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J. Reuben Clark Law Society

J. Reuben Clark Law School

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Clark Memorandum

J. Reuben Clark
Law School
Brigham Young
University
Spring | 2000

Just Lawyers



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The mission of the J. Reuben
Clark Law Society is to promote
high moral and professional
standards in the legal profes-
sion and service to society.
In fulfilling its mission, the Law
Society is guided by the phi-
losophy, personal example, and
values of its namesake, J. Reuben
Clark, Jr. Those values include
(1) public service, (2) loyalty to
the rule of law as exemplified
by the United States Constitution,
and (3) appreciation for the
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Is It Possible to
Be a Lawyer
and a Christian?

Brett Scharffs

I'm honored that each of you would come. I am, after all, just a lawyer. Indeed, the title of my comments is "Just Lawyers"! >> I respect you. I respect you because you would come out on a Sunday evening after a long day. I know it's a sacrifice. I respect you because of your attendance and study of the law at the J. Reuben Clark Law School. I have a vision of great things that will come from you through your studies and your careers. >> The theme of Discovery Week is "So we, being many, are one body in Christ, and every one members one of another" (Romans 12:5). >> Now, how might you say that in Latin? E pluribus unum.

JUST LAWYERS

by Ralph R. Mabey

MICHAEL HOGUE

ILLUSTRATIONS BY





E Pluribus Unum: the motto of the Great Seal of the United States of America. In other words, I submit to you that the purpose of the laws of this land is to make of many one. This is not just the purpose of the Constitution but the purpose of all of the laws of this land.

Take the example of two parties who are entering into a contract. They've got different interests. One wants to sell high, the other wants to buy low. One wants to sell for cash, the other wants to buy on terms.

The contract laws of this country allow them to be brought together. Their very different interests are brought together in one agreement. They are unified and enabled to work together for their separate interests—unified by the law.

Now suppose they have a dispute and one claims breach of the contract by the other. The law is still there to forge a compromise. It gives them something to compromise around, a chance for them to reunify themselves based upon the principles of the law. Or, if they're unable to reunify themselves, they can reconcile themselves to each other through the enforcement of the law in court—whose

purpose is then to reconcile this unhappy seller with this unhappy buyer.

Think about it. There is something profound in the purpose of our laws when seen in this context.

Even the criminal laws are there to unify us in obedience to those laws and, in the event of a breach of the criminal law, to reconcile the offender with the rest of society, to reconcile that offender through enforcement of the law.

Scripture recognizes that this is the purpose of the civil law. By “civil law,” I mean the secular law.

Doctrine and Covenants 134:6 says of our laws: “We believe that every man should be honored in his station, rulers and magistrates as such, being placed for the protection of the innocent and the punishment of the guilty; and that to the laws all men show respect and deference, *as without them peace and harmony would be supplanted by anarchy and terror; human laws being instituted for the express purpose of regulating our interests as individuals and nations, between man and man*; and divine laws given of heaven, prescribing rules on spiritual concerns, for faith and worship, both to be answered by man to his Maker” (emphasis added).

What is meant here? Harmonize? Bring peace between human beings? *The purpose of the law*, according to scripture, is to unify us.

So now we come to the next question: If the purpose of the civil law is to unify us, what is the purpose of lawyers? Can it be that the purpose of lawyers is to unify persons? To harmonize my client's interests with your client's interests so that we can do a deal, so that you can go about your business? To reconcile our clients with their adversaries so that they can get on

“So we, being many, are one body in Christ, and every one members one of another.”—ROMANS 12:5

with their lives? Is the purpose of lawyers to unify humankind through adherence to law and/or reconcile humankind through the operation of law?

Perhaps nobody has heard people say that is the duty of lawyers. But it is the divine purpose of our laws—to unify us, separate and different though we are. Then is the divine purpose of lawyers to take us, separate and apart, and unify us under the law or reconcile us with the law?

I submit, brothers and sisters, that that is the purpose of a lawyer: to unify us under the law or reconcile us with the law. And only one of you laughed out loud. I would expect more of you to laugh out loud. It seems counterintuitive to the way we picture lawyers. But I want you to think about this because I submit to you that it is true.

I believe with this purpose in mind—that lawyers are to unify—the Lord said: “We believe that men should appeal to the civil law for redress of all wrongs and grievances, where personal abuse is inflicted or the right of property or character infringed, where such laws exist as will protect the same [and such appeals are made by lawyers]; but we believe that all men are justified in defending themselves, their friends, and property, and the government, from the unlawful assaults and encroachments of all persons in times of exigency, where immediate appeal cannot be made to the laws, and relief afforded” (Doctrine and Covenants 134:11).

To put it another way, no law enforces itself, no law interprets itself. If the purpose of the law is *e pluribus unum*, then the purpose of a lawyer is to effect *e pluribus unum*.

I submit that it is important even to the salvation of Zion, therefore, that we study the law. Indeed, the Lord said in Doctrine and Covenants 93:53: “And, verily I say unto you, that it is my will that you should hasten to translate my scriptures, and to *obtain a knowledge* of history, and of countries, and of kingdoms, of *laws of God and man*, and all this *for the salvation of Zion*. Amen” (emphasis added).

From this I take it the Lord says that for the salvation of Zion we should study the law of man and become lawyers. Now I’m likening this scripture to me and to you. But if Nephi could liken them, perhaps we all can. Out of that, I take a divine call to you and to me to study the law.

I believe then, with the purpose of lawyers in mind, that we must befriend the law. We must seek for wise lawyers and magistrates and persons who will rule on the law. You can tell that I’m referring to scripture. “And that law of the land which is constitutional . . . belongs to all mankind. . . . I . . . justify you . . . in befriending that law.” It is lawyers who most befriend the law. “I, the Lord God, make you free, therefore ye are free indeed; and the law also maketh you free.” That reference has to be to secular law, I believe.

In their entirety these verses read:

“And that law of the land which is constitutional, supporting that principle of freedom in maintaining rights and privileges, belongs to all mankind, and is justifiable before me.

“Therefore, I, the Lord, justify you, and your brethren of my church, in befriending that law which is the constitutional law of the land;

“And as pertaining to law of man, whatsoever is more or less than this, cometh of evil.

“I, the Lord God, make you free, therefore ye are free indeed; and the law also maketh you free.

“Nevertheless, when the wicked rule the people mourn.

“Wherefore, honest men and wise men should be sought for diligently, and good men and wise men ye should observe to uphold; otherwise whatsoever is less than these cometh of evil” (Doctrine and Covenants 98:5–10).

I take out of all of these scriptures that, yes, maybe the Lord recognizes that it is our divine obligation to give effect to the motto of the United States of America.

As we—through lawyers, I submit—gain power to organize our businesses, organize our human transactions and relations, and organize the Church, we will be preserved in and able to keep the laws of God. In other words, now I’m ready to take one further step. The step I’m going to take is to suggest that by lawyers acting in their divine calling to unify people under the law, they are partially fulfilling the divine law stated in Romans, that we should each unify ourselves together under Christ.

You may not want to take that leap with me. But let me read from Doctrine and Covenants 44:1–5:

“Behold, thus saith the Lord unto you my servants, it is expedient in me that the elders of my church should be called together, from the east and from the west, and from the north and from the south, by letter or some other way.

“And it shall come to pass, that inasmuch as they are faithful, and exercise faith in me, I will pour out my Spirit upon



them in the day that they assemble themselves together.

“And it shall come to pass that they shall go forth into the regions round about, and preach repentance unto the people.

“And many shall be converted, inasmuch that *ye shall obtain power to organize yourselves according to the laws of man.*

“That your enemies may not have power over you; that *you may be preserved in all things; that you may be enabled to keep my laws*; that every bond may be broken wherewith the enemy seeketh to destroy my people” (emphasis added).

There you have it. I submit that the Lord is saying that if you are going to be

enabled to keep that divine law that Paul spoke about in Romans, it will be by organizing yourselves according to the laws of man.

I believe we can see the fulfillment of divine purposes by the unifying action of lawyers under the law. We can see Professor Wardle, who is here tonight, and other professors at this university and other legal powers at work in the world, attempting to unify the world through adherence to just law—and thereby opening the world and her peoples to the gospel.

I submit that there is a logical and scriptural basis for the progression that I’ve proposed to you this evening. If that’s

the case, that’s all well and good. But I have to make a living practicing law, and some of you may have to, too.

Can we practice law as the Lord has outlined that we should practice the law, by unifying one with another, by reconciling our clients with others? I think that is an important question.

Could we follow the example of Christ? Isn’t He our lawyer with the Father? Don’t we read in Jacob 3:1 that “He will console you in your afflictions, He will plead your cause, and send down justice”? “But behold, I, Jacob, would speak unto you that are pure in heart. Look unto God with firmness of mind, and pray unto him with exceeding faith, and he will console you in your afflictions, and he will plead your cause, and send down justice upon those who seek your destruction.” We can console and plead. We can’t send down justice, but we can try to go get justice.

I think that when it comes down to the practice of law, we can be most successful if we fulfill our calling to unify and reconcile people with each other and the law. We need to seek common ground, to narrow differences.

A few years ago I went to a dinner with my legal adversaries. I represented a client that was missing more than a billion dollars and couldn’t find it under any rock or under any bed. The bad guys sat across the table at dinner; we had fought for a couple of years. All of a sudden we reached a compromise—and it had a spiritual undertone to it. Opposing counsel spoke later of the occasion as a dramatic, unexpected, and crucial reconciliation and unification.

I submit to you that settlements under the law are part of our duty, our divine duty in unifying and narrowing the ground. If we do that, we reduce the transaction costs greatly. We reduce the psychic costs, too, and we allow people to go forward, to move on.

I conducted a mediation in a hard-fought lawsuit a few weeks ago. These parties settled after a day’s mediation. They were apart millions at the beginning of the day (several hundreds of percent in magnitude), and both sides expressed mistrust and pessimism. But they settled. One of the parties said to me, “You know, I didn’t real-



ize that my adversary was a pretty good guy. I could have picked up the phone three years ago and we could have settled this.”

There is power in narrowing issues, in finding common ground. There is great lawyering in that effort.

A few years ago I was involved in a case where hundreds of millions had been lost, rather publicly, by a rather public family. I ended up mediating a dispute between the family and the party who was suing the family and had gone to the trouble of filing RICO charges against them. It was a nasty dustup.

We sat together for three or four days. One night at about 8 or 9 or 10 o'clock, I was thinking, “This is going nowhere. I should have broken things off and gone to the baseball game.” But the parties began talking together without me and without lawyers. By 7:00 a.m. the next morning, we had a settlement.

Well, I asked myself, “What are all we lawyers doing?” These parties got together and settled it themselves after years and much acrimony.

You know, there is a force, a power, in narrowing differences, and there's sometimes a religious component in it. It feels right.

Recently a respected trial judge assisted the parties in a large and disputatious case to reach a global settlement. This judge, a devout Catholic, assesses and reassesses his life at the end of each day. In so doing, he concluded that participating in this settlement was probably his finest day on the bench—ever—exceeding the many years of trials and adjudications at which he had presided and which he had decided.

Another way we can unify is by seeking just results, seeking a just reconciliation by enforcing the law. You know, if you've got the power and you've got the money and you've got the people in your law firm, you can pulverize the other guy.

But J. Reuben Clark, Jr., who served decades as an international lawyer before his call to the First Presidency, said, “Even in war, there should be some things that human beings would not do to their fellows.” He opposed one-sided settlements or treaties based upon one party's overwhelming firepower.¹ He said, “Guns and bayonets will in the future as in the past bring truces, long or short, but never peace that endures. I believe that moral force is far more potent than physical force in international relations.”²

Now just a minute here. “I believe that moral force is far more potent than physical force in international relations,” said J. Reuben Clark, Jr. The moral force of international law and international opinion may unify people better and forge peace and truces better than guns and bayonets.

There is some truth to this, I submit, in our practice of law. That truth is that

if you can reach a fair settlement, that settlement is likely to stick. It's likely to be enforced. Those parties are likely to be able to do business with each other again in the future. They're likely to get on with their lives. Justice is more likely to be done.

If it's just guns and bayonets, then it's going to be expensive. It's going to go on a long time, and any peace achieved may well later fall out of bed.

So I believe also in this principle: Fulfilling a lawyer's divine calling makes good sense in the practice of law.

Now what about respecting diversity, a fundamental precept of Discovery Week?

E pluribus unum. The idea in Romans is not that we are homogenized—the idea is out of many, one. It is that the arm and the ankle and the elbow and the eye can be unified in purpose. So it is in the practice of law: We must work together with

The arm and the ankle and the elbow and the eye can
be unified in purpose. So it is in the practice of law.

diverse peoples in bringing about unity. That is our calling.

You need go no further than the seller and the buyer. They've got very diverse interests. Your job is to allow them to do the business they want to do unified under the umbrella of that law, in their diversity.

Diversity is crucial to entrepreneurial success. It's crucial to the energy of this country. As we unify, we must respect diversity.

As President J. Reuben Clark began his assignment as ambassador to Mexico, he adopted this credo: "There are no questions arising between nations which may not be adjusted peaceably and in good feeling, as well as with reciprocal advantage, if those questions are discussed with kindly candor, with a mutual appreciation of and accommodation to the point of view of each by the other, and with patience and a desire to work out fair and equitable justice."³

When he was ambassador to Mexico, President Clark filled one of the most important ambassadorships in the world. There were momentous disputes between the U.S. and Mexico. There were upheavals and internal armed conflicts and boundary disputes with us. There were calls for armed U.S. intervention.

J. Reuben Clark served seven presidents of the United States as their lawyer, as

undersecretary of state, as the chief legal officer for the Department of State, and in many other assignments, as well as ambassador to Mexico. He knew the international law, and he said the way to forge agreement is peaceably, with good feeling, through questions discussed with candor, mutual appreciation, and accommodation of each other's point of view, through desire to work out fair and equitable justice.

What happened when he left the ambassadorship? This is what the *Mexico City Excelsior* editorialized: Ambassador Clark had "distinguished himself by a virtue that is not common among diplomats: that of not putting himself forward, of not calling attention to himself, of observing a prudent reserve that has won him the esteem of all social classes in Mexico."⁴ He practiced what he intended to practice.

There is, I think, a great lesson in that: have respect for your adversary. How often are we or the other side painted as Satan simply because we play adversarial roles in our judicial system? It makes it very difficult to unify our differing interests.

There has been and is discrimination in this country. A friend told me of a kid who went to work at a great Los Angeles law firm not too many years ago and realized that he was making a thousand dollars less than the others in his class. He

went to the senior partner and complained. The senior partner said without apology, “We can pay you less. You’re Jewish. Where else are you going to get a job for more?”

A professor friend of mine who is pre-eminent in her field tells of standing up for a client in court for the first time. The judge looked over his glasses and said to her client, not realizing that she might have a *woman* lawyer, “Don’t you have a lawyer?” Well, that judge was very apologetic. But it may have been the first time he had seen a woman lawyer—and it was not many years ago.

A person of color, a student of mine, reminded me that a few years ago, to travel in this great country, his family had to take their food with them and sleep in the car. Discrimination is unfortunately still with us.

