2020

Calling & the legal profession

Indiana Continuing Legal Education Forum (ICLEF)

Calling & The Legal Profession
November 12, 2020
Index

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August 2020

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CALLING & THE LEGAL PROFESSION

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CALLING & THE LEGAL PROFESSION

Agenda

9:00 A.M. Introduction – Calling and The Legal Profession

A sense of vocation or "calling" is fundamental to what it means to be a legal professional. Properly understood, a professional acquires knowledge about a subject; artfully applies that knowledge in practice; and is devoted to a way of life founded in part on that knowledge. This devotion to a certain way of life grounds professionalism in our character, our motivations and our convictions about those things we deem worthy of our devotion. Put another way, professional is grounded in our sense of calling – our understanding of who we are, what motivates and the purpose of our lives. These understandings define a lawyer's duties and give meaning to a life in the law. (*Note: The introduction will include a review of the Oath of Attorneys set forth in Indiana Rules for Admission to the Bar and Discipline of Attorneys and Section 33-43-1-3 of the Indiana Code.*)

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The Indiana Rules of Professional Conduct are the result of an evolution of American legal ethics. The tradition of calling was important to this evolution; however, the Rules themselves represent an effort to move away from duties based on this tradition. (Note: This presentation will review the history of the *Rules of Professional Conduct*, including a consideration of the *ABA Canons of Professional Ethics*; the *ABA Model Rules of Professional Responsibility*; and the works of various jurists (including *Hoffman, Fuller and Patterson*) that guided the drafting of these codes and the *Model Rules of Professional Conduct*.)

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11:05 A.M. Break

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What purpose does the legal profession serve? Why is it important and valuable? How has this purpose changed? An examination of the Rules of Professional Conduct through the lens of past answers to these questions reveals the ways in which the answers to these questions have changed and offers insights into the current state of the profession. (Note: This presentation will include discussion of a *Indiana Oath of Attorneys and the Preamble and Rules 1.8, 1.2, 1.5, 6.1, 7.1, 7.2 and 7.4 of the Indiana Rules of Professional Conduct.)*

12:15 P.M. Lunch Break (on your own)

1:15 P.M. Arthur Usher, Misconduct and the Lawyers' Calling

In May of 2013, the Indiana Supreme Court suspended Arthur Usher from the practice of law for a minimum of three years. The reasons have important implications for what constitutes misconduct under the Rules of Professional Conduct and harken back to earlier visions of a lawyer's calling. (Note: This presentation will include an examination of the Indiana Supreme Court's decision *In The Matter of Arthur J. Usher, IV (No. 49S00-1105-DI-298) as well as Rules 3.3, 8.1 and 8.4 of the Indiana Rules of Professional Conduct.)*

November 12, 2020

CALLING & THE LEGAL PROFESSION

Agenda Continued

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2:35 P.M. Coffee Break

2:50 P.M. Calling & The Lawyer Well-Being Movement
In recent years, the American Bar Association has advocated efforts to improve the well-being of lawyers. In 2018, it even issued a Well-Being Toolkit for Lawyers and Legal Employers to encourage the creation of a more "sustainable" culture that will promote lawyer well-being. The lawyer well-being movement makes clear that something is wrong with the profession, but its solution represents a continuation of the profession's movement away from the tradition of calling.

3:25 P.M. Calling and Dedication to a Higher Purpose
Few attorneys in American history serve as better examples of dedication to purposes beyond self than John Adams, founding father and second president of the United States. A dedicated diarist and prolific correspondent, Adams provided detailed accounts of his advocacy for such principles as right to counsel and presumption of innocence and why he took on the immensely unpopular defense of the British soldiers involved in the Boston Massacre. Adams' example inspired his own offspring, including a son who became president, a grandson who served as US ambassador to Britain, and a great grandson who wrote one of the greatest non-fiction works in US history.

4:00 P.M. Calling & The Haunted Lawyer
Lawyers today are haunted. A modern, scientific approach to law has separated lawyers from the traditions of professionalism and calling that connect them with enduring ideals. A more balanced approach is needed to sustain American practices and institutions and recognize the significance and satisfactions of being a member of the legal profession.

4:30 P.M. Adjournment

Faculty

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Philosophy, Liberal Arts, Philanthropy and Medical Humanities and Health Studies
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November 12, 2020

OVERVIEW

Law has long been considered a profession. Implied in this special designation was the belief that the practice of law was indispensable to the wellbeing of society and that a lawyer served the common good in a distinctive, fundamental way. A lawyer's work was not just a job, but a genuine vocation, a calling. Without a sense of calling, however, the practice of law can devolve into the regulated business of providing legal services, and a lawyer into a mere service provider who finds little satisfaction in the law. To deserve the designation as a professional, a lawyer must have a sense of calling. Calling is the source of the commitments and passions that give meaning to the profession and define a lawyer's duties. Lawyers without a sense of calling can find themselves burned-out and alienated from the well-springs of professional fulfillment. At one time, calling was at the heart of legal ethics. Vestiges of this past exist in the Rules of Professional Conduct. If lawyers are to claim their roles as professionals, they must renew this heritage and cultivate a sense of calling in their lives.

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PRESENTERS

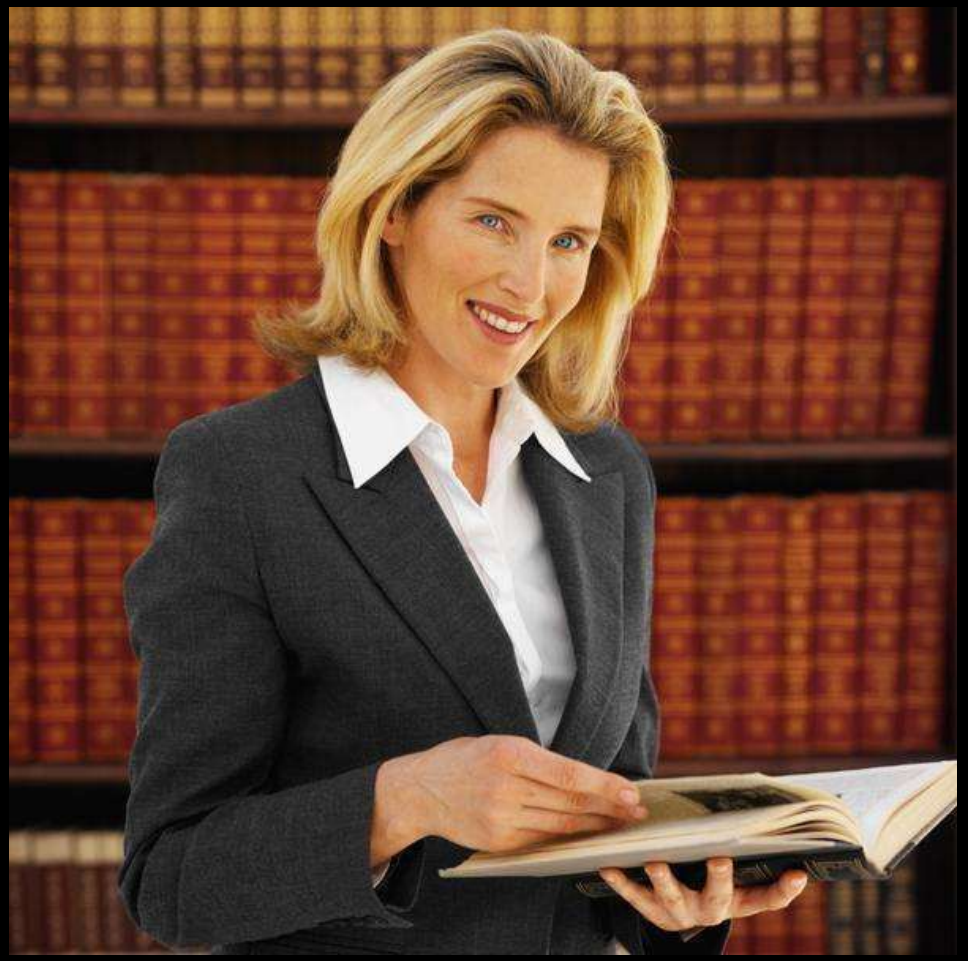
J. Mark Mutz is a lawyer, consultant, and entrepreneur. His career has included private practice with a large law firm, acting as general counsel to two healthcare companies and service as an officer of a think tank. As a consultant, he plans, manages, and leads transactions that involve a mix of legal, financial and relationship issues. His undergraduate degree is from Northwestern University and his law degree is from Yale Law School. He has served on the Boards of numerous for-profit and charitable organizations.

Dr. Richard Gunderman is Chancellor's Professor of Radiology, Pediatrics, Medical Education, Philosophy, Liberal Arts, Philanthropy, and Medical Humanities and Health Studies at Indiana University, where he also serves as Bicentennial Professor. He received his AB Summa Cum Laude from Wabash College and MD and PhD (Committee on Social Thought) from the University of Chicago. A practicing physician at Riley Hospital for Children, he has won numerous awards for teaching and published over 800 scholarly articles and 15 books, including most recently "Contagion" and "Marie Curie."

Introduction:
Calling & The Legal Profession

Calling &
The Legal Profession

Which is a professional?



Premise: To be a professional, a lawyer must have a sense of calling.

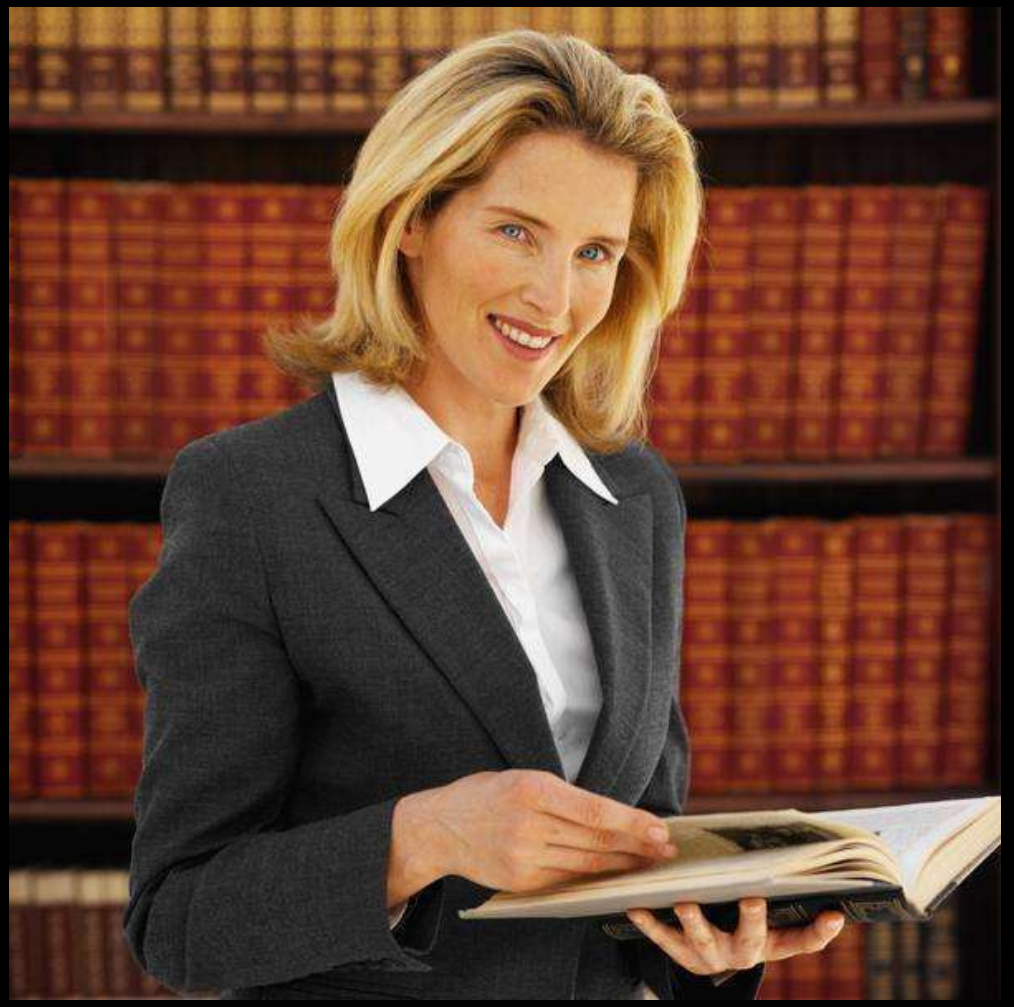
What makes a professional?

What makes a professional?

Learning

What makes a professional?

Which of these is a professional?



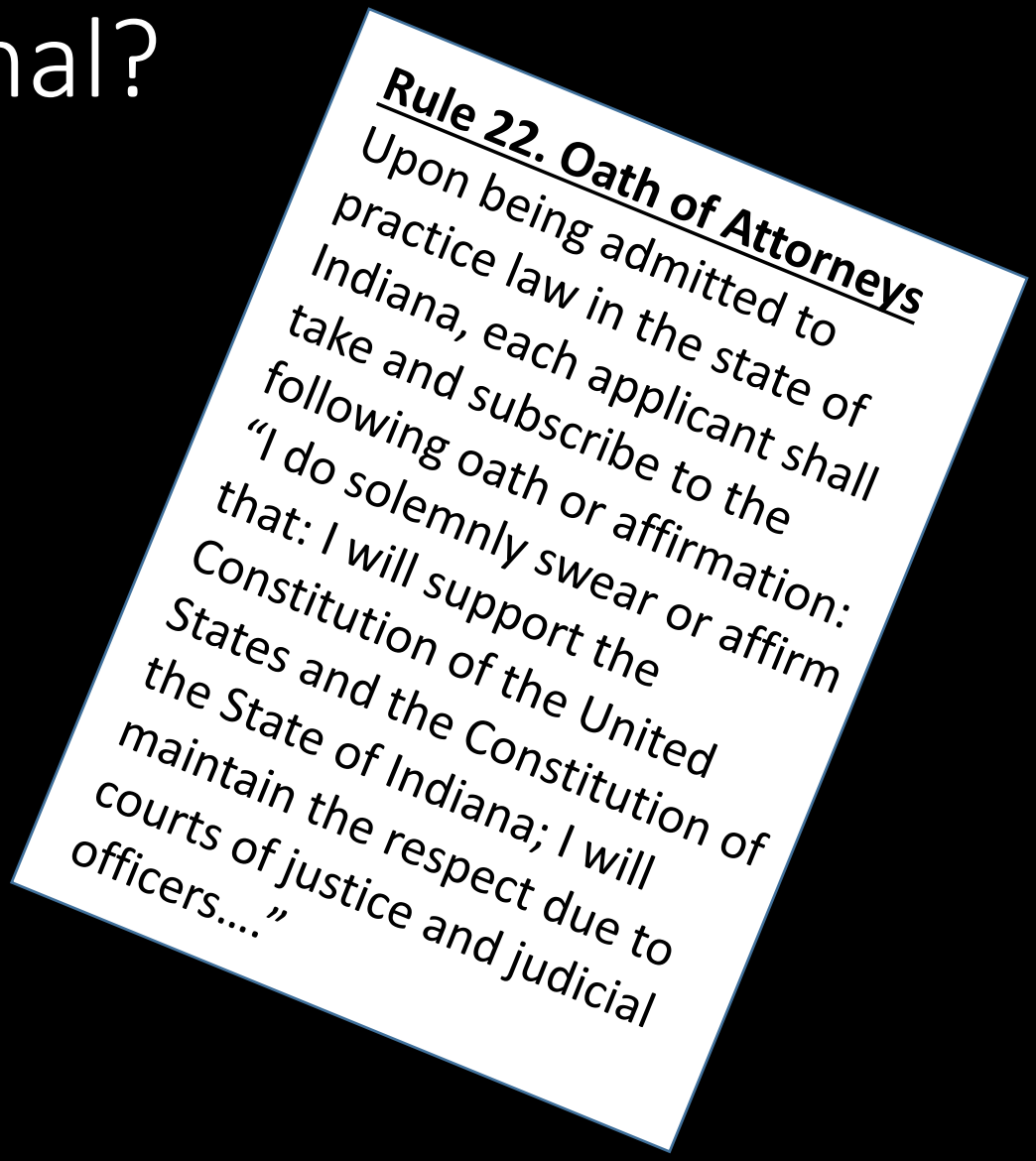
What makes a professional?

According to the sociological view, a professional…

- Provides specialized services
- Receives specialized training
- Is autonomous

What makes a professional?

A professional is one who professes



Rule 22. Oath of Attorneys

Upon being admitted to practice law in the state of Indiana, each applicant shall take and subscribe to the following oath or affirmation: "I do solemnly swear or affirm that: I will support the Constitution of the United States and the Constitution of the State of Indiana; I will maintain the respect due to courts of justice and judicial officers…."

What makes a professional?

A professional…

- Is **learned** (i.e. she pursues and acquires knowledge)
- Applies knowledge **in practice**
- **Devoted to a way of life based on that knowledge**

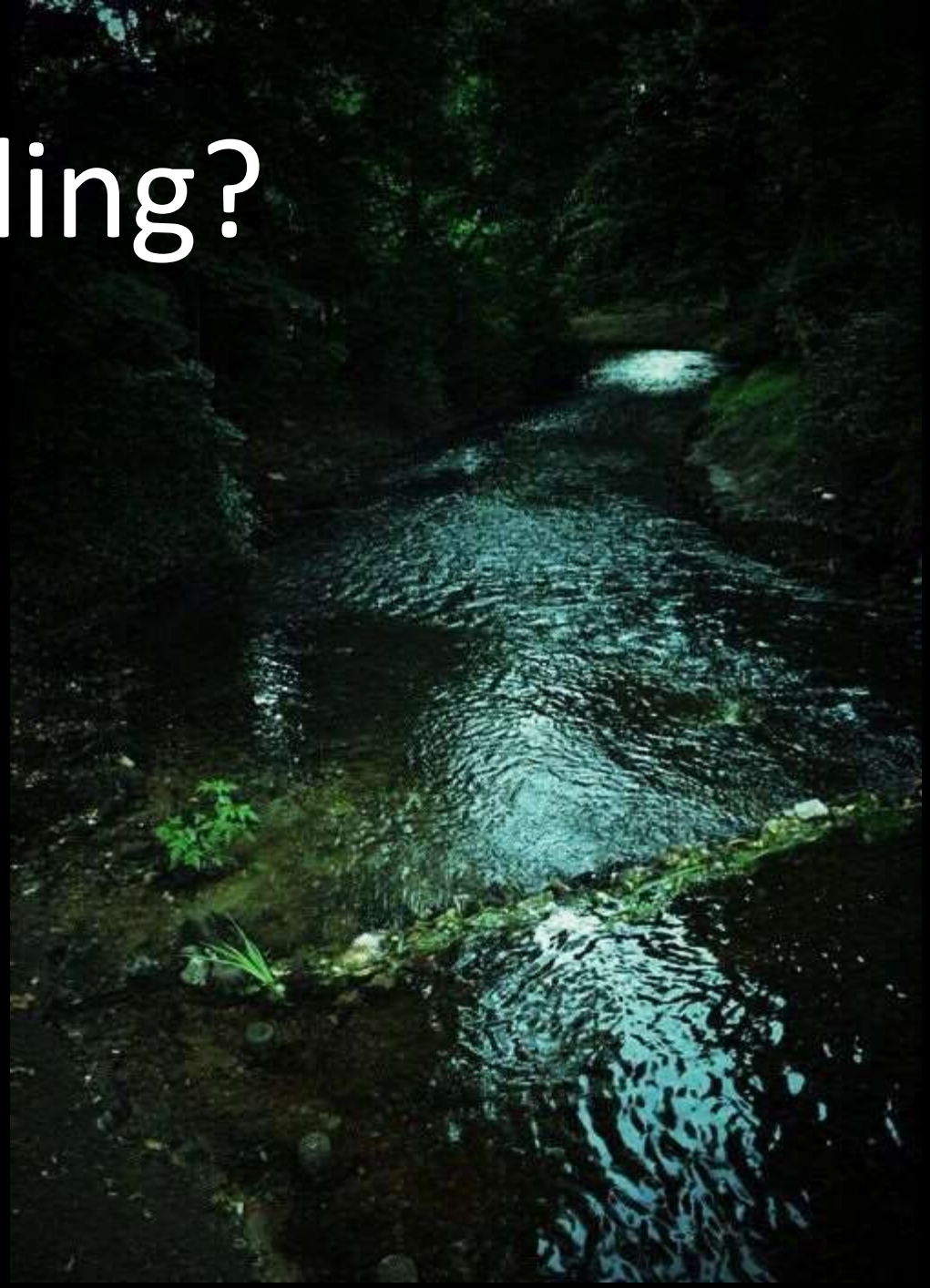
Devotion to a way of life roots professionalism in…

- Our character
- What motivates us
- What is worthy of our devotion

What is calling?

What is calling?

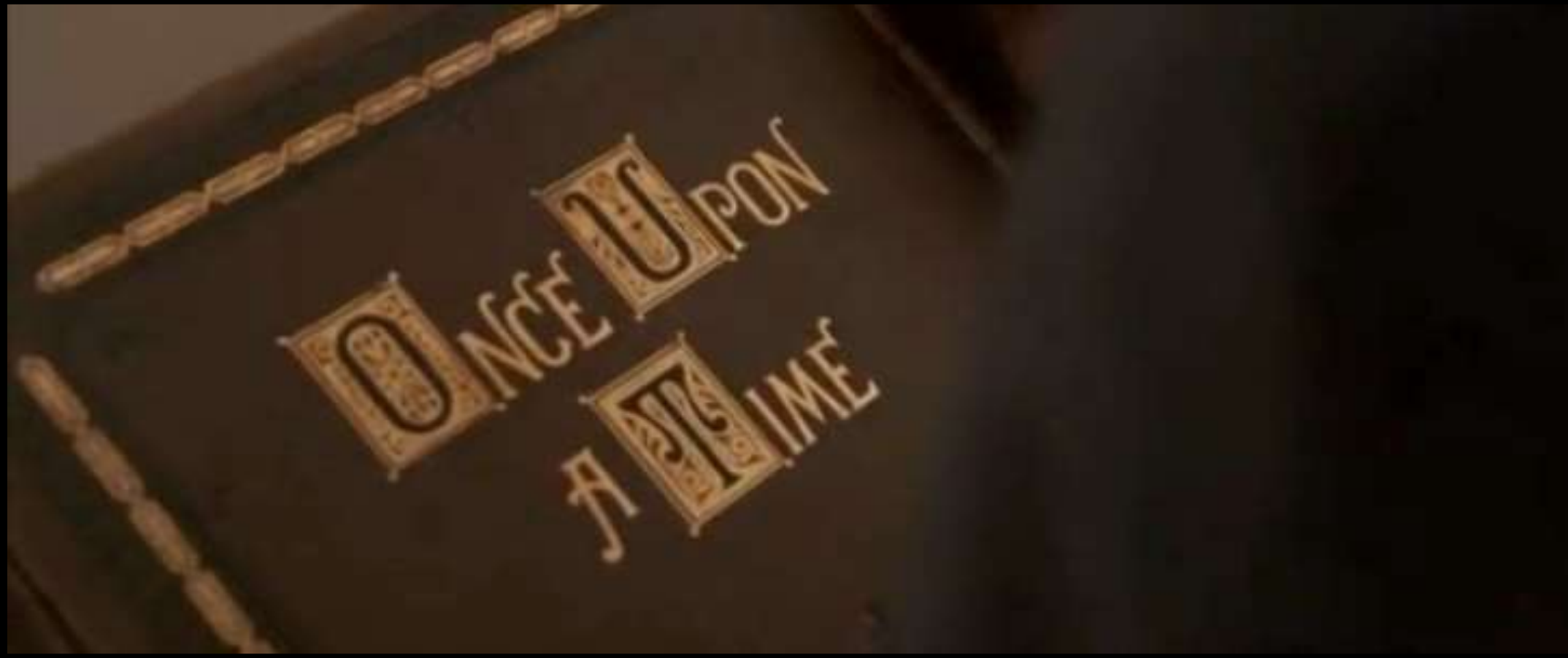
Calling answers the question, Why?



Calling answers, Why?

- A formal/material answer: Calling grows out of our identity and the circumstances that shape it.
- An efficient answer: Calling is what moves us towards our purpose, like an invisible current in our lives.
- An answer in terms of final cause: Calling is our mission, our purpose. It is the theme of the story of our lives.

Calling…



Takes the form of a story

Calling is…

A narrative that answers the question of why we are engaged in some activity with reference to:

- Who we are
- What motivates us
- What we are meant to do – our mission

What makes a professional?

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- Is **learned** (i.e. she pursues and acquires knowledge)
- Applies knowledge **in practice**
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Professionalism & Calling

Devotion to way of life roots professionalism in…

- Our character and identity
- What motivates us
- What is worthy of devotion

Professionalism & Calling

Devotion To Way of Life

- Character
- Motivation
- Worthy of devotion

Calling

- Identity
- Motivation
- Mission

Professionalism & Calling

Devotion To Way of Life

- Character
- Motivation
- Worthy of devotion

Calling

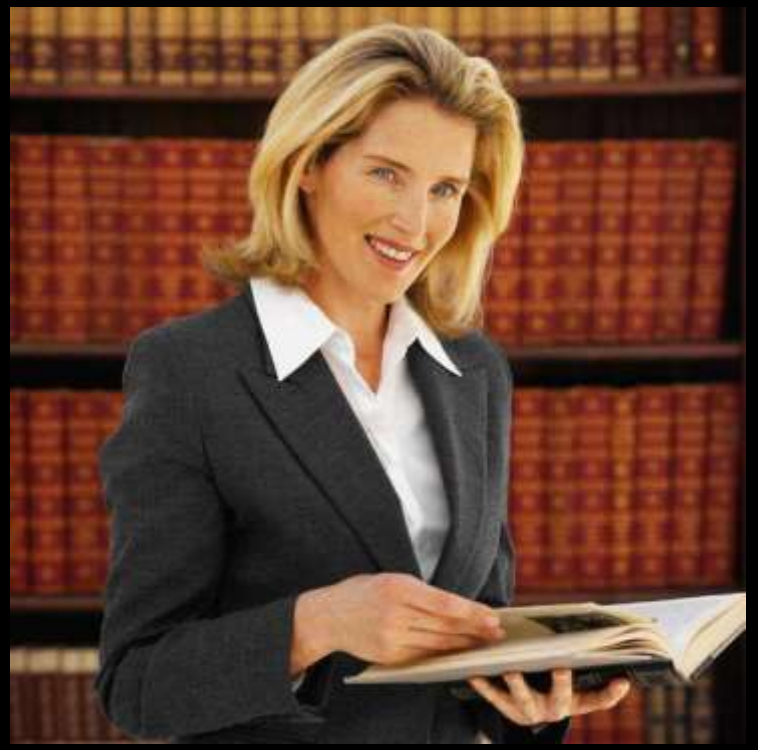
- Identity
- Motivation
- Mission

Formation

Professionalism & Calling

To be a professional, one adopted the calling of a profession – through a process of formation.

?

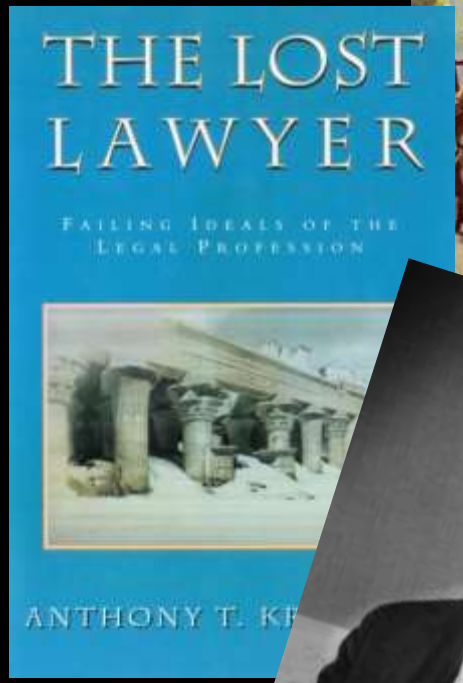


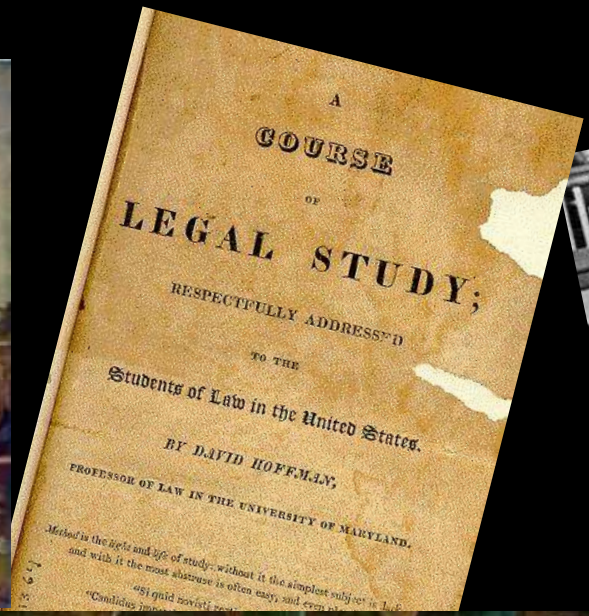
- Law has distanced itself from calling.
- Law is less and less a profession.
- But it’s not too late; law can reform and reclaim the traditions of calling.

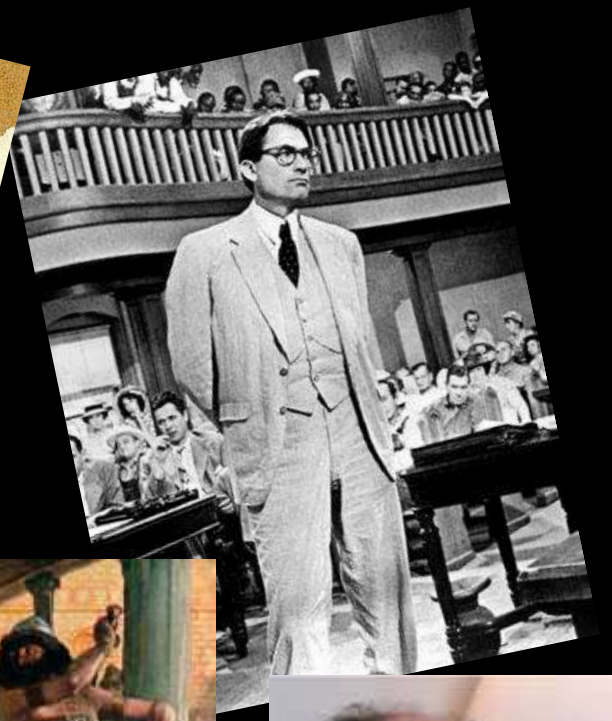
Lawyer Without A Calling

Lawyer With A Calling

Lawyers are heirs of a rich tradition of calling

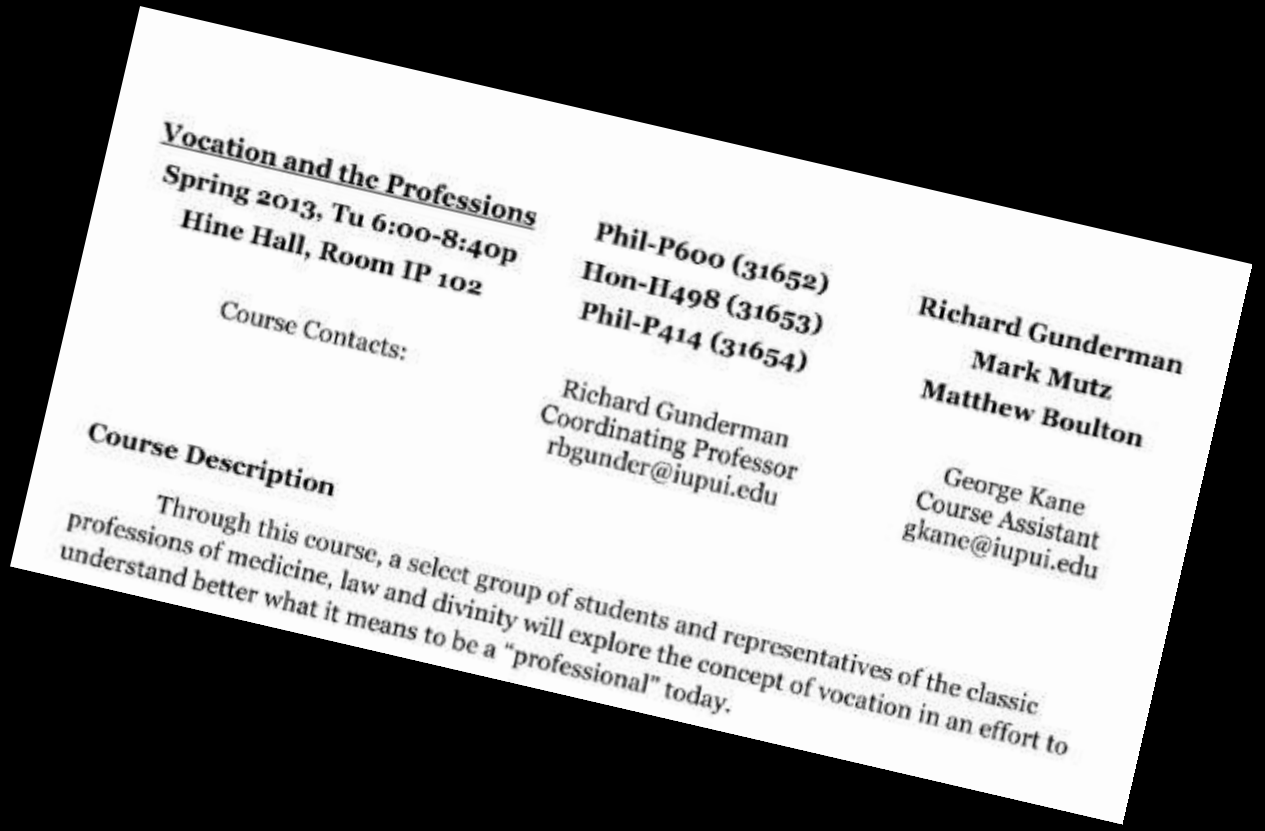






Background of Program & Presenters

- Richard Gunderman
- Mark Mutz



Vocation and the Professions
Spring 2013, Tu 6:00-8:40p
Hine Hall, Room IP 102

Phil-P600 (31652)
Hon-H498 (31653)
Phil-P414 (31654)

Richard Gunderman
Mark Mutz
Matthew Boulton

Course Contacts:

Richard Gunderman
Coordinating Professor
rbgunder@iupui.edu

George Kane
Course Assistant
gkane@iupui.edu

Course Description

Through this course, a select group of students and representatives of the classic professions of medicine, law and divinity will explore the concept of vocation in an effort to understand better what it means to be a "professional" today.

Overview of Morning

- Calling & the Evolution of Legal Ethics
- Calling & the Commitment to Character
- Break
- Calling and the Rules of Professional Conduct

Overview of Afternoon

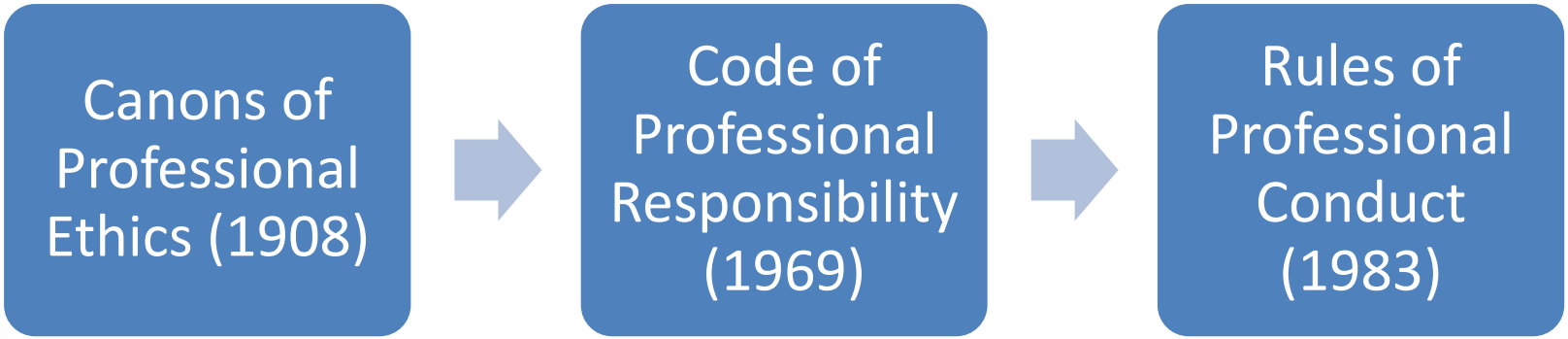
- Arthur Usher, Misconduct & the Lawyer's Calling
- Atticus Finch, Calling & the Rules of Professional Conduct
- Break
- Calling & The Lawyer Well-Being Movement
- Calling & Dedication to Higher Purpose
- Calling & The Haunted Lawyer

Calling and the Evolution of the Rules of Professional Conduct

Calling & The Evolution of Legal Ethics

Premise: The evolution of American legal ethics is marked by a waning of the importance of calling.

