

Symposium: Unethical Says Who?: A Look at How People and Institutions Help Businesses Fulfill Their Ethical Obligations

Business Lawyers, Baseball Players, and the Hebrew Prophets

Thomas L. Shaffer

Recommended Citation

Thomas L. Shaffer, *Business Lawyers, Baseball Players, and the Hebrew Prophets*, 42 Val. U. L. Rev. 1063 (2008).
Available at: <http://scholar.valpo.edu/vulr/vol42/iss4/1>

This Symposium is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.



BUSINESS LAWYERS, BASEBALL PLAYERS, AND THE HEBREW PROPHETS

Thomas L. Shaffer*

The American legal profession has been consistently muddled on the difference between lawyers acting for business and lawyers acting in court.¹

The essential difference turns on the fact that the litigator offers an alternative to violence. The background of the litigator's art is violence, as war is the background for diplomacy: I was told, by the Chief Justice of Indiana, as I was admitted to the Bar in 1961, "[t]he difference between a debate and an alley fight is law." Litigators subsist on keeping clear the battlefield space between litigating parties. If they forget to keep the battlefield clear, our official rules remind them that they are neglecting professional duty—by, for example, trying to be both lawyer and witness (both advocate and truth bearer),² or talking to the other lawyer's client,³ or contacting the judge in a non-adversarial way.⁴

The business lawyer, by contrast, trades on what brings people together, and, in one way or another, appeals to people's often neglected yearning for community and for doing things together. The moral appeal of a business lawyer was the appeal of the Hebrew Prophets; the Prophet, according to Megan McKenna, "sees us as members of a people, of a community . . . and contends with us together, not alone."⁵ The operative first-person pronoun in business practice is in the plural—"we," "us." The operative pronoun in litigation is "them," or "those"—

* Robert and Marion Short Professor of Law Emeritus, University of Notre Dame; Supervising Attorney, Notre Dame Legal Aid Clinic; member of the Indiana Bar.

¹ "Moral ambiguity" is perhaps characteristic of lawyers in court—as the practice of Mr. Rumpole often shows—but not of lawyers advising business clients in offices over the bank. When the reviewer salutes the cinematographer who "turns the enormous law offices into a field of moral ambiguity" in the movie "Michael Clayton," he salutes a portrayal of litigation, or of lawyers in the shadows of litigation. David Denby, *Michael Clayton*, THE NEW YORKER, Oct. 8, 2007, at 100. That more than the "legal adviser" whose concern is that her client be and become a good person. See, e.g., the law-office situation famously proposed by my late friend Professor Louis M. Brown in the "conscientious landlord" story, at (among other places) THOMAS L. SHAFFER, AMERICAN LEGAL ETHICS 622-24 (1985); and the argument of Professor Harry Jones that the business lawyer is a resource for her client's conscience. See *infra* note 7. In that sense the business lawyer may even resemble the Prophets. Jawdat Said, *Law, Religion and the Prophetic Method of Social Change*, 15 J. LAW & RELIGION 83, 135 (2001-2002).

² MODEL RULES OF PROF'L CONDUCT R 3.7 (2006).

³ RULES OF PROF'L CONDUCT R. 4.2.

⁴ RULES OF PROF'L CONDUCT R. 3.5(b).

⁵ MEGAN MCKENNA, PROPHETS: WORDS OF FIRE 19 (2002).

1064 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 42

pronouns that often appear before a rude noun. (It is interesting to me to note in passing that the plural was also the operative pronoun in the appeal-religious, prophetic, as well as legal and constitutional-of the great modern leaders of the Civil Rights Movement.⁶)

At the most elementary level, official “ethics” in the American legal profession has been obsessed with the adversary ethic—with the litigator’s notion that justice is something you get from the government, rather than something we people give to one another. Our obsession has obscured the distinction between the two ways of being a lawyer in America. The two ways I need, for present purposes, to contrast with one another.

Professor Harry Jones, prominent for decades on the law faculty at Columbia, speaking to law students at Villanova in 1978, distinguished these two ways of being a lawyer in terms of partisanship and adversity. He said: “When the all-out partisan model is carried over into the nonadversary aspects of the lawyer’s life, it is as if an offensive lineman of the Pittsburgh Steelers were to use the strong-arm tactics . . . to get his family on board a commuter train”⁷ The distinction was not about decorum. To Harry Jones, as to the Prophets, the distinction was moral. He believes that the reasons that justify and even require partisan advocacy in the trial of a cause do not grant any license to the lawyer to participate as legal adviser in a line of conduct that is immoral, unfair, or of doubtful legality.⁸ He implied what, I think, is the case—that adversarial law treats immorality and unfairness and even legality in a different way than being a lawyer for business does.

Professor Jones implied that the judicial system defines what a litigator should do, and something else defines what a business lawyer should do. And the something else—my subject here—is what the code drafters in the American profession had, he thought, neglected. And maybe the point, as he made it, has less to do with law-in-court than it has to do with business: People “of large affairs do not select their legal advisors entirely or principally for ethical insensitivity,” he said.

