Institutional Responsibility: Professionalism and Ethics

Milton R. Wessel

Parker, Chapin, Flattau & Klimpl

Follow this and additional works at: https://digitalcommons.unl.edu/nlr

Recommended Citation
Available at: https://digitalcommons.unl.edu/nlr/vol60/iss3/3
Institutional Responsibility: Professionalism and Ethics

I. INTRODUCTION

My paternal grandfather emigrated from Bohemia and settled in Nebraska City just a few miles west of the Missouri River. His store, "L. Wessel & Son, Men's & Ladies' Ready-to-Wear," was a prominent feature on the main street until it burned down more than a century later. The family home still stands, however, as a designated historical landmark.

My father grew up in Nebraska City but he moved east in 1890 to attend law school and later practiced law in New York City for fifty-seven years. During his years of preparation and practice most people, whether in New York City, in Nebraska City, or here in Lincoln, were primarily concerned with their own local and regional problems. There was little inclination, need or opportunity to deal with broader national or international issues of social and economic responsibility.

In the decades following World War II, however, developments here and elsewhere have been of dramatic, almost order-of-magnitude character. War-stimulated scientific discoveries created important new products, services and capabilities. These led to greater wealth, better health, longer life and more leisure, which in turn permitted more and more people everywhere to become actively involved in societal problems. In consequence, we have all become national, international and multi-national citizens of an intimate world, almost as concerned with the pronouncements coming out of Washington and events in Iran, Afghanistan or Vietnam, as with what happens in our own local communities. Cline, Wil-

* Counsel to the law firm of Parker, Chapin, Flattau & Klimpl of New York, New York.
© Copyright, Milton R. Wessel, 1981.
† This article is a reproduction of a speech delivered at the University of Nebraska College of Law in Lincoln, Nebraska on March 5, 1981. The speech was presented as part of the Cline-Williams Distinguished Lectureship which is sponsored by the law firm Cline, Williams, Wright, Johnson & Oldfather of Lincoln, Nebraska. Editorial alterations were made to adapt the speech to a written form.
Williams, Wright, Johnson & Oldfather, the law firm which sponsors
this biennial lecture, evidences that commitment to the broader
societal issues. The organized bar’s inquiry into how we lawyers
should conduct ourselves in this new era is chaired by the senior
partner of one of our nation’s largest and most eminent firms. Its
headquarters may be nearby in Omaha, but its offices are nation-
wide and its practice is worldwide.

We lawyers have not yet advanced into the modern world as
quickly or as effectively as many would like. One legal publication,
referring to the forces compelling changes in the practice of law,
concludes, “maybe lawyers, the law and the legal profession will
always be carried by clients and events kicking and fighting into
the future.” But the volume of comment about professionalism,
ethics and practice stimulated by the American Bar Association’s
Kutak Commission on Evaluation of Professional Standards, and
developments along related lines elsewhere, suggest that we are
becoming aware of our new responsibilities to society and of many
of our present problems; remedial action may not be far off.

However, in the important area of institutional responsibility,
we really have not begun to recognize the need for change, much
less to attend to it. That need results from the institutional charac-
ter of modern law practice (exemplified by the large law firm and
corporate law department), of modern clients (such as govern-
ments, the great corporations and citizen organizations), and of
more of the modern issues, which pose general, public interest,
risk/benefit, “quality of life” societal problems rather than the per-
sonal, party versus party concerns which predominated at an ear-
lier time. Insofar as this new practice is concerned, in some ways
we operate in much the same fashion that my father did when he
began his career at the turn of this century.

Problems created by the institutional character of law practice
are all around us, but we rarely see them. Someone once posed
the question, “who discovered water?” to which the quick answer
was “I don’t know, but it wasn’t a fish!” If we weren’t so accus-
tomed to accepting the commonplace, we would be constantly
amazed by events such as those taking place in the government’s
litigation against IBM Corporation. That is truly an institutional
case, involving a government, a large law firm, a large corporation,
a large corporate law department, and public interest issues. Two
months ago the case celebrated its twelfth anniversary; in another
two months it will celebrate its sixth year of actual trial before a

2. This “new” practice, much of which centers on the “socioscientific contro-
versy,” is treated in depth in M. WESSEL, SCIENCE AND CONSCIENCE (1980).
See generally id. at 1-29.
judge. When and if the case is ever finished, the final judgment will deal with an industry which is almost totally different from the one which existed when the complaint was filed in January, 1969. Although each participant may blame the others, and on occasion has, I suspect that judge, government and IBM alike would agree that what has been going on in the case is absurd, ridiculous, and Kafkaesque. Yet, the case continues with a life all its own.