There are strong differences among us. Our job is to respect those with whom and against whom and for whom we practice law and to forge unity. That means no ethnic or cultural jokes, brothers and sisters. That means that even if she tells a joke on herself, I will not repeat that joke. If I tell a joke about Mormons, that’s fine. If you tell a joke about Mormons, that’s not so fine with me. It means not saying things like, “Yeah, some of my best friends are Mormons. I took a Mormon to lunch last

week.” Do you feel the condescension in that? We have got to be careful about what we say, even when we have good intentions.

The J. Reuben Clark Law Society stands for these principles of J. Reuben Clark, these principles of *e pluribus unum*, of unifying the world under law, whether as graduates of this law school or any other law school, whether as members of this faith or of any other faith.

I was moved when the J. Reuben Clark Law Society in Salt Lake City presented its annual award to Nick Colessides of the Greek community. The Greek Orthodox clergy appeared at that luncheon in the Joseph Smith Building, honoring him and honoring us. Lawyering is building these bridges. That is what the J. Reuben Clark Law Society is all about. That is its mission.

I have one other radical suggestion for you on the practice of law. This time you can all laugh out loud. You will be successful and you will be living the scriptural admonitions for lawyers and the law if you will practice the paradox of humility. You will be smarter, better, and more successful if you are humble. It makes you happier. Someone said, “Too many humble people are proud of it.” So I can’t speak for myself. But I speak for you, brothers and sisters. (In general priesthood meeting last October, Bishop Richard C. Edgley spoke of the paradox or irony that strength comes from humility.)

The way you become the best trial lawyer you can is with the humility to learn from what that witness tells you, to learn how that other attorney does it.

You may say, “Michael Jordan, he’s not humble. He says, ‘Give me the ball.’” And that’s what a good lawyer says: “Give me the ball.”

How did Michael Jordan come to want to get the ball and to know what to do with it? He did it through the humility of working harder than others, of learning everything about his opponents, of learning every move from the other guy and employing it. There is the paradox in humility.

You will be a smarter lawyer, a happier lawyer, and a better lawyer if you—if we—can learn that paradox. Learn to say to the client who says, “You’re charging me 500

bucks an hour. What’s the answer?” “I don’t know the answer.” Learn not to take credit for every deal. Just get it done even though you’re thinking, “I’ve got to be out there self-promoting myself or I’ll starve to death.” Your work and your service will promote you.

I’ll close with scriptural proof of this paradox, expressed in Helaman 3:35: “Nevertheless they did fast and pray oft, and did wax stronger and stronger in their humility, and firmer and firmer in the faith of Christ, unto the filling their souls with joy and consolation, yea, even to the purifying and the sanctification of their hearts, which sanctification cometh because of their yielding their hearts unto God.” Now there’s the paradox, and I think it applies to us temporally as well as spiritually.

And in Ether 12:27 we read, “And if men come unto me I will show unto them their weakness. I give unto men weakness that they may be humble; and my grace is sufficient for all men that humble themselves before me; for if they humble themselves before me, and have faith in me, then will I make weak things become strong unto them.”

We become strong through the humility to pray, through the humility to let the Lord know that we’re imperfect, and through the humility of repentance. We become strong in the practice of law through the humility to learn from the other person, to listen to others, even to adversaries, and to change ourselves for the better.

In conclusion, I submit this: It isn’t that there is a religious life we live and a lawyer’s life we live and that we’d better try to reconcile them as best we can. No, I’m proposing something maybe a little more dramatic: that they are the same life, that your calling as a lawyer under *e pluribus unum* is part of your calling as a disciple of Christ under Romans 12:5. I say this in the name of Jesus Christ. Amen.

NOTES

1 EDWIN BROWN FIRMAGE & CHRISTOPHER L. BLAKESLEY, *J. Reuben Clark, Jr.: Law and International Order*, 13 *BYU STUDIES* 273 (1973), p. 81.

2 *Id.*, at 68.

3 FRANK W. FOX, *J. REUBEN CLARK, THE PUBLIC YEARS* (1980), at 549.

4 *Id.* at 583.

MORALITY AND





PROFESSIONAL ETHICS

BY ELDER DALLIN H. OAKS

My dear
brothers and
sisters, I feel very
privileged to
have been invited
to address this
Founders Day
observance of BYU's
J. Reuben Clark
Law School.

My interest in doing this is obvious.

Less obvious is how I have found time to prepare these remarks. It could not have been done without the valuable research assistance of Pamela B. Hunsaker and Marianne M. Jennings, as well as a helpful reading by Dean H. Reese Hansen and his associates. I am grateful to each of them and show my gratitude by the obvious disclaimer: They are not responsible for what I have done with the material and suggestions they provided me.

In preparing for these remarks, I reread what I said over 20 years ago at the dedication of the building that houses the J. Reuben Clark Law School. I used that occasion to add what I called “one additional charge” to the formal charges given to the Law School at the ceremony commemorating its opening two years earlier. This additional charge concerned what I called “the J. Reuben Clark Law School’s special challenges and opportunities for leadership in teaching ethics, morality, and professional responsibility” (“Ethics, Morality and Professional Responsibility,” Proceedings at the Convocation and Dedication of the J. Reuben Clark Law School, Brigham Young University, Sept. 5, 1975, pp. 27–28).

I approached this subject from the standpoint of what I called “the deeper values from which we obtain our commitments to law, morality, ethics, and professional responsibility” (ibid.). I asserted that “the J. Reuben Clark Law School has the most promising ideals and circumstances to be a leader in this important area” (id., 34–35). I presented my case for that assertion in these words:

We have no diffidence in talking about religious commitment at Brigham Young University, and we will have none in the J. Reuben Clark Law School. Religious commitment, religious values, and concern with ethics and morality are part of the reason for this school’s existence, and will be in the atmosphere of its study. As President Marion G. Romney . . . noted in our opening ceremonies, this law school was established to provide an institution in which students could “obtain a knowledge of the laws of man in the light of the laws of God.”

If it is true that law students cannot be taught ethics and morality in law school because those value commitments are fixed before they enroll, then that fact, an excuse for other law schools, becomes a unique opportunity for this one. Most of the students and faculty at this law school are rooted in the same religious tradition, and that tradition more than any other fact accounts for their choosing this setting to pursue their professional goals. The common ideals, principles, and commitments of that tradition should make this institution superbly effective in strengthening the moral, ethical, and professional foundations that compose the finest heritage of our profession.

Because of our reliance on these common ideals, principles, and commitments, the new building being dedicated today should . . . be looked on as . . . a monument to our determination that the fairness, decency, integrity, virtue, and love of truth taught at the hearthstones of thousands of homes throughout the land shall have a concentrated impact on the legal profession and the nation’s laws. It is in these homes, by God-fearing parents, that the young men and women who will be our graduates have already gained that intangible moral instinct that will bear its fruits in the legislative halls, the courtrooms, the offices, and other private and public places in the years to come. [Id., 35–36]

As I look back on that occasion, I feel to reaffirm the substance of what I said over 20 years ago, but I wish to use different words to express it. The meanings of words change with time, and so does the emphasis we wish to give to various elements of our charge to excel in this vital area.

My objective in these remarks is not to discuss the details of the relationship between personal morality and professional ethics or the application of either morality or ethics in the multitude of complex circumstances encountered in the practice of law. The J. Reuben Clark Law School has ample faculty resources for that task, far beyond my experience and abilities even to supplement. What I can try to do is to view these forests from afar and suggest some general limits or broad distinctions to be made, within which our sensitive experts will outline the principles, paint the appropriate patterns, and fill in the details.

The morality to which I referred in our Law School dedication—morality based on religious values, in our case—is the foundation undergirding all of our conduct, personal and professional. Professional ethics must be grounded upon our personal moral foundation and, whatever its source, should not be in conflict with it.

A moral foundation is, of course, broader than the structure of professional ethics that should be built upon it. Stated otherwise, laws and rules other than professional ethics are also built upon our moral foundations. There are innumerable examples of personal conduct that violate commandments based on our religious/moral foundations that are not prohibited by the professional codes regulating the conduct of lawyers. For Latter-day Saints, these examples include such deviations as violating temple covenants, breaking the Sabbath, and viewing pornography. Similarly, we look to commandments and principles based on our moral foundation—not to the rules of professional responsibility—to regulate our relationships with our spouses, our children, our extended families, and our fellowmen. Our personal moral foundation is also the source that regulates our relationships with the various organizations—religious, charitable, and community—through which we render the service obligations imposed upon us by those foundation principles.

I was sensitized to the importance of distinguishing between what I have called the “moral foundation” and the professional ethics “structure” by my recent reading of something written almost 25

years ago by Professor John J. Flynn, now Hugh B. Brown Professor of Law at the University of Utah College of Law. His commentary, written in the 1970s following issuance of the ABA’s Code of Professional Responsibility, was titled “Professional Ethics and the Lawyer’s Duty to Self” (*Washington University Law Quarterly*, 1976:429–436).

Flynn’s thesis was that “although much attention has been paid to immoral conduct and the means to prevent it, the greater hazard to lawyers generally is that of amoral conduct” (id., 29). He explains:

The conventional distinction between amorality and immorality is particularly cogent for the lawyer. Amoral conduct implies that the actor has no standard of right and wrong by which to judge conduct. . . . Immoral conduct, on the other hand, implies that the actor is aware of moral standards but has consciously chosen to violate them. [Id., 429–30]

For reasons having to do with the lawyer’s role in the adversary system, which I will not elaborate here, Flynn concludes that “the legal profession, while no more or less vulnerable to immorality than others, seems to be in considerable danger of a profound amorality” (id., 434).

That conclusion may or may not be correct. Either way, what stimulated me most were Professor Flynn’s comments about the role of the Code of Professional Responsibility in all of this. He begins:

The [C]ode assumes that universal ethical responsibilities for lawyers are to be defined in terms of the lawyer’s duties to the profession, his client, the courts, and society at large. [Id., 434]

The “fundamental difficulty of the Code,” he maintains, is that while it “begins on the correct path by defining the roles lawyers must play in a legal system . . . it simply does not go far enough” (id., 434–35). I quote:

The Code prescribes duties the lawyer owes to others—to society, to his profession, to his client—but says nothing of the lawyer’s duty to self. The internal guidelines that must limit one’s obedience to orders or external duties are unmentioned and unexamined. [Id., 435–36]

So what? we might ask. Flynn explains:

[I]n failing to make the ethical limitations of the Code more explicit, the Code may, in fact, be counterproductive to developing and reinforcing an ethical profession of the highest order. By ignoring the lawyer’s relation to himself and instead of emphasizing only the lawyer’s relation to others and the profession, the Code allows lawyers to rationalize many forms of conduct which would otherwise transgress their duties to self and, consequently, widely held moral values. The emphasis on duty to others leads naturally and dangerously to the “hired-gun” model for deciding ethical questions. The rules that define immorality may reinforce the dangers of amorality, and allow an attorney to justify almost any conduct that promotes the interests of the client. [Id., 436]

These words of Professor Flynn challenged me to think about the contrast between a code that defines professional “morality” on the one hand, and the lawyer’s moral foundation that provides the basis for his or her personal morality (or amorality) on the other. Of course, we who are trained as advocates can defend the Code’s explicit decision to limit its subject matter to *professional* responsibilities. But we could also make a case for the proposition that a code of professional responsibility should not be entirely silent about the existence of other responsibilities. Its failure to put the professional responsibilities it specifies into the larger context of public or personal morality could be understood as implying that the professional code is a comprehensive list of all of the responsibilities of lawyers and thus, as Flynn says, “allow an attorney to justify almost any conduct that promotes the interest of the client” (id., 436).

Professor Flynn’s writings on this subject are basically a voice from the 1970s. Other voices have taken up the same cry in the two decades since then. Writing in the *Catholic Lawyer*, 32:337 (1989), Simon Y. Balian, a member of St. John’s University’s St. Thomas More Institute for Legal Research, maintains that the legal profession’s “morally neutral” codified rules have the effect of providing an “ethical code” to govern professional actions, in contrast to



the general moral framework that governs a lawyer's actions in his or her personal life. Balian asserts that this dual system of roles encourages members of the legal profession to "leave behind their common moral framework and enclose themselves [in their professional activities] in a world which is at best amoral" (id., 337–38).

Balian calls this concept "dual morality" or "role-differentiated behavior" (id., 3446). He concludes:

The concept of dual morality for professionals suggests a false dichotomy in the life of a person. . . . The idea of [a separate morality for the professional] role involves both self-deception and abdication from responsibility and invites immoral conduct. . . . The inevitable result of the dominance which the principle of separate ethics holds over the legal profession is pervasive moral failure. [Id., 353]

Here I pause to thank the spouses of lawyers and other non-lawyer guests whose patience must have been tried by the past 10 minutes of talk about obscure concepts that can only be of interest to lawyers and not to all of them. In appreciation for your patience, I will now try to clarify the subject of "dual morality" or conflict between moral requirements and professional ethics by giving an example from a case decided by the Minnesota Supreme Court.

David Spaulding, a teenager, was injured in an auto accident. His father sued for the damages the defendant caused to his minor son. The injured boy was examined by his own doctor and also by the defendant's doctor. David's doctor did not find anything unusual in the boy's chest, but the defendant's doctor advised the defendant's lawyer that David now had an aneurysm in his aorta, which could rupture at any time and cause his death.

The lawyers for the defendant realized that neither David nor his father nor their lawyers were aware of David's aneurysm and the lethal threat it posed if not corrected. Common morality would seem to require notification of this danger, but the

defendant's lawyer thought professional ethics forbade notifying the adversary. Defense counsel proceeded to settle the case (for a relatively insignificant sum) and neither before nor after the settlement advised David or his father or their lawyer of the threat to David's life. There is your example of conflict between morality and professional ethics. Fortunately, a trial judge later vacated the settlement agreement on the basis that the defense lawyer's failure to make full disclosure to the court

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when the parties applied for approval of a settlement in the case of a minor fell short of the lawyer's obligation as an officer of the court. The Minnesota Supreme Court unanimously affirmed. (*Spaulding v. Zimmerman*, 116 N.W. 2d 704, Minn., 1962.)

This homely example from a routine damage case illustrates one of the public's grievances against the legal profession. If a lawyer fails to take an action the public considers required by common morality and then uses legal rules or lawyer ethics to justify his failure, this alienates the public from lawyers. Citizens in this country do not like to be told that some special group has exclusive rules that excuse them from the civilized conduct that is expected of others.

The potential conflict between personal morality and professional ethics continued to be debated in the 1990s. My first example is from Professor Joseph Allegretti of Creighton University Law School. His book *The Lawyer's Calling* (Mahwa, NJ: Paulist Press, 1996) praises Sir Thomas More as "an authentic Christian hero" (id., 118) and decries lawyers "whose sense of moral obligation comes not from themselves and their conscience but from what others tell them—their profession, their client, their codes of conduct" (id., 119). Allegretti explains:

One of the great temptations for lawyers is to see ourselves in the third person, as the mere instrument of our client. If we do so, of course, moral issues disappear because we compartmentalize our lives and relegate our moral and religious values to the private realm of family and friends. There is never any risk of having to say "no" to a client or the system because only a moral agent, an I, can stand for something—a lawyer in the third person has nothing to stand up for or against.

