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# Tabor Lecture

## CREATING A LIFE AS A LAWYER

Thomas D. Morgan\*

### I. INTRODUCTION

It is hard to explain. Television celebrates our glamorous lives. Starting salaries at major law firms are at an all time high.<sup>1</sup> Social issues requiring legal solutions have never been more challenging. Yet surveys suggest that many of our colleagues are extremely unhappy. Indeed, describing oneself as a “recovering lawyer” seems to have become a badge of honor in former-lawyer circles.

The unhappiness intrigues and troubles me because I like being a lawyer. My father was a lawyer, and so was his father. My wife is a lawyer. Two of our daughters are lawyers and they are both married to lawyers. I firmly believe the sacrifice to get a legal education is justified by the lifetime of opportunity that legal training provides.

But not everyone agrees, and their unhappiness comes with a price. A Washington state study, for example, reported that 18% of all lawyers and 25% of those in practice over twenty years have a problem with drugs or alcohol.<sup>2</sup> A Johns Hopkins study found lawyers to be the nation’s most depressed professionals with an incidence of severe clinical depression 3.6 times that of non-lawyers who otherwise had the

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<sup>1</sup> In 2002, the most frequent starting salary for a first-year associate at the nation’s seventy-five largest law firms was \$125,000 per year. *The NLJ* 250, 2002 NAT’L L.J. LITIG. Y.B. 13. Some received even more, and even the lowest reported starting salary at the 250 largest firms was \$70,000. *Id.*

<sup>2</sup> THOMAS D. MORGAN & RONALD D. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 51 (8th ed. 2003) [hereinafter PROBLEMS & MATERIALS] (citing WALL ST. J., Nov. 30, 1991, at B1). The drug and alcohol problem actually begins in law school. A study commissioned when I was President of the Association of American Law Schools found that nearly two-thirds of all law students had used at least one illegal drug during their lifetime. Indeed, during the previous year, over 20% had used marijuana and nearly 5% had used cocaine. *Report of the AALS Special Committee on Problems of Substance Abuse in the Law Schools*, 44 J. LEGAL EDUC. 35, 41 (1994).

same basic traits.<sup>3</sup> A study of California lawyers found that “only half say if they had to do it over, they would become lawyers.”<sup>4</sup>

One has to be careful about such studies. Many times, the answers one gets depend on the questions asked. A 1995 American Bar Foundation study of Chicago lawyers, for example, found that almost 85% were “satisfied” or “very satisfied” with their current jobs.<sup>5</sup> In fact, people probably vary in their sense of satisfaction; I suspect that most of us think we have the best job in the world some days and are far less sure on others.<sup>6</sup>

But even if measures of lawyer dissatisfaction can be discounted, they should not simply be dismissed. Lawyer frustration can help provide a window on what is happening within the profession and what, if anything, individual lawyers might do about it.

## II. SOURCES OF OUR DISCONTENT

One reason it is hard to know the degree of lawyer satisfaction is that the sources of our discontent seem varied. Part of the concern is probably chronic and inherent in what lawyers are asked to do. Professor William Simon, for example, puts the classic problem in a provocative way when he says:

[T]he dominant conception of the lawyer’s professional responsibilities weakens the connection between the practical tasks of lawyering and the values of justice that lawyers believe provide the moral foundations of their role. This conception often requires that the lawyer take actions that contribute to injustice in the circumstances

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<sup>3</sup> Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 874 (1999) (citing William W. Eaton et al., *Occupations and the Prevalence of Major Depressive Disorder*, 32 J. OCCUPATIONAL MED. 1079 (1990)).

<sup>4</sup> Schiltz, *supra* note 3, at 881 (quoting Nancy McCarthy, *Pessimism for the Future: Given a Second Chance, Half of the State’s Attorneys Would Not Become Lawyers*, CAL. ST. B.J., Nov. 1994, at 1, 1).

<sup>5</sup> John P. Heinz et al., *Lawyers and Their Discontents: Findings from a Survey of the Chicago Bar*, 74 IND. L.J. 735, 742 (1999) (reported in Kathleen E. Hull, *Cross-Examining the Myth of Lawyers’ Misery*, 52 VAND. L. REV. 971, 974 (1999)).

<sup>6</sup> It is also likely that law firms differ significantly in the character of their practices and the manner in which they treat their lawyers. See William J. Wernz, *The Ethics of Large Law Firms – Responses and Reflections*, 16 GEO. J. LEGAL ETHICS 175, 178-79 (2002); see generally Aric Press, *Lessons from Ten Firms*, AM. LAW., Oct. 2002, at 101.

at hand. Of course, these actions are supposed to facilitate a greater justice in a more remote sense. But the remoteness of the ultimate moral payoff of the lawyer's conduct is a problem. . . .

The problem becomes more serious once we have reason to doubt the connection between the vividly perceived injustice of the here and now and the greater justice expected elsewhere and later. The connection can't be observed. It is a matter for theory, and theory has made it harder for lawyers to believe that their immediate injustices are really necessary to a more remote good."<sup>7</sup>

Professor Simon is pointing out, in short, that many lawyers use their God-given skills to help their clients pursue what both lawyer and client know to be an unjust claim. Or, the lawyers fail to disclose relevant information that would help both sides reach a just result in litigation or a negotiation. The lawyers who do that do not necessarily otherwise live close to life's moral edge. Instead, the lawyers probably are simply trying to live out the professional rhetoric that if both sides behave badly, their acts will cancel each other out and somehow produce a just result.

If we have any common sense, of course, we recognize that no human legal system can miraculously transform misleading information into truth. It should be no surprise that thoughtful lawyers are anxious about being part of a system that makes that claim.