⁶ See generally my collection of recent articles comparing these leaders—especially Dr. King—and the Hebrew Prophets: Thomas L. Shaffer, *Lawyers and the Biblical Prophets*, 17 NOTRE DAME J.L. ETHICS & PUB. POLICY 521, 539-40 (2003); Thomas L. Shaffer, *Lawyers as Prophets*, 15 ST. THOMAS L. REV. 469, 473 (2003); Thomas L. Shaffer, *The Biblical Prophets as Lawyers for the Poor*, FORDHAM URB. L.J. 15, 22-27 (2003); see also Thomas L. Shaffer, *Law Faculties as Prophets*, 5 J. LEGAL PROF. 45 (1980).

⁷ Harry Jones, *Lawyers and Justice: The Uneasy Ethics of Partisanship*, 23 VILL. L. REV. 957, 972 (1978).

⁸ *Id.* at 974.

“Somehow it must be made plain,” as it had not been made plain in our lawyer codes, “that the lawyer’s moral judgment is not for hire, that there are occasions when the lawyer [for business] as counselor is under a duty to act as a person of independent ethical concern with obligations not only to his client’s interest but also to fairness and justice in the management of affairs.”⁹ (As I continue to admire and learn from that classic moment in American legal ethics, I hope to explore a bit critically just one word in that last observation. Fairness and justice are fine with me, but that adjective “independent” is troubling, if familiar.¹⁰)

A contemporary example of Harry Jones’s broader argument (from a gentler sport than the one the Steelers play) is the impressive business lawyer Scott Boras. As the baseball season closed last fall, Mr. Boras was acting for—among others—Greg Maddux (no. 3 starter for the San Diego Padres) and Alex Rodriguez, who at that time may or may not have been returning to the New York Yankees. People who do what Mr. Boras does are often called “agents.” He declines that title for his work; he calls himself a legal advisor. What he claims for himself, and the best thing baseball people say about him—as well as the worst thing they say about him—is that he is a lawyer.

He is also an old player. He started out and lasted not very long in the minor leagues. His having shared that life with his clients and those he negotiates with is, no doubt, part of his influence. For one thing, it casts into doubt Harry Jones’s phrase “independent ethical concern”: a year ago last December, at the *Baseball America* banquet, Mr. Boras was named “the game’s most influential non-player.”¹¹ He talked to the baseball people who were there not about his moral independence but about *their* community, and he used the plural pronouns: “We’re growing the game, as it should be grown.” Meaning, among other things, I suppose, that his clients were being paid better all the time, but also meaning to say to the owners and managers what he says to his clients, the players: “We’re about commitment. We’re about making you better.” We’re making *us* better. That is what *we* are up to.¹² He told

⁹ *Id.* at 973-76.

¹⁰ This would be also to question Professor Bradley Wendel’s proposition that a (business) lawyer’s “non-legal moral beliefs should not be permitted to influence their interpretation and application of legal norms.” Bradley Wendel, *Moral Judgment and Professional Legitimation*, 57 ST. LOUIS U. L.J. 1071, 1074 (2007).

¹¹ Ben McGrath, *The Extortionist: Scott Boras, The Yankees’ bête noir has Changed Baseball Forever*, THE NEW YORKER, Oct. 29, 2007, at 56, 62.

¹² McGrath, *supra* note 11; see also Maddux Stays with the Padres, SOUTH BEND TRIBUNE, Nov. 6, 2007, at C3; Selena Roberts, *No Further Adornment Needed in Boston*, N.Y. TIMES, Oct. 29, 2007, at D7; A-Rod to Stay with Yanks, SOUTH BEND TRIBUNE, Nov. 15, 2007, at C5; George

Vecsey, *The Truth Could Have Set Bonds Free*, N.Y. TIMES, Nov. 16, 2007, at C16; Tyler Kepner, *Lesser Lights Get Chance to Shine for Boras*, N.Y. TIMES, Dec. 3, 2007, at D1. Professor Daniel Wollett, commenting on the McGrath essay, and identifying himself as one who believes in “the church of baseball” (a denomination identified by Susan Sarandon’s character in “Bull Durham”), wrote of Scott Boras: “[T]he system” Mr. Boras and his clients work in “is worrisome . . . because the rules for which the collective-bargaining process is responsible permit gross disparities in income levels.” *Don’t Hate the Agent*, THE NEW YORKER, Nov. 19, 2007, at 10. Professor Wollett, thus focusing on “the law” (so to speak) would make of Mr. Boras more of a litigator than I would. He says Mr. Boras is “a damned good lawyer who believes in doing a damned good job for his client—nothing more, nothing less—and he lives the rules handed down by the collective-bargaining process, by the owners and the union.” *Id.* I would agree that Mr. Boras manages, as a good business lawyer, to use the rules for his clients’ benefit, but I am also inclined to think that he is sincere when he talks of his and his clients’ community—“the game,” as he calls it. That claim, I think, is what makes him, for present purposes, an interesting business lawyer.

