

Lawyer Behavior for

Thwigbothem stands at the end of the mahogany conference table as the firm's new associates take their seats. In front of each place is a stack of CLE materials, including photocopies of newspaper articles, some of them two decades old. Thwigbothem is about to give a lecture that, rumor has it, he delivers every year. At the stroke of 9:00 a.m., he begins with a rhetorical question.

Representing your clients skillfully within the boundaries of law and legal ethics is the most important thing you can do in your new profession. Right?

A few of the associates nod.

No! The most important thing is to *survive*. Acting within the law and disciplinary rules is axiomatic, but it will not assure your survival in the practice of law.

Although I had done nothing illegal or unethical, I have had the distasteful experience of sitting across the table from an FBI agent while he read me my *Miranda* rights. You would be surprised how chilling those familiar words sound when the right to remain silent belongs to you.

Twice during my career, I have had law partners under consideration for indictment by the U.S. Attorney. Neither had done anything wrong, or even close to it. Among your CLE materials is an article by a local political columnist reporting that two members of the largest firm in our city are still under criminal investigation for work they did on behalf of a prominent political figure. They have not been indicted, and I doubt that they will be. But how would you like to read your names where theirs are, or experience the fear that those lawyers must be feeling?

When I was a young lawyer, we had the Watergate affair, in which some of the best, brightest and most ambitious lawyers in the country found themselves questioned by a Senate committee on national television, indicted, convicted and disbarred. The nation's leading law enforcement lawyer, Attorney General Richard Kleindienst, was indicted for perjury and pled guilty to a lesser offence. In your form-

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An earlier version of this article was published in the magazine *LITIGATION*, Fall 2006.
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Survival and Elegance





ative years, the national stage has presented another morality play. A Rhodes Scholar and Yale Law School graduate, William Jefferson Clinton, faced impeachment charges and lost his license to practice law. His adviser, White House counsel Vincent Foster, died by his own hand.

In my years, I have seen talented, well-intended lawyers experience mental breakdowns, serious stress-related illnesses, divorces, bankruptcies, substance abuse, disbarments and suicides. Three lawyers of my acquaintance have been shot in work-related incidents, one of them fatally. Every example I give you is, I assure you, nonfiction. Most of the lawyers involved were not marginal. Like you, they had exceptional law school records, and most were members of prominent firms.

Why do these tragedies occur? Let's look to the causes.

The Enemies of Elegance

First, we are involved in a contest that we want to win. The theory underlying the adversary system is that the best way to get all of the facts and all of the legal arguments out on the table is to pit the egos of the lawyers on each side against each other. In this game, generally speaking, knowledge is power, and each contestant is expected to put her client's best, and the opposition's worst, foot forward—that is to say, engage in partisan presentation of the facts.

Occasionally, a lawyer can become so obsessed with winning the contest that he loses track of the line between proper and improper manipulation of knowledge. You will find an example of this in the article titled "Did Law Firm Hide Witness?" There, an uncommonly able litigator with a corner office at a fine Midwestern firm was held in contempt and ordered to pay \$450,000 for secreting a witness—the highly impeachable president of his client's company—by having the officer secretly retire for several months early and move to his planned retirement home, outside the subpoena power of the court in which the case was pending. When the opposition tried to subpoena the witness, the lawyer supplied technically accurate but misleading responses to queries from opposing counsel and the court about his employment status and whereabouts.

Second are the economic pressures. You want to win, build your reputation, pay off student loans, make partner, attract business and stockpile the bucks you need to achieve material Shangri-la. Or—and this is far more deadly—you want to maintain the lifestyle to which you have allowed yourself to become accustomed. Just when your second child starts college, a merger renders the loyalty of your main client precarious; you receive multiple unexpected, disastrous rulings in your biggest case; and the in-house counsel who really created all of the problems implies that if you lose another motion, you and your three helpers will be out of work.

The Shark Tank, a book about the demise of Finley Kumble, once among the nation's largest firms, illustrates how far amok greed can push supposed professionals. One of its former partners actually went to prison for adding time to the hours reported on associates' time sheets. The recent indictment of Milberg Weiss points to greed on a far grander scale.

Third are our clients. Even when they mean to, clients do not always tell you the truth. Some are intentionally dishonest; others engage in denial or are forgetful. Clients can be unrealistic, manipulative, too busy to pay attention to the case, or, for a variety of reasons, unwilling to authorize the work needed to do the job right.