IBM is an extreme example of the institutional nature of modern law practice, but it is not an unique one. I have been involved in one nuclear power licensing proceeding for eleven years. It will be many more years before it is concluded. I was also involved in the Agent Orange controversies which have continued for a decade; again, there is still no end in sight. Most other lawyers involved in complex, public interest controversies concerning monopoly charges, nuclear power, or chemical carcinogens undoubtedly could testify to similar experiences.

The beginning of a new period in American dispute resolution was marked by passage of the National Environmental Policy Act of 1969 (NEPA), which mandated the publication of a risk/benefit statement in regard to all major federal actions affecting the environment. With greater frequency, courts, administrative tribunals and other dispute resolution mechanisms are called on to deal with socio-scientific controversies whose resolutions require the sensitive balancing of a vast number of positive and negative consequences of a course of action. Almost inevitably, the parties to these disputes are institutional—governments, big corporations, and major environmental organizations. Equally inevitably, these parties are represented by large law firms.

The legal profession has begun to deal with some of the substantive legal problems posed by these essentially legislative controversies. Indeed, our recent national election may have constituted a referendum regarding many of the issues. But we have hardly begun to consider the institutional framework within which we so frequently operate, and its consequences to our practice.

II. THE BERKEY CASE

We are still at an early point in the “risk/benefit” period of controversy and dispute resolution. Most of the key problems are being dealt with at the operating levels in corporations, government agencies, and citizen organizations. There is little empirical evidence to analyze, and few higher court decisions for guidance. With those caveats, however, reference to the litigation of Berkey
Photo, Inc. v. Eastman Kodak Co.\(^4\) will be useful as suggesting certain key areas requiring attention.

In late 1978, a special advisory panel of the National Commission for the Review of Antitrust Laws and Procedures ("NCRALP") reported:

The Panel believes that there exists a fairly limited but important category of actions that occur from time to time in antitrust litigation which are clearly unethical. Deliberate destruction of evidence, deliberate concealment of evidence, and deliberate "tampering" with witnesses in order to try to prevent their testimony from being truthful, all come within this category. . . . [A] general problem of attitude exists among most lawyers engaged in litigation, whereby the emphasis on winning at all costs can tend to make questions of ethics appear irrelevant in a litigation context and whereby conduct on behalf of a client can result in serious adverse consequences to the efficient and effective administration of justice and thereby constitute an abuse of the adversary system.\(^5\)

*Berkey* may be one of the few reported decisions confirming these conclusions, but experienced legal practitioners will quickly recognize the commonplace character of the conduct it involved. Indeed, the distinguished attorney representing one of the lawyers who pleaded guilty to misconduct in the case, without embarrassment sought clemency for his client at sentencing with the statement, "there but for the grace of God go I."\(^6\) Most practicing lawyers would conclude, "Amen." Trial lawyers cannot spend their lifetimes marching as close as possible to the fine line dividing legality from illegality without every so often stepping across it.

*Berkey* involved a federal antitrust litigation. The plaintiff charged unlawful monopolization; the defendant claimed that its market position was the result of achievement and excellence rather than unlawful conduct. Until the standard of conduct for monopoly cases is defined more precisely, such controversies call for the same kind of "risk/benefit" balancing of pluses and minuses that is so characteristic of other major complex public interest disputes. Almost anything and everything is relevant; almost anything and everything goes.

As its key expert witness, Kodak retained a leading economist who had served as a member of the President's Council of Economic Advisers, and as chairman of the economics department at a major eastern university. The expert obtained and analyzed a myriad of the relevant documents. At first he expressed concern


and doubt as to the merits of the case, but finally he came to an opinion in Kodak's favor.

