American College of Trial Lawyers

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Leading the Bar Away from the Marketplace

A growing emphasis on the business end of the practice is turning professionals into tradesmen. This descent must be resisted, says Fellow SIMON RIFKIND.

My theme is a simple one. For 60 years I have lived, worked and played in the belief and on the premise that I am a member of a special fellowship, a profession.

I am not prepared to abandon my belief nor to change my practice.

It may be that voices speaking in favor of professionalism in the law reflect a pathetic nostalgia. Those who exult in commercializing the law, who delight in "the marketing of legal services," may be right when measured by the standards of the universe they inhabit.

But I am unreconstructed. I persist in perceiving a difference between the lawyer and all tradesmen, whether butcher, baker or candlestick maker. To me the equating of the two is a repellent and cynical view. And I will not acknowledge their equivalence until the legal profession accepts as its ultimate goal the making of money rather than the rendition of services.

The basic attribute of a profession is that its members accept a commitment to a cause transcending self-interest. In the profession of law, the specific identity of the cause to be served may differ among members of the legal fellowship. It may extend to the interests of justice, the dignity of the individual, the interests of society, the supremacy of the rule of law, the interest of the client. This is by no means an exhaustive catalog. But one interest is deliberately absent — self-interest.

Are we really prepared to have the relations between lawyer and client governed by caveat emptor?

Are we prepared to declare that the words of the retainer agreement define the limits of the lawyer's duty?

Are we prepared to measure the lawyer's obligation to the indigent in need of services by the butcher's obligation to the hungry?

Is the swarm of locusts that has invaded Bhopal, India, to set the standard of conduct for the American lawyer? And will that be done under the benign eyes of a Supreme Court majority interpreting the First Amendment?

If we do not approve of that, should we not move the organized bar to proclaim its condemnation? Since we are not resigned to descend to these levels, why are we letting ourselves drift into the "law is a business" swamp?

I submit that it is not too late to resist, to build dikes against the flood and to reassert the professionalism that has historically imposed many burdens upon the lawyer and earned him those privileges that members of the bar exercise for the benefit of their clients.

The attorney-client privilege, the work-product privilege and many others were conferred upon the lawyer as part of a social contract that he would conduct himself like a professional and not like a tradesman. That contract can be broken only at grave peril.

Yet the bar was startled to learn from the highest court that "the belief that lawyers are somehow above trade has become an anachronism." Had these words been uttered in chastisement of a minority of sinners, I would have applauded. But they were used in a context of acquiescence. They thus provided a forward movement to the profanation of the good name of our profession.

But I believe we can liberate ourselves from the notion that *Bates v. Arizona* has permanently expelled lawyers from the professional ranks.

What can we do? It is no doubt true that some of the regulatory powers over the bar have been vitiated by *Bates.* But they have not been obliterated. Beyond the rulemaking power and regulations backed by sanctions, there is one power that the leaders of the bar do possess, of which no court can deprive them. That is the power, by their example, to set standards unsanctioned by any force except their manifest propriety. The leaders of the bar can establish the mores of the profession, adherence to which distinguishes those who enjoy the respect of their peers from those who do not.

There is a clamorous need for the reassertion of the professional character of the practice of law, for our rededication to it as a noble, learned and honorable profession. Such a commitment by the bar's leadership carries with it the duty to condemn behavior that falls short of professionalism, to discourage hucksterism, to decry the hired-gun philosophy, to reassert that a lawyer ministers to his client, but is not his servant; that he is not a bondsman, but a free counselor.

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B U L L E T I N

10889 Wilshire Boulevard, Los Angeles, Calif. 90024
Telephone: (213) 879-0143

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To me these propositions are self-evident truths. But our profession is addicted to the citation of authority, duly footnoted. And since regulation of the bar is a state rather than federal function, my cite — *Matter of Freeman,* 34 N.Y. 2d 1, 7 (1974) — comes from a decision of the highest court in the state of New York:

"A profession is not a business. It is distinguished by the requirements of extensive formal training and learning, admission to practice by a qualified licensure, a code of ethics imposing standards qualitatively and extensively beyond those that prevail or are tolerated in the marketplace, a system for discipline of its members for violation of the code of ethics, a duty to subordinate financial reward to social responsibility, and notably, an obligation on its members, even in non-professional matters, to conduct themselves as members of a learned, disciplined, and honorable occupation." ■

(Author Simon H. Rifkind, a former federal judge and president of the College, is a partner in the New York firm of Paul, Weiss, Rifkind, Wharton & Garrison. The article is excerpted from his February 15 address to the National Conference of Bar Presidents.)

