.

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### **Principle 2 CLIENT AND EMPLOYER**

Software engineers shall act in a manner that is in the best interests of their client and employer, consistent with the public interest. In particular, software engineers shall, as appropriate:

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- 2.03. Use the property of a client or employer only in ways properly authorized, and with the client's or employer's knowledge and consent.
- 2.04. Ensure that any document upon which they rely has been approved, when required, by someone authorized to approve it.
- **2.05. Keep private any confidential information gained in their professional work, where such confidentiality is consistent with the public interest and consistent with the law.**
- 2.06. Identify, document, collect evidence and report to the client or the employer promptly if, in their opinion, a project is likely to fail, to prove too expensive, to violate intellectual property law, or otherwise to be problematic.
- 2.07. Identify, document, and report significant issues of social concern, of which they are aware, in software or related documents, to the employer or the client.
- **2.08. Accept no outside work detrimental to the work they perform for their primary employer.**
- **2.09. Promote no interest adverse to their employer or client, unless a higher ethical concern is being compromised; in that case, inform the employer or another appropriate authority of the ethical concern.**

## **D. National Society of Professional Engineers (NSPE) Code of Ethics for Engineers as revised Jan 2003**

### **II. Rules of Practice**

Engineers shall hold paramount the safety, health and welfare of the public.

- If engineers' judgment is overruled under circumstances that endanger life or property, they shall notify their employer or client and such other authority as may be appropriate.
- Engineers shall approve only those engineering documents which are in conformity with applicable standards.

- Engineers shall not reveal facts, data or information without the prior consent of the client or employer except as authorized or required by law or this Code.

Engineers shall act for each employer or client as faithful agents or trustees.

- Engineers shall disclose all known or potential conflicts of interest which could influence or appear to influence their judgment or the quality of their services.
  - Engineers shall not accept compensation, financial or otherwise, from more than one party for services on the same project, or for services pertaining to the same project, unless the circumstances are fully disclosed and agreed to by all interested parties.
  - Engineers shall not solicit or accept financial or other valuable consideration, directly or indirectly, from outside agents in connection with the work for which they are responsible.
- Engineers in public service as members, advisors or employees of a governmental or quasi-governmental body or department shall not participate in decisions with respect to services solicited or provided by them or their organizations in private or public engineering practice.
- Engineers shall not solicit or accept a contract from a governmental body on which a principal or officer of their organization serves as a member.

### **III. Professional Obligations**

Engineers shall not disclose, without consent, confidential information concerning the business affairs or technical processes of any present or former client or employer, or public body on which they serve.

- Engineers shall not, without the consent of all interested parties, promote or arrange for new employment or practice in connection with a specific project for which the Engineer has gained particular and specialized knowledge.
- Engineers shall not, without the consent of all interested parties, participate in or represent an adversary interest in connection with a specific project or proceeding in which the Engineer has gained particular specialized knowledge on behalf of a former client or employer.

Engineers shall not be influenced in their professional duties by conflicting interests.

- Engineers shall not accept financial or other considerations, including free engineering designs, from material or equipment suppliers for specifying their product.
- Engineers shall not accept commissions or allowances, directly or indirectly, from contractors or other parties dealing with clients or employers of the Engineer in connection with work for which the Engineer is responsible.

### **E. American Society of Civil Engineers (ASCE) Guidelines to Practice Under the Fundamental Canons of Ethics**

Canon 1: Engineers shall hold paramount the safety, health and welfare of the public and shall strive to comply with the principles of sustainable development in the performance of their professional duties.

1. Engineers shall recognize that the lives, safety, health and welfare of the general public are dependent upon engineering judgments, decisions and practices incorporated into structures, machines, products, processes and devices.

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Canon 4: Engineers shall act in professional matters for each employer or client as faithful agents or trustees, and shall avoid conflicts of interest

1. Engineers shall avoid all known or potential conflicts of interest with their employers or clients and shall promptly inform their employers or clients of any business association, interests, or circumstances which could influence their judgment or the quality of their services.
2. Engineers shall not accept compensation from more than one party for services on the same project, or for services pertaining to the same project, unless the circumstances are fully disclosed to and agreed to, by all interested parties.
3. Engineers shall not solicit or accept gratuities, directly or indirectly, from contractors, their agents, or other parties dealing with their clients or employers in connection with work for which they are responsible.
4. Engineers in public service as members, advisors, or employees of a governmental body or department shall not participate in considerations or actions with respect to services solicited or provided by them or their organization in private or public engineering practice.
5. Engineers shall advise their employers or clients when, as a result of their studies, they believe a project will not be successful.
6. Engineers shall not use confidential information coming to them in the course of their assignments as a means of making personal profit if such action is adverse to the interests of their clients, employers or the public.
7. Engineers shall not accept professional employment outside of their regular work or interest without the knowledge of their employers.

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