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CONFERENCE ON LEGAL ETHICS: "WHAT NEEDS FIXING?"

FOREWORD

*Roy D. Simon**

The remarkable collection of papers in this special issue of the *Hofstra Law Review* grew out of Hofstra University School of Law's third major ethics conference, which was held at Hofstra from September 9 to September 11, 2001. The papers are linked together by the broad theme expressed in the conference's title: *Legal Ethics: What Needs Fixing?*

In this Foreword, I want to do three simple things. First, I want to talk about how Hofstra put the ethics conference together. Second, I want to comment on the connections between some of the papers. Third, I want to say a few words about the last day of the conference, September 11, 2001.

I. HOW WE PUT THE ETHICS CONFERENCE TOGETHER

From the beginning, the idea behind Hofstra's ethics conferences was simple: Invite the leading figures in the field of legal ethics to write original papers on topics of their own choosing, guided only by a flexible and wide-ranging theme. Our first conference, held in 1996, was entitled, *Legal Ethics: The Core Issues*.¹ Our second conference, held in 1998, was entitled, *Legal Ethics: Access to Justice*.² This time, for our

* Professor of Law, Hofstra University School of Law, and Director of Hofstra Institute for the Study of Legal Ethics. Together with my colleague Monroe Freedman, I served as Co-Director of the ethics conference on which this Symposium is based.

1. The papers from the first conference were published in 1 J. INST. STUDY LEGAL ETHICS (1996) (available on Westlaw and LEXIS).

2. The papers from the second conference were published in 2 J. INST. STUDY LEGAL ETHICS (1999) (available on Westlaw and LEXIS).

2001 conference, we chose the title, *Legal Ethics: What Needs Fixing?* We assembled a remarkable roster of speakers and asked them to choose topics that deeply interested them. We then gave them the podium one at a time, for fifty minutes each, and reserved more than half of the allotted time for questions and comments from the audience.

The questions and comments from the audience were especially penetrating. Most of the conference faculty stayed for at least two days of the conference, and Hofstra invited a series of Commentators whose assignment was to probe, question, and challenge the speakers. These Commentators, all established scholars or practitioners in their own right, included Professor Kathleen Clark of Washington University in St. Louis, Louis Craco of Willkie Farr & Gallagher in New York, Professor Sam Dash of the Georgetown University Law Center, Professor John Dzienkowski of the University of Texas, Professor Steven Hobbs of the University of Alabama School of Law, Professor Peter Kostant of the Roger Williams School of Law in Rhode Island, George Kuhlman of the ABA Center for Professional Responsibility, and Lucian Pera of Armstrong Allen in Memphis, Tennessee. The Commentators did not write separate papers, but their ideas, together with the ideas of others who asked questions or made comments from the floor, are woven into the papers you will read in this issue.

II. CONNECTIONS BETWEEN THE PAPERS

The articles here span a wide range of issues, but many of them resonate and harmonize with each other like instruments in a symphony orchestra. For example, Professor Geoffrey Hazard writes about the ethical advantages of small and solo law practice in bygone days, while Professor David Wilkins and his co-researcher Elizabeth Chambliss write about ethical guidance today in large law firms. Professor Bruce Green, who chaired the New York State Bar Association Committee on Professional Ethics for three years, writes about the problems and contributions of bar association ethics committees, as do Carol Langford, a former chair of the California State Bar Committee on Professional Responsibility and Conduct (“COPRAC”), and David Bell. Lawrence Fox, a former Chair of the ABA Standing Committee on Ethics and Professional Responsibility, focuses on a single recent ethics opinion that he believes is seriously mistaken. Professor Nancy Moore, Chief Reporter for the ABA Ethics 2000 Commission, talks about drafting ethics codes for the twenty-first century, while Dean Nancy Rapoport asks whether bankruptcy lawyers need to draft their own

special code of ethics. Professor Tom Morgan, a chaired antitrust law professor and an Associate Reporter for the Ethics 2000 Commission, attacks the ABA and other players in the organized bar for using the mantra of “core values” to disguise anticompetitive rules, while Professor Deborah Rhode, Chair of the ABA Commission on Women in the Profession, chides the profession for continuing to tolerate discriminatory dual standards for male and female lawyers. Professor Charles Wolfram writes about the unauthorized practice of law by out-of-state lawyers who travel physically to serve the needs of clients in the national economy, while Professor Catherine Lanctot writes about the unauthorized practice of law by nonlawyers who travel virtually and exploit the opportunities of the cyberspace economy.

