LEGAL ETHICS & MALPRACTICE REPORTER

Vol 2. **July 30, 2021** **No. 7**

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PUBLISHED BY:
Joseph, Hollander & Craft LLC

FEATURED TOPIC

AN HISTORICAL LECTURE BY JUDGE W.D. WEBB: *INTEGRITY OF THE LEGAL PROFESSION*

In the past year the media has been filled with stories about lawyers. Indeed, in the past few years more and more lawyers have become frequent commentators about the role of lawyers in key issues and actions of the day. Some lawyers have appeared in a poor light and others have been praised as heroes. How the public views lawyers seems very much to be a matter of politics. Nevertheless, the role of lawyers in American life has become a major preoccupation of the media and, apparently, the millions of Americans who provide a market for that media. Yet, I would venture a guess that most Americans know very little about the *Rules of Professional Conduct* (a situation about which I recently wrote about in the May 2021 edition of this newsletter).

Many of you who read this newsletter know that in addition to my professional interest in legal ethics and professional responsibility, I am also an historian of the law and the legal profession. Amongst one of my favorite activities is turning to older writings about law and legal ethics and to see whether the preoccupations of the public and the legal profession today are the same or different from what they were in the past. Thus, over the past few months, I have been looking at older sources to find materials that reflect upon the pubic disdain for lawyers' integrity. That search was rewarded with the discovery of a lecture given by Judge W.D. Webb, which was published in the *Kansas Bar Journal* in 1886. The title of this lecture, reprinted below, is "Integrity of the Legal Profession." Judge W.D. Webb was a prominent lawyer and member of the firm of Webb & Martin in Atchison, Kansas, before he became a District Judge based in Atchison. The judge was not simply a lawyer and jurist; he was also a scholar and author. And his two lectures on *The Trial of Jesus Christ* were published in book form in 1907.[1] Daniel Wilder, in his *Annals of Kansas*, also notes that Judge Webb gave an address on June 30, 1877 before the Sisters of Bethany College.[2] Judge Webb's interest in the intersection of religion, morals, and law is highlighted in his address below.

Judge Webb's lecture on the integrity of the legal profession was delivered at the third annual meeting of the Kansas Bar Association in 1886 and published both in the *Proceedings of the Third Annual Meeting of the Kansas Bar Association* and in the *Kansas Law Journal*, published by the Kansas Bar Association.[3] This speech is of great significance for multiple reasons. First, it is one of the earliest lectures on the subject given and published by a prominent Kansas attorney. Second, Judge Webb's lecture was delivered and published at a key

[1] The only copy of this book that I could find is at the Kansas City Public Library.
[2] D. Wilder, *Annals of Kansas*, 767 (1875).
[3] *Proceedings of the Third Annual Meeting of the Kansas Bar Association* (1886), at 50-55, *Kansas Law Journal* (1886), at 3-8.

point in the history of the development of professional ethics in both Kansas and the United States. The Kansas Bar Association was only a few years old and bar associations across the United States were actively promoting the idea that a new model code of professional responsibility was necessary. These activities resulted in the 1908 publication of the first A.B.A. model code of professional responsibility and, in Kansas, the formation of a committee to explore creating a code of professional responsibility in 1907. According to the Kansas State Historical Society:

> Conscious of its reputation with the public, the KBA established a committee in 1907 to examine the possibility of creating a code of ethics. At the 1909 annual meeting, the Code of Ethics Committee advised the KBA to adopt the same code as the American Bar Association. The following year, a five-member committee, established for the purpose of monitoring ethics within the committee, was added to the list of permanent standing committees.[4]

There can be little doubt that Judge Webb's lecture was not only one of the earliest manifestations of the movement in Kansas to create a code of ethics for lawyers, but that it was also influential in fostering the belief that one was needed.

I am reprinting Judge Webb's lecture here not only because of its historical value, but also because so much of what he stated in 1886 is as applicable today as it was more than a century ago. His emphasis on the importance of lawyers telling the truth both in and out of court must strike a note of recognition in every lawyer's mind in light of the events of the past year. In my opinion, many of Judge Webb's remarks are timeless and worth taking to heart.

