

Truth in Ethics: Law v. Ethics

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There is, of course, a relation between law and ethics. In certain circumstances, law and ethics will overlap: what is perceived to be unethical will also be illegal. However, in other situations, law and ethics do not overlap – and, in fact, they may even be far apart. In some cases what is deemed to be unethical will be legal and in others, what is illegal may be perceived as ethical. Behavior that may be perceived as ethical to one person or a group may be perceived as unethical by another. The rule of law is important so that individuals and entities can govern themselves legally – but, whether their conduct is ethical often is a different question. Let's examine some of the differences in law and ethics.

First, some basics: law is a consistent set of rules that are published, accepted and, generally, enforced. Laws can set forth ways in which persons and entities are required to act in their relations with others in society and they often set forth requirements to act in a certain way or not to act in a certain way. Governments establish laws and governments can use their police powers to enforce the laws. Finally, the laws generally are universal in nature, applicable to everyone with similar characteristics facing the same set of circumstances.

Ethics comes from the Greek word *ethos* (which means the characteristics of a culture, era or community as seen in its beliefs and aspirations). Ethos also involves habit or custom and, generally together, character and habit combine to define how individuals should choose to interact with each other and with society. Ethics attempts to define what is good for the individual and for society. Ethics also seeks to establish a set of duties that persons owe to

themselves and to one another. Note: There is a difference between ethics and morality.

Morality generally refers both to the standards of behaviors to which individuals are judged, as well as the standards of behavior to which individuals, in general, are judged in relationships with others. Ethics encompasses a system of beliefs that supports a particular view of morality. Let's examine the relationship between law and ethics and in particular that relationship in the business world.

Many would likely say that ethical values and legal principles are, or should be, closely related. However, ethical obligations generally will exceed legal duties. Those of us who are attorneys will remember that the former Code of Professional Responsibility governing lawyers once had disciplinary rules or DRs (which were mandatory) and ethical considerations or ECs, principles to which lawyers were directed to strive; however, at least, for purposes of the Code, they were not deemed to be mandatory. The distinction between DRs and ECs was abandoned in the current version of the Rules of Professional Conduct. Simply stated, and without in any way attempting to denigrate the rules, they presently set forth minimum standards of conduct as opposed to the highest ethical principles and standards.

Law and policy apply to ethics, and *vice versa*, in a variety of areas, including employment law, federal regulations, environmental law, contracts and codes of ethics. But, as stated previously, the law generally does not prohibit many acts that many would consider to be unethical. How can that be? Remember, for a long period of time in our nation's history, slavery was legal although many considered it to be unethical, as well as inhumane. Many of the acts that are presently prohibited by the Civil Rights Act of 1964 were also once legal, but condemned by many as unethical, including discrimination on the bases of race, creed or national origin. On the other hand, a law may prohibit certain acts that many would perceive to be

ethical, or at least not unethical. A simple example is speeding. Driving 65 mph in a 60 mph speed zone is illegal, but many would not consider it to be unethical conduct.

Finally, more recently, ethics of persons and even more particularly, the ethics of business entities have been legislated in the securities area, corporate areas such as Sarbanes-Oxley and in the Federal Sentencing Guidelines. With respect to the Guidelines, courts may reduce fines and jail time for executives, proportionate to the ethical measures a company has taken.

Another example of the legislation of ethics is the Americans with Disabilities Act of 1990. That act states:

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment.

Most of us, I hope, would agree that it would be unethical to deny employment or a promotion to a disabled applicant solely because of the disability and, particularly, if the disability would not affect that person's job performance. Although congress passed this legislation making it illegal to engage in such discrimination, what is or isn't illegal is still often the subject of debate; and as we know, the Supreme Court has reviewed, interpreted and ruled on provisions in the ADA and its definition of disability several times.

There are also certain ethics regulations that pertain to federal employees. Executive branch employees, pursuant to statute and regulation, are subject to legally enforceable rules on ethical behavior. Two examples of these rules are the criminal conflict of interest statutes and the administrative standards of ethical conduct. Chapter 11 of Title 18, U.S.C, provides an example of criminal conflict of interest statutes, which prohibit a federal employee from

engaging in certain types of activities that would place the employee's own personal interest above that of the federal government.

Therefore, a federal employee:

- may not act in an official capacity on a matter in which the employee, or certain others, has a financial interest,
- may not represent the interest of private parties in matters in which the United States is a party or has an interest,
- is prohibited after leaving the government, from engaging in certain activities on behalf of other persons or entities,
- may not accept private compensation for performing official duties.