Kodak was represented by one of the major New York law firms. The senior trial attorney in charge of the litigation was of Watergate fame and had an outstanding reputation. The other attorneys assigned to the case included a senior partner who had enjoyed a long and fine career at the bar, and a senior associate who was also an experienced attorney, knocking at the doors of the partnership.

Pre-trial discovery was typically elaborate and intense. Although Kodak was directed to produce all interim reports, the expert's initial written communication to counsel expressing doubt on the merits was not produced on the ground that it was not an "interim report." At another point, the expert returned to the law firm the great bulk of the documents he had inspected. When asked about these documents, the senior partner, who was responsible for handling this part of the case, falsely asserted that the returned materials had been destroyed. He ignored the whispered reminder of his senior associate that the documents were in fact still available. As a consequence, these documents also were not produced for discovery.

The trial was before a jury, and lasted for six months. Kodak's final witness was the expert who appeared evasive on cross-examination thereby arousing the suspicions of Berkey counsel. Probing questions finally caused disclosure of the existence of the interim report and it was produced at the eleventh hour. At about the same late stage in the trial, the lie concerning the destruction of documents was similarly revealed and they also were produced.

The totality of the conduct shocked the trial judge. He said that the expert's initial communication was an "interim report" if he had ever seen one and that the credibility of the expert had been destroyed on the witness stand. He initiated a criminal investigation with regard to the conduct of the senior partner, who was ultimately convicted of contempt and imprisoned. No one can be certain what led the jury to its decision, but it returned a verdict against Kodak which, when trebled, came to $113 million. For our purposes it seems appropriate to accept Kodak's contention that the jury was vitally influenced by the collateral evidence of obstruction and contempt and that this prejudiced jury consideration of the evidence on the merits.

Berkey has been much discussed in practice and in professional and academic circles. Much of that discussion, however, has centered on the lying by the senior partner. Why did he do it? What should have been his punishment? Another significant area of discussion has been concerned with the responsibility of the senior
associate. What was his obligation to the partner-in-charge? What was his obligation to his law firm? What should he have done? How do other associates view their obligations?

These questions are important. At least in terms of the standards of professional conduct involved, I submit that the answers are simple. The senior partner clearly had no right to lie. His associate clearly had no right to participate in the lie. The remaining questions are not so easy to answer because they are dependent on traditional enforcement considerations.

However, there are a number of other issues posed by Berkey which have hardly been discussed. Yet in my view they are the most important of all. What was the responsibility of the law firm representing Kodak? What was the responsibility of Kodak and its corporate law department? What kind of responsibility should be placed on the other institutions on down the line, such as the expert's university and his professional societies? These questions point to key problems posed by our modern institutional practice.

Before turning to these institutional issues, however, I would like to discuss the significance of the collateral evidence of attorney tactics in Berkey. It furnishes an important framework for the treatment of the institutional concerns.

III. EFFECTS OF COLLATERAL EVIDENCE

Berkey involved some extreme tactics by counsel which were actually illegal. It also involved the far more common game-playing tactics which are so characteristic of our American adversary system and its "sporting" approach to dispute resolution. Berkey demonstrates that collateral evidence of tactical impropriety may have a tremendous adverse impact on the merits of the case, whether the impropriety is committed by perjury, calculated obstructiveness and evasiveness, inexcusable ad hominem tactics, or otherwise.

Modern public interest controversies can be extremely complex and difficult to understand. The typical nuclear power controversy, for example, will involve a host of scientific disciplines such as nuclear physics, biochemistry, biology, and even ichthyology and archaeology. Frequently it will also involve charges and countercharges regarding the motivations of huge organizations or of conspiratorial action both of which can demand the analysis and evaluation of millions of documents and statements covering many years. Similarly, it may involve the computer simulation of events which should never happen, such as the failure of a nuclear plant's emergency core cooling system. No one can adequately understand all the merits of such a case—not even the skilled scientist.