Obviously, one can argue that rigorous protection of confidential client information protects legitimate client welfare. But not all the zealous advocates of strict confidentiality have been criminal defense lawyers whose violent clients appear in most hypotheticals. Many have been corporate lawyers, some of whose clients make a lot of their money

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<sup>7</sup> WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYER'S ETHICS* 2 (1998). See also Robert Granfield & Thomas Koenig, "It's Hard to be a Human Being and a Lawyer": *Young Attorneys and the Confrontation with Ethical Ambiguity in Legal Practice*, 105 W. VA. L. REV. 495 (2003).

skating on the thin edge of fraudulent conduct, where no reasonable person would want a lawyer to be able to assist.<sup>8</sup>

On the other hand, Professor Simon's suggestion that the freedom to disassemble is what makes a lawyer's practice unsatisfying is surely not the whole story. The pre-2003 ABA Model Rule 1.6 on confidentiality, toward which he pointed, was the least influential of the Model Rules as states considered what they should demand of lawyers. Even though the 2003 amendments to the Model Rules have not yet found their way into the law of any state, over thirty jurisdictions, for example, permit a lawyer to disclose the client's intention to commit any crime. Ten states *require*—not simply permit—disclosure of the intent to commit a crime threatening death or substantial bodily injury. Forty states, including Indiana, permit a lawyer to disclose a client's intent to commit a criminal financial fraud, a result directly contrary to the current ABA statement of the rule and consistent with the concern that lawyers act with integrity.<sup>9</sup>

Furthermore, the systemic concern about "lawyers as liars" is not new; it has been with us for generations. We may not stress the problem enough before students enroll in law school, but most lawyers certainly recognize it before they are admitted to the bar. In short, I believe

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<sup>8</sup> A bit of the history of the development of American Bar Association ("ABA") Model Rule 1.6 helps make the point. When the Kutak Commission considered the balance to be struck between confidentiality and public protection, it proposed two occasions for lawyer disclosure in addition to those finally adopted. Those were, first, "to prevent the client from committing a criminal act or fraudulent act that the lawyer reasonably believes is likely to result in . . . substantial injury to the financial interests or property of another," and, second, "to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used." THOMAS D. MORGAN & RONALD D. ROTUNDA, MODEL RULES OF PROFESSIONAL CONDUCT AND OTHER SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 25, eds. n. (2003) [hereinafter SELECTED STANDARDS]. The provisions about protecting the public against significant financial fraud were deleted by the ABA House of Delegates in 1983 and rejected again in 1991 and 2002. In August 2003, however, under threat of congressional or SEC action if the ABA did not act, the amendments to Model Rule 1.6 were finally adopted.

A directly parallel phenomenon was the handling of ABA Model Rule 1.13(c) discussing what the lawyer is to do if the highest authorities in an organization refuse to prevent a violation of law by or against the organization that threatens substantial harm to the organization. The original Kutak proposal was that the lawyer could take reasonable steps to protect the organization, including even reporting the matter to law enforcement authorities. Under the provision as adopted, however, the lawyer's only option is to resign as counsel. See SELECTED STANDARDS, *supra*, at 65. Again, it was not until August 2003 that a version of the Kutak proposal was finally adopted. *Id.*

<sup>9</sup> A useful table providing this information may be found in SELECTED STANDARDS, *supra* note 8, at 163-66.

Professor Simon may overstate the significance of that problem in the lives of most lawyers.

A second, more likely cause of discontent in many lawyers is not that we promote injustice, but that what we do so often seems to be of little lasting importance. The role of most lawyers is to help clients avoid the annoying effects of laws that regulate individuals and corporations. At prevailing attorneys' fees, the greatest demand for legal services inevitably comes from businesses or at least moderately wealthy individuals. The problem is not that such clients are evil; it is that we as lawyers increasingly devote our time and energy to accomplishing the objective of helping clients leave larger estates to their children rather than objectives that contribute to making the world a better place.

Of course, the concern about the banality of work is also not new. Nor is the concern limited to lawyers. But the concern is shortsighted. Professors have one of the world's most privileged roles, for example, but they teach countless classes and give countless lectures, never knowing when what they say has opened a window of understanding or sparked new hope in someone. We all have days when we get depressed about the insignificance of what we do, but the reason may be that none of us has the perspective to see our genuine impact on the people we serve and even those with whom we deal only briefly. All of us, in every job, must renew our hope with faith that our efforts will somehow further a larger design.

A third possible source of lawyer dissatisfaction may come from the changes that are overwhelming the legal profession. Lawyers today, for example, face the reality that their number has more than tripled in the last twenty-five years, from about 300,000 lawyers in the mid-1970s to about one million today.<sup>10</sup> Available work for lawyers has increased, but not proportionately.

A lawyer's role in our society most often involves facilitating transactions, planning for their consequences, resolving disputes associated with them, and seeking to affect the regulatory structure in

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<sup>10</sup> The most carefully collected data on the legal profession remains BARBARA A. CURRAN ET AL., *THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980S* (1985), and BARBARA A. CURRAN & CLARA N. CARSON, *THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN THE 1990S* (1994).

which they are conducted.<sup>11</sup> That is probably why the best predictor of the amount of legal work available in the country turns out to be growth in the country's Gross Domestic Product.<sup>12</sup> The nation's law schools add 3 to 4% to the supply of lawyers each year. In most years since the mid-1970s, the economy has grown at a similar rate. Recessions in the late 1970s, the early 1990s, and currently, however, mean that by my calculations the nation has up to 20% more lawyers than present demand seems to justify.<sup>13</sup>

I say this not to call for limits on the number of trained lawyers. The largest source of the growth in the profession came from the interest in law school among women and members of minority groups, both of which had previously been greatly under-represented in the profession. On the other hand, when many lawyers cannot see an obvious need for their services, we should not be surprised at the effect on their morale.

When clients are in short supply, competition for available business can lead to another related source of lawyer dissatisfaction. Lawyers have been permitted to market their services overtly for more than twenty-five years,<sup>14</sup> and many of us believed that the *Bates* decision,<sup>15</sup> which allowed lawyer advertising, would particularly help potential middle-income clients. They could know what lawyers charged and which ones had an interest in their kinds of cases. But what I, and others like me, did not fully foresee was the no-holds-barred effort many firms

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<sup>11</sup> Robert C. Clark, *Why So Many Lawyers? Are They Good or Bad?*, 61 *FORDHAM L. REV.* 275, 281 (1992). See also Frank B. Cross, *The First Thing We Do, Let's Kill All the Economists: An Empirical Evaluation of the Effect of Lawyers on the United States Economy and Political System*, 70 *TEX. L. REV.* 645 (1992); Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 *YALE L.J.* 239 (1984).

<sup>12</sup> See B. Peter Pashigian, *Regulation, Preventive Law, and the Duties of Attorneys*, in *THE CHANGING ROLE OF THE CORPORATE ATTORNEY* (William J. Carney ed. 1982); B. Peter Pashigian, *The Number and Earnings of Lawyers: Some Recent Findings*, 1978 *AM. B. FOUND. J.* 51; B. Peter Pashigian, *The Market for Lawyers: The Determinants of the Demand for and Supply of Lawyers*, 20 *J.L. & ECON.* 53 (1977).