Confidentiality: Chaos Ahead?

JOHN C. ELAM

Some movements die hard. Two years ago it appeared that the College had killed an attack on the attorney-client privilege when the ABA adopted the Model Rules of Professional Conduct, including our version of Model Rule 1.6. The rule would prohibit disclosure of client confidences except to prevent a client from committing a crime likely to result in death or serious physical injury, or in defense of professional-misconduct charges.

But opponents regrouped for battle in the states, where the fate of the privilege really lies. The results have been mixed — in fact, chaotic. Lawyers with a national practice face the prospect of juggling different attorney-client duties, depending on the rules of each state.

Only three states have acted so far, and the results are ominous. New Jersey and Arizona adopted the Model Rules, but rejected Model Rule 1.6 in favor of requiring disclosure in a distressingly broad array of circumstances. Virginia permits disclosure where a client has committed a fraud, and requires it where he intends to commit any crime.

State bars in Delaware, Montana, Nebraska and New Mexico have recommended that Rule 1.6 be adopted. North Carolina, Ohio and Idaho appear headed in that direction. But Minnesota and Kansas would allow lawyers to reveal a client confidence to prevent him from committing "any" crime. And Indiana, Maryland, Michigan, Missouri and Wisconsin bars have recommended permitting disclosure to prevent injury to property.

In several states, a small number of determined lawyers have managed to turn the tide against the Model Rules. The College must help stem such reversals. Gene Lafitte has mobilized groups in every state to advocate our position. Each Fellow should take part in this effort. ■

(Mr. Elam, a former president of the College, is a partner in the Columbus, Ohio, firm of Vorys, Sater, Seymour and Pease.)

College News

Jesse E. Nichols 1899-1985

Jesse Nichols, the seventh president of the College, died in his sleep at his home in Oakland, Calif., on January 10 at the age of 85.

For many years, Jesse was regarded as the pre-eminent personal injury trial lawyer in northern California. He was instrumental in establishing the liability of Cutter Laboratories in the landmark polio vaccine cases in the late 1950s, before the days of strict liability. In the 1940s he won the first $100,000 personal injury verdict.

Jesse was a senior partner in Nichols, Williams, Morgan & Digardi from 1954 until his retirement in 1975. Four of his partners have been Fellows of the College. Jesse was president of the College in 1956-57.

Born in San Francisco, he graduated from the University of California at Berkeley in 1922, and from its law school in 1925. He started his own practice in 1927.

He is survived by his second wife, Lilian, and two daughters and a son from his first marriage.

— Charles E. Hanger

Spring Meeting

It's not too late to register for the March 17-20 spring meeting at the Lake Buena Vista Palace in Lake Buena Vista, Fla.

The program, planned by president-elect Griffin B. Bell, includes the following speakers: U.S. Attorney General Edwin W. Meese III; Chief Judge Jack B. Weinstein of the U.S. District Court for the Eastern District of New York; Florida Governor Robert Graham; U.S. Army General Paul F. Gorman; Clifford J. Calhoun and Alfred McDonnell, professors at the University of Colorado School of Law; Fellow John T. Marshall and others.

Calendar

- *April 26-28:* Arkansas professional and social meeting; Eden Isle, Ark.
- *June 7-9:* northeast regional meeting; Stratton Mountain, Vt.
- *July 7-13:* Paris and London
- *Aug. 9-11:* five-state regional meeting; Brainerd, Minn.
- *Aug. 11-13:* northwest regional meeting; Sun Valley, Idaho
- *Sept. 26-29:* southwest regional meeting; Pebble Beach, Calif.
- *Oct. 3-5:* state/province chairman's workshop (middle region); Greenbrier, W. Va.
- *Oct. 9-10:* Wisconsin annual professional and social meeting; Stevens Point, Wis.
- *Oct. 18-20:* tri-state regional meeting; Sea Island, Ga.
- *Oct. 24-26:* state/province chairman's workshop (western region); Laguna Niguel, Calif.
- *Nov. 7-9:* state/province chairman's workshop (eastern region); Sea Island, Ga.

Annual Meeting

The pre-convention seminar will take place at the Paris Intercontinental Hotel on July 7-10, followed by the annual meeting on July 11-13.

The professional program will focus on the following topics: the Treaty of Rome — jurisdiction over Americans and rules of joint venture; the effects of EEC antitrust proceedings on U.S. corporations and their U.S. lawyers; and ICC arbitrations. Sightseeing tours have been arranged.