How do judges and juries make decisions when they cannot un-
nderstand the merits? The decisions are made in much the same fashion that lay people generally make decisions about any other complex issue. For example, a candidate for open-heart surgery might elicit the advice of an expert and then test his or her credibility by examining reputation, credentials, and past successes and failures. In addition, he will note whether there are inconsistencies in what is said and done. If the results of this examination furnish cause for doubt, he would likely reject the advice. In similar fashion, a jury might discredit the testimony of the analytical chemist who claims to be presenting an impartial scientific evaluation of a compound if he appears evasive about the sources of his funding, or if he is caught in a lie about the college he attended.

Although there is not a great deal of available evidence, what little there is suggests that judges, juries, administrative tribunals, and arbiters of all kinds frequently make important decisions in complex public interest cases on the basis of this kind of collateral evidence. Undoubtedly, the best known example is Ralph Nader's controversy with General Motors in which GM's attempt to uncover evidence personally damaging to Nader backfired. The result was that the Corvair automobile had to be removed from the market at a time when the statistics showed it to be by far the safest of all the compact cars. Other examples of collateral evidence which apparently had a similar damaging effect include Ford Motor Company's "pattern of delay and nondisclosure... through all its fuel tank litigation," which included Ford's citation "in at least five appellate court decisions for having obstructed discovery by giving false answers to interrogatories, and by hiding damaging documents." Similarly, Reserve Mining Company's litigation conduct during its bitter and lengthy Lake Superior asbestos-like fibre pollution case caused The New York Times to comment editorially about the trial judge's "exasperation at pettifogging and delay and... Reserve's outrageous tactics." Firestone's legal tactics in its "500" brand tire dispute were described by another publication as involving "litigation, delay, contentious foot-dragging and appeal," and as posing the questions "What was Firestone trying to conceal? Why was [counsel] so concerned?" Finally, Mutual of Omaha Insurance Company's conduct led a trial judge to state that its defense against an insurance claim, "could well have given the jury the indication of a deliberate cover-up."

Legal tactics traditionally have been the province of trial counsel, and are rarely discussed with a client. But lawyers are representatives, not principals. *Berkey, GM, Ford, Reserve Mining, Firestone* and *Mutual of Omaha* suggest that juries and courts will hold the clients responsible for what their lawyers do. At least in these kinds of institutional cases where there is a great potential that legal tactics used in the game-playing of our adversary system will be very damaging, the anticipated use of such tactics should be communicated to, and cleared with, the client. The individual attorney should be obligated to obtain the client's specific authorization for the use of legal tactics which are marginal or doubtful, albeit technically lawful and ethical. If he fails to obtain such approval, he should be held responsible to the client for the consequences of the conduct.

With this ethical principle as the framework, let us consider the questions of institutional responsibility, professionalism and ethics suggested by the *Berkey* case.

IV. RESPONSIBILITY OF THE LAW FIRM

The senior partner, the trial partner and the senior associate representing Kodak in *Berkey* were all members of a large law firm. Their individual responsibilities were clear enough. But what was the responsibility of their law firm as an institution?

My father was a solo practitioner. Twice during his career he formed partnerships, but they were not satisfying to him. He loved his individual practice, his "eye-ball" relationships with his clients, his understanding of their wants and needs, and his personal control over decisions.

The corporate law firm of today is very different. Even the smaller firms have scores of attorneys, paralegals and other employees. Branch offices are proliferating at an accelerating pace. The most recent *National Law Journal* survey indicates that all of the top 100 firms have more than 100 attorneys. Nineteen firms have over 200 attorneys. One has 544 attorneys and 25 offices.\(^{12}\)

Many of the senior partners who manage these firms are necessarily more concerned with commercial problems than with strictly legal issues. Most are licensed to practice law, but many may not have actually practiced in years. Few are licensed by each of the jurisdictions in which the firm practices. None of them can possibly be a specialist in all the areas in which the firm gives advice. Even when dealing with professional issues, they may know little more than the name of the client involved, and may have no personal relationship with the individuals working for that client.

