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ADVOCACY AND RESPONSIBILITY: CONFLICTING PARADIGMS?

THE ELEVENTH BLANKENBAKER LECTURE*

Gordon R. Bennett**

Permit me to begin by laying upon three persons my gratitude and beatitudes for their indispensable contributions to the outcry that will follow.

First, I want to thank and congratulate Dean Martin Burke for his shrewd selection of a speaker. It is an innovative response to the ever pressing question: What do you do with dropped out judges? Second, it boldly and creatively rejects the principle heretofore followed: The Blankenbaker lecturer must be an individual of national prominence and outstanding accomplishment. And, third, it will provide the students an opportunity to practice a lesson that has undoubtedly been proffered to them in the practice course: you should always appear to be listening to a judge, even if he hasn't much to say.

Second, I want to thank and acknowledge the invaluable assistance of a distinguished graduate of the law school, recently recognized as one of the "Best Lawyers in America," Sherry Scheel Matteucci.¹ Sherry has researched deeply and well various aspects of

* Joseph N. Blankenbaker founded the Blankenbaker Foundation in 1975. The Blankenbaker Foundation provides an annual endowment to the University of Montana School of Law for educational programs in professional responsibility, including the Blankenbaker Lecture series. The Honorable Gordon R. Bennett delivered the Eleventh Blankenbaker Lecture at the University of Montana School of Law, Missoula, Montana, on April 5, 1989.

** B.A., Carleton College, 1947; M.A., University of Missouri, 1949; J.D., Georgetown University Law Center, 1956. Judge Bennett retired from Montana's First Judicial District in 1988 and served as a Scholar-in-Residence at the University of Montana School of Law during spring semester of 1989. He was appointed to the bench in 1970 and was reelected to the bench in 1972, 1976 and 1982.

1. Ms. Matteucci is a partner in the Billings law firm of Crowley, Haughey, Hansen, Toole & Dietrich.

“professionalism” for a series of articles now appearing in the journal of the State Bar of Montana.² She most generously provided me with the extensive and highly pertinent research materials assembled for these articles, which are the mother lode for the gems that I am about to impart.

Finally, I want to thank and tell you a little about Joseph Blankenbaker, the fellow who made these proceedings possible. Joe, as he was known by everyone, had a very bad case of “consumption,” as it was called then, when he was a youth in his native Virginia. His doctor told him he did not have long to live, but that he might be able to hang on for a while if he moved out to the arid west. Well, Joe moved out to Wyoming and then, shortly thereafter, to Montana, where indeed he did die—nearly seventy years later!

He started out as a hand on a sheep ranch. Apparently he learned quickly that the money in the livestock business was in the banking business, to which he turned his interest. He banked and raised livestock in several Montana locations, but wound up with what is now the Norwest Bank in Great Falls. Quiet, polite, pleasant, unassuming, he never married and apparently kept close track of his money. One of his interests, discussed from time to time with his attorney, was the mores and folkways of lawyers, devious and otherwise.

In 1975, at the age of 90, he established a very substantial foundation to “express his thanks to the people of Montana for treating him so well” and gave the foundation trustees broad discretion in deciding how the money should be spent. The trustees concluded the wish could be carried out, in part, by sponsoring annual lectures on the professional responsibilities of attorneys. That is why we are here today, and I think we should tip our hat to old Joe for treating *us* so well.

Scripture for this morning’s sermon comes from the twenty-third chapter of Matthew:

Then Jesus said to the crowds and to his disciples: “The teachers of the law and the Pharisees sit in Moses’ seat. So you must obey them and do everything they tell you. But do not do what they do, for they do not practice what they preach. They tie up heavy loads and put them on men’s shoulders, but they themselves are not willing to lift a finger to move them.

Everything they do is done for men to see: They make their [tokens of piety] wide and the tassels of their prayer shawls long;

2. Ms. Matteucci’s articles have appeared in the *Montana Lawyer* since March of 1989.

they love the place of honor at banquets and the most important seats in the synagogues

. . . .

Woe to you, teachers of the law and Pharisees, you hypocrites! You shut the kingdom of heaven in men's faces. You yourselves do not enter, nor will you let those enter who are trying to.

. . . .

Woe to you, teachers of the law and Pharisees, you hypocrites! You give a tenth of your spices—mint, dill and cumin. But you have neglected the more important matters of the law—justice, mercy and faithfulness. . . .