<sup>13</sup> This estimate extrapolates from work published in Thomas D. Morgan, *Economic Reality Facing 21st Century Lawyers*, 69 *WASH. L. REV.* 625 (1994). The 20% figure may be high. Census data indicates that only 929,000 people call themselves lawyers even though the ABA puts the number at about 1 million. U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES* 381 (2002). The problem in developing accurate data is the difficulty of knowing when underemployed lawyers have left the profession to use their skills in some other kind of work.

<sup>14</sup> Currently, authority for and regulation of lawyer marketing is addressed in *MODEL RULES OF PROF'L CONDUCT R. 7.1-7.3* (2002).

<sup>15</sup> *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

now adopt to attract and hold lucrative clients. We also did not foresee the increase in meanness within the bar and within individual law firms that those efforts would produce.

In many firms, for example, the dominant ethic has become “you eat what you kill,” that is, originating business and billing hours are all that count. Civic activity and pro bono work do not get much credit under that rule unless the lawyer’s notoriety makes him or her a rainmaker. The extent to which the community is enhanced by a lawyer’s work is often neither measured nor rewarded. Further, when a given lawyer or practice group is unhappy with its share of firm profits under this model, the lawyers simply move to another firm and the process continues.<sup>16</sup>

But probably the greatest source of dissatisfaction among modern lawyers is the endless treadmill created by law firms’ demand for more and more billable hours. When I was starting out more than thirty years ago, 1400-1500 billable hours was the norm, if anyone set a norm.

That may seem low, but no lawyer can honestly bill for keeping up with new cases, doing necessary administrative work, or having a cup of coffee to get a colleague’s take on an issue. Indeed, by most estimates, a lawyer has to spend at least one non-billable hour in the office for every three billed, so 1500 billable hours represented a respectable 2000 hours at work each year. As Dean Patrick Schiltz put it so well, however, now “many firms would consider these ranges acceptable only for partners or associates who had died midway through the year.”<sup>17</sup>

Requirements vary, but some studies have found the norm today to be 2000 billable hours, with many lawyers reporting billing 2400 hours or more. Professor Deborah L. Rhode put the consequences of this behavior particularly well:

[I]ncreasing billable hour quotas have pushed working hours to new and often excessive limits. Lawyers remain perpetually on call—tethered to the workplace through cell phones, emails, faxes, and beepers. “Face

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<sup>16</sup> See, e.g., ROBERT W. HILLMAN, LAW FIRM BREAKUPS: THE LAW AND ETHICS OF GRABBING AND LEAVING 143-45 (1990); Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 STAN. L. REV. 313 (1985).

<sup>17</sup> Schiltz, *supra* note 3, at 891.



time” is taken as a proxy for commitment, ambition, and reliability under pressure. The result is a “rat race equilibrium” in which most lawyers feel that they would be better off with shorter or more flexible schedules, but find themselves within institutional structures that offer no such alternatives. . . .

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. . . Particularly in large firms, unmarried associates report finding it “difficult to have a cat, much less a family.” As one lawyer responded to a bar survey on quality of life: “This is not a life.”<sup>18</sup>

### III. MAKING A LIFE AS A LAWYER

It is that cry of despair—“This is not a life”—that led to this article. The problems and frustrations—whether old or new—experienced by modern lawyers are not primarily the result of lawyers’ personal failings. Indeed, the frustrations have arisen at a time when some of the brightest, most idealistic lawyers in our history have assumed leadership roles in law firms and the bar.

I can offer no comprehensive answer to the challenge of helping a lawyer “make a life.” Each of you—with the help of your faith and your family—must do that for yourself. What I will try to suggest are some options to avoid and a few worth trying. In each case, I hope the ideas will be at least a little counterintuitive and thus provoke your thought or even response.

#### A. *Professionalism is Not the Answer*

My first suggestion is that one will not get far toward making a life simply by taking the path that the organized bar has called “professionalism.” As lawyers started examining their ethical standards and what was happening to them in the wake of Watergate, the most persistent voices argued that the profession had lost its way.<sup>19</sup> What we

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<sup>18</sup> Deborah L. Rhode, *Gender and the Profession: The No-Problem Problem*, 30 HOFSTRA L. REV. 1001, 1008-10 (2002) (footnotes omitted).

<sup>19</sup> There have been many contributions to this literature, among them PETER MEGARGEE BROWN, *RASCALS: THE SELLING OF THE LEGAL PROFESSION* (1989); ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993); SOL M. LINOWITZ &

needed to do, according to this view, was restore the golden age that existed just beyond the memory of all but the oldest lawyers.

Chief Justice Warren Burger was the motivating force behind the ABA Commission that set out to “rekindle” the flame of professionalism.<sup>20</sup> I was asked to be the reporter for that Commission, and I can testify to the conscientious effort that its Chair and members gave to finding a secular goal worthy of a lawyer’s allegiance. The one they chose had been articulated by Dean Roscoe Pound who defined a profession as “a group . . . pursuing a learned art as a common calling in the spirit of a public service.”<sup>21</sup>

That is a noble statement, but abstract, and translating it into principles that can inspire or motivate real hope has proved difficult. One such effort has been to define “professionalism” as “civility.” Civility permits committed representation of a client but requires avoiding ad hominem attacks on opposing parties and counsel and showing respect for public officers and tribunal rules.<sup>22</sup> Civility, in short, is little more than what I call “acting like a responsible adult.” Clearly, a lawyer should do at least that, but it is hard to imagine a less demanding professional aspiration.

Furthermore, what calls for professionalism too quickly becomes what sociologists call an attempt by “members of a specialized occupation [to] control their own work.”<sup>23</sup> In order to achieve such control, such a profession requires “recruitment and training [and control of] entrance into the labor market,” and establishing “the procedures and criteria by which performance is organized and

MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* (1994).

<sup>20</sup> The report was published as ABA COMM. ON PROFESSIONALISM, “. . . IN THE SPIRIT OF PUBLIC SERVICE:” A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM (1986).

<sup>21</sup> ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953).

<sup>22</sup> For good examples of this kind of concern about professionalism, see CONFERENCE OF CHIEF JUSTICES, *A NATIONAL ACTION PLAN ON LAWYER CONDUCT AND PROFESSIONALISM* (1999); ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, *TEACHING AND LEARNING PROFESSIONALISM* (1996) (collecting reports on many professionalism programs). See also Allen K. Harris, *The Professionalism Crisis – The “z” Words and Other Rambo Tactics: The Conference of Chief Justices’ Solution*, *PROF. LAW.*, Winter 2001, at 1.

