

Good Intentions

Review of *The Crime of Sheila McGough*, which examines the events that led up to the imprisonment of Sheila McGough, who was found guilty of defrauding investors

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by Jo Ann Citron

The Crime of Sheila McGough, by Janet Malcolm. New York: Alfred A. Knopf, 1999, 164 pp., \$22.00 hardcover.

I REMEMBER SITTING IN AN uncomfortable seat on the first day of law school, listening to interminable welcome messages, when the dean himself walked into the well of the lecture hall. Without greeting or preliminaries of any kind, he leaned into the microphone and solemnly intoned three words: "Don't commingle funds." And then in case he hadn't made himself clear, he repeated the incantation: "Don't commingle funds. If you forget everything else you learn here, never forget that." Sheila McGough should have been there.

McGough was an attorney in Alexandria, Virginia, who in 1986 supposedly conspired with one of her clients to defraud investors. The federal indictment, which ran to fifteen counts, charged her with various forms of fraud, conspiracy, receiving stolen money, obstruction of justice, witness intimidation and perjury. In the fall of 1990, McGough was found guilty of most of it and eventually went to prison for two and a half years. In 1996, about a year after being paroled, she wrote to Janet Malcolm complaining that she had been "framed" by the US Attorney in Virginia, a man conveniently named Hulkower.

Janet Malcolm is herself no stranger to the legal system. In 1984 she was sued for libel by Jeffrey Masson in connection with her *New Yorker* articles about him, published that year by Knopf as *In the Freud Archives*. The case generated two jury trials and several appellate opinions, including one from the US Supreme Court. Malcolm was eventually vindicated, but the acrimonious litigation lasted some twelve years. Whether for this or other reasons, Malcolm found McGough's letter intriguing and undertook a journalist's investigation of the case – one not bound by rules of evidence or hampered by the limited time and resources that are the lawyer's lot. *The Crime of Sheila McGough* is the uncertain result.

I mean "uncertain" in various ways. One uncertainty is the nature of the legal violation announced in the book's title. Just what was the Crime of Sheila McGough? According to Hulkower, McGough ran afoul of the law by distributing from her lawyer's trust account funds that were allegedly to have been held there in escrow. McGough's version of her transgression, as she described it in her initial letter to Malcolm, is that she "irritated some federal judges and federal prosecutors in the course of defending a client," as a result of which the US Attorney's office "made up some crimes for [her] and found people to support them with false testimony." In Malcolm's narrative, the crime that McGough was prosecuted for "was the crime of not letting go, of not accepting the unwritten law of closure." Incredible as it may seem, Malcolm argues, this woman of "preternatural honesty and decency" went to prison for two and a half years just for being irritating.

Whether one views the protagonist as a criminal, a martyr, a scapegoat, a dupe, or a dope (Malcolm herself can't decide between Antigone and Creon, for example) depends on which plot the reader assembles from the various possibilities Malcolm offers. The tale I read with my lawyer's eye goes something like this. One day, Sheila McGough received a collect call from the Fairfax County jail. The call came from someone named Bob Bailes who was being held on a warrant from North Carolina and

was looking for legal help. McGough, an inexperienced criminal defense lawyer, obliged. She immediately went to the jail and, utterly charmed by her new client, signed the bail bond herself.

It is not surprising that Bailes would have charmed the naive McGough, for he was a con man of considerable talent and ingenuity. But it is startling that an attorney – no matter how naive and inexperienced – would play bail bondsman for any client, let alone one she had just met and about whom she knew nothing. This is something that attorneys never do, as McGough herself acknowledges to Malcolm.

Thus began an association during which the lawyer defended her client on various state and federal charges. In one case, she defended Bailes against various bank fraud charges arising from his supplying false information to three different banks in order to secure a loan. She lost at trial and on appeal she attacked "nearly every piece of the government's evidence." The court rejected what it termed her "creative but meritless arguments" and affirmed Bailes' conviction.

While McGough was working on her client's defense, her client, out on bail, was running his cons from her office. Bailes helped himself to McGough's telephone, copier, typewriter – and lawyer's trust account. The con that landed both of them in jail went like this: Bailes claimed to own certain insurance companies that had been chartered before insurance became regulated. These charters – if one were to believe Bailes – allowed the companies to sell insurance without setting aside reserves to pay out claims, a virtual license to print money, as one observer put it. He advertised the companies for sale in the *Wall Street Journal* (Malcolm learned that at one time the FBI assigned a full-time agent to monitor the classifieds in the *Wall Street Journal*), and when he had hooked a sucker, he had the \$75,000 down payment wired to McGough's lawyer's trust account.

AND NOW WE COME TO what the law calls the gravamen of the charges against her. Preoccupied with preparing her client's defense and not paying attention to much else, McGough followed Bailes' instructions to withdraw the money from the trust account, to keep \$5,000 as payment for services rendered, and to turn the remainder over to him. When the scam fell through, the mark wanted returned to him the money he had deposited, as he claimed, in escrow. An escrow fund is used to hold "in-between" money, funds that the buyer gives up some control over but that don't yet belong to the seller. A tenant with no heat might put her rent into an escrow account until the landlord fixes the furnace; she meets her legal obligation to pay rent but makes sure that the landlord can't get the benefit of it until he meets his legal obligation to provide heat. Money held in escrow is understood to be under the control of a disinterested third party. In this case, Bailes' buyer decided that the deal smelled bad and that he would pull his money out. But McGough had already withdrawn the money, in accordance with instructions from her client, and had handed \$70,000 over to Bailes.