. . . .

Woe to you, teachers of the law and Pharisees, you hypocrites! You are like whitewashed tombs, which look beautiful on the outside but on the inside are full of dead men's bones and everything unclean. In the same way, on the outside you appear to people as righteous but on the inside you are full of hypocrisy and wickedness.

. . . .

You snakes! You brood of vipers! How will you escape being condemned to hell?"³

One can reasonably deduce from this that lawyers did not have the enthusiastic approval of Jesus, at least, and quite probably the general public at that time.

Twenty centuries later poet Carl Sandburg was bound to ask:

Why is there always a secret singing
When a lawyer cashes in?
Why does a hearse horse snicker
Hauling a lawyer away?⁴

Sandburg, too, probably reflected accurately the contemporary public view.

Since Watergate and the miscellaneous "gates" that followed, surveys have revealed that an appalling segment of the American public distrusts and despises attorneys in general, viewing them as incorrigibly venal, hopelessly procrastinating and totally beyond trusting. "Lawyer bashing" has not only become the "in" thing for lay people, but is also heard increasingly within the profession itself, and even in such rarified atmospheres as law schools and courts. Interestingly enough, opinion surveys reveal that the "man

3. *Matthew* 23:1-7, 13-14, 23, 27-28, 33 (New International Version 1978).

4. C. SANDBURG, *The Lawyers Know Too Much* (1951) (quoted in Rotunda, *Lawyers and Professionalism: A Commentary on the Report of the American Bar Association Commission on Professionalism*, 18 *LOV. U. CHI. L.J.* 1149, 1150 (1987)).

in the street" has two very distinct convictions: nearly all lawyers are crooked—but his own attorney is a fine, upstanding, hardworking person.

Whatever the vagaries of public opinion might be, in Montana and elsewhere, I offer my not very humble opinion that Montana lawyers, with few exceptions, are hard working, discipline fearing, well-intentioned, good-faith practitioners, who are doing the best they can for their clients—in spite of their clients, their professional opponents and the court system in which they operate.

The most striking depiction of the Montana lawyer as I see him is the old geezer portrayed in the picture hanging behind the secretary in the law school dean's office. Their ages may be different, their offices may look different, maybe they don't work in their shirtsleeves, but the rapt expression of concentration, the almost palpable effort being exerted to solve some kind of legal conundrum and the dedication to the enterprise all characterize most Montana lawyers as I see them. Generally speaking, we have a good bar that serves the public well, whatever the public may think of it.

But we are, like every other profession, laden with unsolved problems, far from our goals, and forever seeking to elevate our standards. A highly active state bar strives mightily to improve our services, our public posture and our livelihood. Our fiscally starved, understaffed, legislatively neglected and virtually resourceless courts labor persistently to work with, beg, encourage, cajole, induce and whip the profession and themselves into greater servicibility. As individuals, lawyers seek elevation of their standards by some—mild it is true—peer pressure, by continuing education efforts and by simple hard work and dedication.

And yet, the job is never done and perfection recedes into the distance as we approach it. We must find ways to expedite litigation without becoming mere word processors and procedural automatons. We must, against all odds, find ways to reduce costs without diminishing the quality of our service to our clients and the courts. We must expand our vision of public service by meaningful and productive allocation of more of our precious time to pro bono and community service. And we must increase our concern for the welfare of the profession and whither it is tending.

There is, I believe, little controversy as to the need for such efforts, in general. It will be the purpose of the following remarks to focus on a somewhat more particular and controversial area. I want to talk to you about the nature of legal advocacy and the apparent conflict that exists between it, as a paradigm of our pro-

fession, and that other basic tenet—personal responsibility—and to suggest to you that the apparent conflict either is not as great as it seems or is reducible, and that it should be reduced to advance our efficacy and our public standing.

A very large proportion of the law that is practiced in America, certainly more than a majority on any standard of reckoning, can be characterized as noncontroversial. It is “office law” that is aimed not only at defining rights, duties and obligations, but also at avoiding controversy. Competence and responsibility are called for, but not advocacy.