Three milestones of legal ethics



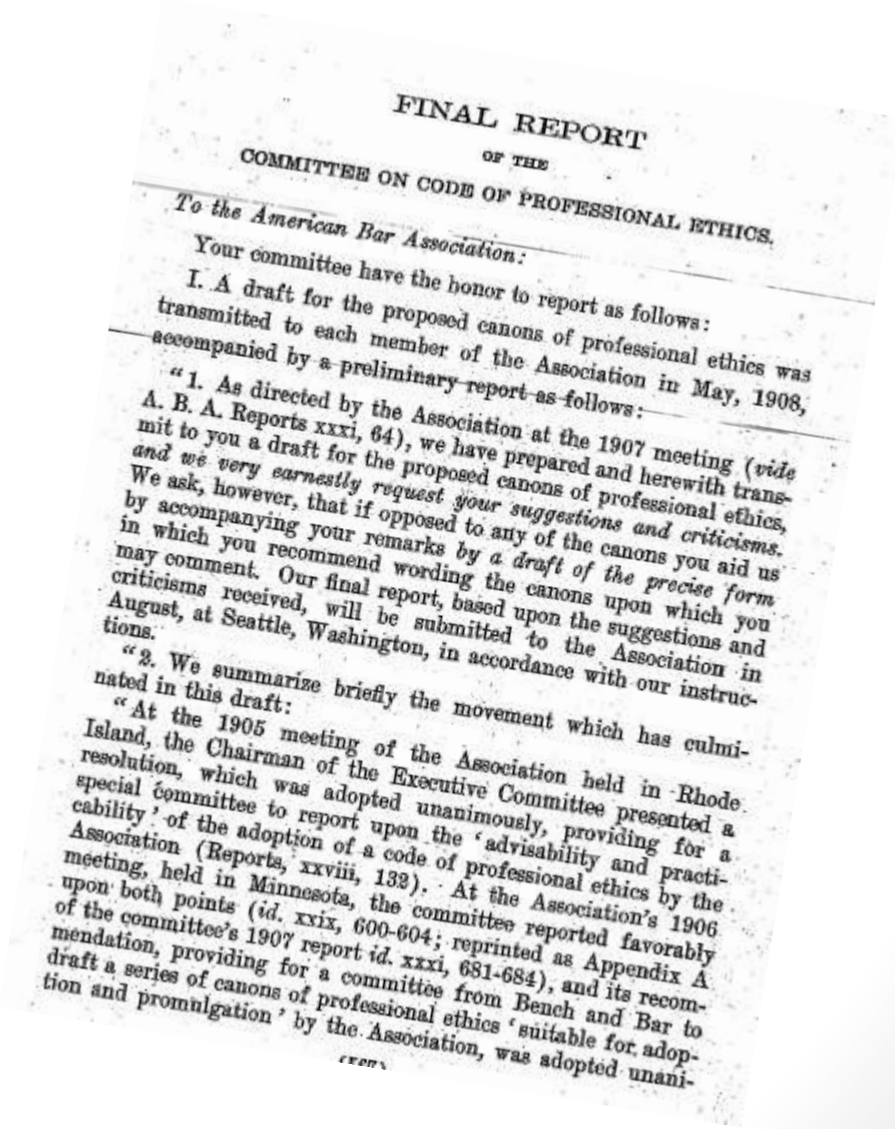
For each set of standards…

- Context and purpose
- Vision of the law
- Relationship to calling

1st Milestone -- Canons of Professional Conduct

Canons -- Context

- First set of ethical principles for U.S. lawyers
- Derived from other sources
- David Hoffman's set of 50 Resolutions was arguably the most influential



FINAL REPORT

OF THE

COMMITTEE ON CODE OF PROFESSIONAL ETHICS.

To the American Bar Association:

Your committee have the honor to report as follows:

I. A draft for the proposed canons of professional ethics was transmitted to each member of the Association in May, 1908, accompanied by a preliminary report as follows:

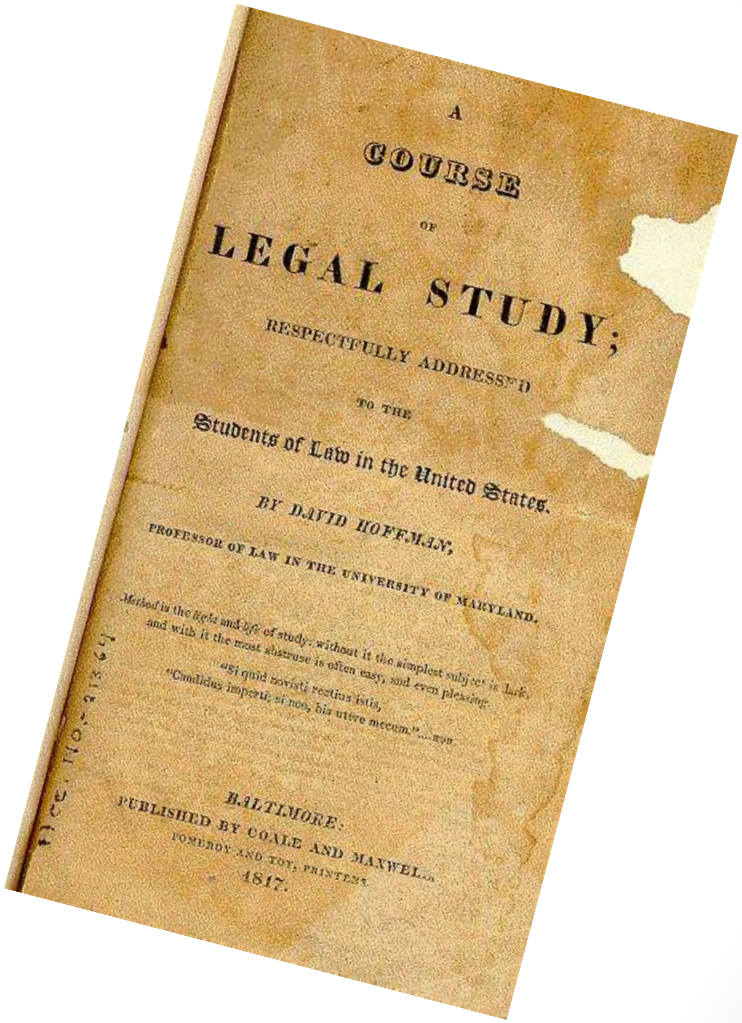
"1. As directed by the Association at the 1907 meeting (*vide* A. B. A. Reports xxxi, 64), we have prepared and herewith transmit to you a draft for the proposed canons of professional ethics, *and we very earnestly request your suggestions and criticisms.* We ask, however, that if opposed to any of the canons you aid us by accompanying your remarks *by a draft of the precise form* in which you recommend wording the canons upon which you may comment. Our final report, based upon the suggestions and criticisms received, will be submitted to the Association in August, at Seattle, Washington, in accordance with our instructions.

"2. We summarize briefly the movement which has culminated in this draft:

"At the 1905 meeting of the Association held in Rhode Island, the Chairman of the Executive Committee presented a resolution, which was adopted unanimously, providing for a special committee to report upon the 'advisability and practicability' of the adoption of a code of professional ethics by the Association (Reports, xxviii, 132). At the Association's 1906 meeting, held in Minnesota, the committee reported favorably upon both points (*id.* xxix, 600-604; reprinted as Appendix A of the committee's 1907 report *id.* xxxi, 681-684), and its recommendation, providing for a committee from Bench and Bar to draft a series of canons of professional ethics 'suitable for adoption and promulgation' by the Association, was adopted unani-

Context – Hoffman's Course

- 7-year program
- Not today's legal curriculum
- Practical guidance
- Process of formation



Context – Hoffman's Course

STUDENT'S PRAYER.

PRAYER

BEFORE THE STUDY OF LAW,

BY DR. SAMUEL JOHNSON.

SEPTEMBER 26, 1765.

ALMIGHTY GOD, THE GIVER OF WISDOM, WITHOUT WHOSE HELP RESOLUTIONS ARE VAIN, WITHOUT WHOSE BLESSING STUDY IS INEFFECTUAL, ENABLE, ME, IF IT BE THY WILL, TO ATTAIN SUCH KNOWLEDGE AS MAY QUALIFY ME TO DIRECT THE DOUBTFUL, AND INSTRUCT THE IGNORANT, TO *PREVENT* WRONGS, AND *TERMINATE* CONTENTIONS; AND GRANT THAT I MAY USE THAT KNOWLEDGE WHICH I SHALL ATTAIN, TO THY GLORY, AND MY OWN SALVATION; FOR JESUS CHRIST'S SAKE. AMEN.

Context – Hoffman's Course

A

STUDENT'S RESOLUTIONS.

I AM RESOLVED [Deo Juvente,]

1. To have a scheme of life.
2. To have a scheme of study.
3. To live temperately.
4. To rise early.
5. To apply myself to study.
6. To oppose indolence, and never to postpone to the morrow the duty of to-day.
7. To take exercise.
8. To adhere to my hours for sleep.
9. To be moderate in my amusements.
10. To note my daily deficiencies, and endeavour to correct them.

Hoffman's Course – View of Law

- Coherent, well-ordered system derived from basic principles
- Originating in laws of nature
- Conducive to justice and human flourishing

Hoffman's Course – A Virtuous Spiral

- Better understanding of the good
- More virtuous
- A better lawyer
- Better understanding of the good
- More virtuous
- A better lawyer
- Better understanding of the good
- More virtuous
- A better lawyer

The 50 Resolutions

- Stated in the first person
- Stated familiar expectations, not as regulatory limits, but as helps and encouragements to a way of life
- Admonitions that addressed moral issues

Hoffman's Resolutions & Calling

- Not regulations to restrain to lawyers
- Rather, a set of practices intended…
  - To form lawyers
  - To inculcate a calling
  - To enable them to reach excellence

Canons

- They were helps and encouragements to become and remain a certain kind of person and pursue a certain way of life.
- The underlying vision:
  - Law is well-ordered
  - Lawyers are formed by their love of the law
  - Love of the law inculcates virtue and an ability to promote justice

Canons

- Law was a calling that suggested…
  - Who a lawyer was
  - What should motivate a lawyer
  - What a lawyer's purpose should be
- Lawyers must be formed.
- Law was a profession in that it required a devotion to a certain way of life

2nd Milestone – Code of Professional Responsibility

Code of Professional Responsibility – Context

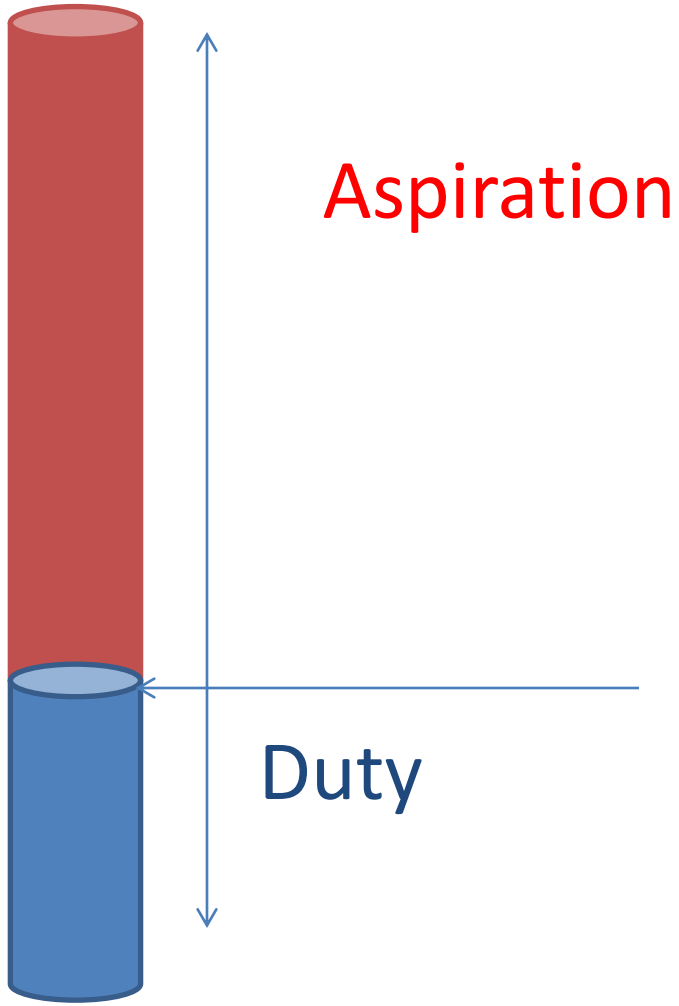
Lon L. Fuller 1902 - 1978

Fuller's Requirements for an Ethics Code

1. Dual moralities of duty and aspiration
2. A clear statement of the function the profession in society

Fuller's Dual Moralities

Moral Scale



Code Followed Fuller's Two Moralities

Aspiration

Duty

CANON 6
A Lawyer Should Represent a Client Competently

ETHICAL CONSIDERATIONS

EC 6-1 Because of his vital role in the legal process, a lawyer should act with competence and proper care in representing clients. He should strive to become and remain proficient in his practice and should accept employment only in matters which he is or intends to become competent to handle.

EC 6-2 A lawyer is aided in attaining and maintaining his competence by keeping abreast of current legal literature and developments, participating in continuing legal education programs, concentrating in particular areas of the law, and by utilizing other available means. He has the additional ethical obligation to assist in improving the legal profession, and he may do so by participating in bar activities intended to advance the quality and standards of members of the profession. Of particular importance is the careful training of his younger associates and the giving of sound guidance to all lawyers who consult him. In short, a lawyer should strive at all levels to aid the legal profession in advancing the highest possible standards of integrity and competence and to meet those standards himself.

EC 6-3 While the licensing of a lawyer is evidence that he has met the standards then prevailing for admission to the bar, a lawyer generally should not accept employment in any area of the law in which he is not qualified.[1] However, he may accept such employment if in good faith he expects to become qualified through study and investigation, as long as such preparation would not result in unreasonable delay or expense to his client. Proper preparation and representation may require the association by the lawyer of professionals in other disciplines. A lawyer offered employment in a matter in which he is not and does not expect to become so qualified should either decline the employment or, with the consent of his client, accept the employment and associate a lawyer who is competent in the matter.

EC 6-4 Having undertaken representation, a lawyer should use proper care to safeguard the interests of his client. If a lawyer has accepted employment in a matter beyond his competence but in which he expected to become competent, he should diligently undertake the work and study necessary to qualify himself. In addition to being qualified to handle a particular matter, his obligation to his client requires him to prepare adequately for and give appropriate attention to his legal work.

EC 6-5 A lawyer should have pride in his professional endeavors. His obligation to act competently calls for higher motivation than that arising from fear of civil liability or disciplinary penalty.

EC 6-6 A lawyer should not seek, by contract or other means, to limit his individual liability to his client for his malpractice. A lawyer who handles the affairs of his client properly has no need to attempt to limit his liability for his professional activities and one who does not handle the affairs of his client properly should not be permitted to do so. A lawyer who is a stockholder in or is associated with a professional legal corporation may, however, limit his liability for malpractice of his associates in the corporation, but only to the extent permitted by law.[2]

DISCIPLINARY RULES

DR 6-101 -Failing to Act Competently.

(A) -A lawyer shall not:

(1) -Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.

(2) -Handle a legal matter without preparation adequate in the circumstances.

(3) -Neglect a legal matter entrusted to him.[1]

DR 6-102 -Limiting Liability to Client.

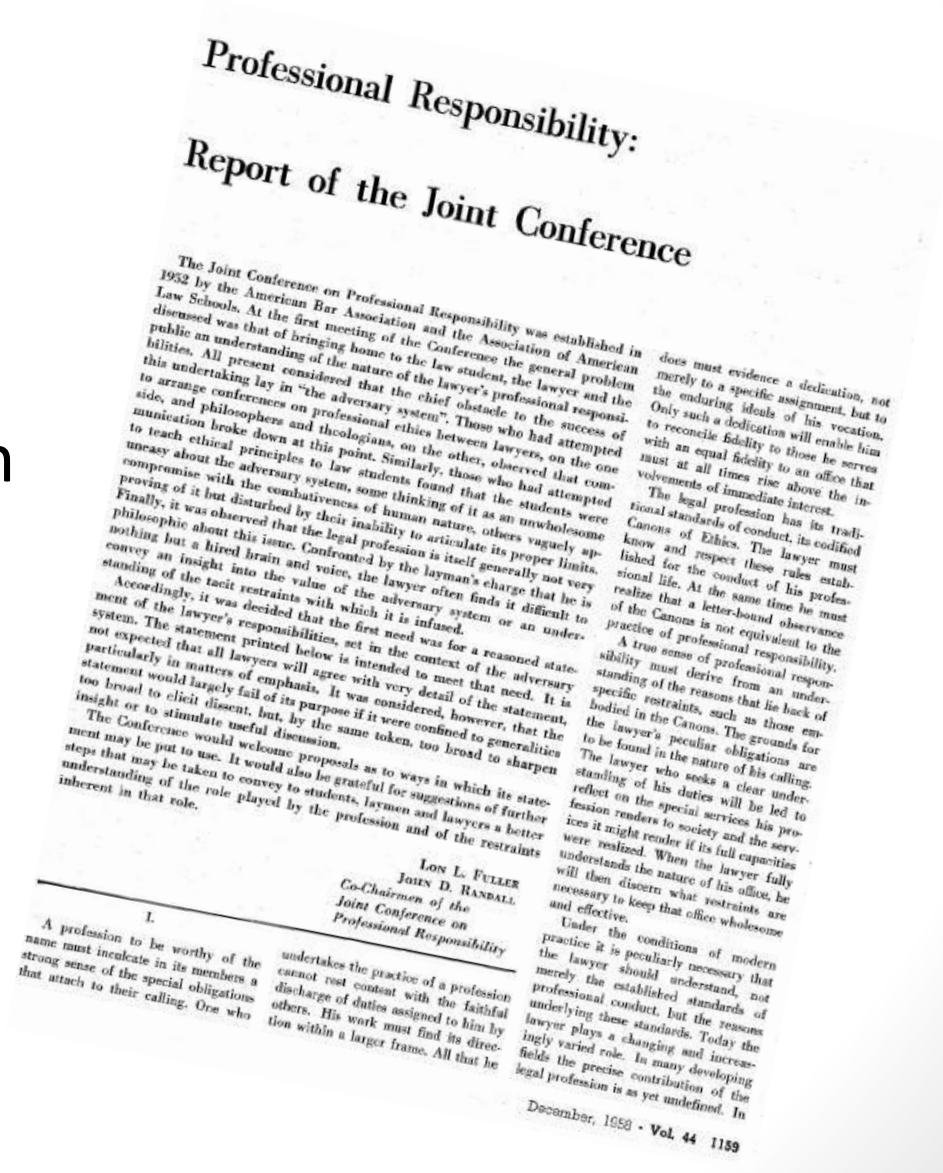
(A) -A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice.

Fuller's Requirements for an Ethics Code

1. Dual moralities of duty and aspiration 
2. A clear statement of the function the profession in society

Function of the Profession

"The best single expression" of "the central moral tradition within which American lawyers ought to live and dwell."



Professional Responsibility:

Report of the Joint Conference

The Joint Conference on Professional Responsibility was established in 1952 by the American Bar Association and the Association of American Law Schools. At the first meeting of the Conference the general problem discussed was that of bringing home to the law student, the lawyer and the public an understanding of the nature of the lawyer's professional responsibilities. All present considered that the chief obstacle to the success of this undertaking lay in "the adversary system". Those who had attempted to arrange conferences on professional ethics between lawyers, on the one side, and philosophers and theologians, on the other, observed that communication broke down at this point. Similarly, those who had attempted to teach ethical principles to law students found that the students were uneasy about the adversary system, some thinking of it as an unwholesome compromise with the combativeness of human nature, others vaguely approving of it but disturbed by their inability to articulate its proper limits. Finally, it was observed that the legal profession is itself generally not very philosophic about this issue. Confronted by the layman's charge that he is nothing but a hired brain and voice, the lawyer often finds it difficult to convey an insight into the value of the adversary system or an understanding of the tacit restraints with which it is infused.

Accordingly, it was decided that the first need was for a reasoned statement of the lawyer's responsibilities, set in the context of the adversary system. The statement printed below is intended to meet that need. It is not expected that all lawyers will agree with every detail of the statement, particularly in matters of emphasis. It was considered, however, that the statement would largely fail of its purpose if it were confined to generalities too broad to elicit dissent, but, by the same token, too broad to sharpen insight or to stimulate useful discussion.

The Conference would welcome proposals as to ways in which its statement may be put to use. It would also be grateful for suggestions of further steps that may be taken to convey to students, laymen and lawyers a better understanding of the role played by the profession and of the restraints inherent in that role.

LON L. FULLER
JOHN D. RANDALL
Co-Chairmen of the
Joint Conference on
Professional Responsibility

I.

A profession to be worthy of the name must inculcate in its members a strong sense of the special obligations that attach to their calling. One who undertakes the practice of a profession cannot rest content with the faithful discharge of duties assigned to him by others. His work must find its direction within a larger frame. All that he does must evidence a dedication, not merely to a specific assignment, but to the enduring ideals of his vocation. Only such a dedication will enable him to reconcile fidelity to those he serves with an equal fidelity to an office that must at all times rise above the involvements of immediate interest.

The legal profession has its traditional standards of conduct, its codified Canons of Ethics. The lawyer must know and respect these rules established for the conduct of his professional life. At the same time he must realize that a letter-bound observance of the Canons is not equivalent to the practice of professional responsibility.

A true sense of professional responsibility must derive from an understanding of the reasons that lie back of specific restraints, such as those embodied in the Canons. The grounds for the lawyer's peculiar obligations are to be found in the nature of his calling. The lawyer who seeks a clear understanding of his duties will be led to reflect on the special services his profession renders to society and the services it might render if its full capacities were realized. When the lawyer fully understands the nature of his office, he will then discern what restraints are necessary to keep that office wholesome and effective.

Under the conditions of modern practice it is peculiarly necessary that the lawyer should understand, not merely the established standards of professional conduct, but the reasons underlying these standards. Today the lawyer plays a changing and increasingly varied role. In many developing fields the precise contribution of the legal profession is as yet undefined. In

Code – View of Law

"The life of the law has not been logic; it has been experience."

Oliver Wendell Holmes, *The Common Law*

- American Legal Realism
- Among other things, an assault on the conception of law as a coherent system of fixed axioms from which particular rules and decisions could be deduced.

Code & Calling

"Understanding may enable the lawyer to see the goal toward which he should strive [i.e. the highest demands of the profession], but it will not furnish the motive power that will impel him toward it. For this, the lawyer requires a sense of attachment to something larger than himself."

"Professional Responsibility: Report of the Joint Conference"

Code & Calling

- The Code represented a transition.
- Under the Canons, the law provided a comprehensive calling.
- Under the Code, the law provided
  - Purpose
  - Guidance as to identity
  - But motivation was challenged
- The Code relied on lawyers' aspirations for compliance, but also imposed rules that could be the subject of disciplinary action.

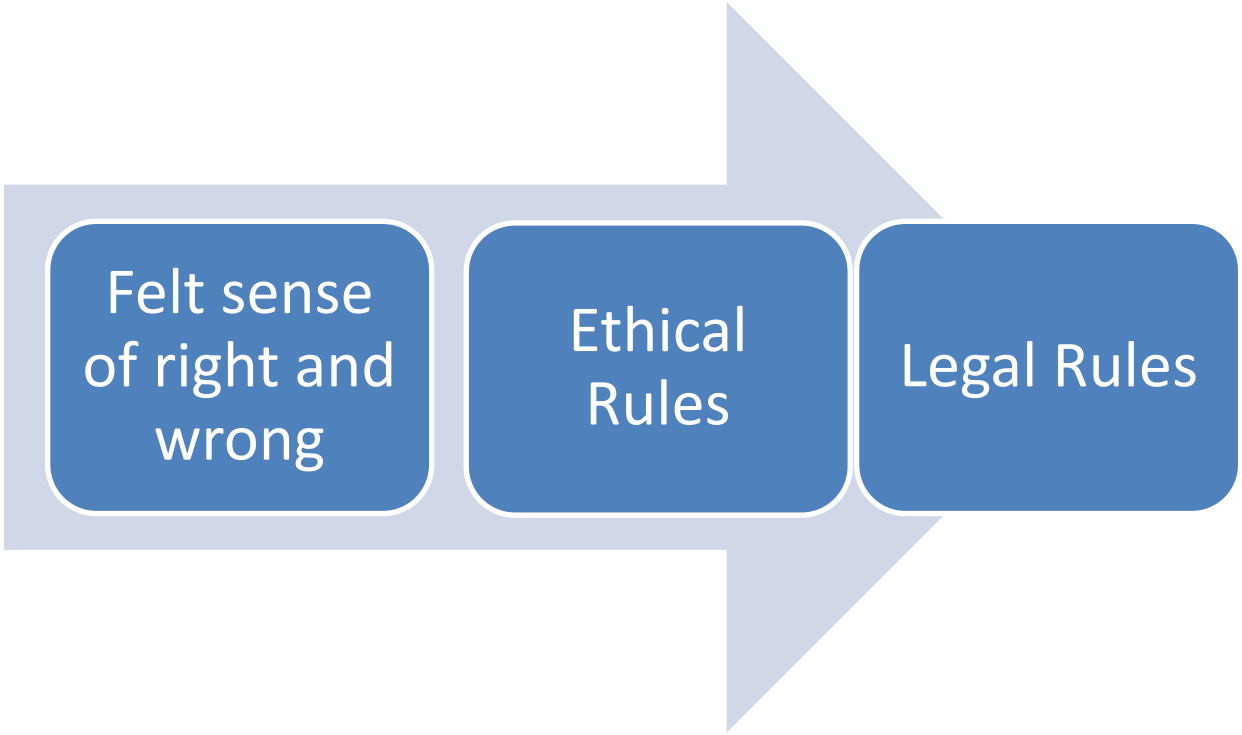
3rd Milestone – Rules of Professional Conduct

Rules -- Context

"The time has come to renounce completely the fiction that ethical problems for lawyers are matters of ethics rather than law."

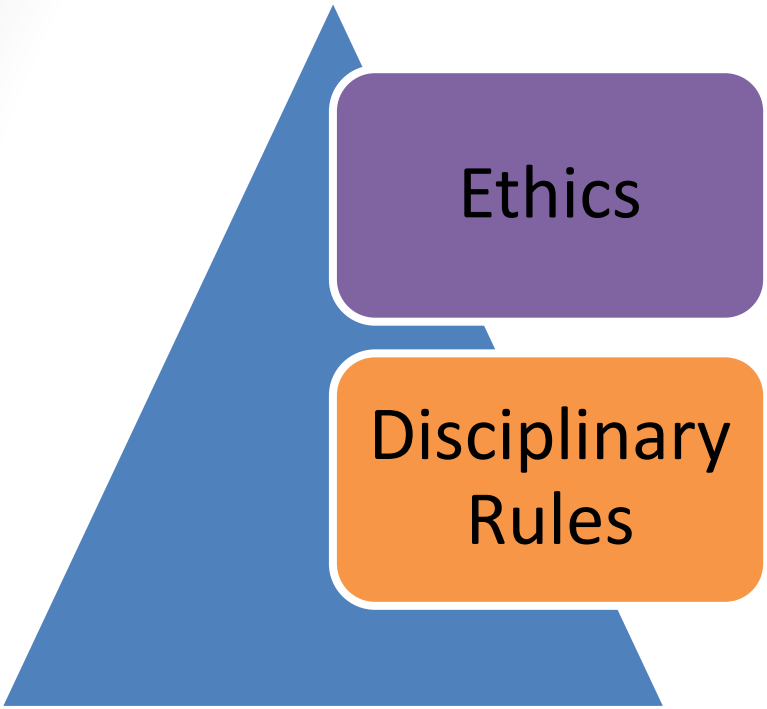
L. Ray Patterson, 1977

Context

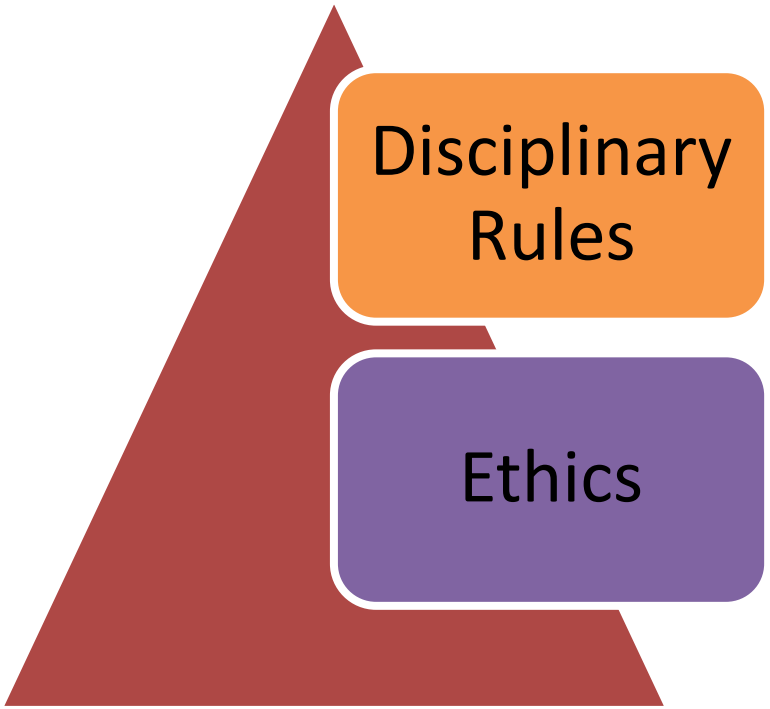


Ethical rules must be “rationalized” into law.

Context – An Inversion



The Code



The Code's Critics

Rules – View of Law

"The very term legal right is a euphemism for power, and the ultimate function of our law is to redress the balance of power in a free society."

L. Ray Patterson

Rules & Calling

- Gave the lawyer black-letter law that provided clear guidance in specific contexts and, where the Rules did not specifically apply, criteria for exercising judgment.
- Avoided addressing lawyers' identity, motivation or purpose.
- Assumed lawyers follow rules because of a fear of disciplinary action and a sense of the rules' legitimacy and rationality.

Rules & Calling

The legal profession "no longer enjoy[ed] an unchallenged sense of purpose and worth….The practice of the profession [was] no longer intelligible in terms that prevailed in the century and three quarters between Marbury v. Madison in 1803 and Roe v. Wade in 1973. Its governing norms no longer represent[ed] the shared understanding of a substantially cohesive group. They [were] simply rules of public law regulating a widely pursued technical" occupation.

Geoffrey Hazard, the Reporter for the Committee that drafted the Rules of Professional Conduct

In short, the Rules almost completely omitted any notion of calling.

Conclusion

- The Canons of Professional Ethics reflected a comprehensive view of the legal calling.
- The Code of Professional Responsibility articulated the purpose and role of the profession in American society, but was uncertain of a lawyer's motivation.
- The Rules of Professional Conduct signaled the demise of an accepted view of lawyers' purpose and calling.

Calling & The Commitment to Character

Characteristics of Calling

Richard Gunderman

Preamble

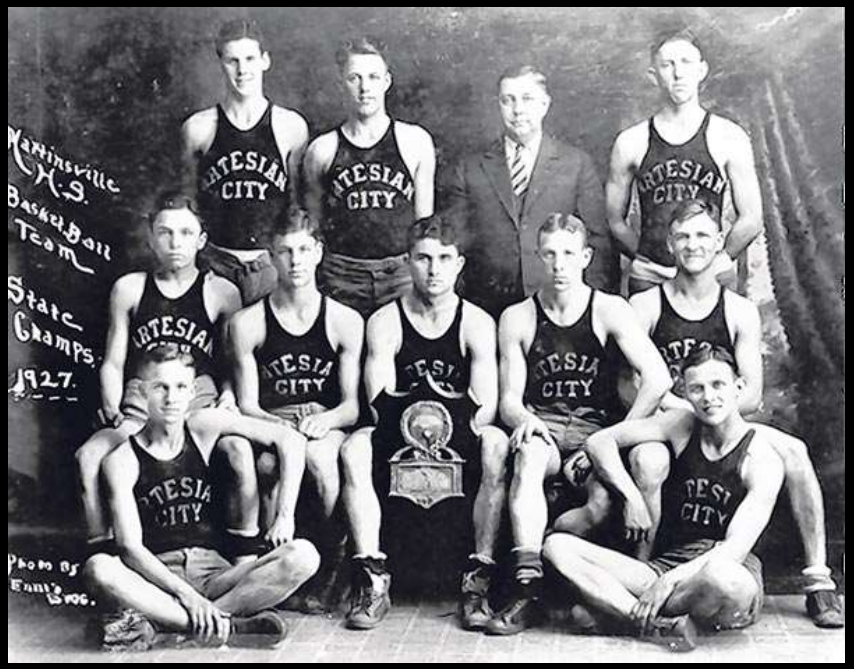
- A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. Whether or not engaging in the practice of law, lawyers should conduct themselves honorably.

Scope of Indiana Rules of Professional Conduct

- The rules do not exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The rules simply provide a framework for the ethical practice of law.

?

- 3 consecutive state championship games
- 3-time All-State
- 1927, state champ
- 3-time consensus All-American
- 138 free throws



?

- 10 championships
- 7 in a row
- 88 consecutive wins
- 6-time Coach of Year
- First Hall of Fame as both player and coach
- Greatest coach

John Wooden

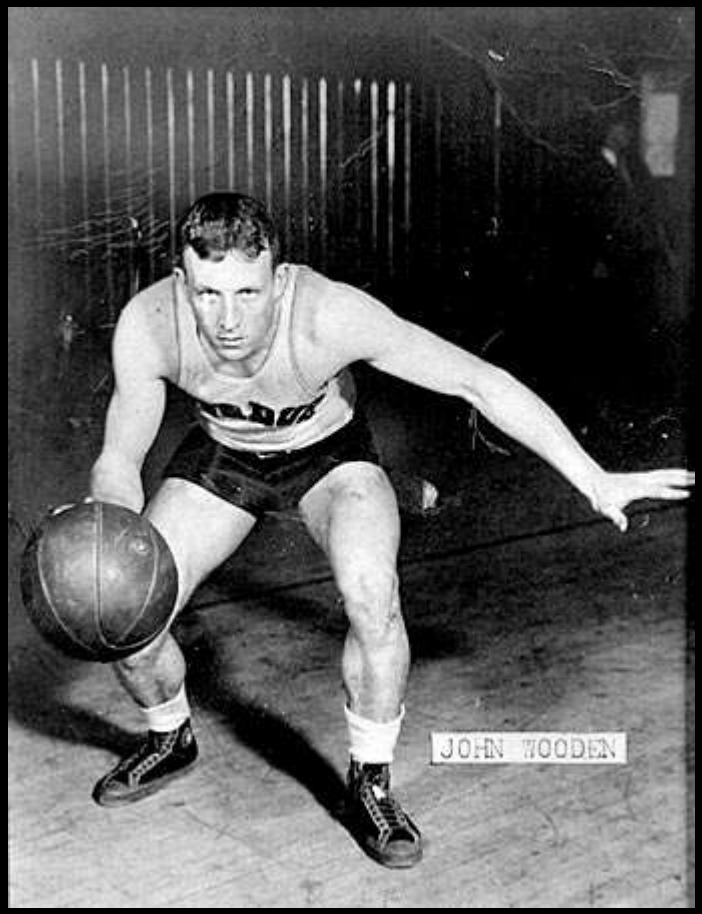
1. Be true to yourself
2. Help others
3. Make friendship a fine art
4. Drink deeply from good books
5. Build a shelter against a rainy day
6. Give thanks for your blessings
7. Make each day your masterpiece

1. Be True To Yourself

- Your success comes not from victories but from knowing that you did everything you could to be the best you could be

1. Be True to Yourself

Don’t measure yourself by what you have accomplished but by what you should have accomplished with your ability.



2. Help Others

- *Willingness* to sacrifice personal interest or gain for the welfare of all

2. Help Others

- *Eagerness* to sacrifice personal interest or gain for the welfare of all

2. Help Others

- Player who makes the team great is better than a great player

3. Make Friendship a Fine Art

- 172/180

3. Make Friendship a Fine Art

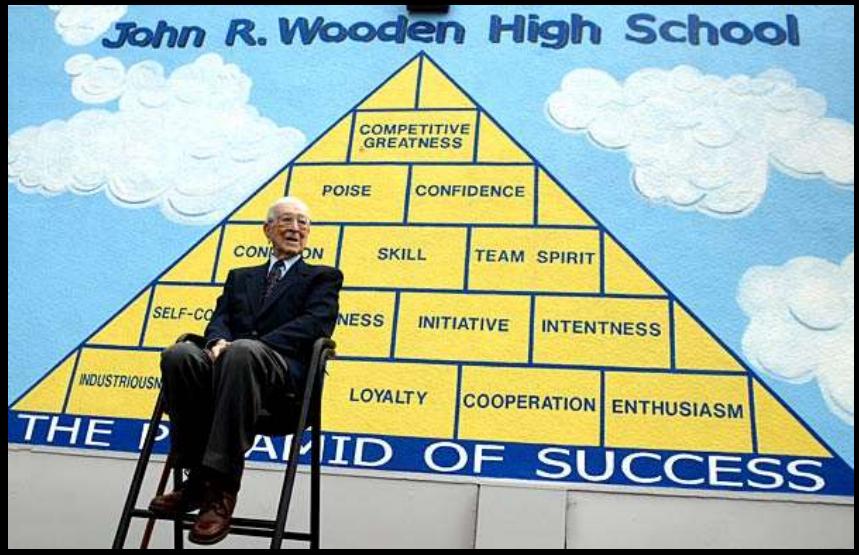
- The thing that gets me about Coach is that there will be others who will go on to win 10 championships. Heck, Phil Jackson has won 10 NBA Championships. But the thing that separates Coach from so many others is his focus on relationships. He truly loved his players. He was a man of genuine land enduring love.