The black-tie dinner will take place at London's Grosvenor House July 13; luncheons for inductees and their spouses at the Hyde Park and Dorchester Hotels, respectively, July 12.

Registration brochures have been mailed, and should be returned promptly to the national office, as space is limited.

Barnabas F. Sears 1902-1985

Barnabas F. Sears, president of the College in 1970-71, died at his home in Chicago on January 1.

Barney was an early expert in labor law. He was a leader of court reform in Illinois, and was president of the state bar association in 1957-58. He was chairman of the ABA House of Delegates in 1968-70.

Barney became a Fellow in 1953 and was a Regent in 1961-65 and 1969-72. In 1975, he received the College's Award for Courageous Advocacy, which cited his prosecution of public officials and police officers in the Black Panther case in Chicago and his prosecution in a police scandal that led to massive reform in the Chicago Police Department.

Born in Webster, S.D., Barney graduated from Georgetown University Law School in 1926. In 1979, the university dedicated the Barnabas Sears Clinical Law Library Research Center in his honor.

Barney was an avid reader of legal history, the classics and writings of contemporary life. His yachting and gin rummy skills were formidable.

Along with his wife, Alice, who survives him, Barney was a prominent figure at College functions. His insight and clear and incisive commentary will be missed.

— James E.S. Baker

President's Report

Gene Lafitte

My professional morale has been at a low ebb. I have needed a tonic — some special elixir that would heal my lawyer spirit.

The source of my problem is familiar. We are a dignified, noble and proud profession; yet we find ourselves constantly bombarded with criticism, sometimes even from within our own ranks. What we read and hear about ourselves is troubling — not because some of it may be justified but because it is repeated so often and in so many ways that erroneous impressions have been created. The profession is taking it on the chin, and it seems unfair that so much damage can be done by a few renegade or incompetent lawyers.

My morale has also suffered because of the recent passing, only days apart, of two distinguished past presidents of the College — Barney Sears and Jess Nichols. They were giants in the profession, magnificent trial lawyers who were devoted to the College and loved by all Fellows who knew them. We will miss them deeply.

But I have found the tonic I've needed in Si Rifkind. An eminent past president of the College, and one of the truly brilliant lawyers of our time, Si occasionally writes and speaks about the profession and the qualities of the American lawyer, whom he reveres. A dose of Si's insight will cure any lawyer's morale problem. We feature his latest words in this, the third issue of the *Bulletin.*

Lawyers like Si, Barney Sears and Jess Nichols stand in a class by themselves. By walking and working among us they have enriched our lives and the profession. Si's thoughts and method of expression are refreshing, especially when he challenges us, and I am grateful that he has shared these remarks with us.

And while I am about it, let me mention another tonic — this great College of ours.

In attending regional and state meetings across the country and in Canada, I have had the privilege of personal contact with many of you. Without doubt, we have succeeded in bringing together, in the words of our bylaws, "members of the profession... who, by reason of their character, personality and ability, will contribute to the accomplishments and good Fellowship of the College." This priceless fellowship — like Si Rifkind — enriches our profession.

Turning to more mundane matters, this issue of the *Bulletin* updates you on important ongoing projects of the College and on state, regional and national meetings scheduled as of press time.

Keeping you informed on such matters is, of course, the main objective of the *Bulletin,* and I hope you are finding it helpful and interesting.

I will briefly mention a few other activities that will be covered in future issues. For example, through the Canada-U.S. Committee we are actively pursuing the possibility of an exchange program between the Fellows of both countries, which was mentioned in the first issue of the *Bulletin.* The program would involve a visit to each country by a team of lawyers and judges from the other, as well as a published report on the project.

In addition, we are working with administrators in states that have mandatory legal-education requirements to secure credit for Fellows who attend the professional programs at our spring meetings. Our national office in Los Angeles has offered to assist those in charge of state and regional meetings to arrange for this credit.

Finally, the Fifth Quadrennial Salary Commission, which will address federal judicial salaries, still has not met. Thus, the need has not arisen for the College to contact members of Congress to support increases.

Once again, I am soliciting your views and suggestions about the *Bulletin,* and would appreciate your taking the time to write me or our executive director, Bob Young. We need your ideas on issues and events that merit a notice or an article, or that should be of particular concern to the College.

Jackie and I look forward to seeing you at Lake Buena Vista, Fla., in March.