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The Fall of an American Lawyer

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ABSTRACT

John Randall is the only former president of the American Bar Association to be disbarred. He wrote a will for a client, Lovell Myers, with whom Randall had been in business for over a quarter-century. The will left all of Myers's property to Randall, and implicitly disinherited his only child, Marie Jensen. When Jensen learned of the existence of a will, she sued to set it aside. She later filed a complaint with the Iowa Committee on Professional Ethics and Conduct. That complaint was the catalyst leading to Randall's disbarment.

Randall had acted grievously in serving as Lovell Myers's attorney. He was also a convenient scapegoat for a profession reeling from the Watergate affair and other crises negatively affecting the reputation of lawyers among the public. Not only had Randall served as ABA President, he was the co-author of a well-known Statement on Professional Responsibility that emphasized the lawyer's duty to serve clients and society before oneself. Randall had chosen otherwise, and authorities planned to "hold him to account."2 The thesis of this essay is that Iowa disciplinary authorities, both its Grievance Commission and the Iowa Supreme Court, strayed from their duty to impartially administer the law as applied to lawyer discipline. They apparently did so in part due to Randall's egregious behavior in defending himself from his own actions related to Lovell Myers. They also did so in part because Randall served more as a symbol than a tragedy.

A detailed study of the fall from grace of a 79-year-old lawyer from Cedar Rapids, Iowa in the late 1970s may serve as a cautionary tale. More broadly, Randall's case offers some insight into the evolution of American legal ethics in the mid-20th century. Finally, Randall's case may reflect the challenges of applying the rule of law to one whose behavior was marked by efforts to ignore the rule of law.

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2. *See* Yepsen, *infra* note 19 and accompanying text.

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I. INTRODUCTION

John D. Randall, Sr., is the only former President of the American Bar Association (ABA) to have been disbarred. Randall served as ABA President in 1959-60.[3] His term focused on "enabl[ing] the individual lawyer to be a better public servant."[4] Twenty years later, and two weeks before his 80th birthday, the Iowa Supreme Court unanimously agreed with a unanimous Grievance Commission decision that Randall's actions relating to his professional and business relationship with an Iowa farmer named Lovell Myers required disbarment.[5] Randall was subsequently disbarred by the federal Eighth Circuit from representing clients in federal matters.[6] His petition for a writ of certiorari to the Supreme Court of the United States was denied.[7] In the view of those judging him, Randall failed his duty to serve as a public servant.[8] He died three years later.[9]

To Iowa lawyer discipline decision makers, Randall's disbarment was necessary. Randall and Myers were equal shareholders in a farming corporation, Myers Farms, Inc., a business the two began in 1946.[10] By March 1973, it was likely worth at least two million dollars.[11] Randall drafted Myers's will that month. Myers made Randall his sole heir as well as executor of the estate.[12] As a co-owner of Myers Farms, a long-time "friend" or acquaintance of Myers, Myers's lawyer (at least in some fashion), and manager of the corporation's finances, Randall knew how much the corporation was worth, and that the will disinherited Myers's only child, Marie Jensen, and

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3. *Metro Deaths*, CEDAR RAPIDS GAZETTE, Dec. 30, 1983, at 10A.

4. John D. Randall, *The President's Page*, 45 A.B.A. J. 929, 930 (1959).

5. Comm. on Pro. Ethics v. Randall, 285 N.W.2d 161 (Iowa 1979); John McCarroll, *Court Disbars John Randall*, CEDAR RAPIDS GAZETTE, Nov. 14, 1979, at 1A (available through the electronic archives of The History Center: Linn County Historical Society). In 1945, Harry S. Knight, Secretary of the ABA, was indicted on two charges of fraudulently appropriating or embezzling the property of a bankrupt estate, and one charge of conspiring to do so. He was convicted at trial. JOSEPH BORKIN, THE CORRUPT JUDGE 152–54, 156, 183 (1962). A divided Third Circuit reversed. United States v. Michael, 169 F.2d 1001 (3d Cir. 1948). The Supreme Court reversed the Third Circuit and reinstated Knight's conviction. United States v. Knight, 336 U.S. 505 (1949). Knight then argued, and the Third Circuit agreed, his conviction should be overturned because the government's "emphasis [at trial] on Knight's position as secretary of the American Bar Association misled the jury into considering Knight's professional misconduct instead of his criminal guilt." JOSEPH BORKIN, THE CORRUPT JUDGE 185 (1962). The United States decided not to retry Knight due to his age of 82. *Id.* Knight's lawyer was Robert T. MacCracken, an influential ABA insider who was long-involved in the ABA's ethics work. *See Pro. Ethics & Grievances Comm.*, 62 A.B.A. REP. 30 (1937) (listing McCracken as Chairman of ABA Professional Ethics and Grievances Committee).

