Public Lecture

UCLA Law Professor Rick Abel

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Kathryn Watts:

Welcome everyone, thanks so much for coming. It’s my pleasure today to welcome Rick Abel from UCLA’s Law School. He’s the Michael J. Connell Distinguished Professor of Law Emeritus at UCLA. And he is an expert in many issues including professional responsibility issue. HE teaches tort, legal profession and law and social change at UCLA. And he has a fascinating background including the fact that after law school, he spent two years reading African law and legal anthropology in London. His books have covered a variety of different topics and subjects. Some of his books include topics like English lawyers between market and state: the politics of professionalism. He’s also written a book that’s titled Speaking Respect, Respecting Speech and also a book called Lawyers: A Critical Reader. He is going to be talking to us today about the issue of overzealous lawyering: an ethical problem.

And so with that, let’s all welcome him and thank him so much for coming today.

Rick Abel:

Thank you Kathy for that kind introduction and the Law School for the invitation to see Seattle at its best. I know it’s always like this. It’s how I will remember it. I’m particularly happy to come today that traffic in Los Angeles is going to be impossible for the next few day, why? Because our president was going to be there. So I land here and go off blithely and who do I see but our president, anyhow it’s clearly inescapable on the West Coast for reasons that we both know.

So today I’m going to be talking in considerable detail about a particular case of a disciplined lawyer but before I begin that, I wanted to situation the larger research project and to do so in fairly general terms, I’m going to pass something out despite the fact that that will be a distraction. It’s not relevant until we actually get to the case study itself, so if you can just put it to one side and try not to look at it too much. It won’t be of any interest until I come to the case study.

What brought me to this area was really two kinds of puzzles. And I use the word puzzles because I can’t think of a more precise term. One was a scholarly puzzle and one was a pedagogical or a teaching puzzle. The scholarly puzzle was this, that as lawyers, law students, law professors, legal academics, we spend our professional careers focused on how law can most effectively control the behavior of people in society, people and institutions in society. And yet, we seem to be surprisingly interested in the ways in which law controls the behavior of lawyers. And this is particularly surprising because lawyers are the crucial intermediaries of our legal system. They are the aspect of the legal system that ordinary people come into contact with. There are far more lawyers than there are judges or legislators and yet we spend much more of our scholarly interest in trying to understand how legislators behave and judges behave and the general public behave and very little about lawyers. And when we think about lawyers, we tend to think about the rules that are supposed to govern their behavior and that’s fine, but in the rest of our activities, we look at institutions, at processes, we look at behaviors, etc… I tended to think that was lacking. So that was the scholarly problem. I’ll come back to that in a second. The second was a pedagogic problem. I taught the professional responsibility course for my thirty-five years at UCLA and I found it a very difficult course to teach, and that of course could be my own inadequacy but I also taught torts and I thrived as a torts teacher and I thrived as a torts teacher and I had endless difficulties as a legal
professionalism teacher. I have my own notions as to why that is. I’ll offer them now, but others of you may have your own and quite different beliefs.

My belief is the following. There is a way in which the professional responsibility is an anomaly in the curriculum. How is that? What is it that law schools say they do? Law schools say, and this is virtually unanimous among law schools, we teach people to think like lawyers, we transform during the course of their first years and law students themselves, experience that year as transformative, often in unpleasant ways, but nevertheless transformative. What that means of course, is to argue both sides of the case, to treat themselves as a hired gun, to suspend their own moral notions, to become an instrument of their clients and to sail as close to the wind as possible. They will spend a great deal of time as lawyers trying to help their clients do what their clients want regardless of what the law says, not to break it but to bend it as far as possible. But when we get to the PR course, we ask them to treat the law very differently. We ask them to follow not just the letter, but the spirit. We ask them to incorporate its basic notions into their own being. And yet, they take the cynicism that I think we breed, rightly or wrongly in students and they find it difficult to transform their moral sense in the PR class. Indeed, and this is now being perhaps a little bit unduly cynical, many of them take the PR class primarily because it’s required and when they actually have to learn the law, they do that in a cram course over the weekend and the principle instruction that they learn in that cram course as they prepare for the MPRE is chose the second most ethical course of behavior and you’ll pass. My point is it’s very difficult to change the attitudes of students. Okay.

The project that I engaged in over the last five years or so attempts to address both the scholarly problem and the pedagogic problem. With respect to the scholarly problem I decided to consider myself not with the rules, but with the behavior of lawyers. I wanted to understand, what is it that lawyers do when they disciplinary rules? Why do they do it? And what could we do to try to change that behavior? And with respect to students, I hoped that if I could tell stories of lawyers with whom they could identify, they could see how easily it is to fall into unethical conduct. These are not bad people by and large. These are people who are quite successful, have often had lengthy legal careers. Most disciplined lawyers are not novices, but lawyers in their thirties, forties, fifties, sometimes sixties, and seventies. So these are long-standing behaviors. I wanted to try to illuminate the behaviors and help people engaged in them.

I chose to work on two jurisdictions, New York and California. Those are the jurisdictions in which I practice and teach. They are also the two largest jurisdictions. Between them, they contain a quarter of a million lawyers which is more lawyers than there are in any other country in the world. So it seemed justifiable to focus on them. Furthermore, they produce public records, which is not true in all jurisdictions. These records are extremely voluminous. When lawyers are disciplined, they litigate the case as though it were a matter of professional life or death, as indeed it is. So they litigate it to death. These are very lengthy records. A typical in record in either New York or California would occupy this entire table, thousands of pages of transcript and exhibits. Furthermore they are bifurcated proceedings, so that when you get to the penalty phase, as I did, because only cases in which guilt is established are cases that I could have studied otherwise they would not be public, when you get to the penalty phase, lawyers have a very substantial incentive to try to exculpate themselves. Not everything should be believed, but it’s more information than you would get from an interview and it’s actually quite, valuable.

Okay after having decided on my jurisdictions. I then had to decide what kinds of misconduct I would look at. I immediately excluded two although they account for the significant part of the disciplinary docket. One is misappropriation of client trust funds, it’s all too common, but it’s not very interesting. Every lawyer knows you’re not supposed to do this, and indeed there are a variety of things that we could do to make it more difficult, there isn’t a lot to be said beyond what I’ve just said. Also there is a lot of discipline that is basically and appendage of the criminal justice system following a felony conviction. There, again, there isn’t a great deal more to be said than is
contained in the criminal docket.