Fourth are the time pressures. Clients do not schedule their crises, nor do courts set deadlines, with the primary goal of allowing lawyers to lead calm, well-ordered lives. Forgive a parable and my bad Cockney accent: A British sports car enthusiast was out on a drive through the English countryside one pleasant Sunday afternoon when his progress was slowed by a lorry ahead of him that was so wide he could not pass it on the narrow country lane. His frustration increased each of the three times the lorry driver stopped, pulled out a long club, and pounded the side of his truck before resuming his travel. After the third stop, the sports car driver finally asked, "I say, mate, why are ye stoppin' me like this?" The lorry driver replied, "Be glad I'm stopping. This here is a two-ton lorry and I'm carrying three tons of canaries. If I don't do something to keep one ton in the air, me lorry will break and you'll be stuck for good." Throughout my career, I have had

to pound on the side of the lorry, and even now, I worry that tomorrow the airborne canaries will land.

Fifth, to a surprising extent, we need to be needed. It is not an accident that many of us find ourselves working in a service profession. When a client calls and wants *you*, not anyone else, to rescue him from an impending calamity, the call can seem irresistible. I remember a call late one afternoon from a bright, attractive lady whom I liked, an in-house lawyer for a developer. She implored me to call the local newspaper as the spokesman for Citizens for Environmental Responsibility, an organization her employer had conjured up two days previously, to arrange advertisements favoring rezoning for one of his real estate developments.

My first impulse was to reach for the phone. If I had followed it further, it would have been me rather than a lawyer from another firm who was skewered two days later in a newspaper editorial for pretending to be the leader of a sham organization.

Courage and Judgment

So we have identified the pressures, but what are the solutions? Fortunately, there are some, but they require vigilance and, sometimes, courage.

First and foremost, be a New Age lawyer. *Share*.

At the first nanosecond, when you feel discomfort at the back of your skull or hear even the faintest garbled whisper from Jiminy Cricket, share. Do not take it on yourself to solve the problem alone. If for no other reason than to have someone to share the blame with, go to another lawyer in the firm who seems to have good sense and tell her about your concerns. If you have left the firm, talk to a good friend or mentor. Please, please, please do not be constrained by pride, concern about your career or anything else. Although I do not mean this as a challenge, I profoundly doubt you will be able to mess up a case in a way that none of the senior lawyers in this firm has done before. Please let us use that experience and our greater objectivity to attack the problem.

I have only one caution: Follow this





protocol. Be direct. Tell the partner, “I think I may have fouled up”—or words to that effect. I promise, we will be grateful, not shocked.

The second most important thing you can do is share *immediately*. I cannot overstate the importance of promptness. If you bring a problem to us soon enough, we almost always can fix it. But the longer you wait, the greater the grip of the quicksand, and the harder it is to extricate the client or ourselves.

“The Perkins Affair,” a chapter of James B. Stewart’s book *The Partners*, provides a larger-scale illustration than those I have witnessed. Perkins, a senior partner at a silk-stocking New York City firm, was initially in charge of the defense of an antitrust case for one of the firm’s major clients, Kodak, when the firm decided to bring in a new partner to the firm with more trial experience to try the case. Perkins was in the process of reviewing some documents for production when the change occurred. For some reason, he put the boxes in a closet in his office, and the production deadline passed. Especially in his new, reduced role, Perkins felt embarrassed about his error and so said nothing. After a few months, he even forgot about the boxes. Six and a half months into the trial, a witness testified about some documents that were not among those produced to the plaintiffs. During the judicial inquiry that followed, an associate found the documents in Perkins’s closet, and the firm brought them to the court. Although the documents were not intrinsically damning, by withholding them Perkins had made their revelation an explosive coup for the plaintiffs. Kodak lost the trial. The firm lost the client. Perkins lost his job and his license to practice law. And all of it could



have been avoided if Perkins had only disclosed his mistake *earlier*. Even earlier in the trial. Please, if something might be amiss, share immediately.

You also must be mindful of what you say. In an earlier time and a different context, a popular saying went, “Say it in flowers/Say it in mink/but never, never/Say it in ink.” Do not write or say anything you would be ashamed to testify about on the witness stand. “Well, maybe in most circumstances,” you may be thinking, “but my advice to clients is privileged.” And this is true, up until the moment the client does

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something to waive the privilege.

