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ARTICLES

PROFESSIONALISM AND COMMERCIALISM

The Ninth Blankenbaker Lecture*

Justin A. Stanley**

One has to go back a long, long way in the history of Western civilization to find a time when there was not a motivating relationship between professionalism and commercialism in the law.

At one point, of course, there was no special group which was trained in the law. This was certainly true in Athens at the time of Socrates in the late fifth century B.C. Indeed, Socrates complained to Protagoras in one of the dialogues that when the Athenian Assembly had to deal with a construction project, it sent for builders to advise it. If a naval fleet was to be expanded, it sent for shipwrights. But when it was considering issues of government and law, "then everybody is free to have a say—carpenter, tinker, cobbler, merchant, sea-captain; rich and poor, high and low—anyone who likes gets up, and no one reproaches him, as in the former case, and not having learned, and having no teacher, and yet giving advice; evidently because they are under the impression that this sort of knowledge cannot be taught."¹

This is not to say that the Greeks were unaware of the importance of law and the use and purposes of courts or assemblies. Quite the contrary was true—and men such as Socrates and Aristotle discussed in words that are still read the importance of jus-

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1. PLATO, PROTAGORAS, 1 THE DIALOGUES OF PLATO 144 (B. Jowett trans. 4th ed. 1953).

tice and accepted legal principles and even the distinctions between law and equity.² There just was not a body of lawyers.

It strikes me, though, that there must have been quite a number of able *pro se* advocates. Of course, in time, a group of experts or specialists did emerge.

As late as 200 B.C. in Rome, however, even though the expertise was acknowledged, the payment of fees for legal services was proscribed.³ A hundred years later the experts were called "speakers of cases" and fees were permitted.⁴ Certainly by the fifth and sixth century fees were permitted, but they were legislatively fixed.⁵

I am not certain if fees for legal advice were ever proscribed in England. There was probably little need for legal advice during the Anglo-Saxon period.⁶ However, as English civilization became more sophisticated, refinements in law and the legal system occurred, and certainly by the time of Henry II,⁷ I think it can safely be said that lawyers were recognized as experts and were paid fees for their services.⁸ That system has been with us ever since. Even so, fees did not tend to be an important part of the lawyer-client relationship. Perhaps the role of the church in legal education and in its separate courts for many years continued the notion that compensation should be a minor factor in that relationship.⁹

In some respects, I suppose that the practice during our Colonial period and for some time thereafter of requiring law clerks to pay for the privilege of working in law offices may have tended to minimize the importance of financial gain for lawyers. Incidentally,

2. ARISTOTLE, *NICOMACHEAN ETHICS, THE BASIC WORKS OF ARISTOTLE*, 1020 (R. McKeon ed. 1941).

3. J. CROOK, *LAW AND LIFE OF ROME* 89-90 (1967). Crook says:

It would be wrong to think of jurisprudence in the Republican age as a profession. Its practitioners were members of the Roman upper class, for whom even public and political office were only incidents in lives of leisure, and it was therefore an amateur activity just as much as being a historian or an agricultural expert. . . . The main rule, going back to a law of 204 B.C., was that barristers were not allowed to take fees. Of course, the great advocates of the Republic had no need to do so directly; if Cicero did a client proud the client's purse, friends and influence would be available to Cicero later at call. Nevertheless, the rule was constantly being infringed and as constantly reiterated.

Id.

4. Casson, *Imagine, If You Will a Time Without Any Lawyers at All*, *SMITHSONIAN*, Oct. 1987, at 122, 126.

5. R. POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 50-55 (1953).

6. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 215 (5th ed. 1956).

7. *Id.* at 19.

8. *Id.* at 216. Pound states that, "[p]rofessional attorneys begin under Edward I," but those were a special class of lawyers, akin to solicitors. R. POUND, *supra* note 5, at 86.

