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Pace University Honor Board: Philip Blank Ethics Lecture

Bill Wagner

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Speech

Pace University Honor Board Philip Blank Ethics Lecture April 3, 1997

Introductions

DEAN OTTINGER

I'm Dick Ottinger. I have the privilege of being Dean of the Pace University School of Law. I would like to welcome all of you to our Seventh Annual Philip D. Blank Memorial Lecture.

I would like to welcome his friends and the faculty and staff present today. And a particular welcome to Phil Blank's family, his wife, Mary his daughter, a Pace graduate, and her husband, Peter who are with us as well. Phil's brother, Arthur Blank, maintains the family's association with Pace University by being an adjunct professor here. We are also pleased to have present today Phil's sister, Peggy Murphy, and her husband, Tony.

For those of us who knew Phil, this is a very special occasion, allowing us to perpetuate the memory of his marvelous work for Pace through this lecture series that we hold every year at this time.

Phil was a bundle of energy. He added so much to the creation and the excellence of the law school. He was our Associate Dean for External Relations.

Respected by both the bench and by Bar, he was active in the Westchester County Bar Association, and the White Plains Bar Association. He was active in Mount Pleasant, his home town, as well. He was a fabulous human being.

Wherever he went, he contributed enormously and made the closest of friends. Before he was Associate Dean for External Relations, he started our Hopkins Chair, which is a tribute to Judge Hopkins. He raised the first real money for the law school through those efforts. In every way, he was just a wonderful person to be associated with.

He was a marvelous professor. He taught such subjects as professional responsibility, estate planning, and wills. He was awarded the Pace University Humanitarian Award, an appropriate recognition by the University, posthumously, when he passed away.

So this is a way of our saying thanks to Phil, and continuing to keep alive the contributions he made, both personally and with the law school, as indeed his efforts continue to contribute every day to the success of our programs.

This lecture is always on the subject of attorney ethics, a subject with which Phil was very much involved. Bill Wagner is one of the leaders in the field. We are honored, indeed, to have you with us.

A special word of thanks to the Honor Board, who sponsors this lecture series every year and its President, Judith Machetti, who could not be with us. We do have with us Claudine Morabito and Brian Schmidt who will talk to you shortly. Brian works night and day with us and did a fabulous job in organizing the program. I am sure you will have a very enlightening and stimulating lecture by Bill Wagner, and I welcome you on behalf of the Honor Board. I would like to introduce Claudine Morabito, Vice President.

CLAUDINE MORABITO

Good evening. My name is Claudine Morabito. I am the Vice President of the Administration for the Honor Board. On

behalf of the honor board, and Brian Schmidt, who has worked tirelessly to put together this forum, I would like to welcome you to our seventh annual Philip Blank memorial forum.

The Honor Board has always been at the forefront of attorney ethics. This year, we have Mr. Bill Wagner to speak for us on attorney ethics.

Brian Schmidt has worked extremely hard to put this together, and we are glad he is able to join us today. On behalf of the honor board, I would like to welcome Brian Schmidt.

BRIAN SCHMIDT

I'd like to express my sincerest appreciation to all those individuals that helped put the Blank Forum together this year. Without them, this lecture would not be possible. I express my thanks for their support.

This year the Blank lecture is proud to have Mr. Bill Wagner, an attorney whose legal career spans three decades. Mr. Wagner received his Juris Doctor, with honors, from the University of Florida in 1960, where he was also an associate editor of the law review.

Mr. Wagner entered into the profession of law, and established his legal career as a trial attorney. His reputation as a trial attorney can only be deemed impressive by all standards. Bill Wagner is a partner at the law firm of Wagner, Vaughn and McLaughlin, located in Tampa, Florida.

Mr. Wagner is a past president of the Association of Trial Lawyers of America. He is a Fellow of the American College of Lawyers; a Fellow of the International Academy of Trial Lawyers; an advocate of the American Board of Trial Practice; and a Fellow of the American Bar Foundation.

Mr. Wagner is an elected member of the American Law Institute. He served as a member of the ALI Council. With the American Law Institute, Mr. Wagner has served as Advisor for the two Restatement projects that promise significant influence upon the American system of civil justice: Restatement of the Law, Torts III: Product Liability, and Restatement of the Law of Torts, III: Apportionment of Liability.

Bill Wagner is a member of the Bar of Florida, and has served on its Board of Governors. Mr. Wagner has served as the

Trustee and Treasurer of the Roscoe Pound Foundation. He is a lifetime fellow of the Foundation, and currently serves as a Honorary Trustee.

Bill Wagner was a member of the Commission On Professional Responsibility in Trial Practice, and the founder of, and served on the Board of Directors of Trial Lawyers for Public Justice.

Mr. Wagner has assisted in the formation of the Association of Personal Injury Lawyers (APIL), and is an international member of APIL in Great Britain.

In his spare time, Bill Wagner is a licensed commercial pilot, with multi engine instrument seaplane and helicopter rating. Flying, to Mr. Wagner, is a principal hobby.

A curriculum vitae such as Bill Wagner's is why we are all here today. Would you all please join me in welcoming this year's distinguished Philip B. Blank Memorial guest lecturer, Mr. Bill Wagner.

Speech

BILL WAGNER

Dean Ottinger, members of the Blank family, Honor Board, guests, thank you very much for the opportunity and the honor to be here tonight.¹

Brian did a nice job of introducing me. I'm always pleased when somebody reads my curriculum vitae the way I typed it out.

