

NORTH DAKOTA BAR SPEECH  
2014 MART VOGEL LECTURE ON PROFESSIONALISM AND  
LEGAL ETHICS

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Thank you, Michael McGinnis, for those too-generous remarks. I am honored to deliver the Vogel lecture this year. Part of that honor is to appear before my great friend, Chief Justice VandeWalle, whom I met through the work of the American Bar Association Ethics 20-20 Commission. He is a gentlemen and a scholar, and I was so pleased to learn he is running unopposed for another term in North Dakota.

What I did not know was that I was going to go up against Ron McLean. Nobody should have to face that fellow in a courtroom. Juries must swoon before his folksy, persuasive closing arguments.

I never thought in my lifetime I would have to give this speech. I thought (how gullible am I) that the issues I am to address had been put to bed once and for all by three different events.

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I.	THE DEATH KNELL OF ASSAULTS ON LAWYER INDEPENDENCE .....	443
A.	MULTIDISCIPLINARY PRACTICE REJECTED.....	443
1.	<i>Arthur Andersen Craters</i> .....	444
2.	<i>ALPS Withdrawn</i> .....	444
II.	THE KETTLEDRUMS RUMBLE ANEW .....	445
A.	DEWEY LeBOEUF.....	445
B.	LEGISLATIVE CHANGES IN ENGLAND AND AUSTRALIA .....	447
C.	ACADEMICS ATTACKING OUR PROFESSIONAL STANDARDS .....	448
D.	WHO PRACTICES LAW BEFORE THE SECURITIES AND EXCHANGE COMMISSION? .....	449
III.	WHAT ARE THE CAUSES OF ALL OF THIS NEW TURMOIL?.....	449
A.	SELF-INFLICTED WOUNDS .....	449
1.	<i>Lawyer Misconduct</i> .....	449
2.	<i>The Way BigLaw is Run</i> .....	450
3.	<i>No Loyalty</i> .....	451
4.	<i>Gang of 33</i> .....	451
B.	OTHER FORCES .....	452
1.	<i>The Digital Revolution</i> .....	452
2.	<i>Calls to Shorten Law School</i> .....	453
3.	<i>Those Who Want to Share</i> .....	453
IV.	WHAT DO WE MEAN WHEN WE SPEAK OF CORE VALUES? .....	454
A.	COMPETENCE .....	454
B.	THE OTHER FOUR C'S.....	454
C.	DOING BUSINESS WITH CLIENTS.....	455
D.	REASONABLE FEES.....	455
E.	UNLIMITED POWER . . . RESTRAINED .....	456

F.	LIMITS ON ADVOCACY .....	456
G.	OUR OBLIGATIONS WHEN NO ONE IS LOOKING .....	457
H.	THE DISCIPLINARY SYSTEM.....	457
I.	CLIENT TRUST ACCOUNTS.....	458
J.	CLIENT PROTECTION.....	458
K.	THE BAR.....	458
L.	DEFENDING THE JUDICIARY.....	458
M.	PRO BONO .....	459
V.	WHAT WOULD HAPPEN WITH NON-LAWYER OWNERSHIP?.....	459
A.	LOSS OF INDEPENDENCE .....	460
B.	CONFUSION OF VALUES .....	460
C.	ANOTHER MOUTH TO FEED .....	461
VI.	CONCLUSION—RECAPTURING OUR PRIDE .....	461

## I. THE DEATH KNEEL OF ASSAULTS ON LAWYER INDEPENDENCE

### A. MULTIDISCIPLINARY PRACTICE REJECTED

The first event was the great multidisciplinary practice (“MDP”) debate at the ABA in 2000. The then Big Five accounting firms had set their sights on including legal services in their department stores of financial services they were then intent on building, driven by the fact that mere auditing work was not expansive and lucrative enough for these leviathans of the consulting world. The problem was that our professional rules were impediments to such a growth strategy. Our obligation of confidentiality was inconsistent with the auditor’s duty of disclosure. Our conflict of interest rules, particularly the rule governing imputation, were impossible for the accountants to implement; the Big Five world generated bushels of serious conflicts that the Big Five studiously left unidentified. Last, the accountants’ dream violated Rule 5.4, the rule designed to preserve one aspect of professional independence by prohibiting the sharing of fees with non-lawyers.<sup>1</sup> That rule may sound like lawyers just wanting to keep the

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1. MODEL RULES OF PROF’L CONDUCT R. 5.4 (2006).

money, but in fact was designed to prevent non-lawyer control of lawyers, an inevitable result, if one believes as I do, that non-lawyers would never respect the core values of our profession.

In response to this initiative, the ABA set up a multidisciplinary practice Commission that, shockingly, succumbed to the accountants' importuning, proposing a repeal of Rule 5.4's prohibition on fee sharing.<sup>2</sup> But by the time the proposal came to the ABA House of Delegates, it was dead on arrival. The profession rose up—if not as one, close to it—and voted overwhelmingly not to change the rules.<sup>3</sup>

### 1. *Arthur Andersen Craters*

That clarion call turned out to be unnecessary. In litigated matters, lawyers like to think the victories come from the trial lawyer's brilliance. But every once in a while, victory comes from the other side's blunder. And the House of Delegates' verdict on MDP was sealed—I naively thought for all time—by one such blunder. In this case, it was Arthur Anderson's demise as a result of the Enron debacle: the second nail in what I mistakenly thought was a coffin. Enron, the darling of the financial press and the Wall Street titans, now cratered into liquidation.<sup>4</sup> A subsequent autopsy revealed that the bankruptcy had been rendered all but inevitable by the fact that the auditors from Arthur Anderson—once the class of the accounting world—had been corrupted by the firm's desire to generate outsized fees from Enron on the Arthur Anderson consulting side.<sup>5</sup> This demonstrated, once and for all (I incorrectly thought), that MDP's were dead, and that professionals henceforth would mind their knitting, not compromising their independence by mixing into one enterprise the offering of incompatible services.