4. Drink from Good Books

- 700 square foot condo
- Encino, California

4. Drink from Good Books

- Books
- Learning
- Morals



5. Build Shelter Rainy Day

- Best car
- Raise
- $35,000

5. Build Shelter Rainy Day

- If I were ever prosecuted for my religion, I truly hope there would be enough evidence to convict me.

6. Give Thanks for Blessings

You can't live a perfect day without doing something for someone who will never be able to repay you.

6. Give Thanks for Blessings

7. Make Each Day Masterpiece

- Coach Wooden never talked about winning and losing, but rather about the effort to win. He rarely talked about basketball, but generally about life. He never talked about strategy, statistics or plays, but rather about people and character. Coach Wooden never tired of telling us that once you become a good person, then you have a chance of becoming a good basketball player.

Characteristics of Calling

- Be true to yourself
- Help others
- Make friendship a fine art
- Drink deeply from good books
- Make each day your masterpiece
- Build a shelter against a rainy day
- Give thanks for your blessings

Calling & The
Rules of Professional Conduct

Calling & The Rules of Professional Conduct

The Purpose of the Profession

- What purpose does the legal profession serve?
- Why is it important and valuable?
- How has this purpose changed?

Report of Joint Conference

"The best single expression" of "the central moral tradition within which American lawyers ought to live and dwell."

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Report of Joint Conference

- Services to Clients
- Services to Society

Services to Clients

1. Advocate
2. Counselor
3. Designer of frameworks for voluntary cooperation

Advocate

A defense of the adversary system

- "…a framework within which… impartial judgment can receive its highest realization"
- Overcomes a natural tendency
- "Confirmation bias"
- Follows the tradition that conversation is needed to find the truth

The form is not enough

- The truth-finding purpose of a conversation can be corrupted
- Much depends on the parties to the conversation
- Advocacy works when it “promotes a wise and informed decision”
- An overriding desire to win can corrupt the process

Counselor

Counselor

"the most effective realization of the aims of the law often takes place, not in court, but in the attorney's office,…where the lawyer's quiet counsel takes the place of public force"

Designer of frameworks for voluntary cooperation

Designer of frameworks for voluntary cooperation

Designer of frameworks for voluntary cooperation

"…vital to American society"

- "…human relations are set, not by governmental decree, but by the voluntary actions of the… parties"
- Implies a high view of human beings
- To deny these capabilities was to deny human beings their humanity
- Lawyers help exercise these capabilities

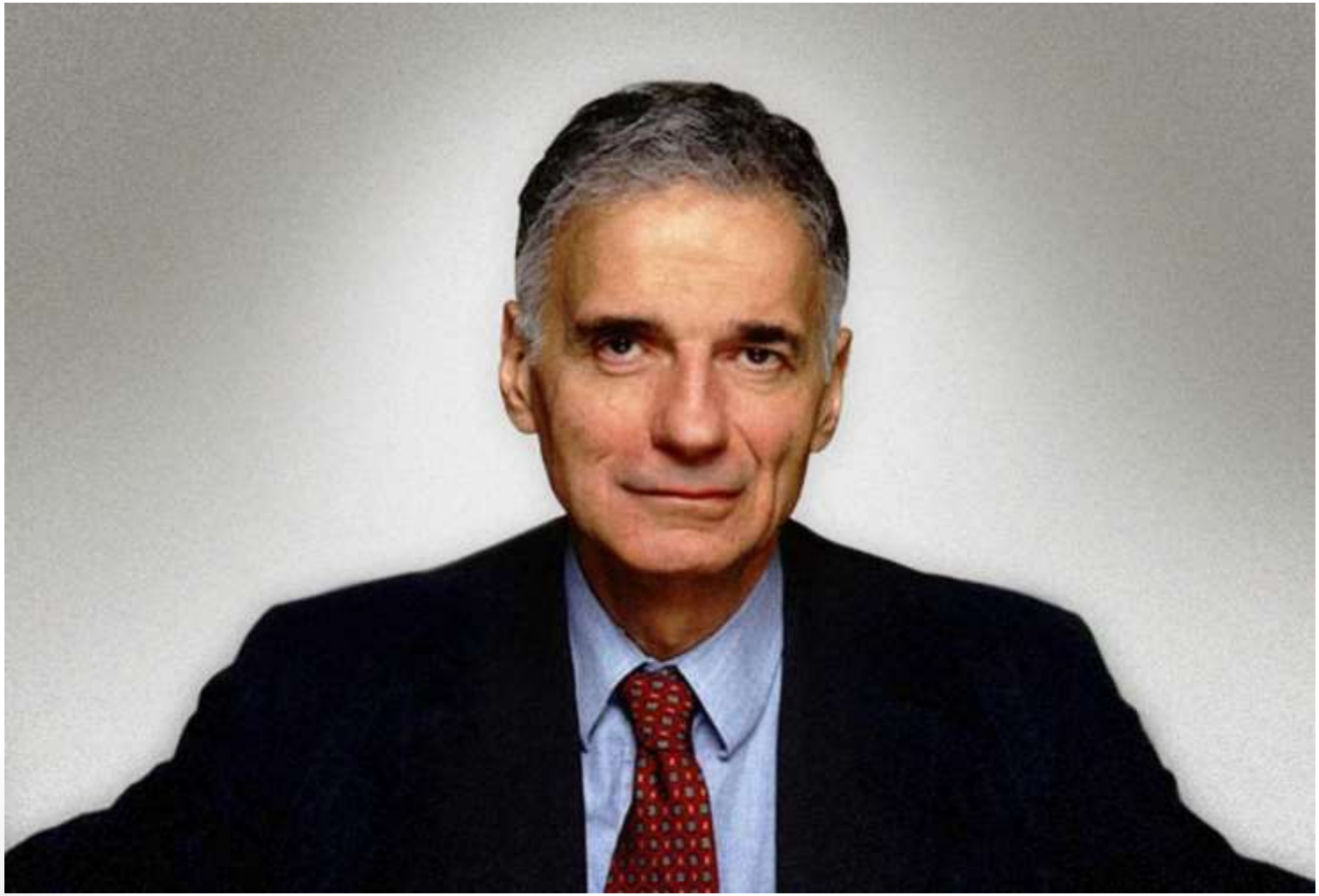
Services Rendered to Society

- Represent those unable to pay
- Guard due process
- Represent unpopular causes
- Reform the law
- Participate in public affairs as a citizen
- Lead in the implementation of ideals
- Engage in private practice

Guardian of due process

Representation of unpopular causes

Improve the law



Participate in public affairs as a citizen

Lead in the implementation of ideals

Engage in private practice

Advocate

Counselor

Designer of frameworks

All three for the benefit of society

A view of the Rules through the central moral tradition…

Advocate

- Rule 3.1 – Abuse of procedure through frivolous claims
- Rule 3.2 – Expedite litigation, no dilatory practices
- Rule 3.3 – Candor toward tribunal
- Rule 3.4 – Practices unfair to opposing counsel
- Rule 3.5 – Impartiality and decorum of tribunal
- Rule 1.7(a) – General prohibition on conflicts of interest
- Rule 1.9(a) – Conflicts of interest involving former clients
- Rule 1.6 – Confidentiality of information

Counselor

- Preamble – “As an advisor, a lawyer provides a client…”
- Rule 1.8(a) – Business transactions with clients
- Rule 1.8(c) – Gifts from clients
- Rule 1.8(e) – Financial assistance to clients
- Rule 1.8(j) – Sexual relations with client
- Rule 1.6 – Confidentiality of information
- Rule 2.1 – “Independent professional judgment” and “candid advice”

But…possibly a narrower view of the type of advice a lawyer is expected to provide

Designer of frameworks for collaboration

- Preamble acknowledges two roles:
  - Negotiator
  - Intermediary
- Rule 2.2 permits a lawyer to act as intermediary in certain circumstances
- Rule 1.7 acknowledges role in consideration of "non-litigation conflicts of interest" and "common representation"

But…the Model Rules no longer permit a lawyer to act as an intermediary

Services Rendered to Society

- Represent those unable to pay
- Guard due process
- Represent unpopular causes
- Reform the law
- Participate in public affairs as a citizen
- Lead in the implementation of ideals
- Engage in private practice

Represent those unable to pay

- Rule 6.1 – “A lawyer should render public interest service…”
  - ABA House of Delegates – “basic responsibility…”
  - Indiana State Bar Association – “aspirational goal of 50 hours per year”
- Rule 6.6 – Coalition for Court Access
  - Purpose: To implement a statewide plan to improve access to legal services for those of limited means
  - Uses interest earned on IOLTA accounts
- Rules 6.3 & 6.5 – Conflicts of interest related to LSOs & lawyers
- Rule 6.7 – Reporting requirement
- Preamble – “All lawyers should…”
- Overall, an emphasis on money

Other services for society

- Guardian of due process
  - Preamble – “demonstrate respect for the legal system…” “uphold legal process”
  - Rules 8.4(d)-(f) defining “professional misconduct”

- Represent unpopular causes
  - Rule 1.2(b) – no endorsement of the client’s activities
  - Rule 1.2 Comment – “R]epresentation should not be denied…”

Other services for society

- Reform the law
  - Preamble – “should seek improvement of the law”
  - Rule 6.4 – eliminates conflict of interests related to law reform organizations
  - Rule 6.1 – includes “improving administration of justice” in definition of “public interest legal service”
- Participate in public affairs as a private citizen
  - Preamble – “As a public citizen, a lawyer should…”

Other services for society

- Provide leadership concerning the implementation of ideals
  - No mention.
- Engage in private practice
  - Rules 3.3 – 3.5 – Rules designed to ensure adversarial proceedings produce justice
  - Preamble – “use the law’s procedures for legitimate purposes”

Glaring omission

Roscoe Pound, The Lawyer from Antiquity to Modern Times, 1953

"The term [profession] refers to a group of men pursuing a learned art as a common calling in the spirit of public service – no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of public service is the primary purpose. Gaining a livelihood is incidental, whereas in a business or trade it is the entire purpose."

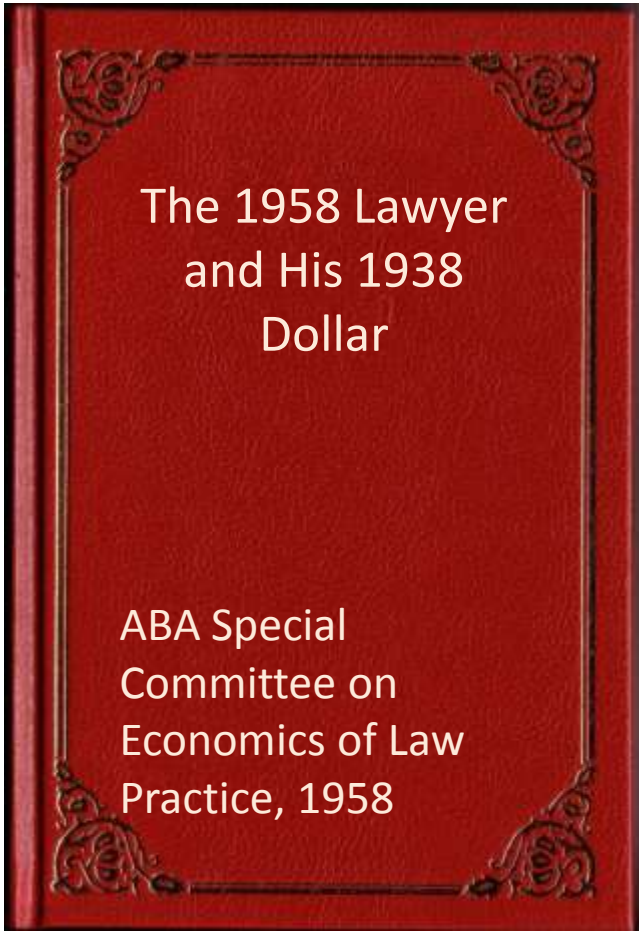
Roscoe Pound, The Lawyer from Antiquity to Modern Times, 1953

"[T]he member of a profession does not regard himself as in competition with his professional brethren. He is not bartering his services as is the artisan nor exchanging the products of his skill and learning as the farmer sells wheat or corn."

Lawyers, Money & Markets

- Rule 1.5(a) – No “unreasonable fees”
- Rules 7.1, 7.4 & 7.5 – Limits on communications about services
- Rule 7.3 – Limits on direct contact with prospective clients
- Rule 7.2 – Limits on advertising

Do lawyers make too little money?



Observations – Services to Client

- Rules recognize all three of the roles identified in the Report
- Advocate: The most attention
- Counselor: More limited counsel – no longer a moral advisor
- Designer of frameworks for cooperation: Little explicit recognition
- Both counselor and designer roles are colored by advocacy

Observations – Services to Society

- Report identified no less than 7 ways lawyers benefit society
- The Rules emphasize 1 -- public interest service
- The distinguishing mark of public interest service is money
- The other ways lawyers can benefit society receive little attention

Observations – Money & The Market

- Moral traditions placed lawyers outside the competition of commerce and discount the importance of money
- Rules retain traces of this tradition in provisions related to fees, advertising and other communications
- Lawyers no longer see money as incidental to the profession; it is an important reason many remain lawyers.

Overall, the Rules suggest…

- A profession that sees itself as more adversarial than it did in 1958.
- A profession that is more concerned about money.
  - Money is now accepted as of great importance in providing services.
  - Working without compensation is the primary indication of benefiting society.

Arthur Usher, Misconduct & The Lawyers' Calling

Arthur Usher, Misconduct & A Lawyer's Calling

Overview


In the
Indiana Supreme Court

IN THE MATTER OF:

ARTHUR J. USHER, IV,

No. 49S00-1105-DI-298

Respondent.

Attorney Discipline Action
Hearing Officer Mark X. Sullivan

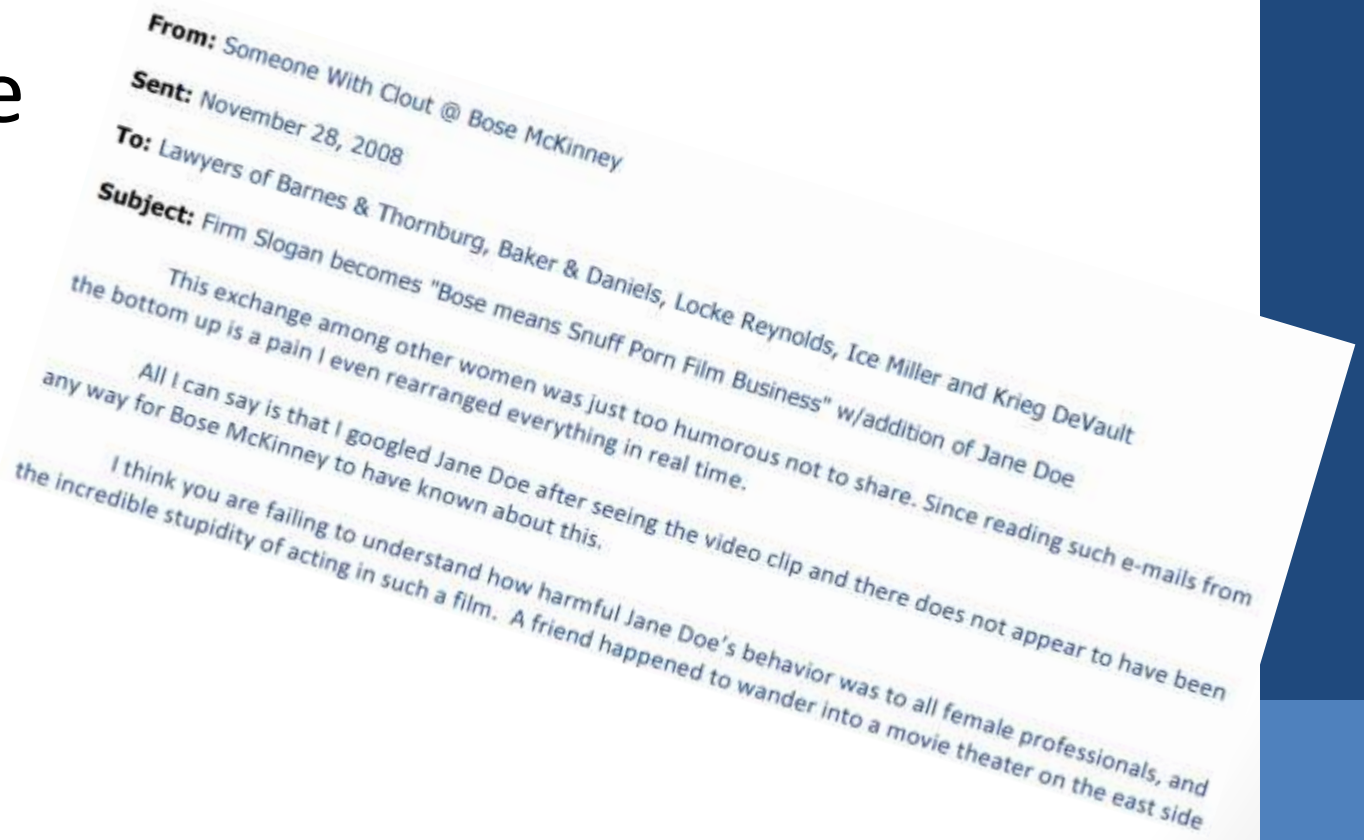
May 17, 2013

FILED
May 17 2013, 1:31 pm
CLERK

- Review facts
- Consider applicable Rules
- Suggest implications for calling

Facts

- Arthur Usher
- Jane Doe



From: Someone With Clout @ Bose McKinney

Sent: November 28, 2008

To: Lawyers of Barnes & Thornburg, Baker & Daniels, Locke Reynolds, Ice Miller and Krieg DeVault

Subject: Firm Slogan becomes "Bose means Snuff Porn Film Business" w/addition of Jane Doe

This exchange among other women was just too humorous not to share. Since reading such e-mails from the bottom up is a pain I even rearranged everything in real time.

All I can say is that I googled Jane Doe after seeing the video clip and there does not appear to have been any way for Bose McKinney to have known about this.

I think you are failing to understand how harmful Jane Doe's behavior was to all female professionals, and the incredible stupidity of acting in such a film. A friend happened to wander into a movie theater on the east side

Three Possible Violations

Possible Violations

1st Possibility

Rule 8.4(b): Committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer

No Violation

Possible Violations

2nd Possibility

Rule 8.4(g): Engaging in conduct that was not legitimate advocacy, in a professional capacity, manifesting bias or prejudice based on gender

No Violation

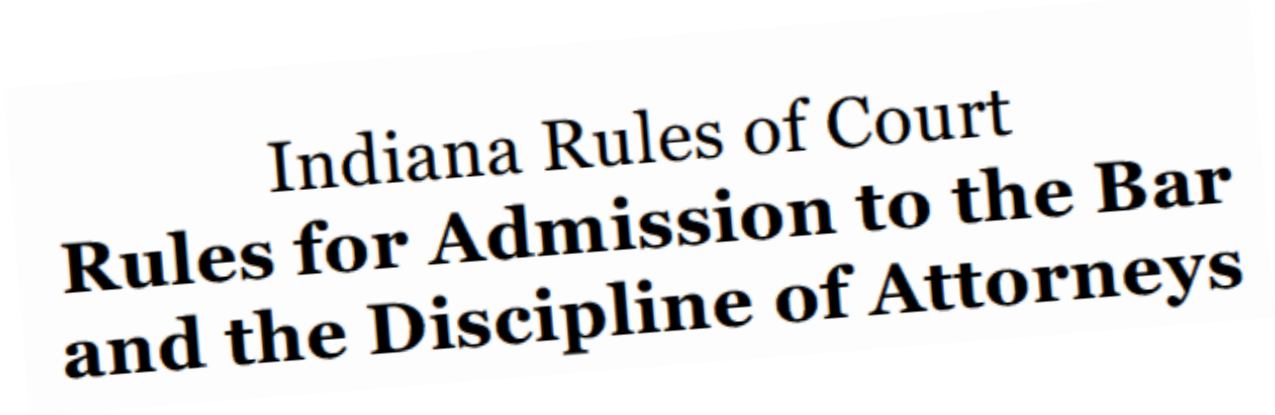
Possible Violations

3rd Possibility

Rule 8.4(c): Engaging in conduct involving dishonesty, fraud, deceit or misrepresentation

Violation

Another Character-Based Rule



"The applicant must be at least 21 years of age and possess good moral character and fitness to practice law…."

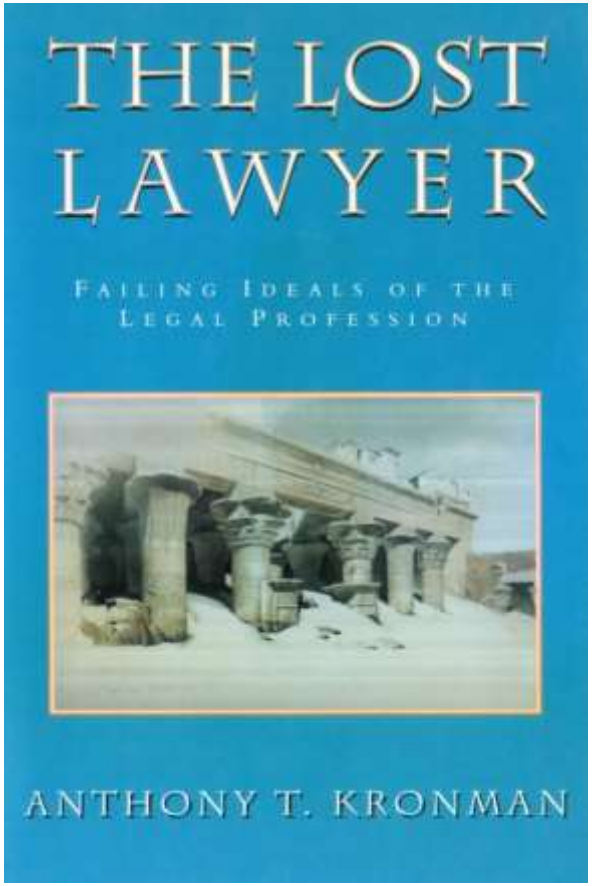
Character in the Indiana Constitution

Article 7, Section 21. “Every person of **good moral character**, being a voter, shall be entitled to admission to practice law in all Courts of justice.”

Justification: To protect the public

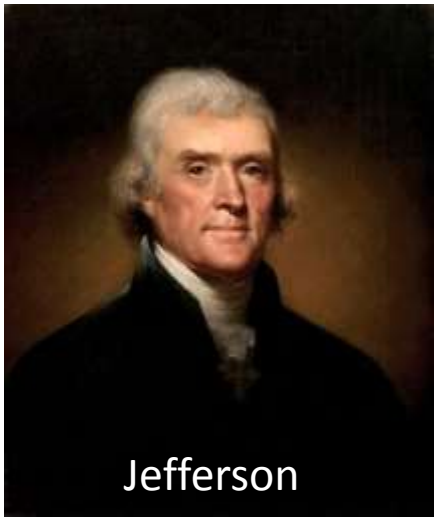
- Rhode's survey: safeguard public from "morally unfit" lawyers
- Courts & scholars:
  - Shield clients from potential abuses
  - Safeguard administration of justice
- Other, less often cited reasons:
  - Maintain professional community
  - Protect and improve image of lawyers

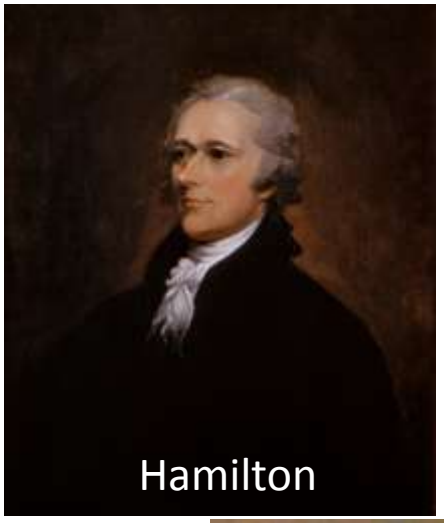
Another view…

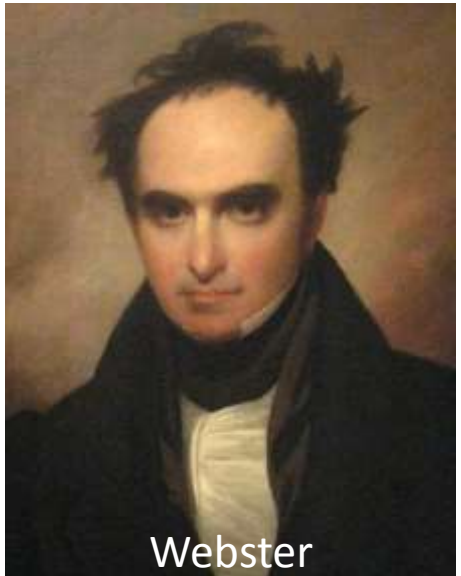


Character-based rules are vestiges of an earlier, largely forgotten view of a lawyer's calling.

The Lawyer-Statesman


Jefferson


Hamilton


Webster


Marshall

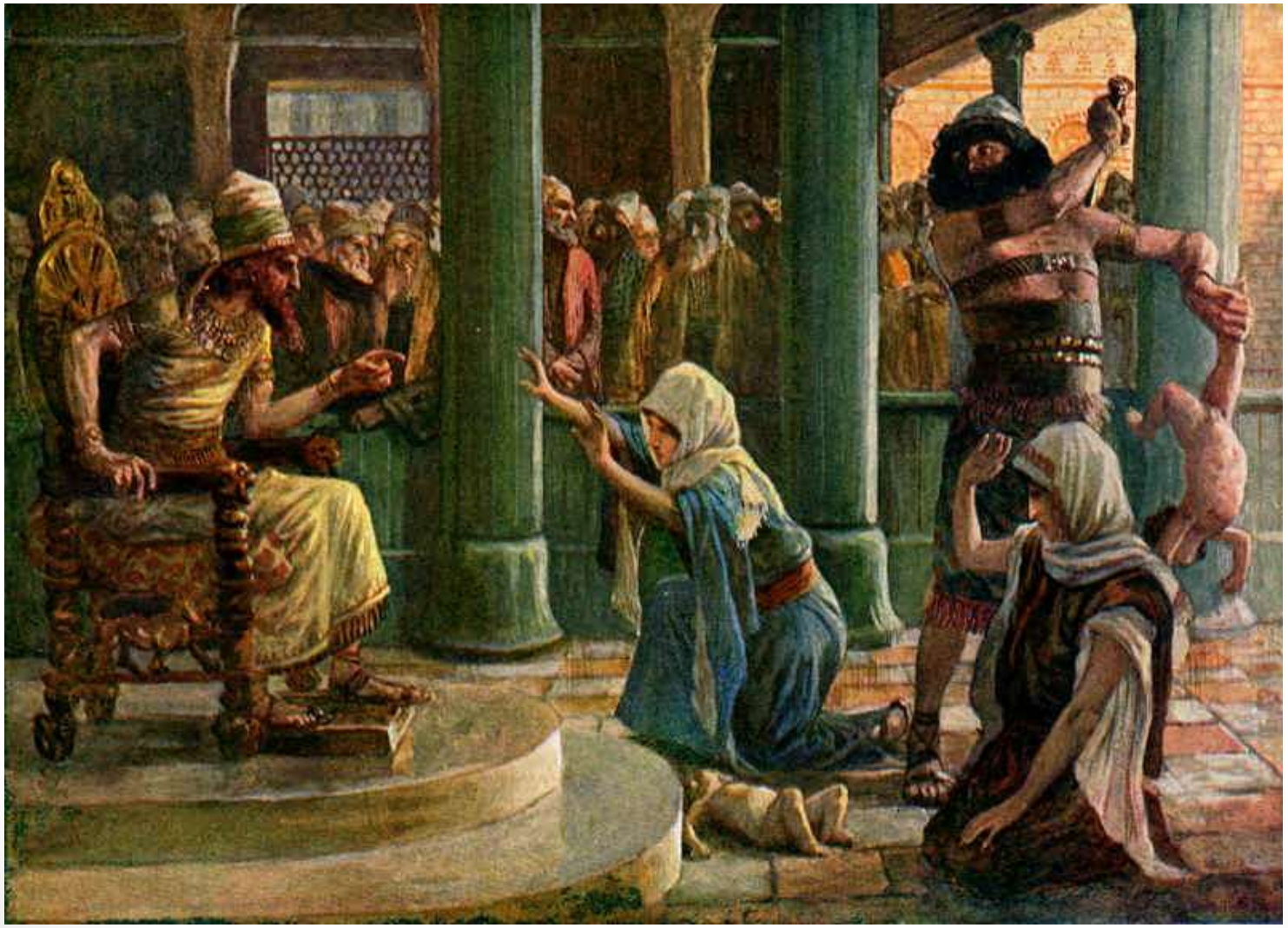
As a devoted citizen

- Sacrifice for the public good
- Talent for discernment of public good
- Talent for fashioning arrangements
- Leader in public life

In dealings with clients…

- Help understand interests and goals
- Identify and negotiate among conflicting goals and interests
- Advice about means
- Advice about ends

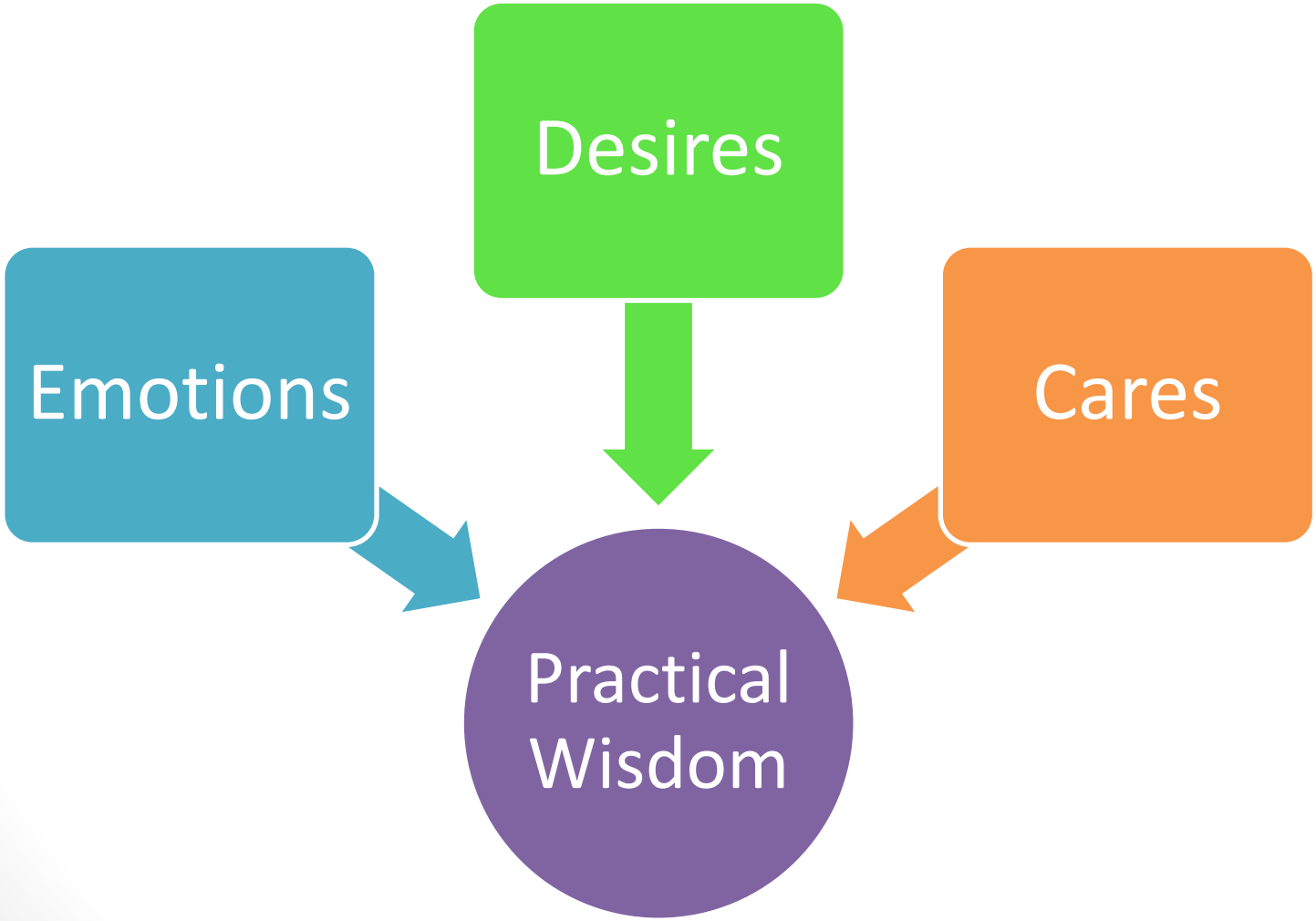
Practical wisdom



Mental virtues

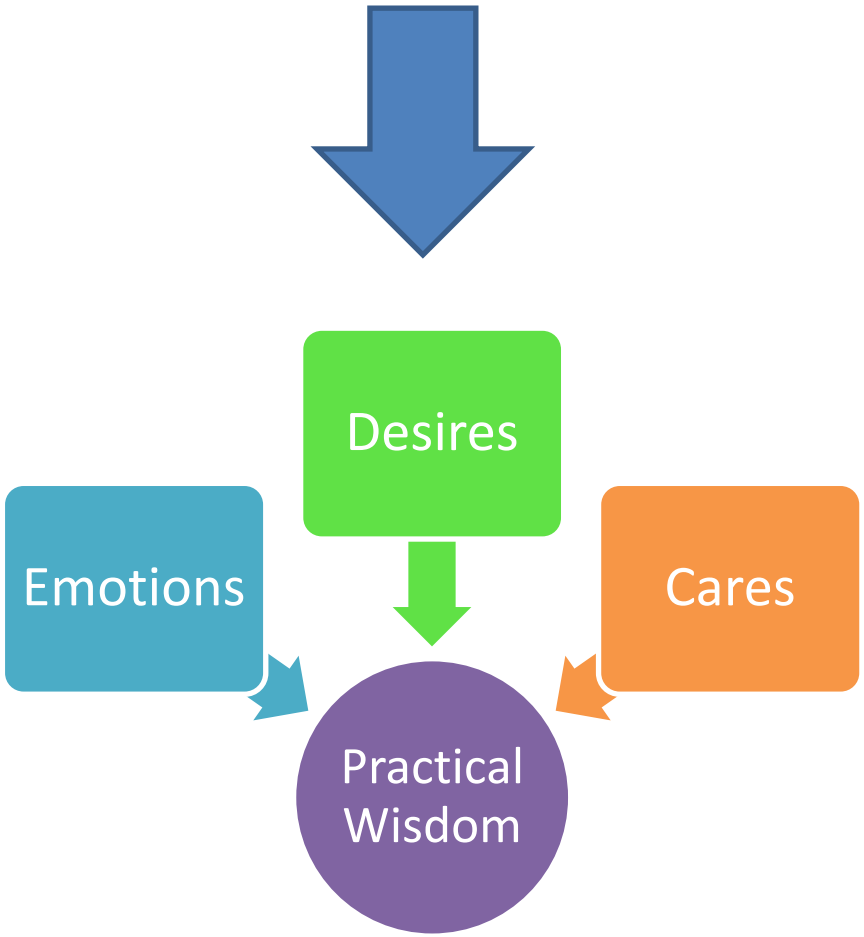
- Love of learning
- Courage
- Firmness
- Humility
- Autonomy
- Generosity

A trait of character



The connection…

Character-Based Rules



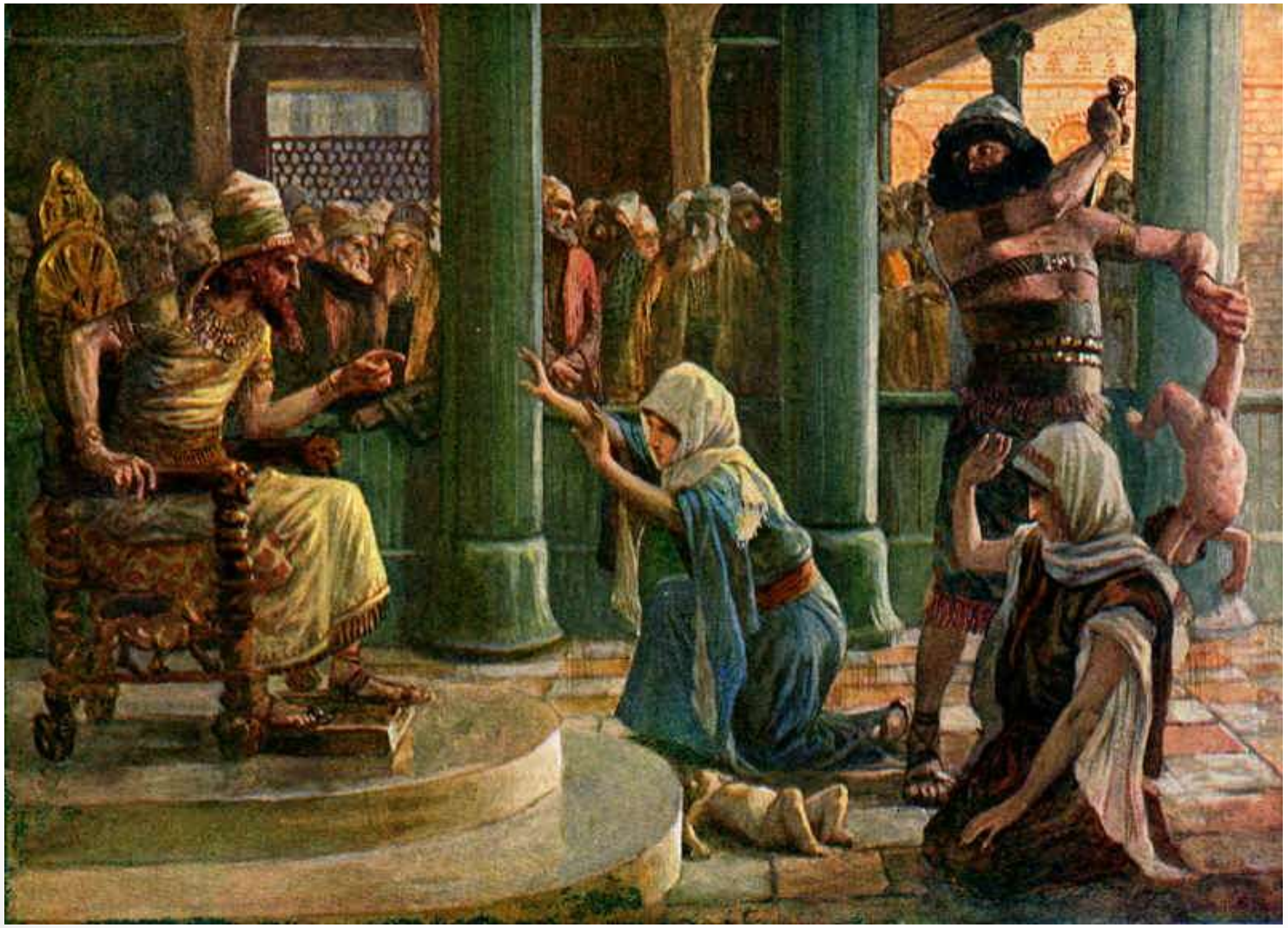
Rhode's reasons to eliminate character-based rules

- Standards are vague
- Used to promote conformity
- Violations do not predict future misbehavior of lawyers
- No improvement in reputation of the profession

Application to Usher

Question: Is Arthur Usher's behavior with respect to Jane Doe predictive of his behavior as a lawyer?