We see in Thomas More someone who was willing to be an I, to see himself in the first person. More knew that what he said and did mattered, that his soul was implicated in his work. While the precise issue—the taking of an oath—may seem quaint and far-fetched to us, the larger question of what we stand for and whom we owe allegiance to is as contemporary as this morning's deposition or opinion letter. [Id., 119]

As a second voice from the current decade, I offer the words of our colleague Marianne M. Jennings, professor of legal and ethical studies at Arizona State University's College of Business. Her recent article in the *Wisconsin Law Review*, 1996:1223, as you would expect, is a lively and persuasive criticism of the way professional ethics can deaden our sense of personal morality. She declares:

What has occurred in the legal profession is typical of any organization or society that becomes addicted to codes or statements of

positive law. Rules are made, interpreted and modified on a regular basis to fit situations with complex nuances. Once the complexity becomes overwhelming, the original purpose of the rules is lost or ignored.

Lawyers are practicing craft ethics. If the code, rules, or an opinion sanction an activity, we separate our own consciences from the behavior, label the behavior ethical, and march forward with the full confidence of Professor Harold Hill. [Id., 1226]

I don't like to quote footnotes, but Jennings's footnote referenced to the mention of Professor Harold Hill is irresistible:

You may remember that Professor Hill, of The Music Man, was a graduate of the Gary Indiana Conservatory of Music and hornswoggled the entire town of River City, Iowa, into supporting a marching band, its uniforms, and its instruments. . . . Professor Hill was a flimflam man who couldn't play a note. . . . [He] would have been a great lawyer. The man committed fraud in the inducement, but still captured a town's heart as well as that of Marian, the librarian. We still had trouble in River City, but no one ever realized it. [Ibid.]

A few pages later Jennings writes:

Slowly but surely, with this fatal combination of the newly defined role of winning for the advocate and reliance solely on written rules to govern conduct and choices, lawyers have shaped a profession governed by rules and devoid of morality. If it ain't written down, it can and will be done. The motto of the trial as a quest for the truth has become a quest for a verdict. [Id., 1238]

Enlightened by the insights and advocacy of Flynn, Balian, Allegetti, and Jennings, I have reexamined some prior ethical preachments I have given to the students and alumni of the J. Reuben Clark Law School. In doing so I have realized that, whatever I have called it, what I have talked about on almost every occasion I have addressed this audience is the personal moral foundation of lawyers. In effect, I have said that whatever the content of professional ethics, and even if it is silent on a subject, lawyers should be gov-

erned by their religious/moral foundation in all of their professional activities.

In 1988 I spoke to a fireside of students and faculty of the Law School. I referred to Cornell Dean Roger Crampton's article "The Ordinary Religion of the Law School Classroom," 29 *J. Legal Educ.* 247 (1978), in which he discussed the value assumptions in the law school classroom. As I look back on the three value assumptions I quoted on that occasion, I realize that each one of them is illustrative of the thesis I pursue this evening—that our professional codes and rules are only a partial list of the behavioral requirements that must guide men and women in the practice of law.

With the benefit of hindsight, I see that Crampton's questions clearly illustrate that our professional conduct must be based on a moral foundation drawn from values larger than the legal profession but of profound importance to it. Without reliance on this moral foundation, a lawyer can be ethical (or moral) in terms of adherence to the narrow requirements of professional ethics, but amoral in those relationships and that conduct not regulated by professional codes or rules.

Crampton's list of the value assumptions of the law school classroom include these three: (1) Under the "instrumental approach to law and lawyering," "the law is nothing more than an instrument for achieving" the goals of the client, and the "lawyer need not be concerned with . . . the value questions associated with them" because the lawyer is simply "the skilled craftsman who works out the means by which predetermined goals are achieved." (2) The skepticism encouraged in legal study "inclines the student toward concluding that principles are meaningless and values are relative." (3) The steady diet of borderline cases served up in the law school classroom, with relatively little attention to routine legal problems of easy solution, encourages students "to generalize that there are no right answers, just winning arguments."

After quoting these questions, I asked: "Does training in the law dull one's sense of justice or one's moral and ethical sensibilities? Does it matter what clients and causes we serve with the skills that we have devel-

oped?" ("Bridges," *Clark Memorandum*, Fall 1988, p. 13). Some who are present here this evening will remember that I then used the story of *The Bridge over the River Kwai* to illustrate my concerns "for the fundamental integrity of those who study and practice law" (id., 13). I concluded my summary with these words:

I do not know of a better example of the glories of a technical job well done—craftsmanship in the face of enormous adversity—and the hazards of ignoring whose cause you are serving by your blind craftsmanship—than this homely little adventure play. . . . All of this has a lot to do with legal ethics. It has a lot to do with morality. It has a lot to do with what I hope is a suitable antidote for the worthy but distorting concentration on craftsmanship that is part of what Dean Crampton called the "ordinary religion of the law school classroom." [Id., 14]

I then quoted Alexander Solzhenitsyn's notable commencement address delivered at Harvard University in June 1978. As I have reread those words, I think they are also an excellent illustration of the difference between the formal structure of professional ethics and the important underlying moral foundation.

Solzhenitsyn described our Western society as wholly dependent upon laws.

Any conflict is solved according to the letter of the law and this is considered to be the ultimate solution. If one is right from a legal point of view, nothing more is required, nobody may mention that one could still not be entirely right. . . . I have spent my life under a communist regime and I will tell you that a society without any objective legal scale is a terrible one indeed. But a society with no other scale but the legal one is not quite worthy of man either. A society which is based on the letter of the law and never reaches any higher is taking very scarce advantage of the high level of human possibilities (Alexander Solzhenitsyn, "A World Split Apart," commencement address delivered at Harvard University, June 8, 1978). [Id., 14–15]

Similarly, some of you may be familiar with my book *The Lord's Way* (1991). In the chapter on litigation, I discussed the princi-

ples that seem to me to govern whether a Latter-day Saint or any other Christian should participate in litigation as a client. Those principles are obviously based on the foundations of Christian morality, rather than on the more technical and more permissive provisions on the same subject in codifications of professional ethics.

I wish to share one more voice from the 1990s, that of Professor Maura Strassberg, assistant professor of law at Drake University, writing in the *Iowa Law Review* (80 *Iowa L. Rev.* 901 [1995]). In her criticism of what she calls the “modern articulation of legal ethics as positive law, in the form of governmentally approved ethical rules” (id., 901), Strassberg draws freely on philosophical writings and historical allusions. As to the latter, she cites three instances where morally repugnant but legally required decisions were rendered by well-meaning judges who “viewed law and morality as analytically distinct” (id., 901). Her three illustrations are pre-Civil War u.s. decisions applying the fugitive slave law, Nazi Germany, and apartheid South Africa.

Strassberg also discusses the origin of legal professional ethics. She says that during the 19th century the legal profession’s view of legal ethics was “inextricably connected to morality” (id., 906). (That is the connection I am advocating a century later.) In 1905 the American Bar Association charged a committee of prominent attorneys to frame a code of ethics. In context it appears that this code of ethics was intended to supplement the moral standards that were previously the only restraint on a lawyer’s professional conduct. The resulting Canons, adopted by the ABA in 1908, were not cast in the form of legally enforceable rules.

Looking back from nearly a century later, we see that the Code of Professional Responsibility and the successor Model Rules of Professional Conduct, as their names suggest, have been written like statutes to define the lawyer’s role and to specify rules for the lawyer’s behavior. So viewed, they constitute positive law in their own right and have the potential to preempt moral rules to the contrary. From this I conclude that in less than a century we have moved from the point where per-

sonal morality was not a *sufficient* guide for lawyers to a point where it may not be a *permissible* one.

Thus far I have cited only those professional voices who deplore so-called dual morality. I have read that some lawyers try to justify one moral standard for professional activities and another for the lawyer’s personal life. I doubt that this idea of dual morality is advocated or defended as a matter of principle. Rather, it seems to me to be a rationalization—a seeming justification for behavior contrary to common morality by persons who either lack a moral foundation or choose to ignore their moral foundation when it interferes with their quest for power, prestige, or pecuniary gain.

In my view, the difficult issue for lawyers is not whether professional conduct is governed by moral standards as well as professional ethics. Clearly it is. The real issue arises when our personal religious/moral standards *forbid* conduct that is required by professional rules or by our employer or where our personal standards *require* conduct that is forbidden by professional rules or by our employer. In other words, the difficult issue arises when there is a clear conflict between the foundation moral standard and the professional rule or direction. (Parenthetically, this is not an issue for those who advocate dual morality. All they ask is whether the conduct is professional and therefore governed by the professional rule, or personal and therefore governed by personal morality. The difficult conflict only occurs for those like us who believe that personal morality should trump professional rules.)

Note also that the difficult issue I have described does not arise unless the conflict between personal morality and professional ethics is clear. For example, where professional ethics require particular conduct and moral standards are silent or obscure on the subject, we have an easy case. The same is true when personal morality forbids particular behavior, and the ethical rule is obscure.

A clear conflict raises the interesting question of how the institutions that discipline lawyers will react to a conflict between personal moral and legal ethics.

Strassberg treats this question, asking, “How would a bar committee or state supreme court respond to a clear, but morally desirable, violation of the ethical rules?” (id., 903). Happily, she observes:

An analysis of bar association advisory opinion shows that adjudicators do flex and bend the [professional] rules in order to accommodate moral concerns. Advisory opinions on the confidentiality of client suicide threats and on information on child abuse have avoided formalism. Instead, these opinions reveal an unusually broad reading of language or even an unexplained deviation from the positive language of the rules altogether. This non-formalistic approach may be better understood as a moderation of the contemporary conversation of legal ethics into positive law. [Id., 903]

I fervently hope that leniency will be followed wherever morally committed lawyers violate legal ethics in direct opposition to clear and compelling moral rules to the contrary.

The prophet Micah seems to have been commenting on a similar contrast between formal roles and underlying moral principles when he declared to ancient Israel:

Wherewith shall I come before the Lord, and bow myself before the high God? shall I come before him with burnt offerings, with calves of a year old?

Will the Lord be pleased with thousands of rams, or with ten thousands of rivers of oil? shall I give my firstborn for my transgression, the fruit of my body for the sin of my soul?

He hath shewed thee, O man, what is good; and what doth the Lord require of thee, but to do justly, and to love mercy, and to walk humbly with thy God? [Micah 6:6–8]

I pray that such fundamental moral principles will ever be your ultimate guide in resolving all of the multitude of moral/ethical questions that confront you in your employment and practice of law.

Elder Dallin H. Oaks is a member of the Quorum of the Twelve Apostles of The Church of Jesus Christ of Latter-day Saints.

by Joyce Janetski

PARADISE



^ At home with sharks, Ryan Tibbitts and other Caldera team members relax in the waters of the South Pacific.

START

BITTER FEBRUARY WINDS AND INCESSANT PHONE CALLS WERE HALF A WORLD AWAY

TWO JRCLS GRADUATES SURVIVE CALDERA V. MICROSOFT



FOUND

AS STEVE HILL ('77) AND RYAN TIBBITTS ('84) LOOKED OUT AT THE BRILLIANT HORIZON FROM BORA BORA.



Stephen J. Hill

IT WAS NO WONDER THAT A YOUNG NAVAL OFFICER STATIONED THERE IN 1942 HAD CALLED THIS SPECK IN THE SOUTH PACIFIC "THE MOST BEAUTIFUL ISLAND IN THE WORLD," THEY THOUGHT. JAMES MICHENER'S PARADISE 140 MILES OFF TAHITI WAS THE PERFECT ANTITHESIS TO THE PAST THREE-AND-A-HALF YEARS OF THE ATTORNEYS' LIVES. ✨ THE CALMNESS AND NATURAL BEAUTY OF THE POLYNESIAN RETREAT CONTRASTED SHARPLY WITH THE GIGANTIC CANNONS SURROUNDING, AND ONCE GUARDING, THE U.S. AIR BASE BUILT ON THE ISLAND DURING WORLD WAR II. STEVE CONTEMPLATED THE POISED, UNFIRED GUNS AND THE TERRIBLE BATTLES FOUGHT IN THE PACIFIC. OCCASIONALLY SOLDIERS WERE SENT TO BORA BORA TO REST AND RECUPERATE FROM THE FIGHTING. ✨ ALTHOUGH THAT IMMENSE CONFLICT WAS FOUGHT BY AN EARLIER GENERATION AND EXACTED THE HIGHEST PAYMENT, STEVE AND RYAN WERE VETERANS OF A NEW KIND OF COMBAT: TECO-WAR. THE COMPANY THEY REPRESENTED, CALDERA, INC., HAD JUST SETTLED A MAJOR LAWSUIT AGAINST MICROSOFT, THE BIGGEST OF THE "BIG GUNS" OF THE COMPUTER WORLD, A STRUGGLE THAT HAD LASTED ALMOST AS LONG AS WORLD WAR II. TO CELEBRATE ONE OF THE LARGEST PRIVATE ANTITRUST SETTLEMENTS IN HISTORY, THE ENTIRE CALDERA LEGAL TEAM HAD GONE TO TAHITI FOR SOME REST AND RECUPERATION. THEY HAD FINALLY MADE IT TO BALI HAI.

At the law offices of Snow, Christensen & Martineau, in Salt Lake City, Utah, a few weeks later, Steve Hill talks about Bora Bora and the remnants of World War II on the island. As he begins an interview with *Clark Memorandum*, law partner Ryan Tibbitts enters the conference room. For a few moments the splendors of Tahiti provide a pleasant memory for the two J. Reuben Clark Law School graduates who are about to relate the battle that got them there.

TROUBLE BREWING

The road leading to the January 10, 2000, settlement of a lawsuit brought by Caldera against Microsoft ended just short of a jury trial. Steve Hill and Ryan Tibbitts, two of the dozen attorneys representing



Ryan E. Tibbitts

Caldera, lived and breathed the case since it was filed in July 1996. It is a story worth retelling.

The beginning of the rivalry was fair enough: In 1981 Bill Gates began licensing his MS-DOS computer operating system to IBM, beating out a rival operating system, CP/M, created by Digital Research, Inc.

(DRI). Though MS-DOS traced its roots back to CP/M, Gates took the lead, retained licensing rights, and laid the foundation of his fame and fortune: free enterprise in the emerging computer industry.

The battle against Microsoft began in 1988 when Digital Research released a new rival to MS-DOS called DR DOS. Soon DR DOS began to receive praise as a superior alternative to Microsoft's MS-DOS software, which then dominated the personal computer market. In 1989 MS-DOS still had 90 percent of the computer operating system market. DR DOS got a boost when Novell, the world's second-largest software company, bought DRI in October 1991 for \$125 million in stock. By 1992 DR DOS briefly surpassed MS-DOS in retail sales. However, by March DR DOS sales began to plummet. By 1993 they were dead.

As early as 1989, Federal Trade Commission attorneys were investigating Microsoft. By fall 1993 the Department of Justice got involved and eventually sued Microsoft over its DOS business practices. Ray Noorda had his own plans.

For years, Noorda—the man who brought Novell back from bankruptcy in 1983—had urged his board to sue Microsoft for killing competition in the DOS market using illegal tactics. But not until he retired from Novell in 1994 and formed a company named Caldera was Noorda able to make his move. In July 1996 Caldera bought DR DOS from Novell for \$400,000 and the same day filed suit against Microsoft.