In New York I focused on the two most common sources of client complaint which are neglect and overcharging: so a feeling that the lawyer is not being sufficiently faithful and energetic on the one hand and secondly that the lawyer is charging too much money. In California, I cast my net considerably more widely than that, and I can tell you about those cases.

But today, I’m going to talk about a case which is in many ways quite anomalous. I picked such a case in both New York and in California. And the anomaly is the following. I believe that the basic problem of lawyer discipline is breach of trust, insufficient fidelity to clients and to the legal system and yet the case that I’m going to talk about today is an excess of zeal, an excess of fidelity. Normally we think of fidelity as a good thing and the more the better and the lawyers who express and personify great zeal are often our heroes. You think of a Thurgood Marshall. You think of a Clarence Darrow. Maybe you think of a William Kunstler. Maybe you think of a Stephen Yagman, etc. But by and large, zeal is something that we value. And yet of course like anything else it can be abused. So I wanted to try and understand cases excessive zeal and also the ways in which they differ from the run of the mill.

Okay, now take a look at the handout. It’s on two pages, but turn it over to the side that has dramadas personi. The rest is a chronology beginning on the other page. It’s very detailed. It will be helpful to you if you want to think back later on what I’ve said or to try to clarify it, but it’s too detailed to refer to. The list of characters is useful because of course you can see there are lots of them, and I will name them but after that I will just refer to them by name and so it may be useful to have that in front of you.

And let me pose the questions that I wanted to foreground as I went through this narrative and that I will come back to when I finish it so that you have them in your mind as you listen to the narrative and they are basically the following: First of all, what did the lawyer in question here, Nicholas Damers, what did he do that was wrong? That’s the first question. Secondly, how do we understand that behavior? Can we get inside his head? Can we understand why he did it? And to generalize that is this a more widespread phenomenon? Is the kind of excessive zeal that he is exhibiting something that we can see in other lawyers and if so, can we understand it more generically? And then to move finally to the policy question that we as lawyers are always interested, so what does that understanding of the behavior and its motivations tell us about what we could do by way of remedying?

So here’s the story. In November 1980, Maria Seward was a passenger in a car and she suffered grievous injuries in a car crash. I can tell you more about that but it’s really not relevant because this is a tort lawyer’s dream. Liability was clear. There was no possible fault on her part. The damages were quite serious and the defendant driver had a three million dollar liability insurance policy and he had that in part because he was quite wealthy. So you had a deep pocket, so you have liability damages in a deep pocket. She was represented by a lawyer named John Elstead. So Marie Seward is the first named person, she is the plaintiff. Her lawyer is John Elstead. He is a partner in the law office of Gerald Sterns, a quite prominent San Francisco PI firm. She sued both drivers. After the lawsuit was concluded, another partner in the Sterns Firm wrote a letter to Sterns, the named partner, the principle, criticizing Elstead, his fellow partner for incompetence and overcharging, for client neglect and for padding bills that were transparent and clear to be caught. So you have a smoking gun and you actually have an intrafirm memorandum memorializing these kinds of complaints. Furthermore, Sterns, himself, the recipient of the letter was aware of these problems because the day before he received this memo, he himself, wrote to Elstead and he called him on some of the dubious expense charges and he also asked why it had taken 32 months to resolve the case when liability was clear and where the docket was current and why the settlement of this case with a $3 million liability insurance policy and substantial damages was just $100,000.
So you have now two memos within the firm about overcharging and potential neglect and incompetence. Two years later, Maria Seward finds her way to Nicholas Damer, who is the respondent in this case. Fids her way to Nicholas Damer who represents her in a legal malpractice claim against Elstead, Sterns, the Sterns Firm and their malpractice insurer.

Damer’s initial demand in the settlement conference is for $12 million. I don’t know where he got the amount of money, but it’s a lot of money obviously. The defendants in the mandatory settlement conference in 1988 offer 200,000. So you’ve got a demand for 12 million, an offer of 200,000 not much likelihood of actually negotiating a settlement. Furthermore, the defendants say that for that 200,000 they want to seal the record. They want absolute confidentiality. They want no mention that this lawsuit had ever been brought. The offer is rejected both on grounds of quantum and on grounds of confidentiality. And this is what Damer writes to the defendants in this case, “I admire the principle stand of my client Maria Seward in this matter and I am sure that her remote ancestor, (you’ve noticed the name) President Lincoln’s secretary of state William Seward (That’s not at all clear the fact that they were related, but Damer as you will see tends to magnify the importance of what he is dealing with.) Maria Seward does not wish to engage in a conspiracy of silence for the benefit of the defendant attorneys to the extent the potential for discovery of the facts underlining their case might motivate the attorney defendants to treat their clients better in the future then Miss Seward will have accomplished one of her major objectives in this litigation.” I’m going to flag some of these things because there is a lot of detail and I want to try and bring the more important points out. So what Damer is emphasizing here is not only that he is being a zealous advocate on behalf of Maria Seward but he is also representing the greater good i.e., the interests of other clients who may have been mistreated by the Sterns firm.

The next Damer writes his client Seward, having rejected this offer, and he asks her for a written authorization to file a class action suit against Sterns and Elstead to compel an accounting and a refund of all funds properly owed, “I need your authorization immediately before Stern’s attorneys send you a refund in an attempt to moot your claims.” So here is Damer again, that he wants to make this a larger case and that he is concerned that a settlement offer will finally be acceptable and the larger issues will be mooted out. Damer asks the judge who is handling the pretrial motions to tell the defendants to negotiate in good faith and to abandon their demand of confidentiality. The defense lawyers ridicule this motion. This is what they say, “Plaintiffs’ attorney’s eagerness to publicize his allegations in any settlement in this case ignores the best interests of the plaintiff, his client.” One of the defense lawyers calls Damer, “an inexhaustible source of gibberish,” this is in writing. And they move for sanctions and indeed they get sanctions of $5000 for a frivolous and unfounded motion.