In praise of practical wisdom

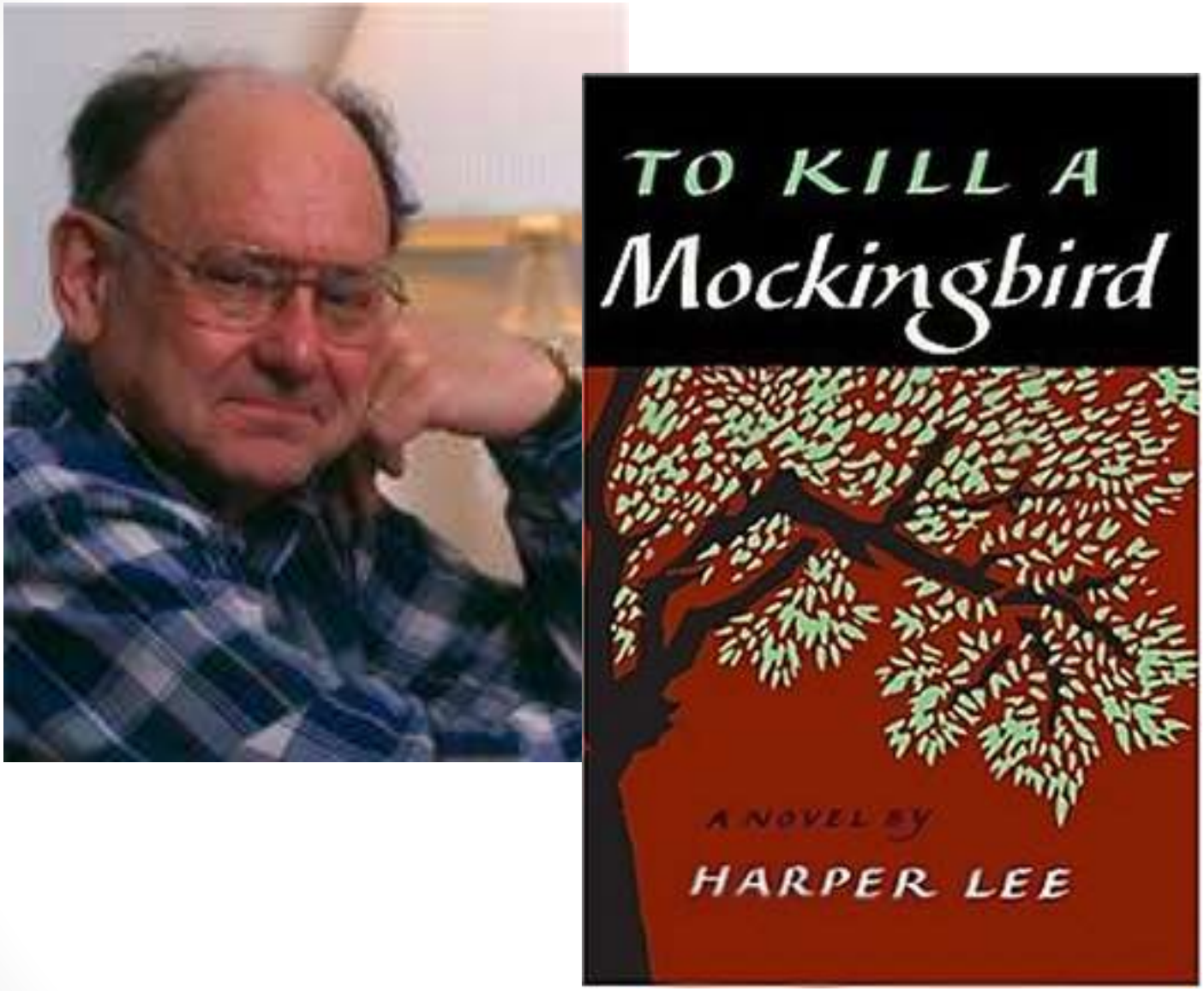


What happened to Mr. Usher?

- Violation of Rule 8.4(c): Conduct involving dishonesty, fraud, deceit or misrepresentation
- Violation of:
  - Rule 8.1(a): False statements to Commission
  - Rule 8.1(b): Failure to correct misapprehension of Commission
  - Rule 8.4(d): False statements in civil action
- Disciplinary Action: Suspended from the practice of law for 3 years

Atticus Finch, One Vision of the Lawyer's Calling & The Rules of Professional Conduct

Atticus Finch, A Lawyer's Calling & The Rules of Conduct


TO KILL A
Mockingbird
A NOVEL BY
HARPER LEE

Reasons to use *To Kill A Mockingbird* to teach ethics:

- Power of story
- Portrait of "Gentleman-Lawyer"

?

Plot Summary

- Scout, Jem & Atticus
- Boo Radley
- Defense of Tom Robinson
- The Trial
- Bob Ewell's Revenge
- Bob Ewell's Death

The Compromise

The Compromise

- Imaginative empathy, but with limits
- Patient
- Preservation of relationships in the midst of conflict

Why defend Tom Robinson?

Why defend Tom Robinson?

- Performing duty is part of identity
- Integrity is source of respect
- Continuity between professional and private lives

Closing argument

He knew we would lose

Atticus's definition of "real courage"

"Real courage is… when you know you're licked before you begin but you begin anyway and you see it through no matter what."

Closing argument

- A guardian of due process
- A realist
- A display of courage

Stand, your father is passing

Stand, your father is passing

- A countercultural loner
- Calm and dispassionate
- Modest, not looking for applause
- Respected

The Gentlemen-Lawyer

- A special kind of person
- A kind of empathy that involves imagination, sympathy and critical distance
- A talent for preserving relationships in the midst of conflict

The Gentlemen-Lawyer

- A commitment to fairness & due process
- A loner who is willing to challenge the majority view
- Modest, not looking for applause
- Calm, patient and dispassionate
- Courageous

?

Traditional Criticism: Bob Ewell fell on his knife

Modern criticism of Atticus

Modern Criticism of Atticus

Did Atticus violate Rule 8.4(g) because his conduct in the courtroom manifested bias based on race?

Modern Criticism of Atticus

- Too little passion
- Paternalistic
- A gradualist who did not understand the structural dimension of racism
- An elitist who is too comfortable with a patriarchy that oppresses African-Americans and women

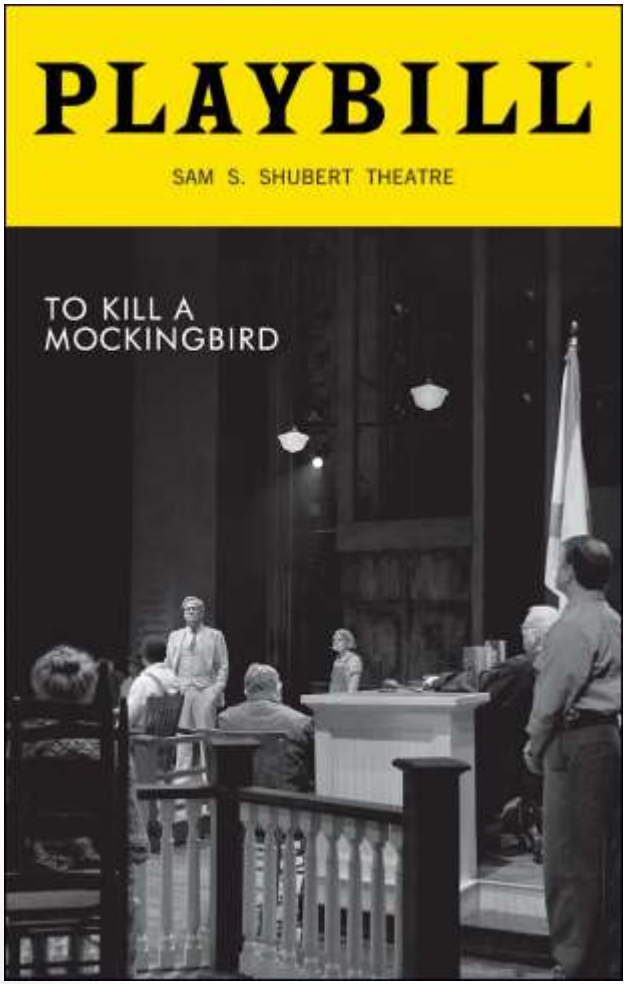
Modern Criticism of the Gentleman-Lawyer

- Not egalitarian
- Too conservative, too respectful of the status quo
- Unwarranted prejudice for certain classes of people

More Criticism of Atticus

Who is Atticus?

Modern Criticism of Atticus

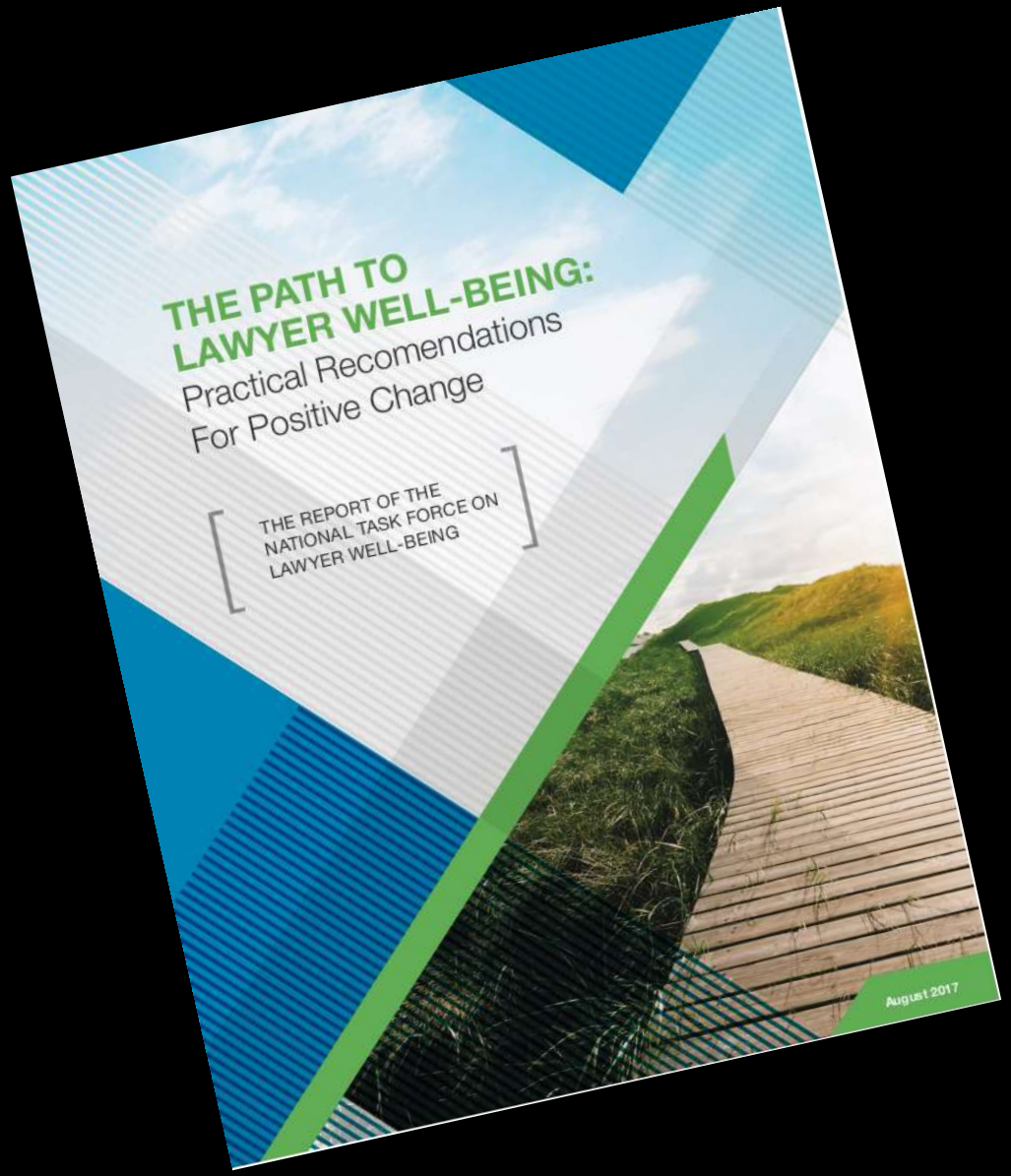


Who is Atticus?

?

Calling & The Lawyer Well-Being Movement

Calling & the Lawyer Well-Being Movement



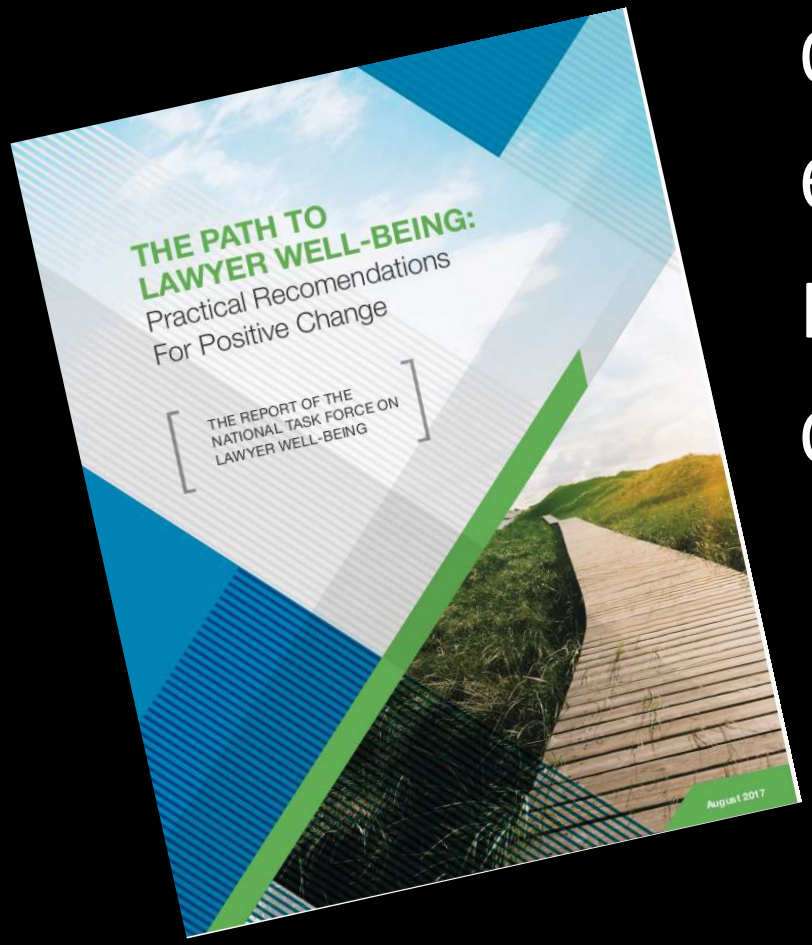
The ABA:

Something is wrong with the legal profession!

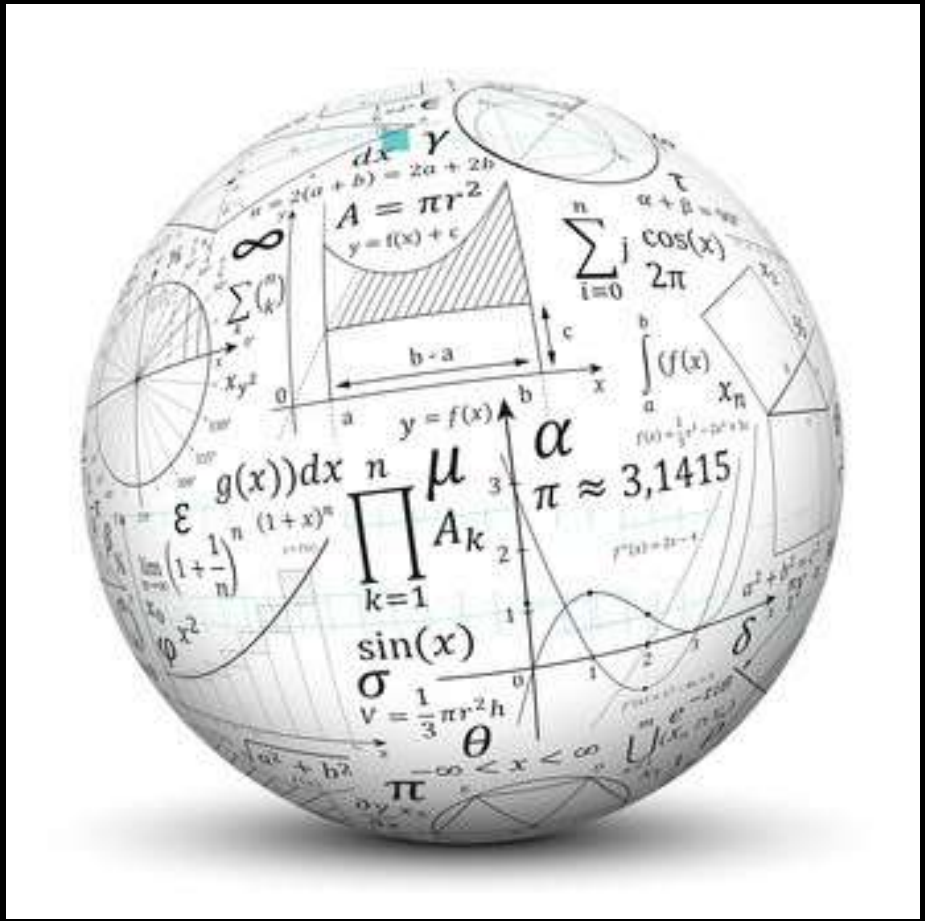
- Problem drinking
- Depression
- Anxiety
- Loneliness
- Suicide

Needed:

"…a courageous commitment to re-envisioning what it means to live the live of a lawyer."



Diagnosis: Lawyers lack “well-being”



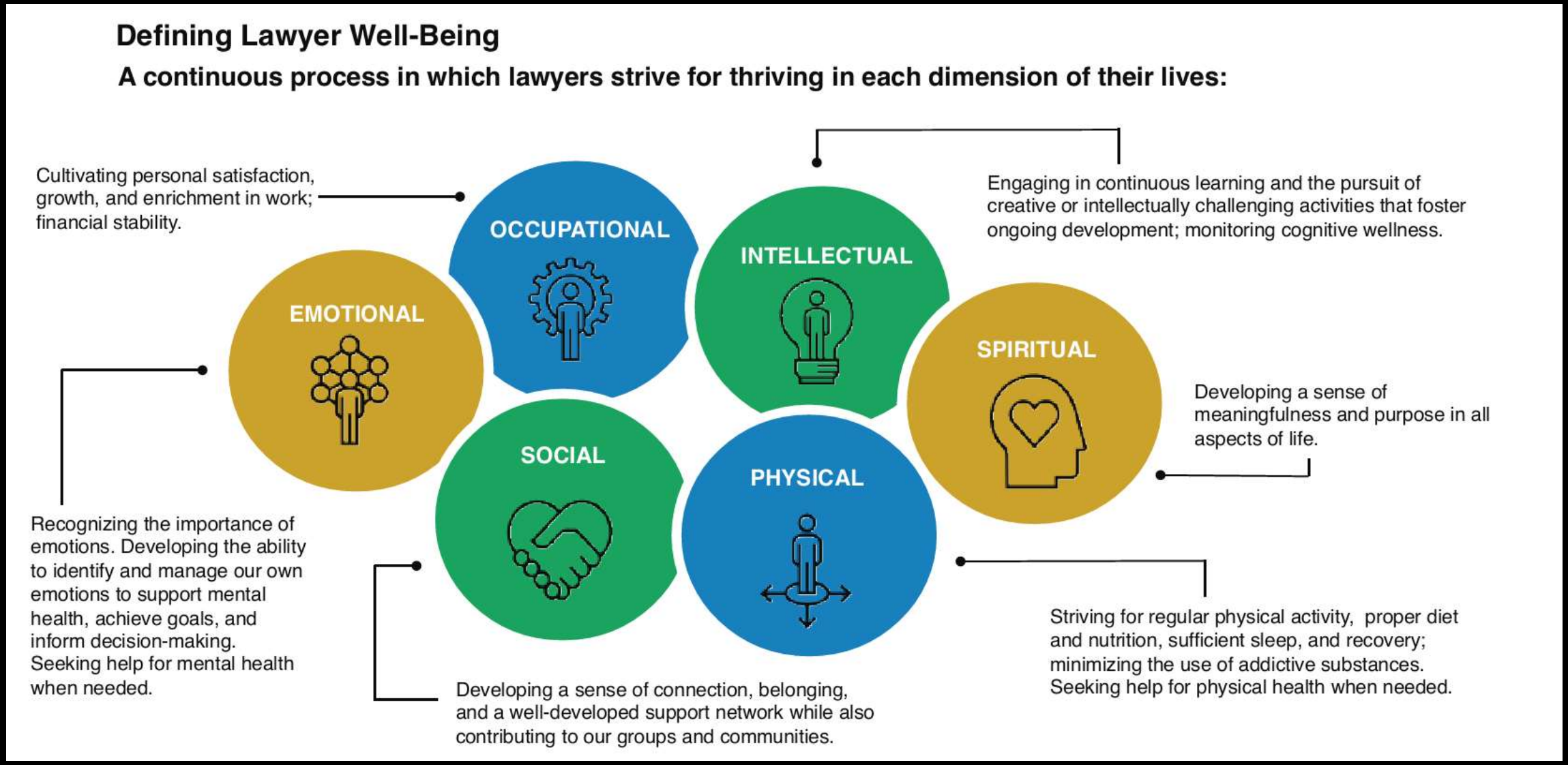
- New
- Scientific
- Psychological
- Empirical
- Analytical

ABA's Diagnosis: Lawyers lack "well-being"

Well-being is <u>not</u> …

- Physical health
- The absence of illness
- Being happy all the time

Lawyer Well-Being



ABA's Remedy: Build a more sustainable culture

Emphasis on context:

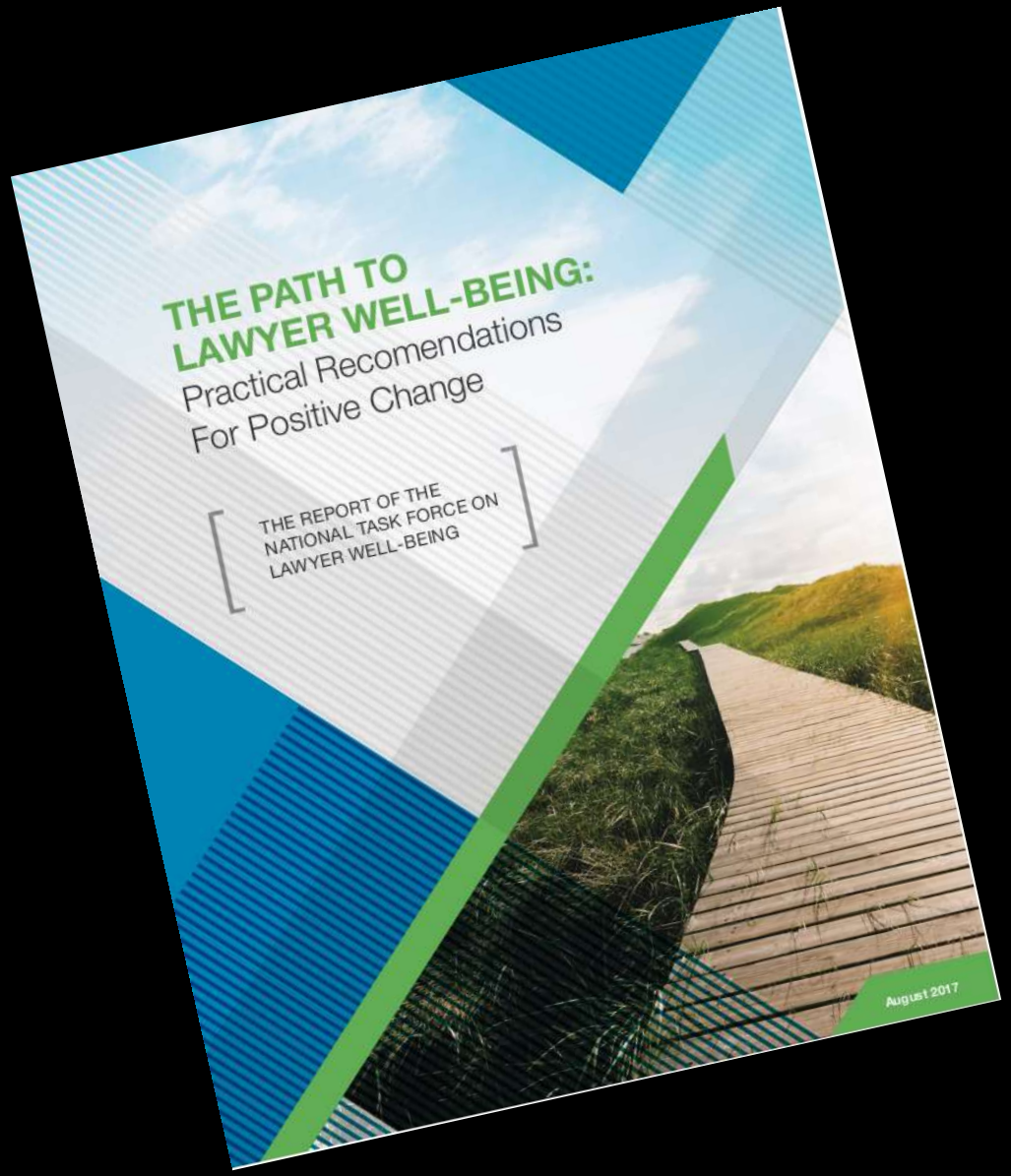
"Well-being is a *team sport*."

ABA's Remedy: Build a more sustainable culture

Five core steps

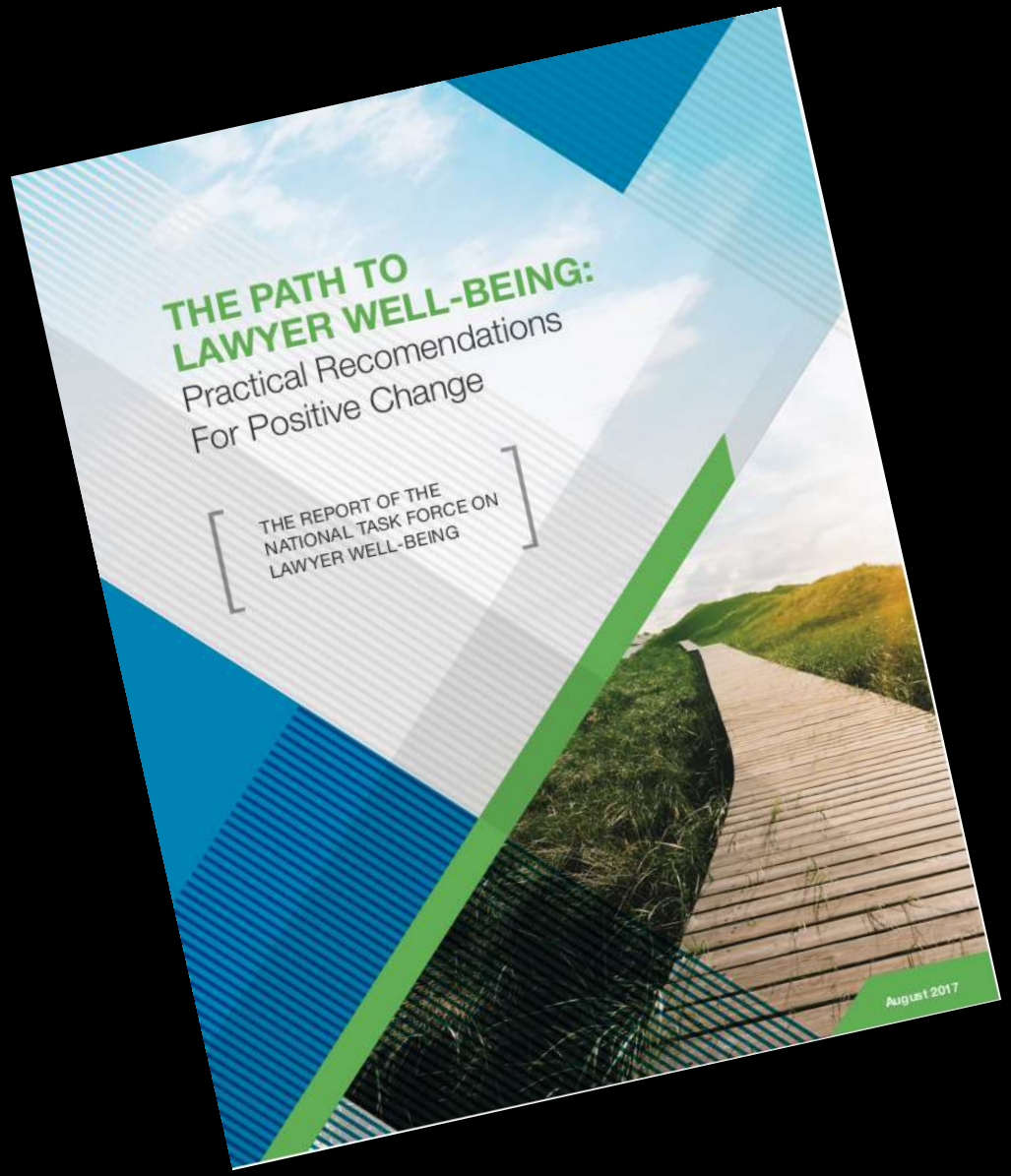
1. Identify "stakeholders" who can reduce "toxicity"
2. End stigma around "help-seeking behaviors"
3. Make well-being a part of competence
4. Educate lawyers and law students about well-being
5. Change the tone of the profession

Calling & The Lawyer Well-Being Movement



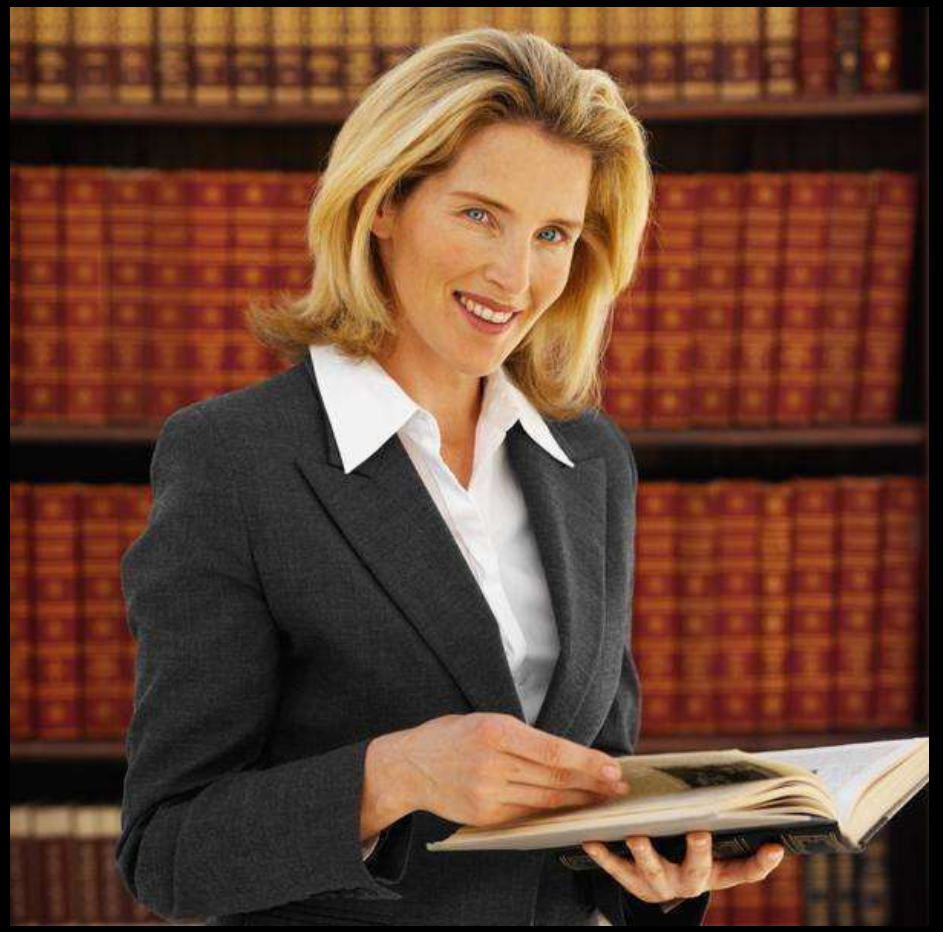
What are the implications for a lawyer's calling?

Calling & The Lawyer Well-Being Movement



Recognition that something is seriously wrong

Calling & The Lawyer Well-Being Movement



Treats law like other occupations

Treats law like other occupations

Law is…”a profession dedicated to client service that is dependent on the public trust.”

Calling & The Lawyer Well-Being Movement

Ignores the tradition of professionalism

What makes a professional?

