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## Historical Preface

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**REPORT**

**ETHICS: BEYOND THE RULES**

**HISTORICAL PREFACE**

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**P**ERHAPS it was just the presence of a legal press. Certainly the *American Lawyer*, the *National Law Journal*, and other publications heightened our awareness of it. Whatever it was, the American Bar Association Section of Litigation was concerned that far too many examples of lawyer lapses were being reported. As Geoffrey Hazard observed, these reports did not involve small practitioners in rural towns who were barely eking out a living selling title insurance and peddling real estate just to get by. No, these reports involved talented partners at major establishment law firms in the nation's biggest cities. Moreover, these reports did not involve close questions on somebody's notion of what was professional. Rather, they involved clear ethical violations for which our rules were certainly adequate, but somehow not deterrent enough to prevent this unfortunate conduct.

This somewhat alarmist observation came together with an evolving view that we as lawyers spend an enormous amount of time in a conscientious discussion of these issues, but that we were always talking to each other. What might be required to really help us understand our profession would be to go outside the lawyers' club and invite sociologists, psychologists, anthropologists, and talented individuals from other disciplines to observe us from their different perspectives.

Lawrence Fox, as incoming Chair of the Section, recruited Geoffrey Hazard, Dean Peter Glenn from Dickinson College of Law, Douglas Frenkel from the University of Pennsylvania Law School, and Nadia Jannetta, Donald Hilliker, and Nancy Higgins from the American Bar Association Section of Litigation leadership to plan the approach. They, in turn, recruited our talented staff, including those whose papers you find here, as well as Renee Fox, a specialist on the medical profession and a Professor of Sociology at the University of Pennsylvania, and Steve Priest, a well-known business ethicist. It was Geoffrey Hazard's idea that we follow the format that had been so successful in his earlier 1978 study, *Ethics in the Practice of Law*.<sup>1</sup> We planned to invite the participants to two different sessions separated by several weeks and, as Professor Hazard suggested, at the second session the truth would come out.

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1. Geoffrey C. Hazard, *Ethics in the Practice of Law* (1978).

Initially, the group chose "Beyond Ethics" to be the title for the project. That title, however, did not capture what we had in mind. This was not to be a study of fuzzy and often unhelpful concepts of professionalism. The title was changed to "Ethics: Beyond the Rules" because our purpose was to help us understand why our ethics rules were not being observed. Additionally, we wanted to ask what, beyond the rules, had to be addressed in order to get lawyers to conform their conduct to the demands of the codes of conduct, and what pressures and perceptions were causing the conduct that had triggered the study. With the huge financial and psychological support of the Section of Litigation and its Council from 1995-98 as well as financial assistance from both the Philadelphia law firm Drinker Biddle & Reath and the accounting firm Arthur Andersen, both of whom contributed funds for travel and the small stipend we paid our scholars, the project became a reality.

Our original concern was with the entire profession, not just litigation, and it involved a broad range of conduct, but everyone agreed that the study would have to be narrowed if anything meaningful were to be achieved. Not surprisingly, given the Section of Litigation sponsorship, we decided to focus on litigators and, in particular, the discovery process. In reaching this conclusion as to focus, the project chose to concentrate on an area whose roots go back nearly one hundred years. In 1906, Roscoe Pound complained about the "sporting theory of justice" in a speech entitled "The Causes of Popular Dissatisfaction with the Administration of Justice."<sup>2</sup> Trial by ambush was the rule of the day, with neither side required to turn over information to the other prior to the trial. Thus, the United States Supreme Court adopted the Federal Rules of Civil Procedure ("FRCP") in 1938, concerned that truth and justice were better served when *all* the facts came before the court and jury. FRCP Rule 26 and the accompanying discovery rules were a dramatic change. The rules required both sides to turn over information to each other in what has been described as "a striking and imaginative departure from tradition."<sup>3</sup>

By 1947, the United States Supreme Court had declared in *Hickman v. Taylor* that "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation."<sup>4</sup> The Supreme Court observed:

The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. Under the prior federal practice, the pre-trial functions of notice-giving, issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings. In-

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2. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. Rep. 395 (1906).

3. Fed. R. Civ. P. 26, 1970 advisory committee's note.

4. 329 U.S. 495, 507 (1947).

quiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method. The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. . . . Thus civil trial in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.<sup>5</sup>

In a later case, the Supreme Court commented that the discovery rules are designed to “make a trial less a game of blindman’s bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.”<sup>6</sup>

Yet from the beginning, the courts and the profession have grappled with the anomaly of a disclosure system designed to bring out all relevant information embedded in an adversary process where a lawyer’s first duty is to be the zealous advocate of the client. Clients’ resistance to disclosure of harmful information is no surprise. Their attorneys’ use of analytical skills to fashion arguments supporting their clients’ view is also no surprise. They are zealous advocates first and foremost.