Early in my career I found myself a witness in a case brought by a former client that tangentially involved some of my legal work. There was nothing improper in the contents of the letters I was privileged to reread during my deposition, but I would have enjoyed my deposition more had I suggested a meeting “to consider available options” rather than “to plot our next move.”

My discomfort, however, was trivial compared to what some of the authors of attorney–client communications described in your CLE materials must have felt. Two articles contained in them describe confidential communications between partners at prominent firms and in-house lawyers at Charles Keating’s American Continental Corp. In each article, the lawyers tout their

successes in using political influence to thwart government regulators seeking to audit the books of American Continental’s (it turned out insolvent) subsidiary, Lincoln Savings & Loan. Not surprisingly, American Continental’s receiver, Resolution Trust Corp., had no qualms about waiving privilege or, for that matter, about featuring those documents prominently in the multimillion-dollar suits RTC filed against each of the law firms.

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I’ll never forget my opportunity to learn exactly how one of our young partners conducted his first interview with a potential expert in a products liability case. To assist him in learning a complicated subject, the young partner decided to tape-record the interview. As the conversation progressed, the partner forgot about the recording machine and drifted into unfortu-

nate partisan coaching. It could have been much worse. I learned about the tape in time to replace the consultant before he was designated an expert witness—but at no small cost to the firm.

Far worse is an incident reported in the *Los Angeles Times* article in your materials. There, an associate and expert witness who worked closely together preparing a case developed a strong mutual attraction—a “relationship,” I think you call it these days. The opposition got wind of it and asked questions at trial designed to show that the expert might not be entirely objective. After the expert denied the existence of the “relationship,” the plaintiff’s attorney, like a divorce lawyer from an earlier time, produced the photographs. You can imagine the rest.

Remember: On some occasions, other

people tape-record conversations, including law enforcement agents with (we hope) warrants. More recent technical innovations provide other temptations for indiscreet communications. You are all undoubtedly familiar with the following caution: If you intend to write an intemperate or controversial letter, let it sit overnight, then look at it again the next morning before sending it. It's ever so much harder to do, but apply the same rule to e-mail. Print out what you've written that night and file your draft under "waiting to be sent." Next day (following up on an earlier theme) have someone else read the e-mail before you send it. Same for voice mail. If the object of your call is not there, be very circumspect about what you leave on her voice mail, or simply ask for a return call. If you rattle off an unprepared spiel in frustration, you may have an opportunity to reflect on what you should have said after you read the transcript of your outpouring attached to a motion your

opposition filed.

Beware of advocate's myopia. Be sensitive to not only the underlying reality but also how it might be perceived. Lawyers can become so focused on trees that the forest eludes them. The lawyer who was fined for hiding a witness became so enchanted with carrying out his creative strategy that he lost track of what he was really doing.

Two of our partners committed a far smaller gaffe when they included the cost of a fancy meal with an expert witness as an expense in the fee application after a successful suit against the state. Although a footnote acknowledged that this might be a debatable expense, the newspaper article scolding the firm for feasting at taxpayer expense made no mention of the footnote.

Consider the judgment shown by the partner from a major Texas firm who, in a well-meaning but misguided attempt to inject some humor into a dry subject, displayed a chart entitled *Environmental*

Decision Making (The Way It Really Is) at a CLE conference. The chart was a tongue-in-cheek decision tree for dealing with environmental problems. Although he got a laugh, no lawyer should imply publicly (or privately) that "hide it" or "sell it" are acceptable ways to respond to a known environmental problem. Environmental regulators and plaintiffs' lawyers in the audience undoubtedly retained their copies of the chart for future uses other than documenting their attendance at the seminar.

New Client Pitfalls

Another crucial point is to recognize your own limits. You all have been schooled that it is essential at a new-client intake to provide a retention letter that defines the limited scope of the firm's engagement. The next step of this self-protective process is to be sure that you do not inadvertently sidle into areas that are beyond the undertaking you have defined or—far more important—





beyond the scope of what you know. When your project moves into an intensely regulated area such as banking or securities law, it's alarm-button time. Get somebody who knows the area involved.