Other authors focus on more sinister topics. Professor Susan Koniak talks about lawyers who enrich their clients at the expense of the public by entering into secret settlements regarding dangerous products. Professor William Hodes talks about lawyers who enrich themselves at the expense of their clients by charging contingent fees based on a percentage of the gross recovery. Professor Lisa Lerman writes about lawyers who enrich themselves at the expense of their partners and their clients through fraudulent billing schemes.

Other connections abound as well. Individual readers will match up the various articles in their own idiosyncratic ways, finding similar themes and concepts emerging in different papers. Finding these connections is what makes reading the conference papers especially fun, and it is what makes a Symposium issue a coherent whole rather than a disconnected stack of independent articles.

III. SEPTEMBER 11, 2001

The last day of our conference was Tuesday, September 11, 2001. The day began beautifully. We awoke to clear, deep-blue skies—what airline pilots call “severe clear.” The day before, during a luncheon on the tenth floor of Hofstra’s main library, many of us had gazed out the windows to the west to see the Manhattan skyline, highlighted by the majestic Twin Towers of the World Trade Center.

Shortly before 9:00 a.m. on September 11, the conference participants were finishing breakfast in a sunlit atrium and moving into a classroom for the day’s program. As we were about to begin the 9:00 a.m. speech, a friend told me that a plane had hit the World Trade Center, and she suggested I might want to announce it. I imagined a little Piper Cub flying too low and accidentally clipping its wings on the

building (much like what happened recently in Milan, Italy). I was focused totally on the conference, and I saw no reason to distract the audience with a routine news item. At about 9:05 a.m., when the crowd of about seventy-five people had settled in, I introduced our first speaker, Carol Langford, who described the challenges of her tenure as Chair of the California State Bar's ethics committee. Everything in the room seemed normal. The audience was alert and attentive, unaware that the outside world was in chaos, in the process of changing forever.

At about 9:45 a.m., the law school's Vice Dean came in and pulled me aside. He told me that both of the Twin Towers had been hit, the Pentagon had been attacked, other planes were unaccounted for, all air traffic was grounded nationwide, and we would need to take a break. Ms. Langford, oblivious to all this, soon finished her presentation and answered some questions from the floor. Then I announced the dramatic news that the Vice Dean had told me and said we would be taking a short break so that people could contact their families and friends.

During the break, we began to learn the magnitude of what had happened outside. Students, lawyers, and law professors gazed in disbelief at the television in the student lounge. Hofstra had cancelled classes for the rest of the day. Conference participants were frantically trying to reach their loved ones. One out-of-town lawyer was desperately trying to reach his son, who worked in the Pentagon. Another lawyer, whose son worked in New York's financial district, could not get through on his cell phone and went home to check on his family. Others called their hotels to see if they could check back in for another night.

One by one, I canvassed the lawyers and professors who were sitting around the lounge and the atrium to see whether they thought we ought to continue the conference or cancel it. Almost everyone wanted to continue. None of the out-of-town participants could fly anywhere today, business as usual in America had ground to a halt, and many people wanted something to take their minds away from the unspeakable tragedy. And as one lawyer put it, "If we cancel the conference now, the terrorists win." We decided to go on with the conference. I reconvened everyone and said a few words about why we were continuing despite the tragedy, and why the rule of law was more important now than ever.³

3. At the conference opening on Sunday, I was asked why Hofstra was taking the trouble to hold a three-day conference on legal ethics. I answered that our society depended upon the rule of law, and we wanted to make sure that lawyers, who are central to maintaining and enforcing the rule of law, adhere to the highest ethical standards. On Sunday, it had seemed true but trite—a brief remark to get everyone's attention so that we could move on to the main speeches. Today, reverence for the rule of law seems almost profound.