<sup>23</sup> Eliot Freidson, *Professionalism as Model and Ideology*, in *LAWYERS’ IDEALS/LAWYERS’ PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 215, 219 (Robert L. Nelson et al. eds., 1992) (emphasis omitted). Dr. Freidson was a non-lawyer member of the ABA Commission on Professionalism.

evaluated at work.”<sup>24</sup> Anyone with economic training, of course, recognizes those classic “professional” traits as also the characteristics of a cartel.<sup>25</sup>

Application of these principles to the legal profession’s traditional self-description is obvious and not accidental. Jerold Auerbach, Richard Abel, and others have traced the efforts of American lawyers since at least the 18th Century to create the sense that they are entitled to be such an organized, self-regulating group.<sup>26</sup> I will not repeat the history here, although one must at least mention Alexis de Tocqueville’s oft-quoted description of lawyers as America’s “aristocrats”:

The special knowledge that lawyers acquire in studying the law assures them a separate rank in society; they form a sort of privileged class among [persons of] intelligence. Each day they find the idea of this superiority in the exercise of their profession; they are masters of a necessary science, knowledge of which is not widespread . . . . Add to this that they naturally form a body. It is not that they agree among themselves . . . but community of studies and unity of methods bind their minds to one another as interest could unite their wills.<sup>27</sup>

Lawyers quote less often what de Tocqueville says in the immediately following passage, but it helps illustrate why “professionalism” is a dubious goal. “Hidden at the bottom of the souls of lawyers one therefore finds a part of the tastes and habits of aristocracy,” de Tocqueville wrote. Lawyers “conceive [aristocracy’s] great disgust for the actions of the multitude and secretly scorn the

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<sup>24</sup> *Id.* at 219-20.

<sup>25</sup> See, e.g., MILTON FREEDMAN, CAPITALISM & FREEDOM 137-60 (1962); RICHARD A. POSNER, OVERCOMING LAW 33 (1995) (“The history of the legal profession is to a great extent, and despite noisy and incessant protestation and apologetics, the history of efforts by all branches of the profession, including the professoriat and the judiciary, to secure a lustrous place in the financial and social-status sun.”).

<sup>26</sup> See RICHARD L. ABEL, AMERICAN LAWYERS (1989); JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (1976). Less critical accounts may be found in ANTON-HERMANN CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA (1965); CHARLES WARREN, A HISTORY OF THE AMERICAN BAR (1911).

<sup>27</sup> ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, Vol. I, Part 2, Ch. 8 (1835) (quoting a volume translated and edited by Harvey C. Mansfield & Delba Winthrop, eds., (2000), p. 252).

government of the people.”<sup>28</sup> De Tocqueville himself liked aristocracy, of course, and the observations were offered in admiration. They are simply not remarks that most of us would proudly cite today.

However, the sense of a once “golden age” remains, perhaps because the 1950s and early 1960s seemed to be a time when lawyers’ lives were relatively stable. An associate who worked hard could expect mentoring from senior lawyers. He would very likely become a partner, and would ultimately retire from the firm in which he began his practice.<sup>29</sup> Now, that perception of a lawyer’s world is virtually unrecognizable in many firms. Partnership is difficult to attain,<sup>30</sup> and lawyers compete, not for places in heaven, but for a higher firm ranking in *The American Lawyer’s* profits-per-partner tables.<sup>31</sup>

Some calls for renewed professionalism are meant to decry those developments. My own doubts about professionalism are not meant as approval of huge financial rewards such as those that lawyers at Skadden Arps were said to call the “pig pool.”<sup>32</sup> What I am saying is that what lawyers call professionalism can quickly degenerate into self-righteousness. Describing one’s career as a “calling” can be a temporary cause for pride and a short-term cure for unhappiness, but it will rarely mature into a basis for building a professional life.

#### *B. Simply Doing Pro Bono Work is Not the Answer*

A second tempting option for restoring life as a lawyer may seem to be doing more pro bono work alongside the fee-generating activity that pays the bills. Some of what I say later will certainly imply work at less than normal rates, but it is naive to think the fact that work generates no income makes it necessarily noble or satisfying.

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<sup>28</sup> *Id.*

<sup>29</sup> The use of the masculine form in this account reflects the overwhelming proportion of male lawyers during this period. This story and the transformation of law practice is told well in MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* 17-39 (1994).

<sup>30</sup> The literature on the competition for partnership includes MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* (1991). The analysis there is helpfully qualified in David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581 (1998).

<sup>31</sup> *E.g.*, *The Am Law 100*, AM. LAW., July 2001, at 131.

<sup>32</sup> LINCOLN CAPLAN, *SKADDEN: POWER, MONEY, AND THE RISE OF A LEGAL EMPIRE* 183-85 (1993).

Legal aid societies around the country have delivered services to the poor in our society since at least the founding of the New York society in 1876. Lawyers who have done that work deserve praise, and generations of clients have benefitted from their efforts.<sup>33</sup> On the other hand, the fact that someone is poor does not mean that her cause is just or even socially significant. And when – as so often happens – pro bono service is simply piled on top of billable hour requirements, a lawyer’s reaction is likely to be resentment, not satisfaction.

Further, the history of institutionalized provision of legal services to the poor and middle class has not been entirely selfless. It often had almost as much to do with serving the economic needs of lawyers as clients. The ABA Special Committee on Economic Condition of the Bar in 1938,<sup>34</sup> and then-Solicitor General Robert H. Jackson in 1939, proposed meeting the needs of the middle class primarily as a way to help get lawyers back on their feet during the depression.<sup>35</sup>

In the post-World War II context, legal clinics for the poor were seen as a way to give practical training to young lawyers who had gone into military service and wanted to get experience before setting out on their own. Returning lawyer-veterans had been denied G.I. Bill benefits because the government reasoned that they were already trained and legal aid work was a way to try to overcome that problem.<sup>36</sup>

Any system in which people bid for the time of lawyers will always have problems of serving the poor. One obvious solution would be mandatory pro bono service by lawyers, but that seems unlikely to happen soon. In the early 1980s, the Kutak Commission was almost disbanded over the very suggestion that a lawyer is required to give something back to his or her community.<sup>37</sup> The fact that no minimum

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<sup>33</sup> See, e.g., JOHN MACARTHUR MAGUIRE, *THE LANCE OF JUSTICE: A SEMI-CENTENNIAL HISTORY OF THE LEGAL AID SOCIETY 1876-1926* (1928); REGINALD HEBER SMITH, *JUSTICE AND THE POOR* (1919).