Noorda's small company accused the software giant of leading computer users to believe that DR DOS would not work with Microsoft's Windows by writing code that caused error messages to appear when Windows ran on top of DR DOS. The lawsuit also alleged that Microsoft made illegal licensing deals with computer manufacturers who installed its software in the computers they sold, that it deliberately announced overly optimistic release dates for its products to beat out the competition, and that it illegally tied together two products, MS-DOS and Windows, to create Windows 95.

By July 1996 Steve Hill and Ryan Tibbitts had entered the picture.

RECRUITMENT

"The statute of limitations set a deadline for us," says Steve, as he leans forward to emphasize his words. "In 1994 [the Department of] Justice had filed essentially the same case we did and then settled in August of '95 with Microsoft. So we had until mid-August of 1996 to file our case."

The "we" included litigators hired that summer by Ray Noorda and Caldera president Bryan Sparks: Ralph Palumbo, from Seattle, Stephen Susman, a Houston attorney, and the strong legal team they gathered around them. They had taken the Caldera case on a contingency basis.

Reflecting on his early involvement with the Caldera lawsuit, Steve recalls, "If I was really going to pick a date when the seeds were planted, it was just before my 10-year law school reunion in 1987." He recounts that one of the former classmates he was asked to call to donate money to the Law School was David Bradford, who is general counsel for Novell.

"As a result of that contact, I started doing a little bit of Novell work that grew over time," he says. "In early '93 David told me that the FTC was investigating Microsoft. They and Novell were seriously considering a civil case at that point. I filled him in on my antitrust background, which started in Seattle. I practiced there for four years, doing mainly antitrust work, and I made friends with a lot of good antitrust lawyers and even knew people that worked in Microsoft's Seattle law firm."

Steve expounds: "I studied economics as an undergraduate at BYU. I always had an interest in antitrust. When I started working with Novell and I learned about the industry, this particular issue became one of extreme interest to me. It's just funny how the threads of your life weave together. It seems like everything that I've done from my undergraduate background to the Law School association to the acquaintances I made in Seattle all came together to create the opportunity."

"In 1995 we had actually been involved representing Novell and had some real live, ongoing antitrust experience in a monopolization case," he explains. "Obviously, it was pretty important."

Steve continues to tell how in early 1996, when he was in Germany, he got a

call from Novell wanting an assessment of what he thought of the case, because the company was thinking of selling the DR DOS business. "A couple of months went by—I thought the case was just going to die. Then later in the spring, I got a call from Dave Bradford. . . . I contacted a friend of mine named Ralph Palumbo. . . . That led to a meeting at Novell between me, Ralph Palumbo, and Steve Susman of Susman Godfrey. . . . Bradford was convinced that we had a good legal team. But Novell was in the process of selling the business to

Digressing from the story for a moment, Ryan talks about how he came to be involved in *Caldera v. Microsoft*. "Unlike Steve," he says, "nothing in my life prepared me for the case. . . . Rex Lee was my stake president at BYU. He was a big BYU football fan, and I was on the team down there. I'd occasionally run with him after football practice. He really twisted my arm to go to law school. The only way I could justify going to law school in my mind was saying, 'Okay. I'll go and become a sports agent.'" But after meeting some sports agents, Ryan changed his

or four associates from each of the three main law firms—Susman Godfrey; Summit Law Group; and Snow, Christensen & Martineau.

OVERSEAS OPERATIONS

The *Caldera v. Microsoft* case took its lawyers beyond the valleys of Utah and shores of Seattle chasing evidence in Europe and Asia. Two countries that played key roles in the lawsuit were areas where, coincidentally, Steve and Ryan had served Church missions: Germany and Korea. The language skills they developed



Caldera, a company chiefly owned by Ray Noorda. At that point, Ryan came into the picture."

Ryan jumps into the interview, explaining how Steve told him that Novell was going to sell the DR DOS business to Ray Noorda. "As it turned out," Ryan says, "a friend of mine named Ralph Yarro is Ray Noorda's right-hand man. . . . So I called Ralph and brought him up to speed on what Steve had been doing with the claim with Novell, shepherding it through the FTC and the DOJ. . . . [By] July of 1996, we had the complaint filed."

mind. He graduated from the J. Reuben Clark Law School in 1984 and ended up at Snow, Christensen & Martineau. "Working in a large law firm on antitrust cases is the last thing I thought I would be doing," he says. Although Ryan chose not to become a sports agent, photographs on a wall of his office suggest that he does represent at least one professional athlete—former teammate Steve Young.

Although he entered the case in July 1996, Ryan became more involved by the spring of 1997. The legal team he joined had grown to 12 main lawyers, plus three

and the contacts they made during those two-year periods put them at a distinct advantage as they returned to those lands on a different type of mission.

"Steve served a mission in Germany. I served a mission in South Korea," Ryan says. "As it turned out, those two countries both had big parts of the story [surrounding] our case. There were quite a few trips abroad. I spent more time going to Asia, and Steve went to Germany quite a few times."

"DR DOS programmers were actually based in England," explains Steve. "At that

time the biggest PC manufacturer in Europe was Vobis, based in Aachen, Germany. Vobis was the biggest account that [DR DOS] had ever had. In 1989 and 1990 Vobis was a 100-percent DR DOS shop; they didn't use any Microsoft operating systems.

"So it was a huge deal to Microsoft to get the Vobis account," Steve emphasizes. "More importantly, they were concerned that if other OEM's in Europe had seen Vobis' success, they would go to DR DOS rather than MS-DOS. So it became a big deal to Microsoft to win the Vobis account, which they ultimately did. Digging out

CEO of Vobis, Theo Lieven. We sent [Lieven] several e-mails and called and called. Finally, he agreed to see us. He owns a chateau just across the border in Belgium."

Steve and others convinced Lieven to sit for a deposition in Los Angeles, which, he says, "turned out to be pretty important evidence for us."

Explaining why Korea was important in the Caldera case, Ryan says, "When Digital Research launched their competing operating system—DR DOS—part of their strategy was to go places that weren't very important to Microsoft, that were kind

in a deposition of a Korean witness when he learned that I could understand what the witness and the interpreter were saying."

IN THE TRENCHES

Ryan explained that "in a typical large commercial case, you're going to win or lose your case on your witnesses and your documents, because you get very little from the other side." Consequently, as lawyers for the underdog, Ryan, Steve, and their colleagues had to scrutinize seemingly endless leads to come up with some ammunition.



that story took a lot of time and was a fairly significant piece of the story we would have told at trial."

"Well, that's a whole other unbelievable episode," Steve continues. "We eventually managed to talk to the CEO of Vobis. . . . While in England we made contact with one of the top guys at Vobis through one of the salespeople at Novell Duesseldorf. The Vobis guy wouldn't talk to us on the phone, but said he would meet us the next day in Aachen. I felt like I was in a spy novel. . . . We made good friends with him, and then he gave us the contact information for the

of off the Microsoft radar screen. So they started going to small OEM accounts in Asia, including Korea and Taiwan. They opened their first office in Taiwan and their second office in Korea.

"Microsoft viewed Korea as a beachhead where DR DOS might make some gain into their market," he continues. "So they really unloaded on DR DOS in Korea, and ultimately the Korean government reviewed some of Microsoft's activities there. That was a story we were able to develop from people I met over there. . . . I was also able to surprise a Microsoft lawyer

"Every witness we got was a 'romance,'" Steve says. "We had to go find them, and they were scattered all over the world. Then once we found them, we had to make friends with them and convince them that our cause was just, that we had a chance of succeeding, and we were good guys."

"And that it was worth it for them to donate all kinds of time getting ready for depositions," Ryan breaks in.

"Everybody worried what would be the consequence to them personally if they testified, . . . what it would mean professionally if they went public," Steve says.

Other kinds of evidence were not much easier to discover, but did yield rewards. "The judge ordered Microsoft to turn over all of their memos and e-mails," Ryan relates. "We spent literally weeks in Seattle going through boxes of documents. We found some amazing smoking guns in there. Many of the Microsoft documents were so good for us it almost made our client's documents unimportant."

Steve says, "We felt like, 'Wow, our case is every bit as good as we had hoped. In fact, better really than we thought it would turn out to be, once we saw their documents.'"

In more ways than one, e-mail turned out to be the salvation of the Caldera attorneys. Not only was it their most effective form of communication as they investigated the case, but, ironically, e-mail provided them with their best evidence. Retrieved Microsoft e-mails verified what Caldera was trying to prove: that the Microsoft tactics Caldera complained about were designed to undermine DR DOS and further monopolize the market.

THE DARKEST HOURS

The three-and-a-half-year pursuit of Microsoft proved to be a bumpy ride for the Caldera attorneys, sometimes with little light at the end of the tunnel. When asked if they were discouraged during the experience, Steve and Ryan didn't hesitate to respond.

"The DRI people were very self-critical because they knew they weren't getting sales like they should have," says Ryan. "DR DOS was winning awards, but they couldn't make the sales. They didn't know what Microsoft was doing behind the scenes then. So there were all of these bad memos about DRI and its people. And that's what I got hit with in depositions. . . . I remember the plane ride home from the first one; I was pretty dejected and thinking, 'Boy, we've got some problems here.' . . . I think that was my low point. But, because of what we found in Microsoft memos and e-mail, we found a way to deal with it."

"Just the process of being opposed to somebody so powerful caused us problems," says Steve. "Gathering witnesses was a much more difficult and unusual process than I had ever been through before."

Sometimes the diversity of expectations within the legal team created challenges. "You can imagine," Ryan says, "with three different law firms and 15 different lawyers involved, there were many different views as to whether we ought to settle or go to trial, or if we do settle, what the value of the case is."

"But all of that finally turned out fine," Steve stresses. "I'd say that working with these other two firms, you would have thought there would have been prima donnas and ego plays. I would say that never happened. What tended to happen, believe it or not, was there was so much to do and people had different talents and experiences, that the lawyers seemed to self-select the things that they could do the best. We had very few issues about who should do what. We were really in accord throughout the whole process."

COUNTERATTACKS AND SETTLEMENT

"It was real hardball litigation," Steve admits. "I'll bet Microsoft filed dozens of motions on various issues. And of all of those, we could only count a handful that they won. But it's amazing that with all of that, the relations between counsel were actually really quite good, very professional and cordial."

"They just wanted to keep us distracted," Ryan adds. "They clearly wanted to get rid of the case. We were at the right place at the right time in a lot of respects, because they were dealing with what was going on in Washington, D.C., and they didn't want to be going through our trial at the time that Judge [Thomas Penfield] Jackson was trying to figure out what to do with them back there."

Although the case against Microsoft did not go to trial, the settlement was a substantial win for Caldera and its attorneys. (Analysts contend that the evidence that would have been revealed in court promised to hurt Microsoft even more than any monetary fine.) The lawyers cannot disclose the settlement figure because of a confidentiality agreement; however, the *Salt Lake Tribune* reported the settlement at \$250 million ("Caldera, Microsoft Settle for \$250M," *Salt Lake Tribune*, 11 January 2000), whereas the *Wall Street Journal*

reported it at \$275 million ("Microsoft to Settle Suit by Caldera," *Wall Street Journal*, 11 January 2000).

Thus, the trip to Tahiti.

NOT WITHOUT COST

As in any battle, many kinds of sacrifice were made during the long course of Caldera's investigation of Microsoft's practices. During the time they were involved in the lawsuit, Ryan and Steve and their families felt the force of this commitment.

"I traveled a lot," begins Ryan. "I went to Europe two or three times and Asia two or three times. . . . There were literally times when I had to have my wife, Nan, meet me at the airport just long enough to grab a different suitcase of stuff and head off somewhere else. But the way I dealt with it, I let other things slip in my life rather than not spend time with my wife or my kids. . . . It was something we talked about, but it didn't cause major problems."

Steve confesses, "For the most part I was having the time of my life. But while I was having this experience, my wife, Tauni, and my kids were at home dealing with my absence. There were periods where I was pretty distracted, and they had to deal with my emotional ups and downs as well."

When asked if his children, who range between nine and 21 years of age, are interested in going into law, Steve responds, "No, but they're interested in technology. In fact, all of them are involved with it in one fashion or another."

Ryan, whose five children are 10 and under, comments, "At least my two oldest kids were interested in the case. A few times my name made it into the paper with quotes, and that was cool for the kids to talk about with their teachers at school."

He continues, "Our last two boys were born during the course of this case. I remember with the first one, one of the things that I did in order to spend more time with the family would be to go home at 6:00 at night and take two or three boxes of documents that I needed to review to prep for these depositions I was defending. I can remember quite a few nights with that baby when he would wake up at 2:00 in the morning for feedings, sitting out on the couch holding him and going through documents while I was up."

Steve takes his turn: "I guess I turned into kind of a cell phone addict. At one point my family was complaining that when I was home, I was on the 'dang' telephone. . . . I came to the realization that once I was home, I had to be home, and I wouldn't take or make calls."

Calculating that he spent two-thirds to three-fourths of his legal time involved in the case, Steve notes, "The last year, it was most of the time. . . . We [the legal team] spent so much time together, we may have seen more of members of the trial team than we did of our own spouses over the past three-and-a-half years." Ryan puts his commitment at 60 to 70 percent of his time.

In addition to their time away from their families, both attorneys were worried about the length of time they were devoting to a contingency case. "It was very risky," Ryan admits. "I know both of us lost a lot of sleep—many people in our firm were very supportive, but, as you can imagine, and justifiably so, there were some people that were pretty skeptical because we were spending up to three-quarters of our time [on the case], which meant we were not bringing in any money for the firm. They were wondering what we were really contributing to the mix. . . . But the settlement healed all of those wounds," Ryan laughs.

Steve confides, "There was a lot of pressure. . . . I was concerned about what my partners here were thinking and the fact that they were paying us to be off doing this while they were doing things that actually brought in money. . . . Those kinds of considerations made [the case for us] less exciting."

GAINS

Of course the magnitude of Caldera's claim against Microsoft made the case *very* exciting. And the fact that Caldera eventually obtained a large settlement made the pursuit all the better. But, as Steve recently expressed in an e-mail to his case colleagues, "While the money is wonderful, this case certainly was not entirely about money."

Reflecting on his personal feelings about the experience, Steve says, "For me as a lawyer in private practice, I couldn't imagine anything that would be more

THE THREE-AND-A-HALF-YEAR PURSUIT OF MICROSOFT

PROVED TO BE A BUMPY RIDE FOR THE CALDERA ATTORNEYS, SOMETIMES WITH LITTLE LIGHT AT THE END OF THE TUNNEL.

important, because I always saw this case as a significant case for the industry. I always felt like we were doing something that really needed to be done. . . . I decided you just couldn't worry about failure."

Perhaps the greatest result of the case, Steve says, was the effect it had on the computer industry. "We made some history. . . . [Caldera] deserves a lot of praise for having the courage and conviction to undertake the case. They did what many in the industry have talked about but never attempted before we filed [the lawsuit]."

The adventures they had and the friends they made also made their involvement a rich experience. "A great aspect of the case," Ryan says, "is that we worked with and we went up against some of the greatest lawyers in the country. . . . Susman Godfrey is known as one of the top commercial litigation firms in the country. The main Susman Godfrey lawyers—Susman, Parker Folse, and Charles Eskridge—all clerked at the U.S. Supreme Court. The Summit Law Group lawyers were also outstanding. One of them, Matt Harris, knew the technology better than Microsoft."