A professional…

- Is **learned** (i.e. she pursues and acquires knowledge)
- Applies knowledge **in practice**
- **Devoted to a way of life based on that knowledge**

Calling & The Lawyer Well-Being Movement

Invokes no high ideal worthy of devotion

Professionalism & Calling

Devotion to a way of life roots professionalism in…

- Our character and identity
- What motivates us
- What is worthy of devotion

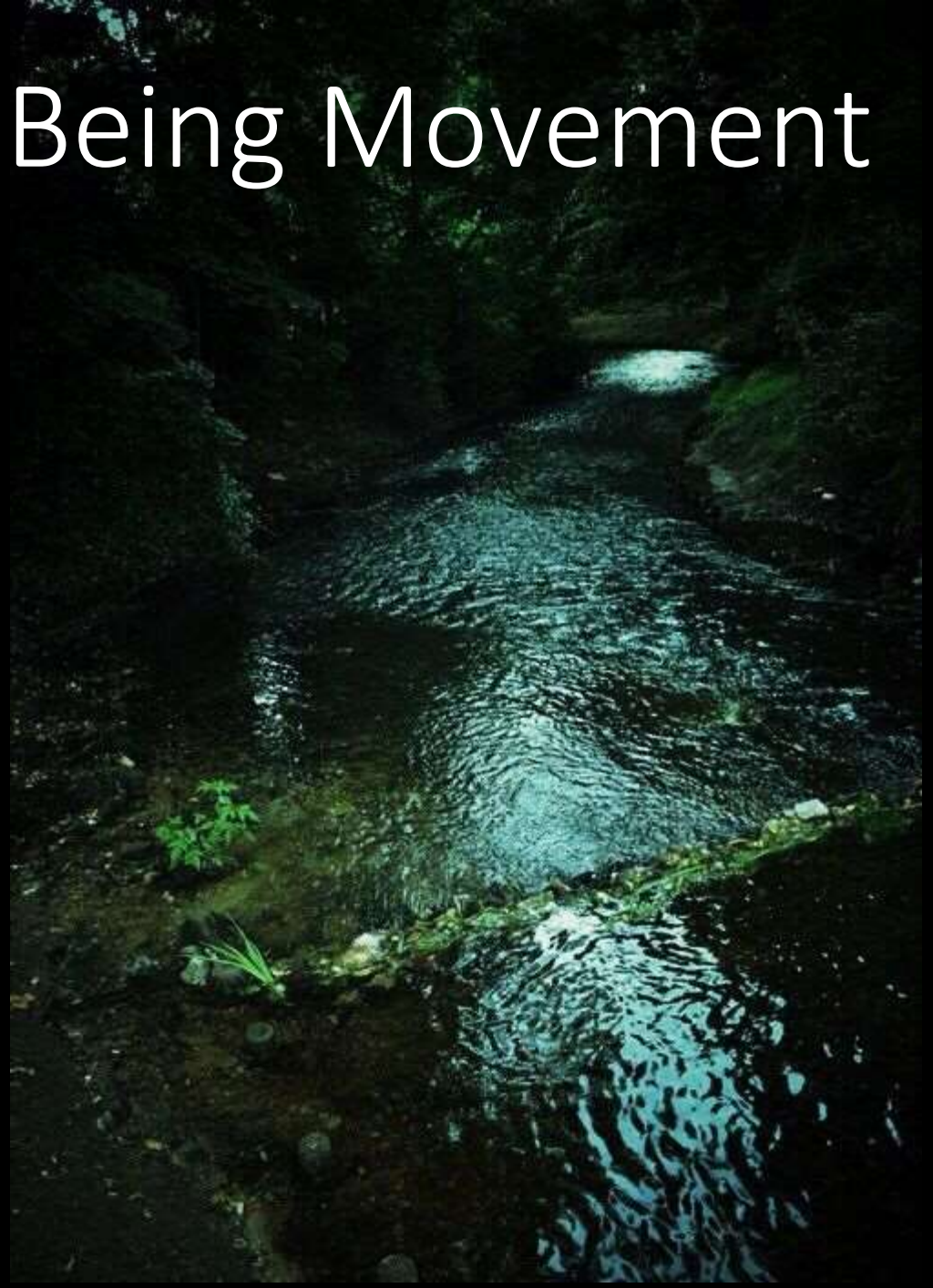
Professionalism & Calling

To be a professional, one adopted the calling of a profession

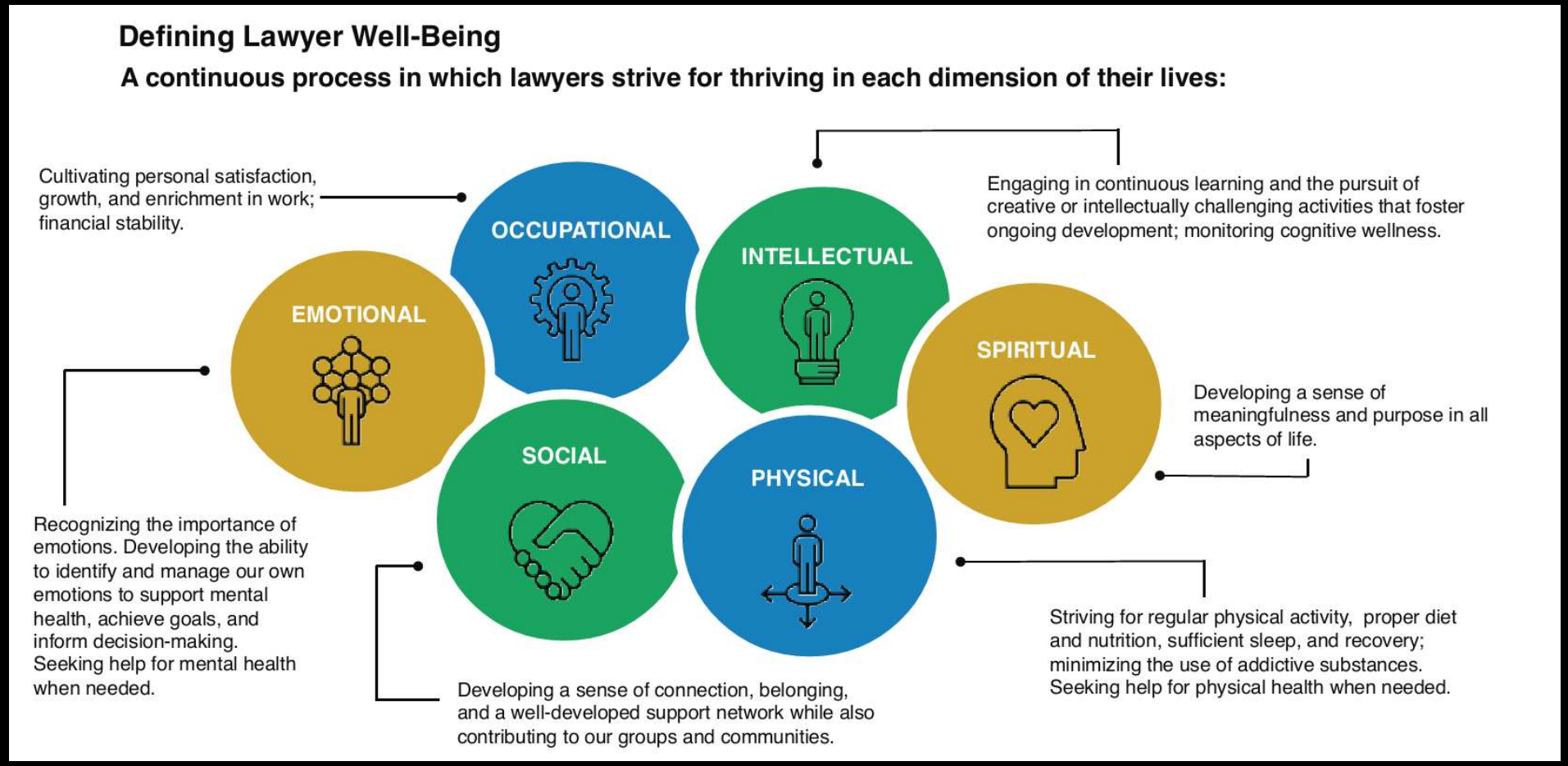
Calling & The Lawyer Well-Being Movement

Does not provide a calling for lawyers

Implies that lawyers don’t need one

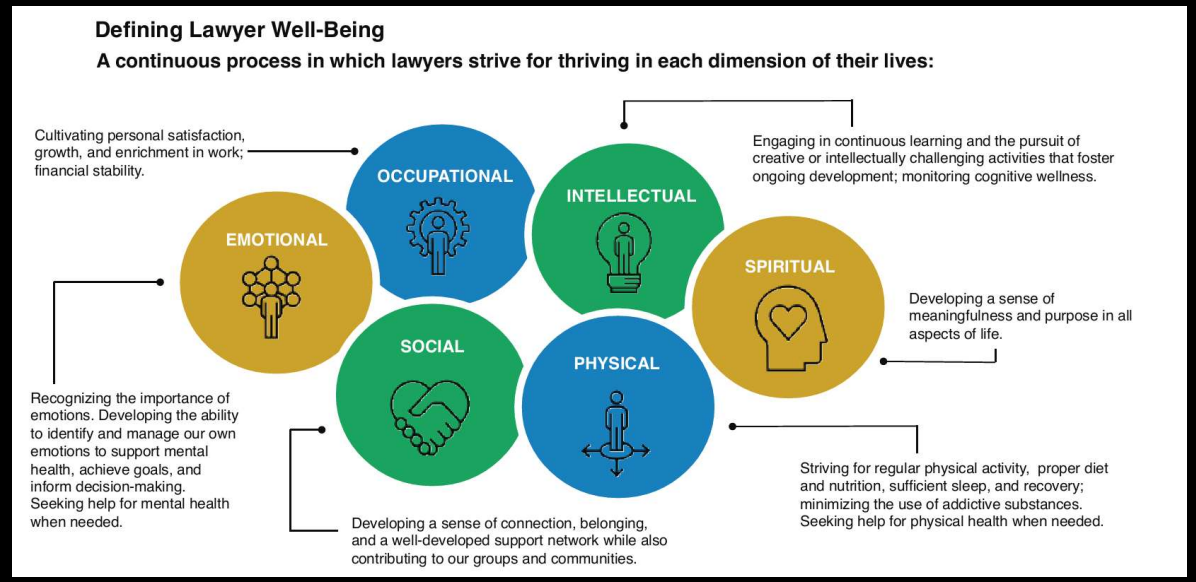


Calling & The Lawyer Well-Being Movement



A skeleton to be completed with preferences

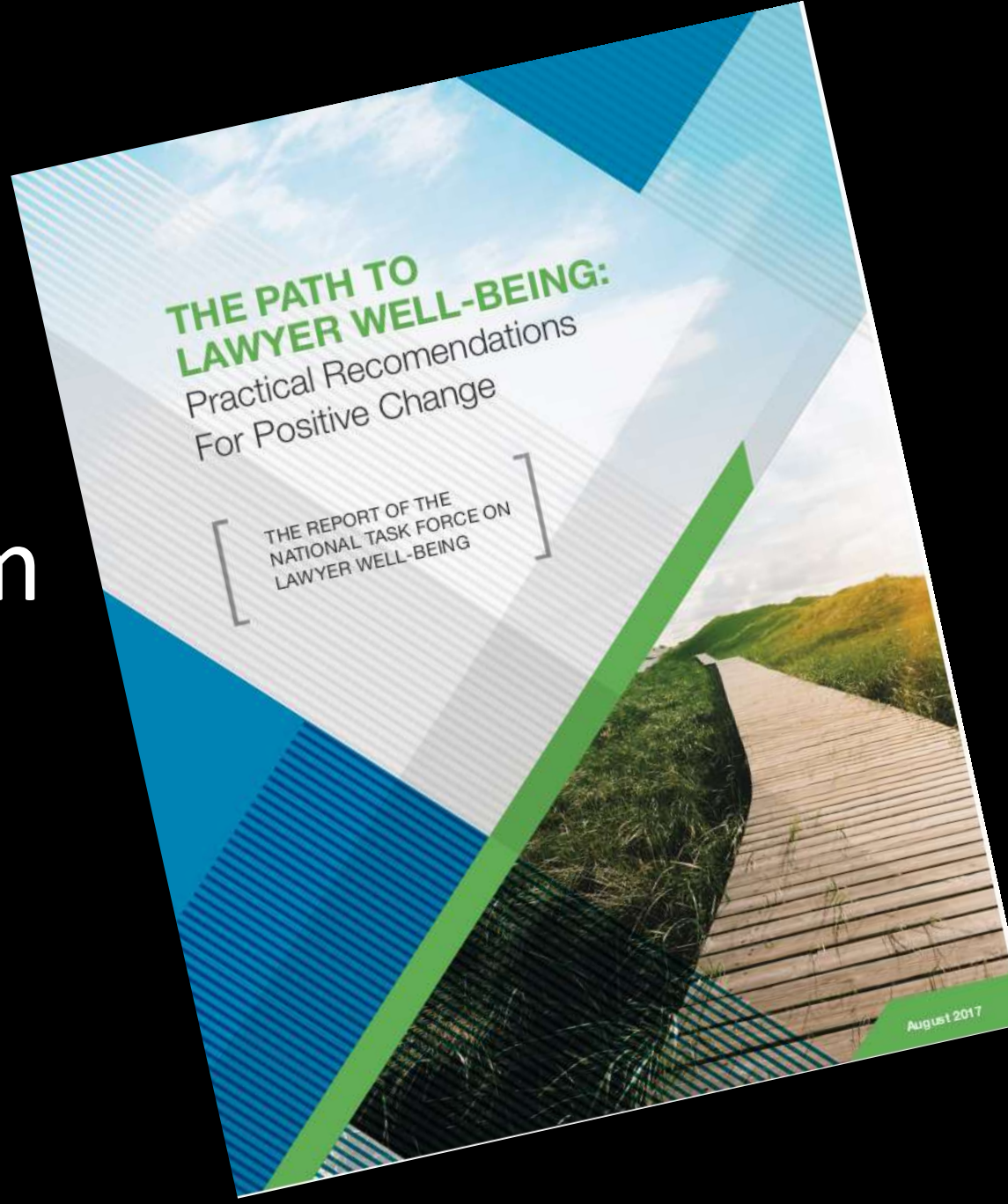
Calling & The Lawyer Well-Being Movement



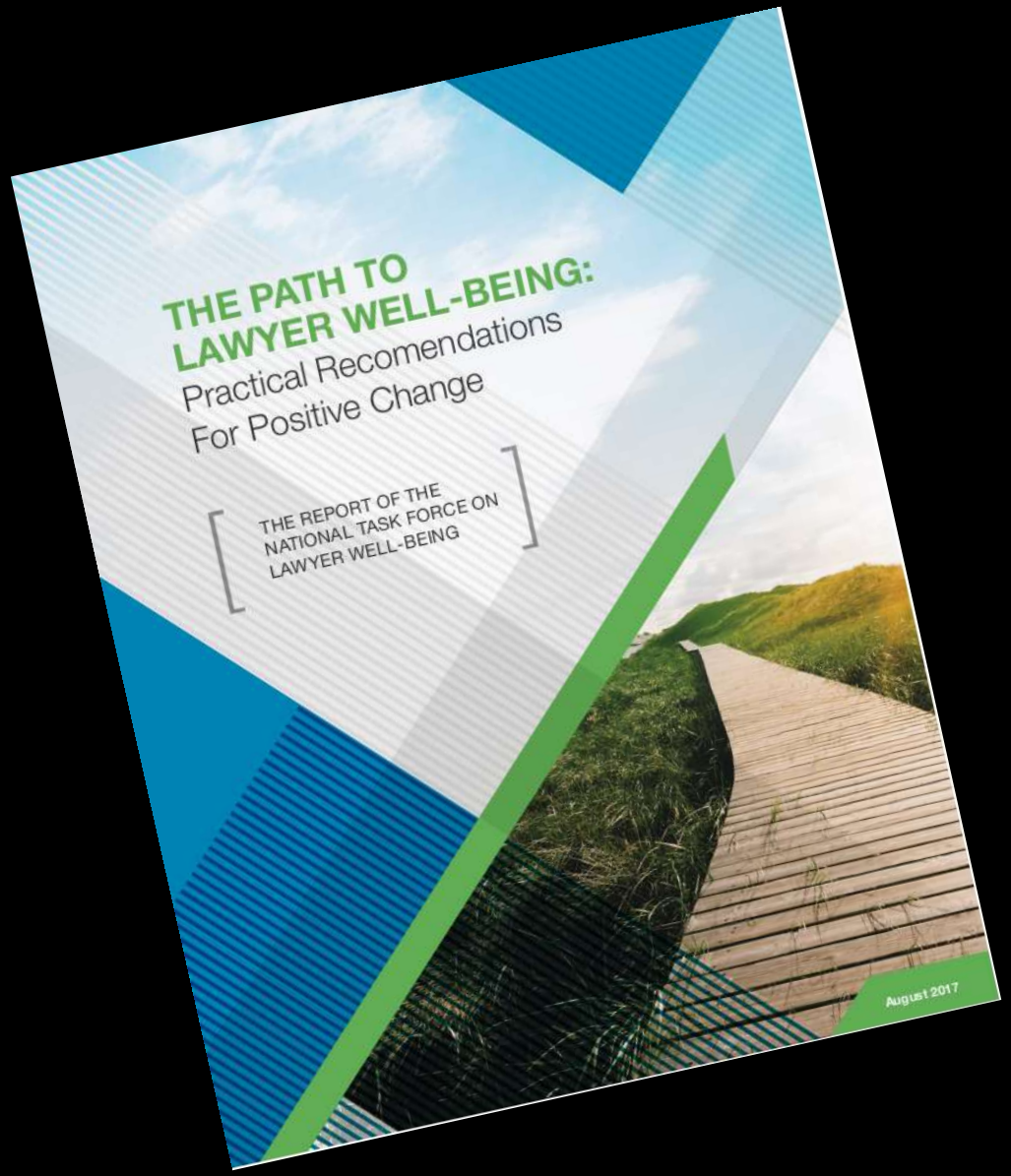
A calling would put flesh on the skeleton

The Lawyer Well-Being Movement continues the law's trajectory away from the traditions of

- Professionalism
- Calling

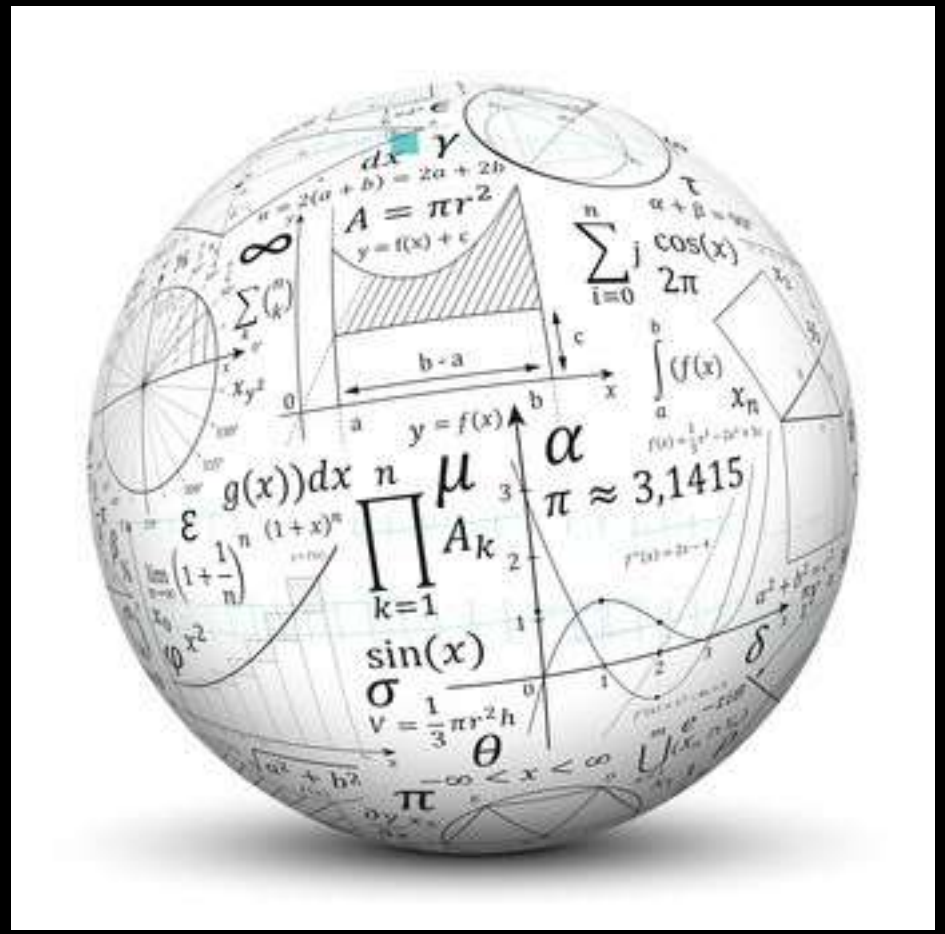


Calling & The Lawyer Well-Being Movement



What is the underlying vision of the law?

Underlying Vision of Law



Law as science

Underlying Vision of Law- Law as Science

IS ⟷ **OUGHT**

Rational & Predictable

Values?
Choice?
Power?

Irrational & Unpredictable

Underlying Vision of Law- Law as Science

Max Weber

- Law is an exercise of power
- Law depends on legitimacy
- Law derives legitimacy from rationality
- Autonomy promotes rationality
- Appeal to religious, political or social goals promotes irrationality

Underlying Vision of Law- Law as Science

Law is a tool

Underlying Vision of Law- Law as Science

Law is a tool

Lawyer is service provider

Underlying Vision of Law- Law as Science

Tool

Service provider

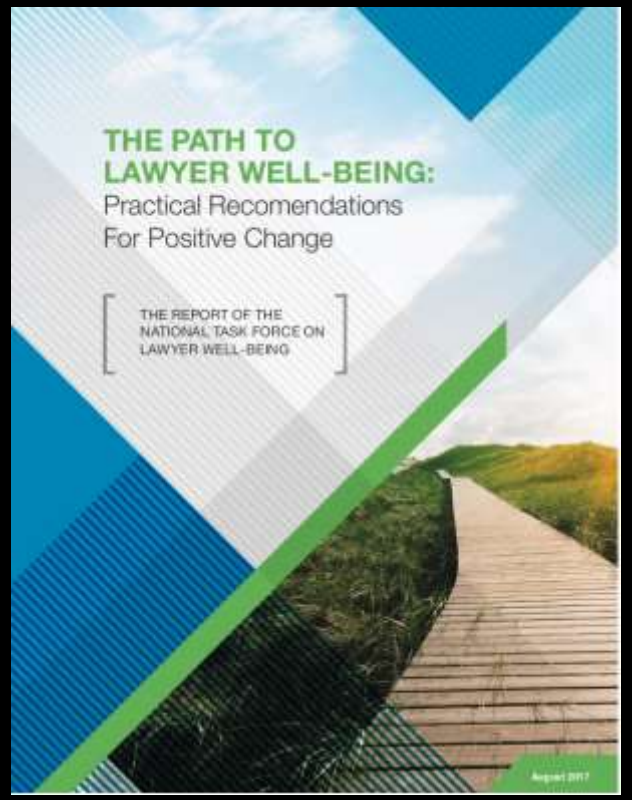
Law is a business

Underlying Vision of Law- Law as Science

Freedom

- Problem drinking
- Depression
- Anxiety
- Loneliness
- Suicide

The Lawyer Well-Being Movement



A scientific solution for an occupation formed by science

Will it work?

Calling and Dedication to a Higher Purpose

A Lawyer's Calling: John Adams and the Boston Massacre

Richard Gunderman

John Adams

- b. 1735
- d. 1826
- Founder
- Continental Congress
- Declaration of Indep
- Peace Treaty
- Mass Constitution
- Vice President
- President

John Adams

- Abigail
  - More than 1,000 letters
  - Most important correspondence
  - One letter in labor

John Adams

- John Adams
- John Quincy Adams
  - President
- Charles Adams
  - US Minister to UK
- Henry Adams
  - The Education of . . .

John Adams

- 16 – Harvard
- 20 – Teacher
- 23 – AM Law
- 29 – Abigail
- 30 – first of six children

Adams

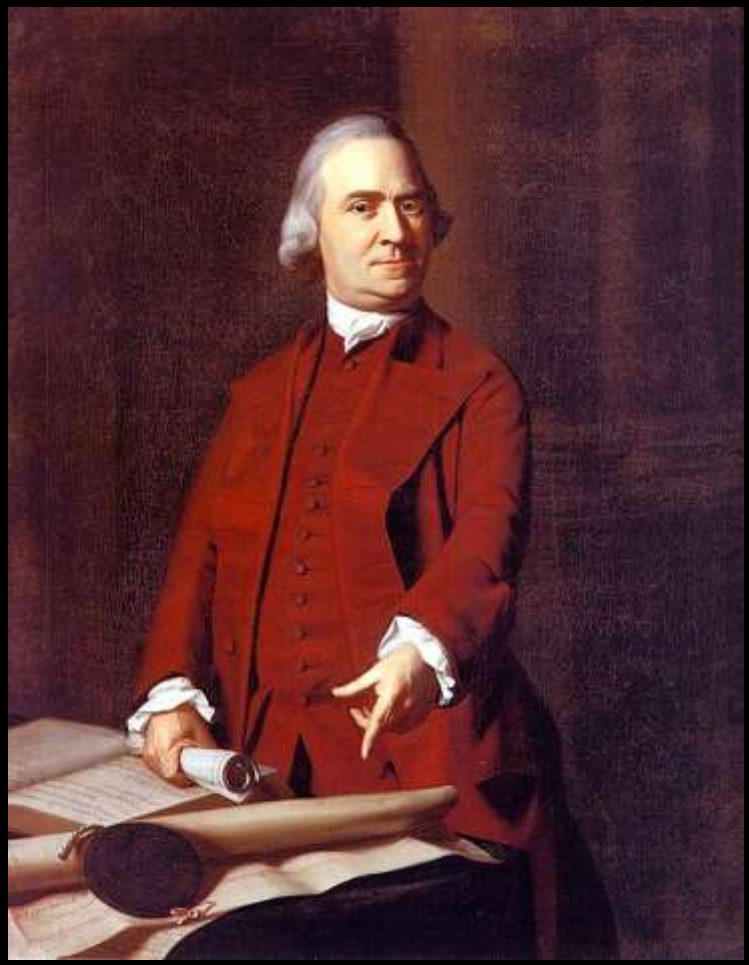
- 1765 – Stamp Act
- Opposition
  - Taxation requires consent
  - Jury trial
- 1766 -- repeal

Boston Massacre

- 1767 – Townshend Acts
  - Pay salaries of gov't officials
  - Enforce trade regul's
  - Punish NY for non-compliance with quartering act
  - Establish parliament's right to tax colonies
- More British troops

Boston Massacre

- 1770 – Near rebellion in Boston
  - Sam Adams
  - Paul Revere
  - John Hancock
- 2,000 soldiers



Boston Massacre

- 1 soldier:2 men
- Eloped with 15 yr old
- Assaults
- Confrontations
- Riots

Boston Massacre

- March 5, 1770
- 250th
- Pvt Hugh White at Custom House
- Taunting
  - “Lobster SOB”
- Snowballs
- Big crowd, “mob”
- White calls for help

Boston Massacre

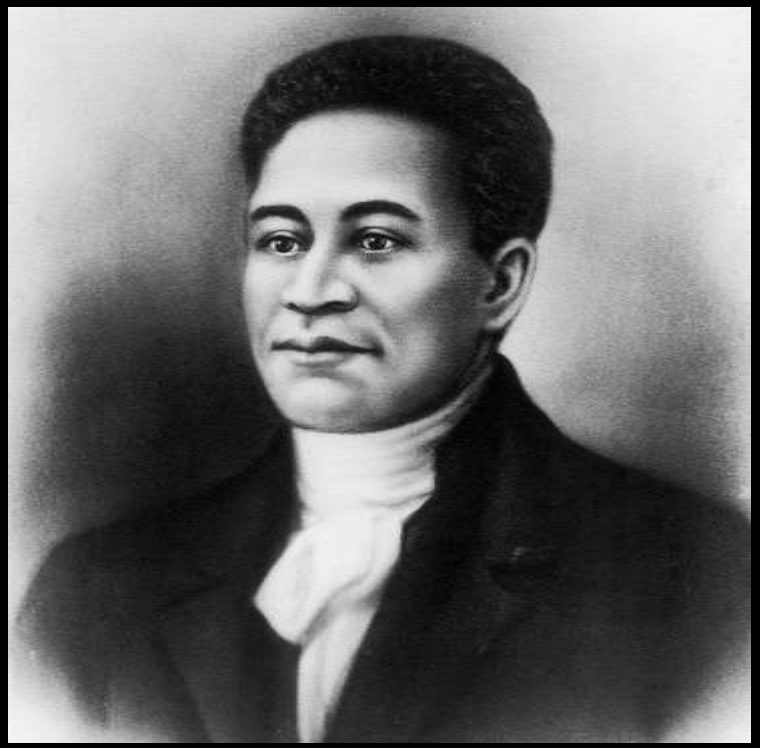
- Cpt Thomas Preston relief force of 7
- “For God’s sake, take care of your men. If they fire, you die.”
- Guns loaded
- Pelted with ice balls, oyster shells, glass

Boston Massacre

- Daring soldiers to fire
- One hit in head with projectile
- Fires

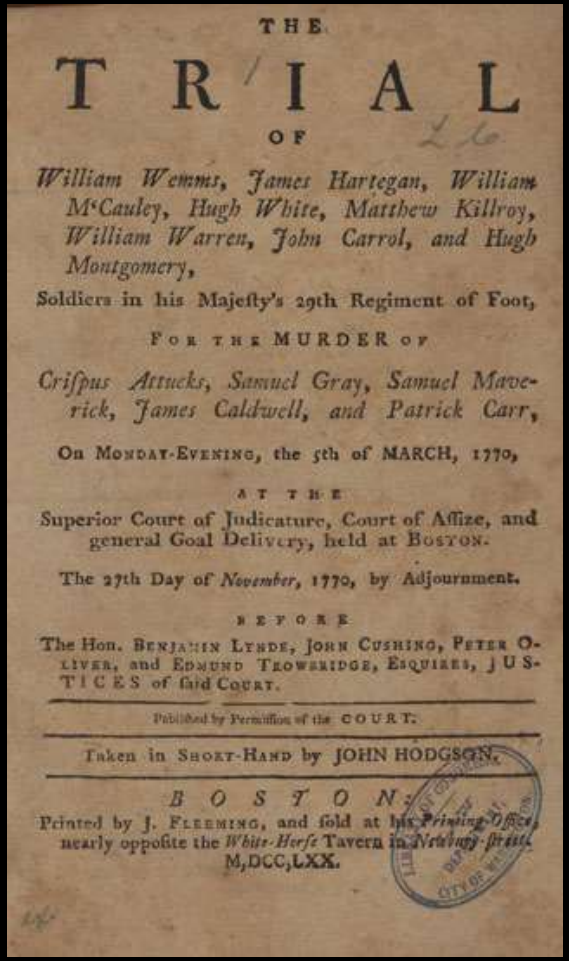
Boston Massacre

- 5 civilians killed



Boston Massacre

- Soldiers arrested on murder charges
- No attorneys will accept cases
  - Reputation
  - Livelihood
  - Safety



THE

TRIAL

OF

William Wemms, James Hartegan, William M'Cauley, Hugh White, Matthew Killroy, William Warren, John Carrol, and Hugh Montgomery,

Soldiers in his Majesty's 29th Regiment of Foot,

FOR THE MURDER OF

Crispus Attucks, Samuel Gray, Samuel Maverick, James Caldwell, and Patrick Carr,

On MONDAY-EVENING, the 5th of MARCH, 1770,

AT THE

Superior Court of Judicature, Court of Assize, and general Goal Delivery, held at BOSTON.

The 27th Day of *November*, 1770, by Adjournment.

BEFORE

The Hon. BENJAMIN LYNDE, JOHN CUSHING, PETER OLIVER, and EDMUND TROWBRIDGE, ESQUIRES, JUSTICES of said COURT.

Published by Permission of the COURT.

Taken in SHORT-HAND by JOHN HODGSON.

BOSTON:

Printed by J. FLEEMING, and sold at his *Printing Office*, nearly opposite the *White-Horse* Tavern in *Newbury-street*.

M,DCC,LXX.

Counsel

- Retainer: one guinea
- Susanna had just died, Abigail pregnant
- Would need to argue against Bostonians

Counsel

- “Counsel ought to be the very last thing an accused person should want in a free country. The bar must be independent and impartial at all times and in every circum-stance.”

Counsel

- “This would be as important a cause as was ever tried in any court in the world. The lawyer must hold himself responsible to the highest and most infallible of tribunals.”

Counsel

- “If I can but be the instrument of preserving one life, his blessing and tears of transport, shall be a sufficient consolation to me, for the contempt of all mankind.”

Trial

- Oct 24 – Cpt Thomas Preston
- First criminal trial in Mass to last longer than one day
- 22 witnesses
- Recreate scene
- No proof he ordered soldiers to fire

Trial

- “A motley rabble of saucy boys, Negroes, and mulattos, Irish teagues and outlandish jack tars...shouting and hazing and threatening life...whistling, screaming, and rending an Indian yell... throwing every species of rubbish the could pick up in the street.”

Trial

- Dec – remaining soldiers

Trial

- Dr. John Jeffries
- Dying declaration
  - Hearsay
- Reasonable doubt
- Sequestration
- Precedent of fair trial

Trial

- “Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our pas-sion, they cannot alter the state of facts and evidence.”

Trial

- “It is more important that innocence be protected than it is that guilt shall be punished, for guilt and crimes are so fre-quent in this world that they cannot all be punished.”

Trial

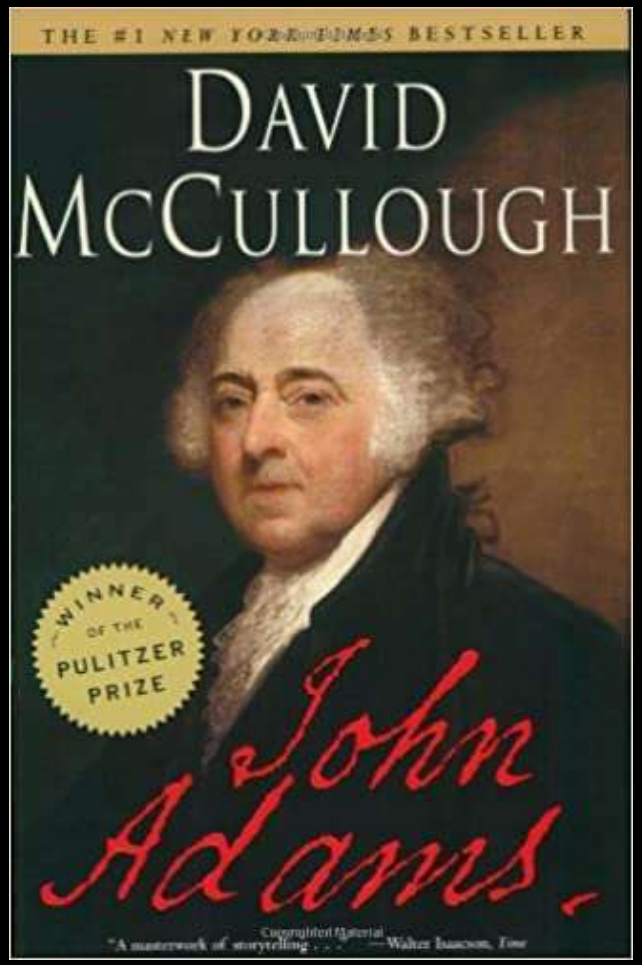
- “But if innocence itself is brought to the bar and condemned, perhaps to die, then the citizen will say, ‘Whether I do good or whether I do evil is immaterial, for innocence itself is no protection,' and if such an idea as that were to take hold in the mind of the citizen that would be the end of security whatsoever.”

Trial

- “Never in more misery in my entire life.”

The Calling of a Lawyer

- “I must study politics and war that my sons may have liberty to study mathematics and philosophy. My sons ought to study mathematics and philosophy, geography, natural history, naval architecture, navigation, commerce, and agriculture in order to give their children a right to study paintings, poetry, music, architecture, statuary, tapestry, and porcelain.”



Calling & The Haunted Lawyer

Calling & The Haunted Lawyer

Lawyer Well-Being Movement

Will it work?

Probably not!

Lawyers are haunted

“I do not
believe in God,
but I miss Him.”

Julian Barnes

“I do not
believe in God,
but I fear Him.”