<sup>34</sup> SPECIAL COMM. ON ECON. CONDITION OF THE BAR, AM. BAR ASS’N, *THE ECONOMICS OF THE LEGAL PROFESSION* (1938).

<sup>35</sup> Reginald Heber Smith, *Legal Service Offices for Persons of Moderate Means*, 1949 WIS. L. REV. 416, 425-27.

<sup>36</sup> *Id.* at 437-44.

<sup>37</sup> MODEL RULES OF PROF’L CONDUCT, R. 6.1 (2002), which deals with pro bono services, is the only Model Rule expressed in aspirational rather than mandatory language. In fairness, the disciplinary rules of the ABA Model Code of Professional Responsibility did not deal directly with pro bono work, so we should probably be grateful that the Model Rules say anything at all.

hour requirement was set did not make the rule palatable. The ABA Ethics 2000 Commission almost proposed a similar recommendation, but this time, it was professional poverty lawyers who were most opposed, asserting that justice for the poor needs to be promoted by specialists who understand those issues backward and forward.<sup>38</sup>

The great outpouring of lawyer assistance for the victims and families of the World Trade Center tragedy shows that lawyers have not lost the will or the capacity to step up when the need is clear. Professor Marc Galanter's proposal for increased use of retired lawyers to staff legal clinics serving the poor may provide yet another example of a good way to round out a life as a lawyer.<sup>39</sup> But I have become increasingly convinced that universal pro bono service would not be practical even if lawyers were willing to assume the burden. My concern is not that lawyers are so specialized that they cannot become familiar with legal issues facing the poor. More telling is the likelihood that issues of language proficiency will increasingly define who can and cannot deliver services to our most vulnerable citizens.

Individualized service for persons from all over the world, in short, will not be provided on a large scale by part-time professionals. Pro bono service will likely play some part in the life of every good lawyer, but it will not be the central part of building a meaningful law practice.

#### IV. A TURN TOWARD THE POSITIVE

Having talked about what will *not* likely be the principal bases for creating a life in the law, I will try to say something positive about five possible sources of hope for creating a legal career in which one can find satisfaction today and can look back on with pride. I acknowledge the arrogance inherent in trying to tell someone else how to build such a life as a lawyer, but I hope that thinking about the subject will at least provide us with ideas upon which to build.

There is very little most of us can do individually about rules of confidentiality and trial practice. We can comply with rules of disclosure, seek ways to speed up resolution of disputes, and find ways

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<sup>38</sup> The debate proceeded over several Commission meetings, but a flavor of the debate can be seen in the minutes for the December 1999 meeting, *available at* <http://www.abanet.org/cpr/121099mtg.html>.

<sup>39</sup> Marc Galanter, "Old and In the Way": *The Coming Demographic Transformation of the Legal Profession and Its Implications for the Provision of Legal Services*, 1999 WIS. L. REV. 1081.

to settle matters in which we personally are involved, but that is about all. Likewise, we cannot eliminate all work that is banal or the competition for legal business that is similarly beyond our control.

A. *Finding a New Form of Self-Definition: The Issue of Hours and Money*

What we can do is try to deal first with the challenge of hours and money. Don't get me wrong. Lawyers have to eat and their families get hungry too. Furthermore, demands on a lawyer's time are often indicators of the lawyer's commitment to doing a job well and the response of satisfied clients to that commitment.

In significant part, however, I would suggest that when editor Steven Brill had his *The American Lawyer* magazines start publishing scoreboards of firm size and partner earnings, he tapped into an important issue of lawyer self-definition that probably applies to most of us. It is not a story to be proud of, and again, Dean Schiltz captures the point well:

If all . . . lawyers making \$160,000 per year sat down and asked themselves, "What will make me a happier and healthier person: another \$40,000 in income (which, after taxes, will mean another \$25,000 or so in the bank) or 600 hours to do whatever I enjoy most?," it is hard to believe that many of them would take the money.

But many of them do take the money . . . . And they do so merely to be able to make seven or eight times the national median income instead of five or six times the national median income. Why? Are lawyers just greedy?

Well, some are, but it is more complicated than that. . . .

. . . .

. . . [L]awyers are, on the whole, a remarkably insecure and competitive group of people. Many of them have spent almost their entire lives competing to win games that other people have set up for them. First they competed to get into a prestigious college. Then they competed for college grades. Then they competed for

LSAT scores. Then they competed to get into a prestigious law school. Then they competed for law school grades. Then they competed to make the law review. Then they competed for clerkships. Then they competed to get hired by a big law firm.

Now that they're in a big law firm, what's going to happen? Are they going to stop competing? Are they going to stop comparing themselves to others? Of course not. They're going to keep competing—competing to bill more hours, to attract more clients, to win more cases, to do more deals. They're playing a game. And money is how the score is kept in that game.

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... If a lawyer's life is dominated by the game—and if his success in the game is measured by money—then his life is dominated by money. For many, many lawyers, it's that simple.<sup>40</sup>

Does that touch a nerve with you as it does with me? I think there is a reason *The American Lawyer* publishes firm revenue in a comparative ranking that says more is better. There is a reason *U.S. News & World Report* publishes its data about law schools in the form of tiers and numerical ranks. There is a market in a country without an aristocracy for criteria by which people can prove their superiority to others.

Rankings sell magazines, and if sales were the only thing involved, that would be fine. Rankings become dangerous, however, when the subjects of those rankings actually begin to believe that the differences the rankings suggest are important. They fuel what Dean Schiltz calls "the game." At least two-thirds of all lawyers will be below the top one-third in all such rankings. Therefore, more lawyers are likely to suffer the indignity of seeing themselves as losers in this professional game than will get the ego boost of being winners.

Building one's life as a lawyer, I believe, requires first, that we develop a sense of ourselves that is not measured in terms of hours worked, take home pay, or similar standards of success. This is where

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<sup>40</sup> Schiltz, *supra* note 3, at 904-06 (footnotes omitted).



religious faith can play a crucial role in a lawyer's life. The message of most religious faiths is that there is nothing you and I can do to make God love us any more. We can live more faithfully and be more true to His word, but God does not internalize *The American Lawyer* data, or even that of *U.S. News & World Report*. His willingness to accept us is absolute, and that frees us to live by standards that others might find naively selfless.