INTEGRITY OF THE LEGAL PROFESSION

An address delivered by W.D. Webb of Atchison before the State Bar Association of Kansas, January 12, 1886

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By the phrase, "The integrity of the legal profession," I do not refer to legal ethics-to the principles which should govern the conduct and actions of lawyers, but I mean more especially to call attention to the standard of integrity which a considerable body of those people, who for the purposes of what I say here I shall call laymen, apply to those who are engaged in the practice of the law, and to that standard which I believe in justice and fairness they should apply to them. We cannot fairly and justly demand that any given class of men shall be judged by a higher standard than another class, or than all other classes. Everybody in morals is bound by a supreme principle of life, of universal authority, from which all motives of action should spring. But lawyers, like other people, are simply human, and the same rules of criticism,

[4] Online at https://www.kshs.org/p/kansas-bar-association-records-1883-1989/13770.

and no other rules, should be applied to their conduct that are applied to the conduct of men engaged in other callings.

Mandeville, I believe it was, who defined virtue as the offspring of flattery, begotten upon pride, its motives being vanity, and its object praise. Well, according to that, even the critics might be subject to criticism. What say you, criticize a critic! It is presumptuous, I admit; but, after all; they are only men who "assume a virtue if they have it not"-only Pharisees who thank God that they are not as other men.

The fact is, as none are perfect, the legal profession should be judged by comparison. If we judge all men by the ultimate rule of right, the standard will penetrate the regions of speculative thought, and this is a practical and not an ideal world. Fact confronts fact. Virtue and vice stand face to face in it. Vice, ever on the alert, keeps virtue constantly on guard.

In this condition we find things in this world, and deal with them. Men do not come to lawyers to tell of their pleasures and delights. Beauty, love, goodness or harmony is not what they come to us to talk about. They tell us of wrongs, strife, contention, frauds, and not unfrequently do we see malice, hatred and passion portrayed. In our professional relations with the world, it is to a great extent with these things that we have to deal. There are comparatively but a few who know how much of passion is allayed in the counsel room.

I suppose, however, that there is no question but that many people are solicitous about the morality of lawyers, declaring that they do not recognize as binding upon them the same rules of conduct by which other reputable men, in other callings, allow themselves to be governed.

Whether other men, in other callings, are proper judges of the professional conduct of lawyers, may admit of some question. All, I think, will agree that, in their unofficial intercourse with men, the ethical basis upon which they stand is not distinguishable from at of other members of society. They deal as fairly as any class of men in their own affairs. They furnish as little of the litigation as any. If, then, as is frequently said, they are given to prevarication, it is for others and not themselves they prevaricate. In their official relations they are, to put it mildly, under no obligation to tell a lie. Those who employ them for that purpose generally meet with disappointment. It is no part of a lawyer's professional duty to speak falsely anywhere in the interest of clients, or to pervert or distort evidence, and I believe it is but seldom done. Those who expect it do not possess that kind of virtue that qualifies them to become their moral critics.

Lawyers who do so, however, soon become known to the profession as members of questionable veracity, and are shunned. The legal profession, as a profession, recognizes as honorable only those who feel the obligations and recognize the necessity of always speaking the truth. People adopt an error when they declare that the members of this profession, before the bar of justice, "consider themselves absolved from the common law of veracity." The fact is exactly the reverse. The legal

profession holds the obligation resting on the advocate to speak truth truthfully to the court as not exceeded by any other obligation of professional ethics. And the court expects that he will speak the truth, as his client has given him to understand the truth, and the court sits to determine, not which of the attorneys have told the truth, but which of the clients have done so. It is an error to suppose that the bar is responsible for the falsehoods spoken in court. That there are many spoken, I do not doubt. Since parties to suits are allowed to testify, every lawyer will bear me witness that he prepares his case for trial with the expectation that their testimony will seriously conflict. Experience has taught him the necessity of doing so. Whether this argues a better state of morals among laymen than laymen entertain of the morals of lawyers, I shall not now discuss. But may not the want of integrity in the client have something to do with the apparent want of integrity in the lawyer.

> "There are more things in heaven and earth, Horatio,
> Than are dreamt of in your philosophy."

There is, occasionally, but no more frequently than in other professions and callings, in proportion to numbers, dishonesty to be found in our profession. Men who become lawyers were born with no more depravity in their natures than those who engage in other callings, and their education, experience and practice do not have a tendency, as is frequently supposed, to make them dishonest. From the time they commenced their legal education until they close their professional career, they study principles and the application of them to the administration of justice. To see these principles violated shocks them.

