THE ABA – A BEACON FOR OUR CLIENTS[1]

Lawrence J. Fox[*]

Introduction

It's a shame my mother wasn't able to be here. She is the only one who would have suggested that generous introduction wasn't overstated.

I cannot begin to describe what a thrill it is to receive this award and even more gratifying to receive it from my dear friend, Donald Hilliker. Don and I have been friends through Section of Litigation leadership work for two decades. Our children grew up together. We share a dedication to this association and, in particular, the pro bono commitment of the profession. Don is a great ethicist who has led the Standing Committee on Ethics and Professional Responsibility and then the Center on Professional Responsibility's governing council with enthusiasm and grace. Though hardly so physically (Don is so tall, thin and movie-star good looking, as is his splendid wife, Kay), I consider us twins separated at birth in terms of our views of the profession.

Long after we had become fast friends, I was going through some old papers when I was moving house and found the mimeographed, faded purple list of the Reginald Heber Smith Community Lawyer Fellowship program from 1969. The "Reggie Program," as it was nicknamed, placed lawyers in legal services programs around the country, with the proviso (how

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[1] This article is a very slight expansion and emendation of the Michael Franck Lecture originally delivered May 31, 2007.

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quaint it sounds today) that they do test cases and class actions, community organizing and lobbying for remedial legislation. And there on the list was Don Hilliker. He, too, had been trained as a Reggie at Haverford College in that summer of Woodstock, a connection that we had never made before but that explained so much about our shared values.

There are so many others to thank for my opportunity to stand before you. First is my family. My wife, Paulette, who supports all I do, but keeps me, believe you me, from ever letting anything, even an award this heady, from going to my head. Emily and Peter, Tony and Carrie, my splendid children, represented today by my police officer son Tony, whose wife Carrie was just graduated from the University of South Carolina School of Law and who is back in Columbia studying for the bar examination. My brother Jon, the former Congressman, who is my biggest fan.

I cannot say enough about my loyal assistant, Bea, who is here today with her daughter Kim. Bea not only makes it possible for me to maintain a bare semblance of organization, but also really takes an interest in the substance of my work, even the boring ethics stuff.

A special thank you is reserved for my writing partner Susan Martyn. No one could ask for a more wonderful friend and collaborator, ever upbeat, a gentle critic, she inspires me to match her outsized contributions to our endeavors.

Susan formed a large group who nominated me for this award and I thank them all. My friend Judge Norma Shapiro and our mutual Philadelphia colleague, the outstanding litigator, Robert Fiebach, were particularly persistent in their campaign. Professor Ted Schneyer of the University of Arizona, Professor Andy Kaufman of Harvard, a distinguished former winner of this award, and Diane Karpman, the leader of the Association of Professional Responsibility Lawyers, lent their good names and rhetorical excess to this gratifying result.

It's a good thing few at my firm heard Don's introduction for, if they had, they undoubtedly would have docked me many points, ex post facto, for spending so much time on non-billable activities. The truth is without the encouragement of Drinker Biddle & Reath, a firm with a unique dedication to professional responsibility matters starting with the legendary Henry S. Drinker, I could never have been so fortunate to take on so many rewarding projects and positions.

So many of my friends from the Litigation Section of the American Bar Association, both volunteers and staff, are in the audience for this event. I want to thank them for their friendship and support. The Litigation Section has been the focus of the greatest amount of activity I have had the honor of pursuing at the ABA and it is my continuing delight to remain in the leadership of that section after all these years.

Finally, I must thank the American Bar Association Center for Professional Responsibility for providing so many outlets and opportunities for lawyers who wish to get involved in improving the profession. I especially have to thank my friends Jeanne Gray and George Kuhlman for their expertise and guidance. When I first expressed a desire to serve on the Standing Committee I counseled with Jeanne, who provided a little road map. And I still have in my upper left-hand desk drawer the message slip from Jeanne with the words "good news" as the message, her signal to me that the treasured appointment was on its way courtesy of then President-elect, Sandy D'Alemberte.

It is an honor, humbling even, to take my place among the distinguished group of prior recipients. I mean no disrespect to those present, whose achievements are profound, to single out two past winners for special mention.