This is not to decry making a living, even a comfortable living. It is simply to say that the first element of building a life as a lawyer is to find satisfaction in more than what money alone can buy. The first step in avoiding the "rat race," in short, is to stop finding satisfaction in making our treadmill revolve faster than the next rat's.

*B. Focus on Client Selection*

I believe the second step in building a life as a lawyer is to pay attention to client selection. Law students understandably say that they do not expect to be in a position to choose their clients, at least for several years. However, they will choose their clients in part as they choose the firm for which they will work. They will also face the direct challenge of deciding which clients to serve sooner than they think.

A more basic answer to my thesis is the standard expressed in ABA Model Rule 1.2(b), which states: "A lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities."<sup>41</sup> I believe that is nonsense.

It is of course true that lawyers can find genuine satisfaction in helping clients who have made bad choices and find themselves in serious trouble. A lawyer who helps clients minimize the sanctions for their conduct does not by implication approve what they did, and knowing that one has helped a client get his or her life on track can be its own lifelong reward.

It is also true that situations can arise in which a lawyer will be the "last lawyer in town" when a person needs professional help. The tradition of providing service in such cases stretches back at least as far as John Adams' defense of British soldiers during the Revolutionary War. In undertaking that representation, Adams was not endorsing the

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<sup>41</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2(b) (2002).

British soldiers' role in opposing the Revolution, so in that sense as well, ABA Model Rule 1.2(b) is correct. In a nation with a million lawyers, however, few clients will find no one willing to take a case. For most individual lawyers, the decision to accept a given representation is a matter of deliberate choice.

My point is not the one sometimes heard—that a lawyer should be independent of a client. One writer has put that apparent objective well, saying:

[T]he ideal of the “independent professional” as public servant haunts the minds of many American lawyers, not just their academic critics. The independent professional displays expert judgment while remaining relatively unspecialized and is thus familiar with the wide range of legal issues into which his clients' diverse endeavors draw him. He cultivates collegiality with professional peers without being diverted from his own life plan. He maintains independence from clients' interests while retaining and enhancing their business. He devotes serious attention to pro bono and periodic public service without enduring economic sacrifice, doing both “good” and “well” while not striving directly to do either. In this conception of the lawyer, practitioners are understood as integral components of a society's legal system who happen to be compensated by private payment, not as part of the market for human services whose services happen to involve interactions with the legal system.<sup>42</sup>

There is something superficially attractive about that picture, but in reality, lawyers can never be truly independent of their clients. Quite apart from their status as fiduciaries who are legally required to pursue a client's interests, as one lawyer has explained: “We only exist because of the client. Without the client there's no need to have a lawyer! And we exist to solve people's problems. So if you're the type of person who

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<sup>42</sup> Mark J. Osiel, *Lawyers as Monopolists, Aristocrats, and Entrepreneurs*, 103 HARV. L. REV. 2009, 2014 (1990) (footnotes omitted) (reviewing *LAWYERS IN SOCIETY* (Richard L. Abel & Philip S.C. Lewis eds., 1988)).

doesn't want to solve somebody else's problem, you should not be practicing law."<sup>43</sup>

My point here is simply that the decision whether to undertake a particular representation will inevitably have consequences for the lawyer, as well as for the larger society. Having a cause worth pursuing—a client worth helping—can be satisfying and ennobling for any lawyer. On the other hand, giving one's best to a cause of questionable merit or a client of doubtful character can ruin an otherwise good day.

A leading malpractice insurer advises its members to represent only "worthy" clients.<sup>44</sup> The admonition sounds arrogant and elitist at first hearing, but I am convinced the point is sound. It is based on loss experience that has resulted, not from bad legal work, but from representing clients who took advantage of others. Lawyers who try to represent only clients with matters worthy of the lawyer's time and training will be lawyers who tend to stay out of trouble. They will also be lawyers who look forward to going to work and who can tell their children what they do for a living without shame.

### C. Find a Role Model / Mentor

A third element of building a life as a lawyer should be, I believe, to focus attention on one or more lawyers whom we believe live or lived their lives well. That does not mean that the lawyers have called attention to themselves or lived extravagantly; it means that they have lived and practiced in a way we would be proud to emulate.

Lawyers do a lot of abstract thinking, but they live among very concrete circumstances. As I put this point in another setting:

Professional life is a constant struggle with uncertain facts, mixed motives, and ambiguous law. None of us has much to feel superior about. The best we have to guide us are not perfect people, but men and women of character, doing their best to live their own lives with integrity.

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<sup>43</sup> CARROLL SERON, *THE BUSINESS OF PRACTICING LAW: THE WORK LIVES OF SOLO AND SMALL-FIRM ATTORNEYS* 106 (1996).

<sup>44</sup> The company is the Attorneys' Liability Assurance Society ("ALAS"). I am a consultant to that company for loss prevention issues.

We cannot shift the responsibility for our own action to such people, but focusing on men and women we admire can give the sterile pages of an ethical code a human face. Asking yourself what these people would do in a given situation—or asking whether you could satisfactorily explain to such a person what you plan to do—can bring a clarity to the right answer that parsing the case law will not.<sup>45</sup>

Finding role models is not always easy. Lawyers tend to do much of their work in private, and modern law firms are not known for in-depth relationships. However, the quest to find role models can almost be half the fun. When one tries it, he or she will find himself or herself working to distinguish what is significant in an approach to practice from what is superficial—what is fundamental from what is flashy. Indeed, lawyers who perform the effort well may one day find themselves in the most satisfying position of all—being a role model that others want to emulate.

*D. Find a Cause Larger Than Your Life*

My fourth suggestion brings us back to the concern expressed earlier about the banality of the issues which most of us deal with every day. I believe that we, as lawyers, would do well to find at least one issue larger than ourselves—and larger than our paying clients—on which we can focus continuing, or at least recurring, attention. As Professor Simon suggested in the passage quoted earlier,<sup>46</sup> most of us went into law in the hope that we could contribute to making the world more just. Too often, what we wind up doing seems to contribute little to that objective.

My purpose is not to define today what one's cause should be. Some lawyers may devote themselves to opposing the death penalty, others to finding ways to impose it only when they know they have the real perpetrator. Some lawyers will defend pro-life positions, others will be pro-choice. Still others will find a religious institution that needs volunteer assistance. Yet others will work on issues of bringing justice to foreign nations, or seeking improved enforcement of the law among nations.

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<sup>45</sup> Thomas D. Morgan, *Heroes for Our Time: Going Beyond Ethical Codes*, CLARK MEMORANDUM, Fall 1992, at 22, 25.