### 2. *ALPS Withdrawn*

Third, there was a slight assault on my confidence when, in 2011, the President of the ABA appointed an Ethics 20-20 Commission that, in my view, was populated with too many cynical academics and BigLaw lawyers who were outspoken critics of our profession's rules governing conflicts of interest. I immediately worried that Ethics 20-20 would become a vehicle for a new assault on our citadel, Rule 5.4, as well as other core values, and

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2. See John Paul Lucci, *New York Revises Ethics Rules to Permit Limited MDPS: A Critical Analysis of the New York Approach, the Future of the MDPS Debate After Enron, and Recommendations for Other Jurisdictions*, 8 FORDHAM J. OF CORP & FIN. L. 151, 157 (2003).

3. *Id.*

4. *Id.* at 190-94.

5. *Id.* at 193.

so wrote the new Commission. My forecasting, alas, proved correct (oh, how I wished I had been wrong), and the Commission launched a trial balloon for repealing the applicable rules, this time devising a benign new acronym, ALPS, alternative legal practice structures,<sup>6</sup> that fortunately turned out to be a mountain too far. But this was only because of an organized response led by state bar leaders making it clear the ABA House of Delegates was no more interested in compromising core values in 2012 than it had been back in 2000.

## II. THE KETTLEDRUMS RUMBLE ANEW

Breathing a sigh yet again, I fooled myself into thinking the issue had been put to rest for a very long time. But no sooner had ALPS been given a respectful burial than—you should pardon the mixed metaphor—the kettledrums could be heard yet again. At most recent count they number at least four and, in my view, represent real threats to the legal profession's core values—indeed whether our profession can continue as a profession at all.

### A. DEWEY LEBOEUF

Reading the saga of Dewey LeBoeuf can evoke many different responses. First, there is the sadness that must follow the demise of two once esteemed, venerable law firms.<sup>7</sup> One hates to see such great names tarnished and the lives of so many professionals and their related personnel devastated.

Second, one must admit a certain level of schadenfreude in seeing a firm that clearly lost its way get its just deserts. No one played the merger/lateral partner game more aggressively than this firm, swashbuckling through the legal landscape, picking off fictional books of business with guaranties that made the deals for the new recruits sound like the firm was snaring free agents for the Bronx Bombers.

Third, there were the shades of Enron. Apparent from the indictments of the key figures,<sup>8</sup> Dewey had turned over its operation in large measure to non-lawyers who were running the business of the firm;<sup>9</sup> lawyers

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6. James Podgers, *Ethics 20/20 Edges Towards Decision on Endorsement of Versions of Alternative Law Practice Structures*, A.B.A. J. (Dec. 2, 2011), [http://www.abajournal.com/news/article/ethics\\_20\\_20\\_edges\\_toward\\_decision\\_on\\_endorsement\\_of\\_versions\\_alternative/](http://www.abajournal.com/news/article/ethics_20_20_edges_toward_decision_on_endorsement_of_versions_alternative/).

7. The firm was the result of a merger between Dewey Ballentine and LeBoeuf, Lamb, Greene & McGrae.

8. Matthew Goldstein, *4 Accused in Law Firm Fraud Ignored a Maxim: Don't Email*, N.Y. TIMES (March 6, 2014), [http://dealbook.nytimes.com/2014/03/06/former-top-leaders-of-dewey-leboeuf-are-indicted/?\\_r=0](http://dealbook.nytimes.com/2014/03/06/former-top-leaders-of-dewey-leboeuf-are-indicted/?_r=0).

9. *Id.*

apparently just did not “get it,” but those financial geniuses did. And the effect of Dewey’s rewarding these income statement magicians based on the “success” of the firm’s business demonstrates why lawyers must control their law firms.

What had this enlightened regime wrought? Overpaying fixed sums to so-called partners in deals that turned out financially reckless for sure.<sup>10</sup> But anyone can exercise bad business judgment, though, even I, a financial neophyte, remember asking how this was not the same mistake the long-lamented Finley Kimble made decades ago.<sup>11</sup>

No. It was far worse than that. These leaders of the firm embarked on a course of financial legerdemain. Now I am not sure whether what happened was criminal—though seven guilty pleas from lesser lights surely sounds like it was<sup>12</sup>—but what is uncontradicted is that this law firm’s management cooked the books. And they cooked the books not just to defraud third party bondholders who were lured to finance this law firm’s continuing recruitment of high-paid lawyers whose books of business were not nearly large enough to make them profitable. That would have been bad enough. No, they cooked the books that they presented to their partners, misleading them into thinking that the non-lawyer management was running the place in a prudent, profitable way.

It reminds me of that old joke of the partner in a two-man firm who receives double the requested fee from a mistaken client. Now that partner faces an ethical dilemma. What is that dilemma? Should he tell his partner? But in this case, there was no overpayment by clients. Rather, the clients did not buy enough services, leaving the firm in treacherous financial straits, a fact conveniently covered up by management.