Lewis H. Van Dusen, Jr.

First, there is my mentor, former partner and firm "chairman" (Drinker Biddle & Reath never had such a title back then), Lewis H. Van Dusen, Jr. Lew drove us crazy. But he did so because he was so dedicated to his clients that he was the very model of the committed professional. His enthusiasm, imagination and tenacity knew no bounds. Lew followed Henry Drinker on the ABA Standing Committee, then served with Mr. Drinker, when the then chairman Walter Brucker resigned[2], and Lew was Chairman of the Committee when the Model Code was adopted and when I first joined Drinker.

One story, though slightly off point, will sum up the Lew we loved. I was invited to speak at Oxford to the Bar of England and Wales on the desirability of the contingent fee. Lew heard of Paulette's and my upcoming trip and insisted that while there we visit with Lady Josephine Villiers, the widow of Lew's best friend, Sir Charles Villiers, whom Lew had met while a Rhodes Scholar at Oxford and with whom Lew served at NATO right after World War II. But before we met her, Lew wanted us to read *Granny Was a Spy*, a book written by Lady Villiers recounting her adventures as a Belgian undercover operative during World War II.

The book, however, could not be found. Lew had everyone at Drinker conducting a search. So too at his home and his wife's office but, alas, Paulette and I left without the book. When we arrived at our hotel in Oxford, the desk clerk greeted us with the information that I had

[2] The story is told that Mr. Drinker was chairman of the ABA Standing Committee for well over a decade, unwilling to give up the chairmanship until a lawyer named Walter Brucker came along, who Mr. Drinker considered worthy of the position. Drinker resigned; Brucker became chairman; and Lew Van Dusen joined the committee. Shortly thereafter, Brucker was appointed by Eisenhower, first to be general counsel of the Department of Defense, and then to be Secretary of the Army, positions he undertook while remaining chairman of the Ethics Committee. President Eisenhower got fed up with this arrangement and insisted that Brucker either resign his ABA work or as Secretary of the Army. Brucker chose to resign from the ABA position, at which point Mr. Drinker immediately reassumed his position as chair of the Standing Committee, giving Drinker Biddle & Reath two seats on the committee for a number of years.

a fax. "You can't escape the office," I thought. Then he said "It's a quite a long fax." With that, he handed me over 300 faxed pages. Lew, of course, had found the book and had faxed the entire volume, which we dutifully read before we lunched with the elegant Lady Villiers. That was Lew.

Fr. Robert Drinan

Second, I want to talk about Fr. Robert Drinan. We lost a giant this past January, but he will not be forgotten. Long before I met him, Fr. Drinan was a hero priest for this nice Jewish boy from Philadelphia. A courageous anti-war activist, this gentleman was as famous for obeying the Pope's directive that he resign from Congress as he had been for serving five distinguished terms there. And I couldn't believe the ABA gave me a chance to meet him.

But meet him I did, and, as so many in this room, I came quite quickly to consider him a friend. He looked like Ichabod Crane, always smiling, with that memorable voice I can still hear even now. He was so modest about all he accomplished. He was gently persuasive in the causes he fostered and the ideas he advanced, intellectually curious about all around him. Most memorable to me, when Fr. Drinan spoke to you he really cared about what you had to say, a marvelous listener who urged me to get involved in teaching ethics, with all the rewards that avocation has brought me.

Fr. Drinan cared about principles, relying on Canon 32 of the Canons of Ethics as a continuing reminder that, beyond the rules, lawyers were obliged to engage in "moral suasion."[3] As we approach the 2008 centennial of those Canons, it seemed particularly appropriate that I would invoke Fr. Drinan's articulation of the lawyers' obligation to engage in moral suasion as an inspiration for my remarks.

[3] Robert F. Drinan, *Is There Another Name for Legal Ethics?*, 15 Human Rights 32, 34 (1988).

My Audience

I look out at the distinguished audience at the 2007 National Conference on Professional Responsibility and what do I see? How would you describe yourselves?