6. *In re* Randall, 640 F.2d 898 (8th Cir. 1981).

7. Randall v. Reynoldson, 454 U.S. 880 (1981) (cert. denied).

8. *Randall*, 640 F.2d at 905.

9. *Obituary*, CEDAR RAPIDS GAZETTE, Dec. 30, 1983, at 10A.

10. *Randall*, 640 F.2d at 900.

11. *Id.*

12. *Id.*

her two adult (and married) sons.[13] Even if Myers's decision to sign the 1973 will fully represented his desires regarding disposal of his assets, Randall's decision to write Myers's will should have made him think thrice. Indeed, his decision was the principal basis on which Randall's disbarment rested.[14] The Iowa disciplinary authorities additionally found that Randall acted unprofessionally by representing Myers in a lawsuit against Randall, Myers, and the corporation.[15] They held that Randall had a conflict of interest, for the defendants had possibly conflicting defenses to the lawsuit.[16] Both events seemed to strike the disciplinary authorities as suggesting Randall was contemptuous of the rule of law.

Randall's disbarment may have generated a *frisson* of excitement from critics of American lawyers not only because the case involved a former ABA President, but also because this former ABA President was officially a co-author, with Harvard Law Professor Lon L. Fuller, of a 1958 joint ABA-Association of American Law Schools statement on professional responsibility.[17] The Joint Conference Statement, actually written by Fuller, approaches the issue of the lawyer's ethical duties from a broad perspective. The Statement urges lawyers to dedicate themselves to the "ideals of [their] vocation."[18] Such dedication makes it possible for lawyers to "reconcile fidelity to those he serves with an equal fidelity to an office" that demands the lawyer act beyond self-interest.[19] What was Randall but a paradigmatic example of a lawyer acting unfaithfully to both client and to his office, of acting solely in self-interested terms? His actions contradicted the ideals he officially encouraged in the Joint Conference Statement. Randall needed to be "held to account."[20]

There are no defenders of Randall in the legal archives, and this essay will not be the first. However, I suggest the decision to disbar Randall was skewed by factors other than the perfidy of his actions. First, Randall's specific status, as both a former ABA President and as a senior lawyer, made him a particularly inviting target of those advocating for greater discipline of

13. *Id.*

14. *Randall*, 640 F.2d at 905.

15. *Id.*

16. *Id.*

17. *See generally* Lon L. Fuller & John D. Randall, *Professional Responsibility: A Statement*, 11 S.C. L.Q. 306 (1959); Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159 (1958).

18. Fuller & Randall, *supra* note 17, at 306.

19. *Id.* On the Statement's tone, *see generally* Robert P. Lawry, *The Central Moral Tradition of Lawyering*, 19 HOFSTRA L. REV. 311 (1991). *See also* John M. A. DiPippa, *Lon Fuller, the Model Code, and the Model Rules*, 37 S. TEX. L. REV. 303, 327 (1996) (noting influence of the Joint Statement on the 1969 ABA Code of Professional Responsibility).

20. David Yepsen, *High Court Unit Urges Disbarment of Lawyer*, DES MOINES REG., Mar. 1, 1979, at 1, 12 (quoting Rolland Grefe, President of the Iowa State Bar Association) (copy on file with author).

unethical lawyers. Second, American lawyers suffered a precipitous decline in both reputation and income during the 1970s,[21] which generated significant anxiety within the profession. One response among bar associations was to use the system of lawyer discipline to signal the integrity of the profession to the public by showing it was serious about ridding itself of unethical lawyers. For example, in 1973, the new President of the Iowa State Bar Association explained why it was important to publish the names of committee members, including the ethics committee members, in the Association's bar journal. It was, in part, to aid "the welfare of the profession as a whole."[22] Why? Because it allowed the Iowa legal profession to assist with solving some of "the currently prominent problems with which the Committee on Professional Ethics and Conduct wrestle."[23] Third, the bar's intention to "get tough" in disciplining lawyers dovetailed with this particular ethical case: a lawyer writing a will which names him a significant or even sole beneficiary. The ethics of such practice shifted markedly toward disapproval from 1950 to 1980.[24] Further, as an evidentiary matter, it was easy for disciplinary authorities to prove their case, given the existence of a written will. In a period of rising mistrust, Randall was a sacrificial offering by the bar and the courts to a public that viewed lawyers with increasing skepticism.[25]

Unfortunately, the intensity of the bar's (and courts') desire to appease its critics led those decision makers to shape, and re-shape, the rules to make Randall's disbarment appear necessary. The Grievance Commission, the Iowa Supreme Court, and the Eighth Circuit all interpreted the Iowa Code of Professional Responsibility in ways that distorted its structure and text. Further, they applied to Randall standards of professional conduct that did not exist when Randall acted. Disbarment with no possibility of reinstatement was the harshest sanction available. Its severity should have caused these decision makers to follow closely the "law" of lawyer discipline when hearing and deciding the case against Randall. That they didn't suggests a zealousness to make sure they got their man. That Randall was never to be allowed to request reinstatement seemed vindictive in light of the record of the Iowa disciplinary system. And his disbarment was, in the end, a pyrrhic victory.