My reaction was that once again those of us who opposed non-lawyer ownership and control of law firms had a new Exhibit “A,” proving yet again we were right. You can then imagine my shock when I read in Law 360 on March 13, 2014, as I was beginning to focus on a topic for this speech, that Jonathon P. Armstrong, a London partner in Duane Morris LLP, thought these Dewey LeBoeuf events called for an elimination of the rules governing non-lawyer ownership of law firms.<sup>13</sup> How could one

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10. *Id.*

11. E.R. Shipp, *Finely Kimble, Major Law Firm, Facing Revamping or Dissolution*, N.Y. TIMES (Nov. 11, 1987), <http://www.nytimes.com/1987/11/11/business/finley-kumble-major-law-firm-facing-revamping-or-dissolution.html>.

12. Matthew Goldstein, *Pleas by “Dewey Seven” Reveal Details on Financial Manipulation*, N.Y. TIMES (Mar. 28, 2014), <http://dealbook.nytimes.com/2014/03/28/pleas-by-dewey-seven-reveal-details-on-financial-manipulation/>.

13. Casey Sullivan, *Experts in N.Y. argue for non-lawyer funding of law firms*, REUTERS L. (Jan. 30, 2014), available at <https://a.next.westlaw.com/Document/>

conclude that? Surely Dewey LeBoeuf's story does not lead one to conclude that law firms need outside capital. No one needs investors to fund imprudent contracts with side-switching lawyers to lure them from one firm to the other with income guaranties. Please save every law firm from such an absurd business model. Moreover, whatever pressure these non-lawyers brought on Dewey LeBoeuf to lose its fiscal way will bear no resemblance to the pressure outside shareholders will create for law firms to maximize shareholder value by abandoning pro bono activities, bar association participation, and other "frills" of our profession in the name of increasing earnings per share or the price of Caldwell & Moore's<sup>14</sup> share price, to say nothing of the conflict between the firm's duty of confidentiality to its clients versus the need to make full disclosure to the shareholders of the enterprise.

#### B. LEGISLATIVE CHANGES IN ENGLAND AND AUSTRALIA

The next kettledrum, which we have heard for a while, arises from changes that were made in Australia and in England and Wales permitting non-lawyer ownership of law firms.<sup>15</sup> The experience so far in each country has been quite limited<sup>16</sup> but, in fact, in Australia there now is non-lawyer ownership of a few law firms,<sup>17</sup> and the Australian firms are making forays into the United Kingdom.<sup>18</sup> How far behind can it be that homegrown United Kingdom firms follow suit, offering shares to the public in their law firms as well.<sup>19</sup> And, the calls have already begun that the more liberal regimes will render United States law firms not competitive in the international arena and, for that reason alone, our rules on non-lawyer ownership and control should be repealed.<sup>20</sup> And any time the clarion call goes out that American competitiveness requires change, there is the worry that some bilateral treaties on trade or some pronouncement from the World Trade Organization may trump our rules of professional conduct—in the name of competition, a race to the bottom begins. Moreover, because our

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Idfb974a089a111e3a8b4a05885c772c3/View/FullText.html?transitionType=CategoryPageItem&contextData=(sc.Default).

14. Caldwell & Moore has been the name I have used for a mythical New York law firm since 1987.

15. Nick Robinson, *When Lawyers Don't Get All the Profits: Non-Lawyer Ownership of Legal Services, Access, and Professionalism 2* (Harvard Law Sch., Paper No. 2014-20), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2487878](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2487878).

16. *Id.*

17. *Id.* at 27.

18. *See id.*

19. *See id.* at 16-26.

20. *See id.* at 2 n.11.

professional rules are adopted state-by-state, there is always the risk that one state will approve non-lawyer ownership and, in the name of competitiveness, a national race to the bottom will occur.

### C. ACADEMICS ATTACKING OUR PROFESSIONAL STANDARDS

The academy has been sounding a kettledrum for some period of time with unusual enthusiasm.<sup>21</sup> Particularly among the professional responsibility professors, we find deeply troubling and disquieting antipathy towards the profession, in general, and a cynicism toward our individual core values, in particular. One must wonder why these folks are spending their careers taking such a dim view of the profession their graduates will pursue.

This approach often focuses on the question of why lawyers should have a monopoly on the practice of law,<sup>22</sup> and it embraces the idea that having more options within the legal industry, including having non-lawyers practice law side-by-side with lawyers, would provide additional competition—as if having a million lawyers and literally hundreds of mega firms does not provide quite enough competition.

Others disparage the idea of core values. Consider what my friend and co-author, W. Bradley Wendel, argues:

The trouble with the idea of core values is that it is often invoked in a question-begging way, and when the rhetoric of professionalism is probed more carefully, it often turns out to be merely a cover for a rearguard action to protect the profession's monopoly rents. The pattern of this argument is familiar: Some characteristic of lawyers not shared with non-lawyers, such as an almost exceptionless duty of confidentiality, is identified as a core value that would be threatened by the involvement of non-lawyers. Lawyers seldom stop to ask, however, whether that posited characteristic is in fact a value from a disinterested standpoint. Near-absolute confidentiality, for example, may not be a good thing from the point of view of affected non-clients, and it may not even be desired by clients.<sup>23</sup>

Similarly, our core value of self-regulation is attacked by the academics: “Many scholars have argued that the legal profession, acting through the organized bar, mostly promotes regulation in the economic

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21. *See id.* at 3 n.17.

22. *See, e.g.,* Milton C. Regan, Jr., *Lawyers, Symbols, and Money: Outside Investment in Law Firms*, 27 PENN ST. INT'L L. REV. 407, 431-38 (2008).

