

ESSAY

IF SHYLOCK HAD A LAWYER

JOEL S. NEWMAN†

The year 2016 is the 400th anniversary of Shakespeare's death,¹ and the 500th anniversary of the founding of the Venetian Ghetto.² To celebrate this confluence of anniversaries, Beit Venezia produced the first-ever performance of Shakespeare's *The Merchant of Venice* in the Ghetto.³ Also, there was a mock trial of the issues of the play with U.S. Supreme Court Justice Ruth Bader Ginsburg presiding.⁴

This year, then, is an apt occasion for revisiting the play. However, rather than focusing on the trial in Act IV, I propose to consider the underlying "pound of flesh" bond agreement reached in Act I.⁵ Admittedly, there were no lawyers involved in the negotiation and execution of the bond, though there was a notary.⁶ However, what if Shylock had been represented by counsel, in the United States, today? What advice, if any, could such counsel have given?

† Professor of Law, Wake Forest University.

1. Jennifer Schuessler, *Shakespeare Fans Gathered Uptown for "Caliban,"* N.Y. TIMES, Apr. 22, 2016, at C4.

2. *500 Years Old*, VENICE GHETTO 500, <http://www.veniceghetto500.org/i-500-anni-del-ghetto-di-venezia-2/?lang=en> (last visited Oct. 17, 2016).

3. *Beit Venice per il Cinquecentenario del Ghetto*, CENTRO VENEZIANO DI STUDI EBRAICI INTERNAZIONALI (Mar. 29, 2016), <http://www.beitvenezia.org/news-events/130/beit-venezia-for-the-ghetto-quincentennial.html>. See generally SHAUL BASSI & ALBERTO TOSO FELI, SHAKESPEARE IN VENICE: EXPLORING THE CITY WITH SHYLOCK AND OTHELLO (2007).

4. Rachel Donadio, *Ginsburg Weighs Fate of Shylock*, N.Y. TIMES, July 28, 2016, at C1, C4.

5. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 1, sc. 3, ll. 145–47 (John Drakakis ed., Bloomsbury Arden Shakespeare 3d ed. 2011).

6. *Id.* at ll. 140–41 ("SHYLOCK: Go with me to a notary, seal me there / Your single bond . . .").

I. THE FACTS

Antonio seeks to borrow three thousand ducats from Shylock for a period of three months:

SHYLOCK:

Go with me to a notary, seal me there
 Your single bond, and, in a merry sport,
 If you repay me not on such a day,
 In such a place, such sum, or sums, as are
 Expressed in the condition, let the forfeit
 Be nominated for an equal pound
 Of your fair flesh, to be cut off and taken
 In what part of your body pleaseth me.

ANTONIO:

Content, in faith: I'll seal to such a bond
 And say there is much kindness in the Jew.

. . .

Yes, Shylock, I will seal unto this bond.

SHYLOCK:

Then meet me forthwith at the notary's;
 Give him direction for this merry bond.⁷

Antonio defaults on the bond, and Shylock takes him to court.⁸ The court, with Portia playing the judge, awards Shylock his pound of flesh.⁹ However, the court further directs that Shylock must not shed one drop of Antonio's blood.¹⁰

Portia is not finished:

7. *Id.* at act 1, sc. 3, ll. 140–49, 167–69.

8. *See id.* at act 4, sc. 1.

9. *Id.* at ll. 295–96.

10. *Id.* at ll. 305–08. Judge Diane Wood disagrees with Portia's ruling, for the word "flesh" could easily be interpreted to include blood. Diane P. Wood, *A Lesson from Shakespeare to the Modern Judge on Law, Disobedience, Justification, and Mercy*, in SHAKESPEARE AND THE LAW: A CONVERSATION AMONG DISCIPLINES AND PROFESSIONS 282, 293 (Bradin Cormack et al. eds., 2013). On the other hand, Charles Fried suggests that it might have been possible even then, and surely now, to remove the flesh without bloodshed, for example, with the use of a heated knife. Charles Fried, *Opinion of Fried, J., Concurring in the Judgment*, in SHAKESPEARE AND THE LAW: A CONVERSATION AMONG DISCIPLINES AND PROFESSIONS, *supra*, at 156, 162.