I noticed you left something out. You left out the fact that I'm also a notary public.

1. Every trial lawyer experiences consternation each time upon reading a transcript of trial proceedings, finding again that what sounded so polished while being spoken, reads as if composed by a below average grade school student. Court reporters debate the extent to which they can properly "edit" a transcript to make false starts, run on sentences, mumbling grammar and improper tense read in some intelligible manner. A good "listen" can't be made into a good "read" except by major literary surgery. Only a genius can write so as to express a "pregnant pause". With this in mind, I have resisted the urge to edit this speech to be the speech I wished I'd given instead of the speech I gave. I confess to some minor editing at points in the transcript where I totally failed to understand what I must have said. I have tried to correct my southern grammar. To the extent I have failed, please try to read with your eyes shut and your ears open.

He also kindly left out something I should mention. When I go to law schools and I speak, I'm often introduced as someone who is a member of the Board of Bar Examiners, and this usually brings on hisses and boos from the students present.

We escaped that problem tonight.

Also, I want to thank those who put together the program. I had one embarrassing problem with the picture on the program. When Professor Madden met me at the law school, he said, "I thought your son was coming down here." I tell my secretary not to send this particular picture of me if people are actually going to see me. It's kind of embarrassing.

I'm here tonight to speak to you about ethics. And it's a difficult subject. I called first, for source material, to Professor Geoffrey Hazzard. He is the Executive Director of the American Law Institute, and nationally recognized as an expert in the area of ethics. He makes a very substantial contribution to his profession testifying in court on behalf of one side or the other concerning lawyer ethics.

I called him, and I said, "Professor Hazzard, I need some help." I told him about this speech, and his first reaction, was, "My God, why would they ask a plaintiff's lawyer to talk about ethics?"

He was willing to give me some assistance. He told me that he had a case book. I knew it was a very thick and expensive book, so I borrowed the case book from someone whom I also know well. Many of you may have heard of him. His name is Reece Smith. He's the former President of the ABA. He is a well-known lawyer. He practices in Tampa, but, as he's gotten older, he has decided also to become a Professor. He teaches ethics at Stetson University Law School.

I asked Reece Smith how I could get some information on ethics. He said, "Stop by," so I stopped by. He gave me a stack of books. My wife will verify, the stack had to be at least two feet high. Then, as only a professor would do, he said, "Bill, you ought to check the library. There is probably still more information there."

I called our Florida Supreme Court, because the Court today is very concerned about lawyer ethics. The Court recently appointed an ethics commission comprised of members of the profession including a number of very distinguished people, not

only from our state, but also from outside the state. In addition, the commission published materials.

After I collected all of that information, I sat down and started to look through it. I will not tell you that I read it all, but I did skim through it, and I found that there was somewhat of a central theme.

The central theme was that everybody feels lawyers' ethics are in terrible shape. Everybody says we must do something. Everybody has suggestions. Some say we have to teach law students how to be more professional. Some say we have to pass more rules. We've got to amend the existing rules. We've got to have the courts "lean on" the lawyers. Everyone calls for more civility, and more professionalism. Unfortunately, for some of us old fellows, we hear more calls for a return to the "good old days."

I was having quite a bit of difficulty trying to come up with a solution that I might propose. Being asked to give a speech on ethics in front of all these distinguished people, I thought, well what can I say?

I did find a sprinkling of agreement throughout this material, and even some things that I think make sense. I don't want you to think that I have an original thought on this. This is all copied from other people. I have learned from the Honor Board here that that is called plagiarism in law school. Lawyers do it all the time and get away with it.

I thought to myself that maybe I should try to rethink this problem of ethics from the beginning. About the time that I was formulating that thought, I received a letter from Brian. He wrote, "Mr. Wagner, we would like to hear about some of the cases which, over the years, have impacted you on a personal and professional level, which discuss the subject of ethics in litigation."

Brian's letter brought back memories of some of my cases. Now, like many trial lawyers, and particularly like plaintiff's trial lawyers, when you think of cases, you remember the ones you lost. And I've lost some. Over the past 30 years, I've lost quite a few. One of them that I lost occurred some 30 years ago . . . and ethics was involved. The other case that remains so clear in my mind, I lost last year . . . and ethics was also involved.

These were both very hard fought cases. They raised all the litigation, ethical, and discovery problems that you might imagine would arise in complex cases. They both involved horrible injuries, putting tremendous personal pressure on me to win the case. But I lost each case.

Like any case that I lose, and particularly those that I lose where someone had been so seriously hurt, I am constantly drawn to try to think back . . . What did I do wrong? What more could I have done?

In rethinking those cases, as Brian suggested for this lecture, I began to ask, in the context of ethics, "Did my ethics, or perhaps my lack of ethics, effect the loss?"

One thing I can tell you for a certain. If, in 1965, I had tried that lawsuit with the same ethical standards that appear to govern in 1995, I probably would have won the case. And if I had won the case in 1965, a 40- or 45-year-old man, my client, with both of his legs cut off at the hips . . . that poor man would have had a much easier life.

Why did I act differently in 1965 than I may have in 1995? I thought to myself, have I changed that much? Have the rules changed? Has the practice changed?

In 1965 when I was faced with an ethical problem in the trial of a case, or in preparation for a trial, I would always ask the question in my own mind, "Can I do that?"