Advocacy is called for only when controversy arises, and the everlasting question rises with it: where, if anywhere, is the professional responsibility for advocacy intersected and limited by other professional responsibilities? Can we agree that one cannot commit murder in furtherance of one’s responsibility for advocacy? Or lie, or cheat, or steal? Nor can there be any question that federal courts and many state courts are finally placing frivolous pleadings beyond the pale of proper advocacy. Without doubt, lots of other unpromulgated or vaguely expressed limitations can be defined by courts and disciplinary bodies on a case-by-case basis. We are, then, in this state and in the nation, slowly—oh so slowly, oh so deliberately—getting around to defining those places where responsibility traverses and limits untrammelled advocacy.

What I believe is needed today is not so much a limit upon advocacy, but an affirmative requirement thereof. It is time for the laws, rules, regulations, codes and all other formal and informal pronouncements to expressly *require* every reasonable effort of counsel to reduce and eliminate controversy by any legal means at the earliest possible time. We enjoy our position at the nadir of public esteem and confidence because we are viewed by the public as the cause, not the cure, for its ills; we come not as healers, but as “hemorrhagers.” Advocacy should come to stand not only for vigorous representation of the client’s interest, but also for the swift and satisfactory resolution of problems, which is in the public’s interest as well as the client’s interest.

This is not a brilliant new insight, nor a daring proposal. It has been said of Justice Brandeis that “[w]hen he represented an interest in a legal controversy [as a private lawyer], he sought to use the knowledge he acquired in order to devise solutions to the underlying problems that would be constructive, durable, and, if possible, self motivating.” Chief Justice Warren Burger, at the end of a long career on the federal bench, concluded it was the highest function of a lawyer to “resolve a matter equitably ‘in the shortest

possible time with the least amount of stress and at the lowest possible cost to the client.' ”⁵

I suggest to you the goals laid down by these prominent jurists are not being met in many, if not most, controversies because of a misapprehension on a good part of the bar as to the primary goal of advocacy. A month ago I received a letter from the victim of a heavy dose of the truncheon, mace, chain, broadsword and battle-axe school of advocacy, who had been dragged through a keyhole in my courtroom by several warring lawyers for some four years. Out of his bewilderment he asked:

What can a divorced person do when the other party of the divorce repeatedly breaks the terms of the divorce decree? I do not want a full-fledged court battle because: one, I cannot afford a lawyer; two, it would be upsetting to the kids; and three, it would create a new round of winners, losers and hate.

The most Draconian case I know of was filed nine years ago this month and involved a custody fight over a, then, one-year-old child. The case is now burning out its eighth judge. It has been to the Montana Supreme Court three or four times. The acrimony gets worse at each stage. The child has been made fully aware at all times of the bitter struggle swirling about him, and he is, presumably, a psychological basket case. One of the parties is an attorney.

It is not only in the field of domestic relations where what should be a duty to heal is sublimated to the misconceived or self-inspired duty to make war. This misconception or wrong-headedness attends many other kinds of proceedings and interferes with or defeats a fair, timely and economical resolution of the problem.

Yes, doctor, you say, but what, concretely, is your prescription? A fair question, the answer to which must be addressed separately as to good-faith lawyers and bad-faith lawyers.

As to the good-faith lawyer, I believe the primary requirements are to reorient as to the advocacy function and to introduce dispute resolution techniques into standard procedures. Orientation, or reorientation, can be accomplished in several ways, beginning right here. Training in negotiation and other dispute resolution techniques is presently available here, and a course in alternative dispute resolution is being developed. Not knowing very much about it, I would nevertheless, judging by the performance of your recent graduates, urge far greater emphasis in these

5. Address by Warren E. Burger, American Law Institute Annual Meeting (1986) (quoted in Stanley, *Professionalism and Commercialism*, 50 MONT. L. REV. 1, 4 (1989)).

subjects. A few of your graduates have taken the idea of dispute resolution and run with it. Most of them, however, seem to be convinced that the idea is some kind of coming event they can abide if it ever arrives.

The State Bar has been vigorously promoting dispute resolution through its publications, the activity of a select committee and training seminars.⁶ Judge Joseph Gary of Bozeman, in cooperation with the State Bar's alternative dispute resolution committee, will hold a "settlement week" program two weeks hence.⁷ The program will consist of both training and actual settlement proceedings. The subject matter will be live, unsettled cases that are deemed capable of settlement.

A few Montana attorneys have been or are acquiring alternative dispute resolution training and techniques and are offering their services as specialists in that field. Attorneys increasingly ask courts for settlement conferences. State judges are calling on their fellow judges to act as mediators, arbitrators or "settlement judges."