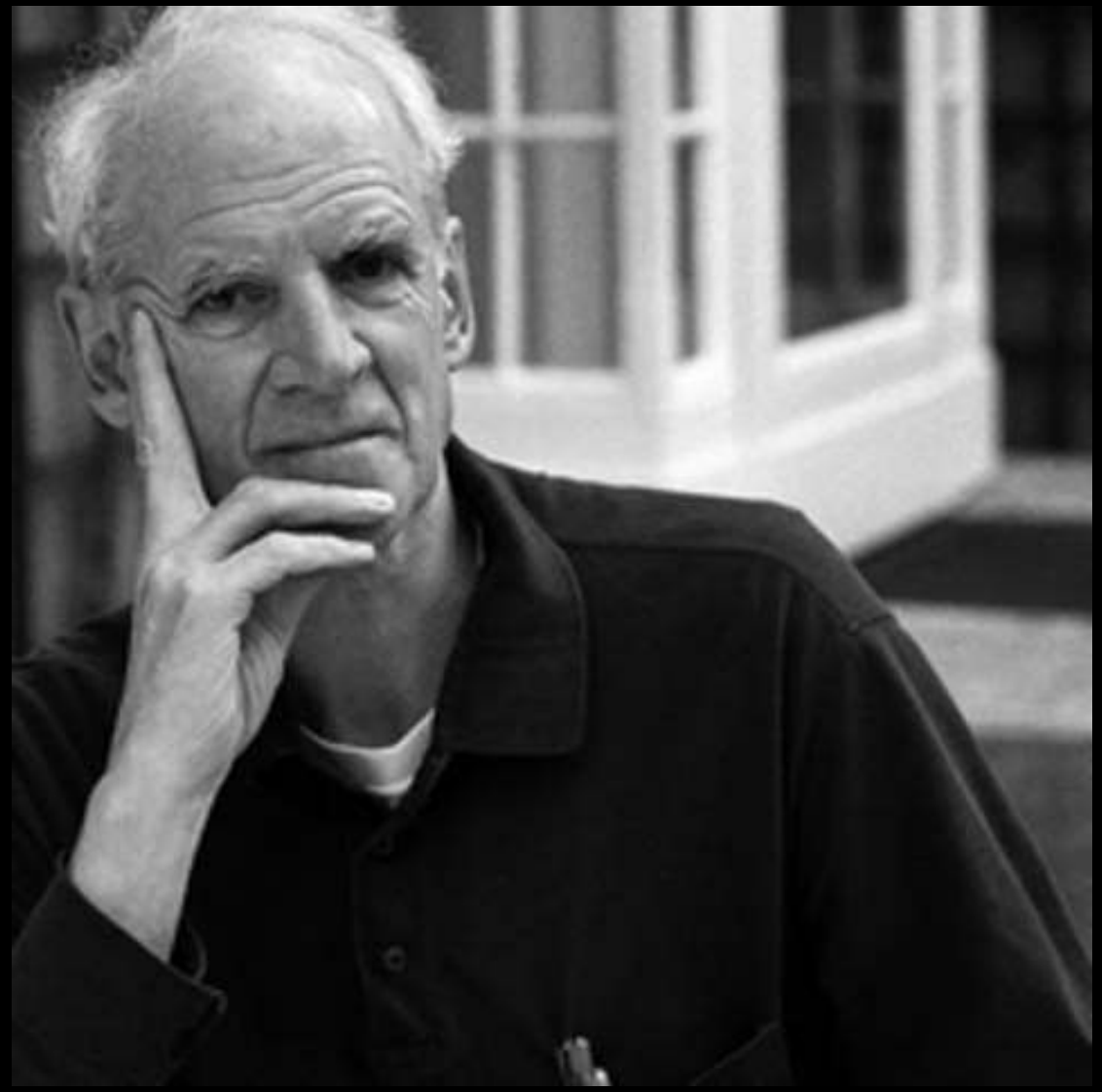
Gabriel Garcia Marquez

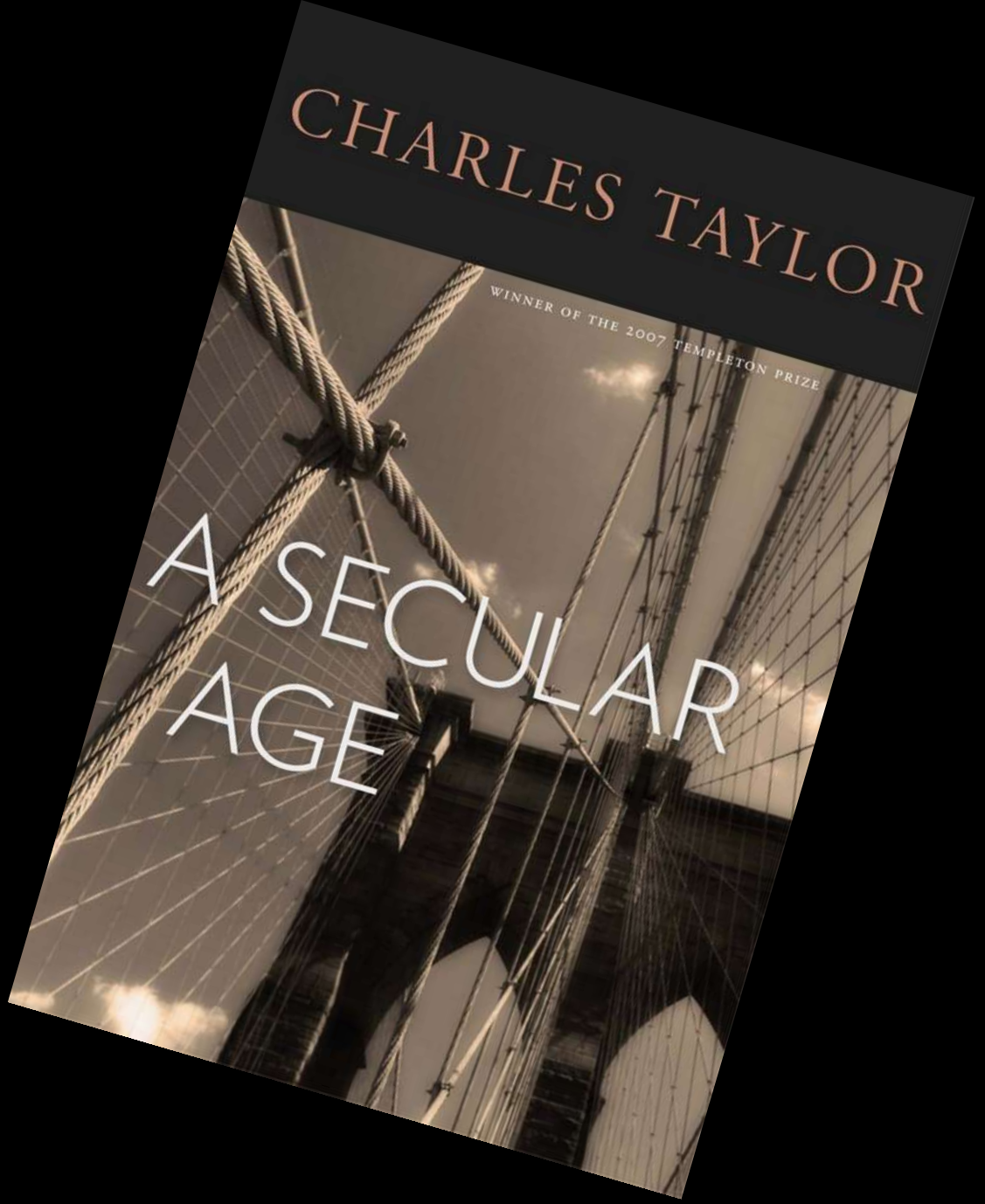
…the South is “Christ-Haunted”

Flannery O’Connor

Lawyers are haunted

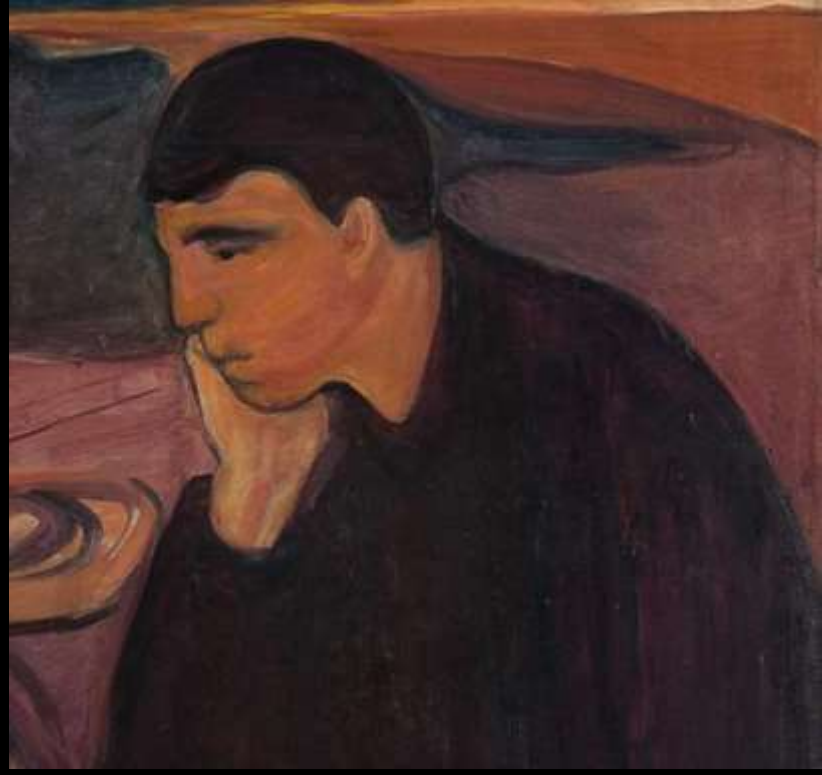
Goodness
Justice
Wisdom





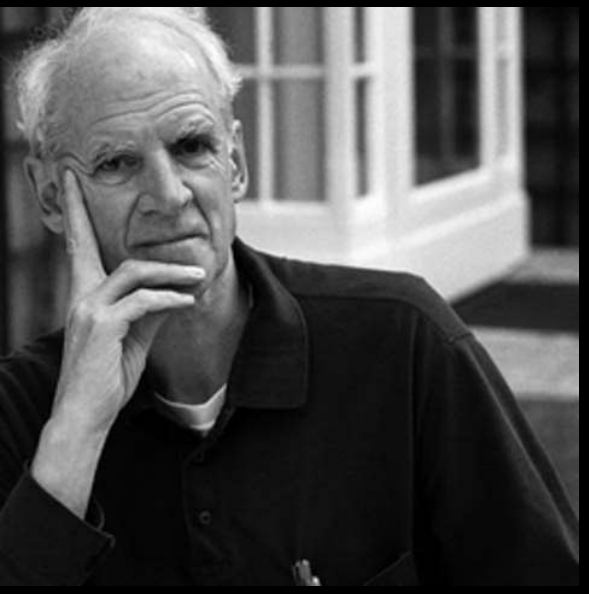
Charles Taylor

Malaise of Modernity



Symptoms:

- “We are missing something”
- “Flat” and “empty” lives
- Pervasive loss
- “Our actions lack gravity”
- Beyond our ordered, rational projects lies a “richer, livelier, hidden world”



Malaise of Modernity

Cause:

An understanding of the world without God or the transcendent

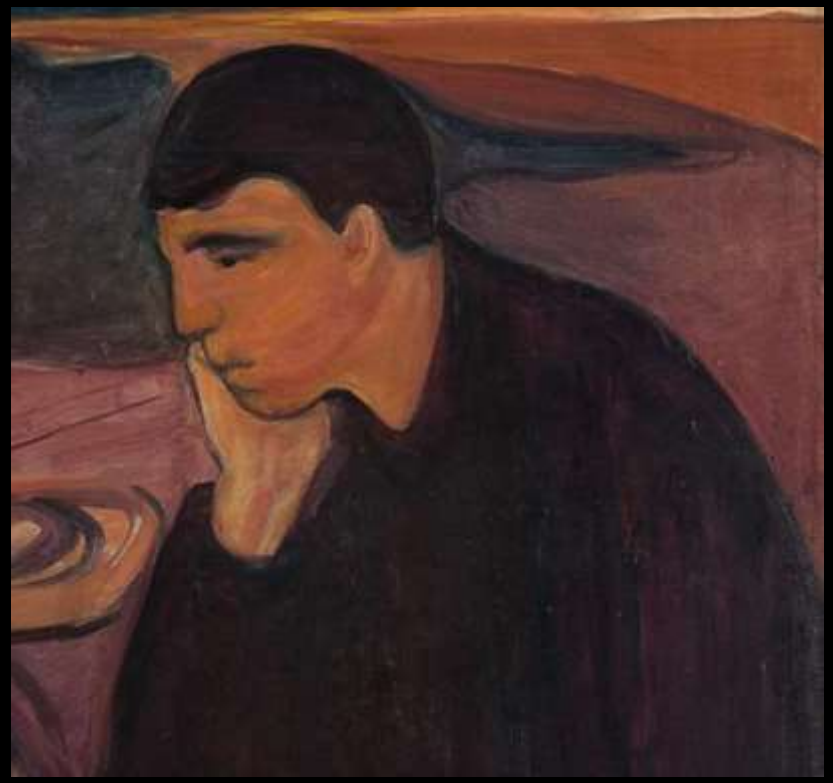
A great achievement

A source of disenchantment

Troubled Legal Profession

- Problem drinking
- Depression
- Anxiety
- Loneliness
- Suicide

Malaise of Modernity



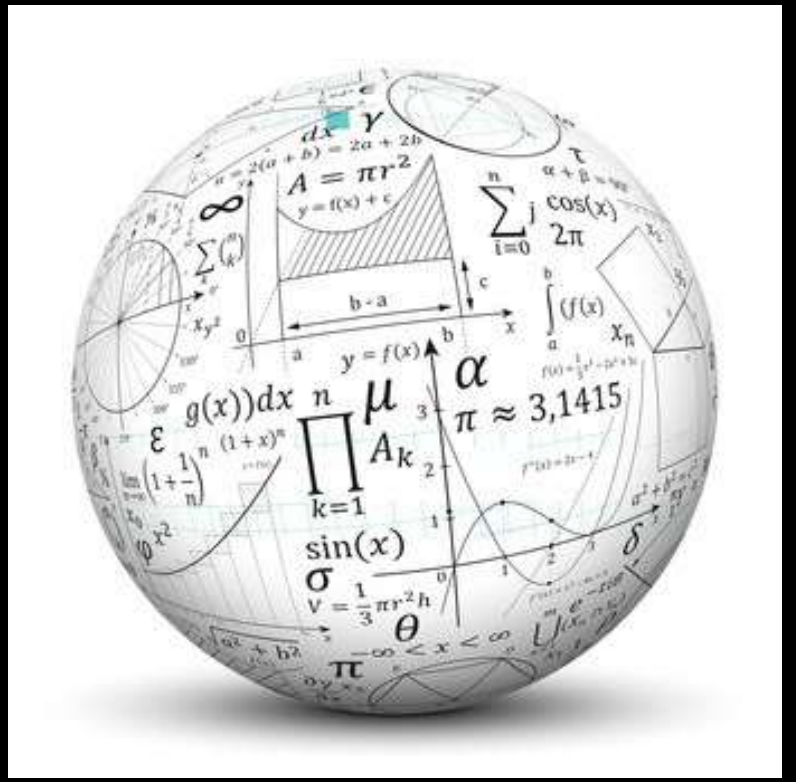
Troubled Legal Profession

Cause:

An understanding of law without goodness, justice and wisdom

Troubled Legal Profession

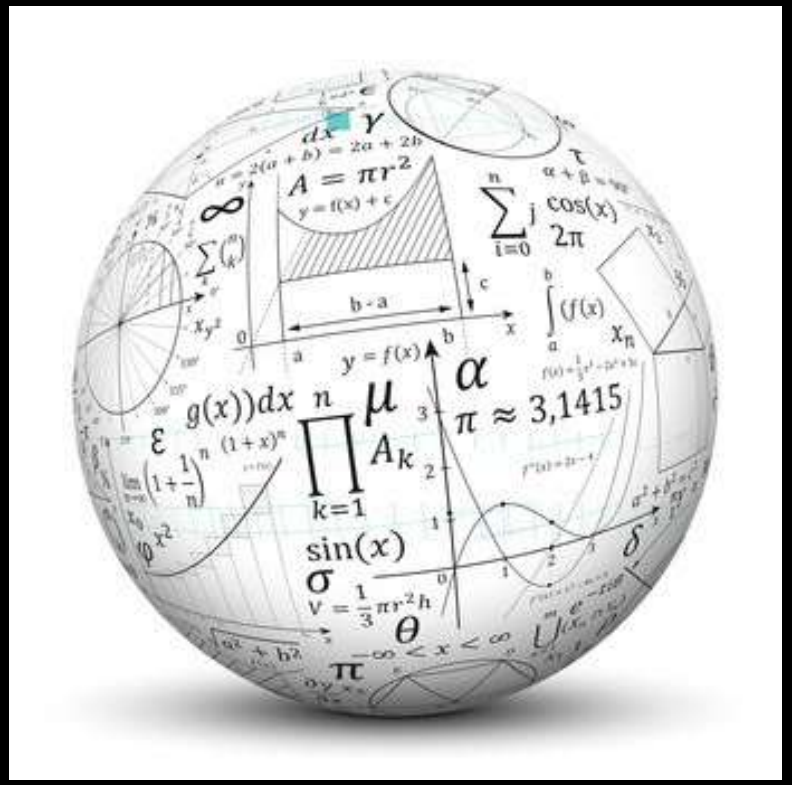
A scientific approach has separated law from sources of its meaning



Troubled Legal Profession

A scientific approach to the law

- Strict rationalism
- Autonomy
- Exclusion of higher goals
- Law as a tool
- Lawyers as service providers

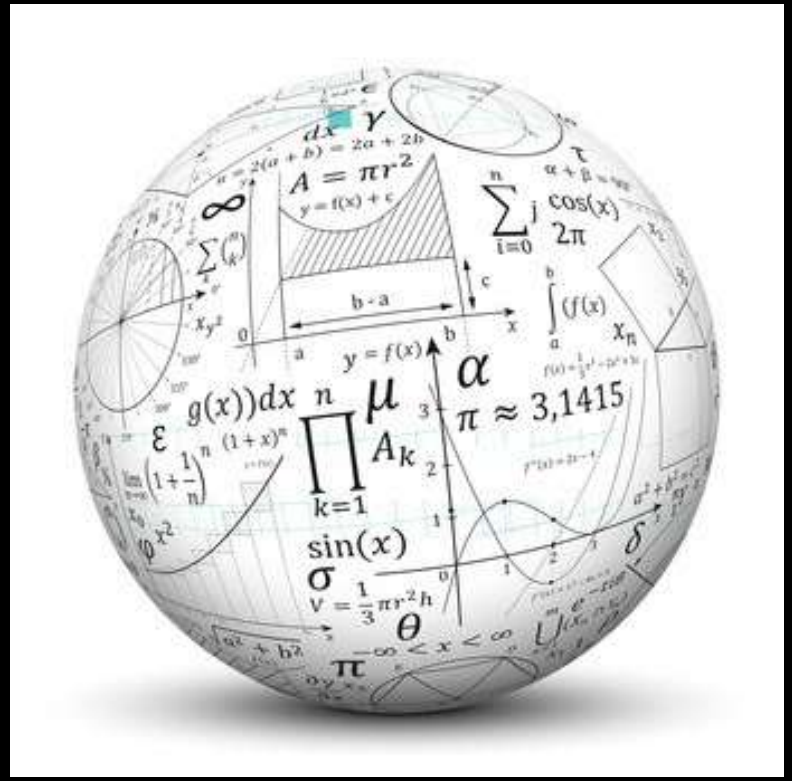


Troubled Legal Profession

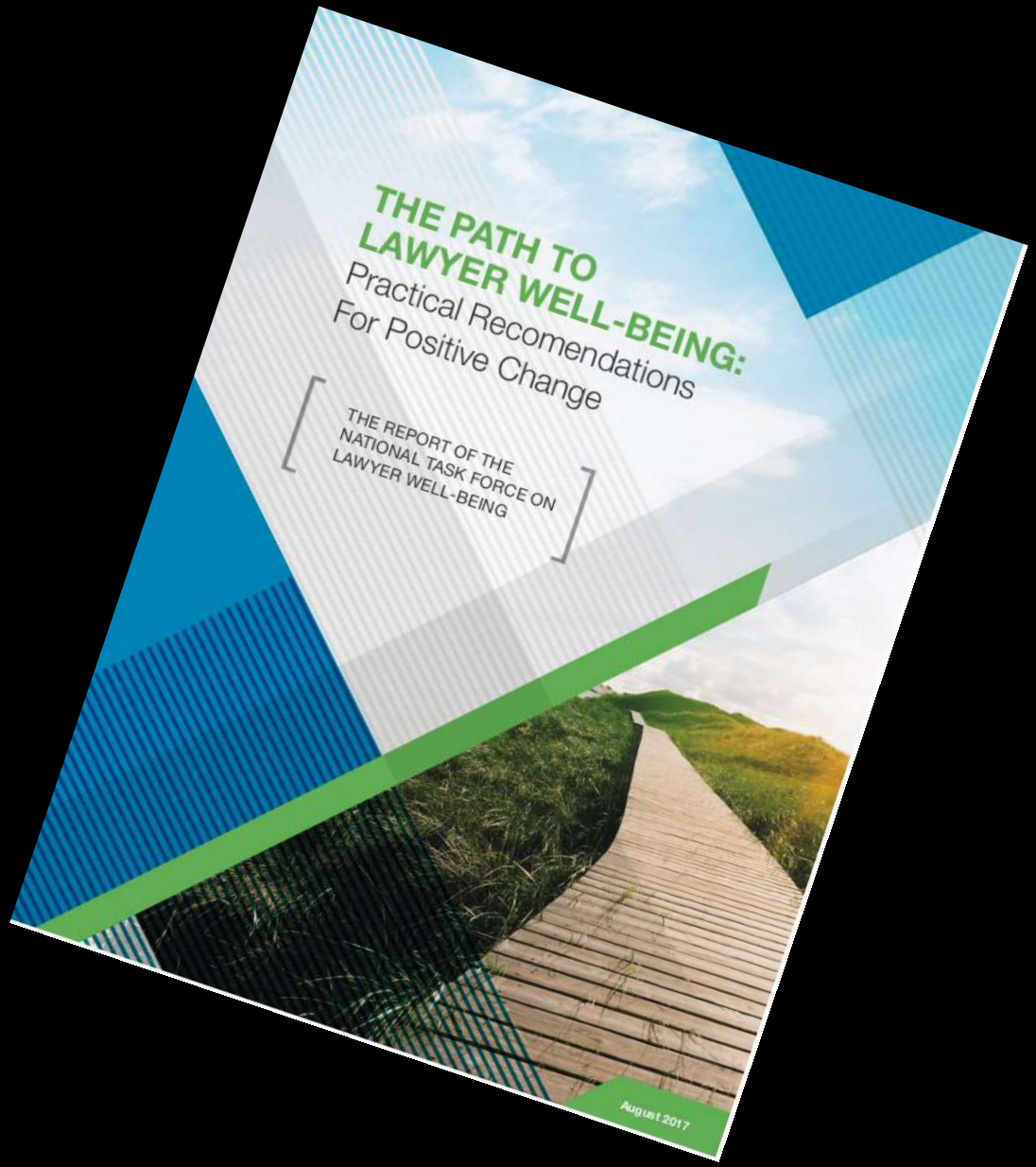
Cause:

A scientific approach to the law

Disenchantment

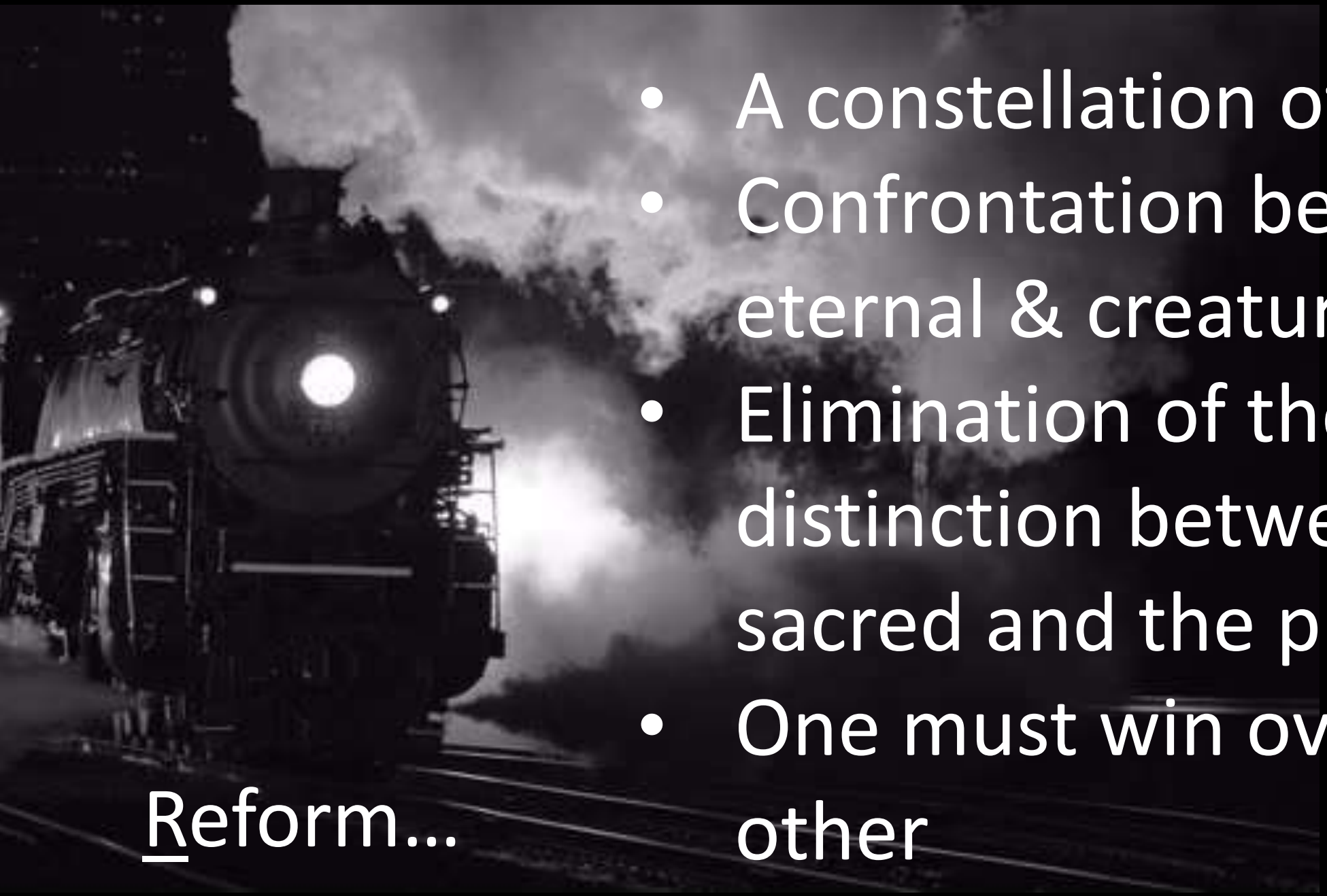


Disenchantment is greatest where enchantment is expected



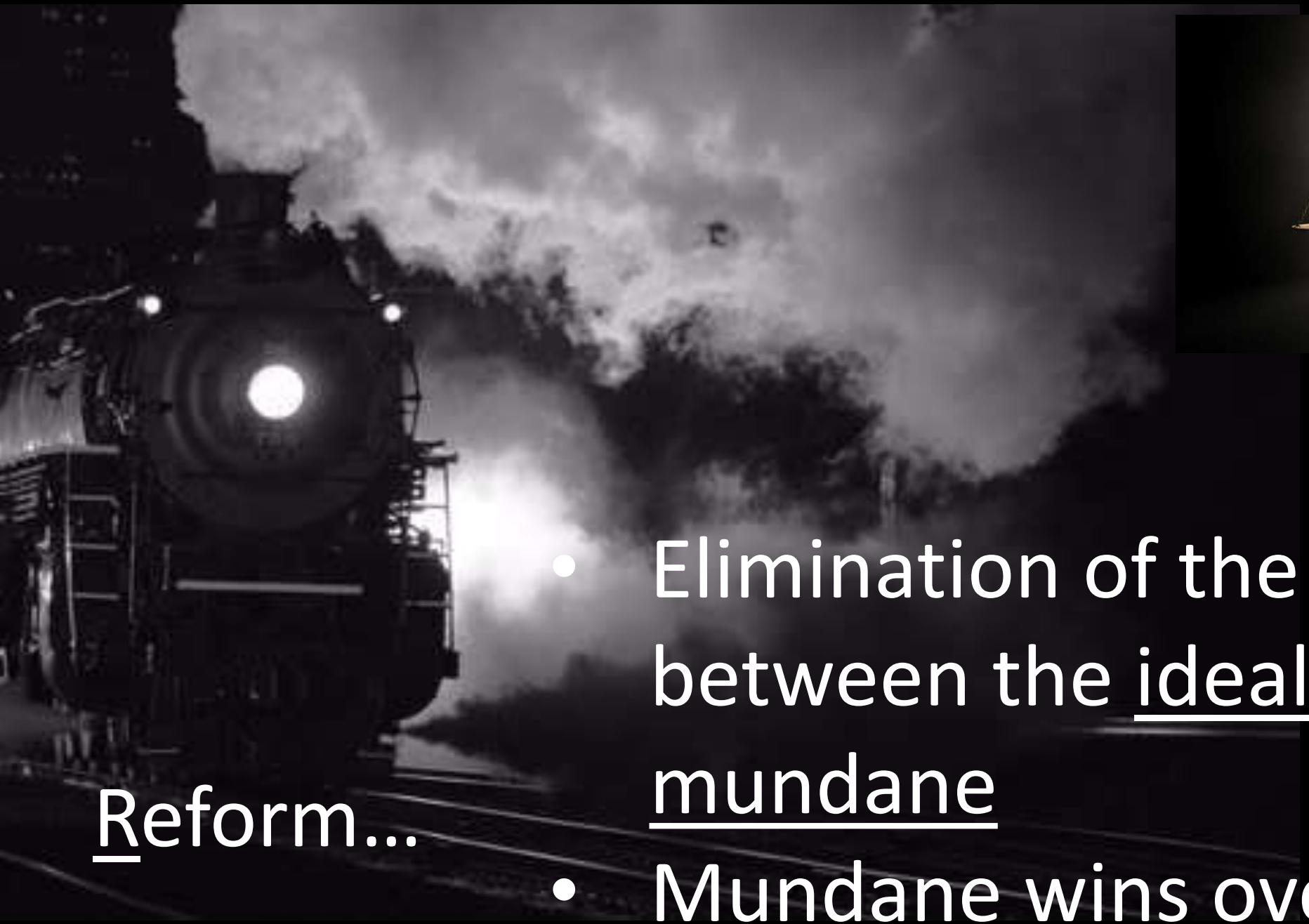
More Disenchantment

Reform… produces disenchantment.



- A constellation of forces
- Confrontation between the eternal & creaturely life
- Elimination of the distinction between the sacred and the profane
- One must win over the other

Reform…



Law

Reform…

- Elimination of the distinction between the ideal and the mundane
- Mundane wins over the ideal

Private Practice & Rule 6.1 – Concerning "Public Interest Legal Service"

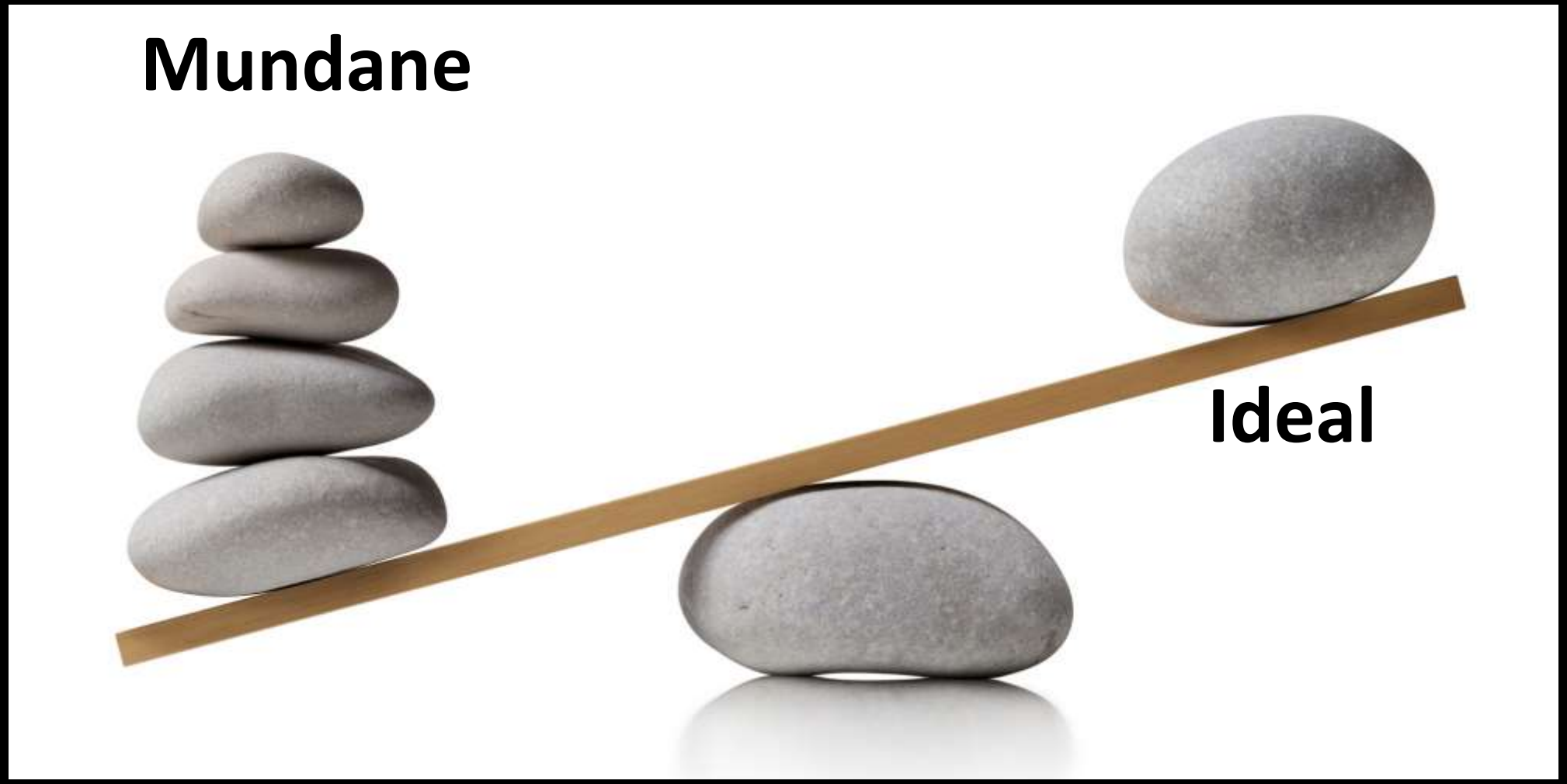
IDEAL

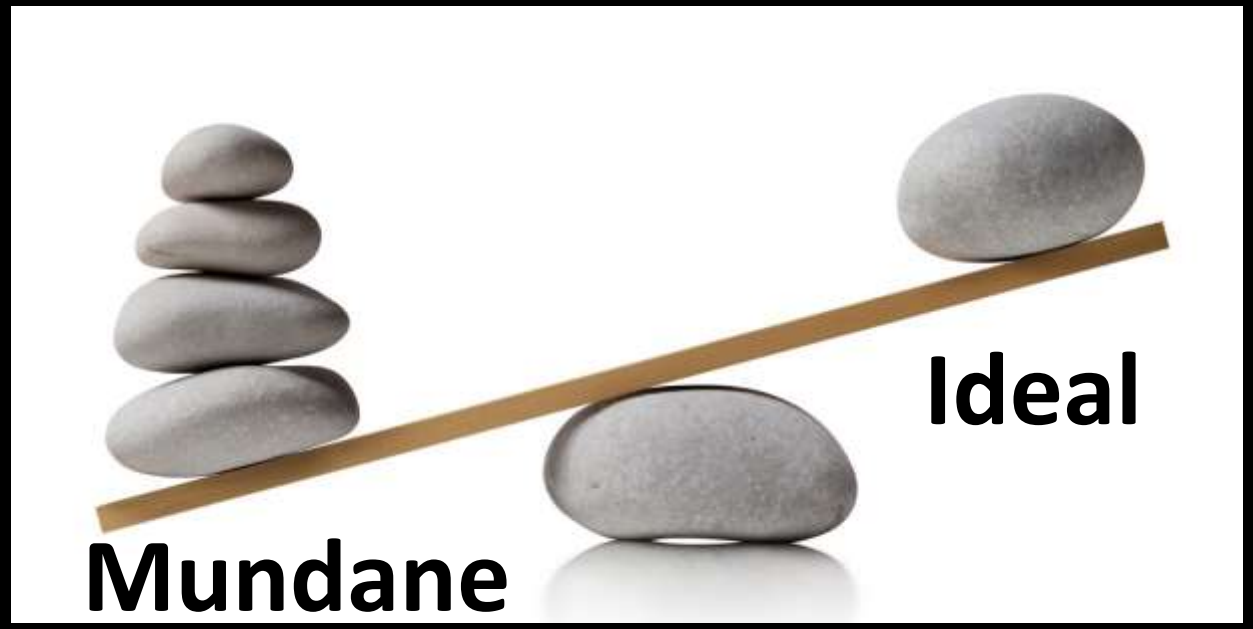
<u>Report of the Joint Conference</u>: Private practice benefits the public

MUNDANE

<u>Rule 6.1</u>: Private practice does not benefit the public; it earns money

Rule 6.1 --The Mundane Outweighs the Ideal

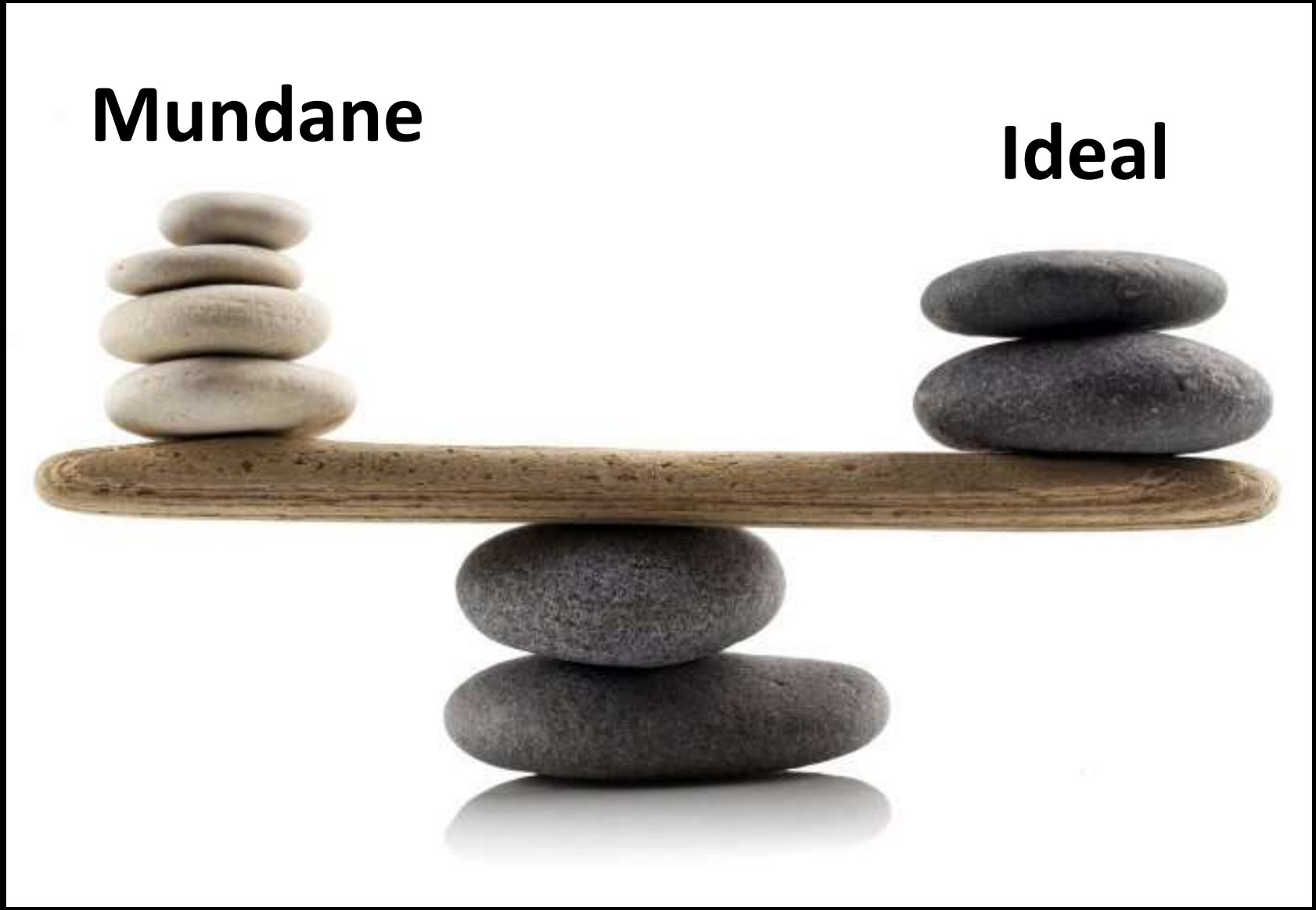




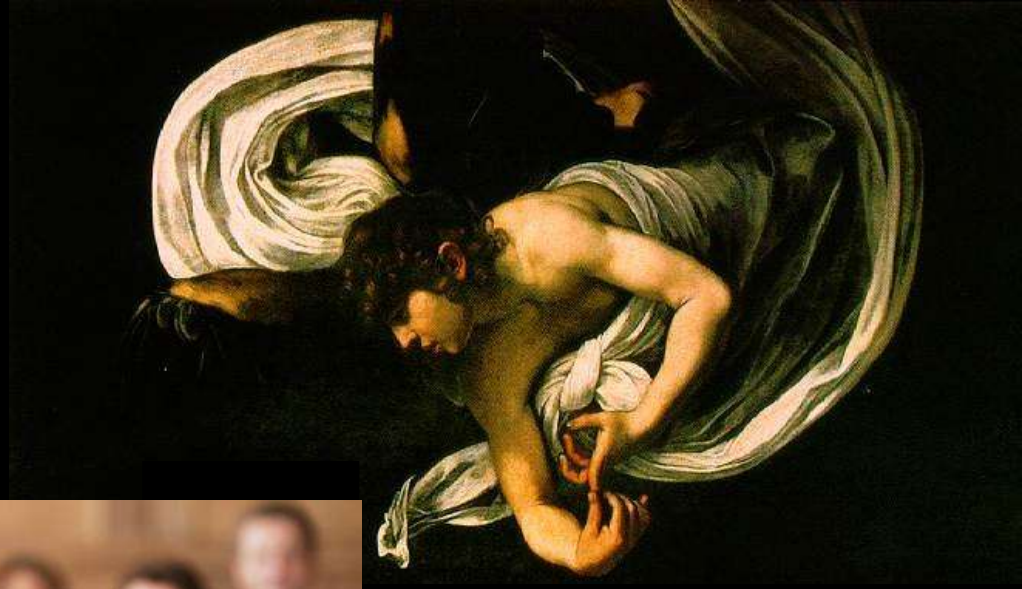
The Mundane Outweighs the Ideal

- Litigation – Contests in which the most clever & powerful win
- Contracts – Opportunities for gain & risk allocation
- The Law generally – What the powerful say it is
- Lawyers – Service providers earning a living

Needed: A more balanced view



Between the angels and…



the beasts

“Man is neither angel nor beast, and it is unfortunately the case that anyone trying to act the angel acts the beast.”