<sup>46</sup> See *supra* text accompanying note 7.

I am not suggesting that all causes are equally valuable and that the only relevant issue is the intensity of the lawyer's feelings. What I am suggesting is that there are so many worthy and demanding causes, that lawyers will have no problem finding one worthy of their efforts. Indeed, even the process of seeking to identify opportunities for service to issues larger than the interests of traditional clients can go a long way toward overcoming the too-common sense among lawyers that what we do has little lasting consequence.

*E. Be Open to the Unexpected*

My final suggestion about building a life as a lawyer is not to expect to finish the effort. My wife likes to say that "Man plans and God laughs." Just when we think we have life figured out, an illness closes a door or events open a window of opportunity. One of the best ways to enjoy going to work in the morning is to stay open to the unexpected. I like to illustrate such ideas through the use of stories—what the text I help write calls problems.<sup>47</sup> I call one such story "*The Smoking Gun Memo*":

It was just lying there. . . .

It was in the front of the third file, in the fourth box of documents, part of the second round of discovery you were conducting in *Bennett v. Major Motors*. Your mind was numb after reading a seemingly-endless series of engineering reports, but your heart stopped when you opened that file. On top was a short memo from a lawyer in the Family Car Division to her boss.

Jim, (it read)

It has finally happened. The front left wheel assembly on a Roadster broke when an old man in his 60s was rounding a corner. He lost control and was killed. This was no hot rod. It appears to have been a failure of our vehicle, pure and simple.

Remember? We predicted last year that this would happen, but Manufacturing told us that it

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<sup>47</sup> See PROBLEMS AND MATERIALS, *supra* note 2.

would cost an extra \$5.00 per assembly to toughen the metal and that its budget would not permit them to spend that extra \$20.00 per car. Heaven only knows how many other cars we have on the road with the same defect. Can't we take this to Corporate Management and try to get them to order a recall?

Ann Davis, Assistant General Counsel

At the foot of the memo, apparently in Jim's handwriting, you read: "If we couldn't find \$20.00 per car to prevent this problem, no one will spend what it would cost to recall the million cars with this defect. Your job is to make this case go away. End of story."

You knew in an instant who the "old man" was. His name was Oscar Bennett. He had been a skilled electrician until arthritis had forced him to retire early. He had been a loving father, and he had volunteered many hours to his church. He had adopted Habitat for Humanity as his personal mission in retirement, and he had supervised the wiring of homes that changed the lives of over seventy-five families. You knew all this because his wife and daughter were your clients in the action against Major Motors for Oscar Bennett's wrongful death.

The original file jacket had simply said "Wrongful Death, \$500,000," as if the client's name was irrelevant. The file had been left on your desk by Mark Schneider, the aggressive young founder of your firm. "Wrongful Death" designated the kind of case you were to bring; "\$500,000" was the amount Schneider thought a good settlement might be.

You initially thought Schneider had set an unreachable target. Even assuming you could prove liability, Oscar Bennett was retired. The jury would be asked to put a value on the remaining years of his life, but they would be told that economic loss alone could be considered. Never mind the valuable wisdom he would have imparted to his grandchildren or the new

beginnings for poor families to which he would have contributed. As a child of God, Oscar Bennett's life was of infinite worth, but our legal system typically fails to capture that reality.

The memorandum from Ann Davis to "Jim" had changed all that. Instead of being stuck with the random failure of a random car part, you could tell the jury about a major corporation knowingly putting consumers at risk of death for an additional \$20.00 profit per car. The jury could find that to be "fraud," and it might award punitive damages in the millions of dollars.

There was an important problem, of course. The memorandum you found would normally be protected by the attorney-client privilege; if so, you would not be able to use it at all. However, you could persuasively argue that the privilege had been waived by turning over the document in discovery, and you would cite cases from the tobacco industry in which memoranda covering up a client's fraud were held not to be privileged at all.<sup>48</sup>

Ann Davis had been cool and confident in your first meeting with her. In your second meeting, she had been indignant. She had just received a draft of your amended complaint in the case. You had added a count to that complaint asking punitive damages of \$50 million dollars.

"I have been instructed to inform you that if you file this amended complaint," Davis huffed, "we will seek litigation sanctions and report you to the disciplinary authorities. You have no basis whatsoever for suing Major Motors at all for this unfortunate accident, much less for seeking punitive damages. We have retained an expert who will testify that the car satisfied all federally-mandated standards and that only driver recklessness could have caused the assembly to break as it did. Our

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<sup>48</sup> See, e.g., *Am. Tobacco Co. v. State*, 697 So. 2d 1249 (Fla. Dist. Ct. App. 1997).

company's reputation is at stake, and I have been directed to devote all our resources to resist any finding of liability in this case."

You listened impassively, but you had a certain professional admiration for the toughness that Davis conveyed and the seeming passion with which she defended a position she had to know was morally indefensible. "Our clients have instructed us to file the amended complaint," you said quietly, "and we think we have more than enough basis for our demand." You placed a copy of Davis' memo on the table and watched for her reaction.

"Where did you get this?" she exploded. "It's a privileged document and you must have stolen it. There is no question now that I can have you disbarred."

"You obviously recognize it as genuine," you answered coolly. You then explained how the memorandum had come into your possession.

"I'll get back to you," was all Davis could say as she gathered up her papers. You even felt sorry for her as you wondered what she would tell her superiors about how her memorandum had been in the file turned over with the engineering documents.

Before your meeting with Davis, you had gone to Schneider—your employer—with a much different agenda. You had proposed to him that you immediately send the memorandum to the news media in the hope of preventing any more deaths and injuries to owners of Major Motors cars. However, Schneider had resisted that approach. "The ethics rules define what you have learned as confidential client information," Schneider correctly said. "You may reveal it only with the clients' permission unless it relates to the clients' intention to kill



or injure someone. That is not the case here; our opponent, not our client is the bad guy.”<sup>49</sup>

“Furthermore, that rule represents simple justice,” Schneider reasoned. “The clients have a lot at stake financially in this matter. At least get the clients’ informed consent before you disclose this memorandum.”

You had been impressed earlier with your clients’ humanity and sense of justice, but they surprised you when you raised the possibility of going public with the memorandum. They were, of course, incensed to know that the equipment failure that had killed Oscar could have been prevented for \$5 worth of metal toughening, and their first instinct was that no other family should suffer as they had. But when you explained that effective use of the memorandum could make the case worth millions, their attitude changed. “Dad wouldn’t want Mother to face financial want,” the daughter reasoned.