What is wrong with this picture? To begin with, a lawyer's trust account is just that – a trust, not an operations account. It is intended to hold money that doesn't belong to the lawyer (even if the lawyer will eventually claim a portion of it as her fee), nor even, in many examples, to her client. And, of course, a lawyer's trust account is controlled by the lawyer, not by a client who has no business camping out in her office in the first place. It is unthinkable that an attorney would disburse from her trust account funds whose origin was obscure and whose purpose was unknown to her. And it is unbelievable that such a withdrawal and disbursement would occur without the attorney's writing letters to everyone in sight documenting what she was doing and why. McGough did everything wrong. But Malcolm is persuaded – and she persuades us – that none of it was done dishonestly.

Privately, McGough denied that she had ever agreed to be an escrow agent or that the investor was entitled to back out of the deal without penalty; however, she refused to assert this defense at trial. To do so would have meant testifying, undergoing cross-examination, and being forced to answer questions about Bailes' affairs. Rather than betray client confidences, the criminal defense attorney presented no defense at all.

Now, while the profession takes client confidentiality very seriously and attorneys can be severely disciplined for breaches, a few situations will release attorneys from their obligations to remain silent. Not surprisingly, establishing a defense to a criminal charge or civil claim is one of them. But McGough

thought that being innocent was a sufficient defense. She declined to offer any evidence that might raise a reasonable doubt in the mind of a juror. This was sheer folly. As a criminal defense lawyer herself, McGough should have known that innocence, alas, is nothing and that a reasonable doubt in the mind of a single juror is everything.

There is, I suppose, a certain nobility to McGough's protecting the confidences of a sociopath whose imagination and skill with Xerox machines and white-out have put her in the way of a fifteen-count federal indictment. Or there would be if she held to the position consistently. But she had no reservations about discussing Bailes with Janet Malcolm. The difference, the lawyer explained to the journalist, was that Bailes had recently died in prison (he'd received a 25-year sentence on the insurance scam) and nothing that McGough said could harm him.

Malcolm never questions McGough's reasoning, but this failure on the part of the attorney to understand basic principles of client confidentiality is breathtaking. The attorney-client privilege does not belong to the lawyer to assert or waive as she thinks fit. It belongs to the client; and it doesn't cease with the client's death. While it is perfectly appropriate to breach confidentiality in offering a truth that will save one from prison, it is never appropriate to breach confidentiality simply because the client is dead.

Or consider this episode from the civil trial that preceded the criminal one (for McGough was sued in a civil action by the owner of the disappearing \$75,000). McGough visited a defense witness the night before he was to testify for her in the civil trial. The visit was made to his hotel room and McGough went alone. When the witness subsequently claimed that at that visit she had improperly asked him to notarize old signatures, she had no recourse but an uncorroborated denial. An attorney who is a defendant in an ongoing case should know better than to meet with a witness without her attorney present. Even if the witness lied (as he almost certainly did), even if Malcolm is right that the truth is messy and can't overcome a good story, what on earth was McGough *doing* there?

MALCOLM'S TALE SPORTS quite a cast of characters: disbarred lawyers, guys doing business out of phone booths, an investment banker educated at Yale and the Sorbonne who gets scammed for \$75,000 in a deal with no paperwork by a guy who lives out of his car. And in the midst of this "cesspool of the criminal defense world," as one of her lawyers called it, stands Sheila McGough, a "trusting, naive, stay-at-home spinster type" who lives with her parents and goes out for the steak specials at Ponderosa. McGough is not up to her role as the central character in this Damon Runyon tale, and Malcolm speaks openly of the "customary state of torpor and annoyance" that overwhelmed her when listening to Sheila:

To my simplest question she would give an answer of such relentless length and tediousness and uncomprehending irrelevance that I could almost have wept with impatience. I took notes of these phone calls, and among them I have found little cries of despair.... "Help, help! I'm trapped talking to Sheila. She won't stop. Save me." (p. 28)

Imagine what the judges felt like.

In trying to know and understand her heroine – for that is how Malcolm came to view her, as "an exquisite heroine" – Malcolm entered Sheila's home, met her parents, ate with the family and participated in its little dramas. But McGough steadfastly refused the intimacy that is the hallmark of the journalist-subject relationship. These episodes, in which the family dog has far too prominent a place, are among the weakest in the book. One misses Bailes.

In her struggle to make sense of how this well-meaning woman got chewed up by the legal system, Malcolm reaches too much and the strain shows. She hasn't the feel for law that she elsewhere shows for psychoanalysis, and is rather too fond of the philosophical metaphor: "Trials are won by attorneys whose stories fit, and lost by those whose stories are like the shapeless housecoat that truth, in her disdain for appearances, has chosen as her uniform." Or: "a journalistic narrative is a kind of lumbering prehistoric beast that knocks over everything in its path as it makes its way through the ancient forest of basic plots." The narrative falters at such moments, and there are too many of them.

Malcolm's beast, despite its lumbering, makes a stronger case for McGough than any that was presented in a courtroom. Not every reader will like this heroine who appears humorless, stubborn and self-destructive; but Malcolm capitalizes on the journalist's freedom from the rules of evidence to draw the reader irresistibly into the story of an attorney who became a felon.

Just how this happened remains one of the narrative's many uncertainties. McGough is the only woman in a drama filled with men, but there is no sense that gender played any but the most indirect role in her misfortune. Was she, as the prosecutor contended, smitten by Bailes in ways that clouded her judgment? Perhaps. Is Malcolm right that McGough's "crime" was refusing to accept guilty verdicts and sentences, insisting on reopening matters long since disposed of, and just generally irritating the legal establishment by refusing to accept closure in a world that depends on the finality of judgments? Maybe. Or was her tragedy, as one of her attorneys would have it, that she was failed by her legal education and by a legal community that never offered to help her out? Quite possibly. Sheila McGough never understood what it means to be an attorney. That much is certain.