Tarry, Jew,
 The law hath yet another hold on you.
 It is enacted in the laws of Venice,
 If it be proved against an alien
 That by direct, or indirect, attempts
 He seek the life of any citizen,
 The party 'gainst the which he doth contrive
 Shall seize one-half his goods. The other half
 Comes to the privy coffer of the state,
 And the offender's life lies in the mercy
 Of the Duke¹¹

The Duke pardons him.¹² Antonio allows him to keep half of his worldly goods.¹³ However, Antonio states a condition:

To quit the fine for one-half of his goods,
 I am content, so he will let me have
 The other half in use, to render it
 Upon his death unto the gentleman
 That lately stole his daughter.
 Two things provided more: that for this favour
 He presently become a Christian;
 The other, that he do record a gift
 Here in the court of all he dies possessed
 Unto his son Lorenzo and his daughter.¹⁴

Shylock agrees.¹⁵

Neither Shylock nor Antonio retained counsel in the modern, American sense. However, they used a notary.¹⁶ Further, they sealed the agreement.¹⁷

11. SHAKESPEARE, *supra* note 5, at act 4, sc. 1, ll. 343–52.

12. *Id.* at ll. 364–65.

13. *Id.* at l. 377.

14. *Id.* at ll. 377–87.

15. *Id.* at ll. 389.

16. *See supra* note 6 and accompanying text.

17. *See* MARK EDWIN ANDREWS, LAW VERSUS EQUITY IN THE MERCHANT OF VENICE 47 (1965) (stating that the seal was “irrefutable proof that the one whose seal was attached thereto was bound to the party named in the instrument” and, thus, further attestation was unnecessary); *see also* EDWARD J. WHITE, COMMENTARIES ON THE LAW IN SHAKESPEARE 113–14 (2d ed. 1913); *supra* note 6 and accompanying text.

II. THE NOTARY

European notaries, then and now, do more than merely acknowledge signatures.¹⁸ They also draft documents.¹⁹ Surely, the notary drafted this one. Under current Italian law, could a notary have drafted such an agreement? She could not.²⁰ In fact, if a notary had drafted such an agreement, her license would have been suspended for at least six months.²¹

III. THE LAWYER: IF SHE DRAFTED THE DOCUMENT

Suppose that Shylock went to an American lawyer today and asked her to draft a document memorializing Shylock's agreement with Antonio. Assume that she agreed to the representation and drafted the document. If she had done so, she would have been in violation of Model Rules of Professional Conduct Rules 1.1, 1.4(b), and 1.2(d).

A. Competence: Rule 1.1

In the play, the contract was unenforceable, for it would have been impossible for Shylock to obtain his pound of flesh without drawing a drop of blood.²² However, under current law, one did not need to be as clever as Portia to find the contract to be unenforceable. Clearly, the contract was unconscionable. Unconscionable contracts are unenforceable pursuant to the Uniform Commercial Code.²³ However, they are severable.²⁴

18. *Notaries at the Service of Business and the Economy*, NOTARIES OF EUR., <http://www.notaries-of-europe.eu/index.php?pageID=212> (last visited Oct. 17, 2016).

19. *Id.*

20. Legge 16 febbraio 1913, n.89, art. 28 (It.) (stating that an Italian notary shall not authenticate a document that is expressly prohibited by law, or that is contrary "al buon costume o all'ordine pubblico"); E-mail from Professor Bernardo Cortese, Univ. of Padua, to author (May 2, 2016) (on file with author).

21. Legge 16 febbraio 1913, *supra* note 20; E-mail from Professor Bernardo Cortese, *supra* note 20.

22. *But see* Richard A. Posner, *Law and Commerce in the Merchant of Venice*, in SHAKESPEARE AND THE LAW: A CONVERSATION AMONG DISCIPLINES AND PROFESSIONS, *supra* note 10, at 147, 149; Wood, *supra* note 10, at 293.

23. U.C.C. § 2-302 (AM. LAW INST. & UNIF. LAW COMM'N 2014–2015).

24. *Id.*

Therefore, the penalty would have been unenforceable, but the underlying debt would still have been valid.²⁵

Drafting an unenforceable agreement is incompetent. Therefore, the lawyer would have been in violation of Model Rule 1.1: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.”²⁶

B. Communication: Rule 1.4(b)

Model Rule 1.4(b) provides: “A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”²⁷

Why would a client pay a lawyer to draft an unenforceable document? If the agreement was going to be unenforceable, one would think that the client would have wanted to know. Model Rule 1.4(b) would have been violated as well.

