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Gillers: Closing Remarks
CLOSING REMARKS

STEPHEN GILLERS, Vice Dean and Professor, New York University School of Law:

I am getting over a cold so if my voice goes, you will understand. My job is to sum up. I have a colleague whom I have heard sum up at events like this with remarkable competence. He describes the last day or day and a half in a way that creates a seamless presentation of a series of ideas, which he interweaves with references to everybody's name. Before I came down here, I asked him how he did it. He said, "It is easy. You just write the conclusion before you go." I did not do that. I wonder if I could have. I doubt it. I could have written some of it, I think, because I have been to other such conferences, and there are some themes that reappear, but there are new ones here and new ones for me as well. We heard many questions posed by our speakers, beginning with Martha Barnett's talk last night. Some of those questions were intended, I assume, to be rhetorical. Some of them turned out to be rhetorical because we were unable to answer them. For some, we provided provisional answers. For example, Martha asked us to ask ourselves: "What does it mean to be a lawyer?" She cautioned that if we do not answer that question, others will do it for us. She also asked us to ask: "What can we do to insure that our values survive?"

This morning Deborah asked if any of this will make a difference in practice, with an emphasis on "practice" because I think we all benefit from being here these last twenty-four hours. What do we want to accomplish? Are we doing it the right way? And finally, what is the problem? Dean Kilpatrick, echoing Deborah's last question, asked whether we have a problem. What can others tell us? How can the legal profession increase professionalism? A little earlier you heard Art Garwin talk about his uncertainty, after years of doing this work, about what exactly it means to us when we talk about professionalism—an uncertainty I think we all share. Martha Barnett also warned us against too much self-absorption. That was her Titanic metaphor. She cautioned against worrying about whether we were dressed properly for the cocktail party on the Titanic and whether or not we were sitting at the Captain's table, while ignoring the broader environment, the iceberg.

I think the legal profession is sometimes guilty of that kind of blindness. I think we rarely look outside to see, digest, and address, in a purposeful way, how people view us. We might quote statistics, but whether or not we actually use that information to bring about change is a separate question. Professor Nelson pointed to the radical changes in the profession in the last thirty years: the radical increase in the number of lawyers, not just absolutely, but relative to the general population; increased stratification; the increase in money spent on business advice compared with personal advice; changes in partner-associate ratios; increase in the relationship of partner income to associate income; increase in competition; increase in law firm size; and increase in episodic relationships between law firms and clients, so that there are fewer

continuous relationships between the two. Clients come and go, and you have to keep attracting them as your competitors seek to lure them away.

Although Professor Nelson did not mention it directly, I think we have to recognize that technology is going to influence the nature of the legal profession because, after all, what we sell is information and technology, as we know it today, is incredibly adept at transmitting huge volumes of information, not only across state lines but across national lines. I do not mean only information to clients, but also information to lawyers in the form of information from clients and the profession's access to the law of other jurisdictions—other states and other nations. We are going to have to deal with that. Perhaps the example that comes to my mind—a caricature of an inability to deal with this phenomenon—was the decision of a federal judge in Texas. He held that the sale of a computer program, *Family Lawyer*, was the unauthorized practice of law. That decision was overturned legislatively and then by the Fifth Circuit, but it tells us something about how we may be entering a twenty-first century profession in reality while still governing it within nineteenth century doctrines. Whether or not we can square that circle and make the necessary changes is going to be interesting to watch.

We talked about the goals of professionalism, and there were several. Not everyone would agree that every one of these is a goal. One is public relations—just persuading the public that we are not quite as bad as people seem to think we are. We agree that if this is simply window dressing, if we are, in effect, attempting to disabuse the public of an evaluation that is true, then first of all, it will not succeed, and second of all, it is dishonorable. But I think we also believe that perhaps the public thinks less of us than we deserve, and we ought to at least try to correct that misimpression. We talked about addressing and being more specific about our aspirations. We discussed that issue in the context of forming character, whether in law schools or through other institutions of the profession. Let us encourage people to internalize certain kinds of behavior that we would call—once we are better able to define it—professional. We also talked about enforcement of the rules of lawyer regulation as a form of professionalism. That includes, but is not limited to, the ethics rules in any particular jurisdiction. We asked whether those ethics rules ought to be expanded to require or forbid more kinds of conduct than they now do and perhaps, as well, to be more specific about what is required or forbidden, so we do not invite the candid, and correct, description of Caroline Heil that the rules seem incredibly malleable. They *are* incredibly malleable, at least in part.