A pointillist study of the fall from grace of a seventy-nine-year-old lawyer from Cedar Rapids, Iowa in the late 1970s may be of some value, if only to serve as a cautionary tale to lawyers susceptible to taking ethical short-

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21. Michael Ariens, *The Agony of Modern Legal Ethics, 1970-1985*, 5 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 134, 171–73 (2014).

22. F. W. Tomashek, *The President's Page*, NEWS BULL. IOWA ST. BAR ASS'N, June-July 1973, at 2.

23. *Id.*

24. Ariens, *supra* note 21, at 153–78.

25. *Id.* at 173 (citing Gallup polls).

cuts. It may also provide a broader value: the American legal profession altered its ethical standards during the 1970s to defend its entrenched public role against rising criticism of lawyer behavior among the public. Further, it may also reflect, in a microcosm, the challenges of applying the rule of law to one whose behavior is portrayed as reprehensible and indefensible, and more particularly, as applied to one who himself was viewed as failing to abide by the rule of law.

Section II discusses the early and mid-20th century shift in the understanding of the ethical boundaries applicable to lawyers, from the post-World War I era through the 1970s, as reflected in both the ABA's 1908 Canons of Ethics and its 1969 Code of Professional Responsibility. In particular, it discusses how the profession revised its view of the ethical propriety of a lawyer writing a will and naming himself a beneficiary. Section III details the curious factual and legal history of the disciplinary case against John Randall. Section IV assesses the impact of Randall's case on legal ethics and lawyer discipline. Section V offers a brief conclusion.

II. WHO BENEFITS?: WILLS AND CONFLICTS OF INTEREST, 1918–1980

A. Supplementing the ABA's 1908 Canons of Ethics

The ABA's 1908 Canons of Ethics were rapidly adopted by state and local bar associations, all of which were then voluntary organizations. A haphazard counting by the ABA listed twenty-four state bar associations and several local bars adopting the Canons by 1910, thirty-one state bar associations doing so by 1914, and "almost all" by 1924.[26]

Despite their subsequent popularity, the 1908 Canons of Ethics were subjected to significant criticism before their adoption by the ABA. The most important and trenchant critic of the proposed Canons was Charles A. Boston, a New York lawyer.[27] Boston concluded the Canons, as proposed, failed to demonstrate that the legal profession had kept true to the "high standard which its position of influence in the country demands."[28] In 1907, the ABA sought comments to a draft of its ethics code, and Boston was a prolific commentator. All comments were compiled in a 1908 *Memorandum*, commonly known as the *Red Book*. In his general comments, Boston argued the Canons and the accompanying oath were ill-framed and too specific to provide

26. *Transactions*, 35 A.B.A. REP. 53 (1910) (failing to include Texas); *Report of the Comm. on Pro. Ethics*, 39 A.B.A. REP. 559, 560–61 & n.3 (1914); *Report of the Standing Comm. on Pro. Ethics & Grievances*, 49 A.B.A. REP. 466, 467 (1924).

27. *See* William W. Miller, *Charles A. Boston, 1863-1935*, 21 A.B.A. J. 281 (1935); *Charles A. Boston, Bar Leader, Dead*, N.Y. TIMES, Mar. 9, 1935, at 15; Frederick C. Hicks, *Boston, Charles Anderson*, *in* 11 DICTIONARY OF AMERICAN BIOGRAPHY 98–99 (Harris E. Starr ed., 1944).

28. Henry St. George Tucker, *Address of the President*, 28 A.B.A. REP. 299, 384 (1905).

proper guidance to lawyers. He concluded, "a Code of Ethics should be a statement of principles rather than specific illustrations of the application of those principles."[29] Boston reiterated his view in a May 1908 essay in the popular law magazine *Green Bag*, also published before the proposed Canons of Ethics were publicly distributed.[30] In broad outlines, he urged a code that encouraged lawyers to act honorably and with integrity. Overall, Boston proposed a creed rather than a code. Neither his general *Red Book* comments nor his proposed *Green Bag* code were incorporated in the approved final draft.[31]