In November 1988 Damer writes Seward in the course of their ongoing correspondence and Seward responds, and I’m going to read her response, I’m going to read it slowly because it’s quite important, again to what happens next. This is what she says, “I am growing weary of constant delaying and I wish to have this matter brought to a timely and appropriate conclusion. Throughout this whole ugly business I have come to really appreciate more and more your awesome and prodigious skills which are being utilized on my behalf and perhaps ultimately for many others who have been abused by some members of the San Francisco legal community. My husband and I are both very grateful to you and to your office for bringing so much talent and experience keep on trucking.” Now that’s a very ambiguous message and Damer I think could have been quite entitled to read that in a number of ways. It begins saying I am growing weary of the constant delaying and I want a conclusion to this matter and then she goes on says but you’re my white knight, you’re my champion, you’re doing a wonderful thing not just for me but for many people and she concludes, “keep on trucking”.

The trial was scheduled to begin in February 1990. Two months before it was to begin, Damer learns the following: the Sterns Firm, the firm he is suing, who are, as I said, prominent San
Francisco PI lawyers are now representing plaintiffs in another much larger case. This is the case growing out of a tragic air crash in the Sun Valley Mall in 1985 when a small plane crashed into a shopping mall killing seven people, injuring 75 people and causing property damage to 40. So the Sterns firm, and other lawyers, but the Sterns Firm is the principle lawyer has many of the plaintiffs in this case and this case is pending at the same time.

Okay, then just days before the trial is to start, there is a television program about the Sterns Firm handling of the Sun Valley Mall case and this television program is brought to the attention of Damer and of the other participants by the clerk of the judge who is hearing Damer’s legal malpractice case. And this is Damer’s memory of the television program, “It was devastating. It showed bloody bodies of the victims being dragged out of the Sun Valley Mall and the next thing on the screen would be a picture of Stern’s $10 thousand dollar bill for a dinner at a local restaurant which he was trying to charge to the clients. Then they would show more bloody bodies, and then they showed the invoice for his trip to London on the Concord which he was trying to charge to clients.”

Soon after that, just before the malpractice trial was about to begin, Damer gets a phone call which leads him to that smoking gun memo that I read to you earlier from Smith to Sterns about Elstead’s incompetence and his padding of bills showing that the firm knew about it four years earlier. Damer, for reasons that aren’t entirely clear hires a young man to assist a young lawyer to assist him in the trial of the legal malpractice. This is a man named Robert Denebeim, and you’ll see him just halfway below in the midsection in the list of characters. Denebeim is hired as a contract lawyer just for this case for a fixed sum of money, $15,000. This was all in writing. Damer was quite careful about this. Damer sends Denebeim to research what’s going on in the Sun Valley Mall case. And Denebeim comes back and finds that there is a contest over a quarter of a million dollars in contested expenses. That i.e., lawyers for other plaintiffs in the Sun Valley Mall case are claiming that the Sterns Firm has overcharged at least $250,000 in the case.

Now on the eve of trial, Damer reduces his demand from 12 million to 4 million and the defendants increase their offer from 200,000 to 500,000 but they are still far apart, 4 million and 500,000 and the trial begins. When the 500,000 is offered, it is offered with a demand for confidentiality, a complete sealing of the record and Damer on Seward’s behalf rejects this. The next day Damer comes to court. There is Seward. There are the defense lawyers. There are the defendants. There is Denebeim and before the trial begins, Denebeim asks that the jury be returned to the jury room, removed from the court and he stands up and he says, “on behalf of Maria Seward I am authorized to settle this case for $750,000 and a promise of confidentiality.” Damer is completely blindsided. It turned out that the night before, the defense lawyers took Denebeim out and they said, “Sell out your superior. If you can get your client’s consent this is what we’ve prepared.” And he went to Maria Seward and she accepted this offer.

Denebeim also withdraws his opposition to the defendant’s motion for a non-suit. A non-suit is entered and that’s crucial because now there is no principle case that can ever be reviewed or appealed from. The case is gone, it’s just disappeared. Gephardt who is the lawyer for Elstead says on the record, “One of the moving forces for this settlement is for the defendants hopefully to rid themselves as much as possible with any involvement with Mr. Damer and so the agreement that he not use directly or indirectly any information used in the case in this case or in any other litigation.” Damer refuses to surrender his files; this is in open court before Judge Chiantelli. He is summarily held in contempt and taken off to the clink. He is released shortly thereafter because of course you can’t actually do this, but he does spend a brief amount of time in jail. This is again is relevant, let me just underline, because as will become increasingly clear, Damer has tendencies towards paranoia. I don’t want to exaggerate this and as you know what is often said about paranoia, “just because I’m crazy doesn’t mean the world isn’t out to get me.” Damer believes the world is out to get him and unfortunately, the facts do tend to conspire that that’s the case and this is one of those
examples.

The parties are to appear in court the next day. This was on a Wednesday and the next day is Thursday, anticipation of concluding that matter and wrapping up the settlement. That afternoon, Damer now out of jail calls the California State Bar to complain about the behavior of a variety of the lawyers in the case. The person answering the telephone refers, now typically if you call the California State Bar for years if you call the California State Bar you would get a busy signal, that was the first thing that would happen, and this has been well documented but if you eventually got to speak to somebody you would be told, well we’ll send you some forms you can fill out and eventually you might hear, but it would take weeks or months at least. But if you’re a lawyer, you get very different treatment. So Damer calls the state bar and he gets the receptionist and the receptionist sends him to a lawyer who is prepared to hear what he is concerned about. Who was this lawyer? This lawyer is Janette Shipman (you’ll see her name immediately below that of Denebeim) coincidence of coincidences. Who is Janette Shipman? Janette Shipman had been a partner in the Sterns Firm and she is a named defendant in the legal malpractice action that is being settled right now. Not surprisingly, Damer is not willing to speak to Janette Shipman, he hangs up. He calls the State Bar in Los Angeles; he explains what this is all about. And they may be sympathetic, but they are not prepared to send a lawyer up to San Francisco, so they are out of the picture, at least for now. He also calls the court of appeal and the commission on judicial performance.

The next day Damer appears in court. Now he has a lawyer to represent him. It’s actually a woman named Cynthia Frazier. You’ll see her name below that of Janette Shipman. She is one of the lawyers for other plaintiffs in the Sun Valley Mall case. Through her, he asks for a written order from Judge Chiantelli for the sealing of the papers and the order of confidentiality so that he can seek a writ to challenge them. Chiantelli promises that, but he does not actually write the order.