We suggested that professionalism may mean greater access to courts. That is an affirmative duty. Let us increase the ability of people to get justice, possibly by mandating pro bono activity, possibly by encouraging it, and possibly in other ways. It was suggested that excessive litigation, or the automatic impulse to litigate a dispute rather than to look for ways to solve problems in a less combative manner, might be an example of the absence of professionalism.

We then also talked about what it was that was impeding the goals of professionalism. Nathan Crystal identified the market, as did others. Lawyers are business people; they have to pay their bills. They are interested in making

a living. They are in competition, increasingly, with other lawyers because there are more lawyers per client and because clients are less loyal to law firms. So, money and market forces are, or can be, at war with the goals of professionalism. Clients, in some instances, can be at war with the goals of professionalism. As I will mention in more detail in a minute, a client's insistence on a particular activity that is legal and ethical but perhaps of dubious virtue may lead a lawyer to engage in the activity because of the lawyer's interest in maintaining the relationship with the client and the fee that will come with the work.

Who else is impeding these goals? Candidly, Justice Zlaket told us that judges may be impeding them. After all, judges are quite jealous of the right of courts to regulate the bar. The courts, and especially the highest court in a jurisdiction, are the regulators of the lawyers in that jurisdiction. To some extent, depending upon the state, they share that power with the legislature, but largely it is their power, and in many states it is so jealously guarded that the legislature is allowed very little authority in the area of lawyer regulation. If you assume the authority, if you are going to displace the democratically-elected institution that would otherwise have this regulatory power, as that institution does for other professions, then you have an affirmative obligation, don't you, to act in a way that encourages professional and ethical behavior? And to act in that way not only in retrospect when somebody does something wrong, through malpractice judgments or discipline for example, but prospectively, too, by encouraging structures within the practicing bar, and indeed within the court system, to reduce the incidence of misbehavior in the first instance? It is so much more efficient to avoid the misconduct than to react to it after it occurs, and it was suggested by Justice Zlaket and others that perhaps judges have not carried this responsibility as well as they should.

Finally, one must always ask whether law schools are carrying their responsibilities or impeding these goals. Very often, when you go to lawyer conferences and complaints are made about professionalism, the bar's lawyers who may or may not themselves be the cause of the problem cite law schools for failing to teach these issues: "Why don't they teach these things in law schools?" We have not heard that complaint much here today or yesterday, and I think it is commendable. There is a great deal of teaching of ethics going on at law schools. In fact, we were cautioned that we should not take such activity in law schools, or in the courts, as a sign that all is well in the profession because there is a disconnect between the sheltered worlds of each of these institutions, on the one hand, and the practicing bar on the other. Therefore, I think law schools are, by and large, doing their job—not every school, in every way possible, to be sure. In addition, if I may editorialize for a second here, it has always seemed to me that no matter how well I train my students in ethics and professionalism, the student is then going to get onto the very bottom rung of a very big profession, where his or her personal value system may be challenged by superiors who, in effect, control that student's professional life in very real ways. The student knows that. To expect that student to emerge from a third year of law school and a bar exam and begin to change the profession because he or she has learned about professionalism and other values at law school is to live in a dream world.

I shortly want to talk about solutions. But before I talk about solutions, I want to remark that there were perhaps eight or nine examples of a lack of professionalism in the course of the last twenty-four hours, or at least examples of behavior that might fit within the category of unprofessional behavior. I believe that focusing on concrete examples is a very healthy way, and a useful way, to illustrate abstract principles, or as William Carlos Williams said it better in *Patterson*, “There are no ideas but in things.” Well, the first thing I want to raise is the Missouri case that Deborah spoke about this morning. Now, I have not seen that case. I think it is rather interesting as described, though it may be more complex than she had time to develop. A lawyer who represented a plaintiff realized that his opponent had failed to answer a complaint. He had taken a default judgment. The opponent called about a discovery schedule, and the lawyer realized that the opponent did not realize that he had failed to answer the complaint. The lawyer waited until the end of the period for moving to vacate the default before responding to the request for a discovery schedule. The Missouri Supreme Court refused to open the default. Let’s look at that from the point of view of the lawyer who chose to remain silent. This is a wonderful professionalism hypothetical, more than a hypothetical in this instance. Imagine that the lawyer tells the client what has happened. The client says, “Well, what happened after they didn’t answer?” “I moved for a default . . . I noticed a default.” “And then what?” “They have thirty days to open it.” “And what if they don’t?” “Well, then liability is established, and the only question is damages.” “You mean, I win on liability if that happens?” “Right.” “And all the money I am going to have to pay you to establish liability, I do not have to pay you any more, right?” “Right.” “And the only question is how much they owe me?” “Right.” “Let’s do it,” says the client. “Don’t warn.” Now, the lawyer thinks, “I better research this.” He finds no precedent in Missouri. The lawyer might not want to do what the client asks, but there is nothing that says he cannot. What if the lawyer says, “Sorry, client, it’s not nice and I’m going to alert the opponent to the fact that the time limit for opening the default is running out.” What if it turns out in a later malpractice action that the Missouri Supreme Court, four to three, says the lawyer did not have that discretion, that the duty of zealous advocacy required the lawyer to take advantage of the default. Now, maybe the court will not say that; maybe the court will say that the lawyer could have, but did not have to, warn—that that was within the lawyer’s discretion. But the lawyer does not know what the court will say. Should he risk malpractice to be a nice guy?