9. T. PLUCKNETT, *supra* note 6, at 301-06; R. POUND, *supra* note 5, at 62-69.

it may have been in recognition of the importance of this custom that in some of our states there were internship requirements for young lawyers even after they had passed the Bar examination.¹⁰

In the direct relationship between lawyer and client with respect to fees charged for services, the statements submitted by lawyers tended until quite recently not to be particularized. One corporate client of mine complained that lawyers' fees were treated differently from those of everyone else from whom the corporation purchased goods or services. That client and I happened to have a retainer arrangement, with regular monthly payments and a year-end adjustment. We were on an hourly basis of charging, and I thought the client was entitled to know what the corporation was being charged for different things. Hence, over the opposition of some of my partners, I initiated the practice of detailing the work and its cost to the client. My objecting partners thought that the professional relationship entitled us simply to submit a statement "for legal services rendered" during the period in question, and that it was not any of the client's business how the charges were computed or allocated, or for that matter, how much was charged.

We lawyers have been considered a profession for as long as recognition has been given to professions in our Western society. However, "profession" today no longer signifies, in the words of Roscoe Pound, simply the practice of "a learned art as a common calling in the spirit of a public service."¹¹ For example, Mike Tyson is regarded as a professional, and I do not propose a personal challenge to him about his right to the designation.

Nevertheless, I think that for our present purposes we can go along with Roscoe Pound. To me at least, the word *profession* strongly implies an obligation to serve "in the public interest." This is particularly true where the profession is, as we are, self-governing to a great degree.

It is obvious, I suppose, although it needs constant restating, that the proper functioning of the system of justice rests largely in our hands. That is a very solemn obligation. Lawyers are often said to be officers of the courts. That implies a lot of things. It should mean that we share with our fellow lawyers on the bench the responsibility of making the formal justice system work. In its simplest terms, this means that lawyers will be totally honest with the courts and with each other. There is a difference between advancing new arguments and a failure to set forth honestly the present

10. *E.g.*, New Jersey, Pennsylvania.

11. R. POUND, *supra* note 5, at 5.

state of the law. There is a difference between abusing the deposition process and striving 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."¹² That is what Chief Justice Burger said should be the aim of every advocate.

A tremendous amount of law is practiced outside the courts, of course, and it is there that our obligation must be stated more broadly, as one running to the entire "system of justice," rather than merely as serving as "officers of the court."

When I used the word *commercialism* at the beginning of this address and I referred to it as a motivating factor, I meant only the payment of compensation. Lawyers surely are entitled to be fairly paid for what they do. But what they do, because they are professionals, must always be guided by what is good for the system of justice, the integrity of the judicial process and their personal integrity. If this is turned around and the primary goal of lawyers is to make money, then we are at a point one hundred eighty degrees from where we started.

As we look back, there is probably no time in history when ideal conditions obtained, with conduct matching duty and compensation being totally fair. And, of course, in comparing the present with the past, there is always a temptation to regard any time before the present as "the good old days." Nevertheless, conditions and attitudes do change, and lawyers, it must be kept in mind, are part of a larger society and are affected by the mores of that society. Given those caveats, let us examine some of the conditions that exist today.

First, let us look at numbers. The American Bar Association advises that:

In 1960, for example, only about 285,900 lawyers were admitted to practice in the United States. . . . [In 1985 there were] about 700,000. It is not uncommon today to find firms of over three hundred lawyers, with offices not only in many states, but in foreign countries as well. In the 1950s and 1960s, firms of that size and geographic diversity were unknown.

. . . [In 1985 there were] some 110,000 women admitted to practice and about 40% of the law school population . . . [was] female. In 1960, there were about 7,500 women admitted to practice and approximately 1,900 were in law schools. In 1971, there

12. Address by Warren E. Burger, American Law Institute Annual Meeting, *quoted in* ". . . IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM: REPORT OF THE COMMISSION ON PROFESSIONALISM TO THE BOARD OF GOVERNORS AND THE HOUSE OF DELEGATES OF THE AMERICAN BAR ASSOCIATION, 112 F.R.D. 243, 290 (1986) [hereinafter REPORT].

were less than 5,600 students classified as members of minorities in law school. In 1985, there were over 12,000.