I will never as long as I live forget a one-sentence letter a Mensa member and Harvard law grad wrote to oblige a new litigation client. It said: "In my opinion your company's securities were validly issued and can be sold to the public." Breathtaking. Simply breathtaking. A letter expressing the opinion of the firm on any legal issue, especially one involving securities, must be authored by a partner expert in the area and subjected to peer review before it leaves the office. Be especially cautious when lawyers in one part of the firm are defending regulatory investigations or fraud allegations and others are doing transactional or securities work for the same client. If the defense team learns about client evil deeds, its knowledge is attributable to those of the firm's lawyers whose work is aiding the client to continue to do business. See a liability issue here?

Tax law is another area where angels (who are, after all, pure intellect) fear to tread. When you settle a case on any but conventional terms, it is tax lawyer time. This is particularly true when an opposing lawyer proposes an unusual structure to provide tax benefits for his client. Once a named partner in one of our town's big firms made such a proposal to me. I turned it down after a tax lawyer confirmed my suspicion that I had been invited to participate in a tax fraud.

Here are a few more intake cautions. That first client meeting is the moment of greatest potential delusion for both lawyer and client. The client wants the lawyer to take the case and so may stress the strengths of the case while forgetting an annoying little problem or two. The lawyer is at once flattered and still in sell mode. She wants to demonstrate both her acuity and enthusiasm for the client's cause.

In the process, the lawyer may forget to inquire whether there is any possibility that the claims against the client might be covered by insurance. Do not rely on the client to answer this question. Review all of the client's policies with your own eyes. Finding out that the client's homeowner's policy provides coverage after he has paid a lawyer \$50,000, even for a summary judg-

ment win, chills the thrill of victory to a surprising extent. You will experience related agony if you win a right to recover attorney's fees for your client but failed to document your time with adequate precision to prove it under the court's local rules.

Another early-stage mistake occurs with defense lawyers (contingency fee plaintiff's lawyers never have this problem) who tend to focus first on developing a strategy to defend on the merits, leaving analysis of damages to a later day. If the plaintiff cannot prove significant damages when that later day arrives, your client may be less than appreciative of the brilliant work during the 200 hours you devoted to the merits.

Once you accept an engagement, stay within your explicit authority. If you do not have client authority to make a deal or a representation on the client's behalf—no matter how certain you are that the client would approve—*do not do it*. You are the lawyer, not the client. Dire consequences can flow from assuming powers you do not have.

Early in my career, while on a developer-client's private jet after visiting one of his various upscale projects, the client told me he had received notice that someone was trying to domesticate an ancient, improper out-of-state judgment for \$200,000, and asked whether I could go to the hearing the next day. At the hearing, I argued that because of the client's obvious prosperity, no bond should be necessary to stay enforcement while I looked into the underlying merits. "Are you avowing to the court that your client's financial condition is so strong that no bond is necessary?" I nearly said yes, but then, thankfully, I thought to say, "No, Your Honor, I do not have authority to make such a representation." Soon after, I learned that when any but the most established developer owns a private jet, it is a good idea to require a retainer for your fees.

Always remember to get advance approval before making an argument that deals with conditions in the client's industry. On one occasion, just before by response was due, I came up with a helpful risk allocation argument in a dispute in a heavy industry products liability case. Despite my elation at this breakthrough, I fortunately remembered to run the argument past in-house counsel. "Great argument," he said,

"but don't make it. It could result in a very damaging change in the way insurers write policies covering our products."

Overreaching Your Skill and Expertise

Be especially certain to obtain client authority before you talk to news media. You are not trained in press relations. You do not know what other public relations concerns your client has. If there is any possibility that a case you are handling may draw media attention, forewarn the client as soon as possible. Almost all large companies have P.R. departments or hire outside public relations experts. In-house counsel will put you in touch with the appropriate person who, in most cases, will tell you to refer any media inquiries to a company spokesperson or, occasionally, will discuss with you what to say. If caught by surprise by a reporter, say, "I cannot comment right now," and call the client immediately. There is nothing, absolutely nothing your in-house contact hates more than to receive an angry call from her CEO, excoriating her for an inappropriate remark made to the press by some idiot she hired (you).

Sometimes you will be handed a case in which your client's leverage is so overpowering that it will present a very different kind of danger. I refer to a case in which you have indisputable evidence that the opposing party committed tax fraud, embezzlement or another criminal act; should be subject to serious administrative penalties; or cheated on a spouse. Especially in bitter litigation, your client may embrace this evidence as a godsend and urge you to exploit it in the manner that will most quickly produce the client's best case result.