As we see, the actual court was seriously split. I think the court dropped the professionalism ball here. From the court’s point of view, it is not simply making a ruling about this case. It is making a ruling about cases like this one prospectively. From here on it is saying that this is a permissible activity. The client can enjoy the default. The lawyer had no obligation to correct the mistake. That will be true tomorrow, and it is going to be true next year and ten years from now, unless and until the court overturns the case. So the Missouri Supreme Court, through this case, has established a broader rule about what kind of conduct is not only permissible, but perhaps required, at least as a practical matter.

A number of the other examples of unprofessionalism are interesting in different ways: scorched-earth conduct (so-called Rambo conduct); and churning of discovery (conducting more discovery than necessary) because you are billing by the hour. Many things that one might do in scorched-earth litigation or by way of churning discovery are not really forbidden in an enforceable way. That is a serious problem. We can all agree that churning is wrong. The problem is, how do we detect it? One person's churn could be another person's due diligence. Is the court going to second guess that? The fact that we attach the label "churn" to discovery does not mean that it is inadvisable. It might mean that the lawyer is looking for that one piece of paper that will clinch the case and that the other side is being very tough in resisting production of that piece of paper. The incivility that was cited as an example of unprofessionalism is also, largely, free conduct. That is, there is often no penalty attached to it unless it is extreme. A lawyer will be civil if there is no harm in being civil, but if it is better for the client for the lawyer to be uncivil, then the lawyer will not be civil. Now, in some small communities, or in specialized communities as Mr. Whelan said, there might be a culture that punishes incivility through group disapproval. But let me tell you, that is not New York City, and, increasingly, it is not other parts of this country.

One last point here, before I come to the solutions—it deals with lies. A rule says that a lawyer, in the representation of a client, may not make a material misstatement of fact or law. We have that rule in our ethics codes. We have other rules against lying in our perjury statutes, in our false swearings statutes, and in our discovery statutes. The problem, friends, is that the words "lie" and "false" have a different meaning for lawyers than for other people. Steven Pinker, the linguist at MIT, wrote a wonderful Op-Ed piece for the *New York Times*. Referring to the Lewinsky episode, he said that when a person goes into a shower with a bottle of shampoo, whose instructions say "shampoo, rinse, repeat," the user understands that she is not supposed to stay in the shower forever. Repeat means repeat once, even though it does not say once. That is how people understand language. But the President of the United States then tells us that his negative answer to the question, "Were you ever alone in any room of the White House with Monica Lewinsky?", is true because he interpreted the word "alone" to mean that no one could hear them or walk in. That is not how people understand language. Unfortunately, some lawyers would say, "Right, it was the questioner's fault because he did not define the word 'alone,' so it was not a lie." When that happens, it gets difficult to win compliance with a rule that says you shall not make a misstatement of fact or law. Cynicism reigns.

Now for the solutions. Of course, one cannot leave a lovely conference like this and a lovely city like Savannah without some hope of change, and we did identify a number of solutions, both preventive solutions—ways of preventing the bad conduct—and retrospective solutions—ways of correcting or punishing the conduct when it occurs. Ethics courses and the behavior of law schools in teaching students how to be good lawyers form one set of solutions. We heard from Jack Sammons and Tony Alfieri about some programs. I think we should not only teach ethics from a rules perspective, from a case perspective, but we should teach what it means to be a good person as a lawyer. Unfortunately, in

many schools, people come to teach law students with no serious practice experience. I practiced for ten years. I think that helps me a lot in being a teacher. The disjuncture that Chief Judge Harry Edwards has noticed between law teachers and practitioners is felt most heavily in the academy. Many law professors, brilliant as they are, have never had a client, or if they had a client, it was twice removed because there was a senior associate and at least one partner between them and clients in the two years that they practiced law. Never having had a client makes it harder to teach people ethics where the rules arise and operate in the context of an attorney-client relationship.