For years, the mere fact that I would ask the question, "Can I do that?", made me stop and think. "Bill, if you have to ask, you probably shouldn't do it." As a result, I would be particularly careful. More often now, in 1997, when I say, "Can I do that?", the answer I hear is, "Why not?"

Now, why did I get that way? For the first time in many years, in preparation for this talk, I tried to understand the change in my outlook. I tried to answer the question, "What is it that makes a person ethical?"

I came across this little book by Robert Fulgrum. Many of you have probably seen it before. The book is titled, *All I Need To Know I Learned in Kindergarten*. Childhood ethics. I copied some of these early ethical lessons. They sounded pretty familiar, and perhaps good for a lecture on lawyer ethics.

"Play fair." "Don't cheat." "Don't hit people." "Clean up your own mess." "Don't take things that aren't yours." "Say

you're sorry when you hurt someone." And one that applies to some of us older folks, I guess I'm the oldest person here, but it applies to old folks, "Goldfish, hamsters and white mice die . . . and so will you."

Not a bad start for an education in ethics.

Actually, Fulgrum had a longer list. One of the things he learned was, "Flush afterwards," but I can't make that fit here.

I once was a Boy Scout. I can still say, "trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful, thrifty, brave, clean and reverent."

And those things I learned in my early years instilled ethics as part of my personality.

But it wasn't until law school, that I experienced my first real picture of a different kind of ethics. Legal ethics. Upon entering law school, I was given a booklet that I brought along tonight.² When I received my copy in 1957, I received it as I entered law school and was told this: "Before you can get your ticket, before you can be admitted to the practice of law, you must read and understand this. You must certify in writing that you have read it and understand it." And that was our total required education in ethics in law school.

Although I received this booklet in 1957, I didn't get around to reading it until 1960, just before graduation. As you might suspect, I had to sign my certificate to get my license, and I wanted to get that license, so I read the booklet.

It's an interesting booklet. It contains, in the early part, the 47 canons of professional ethics, adopted by the ABA for the first time in 1908. When I read the booklet it was 52 years old, twice my age at that time.

Reading it I learned that ethics meant a lot more than being good, or being moral, or being the right kind of person and not the wrong kind of person. Ethics also meant business ethics.

Business ethics made up a large part of the original canons. They explained how to properly make money, and how to keep the other guy from taking your clients, and how to charge a fee, and how to advertise . . . you were not to do it.

2. *Your Privileges and Responsibilities as a Lawyer in Florida*, The Florida Bar, Tallahassee, Florida, 1956.

I won't bore you by reading a lot of this, but when I read it again, I found some interesting things in the booklet that give the flavor of the "good old days." It was okay, in fact, you were urged to use the minimum fee schedule. The minimum was pretty "minimum" too. You were sometimes allowed ethically to charge less than the minimum fee schedule . . . you could give "special consideration" to "the brother lawyers, and their widows and orphans."

It was okay to list your name in the yellow pages. The yellow pages were one long listing of lawyers' names, one lawyer to a line. No bold letters were allowed. Specifically by the Rules, only patent, trademark, and admiralty lawyers could even suggest that they specialized in any field of law. That Rule caused my first grievance.

My wife, not this one, the first one, went to flight school to learn to fly with a group of women. The newspapers wanted to cover the story of women learning to fly. It was unique, in those days, for women to do anything except cook meals and raise children. The reporter asked my wife the question, "What does your husband do?" She told them that I specialized in personal injury law. Sure enough, that statement appeared in the paper, and there was a grievance filed against me. I had to get the reporter to verify her innocence in declaring me a specialist. I wrote letters. My wife wrote letters. We submitted them to the Bar Association. After three or four weeks, they wrote a formal warning letter to me: "Don't ever do it again." For several years, I had to list that warning letter in my application for malpractice insurance.

This booklet contains a number of other things, too. The Florida Bar has its own set of 33 rules. They list many of the same thing listed by the ABA, but in different words. There were a couple of the Rules I thought you would enjoy that were probably applicable just for Florida. One rule stated specifically that you were not allowed to get business from police officers.

As I quote this next Rule, I still shudder. It was okay to split a fee with a "forwarder of business, whether such forwarder be an attorney, or a reputable collection agency." This was during the Depression, and the Florida Supreme Court made the practical decision that if they didn't let lawyers share a fee with a collection agency, the lawyers would go broke.

The booklet contains two other sections. A number of pages included inspirational quotations by famous lawyers. They spoke of the ideals of the profession. There were also a number of pages of questions and answers by the ABA committee on ethics and the Florida Bar's committee on ethics. Lawyers were seeking answers . . . "How do I conduct myself?" There were practical answers to practical questions. What size letters were allowed on the window of an upstairs office? Normally you were allowed one sign, but if you had a corner office, could you put an office sign on a window facing each street?

The quotations in the booklet were from famous people. Consider these examples from the memoirs of the Vice President of the Confederate States of the United States, describing law. "Law requires . . . stout adherence, to all the precepts and principles of morality . . . and possession and practice of the highest and noblest virtues that elevate and adorn human nature. Not even the office of the holy minister opens such a wide field for simply doing good to one's own man." They quoted George Sherwood, a great lawyer from 1896. "No man can ever be a great lawyer, who is not also, in every sense of the word, a good man."

The booklet quotes the admonition of the Chief Justice of the Florida Supreme Court, who, at that time, had served nearly 30 years on the Court. He admonished lawyers to "read the canons as often as the preacher reads his Bible."