23. W. Bradley Wendel, *In Search of Core Values*, 16 LEGAL ETHICS 350, 351 (2013).

self-interest of lawyers, and it is up to other institutions, such as courts or legislatures, to protect the public interest.”<sup>24</sup>

#### D. WHO PRACTICES LAW BEFORE THE SECURITIES AND EXCHANGE COMMISSION?

The loudest and most recent kettledrum sound just came to my attention. I was informed, as I journeyed to North Dakota, that at the prompting of Pricewaterhouse, the SEC is considering entreaties to permit Pricewaterhouse personnel, whether lawyers or non-lawyers, to practice law before this critical agency. This offensive would pose a double-barreled threat to our profession, providing for not only multidisciplinary practice and the sharing of fees with non-lawyers, but the practice of law by non-lawyers.

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Taking the four examples set forth above, one can see that the profession faces three different assaults on our professional values. The first is renewed attempts to permit multidisciplinary practice in which lawyers and other service providers would practice in one organization and share in the fees generated by the legal professionals. Second, the profession is faced with the possibility of naked non-lawyer ownership of law firms with non-lawyers in complete control of the enterprise and lawyers reporting to non-lawyers on all of the matters that count. Last, there is the prospect of non-lawyers formally entering the practice of law alongside lawyers with clients having a free choice whether they want a lawyer or non-lawyer to represent them.

### III. WHAT ARE THE CAUSES OF ALL OF THIS NEW TURMOIL?

As I survey the scene, there is a combination of self-inflicted wounds and injuries we are suffering from outside forces. Permit me to address each category separately.

#### A. SELF-INFLICTED WOUNDS

##### 1. *Lawyer Misconduct*

Self-inflicted wounds are the most troubling and at the same time the most controllable. The cause of these assaults on our professional values is lawyer misconduct itself. Every time a lawyer fails to live up to the lawyer's professional responsibilities, that episode provides our enemies

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24. *Id.*

with the fodder they need to argue that lawyers are not deserving of any special rules or protection because they violate the trust reflected in those rules. And it only takes a few highly publicized examples of misconduct to overwhelm what I know to be the fact that 99% of all lawyers respect our rules, live them daily, and are proud of the special responsibility reposed with lawyers under the present regime.

One recent example demonstrates the point in most unfortunate terms. We learned just last week that there were lawyers at General Motors who knew full well of the dangerous ignition switches installed in Chevys and Saturns and that those faulty switches had led to a number of fatal accidents and other tragic consequences.<sup>25</sup> In what was a frontal assault on the applicable rules of professional conduct, lawyers who had an absolute responsibility to take these matters up the ladder within General Motors to the highest authority within the organization, i.e., the Board of Directors, not only hid the facts from the General Counsel (an incredible assertion), the CEO, and the Board, but misled them as to the seriousness of the problem for reasons that are totally inexplicable.<sup>26</sup> This action or inaction clearly put these lawyers on the wrong side of our professional values. If the General Motors example was the only instance our critics could point to it would be bad enough, but time and again we have seen that lawyer conduct has aided and abetted client fraud and criminal conduct and even gone further to make the lawyer's principals in the client misconduct.<sup>27</sup>

## 2. *The Way BigLaw is Run*

It all began with *The American Lawyer* publishing profits per partner and the sudden recognition by BigLaw that if law firms could only add "X" number of billable hours per lawyer per month, the resulting revenue would go directly to the bottom line. From that beginning, our profession saw a seismic change in the way law firms were run. Unproductive partners could be jettisoned without pause; swashbuckling rainmakers, often barely practicing law at all, moved business from firm to firm at the behest of the highest bidder; partner/associate ratios became so extreme that any new associate who thought he or she had a meaningful chance at partnership was clearly delusional; outside law firms so large that for their partners to meet in one location might require the hiring of a convention center. The list

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25. Michael A. Fletcher, *GM releases results of ignition-switch probe*, WASH. POST (June 5, 2014), [http://www.washingtonpost.com/business/economy/gm-to-release-results-of-ignition-switch-probe/2014/06/05/31c09d90-ec3b-11e3-9f5c-9075d5508f0a\\_story.html](http://www.washingtonpost.com/business/economy/gm-to-release-results-of-ignition-switch-probe/2014/06/05/31c09d90-ec3b-11e3-9f5c-9075d5508f0a_story.html).

26. *See id.*

27. *See, e.g.*, *In re Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig.*, 794 F. Supp. 1424 (D. Ariz. 1992).

could go on and on, but the bottom line is clear. In following this path of obsession with economics and the concomitant ignoring of other values, it is hard to generate enthusiasm for the values of our profession or conforming one's conduct to the rules.

### 3. *No Loyalty*

In my view, it is impossible to demonstrate the loyalty our core values must reflect in our dealings with our clients if lawyers are not loyal to each other. Put simply, loyalty is a value that should start at home. Yet, the profession has clearly succumbed to a dog-eat-dog attitude among lawyers, often directed toward colleagues in the same firm. As a result, we read of lawyers moving among law firms with the same frequency as planes landing at and taking off from O'Hare. One now searches almost in vain for individuals who have actually spent their whole careers in one law firm. And the disloyalty of partners to each other translates into even worse attitudes towards associates and support staff. Law firms may be lucrative today, but, by and large, they are not happy places.<sup>28</sup> And in large part that is due to this lack of loyalty. Why be loyal when I am simply building my business at this weigh station so that I can find a new weigh station that will pay me even more until, if I am lucky, I might land at Dewey LeBoeuf with a guaranteed contract for millions in compensation (Oops!).