We heard about CLE. I am dubious about CLE. I suppose if I were king of the bar I would not require it, but since it is required, and since I do some CLE lecturing, I do believe that conversations at CLEs can have an ameliorative effect. There is a lot of ignorance out there about lawyer ethics. When I do a CLE, I do not let people sit quietly and think about the client they are going to meet tomorrow; I buttonhole them, I walk up to them, I put my face right next to theirs, and I say, "What do you think of that?" "I am not a criminal defense lawyer," they may answer if that is the context of the question. "I don't care," I say. "What do you think anyway? Say anything that you think is right." I want them engaged. My purpose is to refuse to let them serve time in the CLE room with their bodies and not their minds. I think that accomplishes something. As long as I am there, as long as they are there, I think we can do something positive.

Firm cultures: Nathan Crystal and Bruce Green encourage addressing firm culture, and I applaud it. By firm, I mean not only private law firms, but other types of law offices: corporate law offices and government law offices, for example. I think we ought to encourage firms to do private audits of their ethics regimes. Right now, we do require in our *Model Rules*, and in many states, that firms have systems to prevent wrongdoing. We do require firms to have preventive methods to guard against the occasion of a disciplinary violation. The failure to have the appropriate method, given the nature of the practice of the firm and the size of the firm, is itself an ethical violation. But I do not yet know of any law firm that has been punished for the failure to have a preventive system.

That leads to my next solution, which Deborah Rhode mentioned this morning: law firm discipline. New York has it; New Jersey may have it buried in an ambiguous rule. So far as I know, no other jurisdiction has it, and I do not think the Ethics 2000 Commission has finally come to closure on that issue. I encourage a rule that permits law firm discipline because, let me tell you, it is going to make a difference to how firms behave if they have to worry about seeing their firm name and "censure" or "reprimand" on the front page of the local legal newspaper, or worse, in the general press. Not just the lawyer's name, but the firm name. I would encourage that kind of rule. I would encourage judges that review lawyer misconduct to go a step further and say, "Well, would this have occurred if the firm had put in place a preventive mechanism, suitable for that firm, given its nature, practice, and size?" If the answer is "No," then I think firm discipline is the stick that will encourage the right culture in that firm and others.

Some solutions address the judiciary. Dean Ramsey reminded us of the importance of having judges who see themselves as part of an institution called a court. A judge who fails to perform properly—in a competent and timely manner—sets a poor example for lawyers and the public generally. Steve Morrison, looking at the same subject from the perspective of the business community, agreed. Business people expect judges to run their courtrooms efficiently, without undue expense to litigants, and with sufficient predictability in outcome. The most corrosive influence on the justice system is the rogue judge. Mr. Morrison regretted that those who are aware of a rogue judge's bad conduct often fail to take steps to reveal and correct it.

A couple of other solutions, and then I will stop. Judge Warren emphasized the importance of including the public in the broad inquiry in which we are engaged and in the generation of the rules that these inquiries encourage. I could not agree more. It is the public's legal system. It is the public's justice system. The public could take it away from us tomorrow if it were organized to do so. It has a right to be there when rules are made. It has a greater right to be there than we have. We are there as the public's agents. We are not there because we have the inalienable right to decide. The exclusion of the public from, or token admission of it to, so many of our committees and commissions—disciplinary, rulemaking—only encourages public distrust.

A final remedy that we addressed here today, one very close to my heart, is Rob Atkinson's suggestion that we teach the humanities in law school. Now, you might put this at the very bottom of your list of remedies, and I would not blame you because it does not sound like it has a whole lot to do with professionalism—but it does. As someone who, like Rob, has been teaching law and literature, I can tell you that is true. Studying the humanities, especially literature that has legal themes, moral themes, or themes of justice, increases self-awareness, encourages a style of personal reflection that traditional law courses do not, and encourages what I would call linguistic honesty—being honest to the language. In legal education, where manipulation of language is not only tolerated but often encouraged—perhaps properly, perhaps not—the study of literature is a check on that dominant theme. I have seen it in the four years I have taught law and literature with the Dean of our graduate school, Catharine Stimpson. About forty percent of American law schools have law and literature courses. They vary greatly. That is fine. It is in the nature of the subject. You can never really have a casebook on law and literature because it is idiosyncratic, but as you think about today, about last night, and about remedies for the problems we have identified—problems we have all acknowledged exist—I encourage you to remember Rob's talk and read his articles and include this remedy as one among others. Thank you.