In 1924, after serving as the Reporter of the ABA committee that successfully drafted Canons of Judicial Ethics, Boston was immediately tapped to serve as chairman of the ABA committee charged with supplementing the 1908 Canons of Ethics.[32] The ABA was adamant that the Boston committee limit itself to supplementation and avoid emendation.[33] It also agreed the committee supplementing the Canons should consist of fifteen members, matching the size of the original committee.[34] This decision was a mistake. Possibly a consequence of the committee's size, and certainly due to the firmness with which its members held their contradictory proposals, they vigorously disagreed regarding what was lacking in the initial thirty-two Canons.[35]

Boston eventually channeled much of this disagreement into grudging acceptance. Before he did so, his initial proposed supplements were thoroughly attacked by committee member and New York City lawyer Walter F. Taylor. Early in the committee's lengthy tenure, Boston proposed adding thirty additional Canons. Though I have been unable to find his proposal, a published critique by Taylor of Boston's proposed supplements has survived.[36]

Among Boston's thirty proposed supplemental canons were two relevant to the complaint against John Randall half a century later. First, Boston proposed a rule regulating instances in which a lawyer wrote a will for a client

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29. MEMORANDUM FOR USE OF AMERICAN BAR ASSOCIATION'S COMMITTEE TO DRAFT CANONS OF PROFESSIONAL ETHICS 114 (Lucien Alexander comp., 1908) (RED BOOK) (copy on file with author).

30. Charles A. Boston, *A Code of Legal Ethics*, 20 GREEN BAG 224, 225, 230–31 (1908).

31. ADDRESS OF CHARLES A. BOSTON, ESQ. ON THE PROPOSED CODE OF PROFESSIONAL ETHICS 33 (1910) ("It is not sufficient that the code should be a mere catalogue of specific offences [sic].") (copy on file with author).

32. *See* 49 A.B.A. REP. 26 (1924) (listing Boston as Chairman of ABA Special Committee on Supplement to Canons of Professional Ethics).

33. *See Report of the Spec. Com. on Supplements to Canons of Pro. Ethics*, 50 A.B.A. REP. 535, 535 (1925) (reprinting limited function of committee).

34. *See id.*

35. This disagreement is discussed in detail in my book, THE LAWYER'S CONSCIENCE: A HISTORY OF AMERICAN LAWYER ETHICS ch. 4 (forthcoming 2022).

36. ABA Comm. on Supp. to Canons of Pro. Ethics, COMMENTS OF WALTER F. TAYLOR, JR. ON MR. BOSTON'S PROPOSED SUPPLEMENTAL CANONS (n.d.) (copy on file with author).

and was named a beneficiary or executor. Second, Boston made some modest comments regarding the ethical constraints applicable to lawyers who engaged in business activities. Boston's proposed supplemental canon 49 was titled "Will." It stated, in pertinent part as quoted by Taylor:

> In the preparation of a will for a client, a lawyer may with propriety advise him, without exercising undue influence, and if the client so desires, may insert his own name as executor or trustee and even as legatee or devisee, but it is highly desirable that in such a case the client should have independent advice, and the lawyer shall scrupulously avoid influencing his client in his own interest.[37]

Taylor interjected his objections throughout. First, the reminder that the lawyer advise but not unduly influence one's client "seems to have no proper place" in the supplements.[38] Of course a lawyer was to advise clients, not unduly influence them. Second, stating as acceptable that a lawyer may write a will that named him a beneficiary and/or executor disproved doubt as to the matter. The proposed rule was also "subject to all sorts of qualifications which cannot be fully stated."[39] That rule would result in approving a mini-code, not simply a rule. Taylor was using Boston's criticism of the 1908 Canons against his proposed supplements as too specific an application of a rule rather than a declaration of principle. Third, the suggestion of independent advice from another lawyer "is not correct."[40] It was the decision of the client alone to decide whether to seek independent legal advice, and the client alone decided whether the lawyer drafting the will would also be a beneficiary or executor. A lawyer writing such a will acted unethically only if such a bequest was made at the lawyer's direction rather than the client's.[41] Taylor's final comment comported with the modest law on the subject.[42]

Boston's "will" proposal in part may have been a response to a 1917 joint report of the New York Chamber of Commerce and the New York State Bar Association. The joint committee was asked to set forth some rules to prevent "unnecessary litigation."[43] Its members found, to their "amazement[,] . . . the volume of litigation concerning wills seemed to exceed by far that on any other subject."[44] One of the joint committee's "rules" to lessen the amount of such litigation was for the testator to submit the will to "at

37. *Id.* at 28.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. Graham v. Courtright, 161 N.W. 774, 779 (Iowa 1917).
43. Charles T. Gwynne, *Rules for the Prevention of Unnecessary Litigation*, 3 A.B.A. J. 36 (1917).
44. Daniel S. Remson, *Prevention of Unnecessary Litigation*, 87 CENT. L.J. 278, 280 (1918).

