Scott S. Brinkmeyer

Lest We Forget

"I will in all other respects conduct myself personally and professionally in conformity with the high standards of conduct imposed on members of the Bar as conditions for the privilege to practice law in this state."

From *The Lawyer's Oath*

I have just returned from the mid-year meeting of the American Bar Association in Texas, where I had my first experience as a new member of the ABA House of Delegates. The House operates like the State Bar Representative Assembly. It is the policy making body of the ABA and made up of over 500 lawyer members from throughout the United States. For many good reasons, the experience was certainly worthwhile.

Two aspects of the meeting were especially noteworthy to me. First, I was genuinely impressed by the large number of lawyers and judges who are firmly committed to the betterment of the profession and improvement of the judicial system as a whole. It was truly gratifying to see so many of our fellow attorneys working for the common good. Of course there was not always agreement on all of the issues raised, but the issues and positions were presented by capable and impassioned advocates reflecting the highest levels of professionalism and civility.

Secondly, one of the important issues that was prevalent in discussions among ABA members and House delegates alike was that of the increasing federal regulation of lawyer conduct. Much of this gathering cloud of federal intervention emerged as a result of the ENRON, World Com and other corporate scandals, which focused the attention of the public and lawmakers alike upon the conduct of various professions, including ours. The high profile improprieties of corporate officers, accountants, and lawyers, brought to public light misbehavior at the highest levels of corporate America and were the genesis of the Sarbanes-Oxley Act[1] of 2002. This Act was a virtual smorgasbord of rules and regulations relating to corporate governance, financial disclosure, public accounting, and auditing.

Of particular concern to lawyers was the requirement in the Act that the Securities and Exchange Commission adopt new rules requiring all attorneys appearing and practicing before the agency to "report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company."[2] In August, 2003, SEC rules were established calling for "up the ladder" reporting of misconduct to appropriate corporate committees or the board of directors, in the event the chief legal counsel or executive officer do not respond appropriately.[3] Additionally, so-called "noisy withdrawal" rules have been proposed that would permit or require attorneys to withdraw from representation and to notify the commission where material violations of law occurred which have not been appropriately addressed. These are currently under consideration by the SEC and may be passed upon as early as February 2004. The ABA has been working with the SEC to formulate alternatives to the "noisy withdrawal" rule, however friction between lawyer organizations, on the one hand, and federal regulatory agencies, on the other, continues to proliferate.

We were also reminded that issues of lawyer regulation and the delivery of legal services are currently the subject of discussions between the U.S. Trade Representative and World Trade Organization Member States in connection with ongoing negotiations under the General Agreement on Trade in Services (GATS). Although these issues primarily involve international trade law and commerce, the results of these discussions may have far-reaching implications regarding the conditions under which foreign lawyers may practice in the United States, not to mention other disciplinary rules that may apply to lawyer services provided in connection with U.S. Trade Agreements. For example, GATS

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was one of the agreements annexed to the original agreement establishing the WTO. Any country deciding to join the WTO also agreed to abide by the terms of annexed agreements, including GATS.[4] Consequently, the U.S. is a party. GATS rules pertaining to bar admission in member states and countries, and other aspects of the delivery of legal services, are currently in the process of being developed.[5]

Many of you reading this article may know little or nothing about these issues, do not practice in any of these specialty areas, and may now have little interest in even hearing about these topics. You may ask: "Why should I care?" One answer is that it may not be too long before many other traditional areas of practice and discipline matters commonly handled by the states will be further regulated by the federal government or other agencies. Tort law is just one practice area that Congress is once again looking at addressing. Furthermore, recent high profile cases involving alleged misdeeds of accountants, stockbrokers, investment bankers, corporate management and boards, the N.Y.S.E., the mutual fund industry, and lawyers have heightened the concern of the general public and federal regulatory agencies have been pressed by Congress to increase their oversight of professionals, including lawyers, to assure compliance with the law.

If each and every lawyer would honor this oath, there would not be any need for further lawyer regulation . . . . Stated simply, what each and every one of us can and should do is simply to keep our word.