---

Although the managing partners may understand the legal, ethical, and professional requirements, their operating responsibilities will be also to the firm as an institution. They are charged with the duty of assuring adequate business and income; of fairly dividing profits; of admitting new partners; of controlling space, rent, light and heat costs; of managing pension and retirement programs; of obtaining medical insurance; and on and on. These duties can obscure their other obligations.

Similarly, as with the senior associate in *Berkey*, the associates employed by the firm also have a host of concerns which are not necessarily identical to the interests of the client. Will the memorandum delivered to a partner match his expectations of quality? Will it have been done quickly enough? Has enough time been devoted to the matter? Will it equal that of another associate also vying for partnership selection?

I do not intend this discussion to deprecate the large law firm or corporate law department. Such firms are needed to handle the complex problems of the day. However, if lawyers are to serve society properly, we must also recognize that within the ranks of these great firms are attorneys who occasionally may commit a crime (as did the senior partner in *Berkey*); or who occasionally may have divided loyalties and concerns as to how to act (as did the senior associate in *Berkey*); or who may stretch the sporting approach beyond its breaking point with adverse consequences to the client (as may have done the trial attorney in *Berkey*).

Douglas Steven Lavine, an attorney and legal journalist now completing his Master's work at Columbia Law School, has proposed that every law firm ought to be required to have a formal, structured program which will remind its professionals of their legal and ethical obligations. He calls for the creation of law firm ethics committees which would have the following assignments:

*Educative Function:* To heighten awareness of proper ethical standards within the firm, by sponsoring discussions, lectures and other dissemination of information on important ethics developments.

*Advisory Function:* To give advice and counsel to lawyers with questions about the propriety of a particular course of conduct.

*Protective Function:* To assist attorneys by involving the firm in ethical decisions.

*Boundary-Setting Function:* To limit the uncontrolled adversarialness which leads to excesses, to law-breaking and to personal tragedies.

*Supervisory Function:* To act as a conduit to the organized Bar's disciplinary enforcement apparatus where necessary.

*Credibility Function:* To give credibility to the Bar's promise to police itself, and to place responsibility for ensuring high ethical standards on legal entities.  

13. Lavine, Curing the Code Of Professional Responsibility's Blind: A Proposal for a New Disciplinary Rule Requiring Firms to Establish Internal Ethics
The available evidence suggests that Lavine is correct, and that law school training, even if supplemented by continuing education programs, is insufficient. Law firm participation on a practical, working, day-to-day level is needed. Such participation should extend beyond continuing education in adherence to law, beyond ethical and disciplinary rule, and beyond client mandate. The law firm should have a "whistle blower" mechanism which meets the needs of persons such as the Berkey senior associate. It must provide protection against recrimination should an associate pose a complaint. In addition to providing for this "whistle blowing" response, the firm should also have a monitoring and auditing function similar to that maintained by most large organizations to control financial matters. This would enable it to uncover areas of possible problems or concerns.

One might debate at length what details should be included in a law firm's professionalism program. However, such a debate would be premature. For example, there is little doubt that the programs should differ for the 50, 100, and 500 person firms, or for firms with different kinds of practice. What we need at this point is recognition that the law firm, qua law firm, has an obligation of ethical conduct to its participants and to society; the precise elaboration of how to implement that obligation should be saved for a later day.

The proposed new disciplinary rules are still undergoing change. When finally adopted, they probably will help to resolve some of the difficult professional problems which face individual attorneys in the modern institutional practice. But we need more. We need to recognize that many attorneys today work in large firms, and that those firms have independent obligations in light of present practice. They should not be granted exemption from responsibility simply because their members are independent licensed professionals, equally responsible for what they do or fail to do. We need a law firm mandate of commitment and responsibility, as follows:

A law firm has a responsibility to its clients and to society, to insure that the actions of its personnel comply with law, with ethics, and with client mandates and interests. If it fails to take reasonable steps to perform this responsibility, it is responsible to the client for the consequences.  

Committees (Fall, 1980) (Unpublished paper on file with the Nebraska Law Review).