least one specially qualified legal critic, other than the draftsman, for independent interpretation and constructive criticism."[45] The issue, including the suggestion of independent analysis and interpretation, remained a topic of discussion in 1925, when Boston was putting together his proposals.[46]

Boston's proposed Canon 54, titled "Business," declared in part, "In the absence of some prohibitory or limiting law, it is not unprofessional for a lawyer, if he so desires, to engage in other business or employment than the practice of law."[47] It subsequently stated, "and in the conduct of the business he should not depart from those standards of character which are essential to his qualifications as a lawyer."[48] In a broad sense, this proposed canon expanded on Canon 11 from 1908. That Canon, "Dealing with Trust Property," reminded the lawyer to avoid acting "for his personal benefit" if he did so by taking "advantage of the confidence reposed in him by his client."[49] Specifically, the lawyer who handled the client's money in trust was to take care to account for it and not entangle client funds in his own accounts.[50] This is as close as the original Canons came to evaluating any "business" arrangement between lawyer and client. Boston's supplementary proposal also lacked any focus on the specific issue of the ethical limits of representing a client in the role of lawyer while also engaged in a business or business matters with that client.

When Boston published the committee's proposed supplements in the *ABA Journal* in mid-1927, they were pared to fourteen.[51] None of the proposals discussed above survived.[52] This absence remained unchanged the following year when the ABA membership approved adoption of twelve supplemental canons.[53]

Subsequent revisions of the Canons of Ethics by the ABA in 1933 and 1937 also avoided those issues.[54]

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45. Gwynne, *supra* note 43, at 44 (Rule 8(3)).

46. Daniel S. Remson, *Gifts by Will Public Private and Memorial*, 11 A.B.A. J. 93, 96–97 (1925).

47. COMMENTS OF WALTER F. TAYLOR, JR., *supra* note 36, at 32 (quoting Boston's proposed supplements).

48. *Id.*

49. *Canon 11*, CANONS OF PRO. ETHICS (AM. BAR ASS'N 1908).

50. *Id.*

51. *Proposed Supplements to Canons of Professional Ethics*, 13 A.B.A. J. 268 (1927).

52. *Id.*

53. *Important Supplemental Canons of Ethics Proposed*, 14 A.B.A. J. 292 (1928); *Proceedings*, 53 A.B.A. Rep. 119, 120–30 (1928).

54. *See Report of the Special Com. on Supplements to Canons of Ethics*, 58 A.B.A. REP. 428, 428–40 (1933) (listing proposed supplements which avoid issues); *see also Supplementary Report of the Standing Comm. on Pro. Ethics*, 62 A.B.A. REP. 761, 761–67 (1937) (listing the same proposed supplements).

B. Lawyer-Beneficiaries in the Post-World War II Era

1. 1946–1964

During and after World War II, the ABA spent an inordinate amount of time and energy amending Canon 27, which banned advertising by lawyers.[55] It appeared to fear the possibility that some innovative lawyer somewhere might enhance his reputation and income by becoming better known to the public. It thus sought ways to make more airtight its ban on "advertising, direct or indirect," by lawyers.[56] The work of amending Canon 27 and any other canon was largely undertaken by the ABA Committee on Professional Ethics and Conduct. That committee was led by Henry S. Drinker, a well-known Philadelphia lawyer and named partner in the law firm of Drinker, Biddle & Reath.[57] In 1953, Drinker's *Legal Ethics*, a comprehensive study of American lawyer ethics, was published.[58]

Drinker spent little time on the ethical limits applicable to lawyers drafting wills and creating trusts for clients from which they received some benefit in addition to a fee. His brief conclusion was, it "depends on the surrounding circumstances."[59] A lawyer drafting a will for a competent client with whom the lawyer has a long-standing relationship may receive a "reasonable legacy" if suggested originally by the client-testator.[60] And "there is no necessity of having another lawyer" make or review the will in such a case.[61] In reaching this conclusion, Drinker largely echoed, probably unintentionally, the comments of Walter Taylor. *Legal Ethics* also summarized previously unpublished informal opinions of the Committee.[62] Opinions 263–266 discussed lawyers and wills and their administration.[63] Opinion 266 suggested that, when a client desired to leave a legacy to the lawyer who drafted the will, "the lawyer should consider having the testator submit the will to another lawyer prior to its execution."[64] Such pale advice offered extraordinary discretion to the lawyer drafting the client's will.

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55. *See* ARIENS, *supra* note 35, at ch. 4.

56. *See, e.g.*, *Report of the Standing Comm. on Pro. Ethics*, 71 A.B.A. REP. 205, 205 (1946) (noting complaints filed with it regarding violations of Canon 27 banning "advertising, direct or indirect").