Blaise Pascal

Private practice

A way to make a living <u>and</u>…

a benefit to society.

Litigation

A contest in which the most powerful and clever win and…

a process to achieve impartial truth and justice.

Contracts

Opportunities to avoid litigation and get as much as possible and…

frameworks to enable collaboration and self-governance.

Law

Rules enacted by those in power <u>and</u>…

a form of governance that recognizes the dignity of the governed.

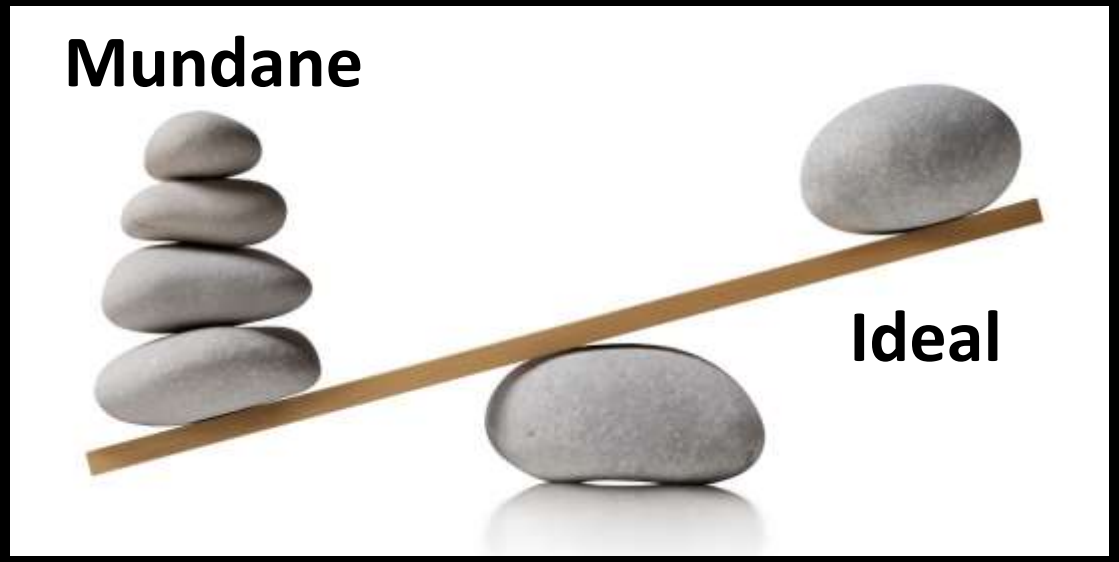
Lawyers

Service providers trying to make a living and…

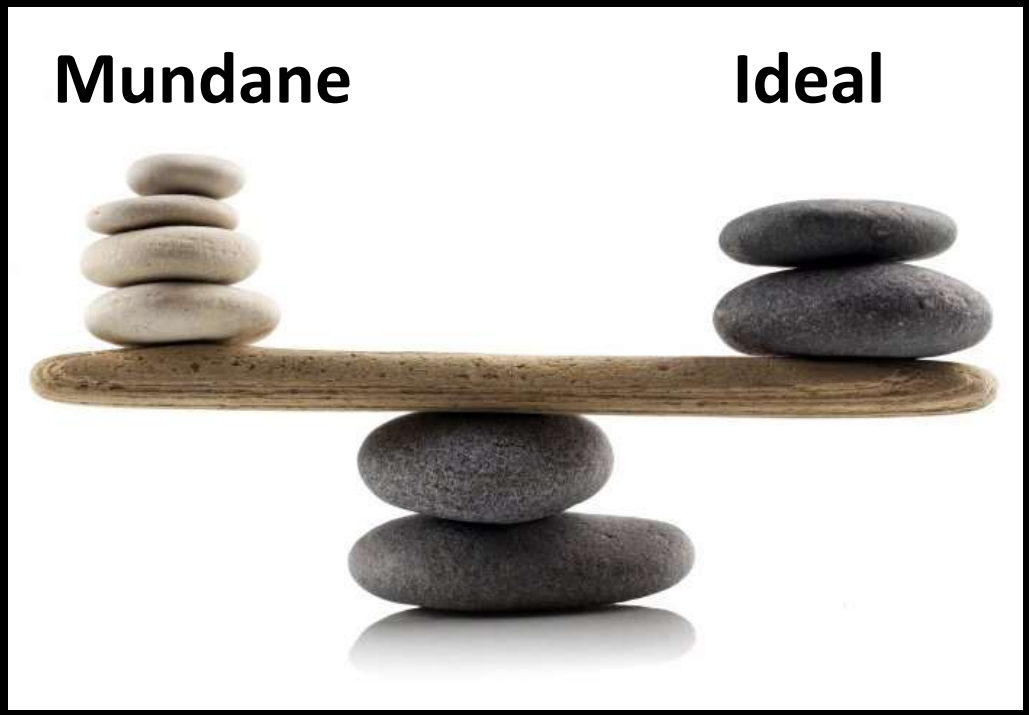
professionals following a calling.

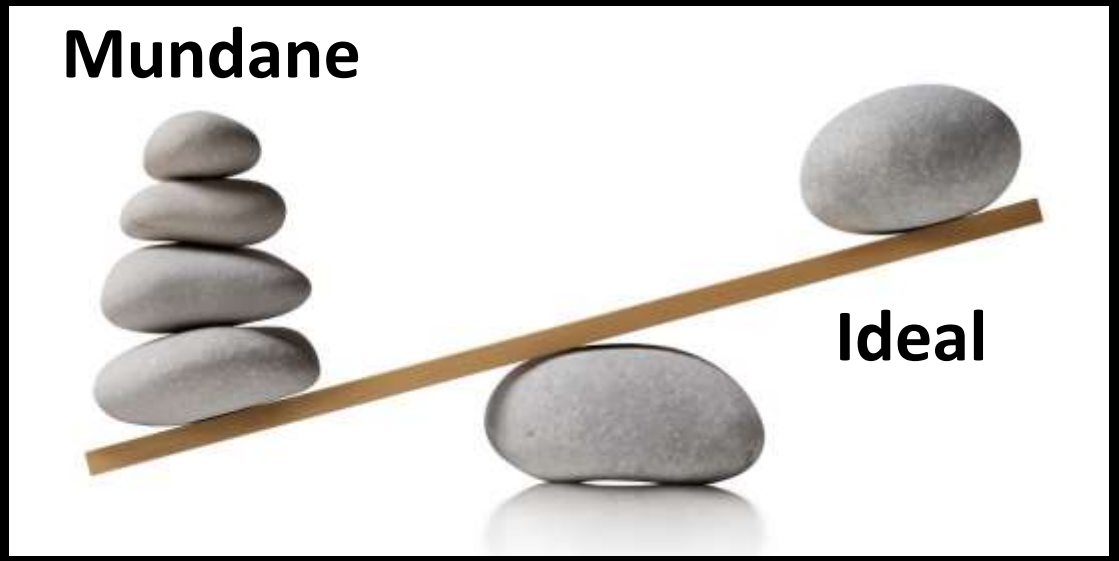
“Every people is defined ultimately by what it admires and reveres.”

Leon Kass

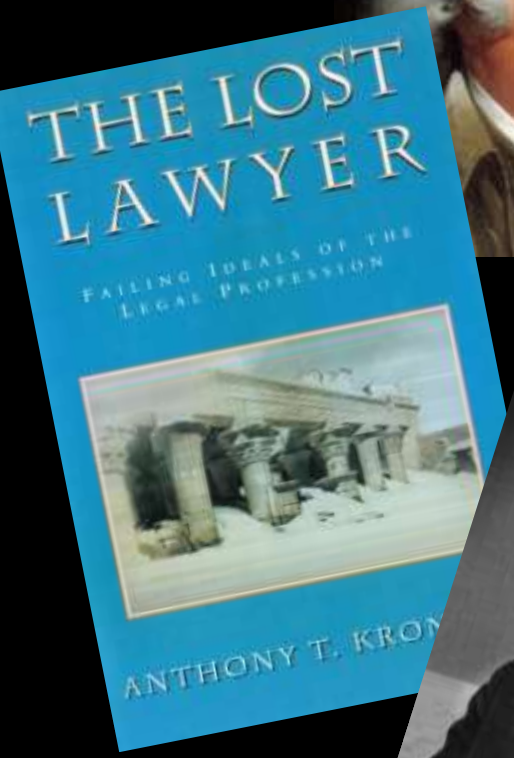


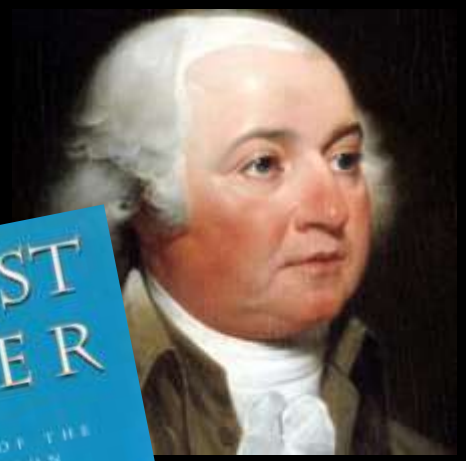
Needed:
More of the Ideal

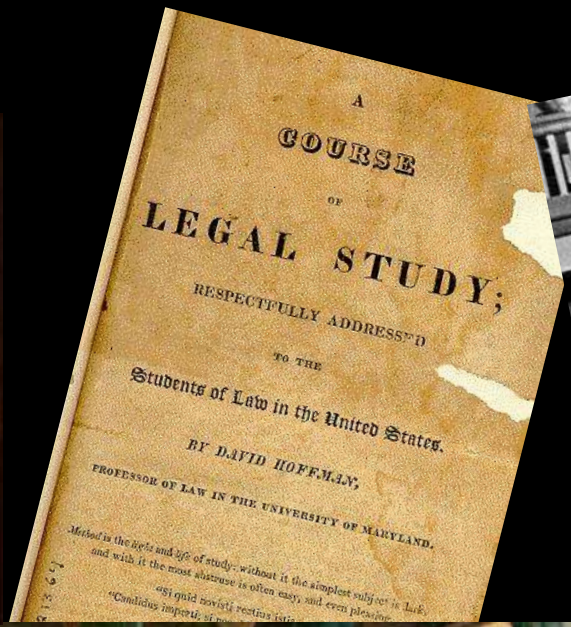




The traditions of the profession







Walter Benjamin

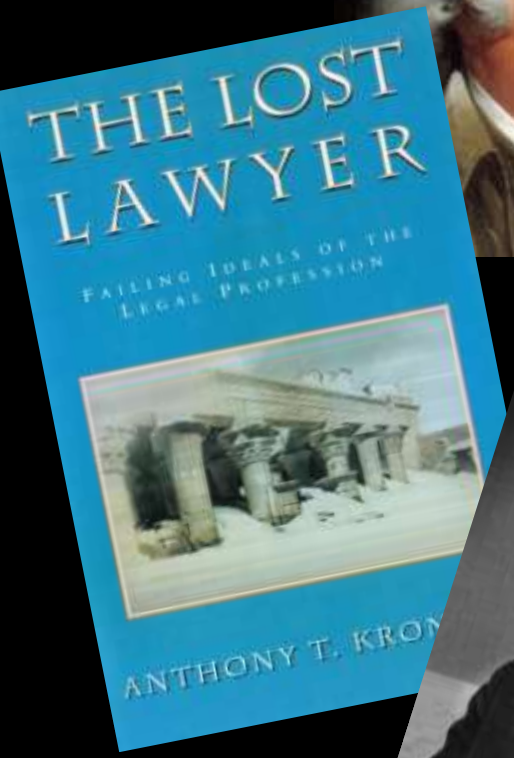
“The Storyteller”

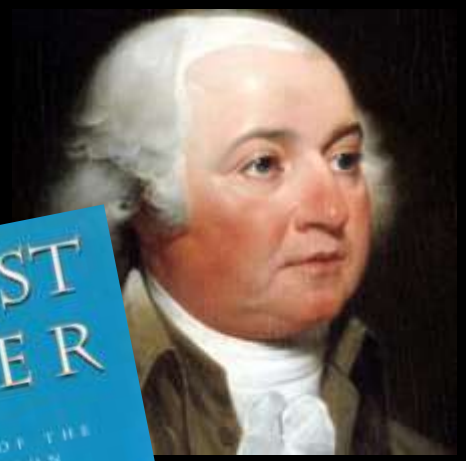
A storyteller must let the story “sink into the life of the storyteller, in order to bring it out of him again.”

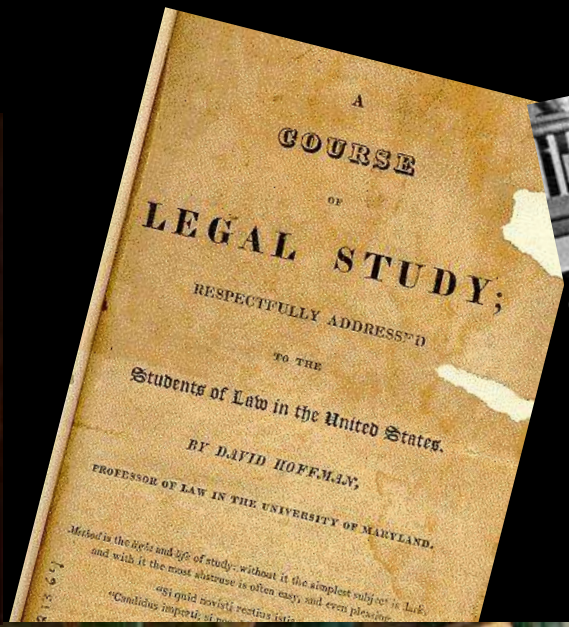
When the story comes out, it is changed.

"Traces of the storyteller cling to the story the way the handprints of a potter cling to the clay vessel."

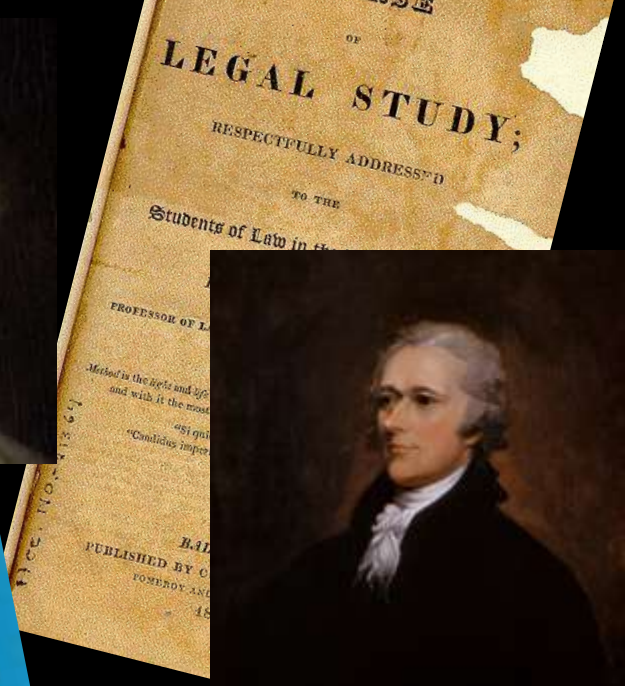
Let them sink into you…

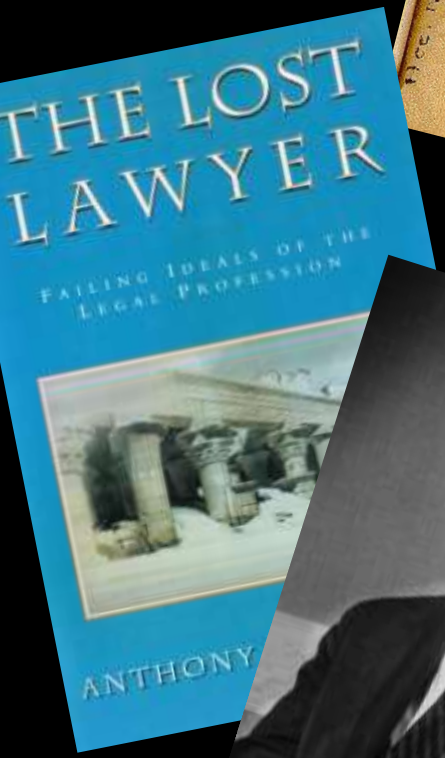






Bring them out again… bearing your handprints





Attachments

- **Oath for Indiana Lawyers**
- **A Course of Legal Study by David Hoffman 1846**
- **Professional Responsibility: Report of the Joint Conference**

Oath For Indiana Lawyers

Upon being admitted to practice law in the state of Indiana, each applicant shall take and subscribe to the following oath or affirmation:

"I do solemnly swear or affirm that: I will support the Constitution of the United States and the Constitution of the State of Indiana; I will maintain the respect due to courts of justice and judicial officers; I will not counsel or maintain any action, proceeding, or defense which shall appear to me to be unjust, but this obligation shall not prevent me from defending a person charged with crime in any case; I will employ for the purpose of maintaining the causes confided to me, such means only as are consistent with truth, and never seek to mislead the court or jury by any artifice or false statement of fact or law; I will maintain the confidence and preserve inviolate the secrets of my client at every peril to myself; I will abstain from offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged; I will not encourage either the commencement or the continuance of any action or proceeding from any motive of passion or interest; I will never reject, from any consideration personal to myself, the cause of the defenseless, the oppressed or those who cannot afford adequate legal assistance; so help me God."

(This oath is set forth in Rule 22 of the Rules for Admission to the Bar and the Discipline of Attorneys included in the Indiana Trial Rules as well as in Section 33-43-1-3 of the Indiana Code.)

A

COURSE

OF

LEGAL STUDY,

ADDRESSED TO

STUDENTS AND THE PROFESSION GENERALLY;

BY

DAVID HOFFMAN,

JUR. UTR. DOCT. GÖTTINGEN.

Second Edition,

RE-WRITTEN AND MUCH ENLARGED.

TWO VOLUMES IN ONE.

PHILADELPHIA:

THOMAS, COWPERTHWAIT & CO., 253 MARKET STREET.

1846.

RESOLUTIONS

IN REGARD TO

PROFESSIONAL DEPORTMENT.

I. I WILL never permit professional zeal to carry me beyond the limits of sobriety and decorum, but bear in mind, with Sir Edward Coke, that 'if a river swell beyond its banks, it loseth its own channel.'

II. I will espouse no man's cause out of envy, hatred or malice, towards his antagonist.

III. To all judges, when in court, I will ever be respectful: they are the Law's vicegerents; and whatever may be their character and deportment, the individual should be lost in the majesty of the office.

IV. Should judges, while on the bench, forget that, as an officer of their court, I have rights, and treat me even with disrespect, I shall value myself too highly to deal with them in like manner. A firm and temperate remonstrance is all that I will ever allow myself.

V. In all intercourse with my professional brethren, I will be always courteous. No man's passions shall intimidate me from asserting fully my own, or my client's rights; and no man's ignorance or folly shall induce me to take any advantage of him; I shall deal with them all as honourable men, ministering at our common altar. But an act of unequivocal meanness or dishonesty, though it shall wholly sever any personal

relation that may subsist between us, shall produce no change in my deportment when brought in *professional* connection with them; my client's rights, and not my own feelings, are then alone to be consulted.

VI. To the various officers of the court I will be studiously respectful, and specially regardful of their rights and privileges.

VII. As a general rule, I will not allow myself to be engaged in a cause to the exclusion of, or even in participation with the counsel previously engaged, unless at his own special instance, in union with his client's wishes: and it must, indeed, be a strong case of gross neglect or of fatal inability in the counsel, that shall induce me to take the cause to myself.

VIII. If I have ever had any connection with a cause, I will never permit myself (when that connection is from any reason severed) to be engaged on the side of my former antagonist. Nor shall any change in the *formal aspect* of the cause, induce me to regard it as a ground of exception. It is a poor apology for being found on the opposite side, that the present is but the *ghost* of the former cause.

IX. Any promise or pledge made by me to the adverse counsel, shall be strictly adhered to by me: nor shall the subsequent instructions of my client induce me to depart from it, unless I am well satisfied it was made in errour; or that the rights of my client would be materially impaired by its performance.

x. Should my client be disposed to insist on captious requisitions, or frivolous and vexatious defences, they shall be neither enforced nor countenanced by me. And if still adhered to by him from a hope of pressing the other party into an unjust compromise, or with any other motive, he shall have the option to select other counsel.

xi. If, after duly examining a case, I am persuaded that my client's claim or defence (as the case may be,) cannot, or rather ought not, to be sustained, I will promptly advise him to abandon it. To press it further in such a case, with the hope of gleaning some advantage by an exterted compromise, would be lending myself to a dishonourable use of legal means, in order to gain a *portion* of that, the *whole* of which I have reason to believe would be denied to him both by law and justice.

xii. I will never plead the Statute of Limitations, when based on the *mere efflux of time;* for if my client is conscious he owes the debt; and has no other defence than the *legal bar*, he shall never make me a partner in his knavery.

xiii. I will never plead, or otherwise avail of the bar of *Infancy*, against an honest demand. If my client possesses the ability to pay, and has no other legal or moral defence than that it was contracted by him when under the age of twenty-one years, he must seek for other counsel to sustain him in such a defence. And although in this, as well as in that of limitation,

the *law* has given the defence, and contemplates in the one case, to induce claimants to a timely prosecution of their rights, and in the other, designs to protect a class of persons, who by reason of tender age are peculiarly liable to be imposed on,—yet, in both cases *I shall claim to be the sole judge* (the pleas not being compulsory) of the occasions proper for their use.

XIV. My client's conscience, and my own, are distinct entities: and though my vocation may sometimes justify my maintaining as facts, or principles, in doubtful cases, what may be neither one nor the other, I shall ever claim the privilege of solely judging to what extent to go. In *civil* cases, if I am satisfied from the evidence that the *fact* is against my client, he must excuse me if I do not see as he does, and do not press it: and should the *principle* also be wholly at variance with sound law, it would be dishonourable folly in me to endeavour to incorporate it into the jurisprudence of the country, when, if successful, it would be a gangrene that might bring death to my cause of the succeeding day.

XV. When employed to defend those charged with crimes of the deepest dye, and the evidence against them, whether legal or moral, be such as to leave no just doubt of their guilt, I shall not hold myself privileged, much less obliged, to use my endeavours to arrest, or to impede the course of justice, by special resorts to ingenuity,—to the artifices of eloquence,—to appeals to the morbid and fleeting sympathies of weak

juries, or of temporizing courts—to my own personal weight of character—nor finally, to any of the overweening influences I may possess, from popular manners, eminent talents, exalted learning, &c. Persons of atrocious character, who have violated the laws of God and man, are entitled to no such special exertions from any member of our pure and honourable profession; and indeed, to no intervention beyond securing to them a fair and dispassionate investigation of the *facts* of their cause, and the due application of the law: all that goes beyond this, either in manner or substance, is unprofessional, and proceeds, either from a mistaken view of the relation of client and counsel, or from some unworthy and selfish motive, which sets a higher value on professional display and success, than on truth and justice, and the substantial interests of the community. Such an inordinate ambition, I shall ever regard as a most dangerous perversion of talents, and a shameful abuse of an exalted station. The parricide, the gratuitous murderer, or other perpetrator of like revolting crimes, has surely no such claim on the commanding talents of a profession, whose object and pride should be the suppression of all vice, by the vindication and enforcement of the laws. Those, therefore, who wrest their proud knowledge from its legitimate purposes, to pollute the streams of justice, and to screen such foul offenders from merited penalties, should be regarded by all, (and certainly shall be by me,) as ministers at a holy altar, full of high pretension, and apparent sanc-

tity, but inwardly base, unworthy, and hypocritical—dangerous in the precise ratio of their commanding talents, and exalted learning.

XVI. Whatever personal influence I may be so fortunate as to possess, shall be used by me only as the most valuable of my possessions, and not be cheapened, or rendered questionable by a too frequent appeal to its influence. There is nothing more fatal to *weight of character* than its common use; and especially that unworthy one, often indulged in by eminent counsel, of solemn assurances to eke out a sickly and doubtful cause. If the case be a good one, it needs no such appliance; and if bad, the artifice ought to be too shallow to mislead any one. Whether one or the other, such *personal pledges* should be *very sparingly* used, and only on occasions which obviously demand them; for if more liberally resorted to, they beget doubts where none may have existed, or strengthen those which before were only feebly felt.

XVII. Should I attain that eminent standing at the bar, which gives *authority* to my opinions, I shall endeavour, in my intercourse with my junior brethren, to avoid the least display of it to their prejudice. I will strive never to forget the days of my youth, when I too was feeble in the law, and without standing. I will remember my then ambitious aspirations, (though timid and modest,) nearly blighted by the inconsiderate, or rude and arrogant deportment of some of my seniors; and I will further remember that the vital spark of my

early ambition might have been wholly extinguished, and my hopes been forever ruined had not my own resolutions, and a few generous acts of some others of my seniors, raised me from my depression. To my juniors, therefore, I shall ever be kind and encouraging; and never too proud to recognize distinctly that, on many occasions it is quite probable their knowledge may be more accurate than my own, and that they with their limited reading and experience have seen the matter more soundly than I with my much reading and long experience.

XVIII. To my clients I will be faithful; and in their causes, zealous and industrious. Those who can afford to compensate me, *must do so;* but I shall never close my ear, or heart, because my client's means are low. Those who have none, and who have just causes, are, of all others, the best entitled to sue, or be defended; and they shall receive a due portion of my services, cheerfully given.

XIX. Should my client be disposed to compromise, or to settle his claim, or defence; and especially if he be content with a verdict, or judgment, that has been rendered; or, having no opinion of his own, relies with confidence on mine, I will in all such cases greatly respect his wishes and real interests. The further prosecution, therefore, of the claim, or defence, (as the case may be) will be recommended by me only when, after mature deliberation, I am satisfied that the chances are decidedly in his favour; and I will never forget that

the pride of professional opinion on my part, or the spirit of submission, or of controversy (as the case may be) on that of my client, may easily mislead the judgment of both, and cannot justify me in sanctioning, and certainly not in recommending, the further prosecution of what *ought* to be regarded as a hopeless cause. *To keep up the ball* (as the phrase goes,) at my client's expense, and to my own profit, must be dishonourable; and however willing my client may be to pursue a phantom, and to rely implicitly on my opinion, I will terminate the controversy as conscientiously for him, as I would were the cause my own.

XX. Should I not understand my client's cause, after due means to comprehend it, I will retain it no longer, but honestly confess it, and advise him to consult others, whose knowledge of the particular case, may probably be better than my own.

XXI. The wealthy, and the powerful shall have no privilege against my client, that does not equally appertain to others. None shall be so great as to rise, even for a moment, above the just requisitions of the law.

XXII. When my client's *reputation* is involved in the controversy, it shall be, if possible, judicially passed on. Such cases do not admit of compromise; and no man's elevated standing shall induce me to consent to such a mode of settling the matter: the *amende* from the great and wealthy, to the ignoble and poor, should be free, full, and open.

XXIII. In all small cases in which I may be engaged, I will as conscientiously discharge my duty, as in those of magnitude; always recollecting that 'small' and 'large' are to clients, relative terms, the former being to a poor man, what the latter is to a rich one,—and, as a young practitioner, not forgetting that large ones, which we have not, will never come, if small ones, which we have, are neglected.

XXIV. I will never be tempted, by any pecuniary advantage, however great, nor be persuaded by any appeal to my feelings, however strong, to purchase, in whole, or in part, my client's cause. Should his wants be pressing, it will be an act of humanity to relieve them myself, if I am able; and if not, then to induce others to do so. But in no case will I permit either my benevolence, or avarice,—his wants or his ignorance, to seduce me into any participation of his *pending* claim or defence. Cases may arise in which it would be mutually advantageous thus to bargain; but the experiment is too dangerous, and my rule too sacred to admit of any exception, persuaded as I am that the relation of client and counsel, to be preserved in absolute purity, must admit of no such privilege, however guarded it may be by circumstances. And should the special case, alluded to arise, better would it be that my client should suffer, and I lose a great and honest advantage, than that any discretion should exist in a matter so extremely liable to abuse, and so dangerous in precedent.

And though I have thus strongly worded my resolution, I do not thereby mean to repudiate, as wholly inadmissible, the taking of *contingent fees*,—on the contrary, they are sometimes perfectly proper, and are called for by public policy, no less than by humanity. The distinction is very clear. A claim or defence may be perfectly good in law, and in justice, and yet the expenses of litigation would be much beyond the means of the claimant or defendant—and equally so as to counsel, who if not thus contingently compensated, in the ratio of the risk, might not be compensated at all. A contingent fee looks to professional compensation only on the final result of the matter in favour of the client. None other is offered, or is attainable. The claim or defence never can be made without such an arrangement; it is voluntarily tendered, and necessarily accepted or rejected *before* the institution of any proceedings.

It flows not from the influence of counsel over client, both parties have the option to be off; no expenses have been incurred; no moneys have been paid by the counsel to the client; the relation of borrower and lender, of vendor and vendee, does not subsist between them,—but it is an independent contract for the services of counsel, to be rendered for the contingent avails of the matter to be litigated. Were this denied to the poor man, he could neither prosecute, nor be defended. All of this differs essentially from the object of my resolution, which is against *purchasing*, in whole

or in part, my client's rights, after the relation of client and counsel, in respect to it, has been fully established—after the strength of his case has become known to me—after his total pecuniary inability is equally known—after expenses have been incurred which he is unable to meet—after he stands to me in the relation of debtor,—and after he desires *money from me* in exchange for his pending rights. With this explanation, I renew my resolution, never *so to purchase* my *client's* cause, in whole, or in part,—but still reserve to myself, on proper occasions, and with proper guards, the professional privilege, (denied by no law among us,) of agreeing to receive a contingent compensation, *freely offered*, for services *wholly to be* rendered, and when it *is the only* means by which the matter can either be prosecuted, or defended. Under all other circumstances I shall regard contingent fees as obnoxious to the present resolution.

XXV. I will retain no client's funds beyond the period in which I can with safety and ease, put him in possession of them.

XXVI. I will on no occasion blend with my own, my client's money: if kept *distinctly as his*, it will be less liable to be considered *as my own*.

XXVII. I will charge for my services what my judgment and conscience inform me is my due, and nothing more. If that be withheld, it will be no fit matter for *arbitration*; for no one but myself can adequately judge of such services, and after they are successfully rendered, they are apt to be ungratefully forgotten. I

will then receive what the client offers, or the laws of the country may award,—but in either case, he must never hope to be again my client.

XXVIII. As a general rule, I will carefully avoid what is called the *'taking of half fees.'* And though no one can be so competent as myself to judge what may be a just compensation for my services,—yet, when the *quiddam honorarium* has been established by usage or law, I shall regard as eminently dishonourable all *underbidding* of my professional brethren. On such a subject, however, no inflexible rule can be given to myself, except to be invariably guided by a lively recollection that I belong to an honourable profession.

XXIX. Having received a retainer for contemplated services, which circumstances have prevented me from rendering, I shall hold myself bound to refund the same, as having been paid to me on a consideration which has failed; and, as such, subject to repetition, on every principle of law, and of good morals,—and this shall be repaid not merely at the instance of my client, but *ex mero motu*.

XXX. After a cause is finally disposed of, and all relation of client and counsel seems to be for ever closed, I will not forget that it once existed; and will not be inattentive to his just request that all of his papers may be carefully arranged by me, and handed over to him. The execution of such demands, though sometimes troublesome, and inopportunely, or too urgently made, still remains a part of my professional

duty, for which I shall consider myself already compensated.

XXXI. All opinions for clients, verbal, or written, shall be *my opinions*, deliberately and sincerely given, and never *venal and flattering offerings to their wishes, or their vanity.* And though clients sometimes have the folly to be better pleased with having their views confirmed by an erroneous opinion, than their wishes or hopes thwarted by a sound one, yet such assentation is dishonest and unprofessional. Counsel, in giving opinions, whether they perceive this weakness in their clients or not, should act as *judges*, responsible to God and to man, as also especially to their employers, to advise them soberly, discreetly, and honestly, to the best of their ability—though the certain consequence be the loss of large prospective gains.

XXXII. If my client consents to endeavours for a compromise of his claim, or defence, and for that purpose I am to commune with the opposing counsel, or others, I will never permit myself to enter upon a system of tactics, to ascertain who shall overreach the other, by the most nicely balanced artifices of disingenuousness, by mystery, silence, obscurity, suspicion, vigilance to the letter, and all of the other machinery used by this class of tacticians, to the vulgar surprise of clients, and the admiration of a few ill judging lawyers. On the contrary,—my resolution in such a case is, to examine with great care, previously to the interview, the matter of compromise; to form a judg-

ment as to what I will offer, or accept; and promptly, frankly, and firmly to communicate my views to the adverse counsel. In so doing, no lights shall be withheld that may terminate the matter as speedily, and as nearly in accordance with the rights of my client as possible; although a more dilatory, exacting, and wary policy, might finally extract something more than my own, or even my client's hopes. Reputation gained for this species of skill is sure to be followed by more than an equivalent loss of character: shrewdness is too often allied to unfairness,—caution to severity,—silence to disingenuousness—wariness to exaction, to make me covet a reputation based on such qualities.

XXXIII. What is wrong, is not the less so from being common. And though few *dare to be singular*, even in a right cause, I am resolved to make my own, and not the conscience of others, my sole guide. What is morally wrong, cannot be professionally right, however it may be sanctioned by time or custom. It is better to be right with a few, or even none, than wrong, though with a multitude. If, therefore, there be among my brethren, any traditional moral errors of practice, they shall be studiously avoided by me, though in so doing, I unhappily come in collision with what is (erroneously I think) too often denominated the policy of the profession. Such cases, fortunately, occur but seldom,—but when they do, I shall trust to that moral firmness of purpose which shrinks from no consequences, and which can be intimidated by no authority however ancient or respectable.