One of the strongest current initiatives of the American Bar Association (ABA) is the development and promotion of dispute resolution training and information programs. A full dispute resolution curriculum is being developed by a few law schools, while many others are offering full credit courses, or weaving resolution techniques into substantive as well as procedural courses.

For at least the past five years the National Judicial College has been featuring its dispute resolution course. It even offered the course in San Diego, rather than Reno, in February, the first session of which I, of course, attended.

Federal and state courts throughout the country are either considering or initiating the imposition of dispute resolution requirements as a routine part of their procedure.

A couple of vagrant notes on this burgeoning field. Some, including one of my colleagues here, view this yeasty development as "trendy," one of those inspirations that flash forth every so often in our profession, only to turn out to be an ephemeral aberration that is swallowed up by a succeeding fad. Some see this development as simply adding another level of litigation to an already overloaded procedural circuit—analagizing it to the dubious economics realized by the addition of discovery procedures forty years

6. From February of 1988 to June of 1989, the MONT. LAW. published a series of articles written by members of the Alternative Dispute Resolution Committee (ADR).

7. See Hansen, *Settlement Week Pilot Program Takes Off*, MONT. LAW., May 1989, at 2; Lineberger, *Settlement Week Was a Success*, MONT. LAW., June 1989, at 7.
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ago. Others contend that few cases will settle, and the whole thing will collapse when disillusion sets in.

Personally, I would hope these gloomy predictions will not be realized. My theme here is that our profession is suffering acutely from the fact, and the public's perception, that we are much of the cause of, not the cure for, the pain our clients suffer. I believe the cure for this blight is the reduction of the pain. The only means I know of by which this can be accomplished is the minimization of disputes by the earliest and best resolution possible.

Another large source of discontent with the legal process—in addition to the cost and other pain of litigation—is the interminable delay occasioned by crowded dockets and overloaded, understaffed courts. We are told that by means of “fast tracking” techniques, the application of automation, and a certain amount of browbeating of the bar, miraculous reduction in delay can be and is being accomplished. We hear this every few years, but the litigation tide just keeps mounting and we keep trying to breast the tide with new procedures, new techniques and stronger orders. Again, the only way I know of to stem the tide of litigation is to resolve disputes as quickly, surely and economically as possible. This, I believe, can be accomplished by a reorientation to dispute resolution in place of classical advocacy. I am confident that good-faith attorneys—willing to carefully balance their responsibility to their profession and to the public with their responsibility to their clients and their own immediate self-interest—can get it done with a bit of training, a touch of imagination, patient experimentation and necessary determination.

So much for the good-faith attorney. What of the bad-faith attorney, the shyster? As mentioned before, it is my conviction that the shysters among us represent a very small numerical minority. But they *are* amongst us and their impact on the profession is far out of proportion to their numbers. It is our duty, as individuals and as a profession, to deal with them effectively in the public's interest as well as in our own. Where, in the case of the good-faith attorney, we were speaking largely of sensitivity to the problem and the development of competence, here, we are talking about ethics and intentional abuse of the advocacy role.

Let us look first at present and possible curative measures. Once again, we begin right here. What can the law school contribute? Let us begin with the assumption that the law school is not going to make Jesuit priests out of its students—the faculty may be willing, but the students are not. Why? There are two reasons.

First, most people who are attracted to law schools, I surmise, are

inclined to be gladiators rather than reformers. They love contention and they love to win. Their purpose here is to gain entry to the profession, not to reform it. Second, ethics taught in the conventional mode does not comport with the thought patterns being developed here. Ethics as a law school subject is doomed, to some degree, to being an academic Thursday's child. One commentator asked, is not the term "legal ethics an oxymoron?"⁸

So how do we get student attention and interest? My answer is, frame ethics in a litigation mode. Legal malpractice litigation is, of course, on the rise. During their careers, law school graduates will inevitably be concerned with such litigation and the threat thereof, either theirs or that of fellow lawyers or clients. A lawyer litigation course could cover most of the ground now covered in ethics courses, but it would be far more interesting because of increased pertinence and relativity. A second suggestion, which may be under implementation here even as we speak, is to weave ethics aspects into substantive and procedural curricula at appropriate junctures. But, however ethics teaching may be improved, I expect it will never have the impact one might wish for, and most practical ethics will probably be learned during on-the-job training.