57. *See* Sarah Barringer Gordon, *Drinker, Henry Sandwith*, *in* THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 175 (Roger K. Newman ed., 2009); Deborah S. Gardner & Christine G. McKay, BUILDING A LAW FIRM, 1849-1999, at 24–25 & 41–42 (1999); *Henry S. Drinker, Lawyer, Was 84*, N.Y. TIMES, Mar. 12, 1965, at 33.

58. HENRY S. DRINKER, LEGAL ETHICS (1953).

59. *Id.* at 94.

60. *Id.*

61. *Id.*

62. *Id.* at 283–303.

63. DRINKER, *supra* note 58, at 297.

64. *Id.*

The general law of lawyer discipline was largely inchoate through the 1960s, including the issue of the lawyer-beneficiary and conflicts of interest when lawyer and client also engaged in business. The courts struggled to delineate when it was proper for a lawyer to draft a will and name himself as a beneficiary.[65] One general response was to turn to Drinker's *Legal Ethics*. As noted in 1969 by the ABA Special Committee that created the ABA Code of Professional Responsibility, "we have relied heavily upon the monumental *Legal Ethics* (1953) of Henry S. Drinker."[66] The problem was that Drinker's "test" was largely unworkable.

Several courts issued decisions in the late 1940s through the early 1960s examining whether a will made by a lawyer who was also a beneficiary was to be probated or set aside.[67] The early cases largely ignored the ethics issue, focusing instead on the applicable legal standard to probate such a will.[68] The primary focus was whether undue influence was exercised by the lawyer, followed closely by the search for one or more persons having a "natural claim to a testator's bounty."[69] Soon, however, courts turned to the ethics issue. Was a lawyer subject to ethical discipline for drafting a will and naming himself a beneficiary? If so, was this an absolute rule, or one applicable only in some circumstances?

A 1957 Nebraska Supreme Court decision attempted to outline the ethical responsibilities owed by a lawyer who served in several different roles in estate matters, including as heir.[70] The lawyer in the dock was E. O. Richards, a middle-aged attorney who served both as the elected lawyer for a Nebraska county and as a private practitioner.[71] The court evaluated several different matters in which Richards played some role in drafting a will, administering an estate, or both. While engaged in the latter task in 1942, Richards decided to serve as the administrator's attorney. The only heirs at law were two adult granddaughters of the decedent. After less than two months as administrator and attorney (again, himself) for the administrator, Richards successfully sought court approval for $6,000 in fees for work undertaken

65. *See infra* text accompanying notes 67–89.

66. *Preface*, Report of the Special Com. on Evaluation of Ethical Standards, 94 A.B.A. REP. 728, 730 (1969).

67. *See* Annotation, *Drawing Will or Deed under which He Figures as Grantee, Legatee, or Devisee as Ground of Disciplinary Action Against Attorney*, 98 A.L.R.2d 1234 (1964); Joseph W. deFuria, Jr., *Testamentary Gifts from Client to the Attorney-Draftsman: From Probate Presumption to Ethical Prohibition*, 66 NEB. L. REV. 695, 701–13 (1987); Gerald P. Johnston, *An Ethical Analysis of Common Estate Planning Practices—Is Good Business Bad Ethics?*, 45 OHIO ST. L.J. 57, 65–73 (1987) (collecting cases).

68. *In re* Phillipi's Estate, 172 P.2d 377 (Cal. Dist. Ct. App. 1946); *In re* Ankeny's Estate, 28 N.W.2d 414 (Iowa 1947); *In re* Johnson's Estate, 193 P.2d 782 (Cal. Dist. Ct. App. 1948); MacKay v. Costigan, 179 F.2d 125 (7th Cir. 1950); Olsen v. Corp. of New Melleray, 60 N.W.2d 832 (Iowa 1953).

69. *In re Ankeny's Estate*, 28 N.W.2d at 420.

70. State *ex rel.* Neb. State Bar Ass'n v. Richards, 84 N.W.2d 136 (Neb. 1957).

71. *Richards*, 84 N.W.2d at 140.

related to both jobs.[72] When the heirs later learned of this, they objected and obtained a remittance of $4,000 by Richards to the estate.[73] In return for Richards's agreement that his entire fee in both roles would be $2,000, he obtained a stipulation from the heirs that his application for the $6,000 payment, and the court's order approving the application, would be removed from the file and destroyed.[74]

Richards and the heirs had made no fee arrangement before his fee application. The Nebraska Supreme Court held Canon 11 and Canon 12 applicable to this case.[75] Regarding the former, Richards had acted with a "greater interest in his personal financial welfare than in his professional conduct in relationship to both his clients and the court."[76]

Richards was also charged with professional misconduct in representing, as an attorney, the administrators of two estates while serving as county attorney. In each case, Richards reached an agreement with the administrator regarding the estate's value, including the value of its real property.[77] That agreed value was used to calculate the estate tax owed to the county. Richards acted unprofessionally because he failed to see he had a conflict of interest in advocating for both clients, the administrators and the county. This conflict required Richards to trim his loyalty to one client to meet the needs of another, a breach of his duty of loyalty to all his clients.