14. Section 7.2 of the Kutak proposals may be read as endorsing aspects of this proposal. See Kutak Commission, Draft of Revised Code of Professional Ethics § 7.2 (1980).
V. RESPONSIBILITY OF THE CORPORATION

What about Eastman Kodak Co., the corporate defendant in *Berkey* which, by adverse jury verdict, may have paid the first penalty for the misconduct of its counsel and its expert? There is no evidence that anyone at Kodak had any direct knowledge of the lying or of the obstructionist tactics of its counsel or expert. But the judge and the jury seemed to have considered this lack of knowledge to be irrelevant. Similar lack of management knowledge also appears to have been deemed irrelevant by the public in other corporate cases, such as Allied Chemical's kepone\textsuperscript{15} misfortune or Hooker Chemical's Love Canal\textsuperscript{16} problems. In another context, Chief Justice Warren Burger explained that public policy can negate a "lack of knowledge" defense as follows:

[A corporate manager has] not only a positive duty to seek out and remedy violations when they occur but also, and primarily, \textit{a duty to implement measures that will insure that violations will not occur}. The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps, onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them.\textsuperscript{17}

Honesty, proper motives, excellence, and achievement were the Kodak substantive antitrust defenses; "corporate responsibility" was the thrust of its jury presentation. *Berkey* teaches that in the American adversarial dispute resolution environment with its common extremes of tactical conduct, corporate responsibility carries an obligation to see that conduct by legal representatives on behalf of the corporation conforms to any claimed corporate ethic; in this context, the representatives' status as qualified independent professionals is irrelevant.

The law departments of our great corporations are growing even more rapidly than the private law firms. The last *National Law Journal* survey shows that thirteen corporations have law departments employing 100 or more attorneys; one had 863 attorneys—over half again more than any private law firm.\textsuperscript{18} Such corporate law departments perform the same functions as private law firms, and should have concomitant professional responsibi-

\textsuperscript{15} Zim, \textit{Allied Chemical's $20-Million Ordeal with Kepone}, \textit{Fortune}, Sept. 11, 1978, at 82.


\textsuperscript{17} \textit{United States v. Park}, 421 U.S. 658, 672 (1975) (emphasis added).

ties with regard to the outside attorneys they retain as well as their
own staffs. Moreover, corporate management has a duty to assure
that the conduct of corporate legal representatives matches the
corporate commitment. The corporate chief executive who asserts
his company's integrity and innocence, who publicly demands an
immediate hearing, and who expresses assurance of complete vin-
dication, will not long preserve his organization's credibility if he
stands idly by while his corporate counsel (inside or outside) en-
gages in obstructionism.

As in Berkey, an increasing number of modern corporate cases
involve broad issues of corporate morality and ethics—commonly
known as "corporate responsibility." There are many different
views regarding corporate responsibility, ranging from the tradi-
tional at one extreme (responsibility only means making a profit
for stockholders) to the activist at the other extreme (responsibil-
ity means broad social commitment), with almost infinite shadings
and gradations in between. But whatever the differences, one
thing seems obvious: It is the duty of senior management to make
corporate responsibility decisions. Such judgments cannot be del-
egated to the junior executives or to the legal representatives. In
the absence of full and proper instructions by senior management
to attorneys and to others, it may not be assumed that the conduct
of agents and representatives matches the corporate commitment.

Lawyers are professionals with a long history and tradition of
independence. This is especially true for the trial bar. Thus, man-
gagement of the legal function by a corporate client is not an easy
assignment, but it certainly can be done. The IBM case furnishes
two excellent examples. For years IBM was attacked on all fronts
for its alleged dilatory tactics. However, at one point, the corpora-
tion's senior management took control. Chairman Frank T. Cary
announced at the 1978 annual meeting that he had given positive
instructions to counsel to move forward "crisply and expedi-
tiously." Thereafter the change in tactics was apparent, including
the elimination of an anticipated IBM motion to dismiss and the
drastic paring of IBM's witness list. On another occasion, when the
need to remove the trial judge became apparent to IBM, the matter
was assigned to a special committee composed of five outside di-
rectors, all of whom were lawyers not then representing IBM. The
committee consisted of two former cabinet members, a former gov-
ernor, a former ambassador, and the then duPont chairman. Al-
though IBM's application was not substantively successful, the
demonstration of senior management control was impressive to
all observers. More important, it helped avoid repetition of the
damaging charges of obstructionism, impropriety, and social
irresponsibility.
In the final analysis, what is needed is a corporate mandate of commitment and responsibility, as follows:

A commercial organization has a responsibility to see that what is done on its behalf complies with law, with ethics, and with its own instructions. If it fails to take reasonable steps to carry out this obligation, it is responsible for action taken on its behalf, even if performed by licensed and independent professionals.