This booklet, from 40 years ago, still contains great quotes. I suppose you may use these and similar quotes from time to time today. Unfortunately, however, the book is otherwise very out of date. Unfortunately the law, as practiced today, is very different.

These quotations speak of ideals that lawyers may have really practiced in the 1900s. There may be a few lawyers today who still feel that those quotes are applicable. But most people believe that in today's competitive world that people, businessmen, and lawyers, cannot live up to such high standards. Or at least they can't live, in the manner to which they have become accustomed, by such high standards. Since today more than ever, lawyers live to serve their clients, it stands to reason that lawyers, if they are to succeed, will also find it difficult, probably impossible, to practice within these restraints.

Back in 1960, there were some other changes taking place. All lawyers didn't follow the advice in this book. Just before graduation, we were invited to visit in the home of the Dean of the law school. I went to the University of Florida. It was located in a dry county, no alcohol; to have a drink with the Dean was a double experience.

The Dean was going to informally meet with the graduating class and tell us what it was really like to practice law. Now, with due respect, that's the last time I ever thought a law school Dean knew anything about practicing law.

But I did listen carefully. Some things stick out in your mind. The Dean warned us, "Whatever you do when you get out there, don't be called a lawyer who engages in shark practice." You didn't find the words "shark practice" in the ethics booklet we were given. But he explained what it meant. He said that a person is guilty of shark practice if, although strictly following the Rules, he simultaneously sets traps for, or takes unfair advantage of his fellow lawyers. Hear that now. You were a bad lawyer if you followed the Rules, but at the same time, set traps for or took advantage of his fellow lawyers.

Then he gave some examples. He probably gave a lot, but these made an impression. He said it was shark practice to ever think about taking a default without calling the other lawyer and giving advance warning. It was shark practice to spring a brand new case on a lawyer at a hearing, without giving advance notice. It was shark practice to set a hearing during your opposition's vacation. It was shark practice to spring a surprise unique objection to evidence during trial.

Our Dean cautioned us with regard to what would happen to lawyers who got a reputation for shark practice. He warned, don't do it. Not because it's immoral. Not because it is unethical. He had a few more practical reasons. The first reason . . . the judge won't like it . . . and he won't like the lawyer. He spoke about a judge's discretionary rulings. If you were one of those shark practice lawyers, you would likely have some of those discretionary rulings go against you.

He also said that one should not engage in shark practice because the other lawyers will get even. If you make their lives hell, they'll make your life hell. He observed that what a lawyer needs to do in the practice of law is to try to get along in the .

legal world. Lawyers needed to work with each other, and in some cases, that meant that you scratch their back, they'll scratch yours.

There were some practical reasons for that policy. In those days, lawyers seldom charged by the hour. They more frequently charged by the case. Value billing, they call it today. The foreclosure, the typical lawsuit, the divorce . . . they each had a more or less standard fee.

Lawyers didn't have computers to do pleadings, so, if you were running late, and your staff had to re-type a pleading on a single piece of paper, with carbons, it was a real chore. If you made a mistake, your staff had to re-type that whole page again. More work for a lawyer meant less profit. If you charged a set fee, the more work you had to do, the less profit. Your opposition was faced with the same problems.

If you could get along with and work with the other lawyers, they made a higher profit. You would make more profit. There would be less lawyer hours of work to earn the agreed fee. There would be less fighting to make a point. And usually, with cooperation on both sides, the clients came out all right.

I'm sure all of you know how things are different today. Today you get paid by the hour. So, the more work you do, the more you get paid. After all, the senior partners have to keep those associates busy, to make the partners more money.

The more complex the litigation, the more the client needs your help. That means more work, more billable hours. It's no longer profitable to make it easy on the other lawyer. In fact, it is profitable to make it hard on the other lawyer.

Today, judges, who used to personally know every lawyer appearing in court, now strain to get through massive dockets without recognizing almost any of the lawyers who appear before them. Now lawyers may appear before a judge only once in two or three years. The judge today often doesn't have the opportunity to know anything about the lawyers arguing the case.

The seeds of today's problems were planted in the early years, and they have come home to roost now. The seeds of today's problems were formalized in the early ABA canons. They have been carried forward in a modified form to the present time. Canon 15 was a major contributor to the conflicts that

exist today. Let me read the parts of Canon 15 that helped create these problems. Listen for the conflicting commandments.

First, "Nothing operates more certainly to create popular prejudice against lawyers . . . than the false claim . . . that it is the duty of a lawyer to do whatever may enable him to succeed in winning his client's cause."

However, that same canon goes on to say that lawyers owe their "entire devotion to the interest of the client . . . warm zeal in the maintenance of his rights, and the exertion of his utmost learning and ability." "The client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense." The law doesn't tolerate "violation of law or any manner of fraud or chicanery." I'll talk to you about that word chicanery later. Finally, the lawyer "must obey his own conscience, and not that of his client."

Now, if you think of the conflict created within that single canon, you will realize what has been a major cause of many of today's problems.

The crux of many of the problems in litigation today, in my opinion, is that, in our confrontational society, the responsibilities of a lawyer originating in that canon are so internally conflicting that they are impossible to accomplish.

What happens if the warm zeal for the client conflicts with the lawyer's conscience? What if the assertion of every defense or remedy does not strictly violate any law, but the conscience of the client is driven by interests different from those of the conscience of the lawyer?