### 4. *Gang of 33*

The last self-inflicted wound is exemplified by the Gang of 33, the nickname I gave to the group of general counsel of prominent, prestigious and highly successful law firms who made a presentation to the Ethics 20-20 Commission that, in my view, caused more damage to our profession than any other recent event.<sup>29</sup> What these thirty-three lawyers urged was the evisceration of our rules of professional conduct governing loyalty to our clients. What they asked is that the rules be changed so that all conflicts were personal to the lawyer who was handling the matter, permitting law firms to take positions directly adverse to clients of the law firm on any matter and at any time, without regard to the nature of the matter, so long as the lawyers representing that client did not participate in

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28. See Debra C. Weiss, *Are lawyers from top law schools a lot happier about their career choice? Statistically the answer is no*, A.B.A. J. (Aug. 28, 2013), [http://www.abajournal.com/news/article/are\\_lawyers\\_from\\_elite\\_schools\\_a\\_lot\\_happier\\_about\\_their\\_career\\_choice\\_stat/](http://www.abajournal.com/news/article/are_lawyers_from_elite_schools_a_lot_happier_about_their_career_choice_stat/).

29. See generally Lawrence Fox, *The Gang of Thirty-Three: Taking the Wrecking Ball to Client Loyalty*, 121 Yale L.J. Online 567 (2012), <http://yalelawjournal.org/forum/the-gang-of-thirty-three-taking-the-wrecking-ball-to-client-loyalty>.

these acts of betrayal. They also sought the wholesale blessing of all prospective waivers of conflicts of interest and the absolute right to sue any organizational clients' parent, subsidiary, or sister corporation.

The message here was clear. It was more important for these firms and their million dollar plus, plus, plus profits-per-partner never to have to turn down a matter for conflict of interest reasons than it was for our profession to demonstrate loyalty to our clients. And in that initiative was a desire to sacrifice a core value of the profession and leave lawyers showing no more loyalty to their clients than Goldman Sachs or Pricewaterhouse, accepting, perhaps even embracing, the end of professional independence as we know it.

In some ways, simply the act of requesting this relief caused almost as much damage as its adoption would have caused. Now the enemies of our profession can point to these thirty-three leaders of the best and the brightest as proof of how unimportant the core value of loyalty is when, of course, we know otherwise.

## B. OTHER FORCES

### 1. *The Digital Revolution*

The argument has been made that the digital revolution has made it possible to break down any given problem into an algorithm that makes it so much more possible for laymen to craft documents or handle routine legal problems.<sup>30</sup> But we lawyers understand that the ability to build the most elaborate decision tree of zeros and ones does not provide the judgment only lawyers can bring to each engagement. Moreover, we know the assertions that so many aspects of legal services are routine are vastly overstated and ignore the fact that even in the delivery of these so-called routine legal services, it takes specialized knowledge and training to identify the non-routine from among the “routine.”

E-discovery is another demonstration of how little the digital revolution contributes to good lawyering. While the computer can locate many documents that might be privileged, it cannot determine which documents are privileged—a topic so vast and convoluted whole books have been written on the subject.<sup>31</sup> Anyone who has viewed the result of a digitized privilege search will know what I mean.

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30. Norman Rozenberg, *Will DIY legal tech replace lawyers?*, DELL (Jan. 30, 2015), <http://techpageone.dell.com/tech-culture/will-diy-legal-tech-replace-lawyers/>.

31. See, e.g., EDNA S. EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* (5th ed. 2007).

Similarly, computer research is no substitute for lawyer judgment. It might find 956 cases in which “negligence” appears within fifty words of femur, but it is virtually no help in telling the lawyer that he or she has chosen the wrong search terms or in identifying which of the hundreds of cases will actually help the client’s cause. It has been my experience that the abandonment of old-fashioned “in the books” research for the click of a mouse results in work product whose quality varies widely.

## 2. *Calls to Shorten Law School*

The legal profession has felt the effects of the Great Recession. Jobs are down;<sup>32</sup> graduates are looking for work;<sup>33</sup> law school applications are at thirty-five year lows;<sup>34</sup> and the cost of law school has soared.<sup>35</sup> These are critical issues that must be addressed. But one solution that has been repeatedly suggested is unacceptable. That is to shorten law school to two years.<sup>36</sup> Law school was three years back in 1939 when my dad graduated from Penn Law. It is still three years despite the explosion in the topics law schools now address and how increasingly complicated the existing topics have become. Dismal bar passage rates do not begin to prove that our students are over-prepared to practice. All that adoption of a two-year requirement would suggest is that those undergraduates who have not attended law school are merely missing four semesters of instruction.

Imagine the outcry if we learned that because of the six-figure loans incurred by newly-minted medical doctors, medical school should be reduced by one year. We would be appalled by the risks an omitted year would create. Why then should not the outcry—particularly by lawyers themselves—be equally loud in response to these suggestions? The core value of a complete education should not be compromised.

## 3. *Those Who Want to Share*

The last outside force causing consternation is the Pricewaterhouses and Goldman Sachs of the world, behemoths that each represent a phalanx of enterprises who see “gold in them thar hills.” The former,

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32. Catherine Rampell, *At Well-Paying Firms, a Low-Paid Corner*, N.Y. TIMES (May 23, 2011), <http://www.nytimes.com/2011/05/24/business/24lawyers.html>.