These instincts, however, do not encourage a lawyer to volunteer information harmful to her client’s case. By the same token, use of the discovery rules to make life difficult for the opponent is a natural response to a perceived meritless claim or to demonstrate that it will not be easy sledding against this lawyer and client. Should we expect anything else from the zealous advocate? Over the years, the courts and the profession have answered the question with a resounding “yes.” Courts have adopted rules to sanction lawyers and their clients who abuse the system. Bar associations and state supreme courts have adopted codes of ethics that prohibit lawyers from employing dilatory and other tactics in the name of zealous advocacy.

Despite the seemingly clear direction from courts about how lawyers must act in discovery, reported cases of misconduct continued to appear. The lawyers involved have sometimes been from the largest and most prestigious firms in the country. For example, in 1978, a then-partner at New York’s Donovan Leisure Newton & Irvine pled guilty to criminal contempt for failure to produce documents in the *Berkey Photo, Inc. v. Kodak Co.*<sup>7</sup> antitrust litigation.<sup>8</sup>

In the 1980s, court rules were tightened, and most states adopted the American Bar Association’s 1983 Model Rules of Professional Conduct. Yet, discovery abuse continued to be reported in the press

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5. *Id.* at 500-01 (footnotes omitted).

6. *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 682 (1958) (citing *Hickman*, 329 U.S. at 501).

7. 603 F.2d 263 (2d Cir. 1979).

8. *See Kodak Case Attorney Pleads Guilty*, Wash. Post, Sept. 22, 1978, at F5.

and sometimes involved major law firms. In one instance, the Washington Supreme Court, in *Washington State Physicians Insurance Exchange & Ass'n v. Fisons Corp.*, rejected the argument of Seattle's Bogle & Gates that it had acted properly in failing to produce key documents.<sup>9</sup> The firm argued, with support from a prestigious list of ethics professors and practicing lawyers, that it had acted responsibly because its narrow and misleading responses to discovery requests simply reflected the way discovery was conducted in Seattle.<sup>10</sup>

The Washington Supreme Court wrote that "[c]onduct is to be measured against the spirit and purpose of the rules, not against the standard of practice of the local bar."<sup>11</sup> The court noted that "[h]aving read the record herein, we cannot perceive of *any* request that could have been made to this drug company that would have produced the smoking gun documents."<sup>12</sup> The Washington Supreme Court concluded:

[T]he drug company's attorneys claim they were just doing their job, that is, they were vigorously representing their client. The conflict here is between the attorney's duty to represent the client's interest and the attorney's duty as an officer of the court to use, but not abuse the judicial process.

[V]igorous advocacy is not contingent on lawyers being free to pursue litigation tactics that they cannot justify as legitimate. The lawyer's duty to place his client's interests ahead of all others presupposes that the lawyer will live with the rules that govern the system. Unlike the polemicist haranguing the public from his soapbox in the park, the lawyer enjoys the privilege of a professional license that entitles him to entry into the justice system to represent his client, and in doing so, to pursue his profession and earn his living. He is subject to the correlative obligation to comply with the rules and to conduct himself in a manner consistent with the proper functioning of that system.<sup>13</sup>

Only a few months earlier, the Eleventh Circuit upheld the imposition of sanctions against defense counsel in *Malautea v. Suzuki Motor Co.*,<sup>14</sup> and wrote:

All attorneys, as "officers of the court," owe duties of complete candor and primary loyalty to the court before which they practice. An attorney's duty to a client can never outweigh his or her responsibility to see that our system of justice functions smoothly. This concept is as old as common law jurisprudence itself. In England, the first licensed practitioners were called "Servants at law of our lord,

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9. 858 P.2d 1054, 1083 (Wash. 1993).

10. *See id.* at 1078.

11. *Id.* at 1079.

12. *Id.* at 1084.

13. *Id.* (quoting William W Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 184 (1985)).

14. 987 F.2d 1536 (11th Cir. 1993).

the King” and were absolutely forbidden to “decei[ve] or beguile the Court.” In the United States, the first Code of Ethics, in 1887, included one canon providing that “the attorney’s office does not destroy . . . accountability to the Creator,” and another entitled “Client is not the Keeper of the Attorney’s Conscience.”