The next day they appear in court and this is Friday, this is now the final appearance, Damer requests a stay that is denied by Judge Chiantelli. A lawyer for the defendants claims that Damer wants the delay so that he can seek the writ to try to eliminate the confidentiality of this matter. To me that makes a joke of the whole settlement. What was purchased was confidentiality. That is why the offer increases from 200,000 to 500,000 to 750,000. They are buying sides. What Chiantelli does is to order that Damer deliver the records to a custodian, not to a defendant, but to a custodian, Judge Scott to deliver them the following Monday. Damer refuses to do so and indeed on Monday, he fails to do so.

On the intervening weekend, Seward calls Damer. And she leaves a message on his answering machine. Remember, that these two are very close because you heard that earlier letter from her expressing her gratitude to her and his sense of enormous dedication. This is what she says, “I think there is something that you need to hear from my mouth and that’s why I’m calling. I made a deal with the defendants and I want you to go along with it. I want you to turn over the files to Judge Scott. I don’t want you to do anything to violate the court’s order. Basically, I just want to get on with my life. I agree that any of the sensitive material in your files shouldn’t be given to Gephardt, but I would like you to turn it over to Judge Scott. I have not been coerced. I am not hungry. I made this decision on my own.” That eliminates the ambiguity of her earlier communication. So that’s what Damer has heard, never the less, he declines to give Judge Scott the files. Instead, he goes into the Contra Costa court, a different court in which the Sun Valley Mall case is being heard and he seeks to submit there the very smoking gun memo that I told you about attesting to the fact that the Sterns Firm knew that lawyers like Elstead were routinely overcharging clients, overbilling clients. He tries to do that in a variety of respects and each time he tries to submit those documents, they are turned by the judge. That gets more complicated, but just take it for granted at the moment that he makes numerous efforts to submit the documents and each time they are rejected.
He writes to Chiantelli. He is unwilling to appear before Chiantelli because he is convinced that Chiantelli is just going to send him back to jail. And as I said, he tends towards the paranoid in any case. So he writes to Chiantelli, asks him to reconsider his confidentiality order and he evokes John F. Kennedy who said, “Mistakes emerge from errors only by our refusal to accept them as mere examples of our fallibility.” Nevertheless, Chiantelli does not reconsider his order. Let me stop there, again, more things happened.

It takes from mid-March to mid-June, three full months before Chiantelli finally issues the order, which is the predicate that Damer needs in order to seek a writ or appeal or somehow challenge the requirement of confidentiality. So three months pass, but it’s actually much more than three months because when Chiantelli finally issues his order, which by the way is two sentences long, when he finally issues his order, it’s sent to the wrong address. So actually Damer doesn’t get it and he only hears about it through the press months later.

In the Sun Valley Mall case, which is going on at the same time, there is a challenge to Sterns’ overbilling. There is a challenge for $700,000 in billings by the Sterns Firm and they are reduced by a substantial amount by over a hundred thousand dollars. At the same time the judge in the Sun Valley Mall case wishing to signal what an extraordinary job Sterns had done for the plaintiffs in that case awards him an extra $500,00 so that although, there was a decrease in expenses, there was an enormous increase in lawyers’ fees. The defendant moved for an order that Damer be held in contempt for violating Chiantelli’s order, the order for confidentiality, and the order to surrender the documents. Damer replies to that that he refused to “genuflect before them in the courthouse foyer simply because they paid the plaintiff enough money.” Again, I’m going to skip over. There is a lot more detail I can come back to it in Q and A.

The upshot of the contempt proceedings is that Damer is held in contempt. He appeals that. He takes it as far as it can go. And then there is a final order of contempt for the violation of Judge Chiantelli’s order.

Okay, now we move to the disciplinary proceedings. In the disciplinary proceeding the first charge against Damer is that he failed to report to the state bar the imposition of sanctions and the finding of contempt as every lawyer in California is required to do so. What does respond to this charge? Damer says, “Well there’s no need for me to tell you. You obviously know about it because you are charging me with it so why do I have to tell you,” suggesting that Damer is not somebody who takes a mollifying attitude towards charges when they’re brought against him. His back immediately goes up. And he says to the investigating attorney, Robert Holling, the prosecutor in this case, “Don’t underestimate my resolve. I volunteered for duty in a foreign of Vietnam to which sons and daughters of ordinary Americans were being sent in place of well-connected people like you and your partners. I simply am not going to sit by and see ordinary Americans victimized by an old boy network.” Holy recuses himself and is replaced by another prosecutor named Fredkin at which point Damer sues Holy for violating his civil rights. Damer tries to get others involved in this case as well. He has a friend in the San Francisco DA’s office. He writes that friend and presents the facts to the friend. The friend takes him quite seriously, researches it for a period of time. Damer claims now, that the overbilling by the Sterns Firm not just in this case, but in other cases generally is $10 million in excess expenses and $100 million in under-settlements, where these figures come from. But his friend in the prosecutor’s office tells him after several weeks, “I’ve been told not to do anything in this matter.” Thereby fueling once again, Damer’s belief that the world is against him.

Okay, in the disciplinary proceeding, Damer does a number of other things. First of all, he claims that it’s impossible for him to get anybody to represent him because he is making complaints himself against a variety of members of the state bar. And indeed he has letters in his file suggesting that a number of lawyers are unwilling to represent him. Maybe you already can get a
sense of why that may be. Damer also asks the state bar to appoint counsel for him and to pay for that counsel. Although, he offers no authority for his entitlement to that and of course the state bar refuses to do that. Damer then gives other reasons for why he did not deliver the files to the custodian judge, Judge Scott. He says some of his firm’s files were taken by his partner and kept at home and they were destroyed by the Oakland Hills fire. So it is very dangerous to surrender anything to anybody and you’ll see in a moment that indeed that is the case.

Damer finally answers the disciplinary proceedings. He makes three responses. First, there had never been a settlement by Seward of the legal malpractice. Secondly, that Seward lacked full cognizance of the settlement and was utterly without the right or power to sell or sacrifice a classed interest for her sole behalf. So once again, he is now claiming to represent the larger category, not just his client Maria Seward. And then finally by virtue of the adversarial position that she has taken, and I’ll tell you about that in a second, he no longer has any obligation of fidelity to her anyhow. What is that adversarial position? Well, Maria Seward now represented by Denebeim, Damer’s former contract lawyer is suing Damer for legal malpractice. He has taught that’s a useful thing to do, why not sue Damer himself.