VI. OTHER INSTITUTIONAL RESPONSIBILITIES

Private law firms, corporate law departments, and large corporate and other organizational clients are the institutions most directly involved in the new legal problems. But there are many others also involved, all of which have concomitant societal responsibilities.

What were the responsibilities of the expert in *Berkey*? In the final analysis, it was his personal evasiveness and his participation in the obstructionist tactics of the Kodak counsel which led the judge to comment that he had been “destroyed” on the witness stand. His conduct may have persuaded the jury not only to disbelieve what he said, but to conclude that the exact opposite was true.

There has been little comment regarding the responsibility of either the expert in *Berkey* or the institutions of which he was a part, such as his university and his professional societies. Yet his adversarial tactics negated his claim of adherence to the “scientific method” and his pretense of scientific impartiality. He certainly discredited his institutions. Why is nothing said or done?

One reason for the lack of comment about the expert’s conduct is that we are all so accustomed to it, just as the fish is to water. We expect it. Jokes about experts in litigations are commonplace. “How much did you pay your expert?”

Individual experts, like individual lawyers, should know their obligations. But experts sometimes violate obligations, just like lawyers do, and their institutions should have responsibilities parallel to those of law firms. Professional scientific societies should make clear in codes of ethics and elsewhere, that the role of the scientist in an adversary proceeding is to present scientific data and opinion, not to engage in adversarial excesses designed to win.

Scientific societies must respect the independence of their members, and should not unreasonably fetter professional freedom. But limitations on adversarialism need not limit scientific freedom. A classic illustration involved a medical specialist who testified frequently at nuclear power licensing proceedings in most extravagant adversarial fashion. Finally, his professional society determined that it had an obligation to prevent miscarriages of jus-
tice resulting from his extremes and adopted a resolution expressing its scientific judgment with regard to his views. Thereafter, it authorized teams of his peers to follow him, voluntarily and without compensation, wherever he testified. As a kind of "truth squad," each team read a condemnation of his testimony into each record. When I heard this presentation in one case, it not only avoided the damage he might have done, but generated enormous respect for and aided the credibility of science as an institution.

There are many other measures which scientific institutions might adopt to enhance the role of scientific experts in adversarial dispute resolution. The public—all of the rest of us—needs standards, benchmarks, risk indices, certifications and other procedures to aid us in evaluating new scientific information and in measuring developments against known experience. We need the help of science to separate value and quality-of-life opinion from scientific data and conclusion. We need aids for communication and understanding. Most of all, we need assurance that the conduct of scientists will serve, rather than disserve, our society.

Similarly, institutions for judicial and administrative dispute resolution have responsibilities to improve the manner in which judgments are reached in the new brand of cases. For example, one eminent federal trial judge has publicly expressed the opinion that half the pre-trial depositions in his court are conducted by attorneys to generate legal fees rather than to benefit their clients. Where he suspects this is occurring, he should insure that the client is advised of the costs of depositions in terms of legal fees, delay of trial, and possible adverse effect on the outcome. If a judge suspects that the trial attorney's game playing is not fully authorized by his client, he should inquire as to whether the client knows what is happening and has given appropriate authority. Finally, until the tactics of expert witnesses change radically, judges should speak with the experts before the hearing and advise them, clearly and precisely, that they are obligated as witnesses to tell the truth, and that they are not to act as adversaries or as advocates.

A large part of our new complex, public interest institutional practice is interdisciplinary, including many sub-disciplines of law, science and business. Although interdisciplinary education is given lip service in this country, unfortunately our educational institutions have not yet fulfilled their responsibilities for providing adequate education, training, and leadership for dealing with

problems such as those posed by the Three-Mile Island nuclear scare or Love Canal chemical waste episode.