In 1965, when I started aggressively practicing, there was already considerable concern about civility and professionalism in the practice of law. Since then, society has become even more driven by the goal of success at any cost. The conscience of my client, your client, and of society, has drifted further and further from the ideals we learned in scout camp, or in kindergarten, or in church. Our clients today are driven more and more only by the ethics of the marketplace. The lawyer, in representing the client, has been driven . . . willingly, I suggest, in many cases . . . to mold his own conscience to that of his clients.

To survive in a competitive legal marketplace, lawyers have to be very careful when their conscience conflicts with

their client's conscience. If a lawyer's conscience is so strong that the lawyer cannot display proper "zeal" for his client, there are plenty of other law firms out there whose sole devotion to the client will increase the odds of the client winning.

Clients now, more than ever, believe in that old phrase, "nice guys finish last." Competition has caused clients to adjust their way of doing business. The law has also become a competitive business. It is a big business, and the ethics of the marketplace more strongly guide our legal industry. Competition in the legal business has driven lawyers, consciously or unconsciously, to focus on how to adapt to and accept the client's conscience, rather than serve their own conscience.

The first battlefield in this conflict was, as you might suspect, in the courtroom. That's the traditional battlefield of lawyers. But for those of you who plan to practice outside the courtroom, you will find that the battlefield exists everywhere.

Contracts are now written . . . and the profit margins are planned, taking into consideration the cost of "the litigation that will be involved." A building contractor's bids are submitted in recognition that the contract expectations aren't going to be met and that it will be cheaper to litigate, than to fulfill contract expectations. The bottom line controls business. Lawyers and litigation are just part of the expense affecting the bottom line.

How has the Bar responded to this? Well, in my judgment, they have failed to adjust. They have only tried to patch up the loopholes in the Rules, by writing more Rules. And usually they just create more loopholes. As more and more loopholes in the Rules are discovered by ingenious lawyers, more and more Rules are written to close the loopholes . . . and this just creates more and more loopholes.

There was a major revision in 1969 to replace the Canons with the Code of Professional Responsibility. The Canons had lasted 61 years. Only 14 years later, because the Bar was concerned with all the loopholes, they rewrote the rules again. In 1983, the profession was called upon to follow the newly written Rules of Professional Conduct.

And again, 14 years later, things are still not getting any better. In my judgment, things have gone from bad to worse. I am not alone in this belief. Almost every lawyer you listen to,

almost all the books, the professional articles you read, and the leadership of professional organizations say that the lawyers are in trouble. They did not find a magic cure to solve the problem of lawyer ethics.

Well-meaning people continue to believe that we should try to band-aid the problem. Listen to some examples of suggested cures. We must teach students better. We must write more Rules. We now have "A Lawyer's Creed of Professionalism." It says "let's believe we can be nicer guys." We have a "Lawyer's Pledge of Professionalism." It says, "let's promise to be nicer guys."

The basic thesis remains. The Rules still tell us that lawyers cannot do anything illegal. They cannot commit fraud. But lawyers, as professionals, are trained to find loopholes. Therefore, lawyers find ways to do almost anything and then tell themselves it is not unlawful.

The writers of the Rules have not helped. Remember that old prohibition against "chicane?" I admit I didn't know what it meant when I reread it to prepare this speech. I don't know if any of you will admit that you don't remember what "chicane" means. The dictionary says it means "to trick." The Bar took that word out of the list of prohibitions a long time ago. After all, how could you compete in the legal world if you couldn't trick somebody?

Let me mention an example of lawyers avoiding rules by manipulating loopholes. I serve on the Florida Civil Procedure Rules Committee. Each year we meet to pass new Rules to close the loopholes that the Rules created during the last year. These loopholes were found, used, and abused by this year's lawyers.

As an example, consider the Rambo deposition. The speaking objection was being made for the purpose of coaching a witness. That was thought to be bad, so we passed a new Rule. The new Rule stated that you could only state the simple legal basis of an objection. So, lawyers then began instructing the witness not to answer a question. So the committee passed a new Rule. A lawyer could not instruct the witness not to answer except in case of a privilege. Lawyers then began to object and claim the answer was privileged. They passed a new rule. You've got to state exactly what privilege is claimed and state facts. The lawyers then began to describe a privilege, whether they had one or

not. So the committee said, we will pass a Rule giving the judges the power to fine a lawyer for violating the Rule. But elected judges do not like to fine lawyers who might be helping in their next campaign. So, the committee passed a new Rule: Judges, you must fine the lawyers. As of today, the problem is as bad as ever.

It goes on and on and on. Create a loophole; close a loophole; create a new loophole; close the new loophole. In our state, we now have detailed regulations concerning what you can and cannot do to advertise; almost like the size of the letters on those signs in 1955. We also, by the way, have a committee that passes on the "propriety" of every single lawyer yellow page ad; the ads are still often outrageous.

In Florida we have a detailed Statement of Client's Rights, that we must give to clients, and have them read and sign before we can represent them. Some of us say that this will protect the client. Others, perhaps more honestly, say no, this was to protect against the aggressive lawyer stealing the client.

It has gotten out of control, in my mind.

This spring the American Law Institute is going to again review more elaborate lawyer rules. I am holding a copy of Tentative Draft Number 8 of the Restatement of the Law Governing Lawyers. As you suspect, there may be a few loopholes in this.

Here we have a Tentative Final Draft of four additional chapters. These close a lot more loopholes, and create many more . . . and there still are three chapters that haven't been written.

