

TRIAL BALLOON: SARBANES-OXLEY AND THE MYTH OF THE LAWYER-STATESMAN

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While firms remain determined to keep clients happy (and their own coffers full), lawyers must strive for the high moral standard epitomized by the lawyer-statesman. Speiser analyzes the lawyers-statesman of the 19th century who protagonize academia to reconstruct a practical approach to client purification.

Trial Balloon

Sarbanes-Oxley and the Myth of the Lawyer-Statesman

by Stuart M. Speiser

Wouldn't it be great if lawyer-statesmen like Thomas Jefferson, Alexander Hamilton, Daniel Webster, Elihu Root, Henry Stimson, and John W. Davis were still around? As they did in their own times, they would shuttle between the highest echelons of government and their private law offices. After distinguished service in public office (usually at a considerable financial sacrifice), they would return to their private practices, where they would use their immense prestige to talk crooked clients like the savings-and-loan swindlers and the corrupt executives of Enron and WorldCom out of their nefarious schemes—and, along the way, inspire others, who in turn would purify their clients and induce them to put the public interest ahead of their own selfish interests. They would, in the words attributed to Elihu Root—a leading lawyer-statesman of the gilded age—spend half their time telling would-be clients that they are damned fools and should stop acting against the public interest.

So goes the legend of the American lawyer-statesmen as recounted by several influential commentators. It's a beautiful story. But is it true? Is there, in fact, as much as a grain of truth in it? If not—if it is only a myth—does its continued propagation pose an obstacle to the balanced reforms needed to promote not only the public interest but also the independence and integrity of the legal profession? Will its deployment to resist "rule-based ethics" lead instead to Dra-

conian statutes in the pattern of Sarbanes-Oxley, designed to make lawyers responsible for purifying many aspects of their clients' business operations?

To answer these questions, we need to do something never before attempted: We must put the law practices of American lawyer-statesmen under a microscope to see what they actually did for their clients. Fortunately, there is plenty of evidence to be discovered. But first, let us examine the claims made for the "purifying" activities of the lawyer-statesmen, as recounted in prominent books authored in the early 1990s by Anthony T. Kronman, Mary Ann Glendon, and Sol M. Linowitz, and as echoed in a recent article by U.S. District Judge Jed S. Rakoff, "Is the Ethical Lawyer an Endangered Species?" Vol. 30, No. 3 LITIGATION at 3 (Spring 2004).

Exhibit A: Kronman's Lost Lawyer

In 1993 Anthony T. Kronman, dean of Yale Law School, published his fourth book, *The Lost Lawyer: Failing Ideals of the Legal Profession*, which the *New York Law Journal* hailed as "a major document in the history of American law." It remains highly influential and widely quoted. The introduction describes the crisis that Kronman calls a threat to the soul of the legal profession—a crisis that "has been brought about by the demise of an older set of values that until quite recently played a vital role in defining the aspirations of American lawyers."

He says that at the center of that older set of values was an ideal with its roots in the past, which he calls the ideal of the

lawyer-statesman. Kronman concludes that the leaders of the early nineteenth century bar viewed their work and social functions in classically republican terms and embodied the ideal of professional excellence, which the members of the bar as a whole highly valued. The precipitous decline of this ideal Kronman attributes to the explosive growth of the country's leading law firms, which created a new, more openly commercial culture that has marginalized the place of the lawyer-statesman.

This begins Kronman's broadening of the lawyer-statesman ideal to include the classical republican visions of civic virtue, prudence, and practical wisdom. Reflecting his pre-law school doctorate in philosophy and his authorship of the widely praised 1983 book, *Max Weber*, Kronman depicts the lawyer-statesman as a person distinguished by the special talent for discovering where the public good lies and for fashioning the arrangements needed to secure it. The lawyer-statesman is a leader in the realm of public life, and other citizens look to him for guidance and advice, as do his private clients.

By citing the lawyer-statesman's special talent for discovering the public good and securing it by advising his clients about "ends," Kronman introduces client purification as an important element of the lawyer-statesman's private practice.