“The game” could perhaps be read as aggregating an individual yearning for perfection, with individual players concurring, as necessary, to be the character Robert Redford portrayed in “The Natural.” It seems closer to Mr. Boras’s point to regard “the game” as referring to a “practice” in the Aristotelian sense, a collaborative commitment to the virtues, particularly the virtues that have to do with the moral excellences in a difficult collective activity. Looked at that way, “the game” is read to focus on what baseball people do, do well, aspire to do well together—rather like the focus the political philosopher Chantal Mouffe brought to the notion of common good, a “vanishing point”: “We reach toward it, appreciating that it can never be grasped. Its tantalizing dimension energizes us to present action without it necessarily collapsing into delayed gratification (‘pie in the sky when you die’) . . . [Mouffe] views all forms of agreement”—e.g., on what “the game” is—“as partial and provisional.” Eric Stoddard, *Spirituality and Citizenship: Sacramentality in a Parable*, 68 THEOLOGICAL STUDIES 761, 768-69 (2007) (discussing Chantal Mouffe, *Radical Democracy or Liberal Democracy*, in DAVID TREND, *RADICAL DEMOCRACY, IDENTITY, CITIZENSHIP, AND THE STATE* 22-25 (1996)). That view of the matter would depend on understanding what a game is, on the way to understanding why the game might be important enough to become a vanishing point. Justice Antonin Scalia scoffed at the possibility in his dissenting opinion in *P.G.A. Tour v. Martin*, 532 U.S. 661, 699-701 (2001), and the philosopher bristled, MICHAEL SANDEL, *THE CASE AGAINST PERFECTION: ETHICS IN THE AGE OF GENETIC ENGINEERING* 42-43 (2007):

Some people deny that sports have a point. They reject the idea that the rules of a game should fit the telos of the sport, and honor the talents displayed by those who play it well. According to this view, the rules of any game are wholly arbitrary, justified only by the entertainment they provide and the number of spectators they attract. The clearest statement of this view appears, of all places, in a U.S. Supreme Court opinion by Justice Antonin Scalia. The case involved a professional golfer who, unable to walk . . . , sued under the Americans with Disabilities Act for the right to use a golf cart in professional tournaments. The Supreme Court held in his favor, reasoning that walking the course was not an essential aspect of golf. Scalia dissented, arguing that it is impossible to distinguish essential from incidental features of a game: “To say that something is ‘essential’ is ordinarily to say that it is necessary to the achievement of a certain object. But since it is the very nature of a game to have no object except amusement (that is what distinguishes games from productive activity), it is quite impossible to say that any of a game’s arbitrary

law students at McGeorge, in apparent reference to his representation of Barry Bonds, “We truly gave counsel that resulted in the betterment of the client—not only in a contract sense but in a performance sense, in a *life* sense.” His little lectures to players often invoke what he refers to as “the betterment of the game.”¹³

Which brings to mind Professor Sung Hui Kim’s focus, in her recent scholarship, on the “gatekeeper” proposal for business lawyers—a reference partly to traditional scholarship on what business lawyers should do, and partly on the ruling by the Securities Exchange Commission on “in-house” business lawyers: The Commission now expects the corporate general counsel and lawyers who work in the general counsel’s office to be “gatekeepers.” She suggests that the concept implies an ethical quadrant in which gatekeeper duties are to monitor what business clients do and to interdict them when they do something bad. On the vertical scale, she distinguishes between *willingness* to monitor and to interdict and the *capacity* to monitor and to interdict.¹⁴

The Kim quadrant suggests, perhaps, something about the disagreement Barry Bonds (then of the San Francisco Giants) had with his lawyer, before he and Mr. Boras split up. After the split, Mr. Bonds’s lawyer said, “Philosophically, . . . we were on different pages.”¹⁵ That could be read to mean that Mr. Boras’s approach to being a business lawyer is a communal approach and that Mr. Bonds’s approach to playing baseball is not. It could mean, in Professor Kim’s phrase, that

rules is ‘essential.’” Since the rules of golf “are (as in all games) entirely arbitrary,” Scalia argued, there is no basis for critically assessing the rules laid down by the association that governs the game.

But Scalia’s view of sports is far-fetched. It would strike any sports fan as odd. If people really believed that the rules of their favorite sport were arbitrary rather than designed to call forth and celebrate certain talents and virtues worth admiring, they would find it difficult to care about the outcome of the game. Sport would fade into spectacle, a source of amusement rather than a subject of appreciation. Safety considerations aside, there would be no reason to restrict performance-enhancing drugs and genetic alterations—no reason, at least, tied to the integrity of the game rather than the size of the crowd.

Id.

¹³ McGrath, *supra* note 11; see also Kepner, *supra* note 12 (“I want the player to play where he wants to play and do what he wants to do If my client has ideas and methods and ways to get things done, my job is providing information and facilitating his interest in getting a deal done”) (quoting Mr. Boras).

¹⁴ Sung Hui Kim, *Gatekeepers Inside Out*, at 2, forthcoming publication in *GEO. J. LEGAL ETHICS* (2007), available at <http://ssrn.com/abstract=969536>.

¹⁵ McGrath, *supra* note 11, at 62.