Unfortunately, the American Bar Association’s current Model Rules of Professional Conduct underscore the duty to advocate zealously while neglecting the corresponding duty to advocate within the bounds of the law. As a result, too many attorneys have forgotten the exhortations of these century-old canons. Too many attorneys, like defense counsel in this case, have allowed the objectives of the client to override their ancient duties as officers of the court. In short, they have sold out to the client.

We must return to the original principle that, as officers of the court, attorneys are servants of the law rather than servants of the highest bidder. We must rediscover the old values of our profession. The integrity of our justice system depends on it.<sup>15</sup>

It was against this backdrop that the project studied the issues of litigators’ discovery conduct today. As Professor Hazard predicted, the truth did come out. Curiously enough, this truth arose not directly from what any individual or group said, but from a comparison and contrast of what different individuals and groups talked about and omitted. We gained fascinating insight from Bob Nelson’s “Circle of Blame,” in which each participant justifies his or her conduct, but savages the conduct of others.<sup>16</sup> We observed a disjunction between associates and partners, in-house and outside counsel, plaintiff’s and defendant’s counsel, with the judges blaming everyone else and everyone else claiming “if only the judges . . .” Austin Sarat noted that judges and lawyers all look at themselves as victims of forces over which they have little or no control. He was struck by an absence of “strategies for preserving or promoting professional values.”<sup>17</sup> Mark Suchman as well reported that the profession’s mechanisms for “resolving ethical ambiguities and transmitting moral standards that rise above the baseline rules” are increasingly inadequate.<sup>18</sup> We learned of Carla Messikomer’s “rhetoric of ethics” that reflects the ambivalence, contradiction and ambiguity of the profession.<sup>19</sup> Robert Gordon noted many possible causes for borderline levels of ethical

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15. *Id.* at 1546-47 (footnotes omitted).

16. See Robert L. Nelson, *The Discovery Process as a Circle of Blame: Institutional, Professional, and Socioeconomic Factors that Contribute to Unreasonable, Inefficient, and Amoral Behavior in Corporate Litigation*, 67 *Fordham L. Rev.* 773 (1998).

17. See Austin Sarat, *Enactments of Professionalism: A Study of Judges’ and Lawyers’ Accounts of Ethics and Civility in Litigation*, 67 *Fordham L. Rev.* 809, 828 (1998).

18. See Mark C. Suchman, *Working Without a Net: The Sociology of Legal Ethics in Corporate Litigation*, 67 *Fordham L. Rev.* 837, 838 (1998).

19. See Carla Messikomer, *Ambivalence, Contradiction, and Ambiguity: The Everyday Ethics of Defense Litigators*, 67 *Fordham L. Rev.* 739 (1998).

conduct in large firms, including firm culture, structural incentives, and the conduct of outsiders.<sup>20</sup>

Because *Ethics: Beyond the Rules* is intended to be the study of “us” by “them,” we will not offer here the views of yet another “us.” What we do suggest is that the papers that follow contain some serious concerns that must be addressed if we as lawyers are going to remain the guardians of our system of justice. While our participants call for more research—a suggestion we applaud—we in the profession know, despite our often sanctimonious denials, that the problems are real and that the solutions, which we must find ourselves, are going to change the way we do business.

We note, however, that a better understanding of the environment in which lawyers work can itself be illuminating. On a practical and immediate level, we encourage lawyers, law firms, and corporate and governmental legal departments to use these papers to spur discussion within their own organizations. Self-examination can reinforce good practices and identify risk areas. Ideally, regular reinforcement within a law firm or law department of the importance of complying with both the rules and their “spirit” should engender an environment where the tough calls can be made in an objective and considered way. While misconduct by lawyers may be relatively rare, we should work to minimize its occurrence. One unfortunate case can reinforce the cynical view many hold about the integrity of the system, ruin careers, and tarnish an organization’s standing in the community—all unnecessarily.

Finally, the profession owes an enormous debt of gratitude to Douglas Frenkel, Robert Gordon, Carla Messikomer, Robert Nelson, Austin Sarat, and Mark Suchman. These talented and energetic scholars stuck it out to the end, worked for a pittance, devoted hundreds of hours each to this project, and produced readable, insightful papers. Their real reward, however, will come if we as a profession take their work seriously and act on it. That will require leadership, imagination, financial sacrifice, and courage. We hope we have it.

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20. See Robert W. Gordon, *The Ethical Worlds of Large-Law Firm Litigators: Preliminary Observations*, 67 *Fordham L. Rev.* 709, 715-19 (1998).