XXXIV. Law is a deep science: its boundaries, like space, seem to recede, as we advance: and though there be as much of certainty in it, as in any other science, it is fit we should be modest in our opinions, and ever willing to be further instructed. Its acquisition is more than the labour of a life; and, after all, can be with none the subject of unshaken confidence. In the language, then, of a late beautiful writer, I am resolved to 'consider my own acquired knowledge but as a torc flung into an abyss, making the darkness visible, and showing me the extent of my own ignorance.'[*]

XXXV. I will never be voluntarily called as a witness, in any cause in which I am counsel. Should my testimony, however, be so material that without it my client's cause may be greatly prejudiced, he must at once use his option to cancel the tie between us in the cause, and dispense with my further services, or with my evidence. Such a dilemma would be anxiously avoided by every delicate mind,—the union of counsel and witness being usually resorted to only as a forlorn hope, in the agonies of a cause,—and becomes particularly offensive, when its object be to prove an *admission* made to such counsel by the opposite litigant. Nor will I ever recognize any distinction in this respect between my knowledge of facts acquired before, and since the institution of the suit; for, in no case will I consent to sustain by my testimony any of the matters which my interest and professional duty render me

[*] Mrs. Jameson.

anxious to support. This resolution, however, has no application whatever, to facts contemporaneous with, and relating merely to the prosecution or defence of the cause itself; such as, evidence relating to the contents of a paper unfortunately lost by myself or by others—and such like matters, which do not respect the original merits of the controversy, and which, in truth, adds nothing to the once existing testimony; but relates merely to matters respecting the conduct of the suit, or to the recovery of lost evidence: nor does it apply to the case of gratuitous counsel,—that is, to those who have expressly given their services voluntarily.

XXXVI. Every letter or note that is addressed to me, shall receive a suitable response, and in proper time. Nor shall it matter from whom it comes, what it seeks, or what may be the terms in which it is penned. Silence can be justified in no case: and though the information sought cannot, or ought not to be given, still decorum would require from me a courteous recognition of the request, though accompanied with a firm withholding of what has been asked. There can be no surer indication of vulgar education than neglect of letters and notes; it manifests a total want of that tact and amenity, which intercourse with good society never fails to confer. But that *dogged silence* (worse than a rude reply) in which some of our profession indulge, on receiving letters offensive to their dignity, or when di · ed by ignorant importunity, I am

resolved never to imitate,—but will answer every letter and note with as much civility as may be due; and in as good time as may be practicable.

XXXVII. Should a professional brother by his industry, learning, and zeal, or even by some happy chance, become eminently successful in causes which give him large pecuniary emoluments, I will neither envy him the fruits of his toils or good fortune,—nor endeavour, by any indirection, to lessen them; but rather strive to emulate his worth, than enviously to brood over his meritorious success, and my own more tardy career.

XXXVIII. Should it be my happy lot to rank with, or take precedence of my seniors, who formerly endeavoured to impede my onward course, I am firmly resolved to give them no cause to suppose that I remember the one, or am conscious of the other. When age and infirmities have overtaken them, my kindness will teach them the loveliness of forgiveness. Those again, who aided me when young in the profession, shall find my gratitude increase in proportion as I become the better able to sustain myself.

XXXIX. A forensic contest is often no very sure test of the comparative strength of the combattants,—nor should defeat be regarded as a just cause of boast in the victor, or of mortification in the vanquished. When the controversy has been judicially settled against me, in all courts, I will not 'fight the battle o'er again,' *coram non judice*; nor endeavour to persuade others (as is too often done) that the courts

were prejudiced,—or the jury desperately ignorant,—or the witnesses perjured,—or that the victorious counsel were unprofessional and disingenuous. In such cases, Credat Judæus Apella

XL. Ardour in debate is often the soul of eloquence, and the greatest charm of oratory. When spontaneous and suited to the occasion, it becomes powerful. A sure test of this is when it so alarms a cold, calculating, and disingenuous opponent, as to induce him to resort to numerous vexatious means of neutralizing its force,—when ridicule and sarcasm take place of argument,—when the poor device is resorted to of endeavouring to cast the speaker from his well guarded pivot, by repeated interruptions, or by impressing on the court and jury that his just and well tempered zeal is but passion, and his earnestness but the exacerbation of constitutional infirmity,—when the opponent assumes a patronizing air, and imparts lessons of wisdom and of instruction! Such opponents I am resolved to disappoint, and on no account will I ever imitate their example. The warm current of my feelings shall be permitted to flow on; the influences of my nature shall receive no check; the ardour and fullness of my words shall not be abated,—for this would be to gratify the unjust wishes of my adversary, and would lessen my usefulness to my client's cause.

XLI. In reading to the court or to the jury authorities, records, documents, or other papers, I shall always consider myself as executing a *trust*, and, as

such, bound to execute it faithfully and honourably. I am resolved, therefore, carefully to abstain from all false, or deceptious readings; and from all uncandid omissions of any qualifications of the doctrines maintained by me, which may be contained in the text, or in the notes. And I shall ever hold that the obligation extends, not only to words, syllables and letters, but also to the *modus legendi*: all intentional false emphasis, and even intonations, in any degree calculated to mislead, are petty impositions on the confidence reposed; and, whilst avoided by myself, shall ever be regarded by me in others, as feeble devices of an impoverished mind; or as pregnant evidences of a disregard for truth, which justly subjects them to be closely watched in more important matters.

XLII. In the examination of witnesses, I shall not forget that perhaps circumstances, and not choice, have placed them somewhat in my power. Whether so, or not, I shall never esteem it my privilege to disregard their feelings; or to extort from their evidence what, in moments free from embarrassment, they would not testify. Nor will I conclude that they have no regard for truth, and even the sanctity of an oath, because they use the privilege, accorded to others, of changing their language, and of explaining their previous declarations. Such captious dealing with the *words* and *syllables* of a witness, ought to produce in the mind of an intelligent jury, only a reverse effect, from that designed by those who practise such poor devices.

XLIII. I will never enter into any conversation with my opponent's client, relative to his claim or defence, except with the consent, *and* in the presence of his counsel.

XLIV. Should the party, just mentioned, have no counsel, and my client's interests demand that I should still commune with him, it shall be done in writing only,—and no verbal response will be received. And if such person be unable to commune in writing, I will either delay the matter until he employs counsel,—or, take down in writing his reply, in the presence of others; so that, if occasion should make it essential to avail myself of his answer, it may be done through the testimony of others, and not by mine. Even such cases should be regarded as the result of unavoidable necessity, and are to be resorted to only to guard against great risk, the artifices of fraud, or with the hope of obviating litigation.

XLV. Success in any profession will be much promoted by good address. Even the most cautious and discriminating minds are not exempt from its influence; the wisest judges, the most dispassionate juries, and the most wary opponents being made thereby, at least, more willing auditors,—and *this*, of itself, is a valuable end. But whilst address is deservedly prized, and merits the highest cultivation, I fully concur in sentiment with a high authority, that we should be 'respectful without meanness, easy without too much fami-

larity, genteel without affectation, and insinuating without any art or design.'

XLVI. Nothing is more unfriendly to the art of pleasing than *morbid timidity*, (*bashfulness*,—*mauvaise honte*.) All life teems with examples of its prejudicial influence, showing that the art of rising in life has no greater enemy than this nervous and senseless defect of education. Self-possession—calmness—steady assurance—intrepidity—are all perfectly consistent with *the most amiable modesty*; and none but vulgar and illiterate minds are prone to attribute to *presumptuous assurance*, the apparently cool and unconcerned exertions of young men at the bar. A great connoisseur in such matters, says, that 'what is done under concern and embarrassment, is sure to be ill done:' and the Judge (I have known some) who can scowl on the early endeavours of the youthful Advocate who has fortified himself with resolution, must be a man poor in the knowledge of human character, and perhaps still more so in good feelings. Whilst, therefore, I shall ever cherish these opinions, I hold myself bound to distinguish the arrogant, noisy, shallow and dictatorial impudence of some, from the gentle, though firm and manly confidence of others—they who bear the white banner of modesty, fringed with resolution.

XLVII. All reasoning should be regarded as a philosophical process—its object being conviction, by certain known and legitimate means. No one ought to be expected to be convinced by loud words—dogmatic

assertions,—assumption of superior knowledge—sarcasm—invective;—but by gentleness, sound ideas, cautiously expressed—by sincerity—by ardour without extravasation. The minds and hearts of those we address are apt to be closed, when the lungs are appealed to instead of logic; when assertion is relied on, more than proof; and when sarcasm and invective supply the place of deliberate reasoning. My resolution, therefore, is to respect courts, juries, and counsel as assailable only through the medium of logical and just reasoning; and by such appeals to the sympathies of our common nature, as are worthy, legitimate, well timed, and in good taste.

XLVIII. The ill success of many at the bar is owing to the fact that their *business is not their pleasure*. Nothing can be more unfortunate than this state of mind. The world is too full of penetration not to perceive it, and much of our discourteous manner to clients, to courts, to juries, and counsel, has its source in this defect. I am, therefore, resolved to cultivate a *passion* for my profession; or, after a reasonable exertion therein, without success, to abandon it. But I will previously bear in mind, that he who abandons any profession will scarcely find another to suit him; the defect is in himself; he has not performed his duty, and has failed in resolutions, perhaps often made, to retrieve lost time, the want of which firmness can give no promise of success in any other vocation.

XLIX. Avarice is one of the most dangerous and disgusting of vices. Fortunately its presence is oftener found in age, than in youth; for if it be seen as an early feature in our character, it is sure, in the course of a long life, to work a great mass of oppression, and to end in both intellectual and moral desolation. Avarice gradually originates every species of indirection. Its offspring is meanness; and it contaminates every pure and honourable principle. It can consist with honesty scarce for a moment, without gaining the victory. Should the young practitioner, therefore, on the receipt of the first fruits of his exertions, perceive the slightest manifestation of this vice, let him view it as his most insidious and deadly enemy. Unless he can then heartily, and thoroughly eradicate it, he will find himself, perhaps slowly, but surely, capable of unprofessional—mean—and finally, dishonest acts;—which, as they cannot be long concealed, will render him conscious of the loss of character; make him callous to all the nicer feelings; and, ultimately so degrade him, that he consents to live upon arts, from which his talents, acquirements, and original integrity would certainly have rescued him, had he at the very commencement fortified himself with the resolution to reject all gains, save those acquired by the most strictly honourable and professional means. I am therefore, firmly resolved, never to receive from any one, a compensation, not justly and honourably my due; and if fairly received, to place on it no undue value; to entertain no affection for money,

further than as a means of obtaining the goods of life,—the art of *using money* being quite as important for the avoidance of avarice, and the preservation of a pure character, as that of *acquiring it*.

☞ With the aid of the foregoing Resolutions, and the faithful adherence to the following and last one, I hope to attain eminence in my profession, and to leave this world with the merited reputation of having lived an honest lawyer.

L. LAST RESOLUTION. I will read the foregoing forty-nine resolutions, twice every year, during my professional life.

Professional Responsibility:

Report of the Joint Conference

The Joint Conference on Professional Responsibility was established in 1952 by the American Bar Association and the Association of American Law Schools. At the first meeting of the Conference the general problem discussed was that of bringing home to the law student, the lawyer and the public an understanding of the nature of the lawyer's professional responsibilities. All present considered that the chief obstacle to the success of this undertaking lay in "the adversary system". Those who had attempted to arrange conferences on professional ethics between lawyers, on the one side, and philosophers and theologians, on the other, observed that communication broke down at this point. Similarly, those who had attempted to teach ethical principles to law students found that the students were uneasy about the adversary system, some thinking of it as an unwholesome compromise with the combativeness of human nature, others vaguely approving of it but disturbed by their inability to articulate its proper limits. Finally, it was observed that the legal profession is itself generally not very philosophic about this issue. Confronted by the layman's charge that he is nothing but a hired brain and voice, the lawyer often finds it difficult to convey an insight into the value of the adversary system or an understanding of the tacit restraints with which it is infused.

Accordingly, it was decided that the first need was for a reasoned statement of the lawyer's responsibilities, set in the context of the adversary system. The statement printed below is intended to meet that need. It is not expected that all lawyers will agree with every detail of the statement, particularly in matters of emphasis. It was considered, however, that the statement would largely fail of its purpose if it were confined to generalities too broad to elicit dissent, but, by the same token, too broad to sharpen insight or to stimulate useful discussion.

The Conference would welcome proposals as to ways in which its statement may be put to use. It would also be grateful for suggestions of further steps that may be taken to convey to students, laymen and lawyers a better understanding of the role played by the profession and of the restraints inherent in that role.

LON L. FULLER,
JOHN D. RANDALL,
Co-Chairmen of the
Joint Conference on
Professional Responsibility

I.

A profession to be worthy of the name must inculcate in its members a strong sense of the special obligations that attach to their calling. One who undertakes the practice of a profession cannot rest content with the faithful discharge of duties assigned to him by others. His work must find its direction within a larger frame. All that he does must evidence a dedication, not merely to a specific assignment, but to the enduring ideals of his vocation. Only such a dedication will enable him to reconcile fidelity to those he serves with an equal fidelity to an office that must at all times rise above the involvements of immediate interest.

The legal profession has its traditional standards of conduct, its codified Canons of Ethics. The lawyer must know and respect these rules established for the conduct of his professional life. At the same time he must realize that a letter-bound observance of the Canons is not equivalent to the practice of professional responsibility.

A true sense of professional responsibility must derive from an understanding of the reasons that lie back of specific restraints, such as those embodied in the Canons. The grounds for the lawyer's peculiar obligations are to be found in the nature of his calling. The lawyer who seeks a clear understanding of his duties will be led to reflect on the special services his profession renders to society and the services it might render if its full capacities were realized. When the lawyer fully understands the nature of his office, he will then discern what restraints are necessary to keep that office wholesome and effective.

Under the conditions of modern practice it is peculiarly necessary that the lawyer should understand, not merely the established standards of professional conduct, but the reasons underlying these standards. Today the lawyer plays a changing and increasingly varied role. In many developing fields the precise contribution of the legal profession is as yet undefined. In

these areas the lawyer who determines what his own contribution shall be is at the same time helping to shape the future role of the profession itself. In the duties that the lawyer must now undertake, the inherited traditions of the Bar often yield but an indirect guidance. Principles of conduct applicable to appearance in open court do not, for example, resolve the issues confronting the lawyer who must assume the delicate task of mediating among opposing interests. Where the lawyer's work is of sufficient public concern to become newsworthy, his audience is today often vastly expanded, while at the same time the issues in controversy are less readily understood than formerly. While performance under public scrutiny may at times reinforce the sense of professional obligation, it may also create grave temptations to unprofessional conduct.

For all these reasons the lawyer stands today in special need of a clear understanding of his obligations and of the vital connection between those obligations and the role his profession plays in society.

II.

In modern society the legal profession may be said to perform three major services. The most obvious of these relates to the lawyer's role as advocate and counselor. The second has to do with the lawyer as one who designs a framework that will give form and direction to collaborative effort. His third service runs not to particular clients, but to the public as a whole.

1.

The Lawyer's Service in the Administration and Development of the Law

The Lawyer's Role as Advocate in Open Court

The lawyer appearing as an advocate before a tribunal presents, as persuasively as he can, the facts and the law of the case as seen from the standpoint of his client's interest. It is essential that both the lawyer and the public understand clearly the nature of the role thus discharged. Such an understanding is required not only to appreciate the need for an adversary presentation of issues, but also in order to perceive truly the limits partisan advocacy must impose on itself if it is to remain wholesome and useful.

In a very real sense it may be said that the integrity of the adjudicative process itself depends upon the participation of the advocate. This becomes apparent when we contemplate the nature of the task assumed by any arbiter who attempts to decide a dispute without the aid of partisan advocacy.

Such an arbiter must undertake, not only the role of judge, but that of representative for both of the litigants. Each of these roles must be played to the full without being muted by qualifications derived from the others. When he is developing for each side the most effective statement of its case, the arbiter must put aside his neutrality and permit himself to be moved by a sympathetic identification sufficiently intense to draw from his mind all that it is capable of giving,—in analysis, patience and creative power. When he resumes his neutral position, he must be able to view with distrust the fruits of this identification and be ready to reject the products of his own best mental efforts. The difficulties of this undertaking are obvious. If it is true that a man in his time must play many parts, it is scarcely given to him to play them all at once.

It is small wonder, then, that failure generally attends the attempt to dispense with the distinct roles traditionally implied in adjudication. What generally occurs in practice is that at some early point a familiar pattern will seem to emerge from the evidence; an accustomed label is waiting for the case, and, without awaiting further proofs, this label is promptly assigned to it. It is a mistake to suppose that this premature cataloguing must necessarily result from impatience, prejudice or mental sloth. Often it proceeds from a very understandable desire to bring the hearing into some order and coherence, for without some tentative theory of the case there is no standard of relevance by which testimony may be measured. But what starts as a preliminary diagnosis, designed to direct the inquiry lends, quickly and imperceptibly, to become a fixed conclusion, as all that confirms the diagnosis makes a strong imprint on the mind, while all that runs counter to it is received with diverted attention.

An adversary presentation seems the only effective means for combatting this natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known. The arguments of counsel hold the case, as it were, in suspension between two opposing interpretations of it. While the proper classification of the case is thus kept unresolved, there is time to explore all of its peculiarities and nuances.

These are the contributions made by partisan advocacy during the public hearing of the cause. When we take into account the preparations that must precede the hearing, the essential quality of the advocate's contribution becomes even more apparent. Preceding the hearing, inquiries must be instituted to determine what facts can be proved or seem sufficiently established to warrant a formal test of their truth during the hearing. There must also be a preliminary analysis of the issues, so that the hearing may have form and direction. These preparatory measures are indispensable whether or not the parties involved in the controversy are represented by advocates.

Where that representation is present there is an obvious advantage in the fact that the area of dispute may be greatly reduced by an exchange of written pleadings or by stipulations of counsel. Without the participation of someone who can act responsibly for each of the parties, this essential narrowing of the issues becomes impossible. But here again the true significance of partisan advocacy lies deeper, touching once more the integrity of the adjudicative process itself. It is only through the advocate's participation that the hearing may remain in fact what it purports to be in theory: a public trial of the facts and issues. Each advocate comes to the hearing prepared to present his proofs and arguments, knowing at the same time that his arguments may fail to per-

suade and that his proofs may be rejected as inadequate. It is a part of his role to absorb these possible disappointments. The deciding tribunal, on the other hand, comes to the hearing uncommitted. It has not represented to the public that any fact can be proved, that any argument is sound, or that any particular way of stating a litigant's case is the most effective expression of its merits.

The matter assumes a very different aspect when the deciding tribunal is compelled to take into its own hands the preparations that must precede the public hearing. In such a case the tribunal cannot truly be said to come to the hearing uncommitted, for it has itself appointed the channels along which the public inquiry is to run. If an unexpected turn in the testimony reveals a miscalculation in the design of these channels, there is no advocate to absorb the blame. The deciding tribunal is under a strong temptation to keep the hearing moving within the boundaries originally set for it. The result may be that the hearing loses its character as an open trial of the facts and issues, and becomes instead a ritual designed to provide public confirmation for what the tribunal considers it has already established in private. When this occurs adjudication acquires the taint affecting all institutions that become subject to manipulation, presenting one aspect to the public, another to knowing participants.

These, then, are the reasons for believing that partisan advocacy plays a vital and essential role in one of the most fundamental procedures of a democratic society. But if we were to put all of these detailed considerations to one side, we should still be confronted by the fact that, in whatever form adjudication may appear, the experienced judge or arbitrator desires and actively seeks to obtain an adversary presentation of the issues. Only when he has had the benefit of intelligent and vigorous advocacy on both sides can he feel fully confident of his decision.

Viewed in this light, the role of the lawyer as a partisan advocate appears not as a regrettable necessity, but as an indispensable part of a larger ordering of affairs. The institution of advocacy is not a concession to the frailties of human nature, but an expression of human insight in the design of a social framework within which man's capacity for impartial judgment can attain its fullest realization.

When advocacy is thus viewed, it becomes clear by what principle limits must be set to partisanship. The advocate plays his role well when zeal for his client's cause promotes a wise and informed decision of the case. He plays his role badly, and trespasses against the obligations of professional responsibility, when his desire to win leads him to muddy the headwaters of decision, when, instead of lending a needed perspective to the controversy, he distorts and obscures its true nature.

The Lawyer's Role as Counselor

Vital as is the lawyer's role in adjudication, it should not be thought that it is only as an advocate pleading in open court that he contributes to the administration of the law. The most effective realization of the law's aims often takes place in the attorney's office, where litigation is forestalled by anticipating its outcome, where the lawyer's quiet counsel takes the place of public force. Contrary to popular belief, the compliance with the law thus brought about is not generally lip-serving and narrow, for by reminding him of its long-run costs the lawyer often deters his client from a course of conduct technically permissible under existing law, though inconsistent with its underlying spirit and purpose.

Although the lawyer serves the administration of justice indispensably both as advocate and as office counselor, the demands imposed on him by these two roles must be sharply distinguished. The man who has been called into court to answer for his own actions is entitled to a fair hearing. Partisan advocacy plays its essential part in such a hearing, and the lawyer pleading his client's case may properly present it in the most favorable light. A similar resolution of doubts in one direction becomes inappropriate when the lawyer acts as counselor. The reasons that justify and even require partisan advocacy in the trial of a cause do not grant any license to the lawyer to participate as legal adviser in a line of conduct that is immoral, unfair, or of doubtful legality. In saving himself from this unworthy involvement, the lawyer cannot be guided solely by an unreflective inner sense of good faith; he must be at pains to preserve a sufficient detachment from his client's interests so that he remains capable of a sound and objective appraisal of the propriety of what his client proposes to do.

2.

The Lawyer as One Who Designs the Framework of Collaborative Effort

In our society the great bulk of human relations are set, not by governmental decree, but by the voluntary action of the affected parties. Men come together to collaborate and to arrange their relations in many ways: by forming corporations, partnerships, labor unions, clubs and churches; by concluding contracts and leases; by entering a hundred other large and small transactions by which their rights and duties toward one another are defined.

Successful voluntary collaboration usually requires for its guidance something equivalent to a formal charter, defining the terms of the collaboration, anticipating and forfending against possible disputes, and generally providing a framework for the parties' future dealings. In our society the natural architect of this framework is the lawyer.

This is obvious where the transactions or relationship proposed must be fitted into existing law, either to insure legal enforcement or in order not to trespass against legal prohibitions. But the lawyer is also apt to be called upon to draft the by-laws of a social club or the terms of an agreement known to be unenforceable because cancelable by either party at any time. In these cases the lawyer functions, not as an expert in the rules of an existing government, but as one

who brings into existence a government for the regulation of the parties' own relations. The skill thus exercised is essentially the same as that involved in drafting constitutions and international treaties. The fruits of this skill enter in large measure into the drafting of ordinary legal documents, though this fact is obscured by the mistaken notion that the lawyer's only concern in such cases is with possible future litigation, it being forgotten that an important part of his task is to design a framework of collaboration that will function in such a way that litigation will not arise.

As the examples just given have suggested, in devising charters of collaborative effort the lawyer often acts where all of the affected parties are present as participants. But the lawyer also performs a similar function in situations where this is not so, as, for example, in planning estates and drafting wills. Here the instrument defining the terms of collaboration may affect persons not present and often not born. Yet here, too, the good lawyer does not serve merely as a legal conduit for his client's desires, but as a wise counselor, experienced in the art of devising arrangements that will put in workable order the entangled affairs and interests of human beings.

3.

The Lawyer's Opportunities and Obligations of Public Service

Private Practice as a Form of Public Service

There is a sense in which the lawyer must keep his obligations of public service distinct from the involvements of his private practice. This line of separation is aptly illustrated by an incident in the life of Thomas Talfourd. As a barrister Talfourd had successfully represented a father in a suit over the custody of a child. Judgment for Talfourd's client was based on his superior legal right, though the court recognized in the case at bar that the mother had a stronger moral claim to custody than the father. Having thus encountered in the course of his practice an injustice in the law as then applied by the courts, Talfourd later as a member of Parliament secured the enactment of a statute that would make impossible a repetition of the result his own advocacy had helped to bring about. Here the line is clearly drawn between the obligation of the advocate and the obligation of the public servant.

Yet in another sense, Talfourd's devotion to public service grew out of his own enlightened view of his role as an advocate. It is impossible to imagine a lawyer who was narrow, crafty, quibbling or ungenerous in his private practice having the conception of public responsibility displayed by Talfourd. A sure sense of the broader obligations of the legal profession must have its roots in the lawyer's own practice. His public service must begin at home.

Private practice is a form of public service when it is conducted with an appreciation of, and a respect for, the larger framework of government of which it forms a part, including under the term government those voluntary forms of self-regulation already discussed in this statement. It is within this larger framework that the lawyer must seek the answer to what he must do, the limits of what he may do.

Thus, partisan advocacy is a form of public service so long as it aids the process of adjudication; it ceases to be when it hinders that process, when it misleads, distorts and obfuscates, when it renders the task of the deciding tribunal not easier, but more difficult. Judges are inevitably the mirrors of the Bar practicing before them; they can with difficulty rise above the sources on which they must depend in reaching their decision. The primary responsibility for preserving adjudication as a meaningful and useful social institution rests ultimately with the practicing legal profession.

Where the lawyer serves as negotiator and draftsman, he advances the public interest when he facilitates the processes of voluntary self-government; he works against the public interest when he obstructs the channels of collaborative effort, when he seeks petty advantages to the detriment of the larger processes in which he participates.

Private legal practice, properly pursued, is, then, itself a public service. This reflection should not induce a sense of complacency in the lawyer, nor lead him to disparage those forms of public service that fall outside the normal practice of law. On the contrary, a proper sense of the significance of his role as the representative of private clients will almost inevitably lead the lawyer into broader fields of public service.

The Lawyer as a Guardian of Due Process

The lawyer's highest loyalty is at the same time the most intangible. It is a loyalty that runs, not to persons, but to procedures and institutions. The lawyer's role imposes on him a trusteeship for the integrity of those fundamental processes of government and self-government upon which the successful functioning of our society depends.

All institutions, however sound in purpose, present temptations to interested exploitation, to abusive short cuts, to corroding misinterpretations. The forms of democracy may be observed while means are found to circumvent inconvenient consequences resulting from a compliance with those forms. A lawyer recreant to his responsibilities can so disrupt the hearing of a cause as to undermine those rational foundations without which an adversary proceeding loses its meaning and its justification. Everywhere democratic and constitutional government is tragically dependent on voluntary and understanding co-operation in the maintenance of its fundamental processes and forms.

It is the lawyer's duty to preserve and advance this indispensable co-operation by keeping alive the willingness to engage in it and by imparting the understanding necessary to give it direction and effectiveness. This is a duty that attaches not only to his private practice, but to his relations with the public. In this matter he is not entitled to take public opinion as a datum by which to orient and justify his actions. He has an affirmative duty to help shape the growth and develop-

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Professional Responsibility

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ment of public attitudes toward fair procedures and due process.

Without this essential leadership, there is an inevitable tendency for practice to drift downward to the level of those who have the least understanding of the issues at stake, whose experience of life has not taught them the vital importance of preserving just and proper forms of procedure. It is chiefly for the lawyer that the term "due process" takes on tangible meaning, for whom it indicates what is allowable and what is not, who realizes what a ruinous cost is incurred when its demands are disregarded. For the lawyer the insidious dangers contained in the notion that "the end justifies the means" is not a matter of abstract philosophic conviction, but of direct professional experience. If the lawyer fails to do his part in educating the public to these dangers, he fails in one of his highest duties.

Making Legal Services Available to All

If there is any fundamental proposition of government on which all would agree, it is that one of the highest goals of society must be to achieve and maintain equality before the law. Yet this ideal remains an empty form of words unless the legal profession is ready to provide adequate representation for those unable to pay the usual fees.

At present this representation is being supplied in some measure through the spontaneous generosity of individual lawyers, through legal aid societies, and—increasingly—through the organized efforts of the Bar. If those who stand in need of this service know of its availability, and their need is in fact adequately met, the precise mechanism by which this service is provided becomes of secondary importance. It is of great importance, however, that both the impulse to render this service, and the plan for making that impulse effective, should arise within the legal profession itself.

The moral position of the advocate is here at stake. Partisan advocacy finds its justification in the contribution it makes to a sound and informed disposition of controversies. Where this contribution is lacking, the partisan position permitted to the advocate loses its reason for being. The legal profession has, therefore, a clear moral obligation to see to it that those already handicapped do not suffer the cumulative disadvantage of being without proper legal representation, for it is obvious that adjudication can neither be effective nor fair where only one side is represented by counsel.

In discharging this obligation, the legal profession can help to bring about a better understanding of the role of the advocate in our system of government. Popular misconceptions of the advocate's function disappear when the lawyer pleads without a fee, and the true value of his service to society is immediately perceived. The insight thus obtained by the public promotes a deeper understanding of the work of the legal profession as a whole.

The obligation to provide legal services for those actually caught up in litigation carries with it the obligation to make preventive legal advice accessible to all. It is among those unaccustomed to business affairs, and fearful of the ways of the law, that such advice is often most needed. If it is not received in time, the most valiant and skillful representation in court may come too late.

The Representation of Unpopular Causes

One of the highest services the lawyer can render to society is to appear in court on behalf of clients whose causes are in disfavor with the general public.

Under our system of government the process of adjudication is surrounded by safeguards evolved from centuries of experience. These safeguards are not designed merely to lend formality and decorum to the trial of causes. They are predicated on the assumption that to secure for any controversy a truly informed and dispassionate decision is a difficult thing, requiring for its achievement a special summoning and organization of human effort and the adoption of measures to exclude the biases and prejudgments that have free play outside the courtroom. All of this goes for naught if the man with an unpopular cause is unable to find a competent lawyer courageous enough to represent him. His chance to have his day in court loses much of its meaning if his case is handicapped from the outset by the very kind of prejudgment our rules of evidence and procedure are intended to prevent.

Where a cause is in disfavor because of a misunderstanding by the public, the service of the lawyer representing it is obvious, since he helps to remove an obloquy unjustly attaching to his client's position. But the lawyer renders an equally important, though less readily understood, service where the unfavorable public opinion of the client's cause is in fact justified. It is essential for a sound and wholesome development of public opinion that the disfavored cause have its full day in court, which includes, of necessity, representation by competent counsel. Where this does not occur, a false aura often persists that perhaps more might have been said for the losing side and suspicion is cast on the decision reached. Thus, confidence in the fundamental processes of government is diminished.

The extent to which the individual lawyer should feel himself bound to

undertake the representation of unpopular causes must remain a matter for individual conscience. The legal profession as a whole, however, has a clear moral obligation with respect to this problem. By appointing one of its members to represent the client whose cause is in popular disfavor, the organized Bar can not only discharge an obligation incumbent on it, but at the same time relieve the individual lawyer of the stigma that might otherwise unjustly attach to his appearance on behalf of such a cause. If the courage and the initiative of the individual lawyer make this step unnecessary, the legal profession should, in any event strive to promote and maintain a moral atmosphere in which one may render this service without untoward cost to himself. No member of the Bar should indulge in public criticism of another lawyer because he has undertaken the representation of causes in general disfavor. Every member of the profession should, on the contrary, do what he can to promote a public understanding of the service rendered by the advocate in such situations.

The Lawyer and Legal Reform

There are few great figures in the history of the Bar who have not concerned themselves with the reform and improvement of the law. The special obligation of the profession with respect to legal reform rests on considerations too obvious to require enumeration. Certainly it is the lawyer who has both the best chance to know when the law is working badly and the special competence to put it in order.

When the lawyer fails to interest himself in the improvement of the law, the reason does not ordinarily lie in a lack of perception. It lies rather in a desire to retain the comfortable fit of accustomed ways, in a distaste for stirring up controversy within the profession, or perhaps in a hope that if enough time is allowed to pass, the need for change will become so obvious that no special effort will be required to accomplish it.

The lawyer tempted by repose should recall the heavy costs paid by his profession when needed legal reform has to be accomplished through the initiative of public-spirited laymen. Where change must be thrust from without upon an unwilling Bar, the public's least flattering picture of the lawyer seems confirmed. The lawyer concerned for the standing of his profession will, therefore, interest himself actively in the improvement of the law. In doing so he will not only help to maintain confidence in the Bar, but will have the satisfaction of meeting a responsibility inhering in the nature of his calling.

The Lawyer as Citizen

Law should be so practiced that the lawyer remains free to make up his own mind how he will vote, what causes he will support, what economic and political philosophy he will espouse. It is one of the glories of the profession that it admits of this freedom. Distinguished examples can be cited of lawyers whose views were at variance from those of their clients, lawyers whose skill and wisdom made them valued advisers to those who had little sympathy with their views as citizens.

Broad issues of social policy can and should, therefore, be approached by the lawyer without the encumbrance of any special obligation derived from his profession. To this proposition there is, perhaps, one important qualification. Every calling owes to the public a duty of leadership in those matters where its training and experience give it a special competence and insight. The practice of his profession brings the lawyer in daily touch with a problem that is at best imperfectly understood by the general public. This is, broadly speaking, the problem of implementation as it arises in human affairs. Where an objective has been selected as desirable, it is generally the lawyer who is called upon to design the framework that will put human relations in such an order that the objective will be achieved. For that reason it is likely to be the lawyer who best understands the difficulties encountered in this task.

A dangerous unreal atmosphere surrounds much public discussion of economic and political issues. The electorate is addressed in terms implying that it has only to decide which among proffered objectives it considers most attractive. Little attention is paid to the question of the procedures and institutional arrangements which these objectives will require for their realization. Yet the lawyer knows that the most difficult problems are usually first encountered in giving workable legal form to an objective which all may consider desirable in itself. Not

uncommonly at this stage the original objective must be modified, redefined, or even abandoned as not being attainable without undue cost.

Out of his professional experience the lawyer can draw the insight needed to improve public discussion of political and economic issues. Whether he considers himself a conservative or a liberal, the lawyer should do what he can to rescue that discussion from a world of unreality in which it is assumed that ends can be selected without any consideration of means. Obviously if he is to be effective in this respect, the lawyer cannot permit himself to become indifferent and uninformed concerning public issues.

Special Obligations Attaching to Particular Positions Held by the Lawyer

No general statement of the responsibilities of the legal profession can encompass all the situations in which the lawyer may be placed. Each position held by him makes its own peculiar demands. These demands the lawyer must clarify for himself in the light of the particular role in which he serves.

Two positions of public trust require special mention. The first of these is the office of public prosecutor. The manner in which the duties of this office are discharged is of prime importance, not only because the powers it confers are so readily subject to abuse, but also because in the public mind the whole administration of justice tends to be symbolized by its most dramatic branch, the criminal law.

The public prosecutor cannot take as a guide for the conduct of his office the standards of an attorney appearing on behalf of an individual client. The freedom elsewhere wisely granted to partisan advocacy must be severely curtailed if the prosecutor's duties are to be properly discharged. The public prosecutor must recall that he occupies a dual role, being obligated, on the one hand, to furnish that adversary element essential to the informed decision of any controversy, but being possessed, on the other, of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice. Where the prosecutor is recreant to the trust implicit in his office, he undermines confidence, not only in his profession, but in government and the very ideal of justice itself.

Special fiduciary obligations are also incumbent on the lawyer who becomes a representative in the Legislative Branch of government, especially where he continues his private practice after assuming public office. Such a lawyer must be able to envisage the moral disaster that may result from a confusion of his role as legislator and his role as the representative of private clients. The fact that one in this position is sometimes faced with delicate issues difficult of resolution should not cause the lawyer to forget that a failure to face honestly and courageously the moral issues presented by his position may forfeit his integrity both as lawyer and as legislator and pervert the very meaning of representative government.

Mention of special positions of public trust should not be taken to imply that delicate moral issues are not confronted even in the course of the most humble private practice. The lawyer deciding whether to undertake a case must be able to judge objectively whether he is capable of handling it and whether he can assume its burdens without prejudice to previous commitments. In apportioning his time among cases already undertaken the lawyer must guard against the temptation to neglect clients whose needs are real but whose cases promise little financial reward. Even in meeting such everyday problems, good conscience must be fortified by reflection and a capacity to foresee the less immediate consequences of any contemplated course of action.

III.

To meet the highest demands of professional responsibility the lawyer must not only have a clear understanding of his duties, but must also possess the resolution necessary to carry into effect what his intellect tells him ought to be done.

For understanding is not of itself enough. Understanding may enable the lawyer to see the goal toward which he should strive, but it will not furnish the motive power that will impel him toward it. For this the lawyer requires a sense of attachment to something larger than himself.

For some this will be attainable only through religious faith. For others it may come from a feeling of identification with the legal profession and its great leaders of the past. Still others, looking to the future, may find it in the thought that they are applying their professional skills to help bring about a better life for all men.

These are problems each lawyer must solve in his own way. But in solving them he will remember, with Whitehead, that moral education cannot be complete without the habitual vision of greatness. And he will recall the concluding words of a famous essay by Holmes:

> Happiness, I am sure from having known, many successful men, cannot be won simply by being counsel for great corporations and having an income of fifty thousand dollars. An intellect great enough to win the prize needs other food besides success. The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a ring of the universal law.