Kronman concedes that "lawyers in the past were not giants with extraordinary gifts that dwarfed our own, and on the whole had no more success in living up to their ideals than their counterparts do today." But, unlike our pro-

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genitors and contemporaries, Kronman lavishly portrays the lawyer-statesmen as “paragons of judgment,” “models to be copied and admired,” “the embodiment of professional excellence,” prepared “to sacrifice their own well-being” for the public good, persistently offering “advice about ends” to convince their clients to serve the public good. Not surprisingly, *Lost Lawyer* has been interpreted broadly as a call to return to the deeds and practices, not merely the ideals and aspirations, of real-life pre-1960 lawyer-statesmen.

We are seeking here the historical facts: Did any of the lawyer-statesmen actually attempt to purify their clients, and did this inspire their fellow private practitioners to emulate those efforts? The above Kronman quotations suggest that he believes the answer is a double yes, but in the end, he submits no evidence. Indeed, we look in vain for a single example of client purification in the practices of the lawyer-statesmen.

Exhibit B: Glendon’s Nation Under Lawyers

Mary Ann Glendon, Learned Hand Professor of Law at Harvard Law School, is recognized as a leading authority on constitutional law, human rights, and the legal profession. Her 1994 book, *A Nation Under Lawyers: How the Crisis in the Legal Profession Is Transforming American Society*, received glowing reviews. The *New York Times Book Review* called it “One of the most accessible and best-written books about the legal profession in the last few years.”

Glendon’s *Nation Under Lawyers* was published the year after *Lost Lawyer*, which she quotes several times. She identifies the “crisis” of her subtitle in nostalgic terms similar to those of Kronman, declaring that lawyers, judges, and teachers are “rapidly shedding the habits and restraints that once made the bench and bar pillars of the democratic experiment,” leading to a “far-reaching transformation of lawyers’ beliefs and attitudes that has been quietly under way since the mid-1960s.” *Nation Under Lawyers* at 3, 6. Among radical propositions that “have achieved respectability and prominence, if not dominance, in mainstream legal culture,” she lists the notions that “law is a business like any other; and that business is just the unrestrained pursuit of self-interest.” *Id.* at 6.

She agrees with Kronman that the large corporate firms once set a shining example for the profession, but she limits that influence to the period between 1920 and the mid-1960s, which she calls “the golden age.” She claims that in those good old days, the “wise counselor” (Kronman’s lawyer-statesman) was able to restrain the forces that brought on the post-1960 crisis. Indeed, she finds it remarkable that so many lawyers “were so widely oriented for so long to a common set of ideals and that these ideals could and sometimes did override a variety of personal and economic considerations. . . .” *Id.* at 28.

Both the text of her book and her references to Kronman make clear that she believes the lawyer-statesmen (or wise counselors) actually practiced client purification during the golden age. By mentioning “evidence” of such “practices,” she is more explicit than Kronman, most of whose statements about purification are couched in terms of ideals rather than practices.

Glendon goes on to explain why she felt it necessary to lop more than 100 years off the time span in which Kronman’s lawyer-statesman ideal allegedly held sway:

Still, if one’s benchmark for corporate firms is the palmy days at the turn of the century when lawyers were using every tactic in the book (and many that were not) to help clients bust unions, consolidate monopolies, drive competitors out of business, and obtain favorable treatment from judges and legislators, it would be hard to demonstrate a marked ethical decline. Many among the founders of today’s grand Wall Street firms were no strangers to the kind of behavior that again became rampant in the 1980s.

Id. at 57.

Distressingly, while insisting that ideals had important effects on the practices of the golden-age Wall Street lawyers, Glendon, like Kronman, presents not a single instance of client purification. Instead she falls back on the timeworn phrase attributed to Elihu Root—“About half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop”—and concludes that “it was once considered to be a lawyer’s duty to persuade the client to attend to the spirit as well as the letter of the law.” *Id.* at 37.

By transposing the Root legend to the more competitive legal market of the 1960s, she implies that the leading lawyers of her golden age actually would have told crooked clients they were damned fools. The Root saga originated in the two-volume authorized biography of him written by Professor Philip Jessup, in which the author laid out the full story, which is invariably downsized when repeated:

[Root] was still pre-eminently a trial lawyer, but he was already wise in consultation and constantly adhered to the principle which he expressed years afterward in private conversation, as he had suggested it to the Havemeyer Sugar Refining Company in 1882, that “of course a lawyer’s chief business is to keep his clients out of litigation.” Or, as he phrased it on another occasion: “About half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop.”