An erroneous decision of a court comes to them like a blow in the face. The establishment of a wrong rule of law by the determination of a court of last resort is deplored by the legal profession of the entire state or country. But much fault is found with lawyers because, as it is declared, they defend criminals whom they know to be guilty. I incline to the opinion that this, comparatively, but seldom occurs. But, to defend a man in the courts for crime of which an attorney knows him to be guilty, I suppose is considered by laymen as an unmixed evil. No good can come from turning a murderer loose, say they. With this last declaration I fully agree. But great harm can come to society to hang him without a trial. Individual and social security is the great paramount object to be attained by government, and, to insure this the fundamental law declares that the accused shall have the right to be heard by himself and counsel. To deny this right in one instance, lays the foundation for the denial of it in another, and another-and so on, until the safety of the person accused depends upon the bare caprice of a community, until the social organization becomes diseased, the innocent as well as the guilty condemned, the object of government frustrated, and government itself indeed subverted.

But wherefore should not the accused be heard according to the rules of law? A charge is made against him, proof to establish his guilt is ordered, whatever he may have to offer for himself is presented by himself or counsel, and the jury render a verdict; and if he is guilty, and

is acquitted, who is to blame? The jury is the arbiter of his fate; all is in its hands; it comes from the people, and doubtless tries to decide correctly.

Perhaps it might not be improper for me to state here that the central event in history was a judicial trial. It was none of the judicial tragedies that resulted in the execution of Socrates, Charles I or Mary of Scotland; not, indeed, the trial of a person only, but the Savior of the world. He upon whose religion all the institutions of our country are based-upon which, indeed, our government itself is founded-upon which justice in our courts is administered, and who is invoked in the administration of every oath taken in court. In that trial He was not allowed counsel-or perhaps I should rather say, no one was found bold enough to defend Him. Even Peter denied him. This was a two fold criminal trial-one conducted under the Hebrew and one under the Roman law-both of which, however, were violated, in order to receive conviction.

Those who are familiar with the subject know the deep sense of justice and law that pervaded the Jewish commonwealth. One of its legal maxims was, "Be cautious and slow in judgment, send forth many disciples, and make a fence around the law.

In trials for life, could speak in favor of the accused, but not against him. In trials for money, only three judges were required; in trials for life, twenty-three. Trials for money could be commenced in the daytime, and concluded after night- fall, but trials for life could only be commenced and concluded in the day time. In trials for money, judgment could be rendered on the day the trial began, but in trials for life, in case of condemnation, judgment could not be rendered sooner than the second day.

Jesus was arrested on Thursday after night, and led out to be crucified on Friday morning.

It was one of the principles of the Hebrew law, that the accused should be free from all personal questioning until he was brought for public trial; but, when nearly alone with Him, the eager ecclesiastical magistrate, about midnight, questioned Him of His disciples and *of His doctrine*. This was what He was soon to be put on trial for. Jesus answered him: "I spake openly to the world; I ever taught in the synagogue and in the temple, whither the pious always resort, and in secret have I said nothing. What asketh thou me? Ask them which heard me what I have said unto them." This was the voice of an accused asking for the administration of Hebrew justice upon the broad and just principles of their law, and "recalling an unjust judge to the duty of his great office."

It was a demand for an open accusation and a public trial; but when it was denied to him, he declined to take further part in it.

Under the Roman law, no one could be convicted of crime unless the judge also believed him guilty. But Pontius Pilate said, "I have und no

cause of death in Him." "No, nor yet Herod, for I sent you to Him, and lo, nothing worthy of death IS done unto Him." "And he took water and washed his hands before the multitude, saying, 'I am innocent of the blood of this just person.'"

It is better for the common good that law should not be violated in judicial proceedings, and that even the guilty should have a fair trial, in due course of law, and be legally convicted before punishment; and no greater error can be committed in a commonwealth, nor a more serious danger threaten the public weal, than the false teaching that the stream of justice through the courts in fair judicial trials.