In addition, the Bar is younger than it was in 1960. Of the over 300,000 members of the ABA, half are 38 or under. Indeed, the median age of all lawyers in the United States today is about 38. In 1960, on the other hand, the median age of practicing lawyers was 46.¹³

There may have been a time in the early days of our country when society produced a group of law students with a pretty homogeneous culture and commonly accepted standards of conduct. That is simply not true anymore. Since it is not true, then the Bar—and I include academics, judges and practicing lawyers—ought to define as clearly as possible what it expects of lawyers, what their obligations are to the system of justice and to their clients—in a word, what it means to be a lawyer and a professional. These things should be instilled in lawyers at the first opportunity, which of course is in law schools. They should be reinforced by individual practitioners and the organized Bar, and they should be adhered to and enforced by the courts.

As a central part of the development of a heightened sense of professionalism, it should be recognized that the primary purpose of a professional lawyer is not to amass a fortune but to develop legal competence and to adhere to the high standards of the profession. For the competent professional, a comfortable living will in all likelihood follow; and that is fine. But to substitute for high professional competence and dedication the amassing of wealth is fundamentally wrong. Not only is it wrong, but it will inevitably lead to a loss of confidence by the public in lawyers, a concomitant loss of faith in the administration of justice and in more rigorous control of the Bar by legislatures and governmental agencies such as the Federal Trade commission.

As most of you may know, the American Bar Association in 1985 named a commission to study the status of professionalism among lawyers. Its Report,¹⁴ issued in 1986, discussed many problems facing lawyers in the effort to sustain professionalism. However, significantly I think, it said:

The Commission believes that many of the problems outlined in this Report could begin to be addressed by subordinating a lawyer's drive to make money as a primary goal of law practice.

...
The temptation to put profits first will always be great. In-

13. REPORT, *supra* note 12, at 251-52 (citations omitted).

14. REPORT, *supra* note 12.

deed, the increase in competitive pressures on lawyers may make the temptation greater now than at any period in history. However, financial reward should ultimately be the consequence of good service. Activities directed primarily to the pursuit of wealth will ultimately prove both self-destructive and destructive of the fabric of trust between clients and lawyers generally.¹⁵

Next, although one might think that an increase in the number of lawyers would result in lower fees to clients, that has not proved to be the case. I am not quite sure why this is so. Fees charged are higher and there is increased competition to obtain and retain the clients who pay those fees.

The Supreme Court unlocked the door to advertising,¹⁶ and many people, both in and out of the profession, think this is good. There are many good things about it; but one basic trouble is that constitutionally unprotected advertising—that is, advertising which is false, fraudulent or misleading—simply cannot be controlled by the Bar. The real responsibility for controlling such advertising rests with the disciplinary commissions in the several states, and they are insufficiently funded to exercise any meaningful control.¹⁷

Advertising by lawyers did not begin after the recent Supreme Court decision. During the early days of the Republic, local papers often carried advertisements by individuals setting out their qualifications for representing potential clients in all kinds of matters. The advertisements were decorous, with powerful references, but they were nevertheless advertisements.¹⁸

15. *Id.* at 300 (citations omitted).

16. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

17. Telephone conversation between Carl H. Rolewick and the author (Apr. 1988). Mr. Rolewick was Administrator of the Illinois Registration and Disciplinary Commission.

18. *E.g.*, the following passage appeared in the July 1, 1835 edition of the *Daily National Intelligencer*:

AMERICAN LAW AGENCY

The American and British Public are informed that the undersigned have established Law Agencies in each of the United States and that claims of every description will be carefully attended to through the medium of eminent and responsible counsel in each State, and personally by the undersigned in the State of Maryland, and at Washington, in the District of Columbia.

Please address them under the firm of Hoffman & Dobbin, Counsellors at Law, Baltimore, Maryland.

DAVID HOFFMAN

GEORGE W. DOBBIN

Baltimore, Jan. 1, 1833 [sic].