1068 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 42

Mr. Boras monitored, then interdicted, then got out. Ben McGrath's profile of Mr. Boras, in *The New Yorker* in October, can be read to imply the latter progression. Mr. Boras, not the sort of lawyer who gossips about his clients, is not quoted in the McGrath piece on Mr. Bonds's different philosophy. We are left to guess what it is, but I suppose it is fair to suppose that Mr. Boras is willing and able both to monitor and to interdict. And it is fair to suppose from the outcome that there comes a time when a business lawyer who loses moral influence feels he has to turn to other clients.¹⁶

And maybe he was not just being sarcastic when, as it appeared Alex Rodriguez ("A-Rod") would, after all, be leaving the Yankees, Mr. Boras said of his client: "He enjoyed playing in New York."¹⁷ Mr. Rodriguez, A-Rod, certainly appeared to enjoy himself at Yankee Stadium. He probably really was sorry to be leaving, and his lawyer probably was really sorry to see him leave. The remark Scott Boras made may have been a sincere statement of regret about community. That reading of the remark about A-Rod's affection for Yankee Stadium would be consistent with less quizzical examples of Mr. Boras's communal concern—such as his joining Bill Gates in a national movement to improve the salaries of teachers, and, closer to home, his suggestion that the major leagues find a way to recognize exceptional defensive play by players such as Andruw Jones, a spectacular center fielder for the Atlanta Braves, who remain impressive in the field, but seem to have "lost their stroke at the plate." Even Mr. Boras's severe critics recognize that he is, to use a sportswriter's phrase, "transparently vicarious."¹⁸

The idea here is one celebrated in a poem by Bonnie Thurston, about a flock of geese she noticed lighting on and moving across a frozen lake "in a great silent dance." I apply it to being lawyers and clients in business:¹⁹

¹⁶ Thus Sherman J. Clark, with a focus on the relationship between the ethics of virtue and the building of character, argues that virtue ethics causes the moral actor to focus the "best and essential function" of operating in the arena of truth (which Scott Boras claims he does; see McGrath, *supra* note 11, at 66) ought . . . to help us think about ourselves." Sherman J. Clark, *Law as Communitarian Virtue Ethics*, 53 *BUFF. L. REV.* 757, 764 (2005-2006).

¹⁷ McGrath, *supra* note 11, at 67.

¹⁸ McGrath, *supra* note 11, at 64-65.

¹⁹ "Ice Dance", 59 *THEOLOGY TODAY* 106 (2002).

Each bird put down
one webbed foot,
slid it forward,
hesitated for an instant
before shifting weight to it.
They did all this:
step, hesitate, slide.

Rising and falling together,
the whole flock waltzed forward,
each one testing the ice,
each one ensuring
the other's safety.

Not birds of the air
nor any creeping thing,
not beasts of the field
nor human kind in God's image
can safely dance alone.
The ice is too thin;
the dance is too dangerous.

That, as I read it, is the way Scott Boras regards himself as a business lawyer-beset, no doubt, by fair and unfair criticism from his counterparts among baseball owners, and beset as well, no doubt, by a certain amount of self-deception as he makes his moral appeals to the baseball community. But, for all that, his is a style of law practice that is, in my observation, common among business lawyers, and a style I remember from my days as a novice in a large Hoosier law firm that served businesses.

We were like almost all such law firms in the Midwest. We had some big corporate deals involving securities registration and federal antitrust law, but representing insurance companies was also a sustaining part of our work—both in the litigation practice and in making moral appeals to our business clients and for them. (The older lawyers—partners—were pretty much divided between the two kinds of law practice I am writing about here: Some of them were business lawyers serving business in the offices of business clients and in our law office over the bank, and, some, a different set of older lawyers, served business clients—mostly insurance companies—in court and on the way to court. We novices carried brief cases for both sets of partners. We hoped the day was coming when we would have to decide which set to join.)

1070 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 42

One of my early lessons came from being asked, by inside representatives of a company that provided group life insurance to an employer in Indianapolis, what to do about a tardy application from a young widower. His wife had died suddenly, leaving him to raise their young children. She had had a job outside the home and, in that job, she had group life insurance provided by our client the insurance company. The grieving young husband did not file his claim within the thirty days required by the policy. The company was willing to pay our firm to advise them on whether they owed the money. They seemed to be not willing to pay the young widower, though, unless the law said they had to. They asked one of the business lawyers—not one of the litigators—and he put me on the job.

(I am using the male pronoun for lawyers in the firm because the firm had no lawyers who were women. Not in those days. No African-Americans, no Jewish people, and, until I came along, no Roman Catholics. And I had the impression that it would not have had Catholics had not one of its business clients, a Catholic, noticed that they had none. I suspect this good client mentioned the fact and that the firm then sent a recruiter to Notre Dame. In other words, moral influence—if that is what this was—works in both directions. In case you check my past and figure out what firm I am talking about, I want you to know that the firm now has lawyers who are women, lawyers who are African-Americans, lawyers who are Jewish, and some younger Catholic lawyers.)

I researched Indiana insurance law on the tardy group-insurance claim and got the answer the company seemed to want: Indiana law favors insurance companies—maybe that’s why so many of them have put their home offices in Indianapolis. I reported to the partner that the law said the company did not owe the money. I reported this with a small editorial comment that I may have owed to my education at Notre Dame. I said it would “be pretty crappy” of the company not to pay the claim. The partner agreed with me; he said he would relay to the client both my legal advice and my moral advice, and, he told me, if the claim were not paid we would not represent that insurance company again.