I see rule drafters prepared to argue whether we need Rule 1.7(a)(1) if we already have Rule 1.7(a)(2); I see rule interpreters ready to assert that two matters are–or are not– substantially related; I see teachers instructing the next generation of lawyers how important are their ethical responsibilities and providing the present generation with its elusive mandatory ethics CLE credits; I see scholars who search for the lost lawyer or advance the heretical notion that lawyers are not that special; I see those who send shivers down my spine–the prosecutors of allegedly transgressing lawyers; I see defenders of lawyers always searching for the clever argument that is the very best of a zealous defense on behalf of the indefensible; I see general counsels of law firms, a uniquely underappreciated group that has to stand steadfast between a drooling partner and a lucrative engagement, explaining why our conflicts rules prevent the undertaking of that representation, and I see just plain lawyers trying to get through the day, serving clients and staying out of trouble.

All of these endeavors are fine, even lofty. But when circumstances do not require you to assume these important roles and you have a chance to step back, what I want you–the entire profession–to do is think of yourselves as fulfilling the role of defenders of client rights, and not just any rights but the rights that should–indeed must–be accorded our clients under our rules of professional conduct and the fiduciary obligations lawyers owe clients.

What I Won't Address

Unfortunately, the need for this role has never been greater and that, sadly, is because the issues raised regarding the rights of our clients have never been more important. Why do I say this?

a. The Provocative Conduct of the AmLaw 200

Some might think I raise these issues because I am so upset about what is occurring at the modern American law firm. It is true that in my view these greatest engines of economic prosperity in the history of the legal world–firms where the average partner compensation is in the millions–engage in practices that have systematically destroyed client rights and they also advocate for other rule amendments that would rend the fabric of our obligations to our clients.

A short catalogue will demonstrate the point.

1. Billable hour goals, quotas, requirements–that have evolved into penalties for non-achievement–place the best interests of clients into direct conflict with firm revenue-per-lawyer budgets, rewarding precisely the wrong activities while not rewarding that which would further client goals. And that is to say nothing of the corrosive effect of those billable hour requirements on the lives of the lawyers who live under their oppressive regime.

2. Telling clients the conflict of interest created by the "side-switching" lawyer has been solved by the establishment of an involuntary screen, a safeguard the affected client must accept on pure faith, since violations will never be known or reported.

3. Campaigning to destroy the foundation of our loyalty rules–Rule 1.10 on imputation–by asserting that the lawyers in the law firm's Hong Kong office are not even known to the lawyers in our New York office, at the same time trumpeting that "we are an integrated firm that offers all clients the resources of all our offices." And, of course, the New York partners happily share those Hong Kong revenues, yes siree.

4. Snaring prospective waivers from current clients for any representation that would not violate Rule 1.9–as if the client in fact were entitled to no more loyalty than a former client–by burying the waiver in paragraph 14 of a ten-page retainer letter, giving an Orwellian definition to informed consent that could not possibly be informed, but that is justified on the basis that "sophisticated" clients recognize how ignorant they are about (a) the nature and timing of the future adverse representation (a RICO claim; a hostile tender offer?) as well as (b) what events will occur in the interim before the prospective waiver is enforced, in terms of matters the prospective-waiver-snaring lawyer will undertake for the client, as well as what confidential information the same "loyal" lawyer will learn from the client in that period of time.

5. Making the world safe for lawyers to fire client A in order to take on the more lucrative client B, based on the disingenuous argument that, since lawyers can withdraw from any representation at any time for no reason at all, so long as the client is not adversely affected, why shouldn't lawyers be able to drop a client like a hot potato for a good reason–improving the bottom line. Lord, save us from such notions of loyalty.

6. Condoning the suing of your client's subsidiary, parent or wholly-owned affiliate on the basis that even though your client is part of one integrated enterprise that is equally affected by a treble damage antitrust judgment against any member of the corporate family, it serves the client right for setting itself up in this elaborate way (even if the law required it or we, your lawyers, recommended it). If you wanted that level of loyalty from your lawyers, you should operate as one corporate entity, the proponents of this idea assert.

These matters are all troubling, deeply troubling, but they are not my theme today.

b. Effective Counsel for Capital Defendants

Some might think that I want you to take up the mantle of defender of client rights because of what is happening in the death penalty arena. And it is correct that I am so dismayed by what is occurring in what does not deserve to be dignified to be referred to as death penalty jurisprudence.