I am concerned about the proliferating Rules. I think you should also be concerned. Some of these Rules talk about ethics. Some talk about lawyer liability. Many of them are thinly disguised Rules to regulate lawyer competition. One thing is clear: there are precious few inspirational quotations in these books, except in footnotes citing old cases.

The debates on this Restatement project are often very depressing. In one of the meetings the proposition was presented that a Rule should state that a lawyer should not lie. Seems like a simple proposition. Mr. Fulgrum learned that in kindergarten. Well, the problem is, someone suggested, "Should not a

lawyer be able to lie during negotiation. Do we really have to tell the other lawyer the truth about our case?"

"What if a lie is needed to protect the client?" "Can a lawyer lie by merely failing to disclose the truth?" "Shouldn't that be an exception?" "What if telling the truth hurts the client?" "You're supposed to protect the client with warm zeal aren't you?"

Remember shark practice. I'm in the litigation business and I know about discovery. Shark practice in discovery is a cottage industry. There has been a new book published. Many of you may have seen it. It's called *Full Disclosure*. It reveals all of the discovery tricks that can be used legally . . . or at least successfully. Answers to interrogatories become a huge game of hide-the-facts. The "creative" answer to an interrogatory that is technically truthful is the mark of a good litigator.

Coming up with the right answer to an ethical problem is a crucial exercise. Those of you who are students get asked ethical problems on exams. If you fail the exam, you may not get to be a lawyer. Lawyers on a day to day practical basis are faced with these ethical questions. If they fail to handle it right, they may not have a client.

What does the future hold? I think there is very little likelihood that in the future the average lawyer will be more ethical than he has been in the past. I think it will be the other way around.

I view this, admittedly, from the perspective of a plaintiff's personal injury lawyer. But I can tell you how a lot of my good friends, who are defense lawyers, feel about the future. They tell me that they face the same ethical problems. More and more the decision is, what must be done will be done . . . and will be justified. For the defense firms, its very often a matter of survival. It is not win or lose, it is win or lose a client.

I think the problem is that our self-regulated Bar continues to give us Rules that create loopholes, and also gives us Rules to justify our actions. The Bar still demands warm zeal on behalf of our clients, so long as there is no clear violation of some law. The Rules give the lawyer little or no help in resisting the temptation to follow the client's conscience instead of their own.

I'm frightened by what I hear. Too often today lawyers say the test is, "Do you think I can get away with it?" Too often, I

hear lawyers talk about how they got away with some proceeding by tricking another lawyer. Often, too often, I hear lawyers talk about the need to “push the envelope” in court, as if getting as close as possible to the edge of breaking the law, somehow is the mark of a good lawyer.

I am certainly not immune. I give lectures on trial practice, and I lecture about the loopholes. In order to prepare for those lectures, I read books written by defense lawyers on the loopholes. One time, I was so frustrated with the process, I leaned across the table at a deposition and I said, “OK, buster, you want to fight with knives? I’m older than you are. I know a lot more tricks than you do. If we fight with knives, you’ll bleed a lot more than I.” And when I think back about that, I’m embarrassed that I was goaded into that reaction. But, I am not different from most lawyers succumbing to combative behavior as the level of aggression rises.

Some lawyers are able to get along pretty well with certain other lawyers. I get along really well with a certain lawyer from a large defense firm in Tampa. He’s about my age, and maybe that’s the reason I get along so well with him. He can be civil with me. I can be civil with him. I can make it easy on him. He can make it easy on me. I believe our clients come out better in the long run when the system is easier on them. Their aggravation is less. Their costs and fees are less.

For most, this civility is only possible with someone with whom you have developed a close, personal relationship. Usually the people involved must be emotionally and financially self-satisfied with their role in life.

Realistically, I believe that a young lawyer, a lawyer in the prime of their legal growth years, cannot manage their life and their practice in the way I can manage my litigation practice when I am dealing with a friend I can trust. If a young lawyer doesn’t join in the fray, they don’t compete. If they don’t compete, they run the grave risk of being left behind. The opposition will win the cases, and the competition will win their clients. It’s a pity, but it’s gone on too long this way, and it’s not likely to change without radical surgery.

The public today justifiably holds lawyers in the same contempt and disrespect that they hold our clients, or our clients’ actions. For, in many respects, we have become our clients.

Our clients' disrespect for the law, morals, and all of the things we learned in kindergarten and boy scouts. This attitude, unfortunately, is mirrored by their lawyers, with similar disrespect for these same things. Unfortunately, when the law is so disrespected, sooner or later it ceases to serve the purpose for which it exists.

This morning, as I'm waking up, I turn on CNN — I don't know how many of you watched CNN this morning. The author of the new book, *Celebrating Our Heroes*, was telling us about his book and the study that went into it. The book studied the best and the worse traits of members of our culture.

He had asked in his study, what is it that you think is the most important characteristic of a hero? Forty-seven percent of the people thought the leading characteristic of a hero was honesty. The second most important trait was being able to rise to the challenge. Jim Brady was the person cited as a hero for rising to the challenge.

The study was disturbing. It revealed that the overwhelming number of people believe that in most cases lawyers were lying. They believe lawyers will cheat or do anything for their clients, whether legal or not.

The study revealed that the tobacco companies are high on the public's hate list. Right behind the tobacco companies, are the lawyers for the tobacco companies. Lawyers have become indistinguishable from their clients.