I do not know what he said to the home office of the insurance company; he later told me they paid the claim. (And, no doubt, they paid our fee.) He may not have made the threat about not representing the company in the future if they failed to behave. He may have said that only to me, for my benefit. I flatter myself into thinking he was training me to be a business lawyer. Or maybe his moral appeal, if he

made one to our client, was not what we thought crappy, but about what life insurance is for, and what group insurance is for—maybe even a bit about working mothers who help their employers pile up profits from which to pay insurance premiums. And I now imagine, to preserve my quibble with Harry Jones, that my mentor probably spoke to the insurance-company executive in the first-person plural and not at all with “independent ethical concern.” I think now, looking back on this small, but vivid, lesson, that I was supposed to learn that this outcome is what business lawyers seek—rather than winning in court. Another partner in the business-lawyer part of the firm once told me that he felt he had failed when his legal work ended up in court. I suspect Scott Boras would say something like that.

I linger for another moment over the first-person plural in business practice: Recent scholarship by Professor Milton Regan, on what he calls “moral intuitions and organizational culture,”²⁰ focuses on moving intuition—what Jung called the ability see around corners²¹—into prominence in the culture. Appeals to intuition, rather to rules and principles, syllogisms, and guidelines. (What being a Scout might mean, to remember my own boyhood, more than what the Scout Law said.²²) “Those who would have an organization attempt to encourage ethical behavior thus need to consider carefully . . . how organizations might heighten the importance of ethical considerations in their operations,” he wrote.²³ Make sensitivity matter and, maybe, avoid calling it morals. At least try to avoid phrases like “pretty crappy,” because this, too, is a matter of lawyer skill.

I think back on the business lawyers who taught me for awhile, and I think the plural pronoun was inherent in their lesson plan, both for our business clients and for our own law firm—intuition and organizational culture, more than sermons and finger pointing. If I am right, the reason

²⁰ Milton C. Regan, *Moral Intuitions and Organizational Culture*, 51 ST. LOUIS U. L.J. 941, 941 (2007).

²¹ C.G. JUNG, *ANALYTICAL PSYCHOLOGY: ITS THEORY AND PRACTICE* 13-14 (1968).

²² A Scout is trustworthy, loyal, helpful, friendly, cheerful, thrifty, brave, clean, reverent. 4 *COLLIERS ENCYCLOPEDIA* 447-48 (1965), available at <http://www.scouting.org/factsheets/02-503.html> (last visited February 14, 2008).

²³ Regan, *supra* note 20, at 947. This is probably what Louis Auchincloss’s big-firm lawyer Henry Knox wanted to be—“a man for clients” in his partner’s phrase—but lacked the skill to manage. See Louis Auchincloss, *THE GREAT WORLD AND TIMOTHY COLT* (1956). It is a skill magnificently manifest in the life and law practice of the entertainment lawyer Fanny Holtzman. See Mary Case Harriman, *Miss Fixit*, *THE NEW YORKER*, Jan. 30, 1934, at 21-25, and Feb. 6, 1937, at 22-25, reprinted in Shaffer, *supra* note 1, at 624-37. See generally, TED BERKMAN, *THE LADY AND THE LAW* (1976).

1072 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 42

would have to do with community (in both places). (The letter offering me a chance to work for the firm had a paragraph reminding me that I was expected to help my peers, not compete with them. I was told there, in an evident allusion to my hope for eventual partnership in the firm, that I would succeed more by helping the other young lawyers than I would by “feathering” my “own nest.” The letter could have referred to “the game,” as Mr. Boras does when he speaks to his clients and his colleagues.)

The occasions of relevance of moral judgments, in that plural-pronoun sense, “help to promote and reinforce the cooperative behavior necessary for humans to survive and flourish,” Professor Regan says.²⁴ Moral judgments in the sense of *using* conscience: I confess that reading Professor Regan’s essay called to my mind my old war story about the life-insurance claim, and caused me to wonder whether the insurance-company executive our partner spoke to was concerned about keeping the company’s moral status among its peers—and even whether the partner I worked with might have used that consideration as a back-door way to hint at our firm’s availability to help the company in the future instead of telling the insurance executive that he ought to learn to have sympathy for a young single-parent widower. The difference is not only a matter of conscious legal-counseling style; it is also a matter of where the lawyer is coming from.

* * *

The first really big job I had involved President Kennedy’s executive order on equal employment opportunity.²⁵ It was the sort of novice’s job that required the beginner to come in on Saturday morning (when we were allowed to wear sport coats). The Kennedy order was worked out among business clients in 1961 and 1962, before the days of modern, federal civil-rights law. (There was some nineteenth century, post-Civil War law around, of course, but it had mostly been worked out to establish rather than prevent racial segregation.²⁶)

President Kennedy’s order required racial integration in companies that did business with the federal government. Our biggest client ran

²⁴ Regan, *supra* note 20, at 966 (footnote omitted).

²⁵ Exec. Order No. 10,925, 26 Fed. Reg. 1977 (March 6, 1961). For a bit of context, see generally RICHARD N. CURRENT ET AL., *AMERICAN HISTORY: A SURVEY, VOL. II SINCE 1865* ch. 30 (6th ed. 1983).

²⁶ See TAYLOR BRANCH, *PARTING THE WATERS: AMERICA DURING THE KING YEARS 1954-63* 30-31 (1988).

racially segregated paper mills in rural Georgia; the corporate secretary of our client asked a partner in our firm what the order required it to do. (The leader here was a different partner than the one in the life-insurance case. In fact, he was a litigator on temporary assignment to a business issue, probably because the client was especially important. Or so I thought at the time. But maybe, as I learned later, when I was a corporate magnate visiting Wall Street for awhile,²⁷ he came over from the litigation division because sometimes a litigator needs to come in on a business-planning issue, in case a preventive-law perspective is needed, or even in case the plan does not work and somebody who knows the case has to go to court.)