Beware. What is a godsend for the client may not be for you. The CLE packet of written materials includes copies of state and federal extortion and misprision criminal statutes. Both are broadly worded. If you are not careful, your pursuit of criminal activity by an opposing party can lead to entangling you in criminal activity of your own.

Never let your desire to solve a problem tempt you into becoming "counsel for the situation." Your only agency is that which your client has given you. It hired you





to serve its interests only. If at all possible, avoid representing more than one client. Avoid even becoming an escrow agent to implement a settlement agreement because acting in this capacity even limitedly gives you duties to the opposing side. If circumstances require you to represent more than one party, in addition to documenting conflict waivers, be sure you obtain the

authority of *all* your clients before you take any action that may affect their interests. This may seem to restate the obvious, but on a surprising number of occasions I have seen good lawyers, as well as some bad ones, get themselves into deep trouble when they undertake to represent multiple clients at the request of an

important primary client, and then slide into a situation in which they communicate only with the primary client's representatives. In another variation, the lawyer forms a partnership at the request of a regular client and then becomes the partnership's lawyer. Wearing two hats when the one client you really serve develops conflicting interests can be lethal. Your materials include an appellate decision affirming a \$3 million damages award against an "A-List" firm on just such grounds. Its malpractice policy, like most, did not cover punitive damages.

The same case illustrates another obvious point: Change happens.

On the eve of trial, the plaintiffs settled with the defendant whose lawyers had been carrying the bulk of the defense burden. Suddenly, the lawyer for the remaining defendant found himself without the support he had been counting on.

Observers tell me it was not his finest hour. I have seen and, I confess, experienced the same phenom-

enon with less dire consequences on more than one occasion. In several cases, I became overconfident on more than one occasion. In several others, I became overconfident because opposing counsel was "in over his head" or the judge's remarks and rulings had all been going my way. Then a judicial rotation occurred, or the opposing party hired a new lawyer. When

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things are going well in a case, do not turn on cruise control. Necessity is the mother of invention. When your opposition must confront necessity, be alert for invention.

For the reasons demonstrated in the article "The Defense of Abercrombie," by Tom Galbraith, Vol. 17 No. 3 LITIGATION at 6 (Spring 1991), a copy of which is in your packet, never enter into any business transaction with a client—not even co-ownership of a sailboat—unless it has been cleared by the firm's executive committee—and it probably will not be. As the firm's H.R. people have already told you, intra-office romance can end a career and be more costly than the byproduct divorce it brings with it.

Bear in mind that law is the last retreat of the dilettante. Maybe that is why lawyers have a tendency to assume that they are skilled in areas where they lack training. A law degree, regrettably, does not confer omnipotence.

Early in my career, I had this point brought home with the impact of a mud

pie in the face, when I appeared on behalf of a client on a controversial water issue before the city council of a village in the hinterlands. That august body evoked comforting memories of my high school student-council days, until it finished teaching me how far out of his element a city slicker could be. In Mudville, *coif* is a pretentious word for *hairdo*. Where or whether you

went to law school counts for zero. If you don't know the territory, get a local.

After my crushing defeat before the city council, I was hesitant to walk that city's streets. Despite my protest that the sight of me in council chambers might incite a lynching, my senior partner told me to return to monitor the next Mudville council meeting. What to do?

A Sober Profession

Thwigothem takes a deep breath, mops his brow, removes his glasses, and turns away. When he turns back, he is wearing black Groucho glasses with the huge nose, bushy eyebrows and black mustache.

There are things they don't teach you in law school.

(Through this means, bless him, Thwigothem has satisfied the state bar's commendable new requirement that in order to qualify for CLE credit, all lectures must include a sight gag.) He continues his lecture, still peering through his Groucho disguise.

This is the part where I talk about substance abuse and mental health. To quote Pogo, "We have met the enemy, and they are us."

When I joined this firm, people used to joke tolerantly about one of the older partners. "Burke," they would say, "is the second-best lawyer in town when he's drunk, and the best when he is sober."

The subject is not funny anymore. In





those days, clients were good sports. They did not sue their lawyers. Today, they do. This is why our firm, like most others, assigns a partner to assist lawyers who may have substance abuse problems. As it happens, I am that person. My approach and that of the firm is remedial, not punitive. What's at stake is far more important than maintaining the firm's standard of practice (though that is undeniably important): It is the saving of lives of people who work here.