REFERENCES:

We are of opinion that entire confidence may be placed in David Hoffman, Esq. LL.D. Counsellor-at-Law in the Supreme Court of the United States, and in his associate George W. Dobbin, Esq. and that claims entrusted to them will be

In a recent issue of the *Texas Bar Journal*, there is set out a portion of a letter written by John J. Good, the first President of the Dallas Bar Association, to his wife. In the letter, dated April 15, 1861, Mr. Good said:

I have some business yet unfinished of here. Have a horse and couple of yoke of oxen tied to a tree here in the shape of fees and came very near getting another (fee) of 80 sheep, fine ones at that, but alas I am *underbid* and the prospect has gone glimmering. . . .¹⁹

Over the years, advertising was found wanting by the Bar which effectively terminated it. Now the wheel has turned again. Advertising, I think, tends to move lawyers toward commercialism and the drive for money. But it is constitutionally here and we must live with it. Somehow it must be controlled.

The Bar many years ago was disturbed by the fact that some lawyers undercharged what the Bar considered appropriate for standard services. This occurred often in probate matters and in simple real estate transactions. So the Bar established minimum fee schedules, and in most instances the courts enforced them. That was a pretty solid move toward commercialism in my view. However, as you know, the Supreme Court in *Goldfarb v. Virginia State Bar*²⁰ said that this practice violated the antitrust laws.²¹ That was a good decision, but the discussion of the Court lent weight to the argument that lawyers, after all, are in business just like everybody else.

Although I am somewhat uncertain about my history on this point, I can safely say that as recently as forty years ago, most billing was on a transactional basis. That is to say, it was based on

attended to with ability, integrity, and promptitude.

John Marshall, Chief Justice U.S. Richmond
 Edward Livingston, Secretary of State, U.S. Washington
 N. Biddle, President Bank U.S. Philadelphia
 Prime, Ward, King & Co. New York
 Thomas H. Perkins & Sons, Boston
 Robert Gilmer & Sons
 Hoffman, Ben & Co.) Baltimore
 Baring Brothers & Co.
 Thomas Wilson & Co.) London
 Bolton, Ogden & Co.
 W. & G. Brown & Co.) Liverpool

23 Daily Nat'l Intelligencer 6995 (Washington D.C.), July 1, 1835.

19. Letter from John J. Good (April 15, 1861) to his wife, *quoted in John J. Good*, 38 *TEX. B.J.* 408 (1975) (emphasis added).

20. 421 U.S. 773 (1975).

21. *Id.* at 791-92.

what the lawyer involved thought was fair for the difficulty of the matter, the expertise required, the time involved, the results achieved and the like. Some lawyers charged simply on a contingency basis. These cases, where the outcome was uncertain, largely involved litigation in personal-injury cases. In some probate matters, however, the contingency principle was used by applying a percentage to the size of the estate, even though recovery itself was clearly not a matter of contingency.

There has been an erosion of transactional billing to one based primarily on time. While at first hailed as an improvement, this has had some adverse effects and has tempted lawyers to put in more time than is either necessary or desirable on some matters where they think they can collect their fees. In other instances, of course, it tends to overlook results achieved.

A good illustration of the abuse of time billing is found in the use of depositions. When depositions were introduced in the early to mid-1930s, it was thought that by the disclosure which they would achieve, the trial itself would become less of a game of chance and that settlements would be more prompt.

Without going into the many abuses that have developed in the deposition process, and the understandable inability of courts to control it, it is enough for our purposes to say that more often than not the use or abuse of depositions has greatly increased the cost of litigation.²² In many large urban law offices there are so-called "litigators" who never try cases, but who spend untold hours taking depositions. When lawyers for both sides—or all sides—in a piece of litigation do this without objection from their fellow lawyers and expect to get paid for it on an hourly basis, then professional objectives are lost and greed takes over. The clients suffer because no one is representing them; no one questions whether the depositions are needed.

Some federal judges, however, are now beginning to question those practices in early pretrial conferences. One Chicago judge recently told me of a case where the lawyers planned depositions in England, France and Japan. But when he questioned them it was clear that a resolution of the issues in the case did not require the taking of any of the depositions and he did not permit it. I am sure the clients were happy with that decision.