"A big part of the job is dealing with the press all the way through," says Steve. "I was on a friendly basis with one of the lead reporters for the *Wall Street Journal*, and never in my experience had I had anything like that happen."

As for their experience "being a little bit like a spy novel," Ryan says, "I would know there would be a big deposition of a Microsoft witness going on in Seattle at the same time I was in California defending somebody else. . . . It was fun to check the e-mail. Somebody would report, 'Oh, this deposition was awesome. This witness said, 'A, B, C, and D.' And we really nailed

him with this document.' Or you would call people at the various law firms to find out what intrigue was going on with them at the time. That made it exciting."

When asked the obvious question, Ryan answers, "I met Bill [Gates] at his deposition in October of '97. We spent two days out at the Microsoft headquarters in Redmond taking his deposition."

THE FABRIC OF LIFE

One of the aspects of Steve's and Ryan's experience with *Caldera v. Microsoft* was the reality of life outside of the case. Many things happened during the three-and-a-half years besides the lawsuit.

"It was so all-encompassing that it seemed like we all lived through these shared experiences that were real life that were going on while we were totally engaged in a lawsuit," Steve conveys. "Collectively, we experienced births, deaths, illnesses, marriages, divorces, and a few lawyers coming and going. In doing so, we formed deep friendships. . . . We pretty much saw the entire fabric of life."

"One of the things that came of this was . . . I developed a real interest in going and trying to do something outside of the law firm," he says. As Steve leaves Snow, Christensen & Martineau to work as vice president of business development at Alta Technology Corporation in Sandy, Utah, Ryan buckles down to his role of president of Snow, Christensen & Martineau.

Bora Bora, with its pristine beaches and silent guns, is now only a pleasant memory for the Caldera lawyers. Although they have moved on to other cases or new careers, none of them will soon forget the four-year journey that took them to this paradise in the South Pacific.



IS IT POSSIBLE TO BE A LAWYER AND A CHRISTIAN?

BY BRETT SCHARFFS • ILLUSTRATIONS BY JACK UNRUH

BOOK REVIEW: Joseph G. Allegetti.
The Lawyer's Calling: Christian Faith and Legal Practice.
New Jersey: Paulist Press, 1996.



Joseph G. Allegratti's book *The Lawyer's Calling* is an accessible, thoughtful, challenging defense of the view that it is possible to be both a lawyer and a Christian. Picking up a theme sounded by Yale Law School Dean Anthony Kronman in his book *The Lost Lawyer*, Allegratti maintains, "At its core the legal profession faces not so much a crisis of ethics or commercialization, or public relations, but a spiritual crisis. Lawyers and the profession have lost their way" (pg. 3).

Whereas Kronman looked to the historic ideals of the legal profession and the Aristotelean concept of practical wisdom in search of an anecdote for the "crisis of morale" in the legal profession, Allegratti looks to Christianity as a way of transforming our legal culture inwardly, one lawyer at a time, by identifying and applying "resources in the Christian tradition that can help lawyers reconnect their work with their deepest and most profound values" (pg. 5).

It is a formidable project, and it is a tribute to Allegratti, a professor of legal ethics at Creighton University Law School, that he undertakes it. The author recounts an anecdote about a friend who, upon hearing that he was writing a book about what it means to be a Christian and a lawyer, replied, "But Joe, what will you do with the rest of the page?" (pg. 1). The remarkable thing is not that Allegratti did find enough to fill an entire page, but that he manages to pack a very wide discussion of many facets of legal practice into a brief and readable 125 pages.

The Basic Typology

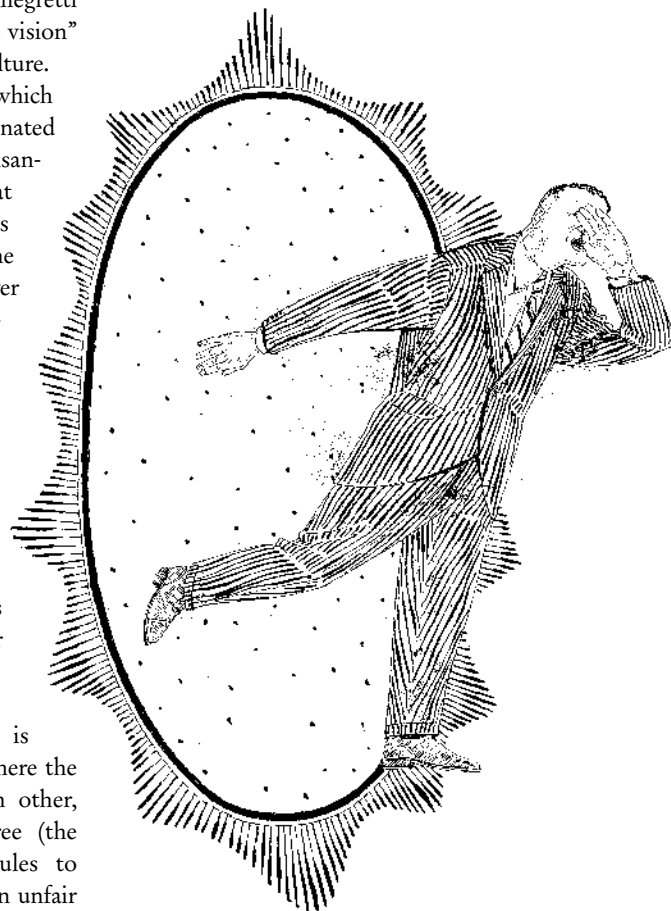
Allegratti uses as a point of departure Richard Niebuhr's effort in his monumental book *Christ and Culture* to identify and evaluate a number of approaches that Christians have taken toward the wider

secular culture. In applying Niebuhr's typology to the legal profession, Allegratti begins by identifying the "standard vision" of the lawyer's role in American culture.

The standard vision, which Allegratti calls the "Code," is dominated by two values, neutrality and partisanship. The lawyer "is neutral, in that he does not let his personal values affect his actions for clients; and he is partisan, in that he does whatever he can to achieve his client's objectives, whatever they might be, limited only by the law itself" (pg. 9). According to the standard vision, "a lawyer's primary responsibility is to represent his client to the best of his ability and leave questions of 'truth' and 'justice' to others" (pg. 8). Rather than letting his own moral scruples intrude on his work, the lawyer acts as the "proverbial hired gun," constrained only by what is legal (pgs. 8-9). Accordingly, "[a] trial is seen almost as a sporting event, where the two lawyers face off against each other, while a neutral umpire or referee (the judge and jury) enforces the rules to ensure that neither party obtains an unfair advantage" (pg. 9).

Adapting Niebuhr's analysis of various attitudes a Christian can adopt towards secular culture, Allegratti discusses four contrasting approaches that a Christian lawyer might take in response to the standard vision of the lawyer's role. Allegratti explains that each of these models represents an ideal type, and as individuals we may find ourselves exhibiting different aspects of more than one of these responses.

The first model Allegratti calls "Christ Against Culture." According to this view it is simply not possible to be a Christian and a lawyer. An example of this approach is a former lawyer Allegratti met at Yale Divinity School, who had abandoned the law because she found that what she did as a lawyer was incompatible with her Christian faith. Adherents of the Model One believe that lawyers "inevitably do things for clients that no true follower of Christ could countenance. Between Christ and the Code is a chasm so wide and so



**THE FIRST MODEL
ALLEGRATTI CALLS "CHRIST
AGAINST CULTURE."**

deep that it can never be bridged" (pg. 11). If this model is correct, a Christian lawyer is faced with a choice of either abandoning one's professional life or abandoning one's commitment to living as a Christian.

A second approach, a mirror image of the first, is "Christ in Harmony with the Code." According to Model Two, there is no perceived tension between the gospel and the Code. Allegratti notes that lawyers who adopt this model are often surprised and even a bit insulted by the question of whether it is hard to be a Christian and a lawyer (pg. 14). Model Two, which Allegratti seems to believe is the dominant attitude of most lawyers, has certain benefits. It frees lawyers from self-doubt and

introspection, enabling them to focus entirely upon their duty to their clients. But there are significant problems with this attitude as well. For one thing, it tends to "blunt the radical message of the gospel and domesticate its countercultural thrust" (pg. 15). More troubling, it enables the lawyer to view himself, in the words of Richard Wasserstrom, as an "amoral technician" (pg. 16). A lawyer in the grip of this approach also fails to see that "God may call us to something *more or different* than the Code" (pg. 16).

Allegretti's third model is "Christ in Tension with the Code." According to this dualist vision, "Christians inhabit two worlds, a private realm in which they relate to God as individuals and are bound by the teachings and example of Christ, and a public sphere where they live and work and must make accommodations to the sinfulness of the human condition" (pg. 17). According to Model Three, there is no way to bring the two realms of Christ and the Code together. Life is compartmentalized, and the two spheres of life are separated. At home, the lawyer "tries to live out his Christian values, but when at work he looks to the Code" (pg. 18).

In response to questions such as "How could you represent such a client?" or "How could you do that on behalf of a client?" the compartmentalizing dualist will respond, "I was only doing my job" (pg. 18). This approach is ultimately dissatisfying, Allegretti argues, because while honest about moral ambiguities, it results in a kind of moral schizophrenia. Allegretti recalls the response of a lawyer friend he complimented for donating time and talents to church service on Sunday. "I've got to do something on the weekend to make up for what I do the rest of the week," the friend explained wearily (pg. 1).

Model Three dualists "forget a simple yet profound truth of the Christian message: God is the God of *all* of life, and so God's claim is on us always and everywhere" (pg. 19). Allegretti also notes that a schizophrenic life is inherently unstable. "Something has to give, and it comes as no surprise that if a lawyer takes positions at odds with his personal values, over time those values will change to comport with his public behavior" (pg. 19). Model

Three slides slowly and imperceptibly into Model Two.

The fourth model Allegretti calls "Christ Transforming the Code." Model Four "asserts that Christ is the Lord of all, even the legal profession, and that Christians are called to serve Christ in all of life, even their life as professionals" (pg. 21). Model Four asks the lawyer to seek to live an integrated life, "to bring his religious values into the workplace, with the hope and trust that God will work through him to revitalize and transform his life as a lawyer, his profession, and ultimately the wider community as well."

Allegretti concedes that while we might feel an attraction to Model Four, it is difficult to know what it means for us in everyday life. He remembers a divinity school professor who, in response to Niebuhr's typology noted, "Everyone wants to be a transformationist, but nobody is quite sure what it means!" (pg. 21).

Living the Transformationist Ideal

Allegretti spends the rest of the book trying to explain what it might mean to try to integrate one's life as a Christian with the secular culture's vision of the Code. In successive chapters Allegretti focuses upon what it means to be part of a "profession" and to have a religious "vocation" or "calling" (chapter 2), the idea of the lawyer-client relationship as one characterized not simply by "contract" but by "covenant" (chapter 3), and the "prophetic ministry" of the lawyer who can be a voice calling her clients back to their better selves (chapter 4).

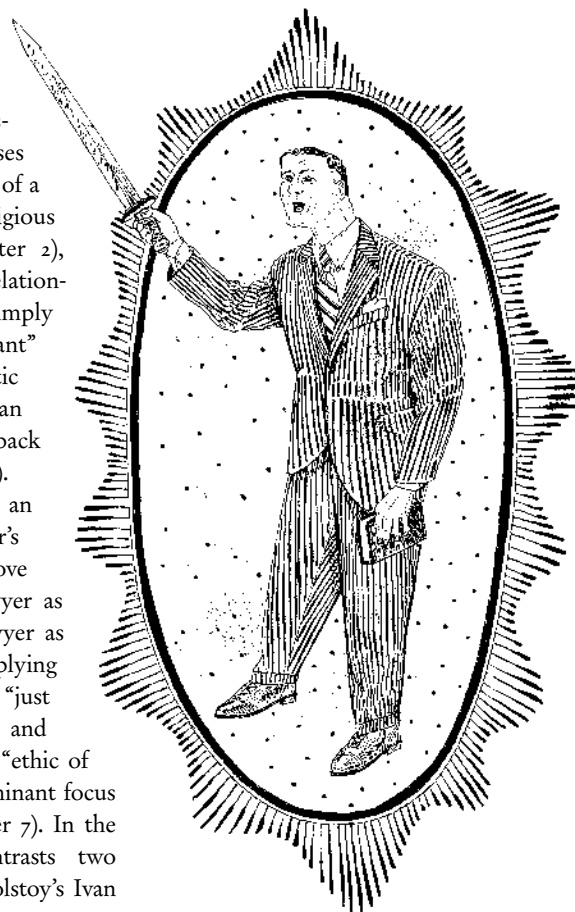
The book then takes an extended look at the lawyer's role in litigation, urging a move from the paradigm of the lawyer as "hired gun" to that of the lawyer as "healer" (chapter 5), applying Christian teaching regarding "just war" to litigation (chapter 6), and advocating the adoption of an "ethic of care" to complement law's dominant focus on an "ethic of rights" (chapter 7). In the final chapter, Allegretti contrasts two lawyers from literature, Leo Tolstoy's Ivan

Ilyich, who is a paradigmatic Model Two "amoral technician," and Robert Bolt's Thomas Moore, who illustrates the Model Four integrationist ideal.

Each of these chapters provides rich food for thought, and each contains concrete bits of helpful advice for the lawyer seeking to integrate her professional life with her religious commitments. Especially for a lawyer feeling dissatisfied with her professional life, the book contains a number of insights and suggestions that might enable lawyers to better integrate their professional work with their moral ideals.

For example, Allegretti stresses the importance of lawyers treating their clients as whole persons deserving of respect, sympathy, and counsel, rather than just a case to be won or settled, or a transaction to be completed. I suspect that by follow-

**A SECOND APPROACH,
A MIRROR IMAGE OF THE
FIRST, IS "CHRIST IN
HARMONY WITH THE CODE."**



ing this simple suggestion, which is surprisingly difficult in the hectic workday of the average lawyer, many lawyers could significantly increase the level of satisfaction they get from their professional life.

In the interest of time and space, I will focus my attention on Allegratti's analysis of the lawyer's "calling" or "vocation" and the implications of lawyers seeking to cultivate an "ethic of care."

The Lawyer's Calling

Medieval theologians such as St. Thomas Aquinas taught that the highest human activity was contemplation of God. In contrast, "normal secular work had no real significance, and was thought to be a hindrance to the religious life, for it distracted one from the leisure that was necessary for divine contemplation" (pg. 27). This view changed with the Reformation. "Luther and Calvin reacted to the medieval devaluation of everyday work by attacking the notion that one could live the Christian life only by abandoning the secular world for the monastery" (pg. 27). Charles Kammer summarizes Luther's thought as follows: "Any occupation becomes a 'calling' if its primary motive is serving God, responding to God's wishes and intentions for human existence" (pg. 27). Thus, after the Reformation, while it is no longer necessary to join the monastery to serve God, "no Christian is exempt from the duty to follow Christ and to serve the neighbor in love" (pg. 28).

Any job, including that of a lawyer, may be a "calling" if our attitude and disposition make it one. The professions—until recently a concept that included only the ministry, medicine, and the law—have a "natural propensity" to be a calling because they exist to serve others (pg. 29).