The Damer files his answer to the disciplinary proceeding; there is a fire in the chambers of Judge Chiantelli the judge who had held him in contempt. The fire department investigator seeks to spike a rumor that a cigarette had caused it. The San Francisco court house you will not be surprised to learn, is a no smoking zone. And the investigator says he found no evidence of smoking in chambers. But the judge was known to be a heavy smoker and the newspaper reporter; the investigators noted an ashtray full of butts on the bailiff’s desk in Chiantelli’s courtroom. So when Damer says if I let anything out of my possession it’s going to be burned once again he has evidence that it’s the case.

Damer insists that he could be found guilty only if, “no reasonable attorney could contend that the orders in question were invalid or unenforceable.” He submits a list of witnesses that he plans to call. He plans to call the following: Holly, the original state bar investigator, Judge Chiantelli who issued the order, the state bar deputy general counsel, the state bar settlement judge, he even plans to call a court of appeal’s judge to say what he really meant by a written opinion beyond what words he said. But Damer has failed to file the statement timely so he can’t actually call any witnesses at all so he’s not allowed to submit any evidence at all. At which point, he files an offer of proof of all the evidence that he can’t actually submit. He also now explains that he missed the deadline because his mother-in-law had died. And he offers a judge’s condolence letter for his mother-in-law. And I’m going to read it because, again, I think it’s quite telling.

He said, “The letter moved me to tears because the last sentence said, ‘she loved nothing better than a good fight for a just cause.’ Comparing himself to a tax protestor, he says” taking a philosophical position in the United States of America still isn’t a criminal act yet.”

The hearing judge in the disciplinary matter, Judge Goldhammer, a quite experienced judge and I haven’t met him but my sense from the record is that A, he was somewhat sympathetic to Damer and very thorough and very even handed. And this is what he says, “This is kind of blown a bit out of proportion.” And then he goes on, “A gag order like the one Chiantelli issued is a special kind of order because once it’s disobeyed it’s like popping a balloon, you can’t blow it up again. We want attorneys to be ardent advocates for positions and that means that they do take judges to the wire and opponents to the mat, but Damer was doing it deliberately. He was going to show Chiantelli he was wrong by disobeying the order and that’s not the way to do it.” Goldhammer who is a retired Superior Court judge now a state bar judge, Goldhammer says, “If you want to get into a spitting match with a judge, you better get another judge on your side to overrule the order.” Nevertheless at the end of the day what Goldhammer recommends is a private reprimand. And had Damer been willing to accept a private reprimand, you never would have heard this story because it
would have been a private reprimand and nobody would have been the wiser, but of course, Damer couldn’t do that. Damer seeks review because however discipline however slight conflicts ominously with the rules of professional conduct, state and federal constitutions and recent legislation prohibiting the suppression of evidence about attorney misconduct and he invokes the recent resignation of associate attorney general Webster Hubble. And you might ask yourselves, how is that relevant? In his replied brief, in his challenge to the order that Goldhammer is proposing this is what he says, “The explanation for respondent’s tenacity can be found in the ironic note in Shakespeare’s fearful query posed confidently by an assassin over his victim’s body.” And this is what Shakespeare writes, “how many ages shall this our lofty scene be acted over in states unborn and accents yet unknown. “Actually Damer’s quite right because I have told this story many, many times and indeed it is now written in a book and therefore inscribed for all posterity. He also invokes James Madison, “The self-serving abuse of power will endure until men become angels.” He ridicules his former Seward, “her pretense of a ‘Greta Garbo pose’ of I just want to be left alone is no more credible than if Madonna made such a statement. Popular entertainment portrays not only lawyers as corrupt but judges as well including nearly the entire German judiciary which lead to the most apocalyptic consequences in recorded history.” He condemned the state bar’s appalling and disgusting prosecution concluding, now this is how the brief ends, now this is all in caps “chiseled in the memory of the people and in the Lincoln monument is the image of an ideal the smart yet honest lawyer as well as that man’s last major utterance concluding with a dedication to the cause of widows and orphans.” So he’s Julius Caesar assassinated in Shakespeare’s play. He is James Madison. He is Lincoln. He is Kennedy, etc. And even though as I said, he wasn’t allowed to submit any of the papers he wanted to submit, he moves again to be allowed to submit additional papers and this is what he says, “If I’m not able to submit the papers what if I had accused the judge of exposing his genitalia to the jury, who would the court of appeals believe without a transcript?”

He appeals to the review department as I indicated and he seeks to put into the record the fact that when the legal malpractice case is finally arbitrated to a conclusion which is how it is concluded, 51% of the interpledged funds are given to Damer, 42% go to Seward and just 6% go to Denebeim. So there is actually now recognition on the record that Damer did well by Seward in his representation of her but this is viewed as extraneous and it’s not allowed into the record. The review department had found that Damer had willfully violated Chiantelli’s order. It affirmed the private reproval but now it ordered public disclosure. Damer files for reconsideration. He says, “In the hope of promoting judicial economy he would not correct every discrepancy in the text of the opinion.” And he concludes with the following analogy, (this is the last word you’ll hear from Damer through me) this is the last word in his brief to the review department, “How many teenage girls continue to be sexually exploited while Mary R’s attorney honor the stipulated gag and sealing orders? How many orphans received smaller settlements because Gerald Sterns was able to charge phony investigative costs freely? How long do lawyers wait in good faith as children are raped and robbed?” The review department denies his request for reconsideration. The California supreme denies to review the case. The US Supreme Court denies cert, not surprisingly.

So ten years after Damer is charged with misconduct, eighteen years after Maria Seward’s car accident, the case is over. So that’s the narrative. Let me pose the three questions that I would like to hear your views about and I’m happy to obviously say more about it in response, but I want to get you talking as well. So the three questions to me are A: to try to specify as narrowly what it is that Damer did wrong, that is why did he deserve discipline at all. Then to get inside his head and to try to figure out whether his behavior is pseudo generous whether this is really just one oddball, bad apple, whatever you want ot call him or whether this is behavior that we can find in other lawyers and if so, what are its origins? How do we understand it, and then to start to think about remedies? So I’m going to stop there.