1 *Elihu Root* 132-33 (1938).

Thus it is clear from the unedited Jessup account that Root was talking about the need to keep big business clients (like the Havemeyers, “lords of the sugar trust”) out of litigation whenever possible not because it was in the public interest but because it was in the clients’ interest to avoid the exposure of their internal affairs that was a frequent side effect of litigation. Root practiced in an era when virtually no corporate disclosure to anyone was required, and, therefore, the private interests of corporate insiders were best served by avoiding litigation whenever possible. Root never mentioned to Jessup or anyone else the high-minded concept of lecturing a client on the public interest. He told his clients they “should stop” when they were headed for the transparency of litigation, not when he felt they were acting against the public interest.

Another difficulty with Glendon’s use of the downsized Root anecdote is that Root was the lawyer of choice for the likes of John D. Rockefeller, William Marcy (Boss) Tweed, Jay Gould, and Jim Fiske, a veritable poster boy for the “lawyer sidekicks of the robber barons” whose ready collaboration with the worst of the business scoundrels caused Glendon to exclude them en masse from her golden age. In fact, Glendon herself pulls poor old Elihu out of the client-purification game

with this passage:

The motto of the day [in the 1980s] seemed to be another old saying attributed to Elihu Root: “The client never wants to be told he can’t do what he wants to do; he wants to be told how to do it, and it is the lawyer’s business to tell him how.”

Nation Under Lawyers, at 75-76.

Root is the only exemplar of the purifying lawyer offered by Glendon. She devotes nine laudatory pages to John W. Davis, the 1924 Democratic presidential candidate, but she focuses on his renowned courtliness, courtesy, and skill as an appellate advocate without mentioning any instances of client purification. She mentions Davis’s view that it was his duty “to discourage litigation whenever possible,” quoting William H. Harbaugh’s acclaimed biography of Davis, *Lawyer’s Lawyer*. As in Root’s time, the Wall Street law firms of Davis’s era were so dedicated to keeping their big business clients’ affairs confidential that their partners were overwhelmingly counselors rather than litigators. In the Harbaugh passage cited by Glendon, the biographer mentions that Davis’s “corporate practice was making him more and more tolerant of the concentration of wealth and power in America” and goes on to say that Davis limited his advice to questions of law:

This indifference to management and corporate policy strengthened Davis’ conviction that he was a free moral agent, that his legal counsel had no relation to his social and political conscience. On Wall Street, no less than in Washington a decade earlier, he adhered absolutely to the principle that the lawyer’s duty was to represent his client’s interest to the limit of the law, not to moralize on the social and economic implications of the client’s lawful actions.

Lawyer’s Lawyer 263-64 (1990).

Exhibit C: Linowitz’s Betrayed Profession

The story of Sol M. Linowitz’s life reads like a Frank Capra script for the American Dream, culminating in the awards of the Presidential Medal of Freedom and more than 40 honorary degrees from universities as diverse as Notre Dame and Yeshiva, in recognition of his illustrious public service.

In his 1994 book, *The Betrayed Profession: Lawyering at the End of the*

Twentieth Century, Linowitz opines that the profession he loves has changed “drastically and disappointingly in the past half century.” Therefore his golden age runs from the beginning of our nation until the 1950s, roughly equivalent to Kronman’s good old days. He proclaims his admiration for the lawyer-statesmen who were leaders of their communities and of the country—Adams, Jefferson, Madison, Jay, Marshall—“how many of our Founding Fathers were lawyers!”

Much of what he misses about the old days has to do with the collegiality of practice in firms composed largely of friends, and the close personal relationships that developed between lawyers and their long-standing clients, which he describes generally as “the nonpecuniary satisfactions that lawyers once sought and found in the law.” What concerns us here is his major goal: “to create the possibility of a legal profession that is once again independent,” thus indicating his belief that it was “independent” in the good old days before 1960.

When we look for evidence of independence as demonstrated by client purification, we find none. There is only the reiteration of the Elihu Root aphorism and this lament: “Today there are too few lawyers who see it as part of their function to tell clients (especially new clients) that they are damned fools and should stop: Any such statement would interfere with the marketing program.” *Betrayed Profession*, at 4.