Additionally, the Code of Federal Regulations, Part 2635, is an example of administrative standards of ethical conduct. These standards of conduct regulate principles of ethical conduct for employees within the executive branch and not only identify principles, but also provide examples of how the principles apply. These standards of conduct cover such areas as:

- gifts from outside sources
- gifts between employees
- conflicting financial interest
- abuse of position
- limits on outside activities
- impartiality in performing official duties.

Rhode Island, as well as many other states and jurisdictions, has a code of ethics that applies to government officials and others who serve in some public capacity. Many private companies, organizations and business or professional associations and trade groups (in addition to the legal profession) also have their own codes of ethics. For example, the AMA has a code

of ethics, the American Institute of Architects has a code of ethics, and forensic scientists have a code of ethics, as do many others.

Some historical examples of differences/conflicts between ethics and law:

- As mentioned previously, slavery was legal until the Thirteenth Amendment abolished it in 1865.
- Women did not have the right to vote until 1920.
- Children were allowed to work in mines, factories and other industries instead of going to school until the Fair Labor Standards Act was passed in 1938.
- Rosa Parks actually broke the law when she refused to give up her bus seat to a white passenger on December 1, 1955.

Current Examples of Ethical Choices vs. Legal Requirements

Contracts

Business is generally about making and selling products, as well as exchanging goods and services. It is often a regularly accepted part of business to form and fulfill contracts. Without enforceable contracts, business, as we know it today, would not be possible. To a large extent, and particularly with respect to the sales of goods, and also with respect to secured transactions, business is governed by the Uniform Commercial Code, which creates certain statutory obligations, rights and duties. In Rhode Island, as in most jurisdictions, the law also implies into every contract a covenant of good faith and fair dealing.

Although there is a substantial body of case law and many statutes governing contracts, a number of issues that may arise with respect to contracts are more ethical than legal in nature. For example, businesses may have return policies that may not be legally required; but either as a matter of good business or good business ethics, they are recognized and implemented by

particular businesses. For example, a good return policy is, in many cases, good business; but it also, in certain respects, leaves the ethics of returns to be decided by the merchant.

Warranties

Another typical issue arises with respect to warranties. A warranty generally becomes part of the business contract, at least with respect to a representation that a product is merchantable or is fit for its intended purpose. As noted previously, certain warranties are dealt with and governed by the Uniform Commercial Code and may be implied or express. Most products come with a limited warranty; and in certain circumstances, manufacturers can write warranties or limit them in almost any fashion so long as they do not conflict with a particular law, statute or legal requirement; however, in certain circumstances, implied warranties cannot be disclaimed, particularly, for example, when a product has caused injury to consumers.

But there are also ethical questions that arise with respect to warranties. For example, to what extent should a company stand behind its products; and at what point is it ethically proper for the customer to accept the risk of a defective product? Additionally, the way that warranties are written may raise ethical issues and problems. They may not be illegal, but warranty descriptions even when plainly written can be confusing about what is included and what is excluded in the warranty. To what extent does the manufacturer have an ethical obligation to make sure that the warranty, as drafted, is not confusing to the customer?

Advertising

There are also legal and ethical issues in advertising. Certainly, false advertising is against the law and there are statutes that prohibit it. False advertising is also unethical. There are also good ethical practices with respect to advertising. Certainly, if a product is advertised, the seller should not engage in bait and switch tactics, such as advertising a product at a low

price with the intention of trying to ultimately have the customer buy something which is higher priced. Generally, if a store advertises that certain desired products are available, it should at least have a reasonable quantity of those products on hand. In many industries, it is considered good business practice to give “rain checks,” although in most cases that is not legally required.

We also know about the “sales pitch” and the concept of “puffery.” The law generally allows sales puffery, which often involves opinions, subjective statements about qualities and, at times, absolute “reaches” of what a product can do or how it can make you feel. While sales puffery and half-truths are not necessarily always illegal, to what extent is it ethical to engage in this kind of conduct?

It is not against law to advertise legal products, but it is against law to advertise illegal ones, such as controlled substances. Sometimes, however, the law also imposes restrictions on advertising of legal products, at least, ones that are considered harmful, such as cigarettes, tobacco, alcohol and the like.

There are, of course, important First Amendment freedom of speech rights in advertising. Truthful advertising is protected by freedom of speech; therefore, even if the advertising may be perceived as unethical, it can not only be legal, but constitutionally protected. Cigarette manufacturers and sellers of alcohol have often used the First Amendment to argue that they should be allowed to advertise their products in different media.