NEW AUTHORITY
ETHICAL IMPLICATIONS OF "BRAIN FOG"

Many lawyers and law firms across the country are beginning to bring staff back to the office and reopen in some semblance of what was "normal" pre-COVID. However, life for a growing number of individuals, including lawyers, post-COVID may not be the same. For months the media have reported that many who have survived infection with COVID-19 do not fully recover but, rather, find themselves still beset by many of the symptoms they suffered during the period of active infection. Indeed, these individuals are now said to be "long-haulers," and physicians fear that many of these men and women may suffer from persistent COVID-like symptoms for months or years to come.

Among the symptoms that seem to plague these long-haulers, two in particular may raise questions under the Rules of Professional Conduct: persistent fatigue and what has come to be called "brain fog." Brain fog has been described as mental confusion, including reduced ability to carry out complex tasks and remember critical details. It seems very likely, given the apparently widespread incidence of long-haul COVID in the United States, that there will be a number of lawyers who will, in fact, be COVID long haulers.

KRPC requires that a lawyer be competent to practice law. Among the many factors that go towards competence, the ability to think clearly and remember details is certainly important. The first question that we must ask, therefore, is whether COVID long-haulers will be competent to practice under the standards of KRPC Rule 1.1.

The second question arises under KRPC 8.3(a) which reads:

> A lawyer having knowledge of any action, inaction, or conduct which in his or her opinion constitutes misconduct of an attorney under these rules shall inform the appropriate professional authority.

Put simply, if a lawyer is suffering from "brain fog" or persistent, debilitating fatigue as a result of long-haul COVID, must this be reported to the appropriate authority? Fortunately, in Kansas, we have KBA Ethics Committee opinion that provides guidance.

KBA Legal Ethics Committee Opinion 14-01 (2014) is headed: "duty to report memory lapses." The opinion's fact section begins:

> Law firm had a partner with "possible cognitive degeneration," evidenced by memory lapses. These lapses include an inability to dial in to a conference call, a client reporting that the lawyer required a re-orientation to the facts of the representation, and multiple staff members reporting the lawyer's failure to recall prior discussions. No violations of the KRPC are reported, but the law firm believes that the subject lawyer's perceived memory lapses "could impact clients."

We may surmise that a lawyer suffering from long-haul COVID might show similar symptoms.

The opinion first states an important limitation on the obligation to report:

> ….the duty to report only extends to a situation in which the reporting lawyer has "knowledge" of acts or omissions which constitute a violation of the KRPC. In the present situation, the inquiring law firm does not identify any violations of the KRPC by the subject lawyer. Thus, no duty to report would arise.

Thus, if the lawyer afflicted with long-haul COVID, even though showing signs of impairment, has not, in fact, ceased to be able to practice competently as required by KRPC Rule 1.1, then no reporting obligation will arise.

However, if it becomes clear that the symptoms of long-haul COVID have begun to affect a lawyer's performance to the extent that the lawyer is violating KRPC Rule 1.1, then the reporting obligation does arise. Opinion 14-01 advises that:

> However, should there be candid concerns in this regard, even coupled with an actual KRPC violation, consideration is commended to the resources and facilities provided by the Kansas Lawyers Assistance Program ("KALAP").
>
> (a) KALAP Purpose. The Kansas Lawyers Assistance Program (KALAP) is established to provide immediate and continuing assistance to any lawyer needing help with issues, including physical or mental disabilities that result from disease, addiction, disorder, trauma, *or age* and who may be experiencing difficulties performing the lawyer's professional duties. KALAP will have the following purposes:

> (1) to protect citizens from potential harm that may be caused by lawyers in need of assistance;
> (2) to provide assistance to lawyers in need; and
> (3) to educate the bench and bar about the causes of and services available for lawyers needing assistance
> The KALAP process provides a confidential means of seeking and obtaining assistance for a wide variety of issues, including those brought on by advancing age, through both the state and local committees.

Lawyers have become accustomed to be vigilant about impairments in older individuals and those with substance abuse problems. Unfortunately, according to current research and observation, many of those who will suffer from long-haul COVID in the coming weeks and months are young, often in the age group from 30-45 when mental deterioration is not common. The new post-COVID reality now makes it crucial that lawyers be sensitive to the dangers of long-haul COVID and, if they observe debilitating symptoms of this disease in themselves or in other lawyers, they should take the steps outlined in KBS Legal Ethics Opinion 14-01.