C. Counseling or Assisting in Conduct that is Criminal or Fraudulent: Rule 1.2(d)

Model Rule 1.2(d) provides: “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent”²⁸

Recall that Portia found Shylock guilty of attempting to claim the life of a citizen of Venice.²⁹ That sounds like a crime. If so, the lawyer would be counseling or assisting the client in criminal conduct in violation of Model Rule 1.2(d).³⁰

25. *Id.* Judge Richard Posner reaches a similar result via a different path. He notes that penalties involving physical injury are unenforceable. Posner, *supra* note 22, at 149. However, they are also severable. *Id.* Once again, therefore, the penalty is unenforceable, but the underlying debt is still valid. However, Judge Posner goes on to rule that, when Shylock elected to enforce the penalty and forego the debt, he must be held to his choice. *Id.* at 150. Therefore, he cannot recover the debt. *Id.*

26. MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2016).

27. *Id.* at r. 1.4(b).

28. *Id.* at r. 1.2(d).

29. SHAKESPEARE, *supra* note 5, at act 4, sc. 2, ll. 343–59.

30. G.W. KEETON, SHAKESPEARE AND HIS LEGAL PROBLEMS 11 (1930) (arguing that “to carry out the stipulation of the bond completely, Shylock will have to commit a crime”). Keeton also argues that Shylock was guilty of fraud and misrepresentation, in that he led Antonio to believe that Shylock would not enforce the agreement when, in fact, he intended to do so. *Id.* at 12. If Keeton is correct, then the reference in Model Rule

Judge Richard Posner and Professor Charles Fried disagree with Portia on this issue. They point out that Shylock would have cut off the pound of flesh only if the court had allowed him to do so.³¹ What might otherwise be criminal or illegal behavior cannot be criminal or illegal, they argue, if the behavior has been sanctioned by the court.³²

Judge Posner and Professor Fried make sense. However, they are analyzing what Shylock actually did when he went to court to enforce his bond. To analyze the behavior of the lawyer drafting the agreement, one must look to the time when the contract was drafted, rather than to the later time when Shylock attempted to enforce it.

When Shylock and Antonio executed the agreement, there was no knowing how Shylock would react to Antonio's later default. Rather than going to court, Shylock might have engaged in self-help—cutting off the pound of flesh first and then, if necessary, defending his actions in court later. Therefore, when viewed from the time of the agreement, it seems clear that Shylock intended, or could have intended, to engage in conduct that the lawyer knew was criminal.³³ Therefore, drafting the agreement would have been in violation of Model Rule 1.2(d).³⁴

IV. THE LAWYER: WHAT SHE SHOULD HAVE DONE

A. Decline Representation: Rule 1.16

So far, we have considered what would have happened if the lawyer had actually represented Shylock and drafted the agreement. Perhaps it is better to look just a bit earlier. What should counsel have done when Shylock first appeared at her door and described the agreement which he sought?

1.2(d) to fraudulent conduct must be considered as well. However, the lawyer should have known that the proposed agreement was unenforceable. Therefore, the conduct could not have been known by the lawyer to be fraudulent within the meaning of Model Rule 1.2(d). *See* MODEL RULES OF PROF'L CONDUCT r. 1.2(d) (AM. BAR ASS'N 2016).

31. Fried, *supra* note 10, at 159; Posner, *supra* note 22, at 150.

32. Fried, *supra* note 10, at 159; Posner, *supra* note 22, at 150.

33. MODEL RULES OF PROF'L CONDUCT r. 1.0(f) (AM. BAR ASS'N 2016) (providing “[k]nowingly,’ ‘known,’ or ‘knows’ denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.”).

34. One might argue that, since Antonio had consented contractually to his death, it could not be murder. However, such consent could not have been a defense. MODEL PENAL CODE § 2.11(2) (AM. LAW INST. 1985).

She should have declined the representation. She clearly had the discretion to do so. Model Rules 1.16(b) provides in part:

(b) A lawyer *may* withdraw from representing a client if:

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement; [or]

(7) other good cause for withdrawal exists.³⁵

As set forth above, Shylock's course of action was criminal under Model Rule 1.16(b)(2) and probably repugnant under Model Rule 1.16(b)(4) as well.