Now, I have a suggestion for your consideration. This is not just my suggestion. There is some plagiarism involved here. Instead of tinkering with the past Rules, let us be willing to take a fresh approach.³

I think we need to start over. I think we need to make a conscious effort to reevaluate the role of the lawyer in society . . . to create a new system. Build this new system as if we were inventing it today, and invent it to work in today's society. Not the society when the speeches were made in 1895, or 1965. Similar to replacing the Articles of Confederation with the Constitution; a hard job, but necessary.

3. At the time of the Speech, the speaker was unaware of the appointment of a special committee of the American Bar Association to make recommendations for a complete revision of the Rules of Professional Conduct.

In drafting this new scheme defining the role of the lawyer, I believe we must first determine the goal to be accomplished. In my judgment, the goal should be that the practice of the profession of law be designed so that incentives exist to have lawyers help . . . in fact, lead their clients to more moral decisions to build a better society.

The first problem is to devise ethical rules for our profession that will encourage lawyers to advise their clients to take actions that will improve society. At least in the civil law, I can tell you that lawyers need all the help they can get to fight the growing disease of lawyer lawlessness that is killing our profession.

I think we could start by throwing out the Rules that require that lawyers become schizophrenic. If you think about it, it's impossible to tell a lawyer to follow the conscience of the lawyer, but also follow the conscience of the client. We have to devise something that eliminates that schizophrenia.

You cannot tell a lawyer to do everything possible to win, but also, at the same time, tell the lawyer to remain civil, professional and "fair." A change like this would require a major rethinking of the role of lawyers in society. Can a lawyer simultaneously be both an officer of the court and the zealous agent of his client?

On some issues, one must be on the side of justice. On some issues, one should be on the side of the client. Lawyers deserve to have those that make the Rules at least try to devise Rules that allow lawyers, when dealing with each other, to know if the lawyer is speaking primarily for justice, or primarily for his client. The members of the Bar deserve that the effort be made. Society deserves that the effort be made.

Now, if you were sitting down today to rewrite all these Rules, I am certain that you would have your own suggestions on what the most disturbing problems are, and how you would correct them. I have some suggestions. Some of you will agree with my suggestions, and some will disagree. At the very least, I hope the suggestions stimulate thought.

The first major revision in thought calls for us to recognize that the ethical Rules governing the criminal law practice should be entirely separate and distinct from the ethical rules governing the lawyers engaged in resolving disputes for citizens

and businesses. Similarly, the Rules governing prosecutors in criminal law should be different.

I agree with Professor Monroe Freedman, a former Blank lecturer, that in the defense of the accused much more must be allowed in order to balance the rights of the accused against the power of the state.

But, when it comes to the civil practice, I am not convinced that such freedom must be allowed lawyers in resolving the conflicts between ordinary people, or between businesses and ordinary people. We do not have to have the same Rules applied in civil matters, particularly in the area of confidentiality. Likewise, the rules governing trial and pre-trial matters should be different in the criminal courts than in the civil courts.

I suggest some other rather drastic changes in the Rules governing lawyers. First, they should take the lawyer protection rules out of what we refer to as "ethics." We all know that the term ethics, in the sense of business ethics, is an oxymoron. We may agree that rules should exist, which make it unlawful to steal a client, but such rules, if needed, should be created as any other regulation of a business. Let competition rules, if needed, be adopted as statutes or regulations such as those that govern other businesses. Statutes, administrative regulation, and the common law protect the public and the competition in other business endeavors, why not the business of the legal profession. Lawyers can be fined, their business license can be restricted or they can have judgments entered against them. In most things lawyers can be regulated like any business. . .but don't mix up business regulation with ethics or morality.

Second, let's get the courts out of the business of regulating lawyers on anything except those features of the practice that truly involve what we commonly know as morals and ethics. Legislatures, prosecutors, and administrative agencies can handle these non-ethical problems as well as bar associations and the courts. We do not need to continue to have the public observe and charge that the courts are engaged in protecting lawyers and not the public. Charges of lawyer protectionism erodes respect for the law; it takes away from the respect due our courts.

Third, in those cases in which a lawyer is acting for a client, let the lawyer be legally liable to whomever is harmed by unrea-

sonable conduct. The client should not be able to hide behind the defense of advice of counsel. Likewise, if the lawyer wants to be the strong arm of the client, let him put his own arm at risk.

In short, in our American free market society, let the obligations and risks of the marketplace govern the liability, not only of the client, but also of the lawyer, at least to the extent the client relies upon the lawyer's advice to accomplish the client's goals. If lawyers are tempted to play fast and loose with the truth, let them have no economic shelter from those harmed.

An immoral and dishonest lawyer should not be able to escape responsibility for the harm caused, merely because that lawyer can get another lawyer to say, "Well, that's the standard of the community." He certainly, in my opinion, should not be able to escape responsibility for his actions by saying, "I did it in court" or "I did it to help my client win."

Fourth, let us craft a set of narrow rules which all of us could agree would represent moral ethics. Do not steal. Do not lie to the court. Do not help your client lie to the court. We should agree that for a violation of this type of Rule, there is no excuse. Those who violate this type of Rule, should not only risk professional disqualification, but by common agreement among lawyers and judges, should be treated as if they are diseased . . . no contact . . . no associations . . . no case referrals.

In dealing with the truly immoral lawyer, judges should have the right to do as British judges do today — when they are faced in court with the appearance of the truly unqualified lawyer, they look at the lawyer and they reply, "I cannot see you." When the lawyer speaks and the judge says, "I cannot hear you." And the client, if they want legal advice . . . to be seen and heard . . . will go elsewhere. A lawyer's fear of personal, social, and economic, ostracization will advance the interest of the law.