I can tell you more detail, but I have to do that in response to some question at least. I’ve given you probably more than you need.
Yes.

I’ve not met Damer. I’ve not spoken to him on the phone. We have had an extensive e-mail correspondence; I can tell you more about that. He was in partnership with one other lawyer when this was going on and the partnership dissolved. My sense from all of the other lawyers he engaged with and the judges in this case is that he is a very difficult person. I have no evidence that he is bipolar because I’m not sure that he is ever anything less than what you’ve just heard. I think he is always on the attack. Of course if we are dealing with a unique psychological problem there is very little that we can do about it. Think about trying to spot it in advance, but there is no reason that he displayed this at twenty-two, or twenty-three or twenty-four. And efforts that bar associations have talked about in the past to try to identify potential problems, we are rightly suspicious of.

I’ll tell a story in response to that because it is an extreme example but it shows just how rare it is. I had a student at one point in the thirty plus years that I taught at UCLA who wrote to me in the summer before law school began. And he asked me what the case book was so that he could read it in advance. This is torts. I said, I could tell him but I didn’t think that was a good idea that reading a book outside of the context of law school is not going to be terribly helpful and there will be ample time to read it once school began. But I did give him the casebook and he read it several times during the course of summer and he claimed to have read it four more times during the course of the first semester. He pestered me with questions, he always wanted more material, etc., etc. This kind of behavior is unusual. Sometimes we think it’s a problem to get students to read the casebook even once. But it flagged concerns that this guy might not make the best lawyer perhaps. But what could you know? Until finally as it got cool as it does in Los Angeles, never cold, but cool he wanted to be able to study twenty-four hours a day and the library closed at night so he moved into the classroom and spent the nights in the classroom. And then for warmth he started to set fires and so at that point, we had reason. But had he not done that he probably would have graduated and I don’t know what he would have become but I would be concerned about that.

Audience 1:

I think to extrapolate from your story to a broader zone and I certainly can in hearing this I can think of a couple of local lawyers who can fit this mold, but I think they are more of an aberration…I think that one thing that he did wrong, that I think is a common problem with lawyers…at the time but it was his case and how dare she tell him what to do with his case. That’s where you see lawyers….

Rick Abel:

So let me follow on with that and try to build on it in two ways. Is that a particular personality syndrome? Is it a dyad of some kind? Are contexts in which this over identification with a client is more likely to happen than others? Are there situational variables that can help us predict when excessive zeal is likely to occur so that we might be able to guard against it? What do you think?

Audience 1:

I think that it cuts both ways. I think there are certain types of practice that I could never do because I…badly because I would identify too much with the clients. And other lawyers have no problem doing that so I think it’s not necessarily that we come overzealous necessarily but that whole identifying too much with the case…all sorts of problems for lawyers and it’s a problem for every lawyer…over identifying…every lawyer has to…draw that line, but I think every lawyer…

Rick Abel:
Let me just for a second in a following sense, let me draw the following analogy. I’m speaking on a very superficial level of knowledge. Part of the training of psychotherapists is learning, being fully conscious of what’s going on between you and the patient as it’s happening and to be aware of the fact that a variety of emotional interactions are occurring and therefore to guard against them so the problems of transference and countertransference. And psychiatrists, psychotherapists spend a lot of time thinking about this and they don’t always observe it, they’re trained to do it. I don’t think there is much of that in law school. There may be clinical settings in which some of that occurs but I think it’s quite unusual. I think there are reasons to believe it is important. I’ll give one context in which I think it tends to occur. I, again, both anecdotal evidence for this and somewhat more systematic evidence, that’s the divorce context. The anecdotal of course is LA Law where the divorce lawyer played by Jimmy Smitts sleeps with all of his pretty clients. Indeed a number of jurisdictions have passed laws making obvious what shouldn’t have to be stated, which is, you can’t do this. But there is an excellent book by two lawyer sociologists, Serat and Felstener, who observed divorce lawyer/client interactions and they actually observed this kind of profound emotional bond between clients, female clients who have just been betrayed by their husbands and their male lawyer so there may be contexts in which this is more common.

Audience 2:

I…agree that this is over identification with client, at least what I hear you describing. It is clearly, as I hear it a commitment to an attachment to the principle of justice that he sees as play here. And it’s almost as if Seward becomes irrelevant to him because he thinks the system is working…these confidentiality orders, the failure to really be interested abuses that the Sterns Firm is doing. That he becomes so fixated on that principle justice that its lead to a kind of self-deception about the structure in which he needs to function to be effective. And that’s the sort of moral decision making piece of this I find so fascinating. We have some local examples, so it’s not solely pseudo generous, but I do think it’s unusual. I don’t think this level of engagement with the principle with everything else falling by the wayside, I don’t think it happens that often.

Rick Abel:

And I think you’re right. So, one way of thinking about this is over identification with the client. Another way of thinking about it actually is betrayal of the client because that’s actually what the defense lawyers are saying, you’re not putting your client’s interest first, Denebeim is doing that, you’re not doing that. But then there’s something else if you’re right, it’s interesting going on here which is the championing of larger justice concerns. And that’s something that by and large we think that lawyers should do. Maybe not do it this way but do and indeed when I gave you that list of zealous lawyers some of who are in the highest in the pantheon of lawyering, they are precisely people who have been what we now call cause lawyers who have tried to generalize the problem.

Audience 3:

Building on that, for perspective, I’m a 2L, I’m seven weeks into my PR class…but having said that I have to say I’m far more bothered by the systemic abuses that Damer was bothered by than by one whack job. The fact that here’s this firm that basically systemically abuses and does so constantly that manages to buy its way into silence that manages to perpetuate its abuses. That’s far more troubling to me that the wheels coming off the bus of one individual.

Rick Abel:

So there are several things that Damer is complaining about. One is the more general problem which is you can buy silence and that’s common practice in tort litigation and there are all sorts of why it’s attractive to everybody who is directly involved in the negotiations.
Audience 3:

But that’s…that’s what’s the most troubling part.

