

MALICE AFORETHOUGHT

HOW LAWYERS
USE OUR
SECRET RULES
TO GET RICH,
GET SEX,
GET EVEN...
AND GET AWAY
WITH IT

DAVID W. MARSTON

“David Marston’s *Malice Aforethought* is a fascinating exposé of the illegal, corrupt, and unethical practices of some members of the legal profession. But what is even more disturbing is that those guilty of such practices too often receive only a gentle slap on the wrist from bar associates and others with responsibilities to punish those who engage in such practices. Some of the abuses he describes are so blatant that if they appeared in a movie, viewers would find it hard to believe that they could have been based on fact. Mr. Marston has written one of those rare books in which the facts of the abuses he describes are worse than fiction.”

—FORMER PRESIDENT
RICHARD M. NIXON

“David Marston has written a book that anyone who has any association with lawyers should put at the top of their list. It reads like fiction but, unfortunately, it is not.”

—DREW LEWIS
Chairman of Union Pacific
Corporation and Former
Secretary of the Depart-
ment of Transportation

“Mr. Marston, in his candid illumination of the dark side of the practice of law, has set an example of courage for his fellow ‘good lawyers’ who together must, in the cause of justice, demand meaningful institutional reforms.”

—NEIL J. WELCH
Former Assistant
FBI Director



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MALICE AFORETHOUGHT

How Lawyers Use Our Secret Rules to
Get Rich, Get Sex, Get Even...
and Get Away with It

David W. Marston

Malice Aforethought is a no-punches-pulled insider's account of runaway abuses in the American legal profession. Spotlighting real lawyers in action behind closed doors, this book is the first major exposé of how lawyers break the law and skirt their own ethical rules—frequently at the expense of their clients. But surprisingly, it is also downright funny.

Previous criticism of the profession has centered on institutional flaws, or on individual “bad apples”: the personal injury lawyer with a phony insurance claim, an insider-trading corporate attorney, a drug lawyer laundering criminal profits to get his fee. Those characters are all here. But *Malice Aforethought* goes much further, identifying bad lawyers across the country, describing how they operate in every area of the profession, and detailing the legal loopholes they jump through to remain in good standing.

The startling conclusion: Bad lawyers are not just sleazy ambulance chasers, bed-hopping divorce lawyers, or slippery criminal defense attorneys. Instead, lawyer misconduct cuts across the mainstream of the profession, involving the vast majority of lawyers—who dodge their professional duties under the rules they themselves write.

The informal tone of this fast-moving book does not diminish its hard-hitting message. The American Bar Association—

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pictured here as an ordinary, money-hungry trade union—may not like it, which only emphasizes this book's importance to every client, would-be lawyer, indeed to everyone with an interest in our system of law and justice. *Malice Aforethought* portrays a greed-driven profession, fat and complacent despite its failure to deliver on its most basic commitments to the public.

Policing itself through secret rules unknown to the general public—and, it turns out, to most lawyers—the legal system has poisoned itself. And everyone else is paying for it.

Now, for the first time, *Malice Aforethought* lets clients and others in on the secret lawyer rules, providing a colorful, anecdotal account of how lawyers use the tricks hidden in them.

This book is about crime and punishment. How lawyers cheat clients and commit crimes—and why “professional courtesy” lets them escape punishment. How they cover up. And our ability to stop it.

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Lead Us Not into Temptation

This may come as a surprise, but “conscience” is a popular concept among lawyers.

We use it for our clients.

It generally works best when clients need to do something not otherwise permitted by law. If a client wants to waltz on a deal, for example, we’ll argue that the agreed-to price is so inadequate that “it shocks the conscience.” When a client needs to wiggle out of an ironclad written contract, we’ll label the contract “unconscionable” (and therefore unenforceable). There are even some courts nicknamed “courts of conscience,” where the judge is supposed to seek equitable justice instead of rigidly applying the law.

Because we throw the word around a lot, the meaning of “conscience” is much discussed in legal literature. *Black’s Law Dictionary* (a monster volume popular not for its usefulness in practice, but rather because it’s a can’t-miss graduation gift for college seniors heading to law

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school) devotes the better part of a column to various definitions of the concept. But what most of them have in common is that they carve out *exceptions* to legal obligations, instead of giving a guideline as to how lawyers ought to behave.

As a result, none of the technical legal definitions is as useful—especially for a lawyer starting in practice—as the obscure description of conscience in Native American lore.

Conscience, the Indians believed, is a sharp, three-pointed stone located in the center of your chest cavity. As long as your conduct is moral, the stone does not move, and you don't feel it. When you do something bad, however, your conscience alerts you by rotating, and the points are sharply painful. But if you do bad things regularly over a period of time, the points are gradually worn down until it becomes a smooth, round stone.

When that happens, the rotation of your conscience makes a pleasurable sensation in your chest, and it actually feels good when you do something bad.

As Professor Casner predicted, every lawyer has chances to grab cash from his clients. But beyond that, every new attorney discovers that the practice of law is a fun house of temptations, with fresh opportunities to do bad things popping out every day—and with almost zero chance of getting caught.

Some lawyers resist every temptation. But many others feel, early in their careers, an intense pain in their chest cavities. Because despite the fact that law schools have made legal ethics into a metaphysical abstrusity, every lawyer who had a mother knows, deep down inside—at least the first few times—when something he does is simply wrong.

Let's look at the temptations.

Temptation number 1. Mishandling cash is still the greatest temptation, but commingling is not the most common way lawyers steal it.

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The problem with commingling is that, sooner or later, someone almost always notices that the money is missing. For Philadelphia lawyer Jordan L. Peiper, the discovery came later; it was not until 1989 that suspicious relatives found that at least \$50,000 had vanished from the widow's trust Peiper had administered since 1973. When Peiper refused to explain where the money went, an angry judge sentenced him to six months in jail for contempt.

But most lawyers who pocket money wrongfully never go to jail because they never get caught.

Why?

Because the money they mishandle is money willingly paid to them by clients for actual legal fees. But there's a trick: In contrast to hotels and car rental companies and dozens of other legitimate businesses, we're willing, actually happy, to be paid in cash. Not all of us insist on it. Joel Hyatt accepts Visa and Master Charge, and Big Firms expect checks in payment of their inch-thick bills. But some lawyers prefer cash so much that they'll discount their fee to get it, and very few attorneys, even in Big Firms or Hyatt Legal Service centers, turn down good old American greenbacks.

Here's what happens when they don't: When a client hands a young lawyer a \$500—or \$5,000—cash retainer, the lawyer, often for the first time in his life, has a big wad of money, cash money, in his hand. And typically, no one else knows about it, because retainers are paid in one-on-one office meetings, or in a remote corner of a courthouse corridor, or in the parking lot outside the police station.

What should he do with it?

In answering that, the lawyer will find three quick ways to trigger a sharp pain in his midsection.

- He can steal from his partners.

Attorneys who practice with partners are supposed to put all fees into the partnership pot. The partners will hear