Let me give you one example of an outrageous abuse of the deposition process which occurred several years ago in Chicago. A case was filed challenging the fairness of the price paid for stock in

22. REPORT, *supra* note 12, at 278-79.

a company which had agreed to a takeover. I think you may accept the fact that this was simply a "hold-up" case, one without any basis except its nuisance value. The principal defendants were the corporate entities involved, although the directors of the company that had been taken over were named as defendants as well. The case was settled between the class action plaintiffs and the corporate defendants and the directors were to be dismissed. The amount to be paid to the plaintiffs and the fee to be paid to plaintiffs' counsel shocked my conscience, and it must have worried the plaintiffs as well, because the matter would have to go to the court for approval. Part of the settlement required the defendant directors to submit to further depositions. The whole thing was a sham. Those additional depositions were taken only to build up time records, primarily so that counsel for the plaintiffs could claim that the fee sought for counsel would have some reasonable relationship to the time spent, and so counsel could obtain the court's approval.

What a far cry that is from the ideal that Chief Justice Burger recommended in the quotation I gave before. Thus, the increasing use of time alone as a basis for billing is beginning to raise problems of professionalism.

Another startling thing that is taking place is that any number of large firms are now going into business or businesses which they control or manage. Two extensive newspaper articles, one in the *National Law Journal*²³ and the other in the *Washington Post*,²⁴ described those activities in detail. Some of the businesses are related to the law firms' legal practice; others are not. For example, one firm has set up an investment advisory service, and this functions principally, I guess, to advise clients of the law firm. Another has set up a lobbying entity in Washington, D.C. Another firm has invested heavily in real estate development. In one case at least a firm has joint venture real estate developments with one of its principal clients.

Why do they do this? Well, they claim to serve their legal clients better by providing ancillary services: sort of a one-stop shopping center. I suspect, however, that they could do just as well for their law clients if they introduced them to competent financial advisers, lobbyists or investors in real estate. I think the real reason is money. They are financially successful firms or they would not be able to build up investment pools. However, they are not

23. Stille, *When Law Firms Start Their Own Business: The Lure of Bigger Profits*, NAT'L L.J., Oct. 21, 1985, at 1.

24. Marcus, *Lawyers Branch out from the Law*, Washington Post, March, 13, 1986, at A1, col. 4 (final ed.).

content with that. They want more money. At a recent symposium in which I had a small role, a representative of one of those firms said it was exciting and great fun to engage in these activities. That may be so, but should lawyers and law firms do it? In an opinion written in 1955, Justice Jacobs of the Supreme Court of New Jersey observed, "Perhaps society would be better served if practicing attorneys were to remain full-time lawyers rather than become part-time business men."²⁵

In England there is a current debate as to whether or not the lawyers should have interdisciplinary partnerships. Some governmental officials and many legislators want it, because it will mean more control by them. The Barristers have, I believe, already said no. The Law Society has not spoken.²⁶ What we have in this country, of course, goes beyond interdisciplinary partnerships because the firms themselves create the other entities, often with their own partners in control and peopled by firm members.

Obviously, there are a multitude of conflict problems, but under existing law those seem to be satisfied by prior full disclosure. If one of these controlled businesses craters or if a real estate development turns out to be disastrous, the issue of the adequacy of disclosure could be interesting. The question of whether lawyers should be permitted to engage in such business activities and at the same time to practice law is one which I hope will attract the attention of the Bar.²⁷

I will give one more example, one that is of course known to all of us, and that is the beginning salaries paid to associates by major law firms in major cities. Law students have commented to me that what is going on makes no sense, and that if the scale keeps going up it will indicate even greater stupidity. Chief Judge John Grady of the federal district court in Chicago put a little different emphasis on the practice when he said:

For [the associate] to come to any conclusion other than the fact that the dollar is what the practice is all about would require some sort of superhuman mental gyration on his part, because all of the stimuli to which he's exposed indicate the exact reverse. The buck is what it's about. Get it, get it now . . . [W]hat are you worth a year later when you know something, or five years later

25. *In re Carlson*, 17 N.J. 338, 346, 111 A.2d 393, 397 (1955).