Rick Abel:

And remember it was in Maria Seward’s interest as well to sell her right to talk because she of course was going to get a lot of money. Now who loses then? The people who lose are all the other people who have been cheated by the Sterns firm. Now there are some jurisdictions that have prohibited that for the same reason but they are very reluctant to do so. By and large people are allowed to enter into contracts and this is one of the contracts they are allowed to enter into.

Audience 4:

As I was hearing the story, two things, I think of some of…the system plus paranoia. And I think of some of my students who have unfortunately been disciplined subsequent who sound a lot like Damer…this sort of…how does that fit into the picture…

Rick Abel:

We know that we want lawyers to be whistle blowers in lots of other contexts certainly in securities practice generally, we require that and we seek to incentivize it as well.

Let me just focus for the moment on the narrow question. I’m just curious to hear especially from people who know a lot of legal ethics, probably more than I do. What could Damer have done that would simultaneously serve the broader interest but not violate the order? What could have done? Was there a course of [inaudible 58:38]

Let me put it to any other law students in the room? Why couldn’t Damer have done that? Maybe you haven’t gotten to that yet in PR.

Audience 5:

It’s a solicitation problem as he’s characterized it but there are ways short of that either through targeted mailing or even ads that he might be able to try to get out of the woodwork people that feel like they were victimized by the firm. He could do that if he had the patience…And I wasn’t entirely clear why he couldn’t eventually appeal that order? Did that get foreclosed to him? I understood that the huge delay occurred and it got mis-mailed that sounds to me like there would be basis for …time limit…document that. So it’s very slim to read but that’s the only thing I’m seeing that he could really have done.

Rick Abel:

The tragic error he made of course is that he rendered himself in contempt and let that order be final and after that there’s nothing you can do about that. It may have been his headstrong quality, his desire to go head to head with his components, etc., so there may have been technical ways to get around it.

Audience 6:

…and then…on top of…examine himself
Notwithstanding a sealing order that was final?

Audience 6:

[inaudible]

Rick Abel:

Damer certainly comes across as someone who seeks to be a champion of the oppressed and mistreated and I think that is true but he also clearly is interested in money and whether he would have been willing to forego the pecuniary rewards in order to pursue the principle outcome, it’s not clear. I don’t know him well enough but he was certainly motivated by money and very jealous of the fact that the Sterns Firm was walking away with huge amounts of money in the Sun Valley Mall case, millions of dollars amounts that Damer himself never made. And very resentful of the lawyers who were making large sums of money, so some of it is I think status resentment as well.

Audience 7:

Well I think that even the cause lawyers have this problem because the ACLU takes on a client to represent them because of a particular clause in the case it’s a fine line for them because they still have a client, so the client may want to settle or that sort of thing, they have to do what the client says even though that’s not really serving the bigger picture that the ACLU took the case for and they’re doing it for free for this particular client…that. So I think that’s true even for the cause lawyers that the client gets to make the call.

But I was just wondering, how did he get the smoking gun…?

Rick Abel:

He doesn’t say. He says he got an anonymous phone call. The memo was written by Smith a partner in the Sterns Firm and Smith’s secretary was also his wife. Smith dies and Damer gets the memo from the widow. Whether she calls him or somebody else does, I don’t know.

Audience 7:

But she’s not subject to the order.

Rick Abel:

That’s true.

Audience 7:

It seems to me like if it’s the smoking gun memo it’s one thing that was…

Audience 8:

…California disciplinary proceedings against the Sterns Firm to your knowledge?

Rick Abel:

Say it again?
Audience 8:

Is there a sort of parallel disciplinary proceeding against the Stern Firm as a result of the smoking gun internal memo surfacing?

Rick Abel:

Certainly nothing that reaches a public reprimand, suspension or disbarment and Damer is constantly complaining publicly that although he is making complaints about the Sterns Firm nothing comes of it and he views that simply as more of the conspiracy.

Let me go to the last question, not to cut off the other concerns. Is there remedial action that should be taken? Are there things that we should be doing about Mr. Damer himself or about this more generic problem let me perhaps be a little bit more provocative about that by at least asking about the efficacy of discipline in this case. Do you think that the finding of a public reprimand is going to change Damer’s behavior here? I see heads shaking which is of course the response that I wanted. In our e-mail correspondence back and forth Damer wrote to me, this is a quote, “If one primary purpose of a discipline system is to teach I did not learn anything, I would do the same again.” I actually have more evidence of that. The book was published in Fall 2010 and about three months ago I got a phone call from my publisher Oxford, the kind of call that no author wants. “Rick, how are you doing?” “I’m doing fine.” “I’m glad to hear that because we’ve just been sued.” So Damer has sued me. And he has sued me, what you would expect.

Audience 9:

Here is where the money is.

Rick Abel:

Well yes, obviously I am the deep pocket.

He sued me for defamation, for breach of privacy, intentional affliction of emotional distress, etc., etc. Fortunately the outside lawyers who are representing Oxford and they are also representing me have assured me of the following. First of all it is a frivolous lawsuit. There are plenty of privileges and defenses here. Second of all they plan to file a slap suit counter claim so that we will be fully protected. And third of all Damer missed the statute of limitations in this case as well.

Audience 10:

File a bar complaint against you?

Rick Abel:

No, no, no, no, he can’t do that, I’m not a member of the bar he can’t do that. I’m too smart for him for that. But the case is still pending. He hasn’t served anybody. So he filed the complaint. He hasn’t served anybody. It’s now been five or six months since he did that. I think he just wanted me to stew a little bit as indeed he was quite successful in that I did stew a little bit. Maybe I still am. I’m waiting for the deadline for when the case can be mooted because he hasn’t moved it ahead. And this is fairly consistent behavior. And there are other examples of that as well. In 1995 after these cases were concluded, Damer sued four large firms for malpractice but again, he missed the statute of limitations and suffered summary judgment and the judge found
what had energetic advocacy became groundless pursuit of a meritless claim and firmness of resolve became truculence. So his behavior is consistent, it seems unchanged. What could we do if in fact this is a problem? Are there things to be done? Or is it not a problem?

**Audience 11:**

[inaudible]

**Rick Abel:**

And yet of course I share your concern but we also are concerned about false positives. If we were to start asking law students have you ever been in psychotherapy. I don’t think we’d want law schools asking that question. We wouldn’t know what to do with the information if we got it. The bars ask it, but can they use it as a basis for denying admission, certainly not. And rightly so.