ETHICS & MALPRACTICE RESEARCH TIP
NEW ARTICLES DRAWN FROM THE *CURRENT INDEX OF LEGAL PERIODICALS*

1. Wendy N. Hess, Promoting Civility By Addressing Discrimination and Harassment: The Case for Rule 8.4(g) in South Dakota, 65 S.D.L Rev. 233 (2020).

This article is particularly relevant in the present social and professional environment.

2. Tory L. Lucas, Greed and the Seven Deadly Sins: Treacherous for the Soul and Legal Ethics, 33 Regent U. L. Rev. 113 (2020).

This work discusses one more consideration of greed and its effects on lawyers.

3. Eugene Scalia, John Adams, Legal Representation, and the "Cancel Culture," 44 Harv. J. L. & Pub. Pol'y 333 (2021).

This is not strictly a piece on legal ethics, but it is worth reading—whatever you may think of Professor Scalia's politics.

4. Karen E. Boxx, Tiptoeing through the Landmines: The Evolution of States' Legal Ethics Authority Regarding Representing Cannabis Clients, 43 Seattle U. L. Rev. 935 (2020).

Here is one more article in a growing body of literature on representing cannabis industry clients.

5. Casey Baker, Attorney-Client Sexual Relationships in the #MeToo Era: Understanding Current State Approaches and Working Towards a Better Rule, 49 Sw. L. Rev. 243 (2020).

6. Maureen A. Weston, Buying Secrecy: Non-Disclosure Agreements, Arbitration, and Professional Ethics in the #MeToo Era, 2021 U. Ill. L. Rev. 507 (2021).

7. Christine Rua, Lawyers for #UsToo: An Analysis of the Challenges Posed by the Contingent Fee System in Tort Cases for Sexual Assault, 51 Colum. Hum. Rts. L. Rev. 723 (2019).

Finally, Baker, Weston, and Rua provide three must-read articles on one of today's hottest topics.

BLAST FROM THE PAST
TEACHING LEGAL ETHICS IN LAW SCHOOLS: AN EXCERPT FROM ROBERT D. COXE'S *LEGAL PHILADELPHIA*

In response to the Watergate scandal and the high number of lawyers involved in it, the American Bar Association adopted rules that required all law schools to offer at least one course in professional responsibility. I have personally benefitted from this requirement because it has provided me ample opportunities for teaching and research. But after almost forty years of teaching professional responsibility to literally thousands of law students, I have begun to wonder whether classroom teaching is enough.

During the nineteenth century many would-be lawyers chose to learn the law through serving as clerks in one or more law offices or judges' chambers. After a suitable period of apprenticeship these students were permitted to take the bar examination and, if successful, were admitted to practice law. Over the decades, however, university affiliated law schools found themselves actively competing with the apprenticeship method and, eventually, were successful in becoming the overwhelmingly dominant form of legal education in the United States.

Occasionally, proponents of the older apprenticeship model argued that, in some areas at least, there was something to be said for young would-be lawyers spending time working in a law office or judge's chambers. Among these proponents was Robert D. Coxe. In 1908, Coxe published a volume he titled *Legal Philadelphia.* Much of the volume is a paean for a lost golden age when all lawyers were giants and geniuses. But, amidst this nostalgia, there are some comments that are still worth reading—including one about the dangers of teaching legal ethics in academic law schools:

> One indisputable fact, adverted to in no invidious sense, but which it may be fairly urged proves that the law-office was more successful than the law-school as an agent in maintaining a standard of conduct is this: the several individuals, who have, of late years, been disbarred for unpardonable violations of professional ethics, were, without exception, the exclusive products of the law school. There is in this no intended or implied censure of the Law Department of the University, for moral training cannot, of course, be a part of the law-school's curriculum. On the other hand, an unprincipled or dishonest youth is speedily discovered and unmasked in the unintermitted intercourse of the law office. It has, indeed, consequently happened that such an undesirable student is checked at the very threshold of his career, and the profession relieved, betimes, of subsequent embarrassment and disgrace.

After forty years of law school teaching, I have come to think that there is much wisdom in these remarks. Perhaps it is time to revisit whether the Bar should require all law students to spend at least some time working in a law office or judge's chambers before being permitted to take the bar examination.