Can the ABA Model Rules of Professional Conduct, as promulgated in 1983 and adopted by the Montana Supreme Court in 1985, be made an effective vehicle for enforcement of ethical standards? As the ABA brought its Rules into being it pulled in its teeth. In its scope note, it announced:

Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.⁹

Why? The truly effective way to implement the Rules would be to make them the basis for civil liability. It is one thing to have a lawyer-dominated practice commission decide whether a duty delineated by the ABA Rules has been breached and prescribe an official sanction, and quite another thing for a lay jury to decide whether a defending lawyer is liable in tort for such breach.¹⁰ The

8. Gee and Elkins, *Resistance to Legal Ethics*, 12 J. LEGAL PROF. 29 (1987).

9. MODEL RULES OF PROFESSIONAL CONDUCT, Scope Comment (adopted by the ABA August 2, 1983).

10. No court examining the matter has ever concluded violation of the Model Code of Professional Responsibility or the Model Rules of Professional Conduct gives rise to a civil liability. See, e.g., *Beck*, 40 Mont. L.J. 490, 529 A.2d 171 (1987). Many courts,

Montana Supreme Court adopted the Rules but did not adopt the scope statement.¹¹ Can we conclude from this that our court may join those other courts that refuse to view the Rules as pious declarations understandable and enforceable only within the professional lodge? In a 1987 legal malpractice case, the court rejected the idea that the Rules, in and of themselves, created a duty, but it did not close the door on the use of the Rules as a standard, if properly supported by expert testimony.¹²

It should be added that the Rules are virtually bereft of adequate direction in the area we are concerned with: i.e., the affirmative duty to resolve and reduce litigation as quickly and completely as possible with the least amount of pain or damage. Rule 1.3 prescribes: "A lawyer shall act with reasonable diligence and promptness in representing a client."¹³ Rule 3.2 echoes the same principle with similar inexactitude: "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."¹⁴ And that's about all. What is needed is a resounding declaration, implemented as an enforceable legal standard, that while lawyers are bound to act as effective advocates, they are also bound to seek, in every reasonable and legal way, the earliest possible end to controversy or litigation, and are bound not to present unnecessary obstacles to such end.

As they stand now, then, the effect of the ABA Rules is limited to the effect disciplinary commissions can and are willing to give them, and they are virtually silent as to any affirmative duty

however, have approved the use of the Code and the Rules to establish a standard for determining the duty of an attorney to a client or a third party. See, e.g., *Miami Int'l Realty Co. v. Paynter*, 841 F.2d 348 (10th Cir. 1988); *Ransburg Corp. v. Champion Spark Plug Co.*, 648 F. Supp. 1040 (N.D. Ill. 1986); *Cornell v. Wunschel*, 408 N.W.2d 369 (Iowa 1987), (in which the court not only recognized the Code as establishing a standard, but also approved of an instruction based on it, and apparently did not require expert testimony to establish the standard); *Jarvis v. Jarvis*, 12 Kan. App. 2d 799, 758 P.2d 244 (1988); see also Faure and Strong, *The Model Rules of Professional Conduct: No Standard for Malpractice*, 47 MONT. L. REV. 363, 371-73 (1986).

The Louisiana Supreme Court has gone so far as to declare that the Code standards have the force and effect of substantive law. *Succession of Cloud*, 530 So. 2d 1146 (La. 1988). In this case the court viewed annulment of an attorney-client contract as the client's remedy for the attorney's "direct and flagrant" violation of the Code standards. *Id.* at 1150. In addition, a Louisiana court of appeals awarded attorney fees in accordance with Rules of Professional Conduct Rule 1.5 in *Cromwell v. Commerce & Energy Bank*, 528 So. 2d 759, 762 (La. Ct. App. 1988).

11. *In re Adoption of the ABA Model Rules of Professional Conduct*, No. 84-303, (Mont., Order Adopting Rules of Professional Conduct, June 6, 1985).

12. *Carlson v. Morton*, 229 Mont. 234, 745 P.2d 1133 (1987). See Luban, *Ethics and Malpractice*, NAT'L RPTR. ON LEGAL ETHICS, n.1 (1988).

13. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1990).

14. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.2 (1990).

to prevent or limit litigation.