**Audience 12:**

It’s the potential…information that would suggest that…

**Audience 13:**

You ask what we can do…on the pattern of…more disciplinary complaints…haven’t learned to temper his…pattern…what kind of intrigu…me is to me it’s the relatively minor discipline…that’s what the system…if you can’t work within the system…

**Rick Abel:**

As part of the book I read all the then published cases in California that I grouped under this rubric of excessive zeal. So let me just give you some other kinds of instances to see what the broader universe of behavior looks like and see whether, again it represents a common syndrome sufficiently clear that we could think of remedies for addressing it.

Some criminal defense lawyers are not only zealous in defense of those who have been accused of crime but facilitate ongoing of future crime. That boundary line can be somewhat grey but we know that you can’t in fact cross it. So that’s one and there are reasons for that because if you are a private practicing criminal defense lawyer you want repeat players and those by definition are people not only have committed past crimes but you want them to be fairly successful because otherwise they can’t pay your fee so there is that. There is out and out tampering with the judicial process. This is quite rare, and there the boundary line is very clear. So tampering with juries by and large, approaching jurors while proceedings are going on or afterwards or actually bribing judges or clerks. That doesn’t happen very often. I found several other examples where clients had initiated a course of conduct a litigation matter and then at some point said, just like Maria Seward said this is too much of a hassle. It’s taking forever. It’s causing enormous emotional wear and tear. The payoff is fairly small. I want to put an end to it. I want to get out of it. And the lawyers are invested. And they’re either invested because they are personally invested in the cause, because winning is after all what lawyers are all about or because they actually have a pecuniary stake. And there were several other cases where lawyers were unwilling to let go so that’s a category. And then of course there’s the most
notorious of all which is Stephen Yagman. Is Yagman known in Washington? He is one of the best known lawyers in California and he goes head to head with every judge in sight and he does all sorts of quite outrageous things. For instance in one case, in which he was displeased with a judge, judge William Keller, Keller recommends discipline Yagman says, well Keller is an obvious anti-Semite and that’s why he’s after me. And then he submits an entry to Prentiss Hall’s Almanac of the Federal Judiciary in which he says, “It is an understatement to characterize the judge as the worst judge in the Central District of California it is fairer to say that he is ignorant, dishonest, ill-tempered, and a bully and probably one of the worst judges in the United States.” And then he goes on and on in those terms. Probably everything that he is saying is true by the way and many of the causes that he is championing are wonderful causes and he is doing them often in a very selfless manner and yet he is pushing too far. He is the William Kunstler type but he did push too far. Eventually, and this took a very long time, these cases went on for years and years, he was disbarred because he was convicted for tax evasion in a major way like not filing returns for years or not reporting his income tax. I mention all this because I write this up in the introduction to this chapter and then of course I get a call from Stephen Yagman who’s not happy with the way I’ve described him. But in this instance I said are there factual errors because if there are factual errors, I’ll be happy to correct them in the next edition knowing full well there isn’t a chance in hell there’ll be a next edition but he doesn’t know about academic publishing. And he was mollified unlike Damer, he hasn’t proceeded further.

Let me give you my bottom line. Let me just say a few words about the remedial aspect of it and conclude. So let me just sort of rundown the ways in which you might think about responses. The regulatory system: well the problem here is that in most instances there will be nobody to complain. The client on whose behalf the lawyer has been overzealous is not going to complain. Judges by and large don’t complain. Now Chiantelli complained here. He also complained to the state bar, now that’s quite unusual and he did so because a lawyer blatantly refused, defied an order that he had made. I don’t think education is, we often think that we could remedy somehow our PR classes. I don’t think there is an obvious pedagogic intervention that we could do. I don’t think there is a problem with the rules. I think the rules are fairly clear. In other instances of lawyer misconduct I have felt that publicity might be an effective sanction because the publicizing of these complaints is very damaging to lawyers and they hate it. But in this case Damers thrives on publicity because he believes the world is persecuting him and he needs evidence of that to fuel his anger and his zeal. In the New York book where I was concerned more with neglect and issues of that sort, I actually mooted, although I didn’t think this was going to go anywhere, the idea that this was partly a problem of solo practitioners and indeed all my lawyers were solo practitioners and maybe mandatory partnership would be a solution. Obviously there are all sorts of arguments against it. That wouldn’t work here. He had a partner when most of this was going on and indeed there is evidence that zeal is engendered by interactions between zealous lawyers within firms. And there is some good sociological research on this. I said something about discipline. Discipline only strengthened Damers’s own conviction. The market is a regulatory. Well actually many clients would like to have a Damers on their side at least for some matters, so I don’t think the market is going to work. And the last thought is the following, it’s a structural thought. There is a very interesting piece of research of the sociology of the legal profession done by the group at the American Bar Foundation, jack Hines and his colleagues, which once stated is fairly obvious but they were the first to state it, which is that lawyers are highly specialized we know that by and large, but they specialize not only by subject matter but also by clientele. For instance, take labor law. No labor lawyer practices both on behalf of management and unions. And almost nobody switches sides from one to the other. Now there are times when people do switch
during the course of their lifetimes but by and large you represent one side of and often quite adversarial dyad. The British have, or I should probably put this in the past sense, had a response to this in the Cab Rank Rule, so British courtroom advocates, the Barristers, the one who appear in the higher court were obligated to operate as if they were in a cab rank i.e., when somebody sought to brief them in a case, they had to accept the case regardless of any personal preference as long as it was in their general subject matter specification and that they were going to be paid their fee and indeed until pretty much until the end of the twentieth century it was common place for a criminal lawyer to prosecute one case in the morning and to defend another case in the afternoon because prosecution ws entirely private, that’s no longer true. So we could try to reduce the kind of strong feelings of partisanship that I think are in part responsible for what Damer did here. But do we want to? Maybe we want lawyers to be strongly partisan. So at the end of this chapter at least I have an old man’s conclusion. I’m recognizing that indeed I am an old man. In my youth I thought every problem had a solution and here’s a problem I don’t think there is a solution and here’s a problem, I don’t think there is a solution. I think we just have to live with the problem and maybe the price isn’t all that high. And so I’m quite prepared to live with the Nick Damers as long as they don’t sue me. Thank you.