Prevailing sentiment among leaders in our profession is that the public will be best served by effective state regulation of lawyer conduct and discipline, and that federal oversight is an unnecessary and inappropriate means of protecting the public. However, increasing interstate and global commerce, necessarily requiring the provision of legal services, will inevitably lead to higher scrutiny as lawyers cross both state and international borders to represent clients in more and more transactions and litigation, particularly if the disciplinary rules vary significantly from state to state. Notably, U.S. lawyers have opened offices in more than 30 foreign countries, and it is estimated that well over 1,000 lawyers now practice in the foreign offices of U.S. law firms. Perhaps tens of thousands of U.S. lawyers regularly travel abroad to perform services on a temporary basis in foreign countries. In response, foreign lawyers and bar associations, and foreign governments, have asked that the U.S. provide reciprocal opportunities for their lawyers. The U.S. Trade Representative has asked for assistance from the ABA in urging the states to adopt rules facilitating the rights of foreign lawyers to provide the same types of services in the U.S. Accordingly, states have been urged to review the ABA model rules and to attempt to take as closely unified an approach as possible in formulating and enforcing disciplinary rules for lawyer conduct, including rules relating to the admission and practice of foreign lawyers within the various states.

To further this objective, the ABA *Ethics 2000 Commission* report[6] has resulted in broad sweeping state-by-state review of local rules across the country. Our own Representative Assembly has responded and met last November to undertake a comprehensive analysis of Michigan's Rules of Professional Conduct. Encouraged by the Supreme Court to complete a review and provide recommendations before year end, the RA considered reports and proposals from numerous State Bar sections and committees.[7] The goal was to suggest which ABA proposed model rules should be adopted in Michigan and which should not. The Standing Committee on Professional and Judicial Ethics provided a comprehensive comparison of the ABA model rules with the existing Michigan rules, and made specific recommendations to the Assembly. Deliberations of the Assembly necessarily concentrated on a limited number of rules, which were the subject of comments indicating disagreement with the Standing Committee recommendations. In

late November 2003, the Report of Assembly Action[8] was issued to the Supreme Court and included the resolutions adopted by the RA, together with other information deemed helpful for the Court's consideration.[9]

It will now be up to the Court to determine which of the proposed changes may be appropriate for implementation and where existing or proposed Michigan rules call for a departure from the ABA model rules. The efforts of so many of our members involved in this process were necessarily focused upon developing recommendations for practice in Michigan. The ABA has recognized that the proposed model rules do not constitute a "one size fits all" proposition, but suggested that the various states appreciate the need for general consistency, keeping in mind the ultimate result that could accrue in the event that there are irreconcilable discrepancies in the rules adopted in the various state jurisdictions. In light of the continuing erosion of jurisdictional barriers, the proliferation of U.S. lawyers practicing in other countries, and the ever expanding instances of multidisciplinary legal practices both here and abroad, we can only expect expanded federal and international involvement in lawyer regulation if the rules of professional conduct differ so widely between states that they stand as an impediment to commercial prosperity.

Again you may ask: "What does this have to do with me, and how do I play any role in all of this?" Purely from the standpoint of self interest, all lawyers have a stake in preserving our system of self regulation. The more that process is eroded, whether unconsciously surrendered or usurped by federal or other agencies, the less we will have to say about how we practice and who can practice in our states. It stands to reason that this privilege alone is worth preserving. The heart of this issue is the public's concern with unethical, unprofessional and illegal conduct by professionals, including lawyers. The public's concern has been, and must remain, our main focus.

When I first began writing this article, I was reminded that I began my 30th year of law practice in January. This realization prompted reflection on many levels, including a consideration of all the changes that have evolved in this time span. Technology has had an exceptional impact on the practice of law, together with the very positive influence of increasing race and gender diversification in our profession. There are certainly many other notable changes, but the transition of law practice as a profession to that of a business strikes me as one of the most profound and troubling. The increasing pressures placed upon lawyers today range from associates strapped with huge law school debt and looking for elusive jobs, to solo and small firm practitioners merely trying to make a decent living and competing with both larger firms and non-lawyers in what seems to be an increasingly overpopulated legal marketplace. Large law firm attorneys labor to bill more and more hours, find and retain clients, increase revenues and compensation, all the while each and every one of us is presumably searching for some semblance of personal fulfillment. Is it any wonder that we seem to find more and more instances of uncivil, unethical, incompetent, and even illegal behavior?