Here Linowitz (like Glendon) overlooks the portion of the quotation in the Jessup biography that makes clear that Root was referring to avoidance of litigation rather than client purification. And by condemning today’s lawyers for putting the “marketing program” ahead of the public interest, he joins Kronman and Glendon in assuring us that the legal giants of the past saw it as “part of their function” to purify clients who were seeking ends opposed to the public good.

Thus Linowitz, like Kronman and Glendon, leaves us with an image of the pre-1960s Wall Street lawyer as the lawyer-statesman or wise counselor whose elite standing and unselfish behavior were independent forces for civic virtue, at least in part by purifying business clients who threatened the public good. And like the other two authors, Linowitz leaves us without a valid example of this sterling conduct.

This reliance on nonexistent evi-

dence is all the more remarkable because all three books are otherwise characterized by erudite scholarship and laudable goals. Their failure to present any evidence of client purification by the lawyer-statesmen led me to suspect that none existed, particularly in view of the vast scholarly resources available to these eminent authors and the disclaimers of such a duty by legal giants like Root and Davis.

To investigate this suspicion, I examined the biographies and collected papers of the lawyer-statesmen spanning all versions of the golden age, from Alexander Hamilton (1755-1804) to John W. Davis (1873-1955), including those of John Adams, Thomas Jefferson, Daniel Webster, William Henry Seward, Rufus Choate, Salmon Chase, Hamilton Fish, Abraham Lincoln, Stephen Douglas, Samuel Tilden, James Garfield, Elihu Root, William Jennings Bryan, Franklin D. Roosevelt, Henry Stimson, Felix Frankfurter, Dean Acheson, and John Foster Dulles. I found no mention of client purification as a lawyer’s duty. I also scoured the published histories of leading law firms and found no trace of any firm policy or procedure for conducting any kind of client purification at any time.

Therefore, it is apparent that client purification by the lawyer-statesmen of any era is a pure myth.

Perhaps the most perceptive comment about lawyers’ independence in the golden age in these volumes was Felix Frankfurter’s portrayal of his encounter, as a young government lawyer, with railroad baron E.H. Harriman and his retinue of lawyers when Harriman was called to appear before the Interstate Commerce Commission:

The way Mr. Harriman spoke to his lawyers, and the boot-licking deference they paid to him! My observation of this interplay between the great man, the really powerful dominating tycoon, Harriman, and his servitors, the lawyers, led me to say to myself, “If it means that you should be that kind of a subservient creature to have the most desirable clients, the biggest clients in the country, if that’s what it means to be a leader of the bar, I never want to be a leader of the bar. The price of admission is too high.”

Felix Frankfurter Reminiscences 67 (1978).

To find a declaration that it was con-

sidered the lawyer's duty to purify clients, I had to look at the works of a major legal scholar whose name does not appear in the Kronman, Glendon, or Linowitz books.

The Unmentioned Exhibit: David Dudley Field

David Dudley Field Jr. (1805-1894) was America's most vociferous advocate of client purification, and a pioneering reformer who made more contributions to improvement of the legal system than any other lawyer or statesman of the nineteenth century.

By the time of the Civil War, Field was a very successful New York lawyer, much in demand for important business litigation. During his 66-year career, he argued several important cases in the Supreme Court, including *Ex parte Milligan* and *Ex parte McCordle*, two key constitutional decisions of the Reconstruction era.

Field's statesmanship took a novel form. Instead of seeking elective office, he launched a private crusade to improve the administration of the law. At his own expense, in 1837 he undertook the prodigious task of reducing the morass of common law civil and criminal procedures to well-organized codes. In 1848, New York adopted his Code of Procedure, which became the model for simplification of court procedure throughout the nation and was partially adopted in England and some of the British Commonwealth nations.

Notwithstanding Lord Brougham's insistence to the contrary, Field never accepted the principle that a lawyer should be totally dedicated to the client's cause, no matter what. In a widely circulated 1844 article first published in the *Democratic Review*, Field wrote:

Now to our view a more revolting doctrine scarcely ever fell from any man's lips. We think it unsound in theory and pernicious in practice. . . .

"Forget that there is any other person in the world than his client." What a monstrous declaration! Sacrifice everything, every relation, every consideration, to save his client! Forget that there is a society whose welfare the advocate is bound by the highest sanctions to promote; that there are other parties, whose interests are at stake, that there are duties to society, to every member of it, as

well as to the one who has retained him! How can a man forget these, and retain his conscience or his memory?