Third, Richards was charged with professional misconduct regarding his actions in drafting seven wills for Mary Dryden between 1945 and 1950.[78] The last of those wills made Richards its "principal beneficiary" of an estate valued at more than $80,000, as well as the executor of the estate. Richards's behavior concerning two other aspects in this matter further troubled the court: first, his misleading communications with the only heirs at law (a grandniece and grandnephew) while probating the estate; and second, his failure to pay interest on the inheritance tax due after receipt of his share.[79]

The court held that Richards was not "guilty of unethical conduct merely because he drafted a client's will containing a provision therein whereby he became a beneficiary of a part of her estate when, as the record here shows, she insisted he do so."[80] Indeed, it concluded, "if a client insists on having his or her attorney draft a will containing such a provision we can see no reason why the attorney should refuse to do so and thereby defeat his client's

72. *Id.* at 142.
73. *Id.*
74. *Id.*
75. *Id.* at 143.
76. *Richards*, 84 N.W.2d at 143.
77. *Id.* at 143–44.
78. *Id.* at 145–46.
79. *Id.*
80. *Id.* at 146.

wishes."[81] However, the lawyer's duty to the heirs at law in such a case, particularly when named as executor and as attorney probating the estate, "are much greater."[82]

That duty required Richards "to make a full disclosure of all facts within his knowledge which were material for [the heirs at law] to know for the protection of their interests."[83] His failure to do so, "under all of the circumstances here established, constituted a breach of his trust as an attorney."[84] Richards "was more concerned in making secure his rights under the will than he was of performing his duty as an attorney," a clear instance of a conflict of interest.[85] Richards was suspended from the practice of law in Nebraska for one year.[86]

In *Magee v. State Bar of California* (1962), the California Supreme Court held that a lawyer in a similar case was not subject to ethical censure.[87] The State Bar sought a two-year suspension of Magee.[88] Though Magee drafted a will for the decedent that left him her entire estate, an independent lawyer reviewed the will with the testator, paragraph by paragraph.[89] The independent lawyer concluded the testator indeed desired to bequeath her estate to her long-time lawyer.[90] That lawyer and a third lawyer testified to the testator's mental competence on the day she made the will.[91] The court held a civil action contesting the testator's will, which found against Magee (and which was affirmed on appeal), was irrelevant to its conclusion.[92] The will contest result meant Magee lost the bequest; he was not, however, subject to professional discipline.

A year later, the Wisconsin Supreme Court reached a contrary result in *State v. Horan*.[93] Horan and the testator were long-time friends, as well as client and lawyer.[94] Horan wrote a series of wills for the testator, through which Horan received an ever-increasing share of the estate.[95] No evidence of undue influence was charged. Even so, the court concluded that Horan should have refused to draft the testator's wills because he was a substantial

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81. *Richards*, 84 N.W.2d at 146.
82. *Id.*
83. *Id.* at 149.
84. *Id.*
85. *Id.*
86. *Richards*, 84 N.W.2d at 150.
87. Magee v. State Bar of Cal., 374 P.2d 807 (Cal. 1962).
88. *Magee*, 374 P.2d at 809–10.
89. *Id.* at 810.
90. *Id.* at 811.
91. *Id.* at 809–10.
92. *Id.* at 810–11 (referencing *In re* Rohde's Estate, 323 P.2d 490 (Cal. Dist. Ct. App. 1958)).
93. 123 N.W.2d 488 (Wis. 1963).
94. *Horan*, 123 N.W.2d at 489.
95. *Id.*

beneficiary.[96] It listed policy reasons such as a conflict of interests, Horan's testimonial incompetency, possible jeopardy of the will if contested, possible harm to other beneficiaries, and "undermining of the public trust and confidence in the integrity of the legal profession."[97] If the testator desired to leave much of his estate to Horan, he needed to hire another lawyer in order to do so.[98]

As the court noted, Horan practiced law in Friendship, a village in central Wisconsin.[99] Its population was then about 560. Friendship was the county seat of Adams County, the population of which was then less than 8,000.[100] The court did not explain how the testator was to choose another lawyer from the few in Adams and surrounding lightly-populated counties. Because the few lawyers practicing there surely knew each other, could Horan serve as a guide? If so, would that make any lawyer he recommended lack "independent professional judgment"?[101] Did some reasonableness standard, in terms of time, fees, and breadth of geographic search for an independent lawyer, apply to the testator's search for counsel? Horan was reprimanded and ordered to pay court costs.[102]