I saw an article in the USA Today. The City of Syracuse, New York, passed an ordinance that allows the housing authorities to erect a sign on the property of slum lords who violate housing regulations. The sign says, "This property is owned by a slum lord." It gives the slum lord's name, his mailing address,

and his telephone number. The sign says, "This person is letting our beautiful community become run down."

At some point, we ought to recognize that if lawyers are slum lords in their care of the legal system, they ought to be branded for what they are.

Fifth, I think we ought to involve ordinary people more in the regulation of lawyers. Let the ordinary citizen have more to say about the kind of lawyers they want; and therefore, the kind of law they will get. To the extent that courts and Bar associations must be involved in that regulation process, I think the committees who do the work should be heavily stacked in favor of ordinary people. I believe in the jury system. I think that the fear of a jury of ordinary citizens has made this country a much safer place to live. I suspect that the world would be a better place if lawyers should also have the fear of the retaliation of ordinary citizens in matters of morals, decency, and discipline. I don't think that lawyers should be able to excuse what they've done in disciplinary matters by saying, that the misdeed is the "standard" of the legal community.

So then, to the extent that the relations of the client with the lawyer result in harm to the client, I say that the resolution should be in the courts, or in administrative agencies. It should be resolved by ordinary rules, applicable to other people. I don't think a lawyer should escape responsibility of the application of moral rules just because he says, "I did it in court." I don't think a lawyer should escape responsibility because he can get another lawyer to come into court and testify, "That lawyer met the minimum standard." I don't think a lawyer should be able to apply to himself rules that protect him from responsibility, when those rules were passed by other lawyers, and enforced by courts.

In my judgment, only in the sense that the common law governs legal relationships, should the courts be involved in the regulation or the providing of special lawyer protection rules.

Finally, I think we ought to readjust the lawyer/client relationship, at least as it applies to matters of confidentiality. The relationship should apply between a "human" lawyer and a "human" client.

You know, I happen to think that a lawyer is a person. Similarly, I think client are people. But, I think only law stu-

dents, and some law professors, can convince anybody that a corporation is a person.

The legal fiction that a corporation is a person, in my judgment, has created untold misery in this world. I think a corporation is a means for human beings to do business. It should have rights, and it should have responsibilities. But it should not have its rights or responsibilities measured as if it were a human.

The law allows both people and corporations to have secrets. But there are different kinds of secrets. I have some personal ideas about secrets. I think businesses and people have trade secrets and other business secrets, and those who have studied it know the requirements for protecting trade secrets. But, there are other kinds of secrets that are not the same.

I believe there are two different kinds of legal secrets. There is the secret about the past. In the situation where you have done something wrong, or you might have done something wrong, you need to get advise, and you go to your lawyer.

But there is a different kind of secret. The kind that, in my judgment, a person might call the dirty secret. The dirty secret involves a secret about future action. It begins when you go to a lawyer, or when you plan, under any circumstance, to develop a way to avoid or to get around the law . . . or avoid the intent of the law. A dirty secret involves deciding how to avoid getting caught violating the law in the future.

Now, with those definitions in mind, I think that clients, of necessity, (including, by the way, people who run corporations) need help in resolving problems by keeping secrets about the past. They have the right to seek help from their lawyer. They should have the right to discuss those past secrets with their lawyers, and feel confident that what they reveal will be kept confidential.

But I think dirty secrets, by my definition, should be more carefully scrutinized, and not so easily hidden. There is not the same societal need to protect those particular secrets. Perhaps a person, a human being, needing guidance should have the advise of a lawyer in dealing with some planned future activities. A corporation, however, should not be able to cast a veil of secrecy merely by discussing issues in the office of the general

counsel, by telling them to an employee who is their in-house counsel, or by having a lawyer attend each meeting at which those dirty secrets are being discussed.

The profession of law should get out of the business of helping businesses create and keep dirty secrets.

In summary, our society has changed. Most citizens think that it is going the wrong way. It has become more cut-throat, more confrontational, and more driven by the bottom line. It is time for the legal profession to take a close look and see what we are doing to help improve society.

Are we creating the problem, or only reflecting the problem? Are we making the problem worse? Are we trying to solve the problem of our cultural moral deterioration? Could lawyers, and lawyers Rules, change the direction we are going?

The law and lawyers should develop governing principles that, whenever possible, cause lawyers and the law to lead in the pursuit of a better society. We need to throw out the outdated rules governing our profession, and redraft and restructure them in light of today's very imperfect world.

I am not the only person who believes that, by the way. Many believe that radical surgery is needed. Perhaps only a few of my suggestions will meet with your approval, maybe none. But my hope is that by suggesting about some radical possibilities, I will make you think about the problem in a different way.

Any movement needs a beginning. This movement for change has already begun. It is an idea for new Rules. I hope that some of you at least, will join with us to help make the necessary changes, if for no other reason than self preservation. After all, it is your profession. It is now what others who came before you have made it. When you are my age the profession will be what you made it, starting today.

Thank you for inviting me to discuss these issues, especially because you forced me to think about some things about the practice of law, and my part in it, that I don't often like to think about. I hope I have caused you to think about some things that you do not like to think about. Someday you will look back and say, "That idea of mine got its start listening to that ethics talk back at Pace."