XIV *Democratic Review* 345 (1844).

Five years later, Field wrote: "Lawyers should not be indifferent to the moral aspects of the causes they advocate. It is error to believe that a lawyer may properly advocate a bad cause. Any lawyer asked to advocate the bad scheme of an unjust client should refrain from pursuing an unjust object." *Speeches, arguments, and miscellaneous papers of David Dudley Field* (Sprague, ed.), at 298-99.

This lusty rhetoric reflects the discomfort that Field suffered when he was branded as a mercenary, the nineteenth century equivalent of a "hired gun." But Field never provided any examples of such a triumph of public interest over duty to serve the client, either from his own practice or any other. Indeed, he practiced the polar opposite of his sanctimonious preachings.

One of Field's most important early clients was Jacob Sharp, who attempted to monopolize the New York City transit system through wholesale bribery of the New York Board of Aldermen. His efforts were highly successful. Field devoted his extraordinary legal talents to keeping Sharp's illicit business thriving. Yet Jacob Sharp emerges as a paragon of civic virtue alongside the three clients for whom David Dudley Field is most famous: Jim Fisk, Jay Gould, and Boss Tweed.

Field's lasting reputation and much of his fortune were made in providing legal cover for the most outrageous capers of that trio, which went down in history as the Erie Wars. The Erie Wars erupted in January 1868, when Commodore Cornelius Vanderbilt (of steamboat fame) sought to put his New York Central Railroad in a monopoly position by acquiring control of his only competitor, the Erie Railroad. The ensuing litigation became a comic opera of Gilbert-and-Sullivan proportions, involving open bribery of judges and legislators, with the going rates published in newspapers like horse-racing results. Many of these bribes were passed through lawyers and accounted for as "legal expenses." At the center of this perfect storm of corruption was David Dudley Field, the reliable hired gun for the biggest business brigands of his time. Before

the Erie Wars ended with Vanderbilt's capitulation, more than 40 lawyers—the cream of the New York bar—performed services on Erie's side, most of them brought in by Field. The Erie truce did not mark the end of Field's services to Fisk, Gould, and Tweed, for they kept Field and his colleagues busy for years, masterminding other legal atrocities.

But in a perverse way, Field's generalship of the Erie Wars did lead to some law reform, in the creation of the Association of the Bar of the City of New York (ABCNY), which on February 15, 1870, became the first bar association organized to "promote the due administration of justice." It was dogged at first by the inconvenient fact that the very scandals that called it into being were committed by Field and other members of the legal elite, the "decent part" of the New York bar.

During its first three years (1870-1872), zealots in the ABCNY engaged in a running battle with Field to denounce his Erie tactics as unethical, even though no code of legal ethics existed as yet. See G. Martin, *Causes and Conflicts: The Centennial History of the Association of the Bar of the City of New York, 1870-1970*. The moment of truth came for Field on January 10, 1872, during a meeting of the ABCNY at which some of his fellow leaders of the New York bar renewed the call for an investigation into his conduct of the Erie litigation. Field presented letters from 12 prominent judges and lawyers who found nothing wrong with his actions. In a long, impassioned speech, he disavowed the propriety of inquiring into the motives or morality of his clients. In fact, he trashed the very notion of client purification in these biting terms: "Now, whether it was proper for me to try the characters of my clients before trying their causes is a question I leave to those members of the association who have refused such retainers or taken only the retainers of saints." *Id.* at 97.

With his unerring eye for the vital point, Field took the occasion of his impending censure to nullify his unequivocal denunciation of Lord Brougham's credo by making it clear that American lawyers had never assumed the duty of questioning or purifying the character of their clients. Had that judging been the lawyer's function, no doubt Field would have dashed off a code laying out exactly what questions

should be put to the client before taking on the case.

Why the Truth Matters

Does it really matter whether Kronman, Glendon, and Linowitz (KG&L) paint an accurate picture of the role of pre-1960s lawyer-statesmen in client purification? Or is the search for evidence of what those lawyer-statesmen actually did for their clients an exercise of interest only to history buffs?