The client was important to us. Our firm was so attentive to its legal work that our client had not developed an in-house legal department, and we did not want it to develop one. Folklore in the firm said one of our partners had given the company legal advice by phone from a gurney in the hospital, as he was waiting to go in for surgery. (This was in the days before cell phones. I have imagined the nurses had to bring an extension phone, cord and all, into the hall for him, from the doctors' office.)

I read and pondered and made copious notes and decided the company did not have to worry. Our client did not do any significant business with the federal government. It did some business with companies that did business with the federal government, but, in that circumstance, the executive order was ambiguous. Given the racial climate in American business in those days, federal enforcement of racial integration would probably have never reached our client; if it did work its way to our client, it would take years to get that far.

I explained this to the partner. (I believe I was already getting a reputation as a promising researcher for businesses that wanted to get out of things. Or maybe the older lawyer was using me as a set-up act leading to his giving moral advice.) He phoned the secretary of the corporation while I was with him, and we three talked on the "squawk box" phone. The secretary made it clear—as if we needed to know—that integrating that mill, in rural Georgia, in 1961, would not be either easy or peaceful. The partner explained what I had found out—that, probably, they did not need to do anything. Not yet anyway. And then the

²⁷ Full disclosure: I was a member of the board of directors of Fort Howard Paper Corporation from the time it "went public" until it ceased being a publicly traded corporation. My stint on Wall Street was during a "leveraged buy-out" of its stock.

1074 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 42

secretary asked for our advice: “What do you think we ought to do?” The partner did not turn to me to answer that “ought” question. He did not ask our client’s spokesperson what the spokesperson was seeking with that word “ought”—legal advice or business advice or moral advice. He spoke into the squawk box to say, “I don’t think there is any doubt about what you should do. You should integrate the mill.”

And so they did; that mill and two or three others and two or three supporting installations. I was down there a year or so later, doing a file search for an antitrust subpoena (this company was nobody’s push-over), and there was abundant evidence both that they had integrated the mill and that it had not been either easy or painless. I do not think the temporary-duty partner said what he did to the corporate secretary for my benefit: It would have been an elaborate way to teach something useful to a young lawyer, and, anyway, he was a litigator not a purveyor of moral lessons. Still, I learned a lesson, and I have carried it with me into teaching and writing about ethics. (I have used it a lot, as some of you may know.) And I have wondered as I carried the lesson what was in the mind and heart of my elder colleague that day. You may need to know that he was no pinko reformer. We had a couple of older lawyers in the firm who were active in the Civil Liberties Union. We even had a Democrat or two. But this partner was not either of those things. He was a Goldwater Republican. It is even possible to conclude that he did not have such sympathy for racial integration; certainly many white Hoosiers in those days did not. (Indiana was, lest we forget, the Midwestern center of the Ku Klux Klan.)

He was a good lawyer, though, in both the intellectual and the “practical” senses. Maybe he was counting tea leaves, realizing that racial segregation was going to die anyway and this client might as well see to it when the pain could be blamed on John F. Kennedy. But he did not say any of that to me. And if he said something to that effect to our client’s corporate secretary, I did not hear him. He left me to make what I could of the moral lesson. The main point for present purposes is that he gave what appeared to me then to be moral direction, without elaboration, and that the client took it (which, translated, means the corporate secretary had to relay the advice to the regal C.E.O. of the company—a grey eminence if there ever was one—and persuade the regal C.E.O. to send the integration order to rural Georgia). The partner in the paper-mill matter did not labor to follow Professor Regan’s advice and see if he could raise the moral sensitivity of the people who worked for the paper company. And if he wanted to raise my moral sensitivity more than he already had, he missed his chance. (It pays to remember

here that he was a litigator on loan.) In any case, I learned that day that business lawyers have clout and, for all of our devotion to the law, we *do* give moral advice—or, if you prefer, legal advice that has moral implications—or, if you prefer, business advice that is both legal and moral.

* * *

How does a lawyer come to have the kind of clout I saw in action in my old law firm? (I could give other examples, from other partners, and I was only down there a couple of years, until I figured out that teaching beats working.) I have found that, sometimes, we have clout just by being lawyers. But I am fairly certain that was not the case in either of these stories of mine. (And I have others) The moral nerve here lay deeper than that—in both lawyers and clients.

And I do not think these lawyers were just telling their clients what they wanted to hear: There were at least two other large firms in town that would have been delighted to take over the legal work of both of these clients, and any business lawyer knows, surely, about the delicate line between telling a client what she wants to hear and giving her sound legal and moral guidance—between contributing to what Professor Regan calls “the cooperative behavior necessary for humans to survive and flourish”²⁸—what Scott Boras calls “growing the game, as it should be grown”²⁹—and keeping a business person out of trouble for the moment.

One of the ways business lawyers have clout is that they understand what Scott Boras understands as he represents baseball players: The moral appeal, usually implicit, is to community. That was the case, I think, when we advised the insurance company, which provided insurance to a business community and which itself belonged to a business community. It was the case, too, in the segregated-mill matter, where, after all, the people who worked there, white and black, were neighbors. Better neighbors, I think, after the mill was integrated. Better neighbors now—years after Jimmy Carter, from Plains, Georgia, was President—than they were in 1962.