Rule 11 of the Federal Rules of Civil Procedure, however, as amended and adopted by the Montana Supreme Court in 1984, presents us with the rustling of a new principle that could become quite significant in the area we are discussing. As you know, Rule 11 requires the signing of pleadings by attorneys or self-represented parties and specifies that the signature constitutes a certificate that the pleading is based on fact and law and is not made for any improper purpose, such as harassment, delay or burdening the litigation with unnecessary costs. It goes on to provide: "If a pleading, motion, or other paper is signed in violation of this rule, the court . . . shall impose upon the person who signed it, a *represented party*, or both, an appropriate sanction . . ."¹⁵ Please note not only the mandatory language, but also the encompassing potential liability.

For generations, the "right of advocacy" has provided a shield against responsibility on the part of both attorneys and their clients. The attorney occupied a special position, due to his professional standing, separate and apart from that of his client. He was the advocate, licensed to protect and foster the best interests of his client, whether his client was right or wrong. The client, on the other hand, enjoyed a position where he could claim "kings-ex" for his misdeeds on the ground he committed them on the advice of counsel. He might have been answerable for crimes, but not for all manner of other sleazy undertakings—nor was the attorney, because he was doing his advocacy thing.

Rule 11 tends to pierce the attorney's professional veil and make him responsible, as an agent, for what he does for his client, and at the same time it makes the client responsible for what the attorney does for him. The responsibility can be considerable for either or both parties, because the court is required to impose an "appropriate sanction."¹⁶ The federal district courts have been exploring, quite vigorously, albeit with some adverse reaction from their appellate superiors, the parameters of the word "appropriate" and have been most resourceful in giving the rule teeth.

This principle of reciprocal accountability for frivolous litigation may be extendable beyond Rule 11, which limits itself to paper work. ABA Model Rule 3.1 would seem to expand the concept to comprehend any sphere of litigation: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein,

15. MONT. R. CIV. P. 11 (1989) (emphasis provided).

unless there is a basis for doing so that is not frivolous"¹⁷ This is sufficiently unequivocal to negate the argument that *any* objectionable performance was in the name of advocacy and at the behest of the client. It seems conceivable that the courts will, after due consideration, begin to enforce the ABA rule with binding rules of their own.

In Montana, however, it would be well not to hold one's breath awaiting vigorous judicial enforcement of Rule 11. The federal judges, with their lifetime tenure on good behavior, have been having a wonderful time with the rule, as noted. Meanwhile, some attorneys have waxed vigorous in their Rule 11 exertions. Montana judges can be observed to be much less enthusiastic and innovative than their federal brethren in breathing life into the rule. Why? Place yourself, if you will, in the chair of a Montana district judge who abandoned a promising career as a lawyer for what he hoped would be a life of public service on the bench. He has two kids in college, house and car payments to make, insurance and taxes to pay and lots of other obligations that leave him teetering on his bench toward the brink of bankruptcy. But he loves being a judge and is resolved to tough it out. It is five years since the last election and one year before the next one and it seems there are two possible opponents. At this juncture he is faced with a well-framed and supported motion for an order holding that the dean of the local bar is in violation of Rule 11, because he filed a patently frivolous lawsuit to delay the commencement of an unpopular municipal project. Will the judge under these circumstances become a screaming champion of Rule 11 and make a holding that will totally vindicate, if not expand upon, its purpose and intention? Think about it.

Can we look to the Montana Supreme Court's Commission on Practice to shore up the gaps left by law school training, the ABA Model Rules and Rule 11? Given the circumstances under which it must operate, the performance of the Practice Commission is a small miracle and a monument to the dedication of a small band of volunteer attorneys who serve it. But with an ever-increasing complaint load, the increasing complexity of complaints and the lack of staff support, we cannot anticipate the timely, full, fair and complete adjudication of all complaints, until the legislature, or the court, or the State Bar get around to providing professional staff.

The State Bar, and its Committee on Professionalism, is mak-

ing an altogether admirable effort to foster the development of competence and responsibility through its continuing legal education (CLE) courses and its journal. What long-range impact this effort will have is problematical; certainly it would be increased by the addition of annual CLE courses on professionalism, held on a regional or local basis. At such sessions, attorneys could hear reports from the State Bar, the Commission on Practice, paid or volunteer specialists and, most importantly, from each other, on such subjects as ethical violations or infringements, competence, responsibility, malpractice, alcohol and drug dependency, client relations and any other matters that might mutually affect their professional standing or ability. CLE credit should be given and attendance should be mandatory, the theory being that those who do not need the instruction can help those who do.

