

dean kearney's remarks at the state bar of wisconsin cle on professionalism

The following are Dean Kearney's remarks at a State Bar of Wisconsin CLE Seminar on November 7, 2003 in Madison, Wisconsin. The CLE was entitled "Attorney Professionalism—Pious Platitude or Practical Aspiration?" Dean Kearney was asked to address the question, "Do the Law Schools Have a Responsibility to Teach the Ethics of Professionalism?"

I have been asked to speak to the question whether law schools have a responsibility to "teach" the ethics of professionalism. Of course, to get at this question, we must have some common ground concerning professionalism and its necessary elements or incidents. I think we can agree that any Wisconsin lawyer is estopped from denying that the lawyer's oath, to which we swear in order to become part of the legal profession, sets forth necessary, even if not sufficient, aspects of professionalism.

The Wisconsin lawyer's oath is long enough that, in reading it, I will run the risk of consuming all of my allotted 15 minutes. But here goes:

I will support the constitution of the United States and the constitution of the state of Wisconsin;

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

I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, or any defense, except such as I believe to be honestly debatable under the law of the land;

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

I will maintain the confidence and preserve inviolate the secrets of my client and will accept no compensation in connection with my client's business except from my client or with my client's knowledge and approval;

I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or

witness, unless required by the justice of the cause with which I am charged;

I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any person's cause for lucre or malice. So help me God.

Do you recall that? I rather suspect that, with the exception of Justice Bradley, who hears it regularly, it is the first time that almost all of us in the room have heard the Wisconsin lawyer's oath since we were admitted.

That itself, of course, is scarcely problematic. These are values that we believe that lawyers have sufficiently internalized that they do not have to hear the oath again and again. It is, after all, not so much the precise text that it is intended to animate us here as it is the words' essential spirit.

But permit me to come to the role of the law schools in "teaching" the ethics or values that underlie or inform that oath. I have little hesitation in stating that students who graduate from law school—and who, if within this state, therefore become lawyers the next day—need to possess those values. My hesitation derives only from the word "teach," as in "Do the Law Schools Have a Responsibility to Teach the Ethics of Professionalism?"

I frankly question how much educators teach, in the narrowest conception of the word, which is "to cause to know a subject." I tell my students that it is not my role to teach them civil procedure. I point out that we get together four or five hours a week, for 14 weeks, and what I can do during that time mainly is to highlight certain matters that strike me as particularly important and to clarify some difficult points. It is fundamentally the students' responsibility, I tell them, to teach themselves civil procedure. To some extent, of course, in saying that, I am simply trying to impress upon first-year law students that it is essential for them to do the reading and to spend more time on the subject matter outside of class than we will or can in class. But, by and large, I will stand by the statement that, at least in its narrowest meaning, my students teach themselves civil procedure.

But the matter seems to me somewhat different with respect to professionalism. Here I do think that we have a responsibility

to teach our students certain values. I should confess that, in arriving at that answer, I am no longer using the narrowest meaning of “teach.” I have instead resorted to a meaning, lower in the hierarchy but valid nonetheless, in which “to teach” is “to impart by precept, example, or experience.” And it is this “imparting by example” that I believe law schools have to do.

Perhaps the simplest way of making the point is by way of a story that has nothing to do with law school. In 1953, Mary Jane Grogan—not yet Mary Jane Kearney, nor yet my mother—was teaching English at an all-girls’ Catholic high school on the south side of Chicago from which she herself had graduated just five years before. She was particularly frustrated one day when she thought that her explication of a Shakespeare poem had not gone especially well. Upon listening to her frustration, a wise old nun said to her, “My dear, haven’t you realized that it is *you* they are studying most?”