The appeal to community is an appeal to a way of being together. It is often like an appeal to the ethical system of the Hebrew Prophets—and they, too, were lawyers—almost all of them. Ezekiel’s confronting question to the king was a *systemic* question, when you think about it.

²⁸ Regan, *supra* note 20, at 966.

²⁹ McGrath, *supra* note 11, at 56.

1076 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 42

He reminded the king of the system the king had bought into, and he said, "Should not shepherds feed the sheep?"³⁰ Should not life-insurance companies feed orphaned children? Should not neighbors who work together *be* together? The prophet Nathan told King David a story about a wrong-doer's mistreatment of people, as you may remember, and the impulsive king wanted to know who the wrong-doer was, so that he could bring government wrath down on the wrong-doer, and Nathan said, reminding the king of the king's moral commitments: "You are the man!"³¹

The prophets traded on such outrage, certainly, but their outrage reminded power brokers of a communal pattern of economic life—a system established in the Torah, a system followed for generations, and supposedly accepted but then disregarded by the rulers who were being addressed by the prophets: The powerful people who heard the prophets were being reminded of what they already knew. I read Scott Boras's moral appeal to his players and to the owners of the teams that way.³² And I think, maybe, that is the lesson I was supposed to learn when able older lawyers were trying to teach me how to be a lawyer for business.

* * *

I need now to focus this on a rather more specific issue: Does it matter whether the business lawyer is on the inside looking out or on the outside looking in—an "in house" lawyer or an "out house" lawyer?

The difference between "outside" business lawyers such as I was for awhile and Scott Boras is, and lawyers who have only one business client, is suggested by an extensive empirical analysis, published in 2002, of "the role of inside counsel" by Robert Nelson and Laura Nielsen.³³ They divided lawyers who are full-time employees of their clients into three groups: entrepreneurs, counselors, and cops. Each of the words

³⁰ Ezekiel 34:2.

³¹ 2 Samuel 12:7.

³² How about unintended outcomes and outcomes that, whatever the intention, do not come out right? Things don't always work. Business labors under Murphy's Law as much as government bureaucracy does. How does a business lawyer do what Mr. Boras proposed to do when he wanted to support Andrew Jones, even though Mr. Jones had, for the moment I hope, lost most of his ability to get on base? McGrath, *supra* note 11, at 64. How does a business lawyer have the sort of influence on clients that Jeremiah had? Jeremiah was right, surely, but, even though he was right, he was thrown into the pit.

³³ Robert L. Nelson & Laura Beth Nielsen, *Cops, Counsel, and Entrepreneurs Constructing the Role of Inside Counsel in Large Corporations*, 34 LAW & SOC'Y REV. 457 (2002), reprinted in MILTON C. REGAN, JR. & JEFFERY D. BAUMAN, LEGAL ETHICS AND CORPORATE PRACTICE 223-48 (2005).

suggest a common perception of what such lawyers are up to in an Aristotelian sense (do good and avoid evil). Perhaps the three words at least imply that lawyers in offices over the bank, who do extensive work for business clients—as we did when I was a young lawyer in Indianapolis, and as Scott Boras does—are not as drawn to being one of the three categories, as much as they are drawn to what Harry Jones would have imposed on business lawyers with that adjective “independent.”³⁴

Nelson and Nielsen found out what I did, both as a young lawyer over the bank and, years later, as a corporate magnate (not practicing law then but serving on the board of directors of a Fortune 500 company that put me on the board because I knew about the law but did not expect to be employed as a lawyer): The lawyer in business, functioning as a lawyer, tends to restrain herself when the issue being talked about does not seem to call for her being a cop, and tends to act like a cop when the issue is one that could put the business at legal risk.³⁵

I think of the report, in the wake of the public-utility price-fixing scandal of the 1960s, that the business people who met with competitors to fix prices and rig bids made sure that their lawyers, whether inside or outside, did not know what they were up to. I think, too, of myself as a young business lawyer sent to meet with delegates to a trade association, to make sure those at the meeting talked about things that did not involve or imply violations of the Clayton and Sherman Acts, or even of the Robinson-Patman Act, and to keep a wary eye on the two or three of the delegates who—I thought I could tell—wanted to slip away and meet in a side room out of the presence of the lawyer. I even attended the cocktail hour. I was empowered to stop the formal meeting and order matters removed from conversation—I did that, once or twice. I was encouraged (by the partner who sent me to the meeting) to be a lawyer there, to walk to the street with the delegates as they left and went, separately, back to their home offices—to make sure that all they said to one another was: “See you later.”

The entrepreneurs among inside legal counsel, it appears, build a law practice within the business organization in somewhat the same way

³⁴ See *supra* note 7.

³⁵ Compare Nelson, *supra* note 33, at 486-90, with Murray Chass, *Is It Collusion or Friendly Chats?*, N.Y. TIMES, Nov. 11, 2007, at C14 (stating that a “labor executive for baseball” told Mr. Chass: “My understanding is there were lawyers in the room to make sure nothing improper happened,” and that the hidden agenda was managers working together to prevent free agency).