We make referrals to qualified rehabilitation counselors, help in interventions if need be, and are willing to consider any reasonable measures to assist those who work here to regain control of their lives. If you have a problem or begin to suspect that you have one, please let me or someone else you trust know about it so the firm can help. If you are concerned that someone else here may be afflicted, please, for his or her good, let me know.

This is not ratting someone out. It is helping the person and the firm. I will keep the source of my information confidential and will do what I discreetly can to follow up in a constructive manner. If, despite my assurances, you cannot bring yourself to entrust the situation to the firm, the State Bar has a confidential lawyer assistance program that has been very successful in helping lawyers with substance abuse problems. Please make use of one of these resources.

Good Mental Health

Although lawyers as a whole are an admirable bunch, if your career is anything like mine, over the years you will separately encounter lawyers with a veritable Wonderland of personality disorders. There will be the paranoid, who makes putting a deal together an infinitely trying adventure and who can always find a rationale for settling a case he is afraid to lose at trial. Occasionally a dangerously glib sociopath who acknowledges responsibility only at verbal level will add excitement to your life. You will encounter manic behavior and find more that one lawyer immobilized by depression. To a person suffering from severe depression, suicide seems the only logical solution. Today's psycho pharmaceuticals can control depression. I have lost two friends who quit taking their meds.

If you are extremely unfortunate, you may encounter a client or opposing party

who cannot control rage or thinks the voices in his head have placed him under your control. These people do exist. If either of these last two types comes along, watch out. They are a threat to your life expectancy. If you must meet with individuals whom you suspect are unbalanced in either of these ways, do so in a public place or with an accomplice. Better yet, if you can, avoid them.

The mental health I am more concerned about, however, is yours. You may not be surprised to learn that studies show that law students as a group fall short in the "psychologically well-balanced" department. And this is before they experience the pressures that make it a redundancy to say that a litigator has a stressful job. Add to those pressures the demands of family and everyday adult life, and some of us become wobbly.

This includes me. I have a particular susceptibility to a disorder that is common among litigators: adrenaline addiction. Unchecked, it leads to an ever-increasing thirst for more excitement through the ever-increasing challenges at the office, and to neglect all that is not fast-paced, including family. Adrenaline addiction, I believe, accounts for the high divorce rate and the numbers of troubled marriages that are common among those of us in the trial biz.

What is the solution? If I knew one of universal application, I'd be on the road giving seminars for big bucks. But what I can tell you is this: If you begin to feel depressed, overwhelmed, overcharged or otherwise emotionally unsteady, talk to me, the managing partner or your supervising lawyer. What we can do is refer you to a psychologist or psychiatrist, one who is competent and sane. Do not be afraid to come to us. Your inquiry will not retard your career. In fact, as an example of cognitive dissonance, we will necessarily think more highly of you because, with few exceptions, the senior lawyers in this firm—including me—at one time or another have sought the assistance of mental health professionals.

Focus on Excellence

Thwigothem shifts his weight and removes the Groucho glasses. There is a subtle change in his tone.

You have chosen to accept jobs at a large firm. Experience teaches that some of you will not find some of the unavoidable foibles of a large firm to your liking and will leave. I trust that you will go on to make much more money as plaintiffs' lawyers, or will settle accounts with partners here you now dislike when you become general counsel to a major client. I wish you other satisfactions that elude you here.

But for those of you who stay: Yes, Virginia, there are such things as law firm politics. But, no Virginia, it is not wise for most associates to try to play them. Among every 250 new associates, there is one who is so politically astute as to be an exception to this rule. But if you happen to be among the other 249, you will be relieved to learn that the collective acuity of the group you aspire to join can spot a posterior-smoocher and is inclined to disapprove. Even more important, an associate who strives to make partner has the wrong focus. Be task-oriented. Your job is to become the best lawyer you can be. If you accomplish that goal, you will almost certainly become a partner, but if you do not, you will still be the best lawyer your abilities allow—in other words, an exceptionally good one.