After a couple of hours, Professor Tom Morgan got the program started again with a biting attack on the organized bar's cartel-like behavior that elevates lawyers over all others and separates lawyers from nonlawyers.⁴ At lunch, Dean Burnele Powell, long active on many ABA committees and commissions, gave a powerful talk entitled *So Obvious, Yet So Easily Done*, listing a dozen things we could easily do to improve the legal profession. The audience stayed riveted to his words for more than an hour. Then a band of thirty or forty of us returned to the classroom to hear Professor Catherine Lanctot discuss the practice of law in cyberspace. Finally, our last speaker mounted the podium. William Hodes, co-author of the Hazard & Hodes treatise on *The Law of Lawyering*, argued that we should outlaw the common practice (already unethical in New York⁵) of calculating contingent fees based on the gross recovery rather than the net recovery. Although it was late in the day—we were running two hours behind schedule due to our unexpected morning break—the audience was still energetic and asked so many questions that Professor Hodes's presentation turned out to be the longest one of the day. It was past 5:00 p.m. when the conference ended, and we finally gathered around the television to begin to absorb the staggering magnitude of the day's events.

Ordinarily, a report like this would end here, at the end of the formal program. But for those who attended the conference from out of town—from Alabama, Arizona, California, Indiana, Maryland, Missouri, Oklahoma, Pennsylvania, Tennessee, Texas, Washington, D.C., Israel, and elsewhere—their most favorable impressions and most vivid memories of the conference began here. It is difficult to mount a successful national conference for hundreds of people, especially with the law school's relatively small conference staff. Even with the expert

4. In the middle of Professor Morgan's talk, a secretary came to get me to tell me that I had a phone call from my son, who was living in Japan. I ran two flights down to my office to take his call. He had been working out in a Japanese gym when a man ran over to him and said, almost incoherently, "Your country attacked. You pray. U.S.A. attacked." My son eventually found a TV news broadcast in English and—ironically—he knew more about the developing events than I did.

5. The *New York Code of Professional Responsibility* prohibits contingent fee terms that violate applicable statutes or court rules. See N.Y. CODE OF PROF'L RESPONSIBILITY DR 2-106(D) (2001). The applicable court rule in the Second Judicial Department states that the contingent fee percentage "shall be computed on the net sum recovered after deducting from the amount recovered expenses and disbursements." N.Y. COMP. CODES R. & REGS. tit. 22, § 691.20(e) (2001) (emphasis added) (stating the rule for the Second Judicial Department). The First, Third, and Fourth Judicial Departments have similar court rules governing contingent fees. See N.Y. COMP. CODES R. & REGS. tit. 22, § 603.7(e)(3) (2001) (First Judicial Department); N.Y. COMP. CODES R. & REGS. tit. 22, § 806.13(c) (2001) (Third Judicial Department); N.Y. COMP. CODES R. & REGS. tit. 22, § 1022.31(c) (2001) (Fourth Judicial Department).

assistance of Hofstra's highly experienced Cultural Center,⁶ the logistics of scheduling rooms, meals, security, hotels, transportation, audio-visual equipment, airport pick-ups, handouts, and dozens of other details for a three-day conference are daunting. But now that the conference was over, an even bigger challenge began—finding lodging, transportation, and communications for out-of-town guests in the wake of the September 11th devastation. All planes were grounded; hotels were booked full with other stranded travelers; the tunnels and bridges to Manhattan were closed; the trains were not running. Yet Hofstra's outstanding staff, especially Lilli Weinger, Nancy Rudolph, and Candyce Goldstein, rose to the occasion. They patiently took care of everyone who needed help. Several conference participants told me later that they had never felt as well taken care of as they did in the hands of Hofstra's staff. In the wake of a tragedy, Hofstra shined. The papers that follow are merely the written record of a conference whose human drama we will never forget.

6. In addition to the legal ethics conferences, the Hofstra Cultural Center has presented and continues to sponsor extraordinarily successful academic conferences on such varied topics that include the legacies of the Presidents, Babe Ruth, John Steinbeck, and Frank Sinatra.