26. Letter from John Mottram, Chief Executive of the General Council of the Bar, England, to the author (Sept. 29, 1987) (enclosing "Comments on Behalf of the London Common Law and Commercial Bar Association on Law Society's Paper on Multi-Disciplinary Partnerships (Draft Copy)").

27. I have discussed this question at greater length in Stanley, *Lawyers in Business*, 8 N. ILL. U.L. REV. 17 (1987).

when you know a little more? Where does it stop?²⁸

As you can tell from what I have said, I think that all these things that are going on lead to the conclusion that John Grady reached: the buck is what it is all about. Put in more polite terms, commercialism seems to be taking over from professionalism. And it is adversely affecting our profession. In my area at least there is less civility in the courtroom. More and more lawyers refuse to be bound by any commitment when it is not in writing. Lawsuits without merit are increasingly filed because it is economically wiser for defendants to settle rather than to fight for principle. Abuse of process takes place when an economically strong litigant faces a weaker one. And how many times do lawyers become handmaidens of their clients who instruct them to ruin the opponents?

These abuses of process and of the high standards of our profession can be corrected only if we lawyers do something about it.

Happily, some things are taking place which are encouraging, although there is a long way to go. I referred earlier to the work of the ABA Commission on Professionalism. That Report,²⁹ which I commend to you, made a number of specific recommendations for action addressed to the law schools, the practicing lawyers, the organized Bar and the judiciary. The Report has had wide circulation and has received generally favorable comment. Further, it has resulted in some preliminary action.

For example, a number of law schools have made the Report part of the courses they are offering on legal ethics and professionalism.³⁰ In January of last year, the 1988 Annual Meeting of the Association of American Law Schools had as the theme for its Plenary Session "The Law School's Opportunity to Shape the Legal Profession: Money, Morals and Social Obligation." The Report of the ABA Commission was the focal point of the discussion. An increasing number of state and local Bar associations have themselves undertaken studies of professionalism and legal ethics.³¹ Many of us associated with the work of the Commission have been invited to talk about its work or to write articles about it. All of this is good.

I regret that the ABA has taken no significant action to implement our Report despite the fact that it named an implementation committee in 1986 and that in some instances all we recommended

28. J. GRADY, *Commentary*, in *THE LAWYER'S PROFESSIONAL INDEPENDENCE: AN IDEAL REVISITED* 30 (J.B. Davidson ed. 1985).

29. *REPORT*, *supra* note 12.

30. *E.g.*, Cornell, University of Pennsylvania.

31. *E.g.*, Arkansas, Illinois, Indiana, Massachusetts.

was study, such as a study of the propriety of lawyers in business.³² But the Report is beginning to develop a life of its own, and the keen interest of the law schools, of some groups within the ABA, and of state and local Bars gives assurance that its message will not die.

Central to the success of the changes which we need to make will be the attitude of the judiciary. The judges' role must be a much stronger one than it has been in the past. They can no longer make the same assumptions about the profession that they used to. They must be fair, of course, but they must be realistic, firm and tough.

What is needed is not simply pleas for us to reach for aspirational goals, although there is nothing wrong with that. In large part, I suppose, what we seek and believe in *are* things of the spirit. But we must be practical, too. And practicality says to us that if we do not act, we are going to become a commercial enterprise, regulated by others, and without independence. And when that happens, the system of justice will be quite different from the one we know. I fear greatly then for the individual and his or her rights.

Despite what I have just said, I am not pessimistic. It is my observation, as it was of our Commission,³³ that there are a tremendous number of fine people practicing law in these United States, people of high competence and high ideals. They do important pro bono work. They serve their clients and the system of justice well. All we have to do is get their attention. Their support will follow.

32. REPORT, *supra* note 12, at 280-81.

33. *Id.* at 304-05.