You were disheartened. Had you gone three years to law school to get yourself mixed up in a cover-up? When you told Schneider, however, he was not surprised. “Lawyers don’t serve justice, they serve clients,” he said. “And clients are no more likely to be saints than lawyers are. By the way,” he said, “remember that we have a stake in this too. We take home one-third of whatever we recover for our clients. I know that you usually work for me on a fixed salary, but in this case, I’ll pay you a bonus of 20% of all fees the firm earns in this case in excess of \$1 million. That should keep your attention focused where legal ethics require your attention to be.”

Davis’ call the day after your meeting with her was brief and matter-of-fact. “We don’t owe your clients

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<sup>49</sup> As amended in 2002, ABA Model Rule 1.6(b)(1) permits disclosure of even a non-client’s act that is reasonably certain to cause death or substantial bodily injury. That formulation of the rule, however, has yet to make its way into the law of any state.

anything at all," she said, "but as an expression of sympathy and good will we will agree to pay them \$15 million." Almost as an afterthought, she added, "We will, of course, require an agreement by the parties and their counsel to keep all the facts of this case and the amount of the settlement absolutely confidential. We will also require the return of all documents turned over in discovery, whether or not by mistake, and your firm must agree not to represent any other clients who imagine themselves to be victims of similar wheel assembly breakage."

"The money is inadequate and the confidentiality is unacceptable," you answered sharply. "What about settling this case for a fair amount, and then disclosing the defect to the public generally so that there will be no further victims?"

"I have been instructed to say that we are not prepared to admit that there is any defect, so there is nothing to disclose," Davis responded. "The confidentiality and the return of documents are not negotiable."

"Off the record," she said, "enough high level company officers have their fingerprints on the decision not to strengthen the wheel assembly that they will invest anything it takes to destroy your firm and your career if you breathe a word about what has happened. Trust me; this settlement will get the attention of top management. They will improve safety as much as necessary to protect future Major Motors' owners. Just don't embarrass us by disclosing my memorandum to Jim." You promised to take the offer to your clients.

You spent a sleepless night. You had gone to law school with a dream of saving the world, but you found yourself trying to save your career. You set out trying to do good, but your job seemed only to be helping clients—and even sometimes their opponents—do well.

You had often rationalized your task as finding a "win-win" solution to problems, but rarely had you seen

how that label concealed the effect of the solution on all the interests not represented at the bargaining table. You knew that around the country there were hundreds of people whose plans would not be realized because violent death would intervene, deaths that you were in a position to help prevent.

You thought about whether a failure to act would make those deaths your responsibility and you concluded the question was unanswerable. What was painfully clear to you, however, was that once again you had found yourself in a situation in which you could help make the world a better place. That opportunity comes to each of us more than we realize—and we respond to it less often than we should—but this time there was no missing either the opportunity or the challenge.

When you brought the offer back to Schneider and your clients, they were thrilled. The clients knew how they wanted to spend the money. Mrs. Bennett planned to invest her portion and live on the income for the rest of her life. Her daughter would get \$1 million now and the rest upon her mother's death. They even planned to put 20% of the settlement—twice the Biblical tithes—into a charitable trust to support workers in foreign mission fields. They missed Oscar, of course, but there was no way to bring him back. A combination of saving souls and caring for his family would have pleased Oscar, they agreed.

Mark Schneider, in turn, saw this moment as one that would make his law firm financially secure. The \$5 million fee he would earn would pay off old debts and finance new cases, at least some of which he was sure would probably some day serve the public interest. The \$800,000 bonus you would earn, Schneider reminded you, would soon ease your anxiety about the justice of the result.

And yet you were not satisfied. "How easily we rationalize the link between our own self-interest and justice," you said to yourself. "I have been given a

chance to extend the lives of people whose names I will never know. I am about to let that chance pass by because our legal system has not reserved a place for such considerations at the bargaining table, except perhaps in the person of the morally-sensitive lawyer." You prayed for guidance, and sleep eased your anxiety. You felt at peace as you realized what you were legally and morally obliged to do.

And what was that? What were you obliged to do? How would you have acted in this situation? What would make you feel good about yourself and about your decision to take on the lawyer's role? What risks would you be willing to take in the hope of achieving a just result?

The professor gets to ask the questions; he usually doesn't have to answer them. And I will admit that I don't have the perfect answer. Lawyers face imperfect choices, and they have to live with the consequences of those choices. In quiet moments, however, I sometimes imagine how this story might end. At our best—or perhaps our worst—you or I might say:

"I did not invent the legal system and I cannot save it. The Bennetts are my clients and they have made their wishes clear."

"We will take your settlement offer," you tell Ann Davis. "Yes, it will include the confidentiality agreement and the return of the smoking gun memo." After the call—and an hour or so after the meeting at which the \$15 million and the documents were exchanged—you prayed for forgiveness for what you had just done.

A day or two later, in newsrooms around the country, excited conversations were heard like the one between the senior correspondent for *60 Minutes* and his executive assistant. "Mike, you have to read this," the assistant said. "When I opened the mail this morning . . .

It was just lying there . . . ."

There are at least three ways to understand that ending to the story. First, is that you, the plaintiffs' lawyer, sent the memo to the news media after promising not to do so. Indeed, perhaps you issued a press release and told the media where you could be reached for further information. That would be the course most likely to get the story out in its entirety but also the most likely to expose you to professional sanctions and private actions for damages.

Second, is that you sent the memo to the media in plain brown envelopes that could not be traced. That would have tended to minimize the chance of sanctions, but it would also make it more difficult for the news organizations to do much with the story if Major Motors denied everything.

The third possibility is that you were not the source of the story at all. Lawyers like to think the world revolves around them. Sometimes, however, we have the opportunity to do justice, but others will if we do not. Perhaps Ann Davis sent the material to the media when she realized—very disappointed—that you did not have the courage to do so. After all, is it certain that your initial receipt of the memo was as accidental as it appeared?

Would you have had the irresponsible courage to put your law license—and your pocketbook—at risk in an effort to protect future victims?<sup>50</sup> Would you rather have left that kind of courage to others? In the answer to those questions lies much of the answer to the kind of life you are likely to create as a lawyer.

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<sup>50</sup> Cf., e.g., Paul Butler, *By Any Means Necessary: Using Violence and Subversion to Change Unjust Law*, 50 UCLA L. REV. 721 (2003).