This is a basic truth that I think is nearly as applicable to someone teaching law as it is to someone teaching high school English. On the basis of observing a faculty member, students continually draw inferences about the way they should conduct themselves. If as a faculty member I routinely start my classes late, or am not adequately prepared, or waste valuable class time talking about wholly irrelevant matters, or have typographical errors in the materials that I distribute, or am overly familiar with students, at least some students will infer that such conduct (or analogous conduct, such as showing up to court late) is acceptable behavior in the legal profession. Even more substantively, if I am inadequately versed in the material, students will infer that this, too, is acceptable.

But even broad inferences from the type of professorial behavior that I posit may not communicate some of the rather specific things contained in the lawyer’s oath—recall, to use just one

example, the provision that “I will maintain the confidence and preserve inviolate the secrets of my client and will accept no compensation in connection with my client’s business except from my client or with my client’s knowledge and approval.” And this is why, for at least some students, it is necessary to provide them models of the professional behavior of a lawyer that are rather more direct than a professor standing before a classroom.

This is one of the reasons that at Marquette we have made a considerable effort to build up our internships, externships, supervised field placements, and the like. What better way, for example, for a law student to learn some of the basic values of professionalism than to work in the chambers of Justice Bradley for part of a semester? We have an extensive set of programs in which we place students in the district attorney’s office in Milwaukee, in the public defender’s office, in the Waukesha County Circuit Court, in the chambers of each Supreme Court justice, in the AIDS Resource Center, and in many other places. Professor Tom Hammer, whom many of you undoubtedly know, is in charge of these efforts and has done extraordinary work over the past several years in making this

program into a central part of the education of many of our students. This really requires a large effort. The idea is not to simply turn the students loose into the community, fixing them up with whatever lawyers express an interest. Professor Hammer has considerable dealings with all the lawyers who supervise our students in these field placements.

I must confess to being something of a convert on this point. When I was in law school and even during the years thereafter that I practiced full time, I did not really see the value of clinical offerings, or at least not so clearly. And I still believe that I was correct—and therefore I still maintain—that it is more impor-

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of the professional behavior of a lawyer that are rather more direct than a professor standing before a classroom. would be a good idea. That is an approach that a few law schools have adopted in recent years and that we at Marquette are currently studying. Although the ultimate determination will be for the full faculty, I myself do not favor such a requirement, and neither did my predecessor and friend, Howard Eisenberg, who even before his death last year was renowned for the extraordinary amount of his pro bono undertakings. Why is this, given the undisputed importance of developing the ethic? It is because of the basic proposition stated as long ago as by Plato (and here I am stealing a quotation recently used by a colleague, Professor Mike McChrystal) that “no forced labors reside in the soul.”

Thus, at least in my estimation, the manner in which to teach students the ethic of pro bono work is not to impose some mandatory requirement but rather to lead by example. One need not be Howard Eisenberg to do this. The primary way in which this is currently being done at Marquette is through something that we call the Marquette Volunteer Legal Clinic. It is somewhat different from a traditional live-client clinic. It rather is a walk-in service that is open once a week (Tuesdays, from 4:00 to 7:00 p.m.) at the House of Peace on the near north side of Milwaukee. The leaders of the clinic are Marquette University Law School graduates who are active in the Association for Women Lawyers. The way that this clinic operates is to pair up experienced attorneys with Marquette law students. These pairs then advise those who come to the clinic with legal questions. In many instances the pairs of attorneys and students answer basic questions, and in other instances they make referrals to a legal services group. This strikes me as the surest way in which to teach students the ethic of pro bono work—to put before them, and to involve them in, the example of attorneys who do it.

tant for a law school to ensure that its students have learned enough legal doctrine. But three years, the length of full-time legal education, is a long time, and it provides more than adequate opportunity for students both to learn plenty of legal doctrine and to enroll in the skills-oriented courses that we call workshops or in the type of on-site field placements that I described above. So while I hope that the students in these field placements are not afforded too many examples in which an attorney must affirmatively decide not to “delay any person’s cause for lucre or malice,” in the words of the attorney’s oath, I have every confidence that the close observation and modeling of attorneys engaged in actual practice are useful means for many of our students themselves to learn the values or ethics of professionalism.

