

ABSTRACT

The Role of Self-Referential Thinking in Legal Ethics

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[By way of background, I am working on a project showing how decision theory might be made the focus of the legal ethics curriculum. By decision theory I mean a foundation of rational choice (very basic game theory) supplemented and qualified by insights from social and cognitive psychology. Although it sounds abstract this approach is designed to be practical. The goal is to help students learn how to spot trouble coming, avoid it if possible, and get out of it if necessary. Ultimately I hope to produce a casebook based on this approach.]

Lawyers often must make decisions based on predictions of what others will do, knowing that others will choose based in part on what they think the lawyer will do. To choose wisely in such situations lawyers must learn (to borrow from Robert Burns) to see themselves as others see them. I will refer to such analysis as self-referential thinking.

Self-referential thinking is an important skill for dealing with ethical problems in the practice of law. Lawyers who want to avoid creating duties, for example, need to understand how prospective or actual clients see them in order to understand how such persons interpret what the lawyer says. Lawyers faced with adverse action by supervisors need to assess whether the supervisor is acting in good faith or from impermissible motives. Like most important skills, self-referential thinking has no ethical valence. It is necessary, for example, for anyone who wants to deceive another. Deceit depends on the deceiver accurately perceiving the mark's perceptions.

This article offers several stories illustrating the importance of self-referential thinking. It discusses ways in which students may be introduced to the skill analytically. It also suggests there may be a partial paradox to learning such thinking. Some research suggests experienced, proficient decision-makers decide differently than novices. They compare options less (if they do so at all) and tend to perceive situations and actions simultaneously. They don't draw decision trees or cost-benefit tables, which novices might need.

My stories suggest that in some cases experience may sharpen and embed self-referential thinking, leading to more proficient judgments, but in other cases it may have the opposite effect. I ask whether there is a reliable means for assessing whether this is the case and, if so, whether it implies that even hedgehog lawyers need to retain a bit of the fox to keep their judgment sharp.

* Prof. David McGowan is Professor of Law at the University of San Diego School of Law. He teaches and writes in the areas of securities regulation, contracts, corporations, professional responsibility and the intersection of antitrust law and intellectual property. His current research includes theories of collective behavior, such as network economic theory, the role of organizational analysis in assessing legal problems, the changing nature of the legal profession, and legal history. Prof. McGowan received his B.A., *magna cum laude*, from the University of California at Los Angeles, and his J.D. from Boalt Hall School of Law, University of California at Berkeley. He has served as a law clerk to Judge A. Raymond Randolph of the United States Court of Appeals for the District of Columbia Circuit, practiced in the fields of securities and antitrust litigation and counseling for Skadden, Arps, Slate, Meagher & Flom, practiced as an associate and later a director of Howard, Rice, Nemerovski, Canady, Falk & Rabkin. Prof. McGowan has previously taught at Boalt Hall, University of Minnesota and currently is a faculty member University of San Diego School of Law.