33. *Id.*

34. Elizabeth Olson & David Segal, *A Steep Slide in Law School Enrollment Accelerates*, N.Y. TIMES (Dec. 17, 2014), <http://dealbook.nytimes.com/2014/12/17/law-school-enrollment-falls-to-lowest-level-since-1987/>.

35. *Id.*

36. Peter Lattman, *Obama Says Law School Should Be Two, Not Three, Years*, N.Y. TIMES (Aug. 23, 2013), <http://dealbook.nytimes.com/2013/08/23/obama-says-law-school-should-be-two-years-not-three/>.

notwithstanding the lessons of Enron, want to offer legal services without limitation, but will be happy to start with the IRS and the SEC as forums that will welcome their officious intermeddling, Rule 5.4, Rule 1.7, and others be damned. The latter want to be the investment bankers as these law firms go public, offering shares to “passive” investors (but hardly passive about return on investment), and then making a market in the shares of the next Dewey LeBoeuf and Brobeck Phlegler.

#### IV. WHAT DO WE MEAN WHEN WE SPEAK OF CORE VALUES?

In the face of these threats, we (particularly I) have found shelter in the defense that any of these developments would compromise our core values, destroy our independence, eviscerate client protections, and end law as a profession. But while proceeding on this path I feel that I, especially, and many like me, have taken too cramped a view of core values. Yes, we have argued that the loss of professional independence was inevitable and that our client protections would be compromised or eliminated by those not subject to our regulatory regime. But as I contemplated this speech, a much broader view of why lawyers are special emerged: not because we have any special entitlements or prerogatives, but because we have special responsibilities to our clients, to the judiciary, to the bar, and to the public. Permit me to enumerate my catalogue. Maybe you can think of others.

##### A. COMPETENCE

Susan Martyn, my long-suffering co-author, and I have developed the teaching construct of the five C’s. The first of these is competence, and the concept embraces all of those requirements our profession has established to entrust the affairs of others in the hands of qualified fiduciaries. The following are required for such a high task: a three-year education in an accredited law school, meeting the ABA’s exacting requirements, passage of a bar exam, surviving character and fitness review, and continuing legal education required either by bar rule or the demands of the practice. The law is complicated, nuanced and ever-changing. It takes competent lawyers to master it.

##### B. THE OTHER FOUR C’S

These are the heart of the core and also what we traditionally enumerate as “core values”: (a) We are agents of our clients; it is the client who determines the objectives of the representation,<sup>37</sup> requiring the lawyer

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37. MODEL RULES OF PROF’L CONDUCT R. 1.2 (2006).

to adopt a collaborative approach respectful of the client's dignity and authority, in short, client control. (b) The lawyer has affirmative duties of communication.<sup>38</sup> The client must be informed before the client asks and the duty of communication comprehends bad news, including informing the client of the lawyer's own blunders. (c) Absent the client's informed consent, itself a defined term requiring full communication with the client, the lawyer's lips are sealed, refusing to disclose any confidential information of the client,<sup>39</sup> a category that is as big as all outdoors, including facts that are in the public domain and those that are generally known. (d) And the last C, perhaps a stretch C-wise, is conflict of interest resolution—what we require in order to reflect the loyalty to prospective, present, and former clients in terms of identifying conflicts and then either seeking a waiver (if the conflict is waivable), again on informed consent, or refusing to take on or resigning from the conflicting representation.<sup>40</sup> No other line of endeavor comes close to these strict fiduciary duties that are at the core of who we are as lawyers.

#### C. DOING BUSINESS WITH CLIENTS

Is there another for-profit enterprise that recognizes as a core value that doing business with clients must be carefully circumscribed? Lawyers may not do business with clients if that would create a conflict of interest.<sup>41</sup> And if a business relationship is pursued, the client must be informed in writing about the transaction, the client must be given an opportunity and the advice to consult another lawyer, the client must be warned of the risks involved, and the transaction has to be entirely fair to the client, a conclusion that has to be true both going into the relationship and after the fact.<sup>42</sup>

#### D. REASONABLE FEES

Jokes aside, lawyers may only charge reasonable fees.<sup>43</sup> Without asserting that some present lawyer fees (including my own) are reasonable only in the BigLaw world, it remains true that any client, at any time, and without regard to the how splendid the outcome, can challenge the reasonableness of the lawyer's fees, a core value that reflects as well as anything how our profession has assumed special responsibility by arming

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38. MODEL RULES OF PROF'L CONDUCT R. 1.4 (2006).

39. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2006).

40. MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (2006).

41. MODEL RULES OF PROF'L CONDUCT R. 1.8(a) (2006).

42. *Id.*

43. MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2006).

our clients with this unique power. One can only imagine how certain nameless non-lawyer enterprises would look and act if they subjected themselves to such a high standard.

#### E. UNLIMITED POWER . . . RESTRAINED

We lawyers rarely pause to contemplate our power, why it is we must be officers of the court, why entrance into the priesthood requires going through a series of culling gates (yet another mixed metaphor). But it is the awesomeness of this power that so prompts granting it only to those who have demonstrated the knowledge, judgment, and character to be entrusted with it.

This power applies to all lawyers, not just litigators. In the transactional field, few “deals” would ever close if it were not for the opinion-giving authority of lawyers, opining on important matters such as capacity, authority, conformance to law, full disclosure, tax implications—the list is endless. In short, lawyers are truly the gatekeepers here, either opening or slamming the gates shut depending on the circumstances and based solely on their expertise and integrity.

