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The Ethics in Being the Wrong Lawyer for the Case

By Joel Cohen

If a criminal lawyer has no conflict as an ethical matter that might decisively preclude him from representing a particular client, and has the skillset to "competently" represent him, one might firmly conclude that's that—he can appropriately represent the client. Sure, a client might want the ideal or even perfect lawyer to represent him—assuming such a person actually exists—but that's not always possible. The lawyer may not want the case; the client may not want to pay the fee being demanded.

But put that to the side. Are there factors beyond competence that should go into determining whether a technically unconflicted attorney might nonetheless be the wrong guy for the job? Are there considerations that should encourage the criminal lawyer who has been preliminarily selected as a contestant in the client's "beauty contest" to communicate that he might not best serve the client's interests?

Indeed, maybe counsel had a bad run-in with the prosecutor. Perhaps the lawyer is not disposed toward, or actually has a personal policy against, the best case strategy, whether that is to cooperate or fight to one's last breath. Maybe it's a sexual assault case, and potential counsel, a male, knows that only a female lawyer will best serve the client. The race of the client, judge, jury and the lawyer may play into the decision. Or if the lawyer is from "the big city," when "homegrown" counsel would better relate, or be relatable. Or maybe the lawyer is publicly associated with some particular politics that might rub the prosecutor's office, a potential jury, or even the judge the wrong way.

Let's take a look at a case in point, though not a criminal one. Michael Avenatti, currently, is one of the most famous, and most visible, lawyers in America, having initiated a lawsuit against President Trump on behalf of Stormy Daniels. Let's assume that his recent arrest for domestic

abuse in California had not happened, as that in itself might make Avenatti an undesirable choice as criminal defense counsel, unless and until that case is completely resolved favorably for him. Nor, for these purposes, consider that Daniels, just in the last two weeks, has claimed that Avenatti filed a defamation lawsuit against Trump without her authority, and has not properly accounted to her for her GoFundMe account. Again, we're talking about choosing Avenatti as one's lawyer knowing nothing about these recent developments as nothing about them had become public.

There is probably no lawyer who has performed for his client on television better than Avenatti has done (as he demonstrated time and again, and even after his own arrest). He presents as an aggressive representative of his client's interests and there has even been speculation that he intends to run for president against Trump. If you had a case that required an aggressive lawyer who would go to battle for you—putting aside these recent developments—Avenatti might indeed be your candidate.

That's presumably how Julie Swetnick, now-Justice Brett Kavanaugh's third accuser, came to retain Avenatti's services. To be sure, unlike Kavanaugh's first two accusers, her story seemed a bit bizarre—drinking parties reportedly involving gang rapes (parties to which she admittedly returned). But even if totally true, the weirdness of her account isn't necessarily what left it on the cutting room floor of the Senate Judiciary Committee. Rather, it was the ability of President Trump and Kavanaugh supporters to point at Swetnick's lawyer as "out to get" the president, thereby making her (even more) unreliable. Think of it this way—if Stephen Douglas brought an action on behalf of a client against Abraham Lincoln, claiming the suspension of habeas corpus during the Civil War as unconstitutional, would the public focus on the claim, or that Douglas was the lawyer?

It seems that Swetnick, rightly so, wanted a skilled pugilist to state her case for why she should have been interviewed by the Judiciary Committee or the FBI. While we do not know for certain, the very presence of Avenatti in the mix may well have been a—or the—negative. It may have even undermined (although that wouldn't or shouldn't have been a consideration for Avenatti in representing his only client, Swetnick) the entire thrust of the efforts of the Democrats in the Senate to defeat the nomination.

A lawyer "should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion." ABA Model Rules of Professional Conduct, Rule 1.16, c. 1; NY Rules of Professional Conduct Rule 1.16, c. 1. The ABA Preamble ¶ 1, reminds us that a "lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." As Professor Monroe Freedman and Abbe Smith quote in their book, Understanding Lawyers' Ethics, Professor Murray Schwartz's Principles of Professionalism require that when "acting as an advocate, a lawyer must, within the established constraints upon professional behavior, maximize the likelihood that the client will prevail." §4.04.

Now, could another attorney—for example, a skilled statesman or revered, non-political ("non-movement", as we used to say) former prosecutor—have better fulfilled those responsibilities? Who knows? But it probably couldn't have turned out worse—the Chairman of the Senate Judiciary Committee actually referred Swetnick and Avenatti to the Justice Department for criminal investigation, an unlikely occurrence had Swetnick chosen other counsel.

Now, maybe Avenatti, technically unconflicted and certainly competent, tried to persuade Swetnick to go elsewhere, and even recommended someone else. He has been, after all, the bete noire du jour of the current Administration. Alternatively, maybe he championed her cause and agreed to represent her pro bono. Or perhaps she demanded he represent her—she had confidence in him that she didn't have in anyone else. We're unlikely to know the answer—but we do know that another attorney, whatever his or her shortcomings as a lawyer, wouldn't have been encumbered by the public persona of "A Man On A Mission To Get Trump." That is, a person who has toyed with running for office in 2020.

Indeed, rather than address the merits (or lack of merits) of Swetnick's claims, the President jumped on Avenatti—a "third rate lawyer" "just looking for attention." Republican senators gave short shrift to Swetnick's accusation and Democratic senators criticized both Swetnick and Avenatti, one even referring to the "circus atmosphere" created. We'll never know if Swetnick's accusations fell on deaf ears (the FBI did not even interview her) because Avenatti represented her, or for some other reason. But a client often needs to know the potential downside of being represented by someone who—in his own right—is in the public eye, particularly if a controversial figure. And it is the obligation of the counsel she tentatively selects to so advise, especially when the lawyer, better than she, might have been able to predict the negative that he might bring to the representation. Or the positive.

No one lawyer is the perfect lawyer for every case, especially when he or she brings heavy (and public) baggage to the representation. Did Avenatti have an obligation to tell Swetnick that she should seek other counsel, and why? And, beyond that, did he have an obligation, if she nonetheless insisted that he represent her, to flat out tell her that, indeed, he would simply have to decline because of the negatives he brings to the table—i.e., the controversial litigation in which he has been engaged, as well as being publicly viewed as an enemy of the president—in trying to achieve the best result for her?

As "advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications." ABA Rules Preamble, ¶2. Indeed, a lawyer "shall exercise independent professional judgment and render candid advice," including such considerations as "moral, economic, social and political factors that may be relevant to the client's situation." ABA Rule 2.1; see also NY Rules of Professional Conduct Rule 2.1. It is thus the lawyer's responsibility to express his "straightforward" and "honest assessment" of the facts and alternatives, no matter how unpalatable to the client. ABA and NY Rule 2.1, c. 1.

The discussion here is not at all intended to diminish Avenatti as a true professional. He has proven to be tremendously successful, for example, on behalf of Stormy Daniels, in pursuing litigation against Trump and Michael Cohen, undoing their NDA and persuading a majority of the American people that Ms. Daniels' allegations were truthful (assuming the latter was the Avenatti/Daniels' purpose).

It is true that some members of the criminal bar would easily have seen from the outset that Avenatti's role in the Kavanaugh confirmation process was likely to be viewed as an albatross to Swetnick's allegations, even if Swetnick might not have realized it, at least initially. But the Trump/Kavanaugh/Swetnick/Avenatti scenario is a good teaching moment and a helpful object lesson in things a lawyer should consider as an encumbrance to his representing a particular client involved in a particular situation, even if no disciplinary rule or decision directly tells him to steer clear.

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