As a partner, you should make the firm need you more than you need it. Candor requires that I disclose that this means, at a later point in your careers, developing your own book of business. Law firms, even benign ones such as this, can change. The new managing partner can turn out to be a dyspeptic misanthrope, or a steer can be elected to lead the herd. The best way to gauge the health of a law firm is to monitor the extent to which it stays focused on external, rather than internal, competition. If you become uncomfortable here after you reach middle age and decide to look for employment elsewhere, no prospective employer will care where you finished in your class or what academic awards you garnered. Except in those rare instances when a firm needs a senior lawyer to take over the practice of someone who died or is retiring, the decision whether to extend an offer to you will depend upon your book of business.

The Elegant Lawyer

I have devoted a disproportionate amount of time to my first subject, survival, because without it, not one



of you will have the chance to be the elegant lawyer I want to persuade you to become.

What does it take to be an elegant lawyer? First, some self-evident basics:

1. She is honest. The truth, the whole truth, and nothing but the truth. An elegant lawyer does not mislead other lawyers. She does not bury an advantage for her client in an obscure definition or include an unenforceable provision in a contract without identifying the provision and disclosing why it may be unenforceable.
2. He is tough without being rude. No matter what the provocation, he is polite and well spoken. He affords respect even when it is not earned. He almost never files a motion for sanctions. If his opponent sinks into the gutter, he stays on high ground. Or, as I have sometimes put it, in response to a personal attack, he does not respond in kind but instead retreats into professionalism.
3. She is not part of the problem (as, far

too often, lawyers are); she works for the solution.

4. He is unflinchingly loyal to his client. He does not speak disparagingly of those whose bread he eats.
5. She is a stand-up person. When a lawyer blames a mistake on a secretary or an associate when responding to an upset judge or client, she banishes herself from the league of the elegant.
6. He does not duck hard issues. He is the antithesis of the civil servant who disappears at crunch time and then papers his file to place blame on a coworker if something goes wrong.

Do not make gratuitous enemies. You will get enough of them by just doing your job. When opposing counsel tries your patience, remember that someday he might become a judge. Never gloat when you win, and congratulate your opponent when she does. An elegant lawyer never brags. The letter in your CLE materials in which the lawyer really does say, "I did not get an AV

rating for noting," is self-refuting. Every time I see one particular young partner from another firm, he repeats several times how much he *loves* to try cases. The real thing doesn't do that. Instead of intimidating, the young man advertises his insecurity.

Many American Indian tribes in their own languages call themselves "the human beings" but refer to neighboring tribes in less-flattering terms, such as "the dog people" or worse. Of course, I want you to have pride in our law firm. It is good for the institution at the same level as school spirit is good for a high school. You cannot imagine how foolish (to say nothing of inelegant) a lawyer looks who projects even a hint of superiority when announcing that she is from Hinderblath, Thwigbothem & Banderdosch. Do not be insular. It is a mistake to limit your friendships to the comfort and convenience of intra-firm pals. Other lawyers possess an infinite variety of talents. The characteristics that drew them to other firms and what they carry from those cultures can be instructive. If lawyers





outside these walls respect and like you, they will send you business and vote you into multitudinous honorific societies.

An elegant lawyer does not embarrass opposing counsel unnecessarily. I will always remember with gratitude a lawyer who, during a meeting of lawyers and clients, sensed that I was unaware of a critical case and managed to make me aware of it without alerting my client to my inadequate preparation. Another time, before oral argument, opposing counsel gave me a copy of a critical case that had been decided the previous day, rather than stuffing it down my throat (or elsewhere) after I had sung my opening song. On yet another occasion my local counsel had obtained my *pro habe vice* admission in what I later learned was apparently a sneaky, improper way. Rather than blast me, opposing counsel asked whether I was aware of the impropriety. When I said that I was not, he did not contest my right to appear. I burn candles on an altar in my home for lawyers like those.

Elegant lawyers do not practice circumlocution or stuffy law prose. They communicate clearly, in unpretentious language. They do not begin sentences with “To be perfectly honest with you,” because this implies that previously, they were not. Elegant lawyers do not pretend that they lack authority to initiate settlement discussion, and when an elegant lawyer says, “This is my final offer,” it is. And elegant lawyers never trumpet their “good faith.” Lawyers who do protest too much.

Discretion and Integrity

If a lawyer has a heart attack while jogging at the downtown YMCA, lawyers uptown will be talking about it before he finishes crumpling to the ground. It is a fact of life:



Lawyers are huge gossips. But the moment their gossip slips into a discussion about clients—even where no privilege is involved—they leave

behind any pretext of elegance. You will see many bad examples. *The Partners* provides another one. Although the personal information in its chapter on the Rockefellers probably does not contain any sensitive, attorney–client privileged information, the family’s lawyers must have been among Stewart’s sources. They should not have been.