Just two weeks ago the United States Supreme Court decided, by a 5-4 vote, *Schriro v. Landrigan*. I cannot be objective about this case because my colleague David Kessler,[4] who is here to day, and I were honored to write an *amicus* brief on behalf of the American Bar Association.[5] But the case decided that, despite the failure of Landrigan's lawyer to undertake any investigation to develop a case in mitigation–thereby failing to uncover and present in mitigation Landrigan's organic brain damage and mental illness–Landrigan was not entitled to a federal habeas hearing because the federal courts had to defer to findings of the state court that found no support in the record. In short, the majority gave a disrespectful internment to the notion that ineffective assistance of counsel claims arising from violations of the obligations of competence, diligence and loyalty could somehow get a fair hearing in federal court. You must read Justice Stevens' eloquent and pointed dissent to fully appreciate how the rights of clients–clients subject to the death penalty and therefore those most in need–have been eviscerated by this jurisprudence (if it can be called that).

But that depressing opinion and its antecedents, bad as they are for client rights, are also not what warrant my present remarks.

The Federal Government Attacks the Lawyer-Client Relationship

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[4] It is to David that I hope the Drinker-Van Dusen mantle will be passed.

[5] The real credit for that endeavor belongs with our DB&R colleague Kate Bisordi and Robin Maher, Director of the American Bar Association Death Penalty Representation Project.

Rather, my theme–depressingly–is how we in this room, the American Bar Association, the lawyers of America, must jump into the fray as defenders of client rights because of the wholesale onslaught on those rights by the federal government. Indeed, one could almost teach an entire law school professional responsibility course based on no more than the six items I have selected to discuss with you from a catalogue that includes far more.

What are the half-dozen examples?

a. Waiver = Cooperation

To demonstrate that this issue is unfortunately non-partisan, I start with the unholy trinity of the Holder-Thompson-McNulty memoranda, each of which tells Justice Department lawyers that they cannot be really effective prosecutors unless they have a notch on their holsters for each putative object of their attention who–in order to prove cooperation–waives his, her or its attorney-client and attorney work product privileges.

For the retained lawyer to know the investigation of the client's matters could be the subject of this kind of forced disclosure invades the lawyer-client relationship from the moment it commences.

And for the client to be told the only way to prove cooperation and avoid prosecution is the client's waiving the attorney-client privilege and the turning over all privileged material, destroys the concept that such waiver must be informed and voluntary.

Finally, the whole process makes the lawyer for the client part of the constabulary, doing the SEC or Justice Department's work–the very antithesis of the role we think is enshrined in the rules of professional conduct.

b. Sarbanes-Oxley

Every professor in this room teaches Rule 1.13, representing organizations. And now they also teach Sarbanes-Oxley and tell their students a) that when representing public companies they look to the federal legislation for their obligations in this regard and b) that the present Model Rule version of Rule 1.13 reads as it does because it was hastily amended and distorted by the ABA under pressure from the SEC, both developments intruding into the lawyer-client relationship by dictating what lawyers must do and creating yet another exception to the clients' right to confidentiality. Not only was this the first major legislative incursion into the state supreme courts' traditional role in establishing our rules of conduct, but it is surely yet another assault on what otherwise would be our clients' rights to have lawyers exercise independent judgment in a relationship cloaked in confidentiality.

c. Cully Stimson

Third, there was the January, 2007 attack by Cully Stimson on volunteer lawyers representing detainees at Guantanamo. A senior government official announces that the clients of these lawyers–the General Counsels of the Fortune 500–ought to consider switching counsel from these treasonous lawyers who are billing corporate America to subsidize their nefarious, unpatriotic work on behalf of these detainees. Our government, allegedly a believer in the rule of law, threatening lawyers through their clients. It would be hard to imagine a bigger threat to the rights of clients than such a pronunciamento.