1078 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 42

a lawyer with an office over the bank builds a practice in a small town—by individual service, by individual alliances, by a sense of where the power is in the company, by careful discretion, and by a certain aloofness that lets the law office have—as we did in Indianapolis—some Democrats (not many), when almost everybody is a Republican, some Masons, and some who belong to the Odd Fellows. Some Protestants, even a Catholic or Jew as the office becomes really progressive, or as the lawyers there realize that some business clients are Catholics and some are Jewish. As the wise old Hoosier lawyer once said: “If you want to catch a cold, you have to stand in the draft.”

Those in the third category, counselors, do what Scott Boras does, even what I have been arguing the Hebrew Prophets did: They speak morally to community. A study of inside business lawyers in Silicon Valley that was published in the *Indiana Law Journal* in 1989 may illustrate this. That study reported that lawyers in those businesses:

... tend to stress those aspects of their practice roles and styles that in their view distinguish them from big downtown firms of corporate lawyers.... They can offer their clients... service that business lawyers outside the high-tech regions cannot offer: general business advice based on local industry-specific knowledge, access to local sources of venture-capital financing, a facilitative, or “engineering” approach to the client’s problems, and... a style of law practice—informal, practical-result-oriented, flexible and innovative, keyed to high-trust business relations—that matches the business culture...³⁶

One way to read that description is that the difference between inside and outside in the life of a Silicon Valley lawyer is not as clear as it used to be in Indianapolis, when we endeavored to keep our paper-mill client on the books and to keep inside counsel out of the company offices. The distinction in Silicon Valley—I am guessing—may turn on whether the business lawyer there has one client or several (and, I suspect, if she has several, her clients do not compete with one another).

In Richard Russo’s new novel *Bridge of Sighs*, Bobby Marconi, a high-school football player, coming to the end of a losing season, finally has a

³⁶ Lawrence M. Friedman et al., *Law, Lawyers, and Legal Practice in Silicon Valley: A Preliminary Report*, 64 IND. L.J. 555 (1989).

good game, and his team wins. After the game, as the players mill around the locker room, their somewhat hapless mentor, Coach Halliday, tries to explain to them how, despite themselves, they have managed to rescue a dismal season:³⁷ “Koz,” he asks Bobby’s nemesis (a thug, who is also for the present Bobby’s colleague), “What have I been saying since August?” And Perry Kozlowski “was visited by a sudden inspiration. ‘How good we could be if we all worked together?’”

“‘Thank you,’ Coach said, as if he really was grateful . . . ‘Life is teamwork, men. That’s all it is. When you think about this game, that’s what I want you to remember.’”³⁸ Bobby Marconi, who could not think of an answer to the coach’s question, and let Perry move ahead of him, thinks later that he should manage to be grateful for the coach’s “thought that life was teamwork[] and . . . his high opinion of their abilities,” without believing a word of what the coach said. Bobby should have learned the coach’s lesson, and did not, and as a result leads a lonely life.³⁹ Stephen Metcalf’s review in *The New Yorker* (Nov. 4, 2007) says Bobby became a “sect of one.” (Bobby does, though, seem, on reflection, to understand that being on the same team with Perry Kozlowski temporarily overcame the old animosity between the two teenagers.)

The point I get from that small part of the story, in which Russo uses “life” and “game” in the way Scott Boras uses those words when he talks to baseball people, is the point of this modest reflection on being a business lawyer and, in working as a “legal advisor” to business clients, trying one’s best not to be a litigator. It is helpful, I think—exploiting Russo’s genius—for a lawyer to be able to invoke, as the hapless Coach Halliday had, a communal lesson—teamwork, if you prefer—not a bad word for business practice (even if rarely a good word for litigation). Bobby Marconi should have learned (and did not) that day of the rare good game, the lesson in Robert Frost’s poem about haying: We work together when we work apart.⁴⁰ The communal lesson is useful in all three places (four, counting the Prophets). It distinguishes courtroom law from office law, litigation from being “legal advisor” (to use Boras’s word) or (to use Coach Halliday’s word) coach, fan, even sometimes, and much of the time for lawyers and coaches, parent (in the “Games

³⁷ RICHARD RUSSO, *BRIDGE OF SIGHS* 392-93 (2007).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ “‘Men work together,’ I told him from the heart, ‘whether they work together or apart.’” Robert Frost, *The Tuft of Flowers*, *THE POETRY OF ROBERT FROST* 22-23 (Edward Connery Lathem ed., 1969).

1080 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 42

People Play”⁴¹ sense). We, communally, should strive to be all of those things to clients in businesses who occasionally, despite themselves, end up, as Bobby Marconi did, winning.⁴²

⁴¹ See generally, ERIC BERNE, M.D., *GAMES PEOPLE PLAY: THE PSYCHOLOGY OF HUMAN RELATIONSHIPS* (1964).

⁴² The point I try here to make is something I learned from my friend and teacher, Professor Robert E. Rodes, Jr., when I was his student in a series of courses at the Notre Dame Law School, 1958-1961, and beyond the classroom ever since, and from my classmate and business colleague Paul J. Schierl. I dedicate my efforts to them, as I thank for their help members of my team, Linda Harrington, Dwight King, Nancy J. Shaffer, Joseph P. Shaffer (entrepreneur), and Coach Edward L. Shaffer.