Effective corporate management of the legal function, for example, would help to insure that the conduct of legal representatives matches corporate responsibility commitment. In preparation for this lecture, in December, 1980, I conducted a survey of 157 graduate schools of business to test the adequacy of business school education in this regard. One hundred and seven schools responded and a number of them identified substantive legal training in such areas as environmental regulation or employee relations. However, not a single response referred to any training in this specific and critical management area.

Law schools and business schools should offer interdisciplinary education and leadership with regard to the new institutional practice. We need empirical data and analysis of the socio-scientific dispute which is so central to that practice. Interdisciplinary academic attention is especially needed with regard to the guidelines for conduct by lawyers, scientists, business-people and others involved in the new practice. Most of the people concerned with the issue apparently agree that present methods are inadequate, or worse. Yet there has been little constructive remedial action.

One set of proposed new guidelines, for example, has been questioned as unrealistic, impractical, or utopian. That set, termed the procedural "rule of reason," is as follows:

- Data will not be withheld because "negative" or "unhelpful."
- Concealment will not be practiced for concealment's sake.
- Delay will not be employed as a tactic to avoid an undesired result.
- Unfair "tricks" designed to mislead will not be employed to win a struggle.
- Borderline ethical disingenuousness will not be practiced.
- Motivation of adversaries will not unnecessarily or lightly be impugned.
- An opponent's personal habits and characteristics will not be questioned unless relevant.
- Wherever possible, opportunity will be left for an opponent's orderly retreat and "exit with honor."
- Extremism may be countered forcefully and with emotionalism where justified, but will not be fought or matched with extremism.
- Dogmatism will be avoided.
- Complex concepts will be simplified as much as possible so as to achieve maximum communication and lay understanding.
- Effort will be made to identify and isolate subjective considerations involved in reaching a technical conclusion.
- Relevant data will be disclosed when ready for analysis and peer review—even to an extremist opposition and without legal obligation.
- Socially desirable professional disclosure will not be postponed for tactical advantage.
- Hypothesis, uncertainty, and inadequate knowledge will be stated affirmatively—not conceded only reluctantly or under pressure.
- Unjustified assumption and off-the-cuff comment will be avoided.
- Interest in an outcome, relationship to a proponent, and bias, prejudice,
and proclivity of any kind will be disclosed voluntarily and as a matter of course.

—Research and investigation will be conducted appropriate to the problem involved. Although the precise extent of that effort will vary with the nature of the issues, it will be consistent with stated overall responsibility to solution of the problem.

—Integrity will always be given first priority.20

Our law, business and other schools have responsibilities to tell us whether these are valid criticisms and, if so, whether substitute procedural guidelines would improve present practice. Surely they can come up with something better than we have today, if they will only devote their attention to the problem.

VII. CONCLUSION

Modern law practice increasingly concerns the socio-scientific dispute—the complex, public interest controversy with institutional parties and counsel. In these matters, legal tactics are of critical substantive importance. Under these circumstances, the individual attorney should recognize his obligation to obtain specific authorization from the client before using legal tactics which, although technically lawful and ethical, are marginal or doubtful. If he fails to do so, he should be held responsible to the client for any harm which results.

We also should recognize that the institutions involved have responsibilities to society apart from, and in addition to, the responsibilities of the individuals involved. Those responsibilities, in final summary, are as follows:

1. A law firm has a responsibility to its clients and to society, to insure that the actions of its personnel comply with law, with ethics, and with client mandates and interests. If it fails to take reasonable steps to perform this responsibility, it is responsible to the client for the consequences.

2. A commercial organization has a responsibility to see that what is done on its behalf complies with law, with ethics, and with its own instructions. If it fails to take reasonable steps to carry out this obligation, it is responsible for action taken on its behalf, even if performed by licensed and independent professionals.

3. All other institutions involved in the new practice, indirectly as well as directly, have responsibilities to insure that what they and their members do, serves rather than disserves society.

Lincoln, Nebraska
March 5, 1981