Now I know for some General Counsel–my great friend Kenneth Frazier, General Counsel of Merck, for example–Stimson's call would be an incentive to send additional work to these courageous lawyers, but we will never know to what extent Stimson's remarks will have a lingering effect on the representation of unpopular causes and individuals, long after Stimson's much applauded resignation.

d. The Virgin Dismissals of U.S. Attorneys

Fourth, we have been treated to the ongoing saga of the Justice Department dismissal of United States Attorneys. While to this day no one has taken responsibility for this outrage–seemingly virgin firings of nine capable public servants–the one thing we now know is that the reason for them was purely political, and here the clients whose rights were attacked are all of us–the American public–who recognize that while, of course, the appointment of U.S. Attorneys is political, once in office we cannot abide a justice system that is motivated by political considerations whether it is forbearing from prosecuting Republican operatives, singling out certain Democrats for special attention, or bringing voting rights cases days before key elections, all for partisan advantage.

e. Attacks on Guantanamo Defense Counsel

Fifth, we have the attacks on Major Michael Mori, counsel for David Hicks, by Colonel Morris Davis. David Hicks was the Australian national detained at Guantanamo who just recently pled guilty to a nine-month sentence, six months to be served in Australia. Major Mori led a campaign to free his client. That campaign quite legitimately took him to Australia, where he enlisted the aid of the Australian government and the Australian public to bring pressure on our government, in the highest tradition of effective lawyering on behalf of his client. And what did his effective representation–this delivery of the rights to which Major Mori's client, David Hicks, was entitled–earn Major Mori? Threats of prosecution from the Chief Prosecutor at Guantanamo for unpatriotic behavior, the irony that it is Major Mori who is the true patriot apparently lost on Colonel Davis.

f. No Rights for Guantanamo Detainee Clients

Finally, and most drastically, I look at the destruction of client rights at Guantanamo.

This is not about torture. That activity is its own disaster, but not my theme today. Rather it is about the systematic interference by the Bush administration–an unrelenting interference in defiance of both law and public opinion–with the performance of all the fiduciary obligations the Guantanamo lawyers owe their clients. Let me take you on a tour:

1. Rule 1.1–Competence. How can a lawyer fulfill the fiduciary duty to provide competent representation when the lawyer cannot see the evidence against the client and when the lawyer is barred from entering into any agreements with lawyers for other detainees that would cloak their discussions with confidentiality and bar them from testimonial disclosure? These detainees are accused of conspiracy yet their lawyers' representation of them is rendered less than competent in this way.

2. Rule 1.4–Communication. How can these lawyers fulfill their fiduciary duty to communicate with their clients when they are barred from sharing with their clients the evidence these lawyers are allowed to learn and, if they cannot communicate that information, how can these lawyers counsel with their clients to develop a defense to the charges against them?

3. Rule 1.6–Confidentiality. A lawyer's fiduciary duty of confidentiality and the related duty to preserve to the greatest extent possible both the attorney-client and attorney work product privileges cannot begin to be fulfilled under a regime in which lawyer notes are reviewed, conversations between lawyer and client are subject to surveillance, and the government pointedly refuses to assure lawyers that lawyer telephone calls to client relatives and friends overseas are not subject to wiretaps. These lawyers face a Hobson's choice: no communication or communications whose characteristics bear no resemblance to what we lawyers know we must achieve to protect our clients' rights.

4. Rule 1.7–Loyalty. Lawyers have an obligation to maintain conflict-free representations. For few (capital defendants, perhaps) is that more important than those subject to commission proceedings at Guantanamo. Yet the military lawyers representing those charged under the new Military Commission Act are all in the same law firm, not just theoretically but in the physical sense of having offices next-door to each other and all reporting to the same superior officer who is also on-site down the hall. All of this is compounded by the fact that, despite the multiple conflicts among the detainees, each detainee military lawyer reports fully to Colonel Sullivan who therefore is privy to the confidences of everyone, a problem the Guantanamo folks think they have "solved" by concluding that Colonel Sullivan has a duty of confidentiality to each detainee, but a duty of competence or loyalty to none. It would be hard to conjure up a more multi-pronged attack on client rights.

The ABA Response

What has been our response at the ABA? Not entirely pristine.

When it came to the SEC's response to its new power under Sarbanes-Oxley, the ABA did not stand tall–we panicked, collapsed and passed amendments to 1.6 and Rule 1.13 we all should regret.