Not only could a lawyer have declined to represent Shylock under Model Rule 1.16(b), the lawyer would also have had to decline under Rule 1.16(a). That Rule provides in part: "A lawyer *shall not* represent a client . . . if: (1) the representation will result in violation of the Rules of Professional Conduct or other law."³⁶ Counsel would have been required to decline the representation, since, as shown above, the representation would have resulted in a violation of the Rules.³⁷

35. MODEL RULES OF PROF'L CONDUCT r. 1.16(b) (AM. BAR ASS'N 2016) (emphasis added). The broadness of Model Rule 1.16(b)(7), when added to the specific provisions of Model Rule 1.16(b)(1) through (6), suggests that almost any cause will do, although the principle of *eiusdem generis* might limit the other good causes to causes similar to those listed earlier. *See id.* Also, the fact that the seven sections of Model Rule 1.16(b) are connected by the disjunctive "or" suggests that any one reason will do. *See id.* The Model Rules push slightly harder about lawyers accepting all clients in the case of judicial appointments, in Model Rule 6.2. *Id.* at r. 6.2. However, even in that circumstance, there is no mandatory language, and the repugnance of the client or cause is still specifically listed as good cause. *Id.* at r. 6.2(c).

36. MODEL RULES OF PROF'L CONDUCT r. 1.16(a)(1) (emphasis added).

37. *See supra* notes 23–34 and accompanying text.

B. Candid Advice: Rule 2.1

Counsel would have been allowed, but not required, to advise Shylock on the legal and non-legal aspects of his situation. Model Rule 2.1 provides: “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”³⁸

What advice should she have given?

She had to tell Shylock that he could not do what he proposed to do. However, we all know what would have happened then. Shylock would have learned that, next time, he should simply do what he pleased without consulting a lawyer. Then, if necessary, he would go to the lawyer after the fact to clean up the mess.

The better practice is for the lawyer to determine what the client really wants, and then see if there is a legal way to get there. What, then, did Shylock really want? If his underlying objective was revenge,³⁹ then other than charging the highest interest allowable, there was not much Shylock could have done.

Alternatively, perhaps Shylock’s ultimate goal was to prevent Antonio from undercutting Shylock’s business by lending interest-free money.⁴⁰ Perhaps Shylock could have obtained a cease and desist order.⁴¹ Short of that unlikely prospect, it seems

38. MODEL RULES OF PROF’L CONDUCT r. 2.1 (AM. BAR ASS’N 2016).

39. SHAKESPEARE, *supra* note 5, at act 3, sc. 1, ll. 61–64 (“SHYLOCK: If a Jew wrong a Christian, what is his humility? Revenge! If a Christian wrong a Jew, what should his sufferance be by Christian example? Why, revenge!”).

40. SHYLOCK:

I hate him for he is a Christian;
 But more, for that in low simplicity
 He lends out money gratis, and brings down
 The rate of usance here in Venice.
 If I can catch him once upon the hip,
 I will feed fat the ancient grudge I bear him.
 He hates our sacred nation, and he rails,
 Even there where merchants most do congregate,
 On me, my bargains and my well-won thrift,
 Which he calls ‘interest’. Cursed be my tribe
 If I forgive him.

Id. at ll. 38–48.

41. Assuming that Antonio made interest-free loans only rarely and only to close personal friends, Shylock would probably have had a hard time getting a court to stop him. And yet, there was clearly a governmental interest in promoting Jewish

that the best that Shylock could have done would have been to make such lending difficult, or perhaps impossible, by either refusing to lend money to Antonio at all, or by lending the money at the highest possible interest rate allowed by law.⁴²

V. CONCLUSION

It's a good thing that Shylock did not go to a modern American lawyer. If he had, it would have been a much shorter play.

moneylending. See RICCARDO CALIMANI, *THE WALL STREET OF 16TH CENTURY VENICE: THE GHETTO OF VENICE* (Katherine Wolfthal trans., M. Evans & Co. 1987).

42. Perhaps, instead, Shylock's objective was to force Antonio to view him as a man worthy of respect. In sixteenth-century Venice, such an objective would have been highly unlikely to succeed.