If the efforts of the law schools, the courts, the State Bar, the Commission on Practice and the lawyers themselves are not effective in reducing costs and delays and elevating the status of the profession, what can we look forward to?

First, we can look forward not only to increased conventional malpractice litigation but to the extension of the "doctrine of good faith and fair dealing" to lawyers. If lawyers are perceived as a class that aspires to the limited objectives of businessmen, i.e., profits, then they will be treated accordingly and, today, nearly every complaint that arises from a business transaction carries a count for violation of the holy covenant. For example, I see no logical reason for denying such a claim to a party alleging that during the course of a lawsuit there was negotiation agreed to and engaged in by the parties, and the opposing party failed or refused to deal in good faith.

You may not be aware that the Montana Legislature passed its own "Rule 11" in 1985.¹⁸ That legislature provided for the payment of excess costs, expenses and attorney fees by attorneys and their clients who "unreasonably and vexatiously" multiply proceedings.¹⁹ Ever since 1895 we have had a statute that provides for treble damages for a client whose attorney willfully delays his cause of action.²⁰ And under another 1895 statute an attorney who deceives a party or the court is subject not only to treble damages but also to misdemeanor prosecution.²¹ These statutes have not been without application in the past and are lying in wait for the

18. MONT. CODE ANN. § 37-61-421 (1989).

19. *Id.*

20. MONT. CODE ANN. § 37-61-407 (1989).

21. MONT. CODE ANN. § 37-61-406 (1989).

attorney who delays, deceives and vexes in the name of advocacy.

The 1985 law referred to, and the veritable flood of various kinds of anti-lawyer legislation we have seen in the 1987 and 1989 legislatures, provide fair and full notice that—whatever ethical or professional obligations we might or might not recognize—the public is ready to “deprofessionalize” this profession, unless this profession starts healing, rather than hemorrhaging, people’s legal problems. The work being done by the State Bar, the Commission on Practice and the courts is helpful but—clearly—it is not going to get the job done. If the profession is rotting from within, they can apply poultices, and no more.

In the end, the health and future of the profession is in the hands and hearts of its individual practitioners—that’s you. Don’t look to the organized bar, don’t look to the courts and, for heaven’s sake, don’t look to the legislature! The buck starts and stops with you—it cannot be passed, and what you do with it as an individual will determine what kind of profession you have and what you will get out of it.

The West Publishing Company used to send to all of its customers a little plaque that decorated the walls of lawyers’ offices, particularly those of country lawyers. It depicted the face of Abraham Lincoln and attributed to that country lawyer the saying: “A lawyer’s time and advice are his stock in trade.” While this—probably spurious—quotation provides the lawyer with a rationale for the levying of fees, I submit it does not represent what the client is seeking. From the point of view of most clients, a lawyer’s stock in trade—what they come to buy, if you will—is *integrity*. They are seeking integrity in the quality of work, integrity in dealings, both with them and with others on their behalf, integrity in expediting the early, economical solution of problems that might arise and integrity in charging for the service.

The standing of this profession will, in the long run, be the sum of the integrity of its individual members. It is in our own personal interest that each of us contribute to that integrity in any way we can. No organization or institution can effectively impose or enforce that obligation, and no institution or organization can save this profession if that obligation is not discharged.

How can your performance be measured? I refer you to that episode in *Don Quixote* when Don Quixote is with Sancho Panza, his squire:²²

22. See Rotunda, *Lawyers and Professionalism: A Commentary on the Report of the* <http://scholarship.law.com/professionalism/> 18 Loy. U. CHI. L.J. 1149, 1178 (1987).

Quixote explains that he must now stay up all night and think about his love, Dulcinea, because Knights-Errant are supposed to do that.²³ “But, M’Lord,” says Sancho Panza, “I will be asleep and I won’t know if you fail to stay up all night. And we are in the middle of the plains. No one else is here, so no one else will ever know.” “I will know,” says Quixote.²⁴

I do not invite you to tilt at windmills. But I think you should understand that the future of your profession, and the satisfaction that you will derive from it, will depend to a very large degree on what *you* do when you believe nobody is watching.

Thank you.

23. *Id.*

24. Rotunda, *supra* note 22, at 1178 (quoting M. CERVANTES, DON QUIXOTE).
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