Having a sense of calling involves both an internal and an external dimension. The "internal call" is a "private realization that one is chosen by God to serve the church as an ordained minister" (pg. 30). For a lawyer, Allegratti describes the inner call as a desire to serve others coupled with "an intuitive sense that one has the right kind of talents, attributes, and life experiences to become a lawyer" (pg. 31). According to Allegratti, "[t]hose who enter law with the intent to bring justice

to a broken world, to vindicate the rights of the weak and vulnerable, to heal broken relationships, to ensure equality to all persons—these persons have responded to a true calling" (pg. 31).

The decision of the church to ordain a person a minister is what Calvin spoke of as the "outward call" (pg. 31). Allegratti suggests that we think of law school "as the rough equivalent of the minister's outward call." So viewed, the law school "is the means to an end—it is the instrument by which we develop the competencies to implement our inner call to service. It is the place where our inner call takes on flesh" (pg. 32).

BYU law school professor David Dominguez's efforts to encourage law students to remember and reclaim the ideals that drew them to the legal profession can be seen as a way of enabling students to reclaim their sense of "inner call" that drew them to the law. Professor Dominguez places before second- and third-year law students the essays they wrote when applying to law school, essays in which they often speak in idealistic terms of the service they hope to provide as lawyers. He then challenges them to bring their current attitudes and plans into harmony with this earlier, more idealistic self.

Having a sense of calling serves several purposes. Seeing her vocation as a calling places a curb on a lawyer's sense of self-interest, which "places limits on certain behaviors that have contributed mightily to the current dissatisfaction with the profession, such as the padding of bills and the neglect of clients" (pg. 33). Allegratti maintains that a lawyer "who regards herself as having a calling cannot help but see her clients differently. A client is not a mere commodity, but a human being, a human being in pain and emotional turmoil, who has come to the lawyer for help" (pg. 33).

The concept of vocation or calling also has the effect of expanding the lawyer's moral universe. "The concept of a calling gives the lawyer a kind of moral compass: it constantly reminds her that her ultimate loyalty is not to a client, or to the Code, but to God" (pg. 33).

Allegratti acknowledges that it is not easy to cultivate a sense of calling "when

our days are a chaotic jumble of constant phone calls, impending deadlines, hurried research, endless meetings, and no-time-to-leave-your-desk-lunches" (pg. 35). Having a sense of calling does not resolve all problems. Nevertheless, "a sense of calling can help us endure and flourish in our work. It can put things in perspective. It can give us hope" (pg. 35).

The Ethic of Care

Once a decision has been made to resort to litigation, Allegratti notes, "there is a near-irresistible drift toward all-out warfare" (pg. 96). In response to the question of what a lawyer's conduct should be during the conduct of a lawsuit, Allegratti endorses Calvin's "admonition about the proper disposition that should accompany a lawsuit" (pg. 96). According to Calvin, "it is not out of order for Christians to pursue their rights with moderation, so long as no damage is done to love" (pg. 96). While this may appear to set an impossibly high standard, Allegratti maintains that "[a] lawsuit can be brought if and only if it can be prosecuted without impairing Christian love. If anger, bitterness, or the lust for revenge infects a lawsuit, even a just cause becomes unjust" (pgs. 96–97).

Building upon the work of Carol Gilligan and Rand and Dana Crowley Jack, Allegratti suggests that such an attitude can be cultivated if the lawyer seeks to develop an "ethic of care" rather than just an "ethic of rights."

In their research, Jack and Jack discovered that while some lawyers conceive of the moral life primarily as a matter of following the rules of the game embodied in the adversary system and the codes of professional responsibility, others are more concerned with minimizing harm and preserving relationships. While an ethic of rights stresses competition, the ethic of care emphasizes cooperation; instead of rights, responsibilities; instead of formal and abstract thinking, contextual reasoning; instead of the fair resolution of disputes, the avoidance of harm. [Pg. 100]

Allegratti cites a hypothetical case from the Jacks' research that illustrates the difference between an ethic of rights and an ethic of care. A lawyer is asked to



ALLEGRETTI'S
THIRD MODEL IS
"CHRIST IN
TENSION WITH
THE CODE."

imagine that he represents a client seeking custody of children in a divorce action. The lawyer inadvertently learns that the client poses a risk of serious harm to the children. The information will remain unknown to the other party unless the lawyer reveals it. If he reveals the information, his client will lose custody of the children, but if he keeps the information secret, his client will win custody of the children. There is no doubt in the lawyer's mind that the other party is the superior parent who should have custody of the children.

The ethic of rights focuses exclusively upon the rights and interests of the client, focusing upon the role of the lawyer as advocate and nothing else. In contrast, a lawyer motivated by the ethic of care will place more weight on the best interests of the child. This approach, Allegretti maintains, provides less certainty. Perhaps the lawyer will urge his client to get counseling. Perhaps the lawyer will have developed sufficient trust that he is able to have

a heart-to-heart talk with his client and get the client to acknowledge that the child is better off with the other parent. Perhaps the lawyer will support the appointment of a guardian to represent the best interests of the children.

This hypothetical case brings into focus a significant shortcoming of Allegretti's book. Stated simply, it leaves unanswered, in fact almost entirely unaddressed, the question of whether, and under what circumstances, one would want to hire a lawyer who manifests Allegretti's transformationist ideal. If we would not want to trust such a lawyer with the representation of our most precious interests, it is difficult to see how we could justify seeking to become such a lawyer ourselves. The question we must ask is whether we would knowingly choose a lawyer whose advocacy is significantly tempered—much more than the professional norm—by values and commitments other than our own best interests.

It is difficult to imagine a client engaged letter in which a lawyer informs a

client that he will pursue the client's rights with moderation, so long as no damage is done to love. If a lawyer would be reluctant to give such disclosure to a client, it is difficult to imagine a justification for secretly adopting such an attitude.

In fairness, Allegretti does touch upon related questions. We can easily imagine ourselves as a client in need of a devoted lawyer's tough love, telling us to forsake a course of conduct that would be wrong or self-defeating. Allegretti quotes lawyer-statesman Elihu Root, who said, "About half the practice of a decent lawyer consists in telling would-be clients that they are damn fools and should stop" (pg. 51). I suspect he is right, although doing so in today's legal market may be much more difficult for a lawyer who has been hired for his expertise with a particular area of the law, than in Root's day when the lawyer-client relationship was much more stable.

The question I found myself asking was this: If I am facing the loss of life, lib-

erty, or property, is it in my interest to want a Christian lawyer who is seeking to live Allegratti's transformationist ideal? Especially if I am guilty, or if I am innocent but the available evidence strongly implies that I am guilty, perhaps what I want is a lawyer who will be wholehearted in his allegiance to my interests. Should I want a lawyer who is going to "pursue [my] rights with moderation, so long as no damage is done to love?"

Allegratti does emphasize the importance of the lawyer as a friend who will stand by his client, but my lawyer isn't going to follow me into prison. Maybe I don't want a friend who will bid me an affectionate farewell as I am led away in shackles, perhaps I want an advocate who will do battle on my behalf without reservation—the prototypical Code-driven lawyer.

At times one feels that while Allegratti recognizes this problem, he does not altogether come to terms with it. For example, in the hypothetical child custody case, Allegratti stipulates that the lawyer is *certain* that the other party is the superior parent that should have custody of the child. But the more likely reality would be that the lawyer is not certain, although he might have nagging questions about what is really in the best interests of the child.

Allegratti's ideal lawyer, we suspect, might work quietly, perhaps even unconsciously, against his client's own interests, while pretending to be a faithful advocate and friend. Allegratti does not face as squarely as he might the possibility that the Christian integrationist might inadvertently thwart justice and the underlying rationale of the adversary system by acting himself as judge and jury of what is best or right.

This is not to say that the integrationist ideal does not deserve our allegiance. There is much about it that is inspiring and encouraging. For one thing, it does not let us off the hook by simply invoking the lawyerly "role." Surely there are things that lawyers should do that would be wrong to do in other contexts, but just as surely Allegratti is right that lawyers can use the Code as a rationalization for turning off their moral lights.

Conclusion

Allegratti is not a lone voice calling in the wilderness. The last few years have seen a small deluge of books commenting upon the deterioration of our legal culture and lawyers' many discontents. Allegratti's offering is distinctive in two primary ways. First, it sounds a tone that is hopeful and optimistic. Near the beginning of the book, Allegratti notes, "This is not a book that expends much sound and fury castigating lawyers and the profession. This is not a naysaying, doomsaying book about all that is wrong with the law and with lawyers." (pg. 5) Rather it is an optimistic book, based upon the author's observation that there are many lawyers who have successfully bridged the gap between their faith and their work.

The second distinctive characteristic of Allegratti's book is that its recommendations focus not primarily upon the legal profession as an institution but upon the hearts and minds of individual lawyers. It is not a call for systemic change, although there would be wide-ranging effects if the book's message were widely embraced and followed. Rather, it is primarily a call to conscience, an entreaty to individual lawyers in their everyday workaday lives, to recognize and find ways to minimize the gap between their personal moral ideals and the professional imperatives that push them away from their ideals.

Indeed, Allegratti's book may best be read as an example of what he calls the prophetic ministry of the lawyer. "The prophet calls the people back to their covenant obligations, holding up the idea of covenant faithfulness against the reality of human faithlessness" (pg. 52). Similarly, Allegratti asks the lawyer who also aspires to be a Christian to seek to be their best selves. Allegratti notes that the prophet's role is both to afflict the comfortable and comfort the afflicted (pg. 57).

Allegratti's book should be read both by lawyers feeling afflicted by the demands and constraints of their professional lives and by those who feel unduly comfortable in those roles, those, perhaps,



**THE FOURTH MODEL
ALLEGRETTI CALLS
"CHRIST TRANSFORMING
THE CODE."**

who make the Model Two mistake of believing that there is complete harmony between their professional roles and their obligations as aspiring disciples of Christ. For the comfortable, Allegratti's book raises a warning that thoughtless adherence to the Code may result in a moral schizophrenia that will lead to the gradual wearing down of the lawyer's preprofessional ideals and aspirations. For the afflicted, Allegratti's book contains a message of hope that it is possible to integrate being a good lawyer with being a good Christian, as well as a number of useful suggestions for ways of going about that integrationist work.

A

CHANGE IN
FLIGHT PLANS

by Lovisa Lyman



ROBERT PAYNE, NEWEST reference librarian at BYU's Howard W. Hunter Law Library, knew exactly what he wanted to do after he earned his JD from BYU in 1999: pursue an LL.M. in environmental law at the University of San Diego. He chose the San Diego program because it was a "focused advanced degree in an area of law that [was] difficult and lucrative." But in a matter of hours, one month before graduation, his plans fell apart.

It happened when Robert visited the San Diego campus and saw where he would be able to afford to live with his wife Melissa, three-year-old daughter Elena, and nearly-two-year-old son Jordan (they had recently discovered they were expecting a third child, to be Thomas). Robert, a totally invested father, couldn't countenance the idea of removing his family from their insulated Utah environment to live in such needy circumstances. Quickly he changed his flight plans—figuratively and literally—and returned to Provo, as certain as he had ever been that he was inspired to do so.

But because he had been planning on the master's program since the previous August, Robert had not actively sought a legal position. On graduation day he was jobless and directionless. He covered his back by picking up freelance research

projects from local attorneys and started to polish his résumé. It was roughly at this juncture that a two-year reference librarian position opened up at the BYU law library (Kristin Gerdy had accepted a visiting professorship at Temple's law school, which vacated the position). One of Robert's newly-minted résumés went to Gary Hill with an unusually sincere cover letter, which began: "I would like to be a reference librarian for the Law School. Never before, in my three years here, have I seen a job which I was more excited for, or daydreamed more over, than this position."

Although Robert's skills, interests, and abilities seemed to fit the job, his journey to law and librarianship had some major detours along the way. As an undergraduate, he majored in English, concentrating, he freely admits, on what he calls *DWEMS*—dead, white, European men—mostly romantic poets, and nourishing his love of research.

Librarianship was Robert's choice for a master's degree after he graduated, but there wasn't a library program at the University of New Mexico, and he wanted to stay close to his Albuquerque home. He began a graduate program in English with the understanding that he could emphasize library services, hoping to work in a university library and teach romantic literature on the side when he graduated.

He was not too far into the program, however, when his father became disabled. To help the family, Robert dropped out of school and got a job at an export/import firm in Albuquerque. The Spanish that he had mastered while serving a mission in Chile contributed to his success, as did other skills. His supervisor wrote about him: "Robert's keen sense of humor surfaces with excellent timing in ways to add to the productivity of the whole effort. He is an enthusiastic disciple of the traditional values of honesty, hard work, and loyalty, and I found these values were consistently confirmed in his performance."

Because of this business experience, Robert entered the MPA program when he returned to school. Very quickly he discovered this was not the program for him, and he switched to law, because "that was where everyone had been telling me I should go since my junior high days."

Not only did he like studying law, but he had ample opportunities to use his research skills. For three years he was employed as a research assistant to Professor David A. Thomas, two of which years he was charged with training Thomas' other assistants, assistants who now earn \$75,000 and more, Robert is proud to say. Thomas characterizes Robert as "a ferociously dili-

gent researcher" because of his excellent contributions as assistant to the editor-in-chief of the Thomas edition of *Thompson on Real Property* and as coauthor of two publications on methods of corridor preservation. Robert also worked as Thomas' teaching assistant for his first-year real property class.

Both his research and teaching were excellent training for Robert's qualification as a reference librarian with the particular assignment to coordinate faculty reference services. As do other reference librarians, he teaches modules of advanced legal research to the student body generally, but he also has the specific assignment of teaching legal research to the LL.M. students.

After several months in his new position, Robert still feels he has made the best possible decision for his family and for those he serves. "I want to help people find the answers they need. I want to do research and gain knowledge as part of my job, simply for the sake of gaining knowledge."

As for his future plans, Robert, as well as those he works with, hopes his appointment at the Law Library becomes permanent. He would also like to finally complete a library degree, perhaps by distance learning, and to teach an occasional class on campus about *DWEMS*. More than any of these things, though, he wants to have plenty of time to spend with his family. It is not unusual for him to literally run home during his lunch break to read a story to his children or to take them for a walk. It's at those moments that he is most thankful he has the opportunity to stay in Utah and at BYU.

W.**COLE****DURHAM****AND THE****MUSIC****OF THE****SPHERES**

by Scott W. Cameron

HAVE YOU EVER CONTEMPLATED the “music of the spheres”—that ethereal harmony the Pythagoreans attributed to the vibration of celestial bodies? On soft summer nights you may hear it as you close your eyes and visualize the orderly progression of the earth in its course around the sun, or you may sense it as you think upon the poetic movement of the galaxies in the immensity of space.

Amidst the harsh sounds of the 21st century, we view the universe too prosaically and are prone to attribute correlating occurrences to coincidence. However, a review of the academic and ambassadorial achievement of BYU Law Professor W. Cole Durham over the past two decades confirms the Pythagorean view that there is ethereal harmony.