Polls and surveys going back many years reflect increasing public disparagement of lawyers.[10] Whether this is a jaundiced view resulting from resentment of the power and capability of lawyers in our society, or a reflection that the "'dignity and honor' formerly associated with our profession has been 'contaminated with the spirit of commerce,'"[11] can be debated. The fact is that each of us bears responsibility for preserving the "high standards of conduct imposed on [us]... as conditions for the privilege to practice law..." These words, taken from an excerpt of The Lawyer's Oath quoted at the outset of this article, were only part of what each and every one of us swore when we took advantage of the privilege offered to us upon becoming lawyers. As I reflected upon my own transition into the new millennium, I was reminded of this oath (see sidebar on the next page). I suggest that we each read this carefully and often, and take to heart every one of the promises we made.

The Lawyer's Oath

I do solemnly swear:

I will support the Constitution of the United States and the Constitution of the State of Michigan;

I will maintain the respect due to courts of justice and judicial officers;

I will not counsel or maintain any suit or proceeding which appears unjust, nor any defense unless it is honestly debatable under the law of the land;

I will employ, for the purpose of maintaining the causes confided to me, means that are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;

I will maintain the confidence and preserve inviolate the secrets of my clients, and will accept no compensation in connection with their business except from them or with their knowledge and approval;

I will abstain from all 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 never reject, from any consideration personal to myself, the cause of the defenseless, or oppressed, or delay anyone's cause for lucre or malice;

I will in all other respects conduct myself personally and professionally in conformity with the high standards of conduct imposed on members of the bar as conditions for the privilege to practice law in this state.

If each and every lawyer would honor this oath, there would not be any need for further lawyer regulation. It is only in departing from these principles that we risk bringing disdain and disrespect upon our profession and provoke more lawyer bashing, not to mention more public and political outcry for further regulation. Stated simply, what each and every one of us can and should do is simply to keep our word. In doing so, and appropriately taking to task those who do not, every lawyer does his and her part in maintaining the tenets of our profession. This may seem like a very insignificant step, but the results would be profoundly positive. Alternatively, each lawyer's failure to subscribe to The Lawyer's Oath merely contributes ammunition to our critics and further erodes the dignity and honor of our profession. ✦

FOOTNOTES

1. 15 USC 7210, et seq.
2. Id., Section 307.
3. Id., Section 307 (2).
4. GATS is the very first multilateral trade agreement that applied to services rather than goods.
5. See e.g. Laurel S. Terry, GATS, *Legal Services, and Bar Examiners: Why Should You Care?*, The Bar Examiner, May 2002, p 25.
6. In 1997, the president of the ABA appointed a commission, called the "Ethics 2000 Commission" to undertake a comprehensive evaluation of the Model Rules of Professional Conduct. This was the first comprehensive review of the Model Rules since 1983, and had as part of its main objective the establishment of greater uniformity of the rules among the states.
7. These included the Standing Committee on Professional and Judicial Ethics, the Special Committee on Grievances, the U.S. Department of Justice and the Pro Bono Community, among many others.
8. Report of Assembly Action on Proposed Rules of Professional Conduct and Proposed Standards for Imposing Attorney Sanctions, November 25, 2003. The Supreme Court did agree with the recommendation of the RA and the Special Committee on Grievance of the State Bar that Standards for Lawyer Sanctions should not be adopted while the Proposed Rules of Professional Conduct were still under consideration. Both are now being considered by the Supreme Court.
9. The RA effectively concurred with those recommendations from the Standing Committee which were not otherwise subject to comment or debate.
10. See e.g., Carl Horn III, Lawyer Life—Finding a Life and Higher Calling in the Practice of Law (ABA Publishing, 2003) pp 2–6, n 10–14.
11. Id., at p 5, n 23.