When it came to Holder-Thompson-McNulty, we passed all the right policy statements, but we have not taken a strong enough stand yet against the insidious compromise idea that it is acceptable for the Justice Department to seek waivers by holding a gun to the client's head so long as that waiver of the privilege to demonstrate cooperation with the government does not act as a waiver in related matters, a policy that destroys the lawyer-client relationship in the same

way present policy does. Nor have we yet adopted the great proposal of Peter Moser,[6] another Michael Franck award winner, that we declare by rule that it is unethical for a prosecutor to invade the lawyer-client privilege in this way, though I still have hope that we will.

When it came to Guantanamo, the ABA has been a leader in denouncing all of these client rights destroying policies of our government. There the ABA can really be proud. President Mathis and others have spoken as clearly and forthrightly as we can, condemning everything the name Guantanamo stands for.

But this response has not been enough. It looks like nothing will change. The accusation that the Democrats are soft on terrorists, are not sufficiently patriotic, has stalled essential remedial legislation to repeal the worst legislation passed by Congress in the aftermath of the Supreme Court's much welcomed, defiant decision in *Hamden*, the Military Commission Act of 2006.

A Search for Solutions

What should we do? I don't have the answers. I know passing policy statements and the current level of lobbying are not enough. We have to do better. Like the lawyers in Pakistan who galvanized public opinion with their bewigged demonstrations seen in photographs

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[6] Mr. Moser's amendment to Rule 3.4 would provide:

> A lawyer shall not:
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> (g) when representing a government or governmental agency in a criminal or civil enforcement matter, seek to obtain from an individual or entity any material protected by the attorney-client privilege or attorney work product doctrine through the grant or denial of any benefit or advantage regarding:
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> (1) whether to proceed against the individual or entity in the matter;
>
> (2) the nature of the proceeding
>
> (3) the extent of any criminal charges filed; or
>
> (4) the extent of sanctions sought.

published round the world, we must ratchet up our protest. What if 25,000 lawyers in three-piece suits and female equivalent attire showed up on the steps of the Supreme Court or across from the White House on the first Monday in October? What if we ran full-page ads in every major newspaper in the country? Or bought billboard space in key locations? What if we seized the blogosphere to make Americans understand that when the rights of the detainees at Guantanamo are at stake, so are theirs–and that in the name of fear and false patriotism their rights are being destroyed.

Let us all put our heads together and figure out what more we can–must–do to right the balance, to restore client rights. For we know if we stand silent now, if we don't end this assault on client rights at Guantanamo, we won't know where it goes next.

Every society is judged by how it treats its most despised. On that score our society is currently flunking the test. And it is only we lawyers who have the wherewithal, the talent and the courage to take a stand here and now. In the blessed memory of Fr. Robert Drinan, we must ratchet up our moral suasion so that we are not only heard, but also effective in prompting change.

Conclusion

Some in the audience will remember the great debates over the ABA's hysterical and, in my view, even today, badly misguided efforts to amend the Model Rules after Sarbanes-Oxley became the law of the land. There were three different proposals and I opposed each of them on the floor of the House. When the first came for a vote, I urged the House to make the ABA a beacon for client rights, by rejecting that confidentiality-destroying proposal. I lost. So when the second proposal was advanced, I again rose and urged that if the ABA could not be a beacon, at least we could be a flashlight for client rights and lawyer independence. I lost again. So when

the third deeply-flawed proposal was offered, I delivered the shortest speech of all. I simply rose and asked the delegates whether the ABA could not at least light a match for our clients? Alas, I lost for yet a third time.

But I am like the proverbial schmoo. Knock me down and I bounce right back, whether it makes sense to do so or not. For me, hope springs eternal. And on these issues I have discussed today, I really believe that the ABA can be a beacon. For that reason, I have brought a 1,000,000 candlepower beacon that my son, Tony, gave to me. Paulette made me promise not to shine it in your eyes. So I will shine it at the ceiling in the hope that Tony's beacon will become a symbol of all the ABA can and will do in the future to defend our clients' rights to effective lawyers.

Thank you for this honor. Thank you for being a patient audience. Your beverage of choice awaits.