And, of course, the power analysis applies full bore to trial lawyers. Every time I sign and file a complaint, I pause to contemplate the awesome power we possess. With no more than our John Hancock we trigger all the trappings of the courts. Judges get assigned. Subpoenas issued. Documents demanded. Depositions conducted. Juries impaneled.

#### F. LIMITS ON ADVOCACY

That awesome power is tempered, as it should be, by limits on lawyer advocacy. These are the limits that, again, reflect a core value of our profession, a brook on our authority that has no real cognates in the free enterprise world. Lawyers owe a duty of candor to the tribunal.<sup>44</sup> This covers a number of special responsibilities, none more challenging than the obligation to correct false testimony, even false testimony by one’s own client.<sup>45</sup> Similarly, lawyers may not advance arguments or claims that do not have a sound basis in fact and law.<sup>46</sup> Lawyers have special obligations when dealing with anyone who is unrepresented.<sup>47</sup> Yet a fourth example is the lawyer’s obligation to respect the rights of third parties, even

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44. MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(1) (2006).

45. MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(3) (2006).

46. MODEL RULES OF PROF’L CONDUCT R. 3.1 (2006).

47. MODEL RULES OF PROF’L CONDUCT R. 4.3 (2006).

adversaries, by avoiding opportunities that the inadvertent acts of our opponents present from time to time.<sup>48</sup>

#### G. OUR OBLIGATIONS WHEN NO ONE IS LOOKING

What do we do when no one is looking? There can be no more telling demonstration of the special trust that is bestowed upon lawyers than those activities we engage in hidden from the prying eyes of courts or opponents. I think of two in particular. First, consider document production. Requests are served, files—electronic or otherwise—are searched, responsive non-privileged documents are produced and those withheld are identified in detail on a privilege log. How easy it might be to withhold a damaging document. Or fail to disclose that an allegedly privileged document was sent to an individual who arguably breaks the privilege. And the only way the system works is because we believe that lawyers recognize and fulfill the sanctity of their role.

Similarly, lawyers regularly engage in witness preparation. Indeed, we believe it is a lawyer's duty to do so. But the line between prep and the suborning of perjury is a fine one. And no one is in the conference room except lawyer and witness. Yet, lawyers take the responsibility for doing no more than gussying up the truth, recognizing and fulfilling this additional duty that the officer-of-the-court role imposes upon them. Of course lawyers are not perfect, but they achieve a level of perfectibility that is worthy of respect—one that the rest of the world (and maybe a few law professors) do not begin to appreciate.

#### H. THE DISCIPLINARY SYSTEM

Now I come to a series of core values that extend beyond the lawyer-client role while also defining us as professionals, core values that are impossible to imagine co-existing with a publicly traded Caldwell & Moore, or lawyers providing legal services to third parties for a wholly-owned subsidiary of Goldman Sachs.

Lawyers play the instrumental role in the disciplining of professional colleagues who have violated rules of professional conduct. Lawyers serve on hearing boards, render decisions, monitor the system's effectiveness, and suggest improvements to the system itself. They develop diversion programs and seek to prevent misconduct through professional instruction and lawyer assistance programs, giving thousands of hours of time to the endeavor.

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48. MODEL RULES OF PROF'L CONDUCT R. 3.4 (2006).

## I. CLIENT TRUST ACCOUNTS

Following guidelines they themselves have helped establish, lawyers maintain, under strict scrutiny, lawyer trust accounts that hold hundreds of millions of dollars that belong not only to clients, but also third parties, including their clients' adversaries. And they do so gratis, despite the heavy responsibility such trust accounts impose.

## J. CLIENT PROTECTION

Volunteer lawyers administer client protection funds in every state, imposing fees on themselves and their colleagues to pay off claims when, sadly, lawyers convert client funds to their own use.

## K. THE BAR

It seems altogether fitting to remind ourselves at this wonderful North Dakota Bar annual meeting of the institutions we have created called bar associations. Think, just for a moment, of all that bar associations undertake. Continuing legal education, publication of magazines, law reviews, and books covering the gamut of topics from how to start a law office to the meaning of the equal protection clause, recommendations to the courts regarding rules of professional conduct, professionalism, disciplinary standards, rules of civil procedure and evidence, regulation of trust funds, IOLTA requirements and administering the distribution of those funds, establishing committees and sections to provide attention to specialized areas of the law, fostering diversity initiatives, lobbying for and contributing to legal services for the poor, and evaluating judicial candidates. The list is just a sample, but the scope and intensity of these activities reflect a dedication by lawyers to improving the profession and supporting the rule of law measured in millions of hours, all without compensation and largely unheralded.

## L. DEFENDING THE JUDICIARY

The role of an independent judiciary is an essential component of our legal system. Though not perfect, the judiciary we have is the best we can achieve consistent with human frailty and the unfortunate election of judges. Far too often the judiciary is attacked for results that are unpopular, even divisive. Some may be justified; some may be pure pandering for political advantage. Either way, if judges act consistently with their special ethical obligations, the judges must speak through their opinions. They may not respond to their critics directly. That is when the job falls to the lawyers who, by and large, fulfill their obligation to defend the

independence of the judiciary, a special responsibility that the bar has embraced.