Environmental Law

There are many environmental laws, both state and federal, that regulate what can be done, for example, with waste, chemicals, certain byproducts, lead paint, asbestos and the like. How far should the environmental laws go in this regard? For example, chemical companies make products that we all use and need, but by the very nature of that business, they pollute the

environment. Is it ethical for a chemical company, for example, to spend money lobbying at the state or federal levels with respect to scaling back environmental laws and the enforcement of those laws? Automobiles still pollute the environment as well, although much less so now than in the past. There are many statutes that govern emissions, fuel economy and the like. Is it ethical for automobile manufacturers to lobby against laws that would protect the environment, but make it more expensive or less profitable for the manufacturer to operate?

Finally, global warming is something that we have all heard about and about which we may have differing opinions. For example, on one side (the majority view), the planet is gradually growing warmer at least, in part due to pollutants and this change could end or radically change life on Earth. Others argue that the Earth naturally warms and cools and that there is no scientifically valid evidence to suggest that there has been any significant change because of man-made pollution. We can debate what the law should be on this important topic, but we also might consider the ethical position of companies that stand to either lose or gain by environmental measures taken and laws passed or lobbied against passage. For example, many countries have laws that are less stringent in protecting the environment than those in the United States. American companies with operations in these countries may be able to legally pollute much more so there than in the United States. What ethical considerations should a company consider in making its policies on environmental pollution?

Employment Law

Employment law is perhaps one of the best examples of how law and ethics “mix” in the real world. Let’s look at a few examples:

Employment discrimination law. In many respects, the Civil Rights Act of 1964 engrafted ethics into the law by forbidding employment discrimination based on race, religion,

creed, national origin or sex. Other categories, such as age, disability and status have been added. These laws continue to be interpreted and challenged. In many respects, there may still be certain ambiguity on whether certain conduct, whether ethical or not, violates the employment discrimination laws.

Employment at will. Rhode Island and a number of other states are so-called employment at will states. Although certain government and state employees, unionized workers and others who are or may be subject to contract have more job protection than the average worker, most employees are employed at will. In certain circumstances, the law allows such employees to be fired for cause or for no cause at all. Even a long term employee may be fired simply because his or her superior does not like the person. (Of course, the reason for termination cannot violate another law, such as the employment discrimination laws discussed earlier.) However, in this regard, the United States is different from many industrialized countries where employees, after some probationary period, can be fired only for cause (such as incompetence or stealing). It may be argued that American law is more business protective and, perhaps, less ethical in this regard. On the other hand, it can be argued that those countries that only allow termination for cause actually might support unethical conduct on the part of certain employees – bad conduct that does not amount to incompetence or thievery – and leave the business with little, if any, practical options to terminate. Is that ethical?

Family Medical Leave Act. The law requires covered employers to grant certain unpaid leave and job protection to employees for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken the leave. In addition to what the law requires, however, a number of employers go further, some believing that as a matter of policy or as a matter of ethics they should extend or

expand benefits and protections. For example, some may expand benefits and protections such as:

- granting paid maternity or paternity leave
- greater protection for military family leave

Note: On February 15, 2012, the U.S. Department of Labor announced that the Wage and Hour Division published a notice of proposed rulemaking to implement and interpret statutory amendments to expand the military family leave provisions.

Jobs overseas. Almost everyone would agree that the civil rights laws serve, at least in part, an ethical purpose as well as a legal one. Therefore, should American businesses voluntarily implement these laws as their policy in their business operations in foreign countries that do not have similar laws? Generally, wages are substantially lower in many countries than they are in the United States. For example, a number of companies have moved all or part of their operations to Mexico. They are legally allowed to do so. Are there any ethical obligations that a company has to American workers who in many cases will not find comparable employment once the company has closed shop here and moved to another low wage country? Is there an obligation that managers ethically owe to their workers, as well as to their shareholders or owners? What standards of employment (including pay, benefits and job protection) should American companies and consumers expect when they make or buy goods produced in a foreign country by a U.S. manufacturer?

Conclusion

Although there is certainly a relationship between law and ethics, and while it is true that the relationship is important in the legal field as well as in business, we need to consider not only what is legal, but also what society considers to be ethical as well. Many things that are not illegal will not be accepted by our clients or customers as being ethical or right. The

establishment of relevant and workable codes of ethics and business conduct, respectively, will help to provide an overall framework to judge appropriate ethical behavior.