Be careful where you talk about business. The frumpy lady on the other side of the plastic plants at a nearby lunch dive might be your opponent’s secretary. You do not know all the other people in the elevator or who might be in one of the restroom stalls.

*Punctuality is the courtesy of kings.
This applies to telephone calls, too.*

Although at times it may be necessary to give information to get it, in general it is better to be a sponge than a faucet. There will be many occasions when opposing lawyers volunteer information helpful to your case for no reason other than to hear themselves talk. I have never heard a lawyer criticized for being too discreet.

Of course an elegant lawyer practices the courtesies. She does not enter a default without first calling opposing counsel to provide a final chance to answer. Although the elegant lawyer tries never to ask for extensions, she grants requests for reasonable extensions in all but unusual circumstances, such as when her client is in a race with other creditors for a limited pot of assets. And in those cases, if possible, she forewarns her adversary that this particular railroad must run on schedule.

If she receives a letter containing her opponent’s attorney–client communications—accidentally misaddressed by an assistant—she stops reading the moment she realizes what the document is, makes no

copy, and immediately sends the original back to opposing counsel. I sure wish my opposing counsel had done that when it happened to me.

During litigation, when it appears that there might have been an inadvertent production of privileged material, the lawyer stops reading, places the document under seal, and informs opposing counsel. If opposing counsel confirms that the production was accidental, it is proper either to return the document or, sometimes, to ask the court to conduct an *in camera* review to determine whether the claim of privilege is proper.

Punctuality is the courtesy of kings. This applies to telephone calls, too. This firm’s founder, Ulysses Hinderblath, never went home at the end of the day without returning every call on his telephone message slips. That goal may seem a

bit aspirational to many of us, but to the extent possible, it is a worthy one. It can also make you a buck. Sometimes the call is from a potential new client or a referring lawyer who needs to reach a lawyer to do something *immediately*. First one to return the call gets the business. On the other side of the coin, I have heard lawyers *in front of their own clients* tell a secretary to tell an incoming caller, “I am not here.” What an impression that must make.

A Life Well Spent

Why should you try to become an elegant lawyer? Money is not the answer. There will always be a strong market for junkyard dogs, and a segment of the client population will gravitate to shysters. This is not to say that the virtue of elegance is necessarily without earthly reward. Over time, lawyers develop reputations. In their lunchrooms judges talk to one another about the lawyers who appear before them. They do not like lawyers who make litigation unnecessarily

acrimonious or expensive. They despise liars. There will be times at the bar when the most valuable asset your client will have is your personal credibility. There will be others when, if you are an elegant lawyer, you will be able to make deals that less trustworthy lawyers cannot. These may involve many millions of dollars. And if you are good at your job, reasonably outgoing and achieve elegance, other lawyers will refer you cases. I know some wonderfully skilled lawyers who are jerks. I do not send them business, nor would you.

There are more important reasons to join me in striving to achieve elegance.

It is an effort to pass from clever to wise. What do you want in exchange for the most valuable commodity you have to spend—the limited minutes, hours and days of your life? Despite the pressures, we who practice law are so fortunate. Lawyer jokes aside, ours is a respected profession. We stand for something. What we do makes a difference. We are privileged to participate in a marvelous, multidimensional game that is fundamental to maintaining an ordered society. Through our daily efforts, abstract written principles are transformed into tangible reasoning. Viewed existentially, what we do *is* Justice.

We get to go from one difficult, usually interesting contest to another. Our cases have a beginning, middle and end; and we have a social as well as intellectual component to our travails. We can congregate in tribes or bands, or go it alone. Often, we get to work in small, efficient teams. We must enthusiastically embrace our clients' cases yet maintain objectivity. Continually, our conclusions (and egos) face the bracing, instructive challenge of dialogue.

It would be an abuse of such blessings not to strive for elegance. But the most important reason to seek elegance is simpler: It will make you feel better about how you spend your life.

Finished with his formal remarks, Thwigbothem holds up a vertical palm to quiet the applause.

Please, no hand clapping. If you find these thoughts helpful, as I hope you will, I would be grateful if you would recall them in your practice and, together with what you will have learned from your own experience, pass them on. 