Three weeks before the wall came down in Berlin in November 1989, Cole Durham was elected secretary of the American Society of Comparative Law (ASCL). Cole’s colleague at the Law School, Stephen Wood, who had considerable stature within the organization, was the chair of the nominating committee and put forward Cole’s name. Steve explains that Cole’s six years as secretary and then chair of the Law and Religion Section of the American Association of Law Schools (1981–1987), his receipt of a prestigious Max Rheinstein award to study in Germany, and his connections with

the Max Planck Institute for Criminal Law in Freiburg made him an extremely viable candidate.

Within two months of his election, Cole became a member of one of the first teams sent to then Czechoslovakia by the American Bar Association’s Central and East European Law Initiative. His expertise in German criminal law and the associations he made while researching in Germany assisted him in forging several teams made up of both European and American legal scholars. In this time of massive legal transformation in the former eastern bloc, Cole Durham was in a position to assist.

In addition to formal invitations, Cole became an itinerant ambassador in Central and Eastern Europe. With support from the Law School, he traveled through most of the eastern European countries during the months of April and May of 1990, taking overnight trains and spending the days meeting with people. He established ties with human rights organizations, Helsinki committees, and those in the legal academy. Cole was willing to talk to anyone with a link to the transformation of Eastern European society. He introduced himself as an officer of the American Society of Comparative Law, and hoped the door-to-door skills he learned in Germany as a missionary 20 years earlier would lead to other contacts. With the tremendous need for advisors in Eastern Europe and people hungry to discuss the challenges they

faced, Cole’s willingness to meet the people in their own cities and in their own homes was a valuable first step.

This whirlwind networking was enhanced by a second fortuitous event in 1991. George Fletcher, one of Cole’s professors at Harvard, who was then at Columbia, involved Cole in “Raising Rights Consciousness,” a one-month training program for talented young people in law from Eastern Europe. Others included on the faculty were Charles Fried, who succeeded Rex Lee as solicitor general, and distinguished Europeans such as Andras Sajó, who later visited at BYU. Of the experience Cole said: “While for 15 years I had taught students whose primary concern was, what job am I going to get, and what will my starting salary be? all of a sudden, I had people from all over Eastern Europe who were asking, how do we rebuild our world?” This experience awakened Cole to what a small group of people can do in terms of having an impact on the world. It also put him in contact with some people of influence who were involved with all kinds of law reform initiatives and were also sensitive about ways that those efforts could go awry.

While Cole’s instincts were initially academic, his background in comparative law sensitized him to what was happening in Eastern Europe, a change he describes as “being of a magnitude seen perhaps once in a century.” To add perspective Professor Durham notes, “While there is stress associated

with a legislative session each year in this country when legislators are meeting to merely patch up or amend legislation, try to contemplate the quantum increase in stress on a legislature that has an entire code to draft, starting from a point where nothing exists.” After teaching for two years in the Raising Rights Consciousness Program, Cole was asked to teach at the Central European University in Budapest. He has taught there every spring since 1994, having earned the designation of a “recurring visiting professor of law.”

Another important point of contact for Professor Durham also had its origin in the 1980s. The International Academy for Freedom of Religion and Belief (IAFRB) was organized in 1985, and Cole Durham was one of the founding members. In 1991 he was made a member of the board of directors, and in 1996, a member of the executive committee. This organization, because of the credibility and diversity of its board members and fellows, has turned out to be a particularly effective vehicle for carrying out multinational comparative conferences and consultations on religious freedom issues. The individuals involved in this organization are a veritable “Who’s Who” of religious freedom experts in the United States, Europe, and other parts of the world.

Professor Durham’s efforts to sponsor international conferences and publish a yearly international issue of the *BYU Law Review* over the past 15 years have helped pave the

way for expanded efforts in organizing conferences and promoting scholarly work in the field of freedom of religion. Since 1990, working individually and as a member of the International Academy Board, Professor Durham has organized more than 30 international conferences. Each October he has been able to sponsor many of these international scholars and leaders at a conference at Brigham

McKenzie had been hired to lobby the Russian parliament, which was considering a "draft law" on religious liberty. Bill suggested to his partner, Dick Johnson, that Cole Durham be hired to analyze the proposed legislation. Professor Durham spent the summer of 1992 working on a memorandum on the draft law. His memorandum was a scholarly analysis of each provision of the draft law and its strengths and weaknesses in

draft law in Russia began. By the third day, the Russians were saying, "Why do you keep talking about draft law? There is no draft law out there." Cole modestly remembers, "We had the feeling that we had sort of killed off a fairly dangerous draft."

Cole's work on Russian developments in late 1992 and early 1993 prepared him for a succession of subsequent efforts to help oppose or ameliorate problematic Russian legislation. Three months after the March 1993 conference, a different and even more restrictive draft surfaced. This had been percolating in back chambers of the Supreme Soviet during the spring and emerged unexpectedly in the summer. Cole was involved in u.s. efforts to oppose this legislation, which was initially vetoed by Boris Yeltsin, and a threatened override vote came to naught as a result of the dissolution of the Supreme Soviet in the fall of 1993.

During that time, shortly after the standoff at the houses of parliament in Moscow when the Supreme Soviet was reconstituted as the Duma, Elder Dallin H. Oaks of the Quorum of the Twelve Apostles, Elder Dennis B. Neuenschwander, area president and member of the First Quorum of the Seventy, and Bill Atkin met with the newly appointed Head of Religious Affairs in Moscow.

Seated next to the current Head of Religious Affairs was a bearded gentleman who was introduced as Father Polosin. Father Polosin had been the Head of Religious Affairs when the draft law was being considered. Bill relates that after the meeting, Father Polosin told Elders Oaks and

Neuenschwander that the memorandum that Cole had authored was the "single best and most helpful submission received with regard to the proposed legislation." Professor Durham's measured delineation of the legislation, section by section, with thoughtful observations tied to international law had been persuasive. Bill indicated that for years the only group in the u.s.s.r. with significant exposure to Western thought were the lawyers who read carefully and seriously everything on international law. Indicating that Russia takes its responsibility under international law and treaties very seriously, Bill explained, "Cole's analysis was in the exact format to be persuasive to that group."

New drafts began to emerge after the new Russian Constitution was adopted at the end of 1993, but progress was slow. A fairly reasonable draft was developed by the end of 1996, but this was commandeered by some hard-liners at the end of May, and very restrictive legislation was adopted by July 4, 1997. Cole spent much of the summer of 1997 working with another attorney, Lauren Homer, preparing analyses of successive drafts and a compromise version that was ultimately passed when Yeltsin's veto of the legislation was threatened with an override vote. Cole's network of contacts with scholars, government officials, and other experts both in Russia, Europe, and the u.s. helped mitigate many of the potentially harsh measures of the Russian law.

Recently, Cole was invited to serve as a co-chair of the Legislative Working Group of the Advisory Panel of Experts



Young University. This has been a great opportunity for students with foreign language expertise to meet with leading experts and to use their language skills in a professional setting in conjunction with conference activities.

An important collaborative effort between Professor Durham and William F. Atkin, now assistant legal counsel to the LDS Church, had its origin in 1992. At that time Bill was employed in Moscow by Baker & McKenzie as managing partner of the firm's Commonwealth of Independent States (CIS) office. Baker &

light of international law. Bill said they had the memorandum translated into Russian and delivered it to the committee.

The memorandum was clearly being used by the committee in drafting the legislation. It also won Cole and Bill the confidence of the person who was acting as staff to the committee. Cole suggested to this individual that through the International Academy they could arrange a meeting in Moscow with 15 or 20 people from the u.s. and Europe. The conference lasted three days. Following a number of formal presentations, talk about the

on Freedom of Religion and Belief, which has been established under the auspices of the Organization for Security Cooperation in Europe (OSCE). This is an important initiative of the OSCE's Office of Democratic Institutions and Human Rights and is aimed at helping to promote better implementation of freedom of religion and belief in OSCE countries (the U.S., Canada, Western Europe, and all the countries of the former communist bloc). The panel of experts has noted that no one has a comprehensive oversight on religion policies in all of these countries. Cole has done a background report on registration issues for churches. He indicates, "There is a crying need for more extensive information so that we will have a better understanding of the legal framework of religious freedom in these countries." Cole has been asked to lead an effort to help gather key legal materials in this area and make them available through a Web page. The panel of experts is also spearheading efforts in legislative reform, conflict resolution, and education for tolerance.

Efforts of this type make sense, of course, to people from many different countries and faith traditions. But to Cole, these take on a special significance in light of scriptural passages such as D&C 93:33, which instructs that it is God's will that we "obtain a knowledge . . . of laws of God and man, and all this for the salvation of Zion." Even in the limited sphere of laws directly relevant to freedom of religion, Cole explains the difficulty of following this injunction. "Even in the relatively developed OSCE countries, no one has succeeded in

compiling a comprehensive set of the relevant constitutional and statutory texts. We do not know the laws of different countries. No one does. You can't get copies of them. For example, even people administering religious matters at the federal level in Moscow have not been able to succeed in keeping track of relevant legislation (often unconstitutional by Russian standards) that is being adopted in the regions. It is vital to be able to get access to such materials so that it becomes possible to analyze them, to work on reform measures, and to improve practices."

At the university conference in August 1999, Cole was awarded a prestigious University Professorship. Due to his travel schedule, the installation banquet honoring Professor Durham could not be scheduled until November 3, 1999. One of the speakers, Elder Dennis E. Neuenschwander of the First Quorum of the Seventy, who has been personally involved with the LDS Church's effort to obtain legal recognition in Eastern Europe and Russia for over a decade, commented on Cole's unassuming nature: "Professor Durham was quietly going about doing good without significant notice." Elder Neuenschwander went on to describe the natural tendency to look for prominent people when something important has happened, "when in actuality the work is done by those prepared to do it, and they generally do it quietly, and occasionally, in the words of the Doctrine and Covenants, even the person himself 'knowest it not' (D&C 35:4). Elder Neuenschwander indicated that "the rest of us could do what we did because of the context that Cole Durham had prepared for

us." He also indicated that Cole's service was doubly appreciated as he served without "wanting something out of his service."

In recognition of Professor Durham's work, Brigham Young University and the J. Reuben Clark Law School have founded the BYU International Center for Law and Religious Studies, with Professor Durham as director. In a recent grant proposal, Professor Durham described the work of the Center.

The Center aims to encourage interdisciplinary study that will help explore the fundamental values of freedom of religion both as these have emerged historically in the United States, and as they are evolving in other parts of the world. It will place special emphasis on study of the legal implications of these fundamental values and is committed to do so taking a broad comparative perspective. The Center will promote scholarly study through organizing symposia, colloquia, lectures, and workshops that will involve key church-state leaders both from the United States and abroad. It will promote dialogue between scholars and government officials and will facilitate the development of networks of experts working in this area to assure support for those working in this field around the world.

[The goals of the Center are to nurture] *relationships with government officials and scholars who are shaping long-term church-state policy, [to help] strengthen commitments to the universally accepted right to freedom of religion or belief enunciated by the American Constitution and other constitutional instruments around the world, and to organize a group of experts who are assisting with religious freedom law reform on a global basis.*

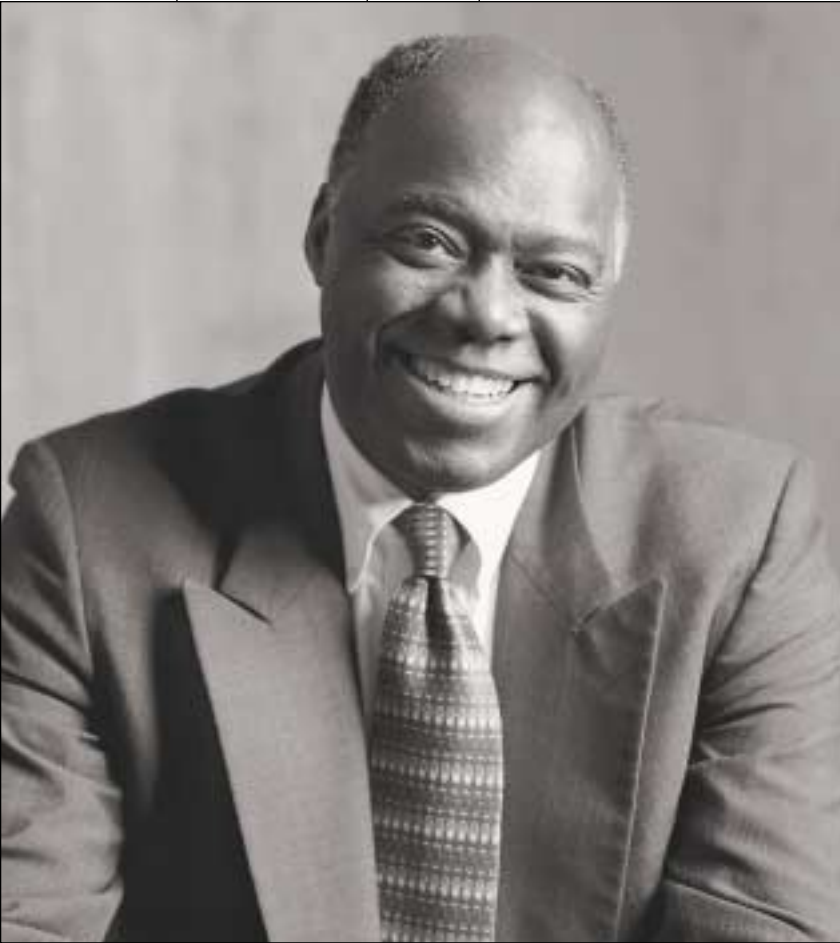
Professor Durham is quick to point out that there are many others involved in these same efforts. Professor Frederick M. Gedicks, of the BYU law faculty, and Steven Smith, now at Notre Dame, have emerged as major thinkers on constitutional theory dealing with church-state issues in the United States. Several other members of the faculty have published and/or made other scholarly contributions in the field: e.g., Kif Augustine-Adams; Ray Jay Davis; James Gordon; Brett Scharffs; David Thomas; Kevin J. Worthen, '82; Jay Bybee, '77; and Michael K. Young, dean of the George Washington Law School, BYU '73, Harvard Law School '76, who has a presidential appointment as vice chair of the International Religious Liberty Commission established under the International Religious Liberty Commission Act of 1998. According to Cole, Dean Young's appointment gives him a significant voice in influencing policy in the United States and between the United States and other countries.

While there is much to be done for the cause of religious liberty throughout the world in the coming decades, in retrospect, it is clear that Professor W. Cole Durham has been quietly doing good. There is a grace and symmetry that emerges when looking at the last 20 years of Cole's life, which evokes the music of the spheres. Any assertion of coincidence or mere good timing seems a woefully inadequate explanation. With the establishment of the BYU International Center for Law and Religious Studies, we will all keep listening, for it appears there is more "music" forthcoming.

WINSTON

WILKINSON

BLACK
MORMON
REPUBLICAN



by Lovisa Lyman

IMAGINE AN AFRICAN American child growing up in the United States in the 1950s and early 1960s insulated and protected from racial discrimination. The scenario is hard to believe but true of Winston Wilkinson, LDS Development donor liaison for the J. Reuben

Clark Law School. Winston, a Howard University law graduate with years of experience in government service in Washington, D.C., brings hard-won wisdom, a genial nature, and a warm, open smile to his recent appointment.