This brings me then to the other Wisconsin Supreme Court rule that I was asked to touch upon in my talk. This is SCR 20:6.1, which is entitled “Pro Bono Publico Service.” Here is what it provides:

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or by public service to charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

The question for me is, Do we legal educators have a responsibility to teach this as well?

The answer again is “yes” (I could justify that on the basis of the lawyer’s oath alone), and here, again, it is important to underscore the type of teaching that we are discussing. I am not suggesting that the ethic of pro bono work is something that students can be taught through some lecture. Some others who also recognize this believe that a mandatory pro bono requirement

Nothing that I say this morning should be taken as suggesting that I have all the answers as to how law schools can or should seek to teach the values of professionalism. In fact, one of the things that attracted me to accept the invitation to this forum was the opportunity, either today or in subsequent

communications, to learn from you about your ideas. Each of you is a professional, and each of you has been to law school. To the extent that I do not get them today, I would welcome your insights, by letter, telephone call, or e-mail, on ways in which we in the academy can seek to instill the ethics of professionalism in our students.

But I am certain that the primary means has to be by example. Chief Justice Abrahamson spent the day at Marquette this past Monday as our annual Hallows Lecturer. The value that she provided was not simply in the talk that she gave or in the particular answers to the questions posed to her throughout the day. It was also—even primarily, I think—in the example that she provided to our students. It is for similar reasons that we have invited George Burnett, the president of the State Bar of Wisconsin, to be on our campus on several occasions in the past several months to address or to interact with students.

I also (and finally) think that it should not escape our explicit attention that all of us, even if teachers, should be slow to conclude that we ourselves are fully formed as professionals. We should be frequently asking ourselves how we might improve. Although I became dean this past summer, I had been at Marquette for the previous half decade or so. I came there more expecting to teach than to learn. I had practiced law at a firm for six years, worked at other places such as the United States Supreme Court, and was reasonably confident that I was a pretty good professional. But even if I was, I learned a great deal in my first five years at Marquette, particularly from Howard Eisenberg. I am scarcely alone in this regard. Consider the words of Howard's classmate, Walter Dickey, in a memorial issue of the *Marquette Law Review* that I edited last year in honor of Howard. (If any of you wish a copy of this, please let me know, as it has much to relate concerning professionalism.) After describing four encounters with Howard Eisenberg over the years, this is how Professor Dickey concludes:

Here is how I would characterize these several interactions with Howard. While he was aware of the “politics” of issues, the core of his concern was with

substance. His attention and talent were invariably focused on the substantive issue. He had a keen desire to discover what the right thing was to do and to do it. He was well prepared, and he always followed up with a high-quality execution of whatever idea required implementation. Not much for speeches, not a lot of noble talk. He just did. This was not just his job, this was his duty. He would do it as well, as honorably, and in as straightforward a fashion as he could. If some of the causes he advocated were out of favor in the brittle world of politics, he did not apologize or even explain why he was advancing the cause or position he stood for. His expectation was that others would and should know that what he did was to fulfill the responsibility of the legal profession. His expectations brought out the best in others.

While Howard surely had passion for what he did, it was his business-like, matter-of-fact, direct approach which most impressed me. He channeled his passion, his concern and caring for others, in ways that were likely to be effective for those he sought to help. Howard possessed the qualities of a good lawyer. No cause in which he believed was either too large or too small for his attention. For me, he is a model of the best in the legal profession.

There was, of course, only one Howard Eisenberg, and it is no disrespect to my great friend to say that even in his case I am sure that there were some students who did not take to him, for there always are. But it is by giving our students multiple examples, some on a daily basis in the form of full-time and adjunct faculty and others in the form of the occasional guest such as Chief Justice Abrahamson, that we primarily fulfill what I have no hesitation in saying is our obligation in the law schools to teach students the ethics of professionalism. •