I think it is vital to determine the true role of the lawyer-statesman in client purification, mainly because KG&L's reading of history is coupled with eloquent pleas for reform. KG&L—along with many other leading legal scholars and most of the general public—see the legal system in deep crisis, with lawyers openly dedicated to making big money by doing whatever their clients demand. If KG&L's client purification recitals are accepted at face value, their quest for badly needed reform will continue to be directed toward restoration of self-regulation of the bar by the elite Wall Street lawyers described by Glendon as highly skilled, well educated, “genteel, and eager to distinguish themselves from the buccaneer lawyers of the gilded age.”

If the thrust of KG&L's proposed reforms is to turn the clock back to the elite bar's pre-1960 level of independence from business clients, we must know whether that independence was real or an illusion. If (as demonstrated here) their legendary independence is a myth, we must look elsewhere for the reforms needed to alleviate the crisis, and not waste any precious reformist energy on a self-serving fairy tale.

This need for the truth is pointed out by the acceptance of KG&L's views by other influential legal scholars, such as Pepperdine Law School Professor Robert F. Cochran Jr. After noting that Kronman and Glendon had rejected “the rule-based ethics that the legal profession focuses on today,” Cochran, in a 23-page essay review of the Glendon and Kronman books, aligns himself with Kronman and Glendon's call for “a return to an older, more subtle moral tradition—the exercise of virtues.” “Lawyers and Virtues,” 71 *Notre Dame L. Rev.* 707, 709 (1996).

While recounting in detail the lawyer-statesman philosophy of Kronman and Glendon, Cochran's only

alleged example of client purification is the incredibly shrunken Elihu Root “damned fools” pronouncement, which we have examined in its full-grown (and vastly different) version. If the image of the elite business lawyer playing a vital role in client purification before 1960 had any substance, Cochran and other ethicists might be justified in calling for a return to dependence upon that elite corps as the basis for reform of the legal profession. But since these depictions of the past are merely wishful thinking, and there never was such an operating tradition, evoking them will serve only to seduce legal reformers away from pursuing rules that can have a positive impact on the profession and result in meaningful reform.

In the course of a richly deserved tribute to the late Bernard G. Segal, Judge Rakoff of the Southern District of New York called for vigorous enforcement of existing ethical standards and new legislation along the lines of the Sarbanes-Oxley Act that “in effect empowers the in-house lawyer to act as a corporation's conscience.” Judge Rakoff cites the Kronman and Glendon books for documentation of the post-1960 erosion in standards of professionalism. While he appears to accept their descriptions of client purification as practiced by earlier lawyer-statesmen, he is not blinded by that vision, for he recognizes the need for the “rule-based ethics” eschewed by Cochran, in the form of new legislation and stricter enforcement of existing rules. *Id.* at 4-6, 63. Seen in that light, Sarbanes-Oxley may be the icebreaker for a stricter regime of statute-mandated client purification.

Another reason why the truth matters is that we lawyers do not have a surplus of credibility. One hundred and fifty years ago, Abraham Lincoln lamented that most people thought lawyers were dishonest. Thanks to such post-Lincoln lawyer-driven atrocities as Credit Mobilier, Teapot Dome, and Watergate—and the fact that two of the last three lawyer-presidents have been guilty of obstruction of justice—we are trusted even less than in Honest Abe's time. If we build our reform proposals on a smoke-and-mirrors foundation, the public will have even less respect and trust for lawyers. We will be made to appear so desperate for a positive lawyer image that we have to fabricate one that never really existed.

Therefore, the myths spun by the Kronman, Glendon, and Linowitz

books threaten to do more than merely perpetuate a harmless fantasy. Clinging to a false legend might well stymie measured, constructive legislation and rules, leading instead to the sledgehammer and wrecking ball, administered by politicians who enjoy lawyer-bashing.

The pre-1960 lawyers practiced at a time when their activities were screened from public view, and their role in the business world was far less prominent or demanding than it is today. We should get on with the job of reform ourselves, discarding the illusion that the earlier lawyers adhered to higher moral standards than our own and formulating practical rules that mandate appropriate client purification while preserving those elements of the attorney-client relationship that have proven themselves to be in the public interest. We should stop deluding ourselves that anything in our history can obviate the need for rule-based ethics. □

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**First published in Vol. 32, No. 1, Fall 2005 of *Litigation*,
a publication of the Section of Litigation.**

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