Named for Winston Churchill, whom his mother admired, Winston Wilkinson was born and grew up in

Cedar Heights, Maryland, an all-black, mostly agrarian community about a mile outside of Washington, D.C. Separated from the nearest white community by a eight-foot fence topped with barbed wire, Winston attended black schools and a black church and didn't have a television to access the outside world. "Hate was not instilled in us," he avers. Although he realized that his father occasionally came home frustrated from his job at the Government Printing Office, he never heard any details. In retrospect he recalls that on those occasions his parents would discuss matters behind closed doors. As an adult, Winston learned that his bright but uneducated father was repeatedly passed over for promotion during the 35 years he worked at GPO and regularly had to teach new white employees their jobs, only to have them rise to positions of authority over him. He bore this treatment quietly to protect Winston and his three sisters, but he could not protect them indefinitely.

In 1962, 18-year-old Winston left home to join the Navy, and it was then that he first encountered racial discrimination. He and some white servicemen companions ordered a restaurant meal after which the waitress markedly informed them that they could buy the food but wouldn't be allowed to eat it inside. His friends recognized the slight before he did and insisted that they all leave. (Subsequently the restaurant was placed off-limits to military personnel.)

While Winston was stationed in Washington, D.C., President Kennedy decided that the White House honor guard needed ethnic variety, and Winston was chosen to

join the elite group. After an extensive security investigation, he became the first black serviceman to participate in official White House ceremonial functions, such as state dinners.

A year into his assignment with the color guard, Winston's unit was called on for riot control when Martin Luther King, Jr., delivered his "I have a dream" speech to a packed Washington, D.C., Mall. Winston and 10 other black servicemen hurriedly conferred about what they would do if they were ordered to turn their bayonets on their own people. They agreed to lay their weapons on the ground and take the consequences. Fortunately, King's words had a calming effect, and Winston and his companions never took an action that could have led to court martial. As much as he was wooed by charismatic King, Winston couldn't forget that his father's dreams were never attained through passive resistance. Later Malcolm X, whom Winston calls an "eye-for-an-eye guy," would win his allegiance.

An incident in 1964 gave him a substantial push toward Malcolm X's corner. As a joke, Winston's chief petty officer assigned him to carry the Alabama state flag in Lyndon Johnson's inaugural parade. As Winston held the flag at attention in the Sam Rayburn Office Building, a stranger approached him and attempted to wrench the staff out of his hands. Others subdued the man and someone told Winston that his assailant was Governor George Wallace, an adamant segregationist from Alabama. Later that same day as Winston carried the flag on the parade route, Wallace's limousine was right behind him. Each time

Winston slowed to a stop, the driver eased the limo into the back of his legs, nudging him while revving the engine as though he would run Winston over. No longer was he insulated from Southern hatred and prejudice.

After four years in the honor guard, Winston used the GI Bill to attend Morgan State University in Baltimore, where he starred in basketball. There, military spit and polish gave way to an Afro halo and a Fu Manchu mustache that reached his chest. Similar changes occurred mentally, and before long he joined fellow students at sit-ins, pitching tear gas canisters back at the policemen who threw them.

His growing anger was tempered somewhat when he moved on to law school and a fellow student advised him that to prepare for future crises he must develop mentally, physically, and spiritually. Though raised a Christian, he saw his spirituality as his weakest suit and began to search for a belief he could truly espouse. After serious introspection, he and his wife, Gloria, whom he had met at Morgan and married in 1970, embraced Islam and changed their names. For three years he was a believer, but he was still not entirely satisfied. He recalls praying a number of times for guidance in finding the religion that would answer all of his needs, but not receiving a response.

He was making progress professionally, however. Upon graduating from Howard, where he concentrated on city planning and zoning rather than on litigation, he clerked in the country attorney's office in Prince Georges County, Maryland, then moved to the county executive offices, where

he remained until 1981. There he determined to become even more involved in politics and joined the Republican Party.

In 1980 he attended the Maryland Republican State Convention. In the hotel lobby, he passed a man he'd never met before and suddenly felt prompted to stop and ask the stranger about his religion. The man was Dallas Merrell, who later became a member of the Quorum of the Seventy. Merrell responded that he was a Mormon, and when Winston pressed him for more details, he graciously invited the Wilkinsons to his home for dinner and to meet the missionaries. After two lessons, Winston knew the Church was what he wanted, but Gloria took a bit longer to convince. She was particularly concerned about how they and their children would be accepted in a white church. Merrell assured them there were black members in the congregation, and they agreed to attend. None of the black Saints were there the week the Wilkinsons went to church, however. Nevertheless, the members were friendly and warm. (Winston admits that all entries into new wards haven't been quite as warm. "For a second I wonder if it's because I'm new or because I'm black, but I prefer to think that it is because I'm new.") Once they finished the lessons, Winston, Gloria, and their oldest son were baptized. (The couple's daughter and other two sons were baptized as they came of age.)

Some time after their baptisms in 1981, when the family was well established in the Church, Winston discovered that blacks had not held the priesthood before 1978. Although it took him some time to work through the

issue, his strong testimony sustained him. Winston has relegated the priesthood issue along with other questions and feelings about racial injustice to a compartment at the back of his mind. He says, "Blacks are still fighting battles in their minds that have already been fought in reality." The gospel helps him deal with the contents of that compartment.

The same year his family joined the Church, Winston began working for the Department of Education helping to draft national policy. Later, he served as deputy assistant secretary for civil rights at the Department of Health and Human Services, dealing for a time with Title IX and women in sports issues. His supervisor was Clarence Thomas.

While Winston worked for the government, Gloria worked for Church public affairs in the Washington area, making many contacts with Church leaders and hosting ambassadors from around the world and visiting dignitaries. Between the two of them, they became well acquainted with a wide range of people in and outside the Church. But as Winston's tenure drew to a close, they necessarily began to look for new arenas.

When Winston was a young boy in Cedar Heights, he had dreamed of going West. Now that desire rekindled and in the mid-1990s he had an opportunity to work in Utah Governor Leavitt's administration. When he came to Utah to interview, he also investigated an opening in the human resources division of the Church offices. He accepted the human resources position and became part of in-house counsel in such matters as sex-

ual harassment. In 1999 he moved to his current position at LDS Development where he is assigned to the Law School. His legal background, expert knowledge of politics, and wide acquaintanceship on the east coast prepared him to assume the fund-raising efforts in the eastern United States. Though new to fund-raising, Winston sees his career change as "divinely inspired."

Uniquely placed by his experience to take on the interests of the Law School, Winston is also eager to be involved in and contribute to his local community. A resident of Sandy, Utah, he is currently running for one of the new county commissioner slots and has wide-ranging support from the constituency because of his long government service, community planning skills, and comprehension of minority needs and aspirations.

Winston characterizes himself as "three times a minority: I'm a Republican, I'm black, and I'm a Mormon." In fact, Winston's experiences combine to produce a complex, caring individual who has successfully compartmentalized the questions of racial injustice into a place he does not visit very often and which makes him more determined to improve others' lives.

This background explains his attitude toward his position as donor liaison: "It's not about fund-raising" but "about saving people's lives." He is particularly concerned about the many bright, capable students who would not be able to attend Law School without donor support. He assures potential donors that becoming "part of someone's life is what giving is all about."

FIT FOR THE KINGDOM:

LAW SCHOOL DONOR

LIAISON

RICHARD

FITT

by Lovisa Lyman

FOR THE PAST YEAR Richard Fitt has been assigned to BYU Development as a donor liaison for the Law School. He recalls one of his early experiences in fund-raising when he worked for LDS Foundation* in Northern California. A local CPA who is a member of the Church contacted him about a nonmember couple who would be paying high taxes if they did not give a charitable gift. The CPA had outlined the various educational interests of the Church for the potential donors. When he mentioned Ricks College, they perked up and wanted to know more about the school. Richard had provided the CPA with a copy of a video on a program for outdoor education of the handicapped, and the CPA invited the couple to view it. Afterward, they confided that they had a handicapped son named Rick. Their gift of \$300,000 substantially furthered the Ricks College program.

When people ask Richard Fitt what he does, he often illustrates his explanation with such stories. "Fund-raising for the Church is very missionary-like," he says. "It's absolutely clear that we are directed by the Lord if we are doing what we should be doing." When asked what they should be doing, he answers, "All we do is build relationships and help donors do what they want to do."

Like many involved in fund-raising, Richard came to the field by a circuitous route. Both his BA and MA, earned at BYU, were in humanities, with emphasis on art history and French literature. The vague notion that he would someday teach gave way to successful forays into sales and marketing in the San Francisco Bay area where he was reared. In 1985, almost by accident, he heard about an opening for a position with LDS Foundation in Northern California. He learned that LDS Foundation personnel are employed and staffed through Church headquarters in Salt Lake City and deployed to particular areas or assigned to specific projects.

Since Richard lacked the requisite experience in finance and charitable giving for the job, he didn't think his application had much of a chance. To his surprise, he was called in for personal interviews and offered the job. At the risk of seeming ungrateful, he asked why he was chosen over other applicants. His new employer assured him that finance and charitable giving can be learned, but selling and people skills cannot.

Richard's people skills were immediately called into service. He began by contacting past donors; professionals involved in charitable giving and estate planning, including attorneys



and CPAs; and ecclesiastical leaders who are often consulted about giving charitable gifts. Next Richard made presentations to LDS stake leaders so they would know how to manage their part of the transaction. In a bishopric himself at the time (in fact, since 1980 he has served as a counselor or bishop every year but one), he knew how burdened these men were, so he requested that they do no more than remember his name. Richard follows a similar approach for the Law School.

One substantial gift in California came as a result of an ecclesiastical contact. A stake president found out that a less-active widow in his stake wanted to give a gift, and he referred her to Richard. As they visited, Richard discovered something she loved. Before her husband's death, the couple had gone on cruise after cruise—not because they loved cruises but because they found that a cruise ship is a wonderful place to

ballroom dance. Richard told her about the BYU Ballroom Dance Program, and she was delighted with the opportunity to contribute a generous million dollars. Subsequently, she enjoyed the results of her gift when she attended many ballroom competitions.

"You try to discover their dreams," Richard explains of his approach, "what they want to accomplish, their vision of the future, and then try to make as good of a match as you can."

Large or small, "every penny of any gift goes to the project itself." Modest gifts are as important to the effort as large ones. "It's amazing how helpful \$10 can be when the whole amount goes to a particular destination," Richard says. The important thing is that the donor feel "good about the gift and that it will make a difference."

In 1993 an opportunity to learn more about the legalities of charitable giving opened up

in Provo. Richard and his wife, Patricia (Tricia), had met at BYU and welcomed the chance to return to Utah with their three children. In the LDS Foundation's technical assistance office, he joined three attorneys in counseling donors—generally through their professional representatives—about ways to make gifts the most beneficial to the university and the donor. Their efforts, geared more to the professional than to the giver, served as a resource for attorneys. Although Richard lacked a law degree, he was the only one in the office who had worked as a donor liaison before. Thus, while he gained a healthy respect for the legal challenges of charitable giving, including trusts, estates, and annuities, Richard shared his long experience in the human side of giving. “Lawyers want to look at all sides,” he says.

Though his time at technical assistance was mutually productive, Richard missed direct contact with donors. After five years, he was reassigned to the College of Humanities and the Lee Library, areas heavily involved in fund-raising for new buildings. Then in 1998, when Development's Law School representatives Bruce Snow and Larry Bluth moved on—Bruce to become executive director of Development for BYU, and Larry and his wife to preside over the Mexico City Temple Visitors Center—Bruce invited Richard to assume Law School fund-raising for the western United States.

Richard's past experience helped him better understand what lawyers face in protecting the university, its institutions, and their donors and uniquely prepared him for the new position. Best of all, he still works

directly with donors, though his efforts also extend to attorneys who represent donors. “The Law School has a natural constituency—graduates of the Law School and attorneys, either BYU graduates or not,” explains Richard.

In approaching these “extraordinarily gifted, incredibly talented people” Richard first seeks to establish a relationship. “My job is so much more building genuine relationships than fund-raising. Naturally people realize when you contact them that you are interested in their money, but they can see very clearly if you are *only* interested in their money.” Sincere interest cannot be feigned and should never be pushy. “Pressure takes away from the charitable nature of the gift, robbing donors of the blessing of giving a totally voluntary contribution.”

Publicity can also dilute the joy of giving. Richard recalls another gift he arranged. Even now he is hesitant to tell the details, since the donor insisted on complete anonymity. The diminutive woman involved was a college science professor who lived on pristine property abutting a national forest. One day an inexperienced logger cut down a tree on government land, which fell onto her property, hitting her, breaking her leg and jaw, and inflicting internal injuries. After six weeks of hospitalization with her jaw wired shut and months of recovery, she finally received a settlement from the government. About that time, she was diagnosed with bone cancer. Since the settlement of \$40,000 did not begin to compensate her for the money she had spent on her accident expenses, she determined to give the money to the LDS Foundation

instead. She told Richard about two causes dear to her heart: BYU—Hawaii and teaching science to youngsters. Together they drafted a scholarship fund for Polynesian students who wanted to become science teachers. Her final hope was that she would be able to go to Hawaii to set up a related tutoring program. Against all medical expectations, she went, lived in Hawaii for two months, and returned home to die a month later. Richard admits he grieved the death of this strong, determined woman: “You become so involved with people that you are almost treated like members of the family.”

Though difficult to heed in this woman's case when she was so ill, Richard realized one of the truths of giving: “Don't try to dissuade people from what they want to do. The gift is the donor's stewardship. The liaison's job is to give options and counsel.” As a footnote to this story, Richard says this donor continues to give. He recently learned that with the settlement of her estate the Foundation has received \$50,000 to fund scholarships for Polynesians and Latin Americans at Church colleges.

The Law School is still reaping the benefits of Bruce Snow's and other Law School donor liaisons' work. “We have helped to harvest where they plowed and planted,” Richard says of much of his and Winston Wilkinson's service. “The Lighting the Way Campaign was tremendously successful. But now we are plowing and planting for future harvests.” Richard is wholly committed to current Law School projects, including the Rex E. Lee Endowment, which funds an endowed chair and the Rex

E. Lee Advocacy Program; Cole Durham's International Center for Law and Religious Studies, which strives to assure that religious liberty is built into the language of emerging constitutions in Eastern Europe; and Richard Wilkins' World Family Policy Center, directed at helping families internationally to stand against policy-making institutions and people with antifamily agendas. In addition, Law School liaisons seek ongoing funding for scholarships and professorships. Currently Law School development is setting up a voluntary organization for the Lee Memorial Fund. “We need participants in time and treasure,” says Richard, who is talking to alumni, law society units across the country, and other attorneys. “All you need to qualify is a desire to make friends.”

For the past 15 years, Richard has made many friends while helping generous people find the projects they can feel good about and then assisting them with the intricacies of actually giving their gifts. “Most donors,” he has discovered, “regard their wealth as a stewardship, and they want to use it properly. If they are LDS, they usually view their donations as helping to build the kingdom as well.” They subscribe to the Savior's words: “No man, having put his hand to the plough, and looking back, is fit for the kingdom of God” (Luke 9:62). So does Richard Fitt, whose hand is firmly on the plow of the Law School.

*LDS Foundation is the “umbrella” department that oversees all fund-raising efforts of the Church, including BYU Development.

Clark Memorandum

J. Reuben Clark Law Society
J. Reuben Clark Law School
Brigham Young University