#### M. PRO BONO

Last, but by no means least, there is the obligation of lawyers to perform pro bono services. While this obligation is not mandatory under our rules, the fact is that lawyers and law firms dedicate millions of hours to pro bono services annually.<sup>49</sup> Lawyers working pro bono handle everything from the representation of children in family court matters addressing with whom the child shall live through post-conviction proceedings in capital cases. Lawyers similarly represent, on a pro bono basis, not-for-profit organizations, and whole institutes have been devoted to train lawyers to handle these complicated and important matters. Suggested minimum requirements for pro bono are found in the professional rules of conduct.<sup>50</sup> Those who rank law firms, such as *The American Lawyer*, evaluate law firms on the extent of their pro bono commitment, with many firms dedicating from three to five percent of their hours to pro bono engagements.<sup>51</sup> Law firms and lawyers also compete for various awards that are given by the American Bar Association and state and local bars to honor pro bono service. Bar associations also establish training programs for undertaking pro bono engagements, and it is not unheard of for law firms to commit millions of dollars in disbursements and multiple millions of dollars in time to their pro bono endeavors. In short, pro bono work is one of the most critical core values of our profession and sets the profession apart, in a quite remarkable way, from those enterprises that would love to own law firms or help establish law firms as public companies owned by their passive shareholders.

#### V. WHAT WOULD HAPPEN WITH NON-LAWYER OWNERSHIP?

Given the foregoing, one can fully comprehend how the three incursions would leave the profession diminished in significant ways, perhaps unworthy of the title at all.

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49. See, e.g., *Pro Bono and Community Service*, LATHAM & WATKINS, <http://www.lw.com/AboutUs/ProBonoAndCommunityService>.

50. MODEL RULES OF PROF'L CONDUCT R. 6.1(a) (2006).

51. See *Pro Bono: How Does Your Firm Rate?*, THE AM. LAW. (June 30, 2014), <http://www.americanlawyer.com/id=1202608682486/Pro-Bono-How-Does-Your-Firm-Rate?slreturn=20150230205511>.

### A. LOSS OF INDEPENDENCE

This has been the classic argument that I believe still carries as much force as ever. If control of law firms is in the hands of “passive” return-on-investment-obsessed shareholders or even other service providers, the loss of independence is inevitable. Everyone recognizes that control equals power and that the operation of for-profit enterprises is to be conducted in the best interests of their shareholders or owners. For lawyers, that is not the case. Our work must be undertaken in the best interests of our clients, as so many of our core values that I outlined above demonstrate. Only reasonable fees may be charged. Only business transactions with clients can go forward if they meet fundamental fairness principles. The client gets to decide the objectives of the representation. The list could go on. But the achievement of these obligations can only occur in the context where lawyers are in complete control of the institution.

Our detractors argue lawyers already lack independence. Some lawyers work directly for corporations who employ them full time. Other lawyers are paid by third parties, e.g., by an insurance company to represent the client. Those situations, it is asserted, compromise independence. That is certainly true, and the profession has had to fight long and hard to maintain the independence of lawyers who are in those positions because, in fact, they can compromise independence. But that is no reason for us to compromise further by permitting non-lawyers to own law firms, whether as investors or as part of a multidisciplinary practice, when there is no countervailing benefit to be derived from doing so. Indeed, one can extrapolate, particularly from the insurance company example, to conclude how much worse things would be if Caldwell & Moore were a public company.

### B. CONFUSION OF VALUES

Lawyers are required to maintain confidentiality.<sup>52</sup> Auditors and other professions have duties of disclosure.<sup>53</sup> Lawyers owe their obligations to their clients. Auditors, in particular, have duties to the public that trump any duties they might have to their clients. The accounting firms ignore what we call conflicts of interest and treat duty of loyalty as a duty owed by individuals in the firm, rather than the firm itself. The Goldman Sachs of this world are even worse. They have fought tooth and nail to avoid owing anything that resembles a fiduciary duty to their customers. They think

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52. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2006).

53. See generally Leo C. Moersen, *The Independent Auditor's Duty to Disclose Corruption*, 11 BUS. & PROF. ETHICS J. 89 (1992).

nothing of the horrible conflicts created in selling collateralized mortgage obligations to their customers at the same time they sell those same obligations short for their own account—on an undisclosed basis, of course.

### C. ANOTHER MOUTH TO FEED

It surprises me when some argue that lawyers' monopoly on the delivery of legal services results in costs that are too high; these dissenters assert public ownership of law firms would make costs come down.<sup>54</sup> It is certainly true that I am arguing for the practice of law to be in the exclusive domain of lawyers. But that is not a monopolistic statement. All one has to do is interview lawyers at all levels of our profession, from sole practitioners to the globe-straddling, multi-partner colossi, to learn that the competition to provide legal services is as robust as it has ever been.

Moreover, adding outside investors to the equation will only increase the cost of legal services because those passive investors are anything but passive when it comes to their interest in a return on their investment. They will not buy shares in Caldwell & Moore for charitable reasons. They will expect law firms to compete with General Motors and Google in terms of return on investment or stock appreciation. In short, there is no way the delivery of legal services will become less expensive when the law-firm family invites hungry investors insisting on their fair share to the dining room table.

### VI. CONCLUSION—RECAPTURING OUR PRIDE

My hope is that the foregoing is viewed as the sermon of a cheerleader for the profession, if you'll pardon another mixed metaphor. I think we, as lawyers, have so much for which we can be proud. We have the right values. We have the right interests. We have the talent. We have the expertise. What we are missing is effective advocacy on our own behalf. Advocacy to respond to our detractors with the message that lawyering should be left to lawyers—the only individuals qualified by training, values, and experience to deliver the legal services the public needs.

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54. See, e.g., Laurel A. Rigertas, *The Legal Profession's Monopoly: Failing to Protect Consumers*, 82 *FORDHAM L. REV.* 2683 (2014).