Seven months before the Wisconsin Supreme Court's decision in *Horan*, the ABA Committee on Professional Ethics issued Informal Opinion 602.[103] It was asked whether it was ethically permissible for a lawyer to draft a will and name himself the attorney for its executor as a standard provision. The Committee adopted Drinker's view of the matter: it depended on the circumstances; no bar to such appointment existed. However, Drinker (and the Committee) also noted that such a provision in the will was not binding on the executor, as the lawyer enjoyed no "vested interest" in serving as the attorney for the estate.[104] Insofar as the lawyer included such a provision as a matter of custom, the Committee found this violated Canon 11.[105]

In *Richards*, *Magee*, and *Horan*, the courts found that the lawyer had not exercised any undue influence. The difference in result in the two former cases seemed based on some other subterfuge. Richards had failed to communicate effectively with the heirs at law, the natural objects of the testator's bounty, thus making it easier for him to receive his bequest. Magee, on the

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96. *Id.* at 491.

97. *Id.* at 490.

98. *Horan*, 123 N.W.2d at 490–91.

99. *Id.* at 489.

100. NUMBER OF INHABITANTS WISCONSIN (1950 CENSUS): Population of Counties by Minor Civil Divisions: 1930-1950, at 49-11 (tbl. 6), https://www2.census.gov/library/publications/decennial/1950/population-volume-1/vol-01-52.pdf.

101. CODE OF PRO. RESP. DR 5-105(B) (AM. BAR ASS'N 1969).

102. *Horan*, 123 N.W.2d at 492.

103. ABA Comm. on Pro. Ethics & Grievances, Informal Op. 602 (1963).

104. *Id.*

105. *Id.*

other hand, by sheer luck, had an "independent" lawyer go through the will with the testator paragraph by paragraph and who additionally testified to her competence. In *Horan*, the court emphasized that Horan was a "substantial" beneficiary; the number of wills and Horan's increasing share of each will were likely matters of concern.

2. 1964–1974

In 1964, ABA President Lewis Powell convinced the House of Delegates to agree to create a Special Committee on Evaluation of Ethical Standards. The Committee worked largely in secret for over four years, publishing a tentative draft in late 1968, a preliminary draft in January 1969, and a final draft in July.[106] The Code of Professional Responsibility was approved by the ABA House of Delegates without amendment in August. It was adopted as law by most states within three years, ordinarily with just a few minor changes.[107]

The Code of Professional Responsibility consisted of three parts: Canons, Ethical Considerations (EC), and Disciplinary Rules (DR). The nine Canons were generalized statements of duty. The Ethical Considerations listed within each Canon were "aspirational in character."[108] They "represent[ed] the objectives toward which every member of the profession should strive."[109] The Disciplinary Rules followed the Ethical Considerations, but "unlike the Ethical Considerations," the Disciplinary Rules were "mandatory in character."[110]

Like the 1908 Canons, the 1969 ABA Code often framed lawyers' ethical responsibilities in broad terms. Canon 1 underscored the duty of lawyers to maintain "the [i]ntegrity and [c]ompetence of the [l]egal [p]rofession."[111] EC 1-5 encouraged the lawyer to "be temperate and dignified."[112] DR 5-105(B) barred a lawyer from representing multiple parties if the lawyer's "independent professional judgment" was "likely to be adversely affected by his representation of another client," unless, under DR 5-105(C), "it is obvious that [the lawyer] can adequately represent the interest of each" and both

106. CODE OF PRO. RESP. (AM. BAR ASS'N, Tentative Draft Oct., 1968); CODE OF PRO. RESP. (AM. BAR ASS'N, Preliminary Draft Jan. 15, 1969); *Report of the Special Committee on Evaluation of Ethical Standards*, 94 A.B.A. REP. 728 (AM. BAR ASS'N, Final Draft 1969).

107. *Report of the Special Committee to Secure Adoption of the Code of Professional Responsibility*, 97 A.B.A. REP. 740, 741 (1972).

108. CODE OF PRO. RESP. Preliminary Statement (AM. BAR ASS'N 1969).

109. CODE OF PRO. RESP. Preliminary Statement (AM. BAR ASS'N 1969).

110. CODE OF PRO. RESP. Preliminary Statement (AM. BAR ASS'N 1969).

111. CODE OF PRO. RESP. Canon 1 (AM. BAR ASS'N 1969).

112. CODE OF PRO. RESP. EC 1-5 (AM. BAR ASS'N 1969).

clients consent "after full disclosure."[113] Thus, even when a lawyer's independent professional judgment was "likely to be adversely affected," if it was "obvious" that the lawyer could represent both clients, no withdrawal was necessary.[114] How one determined whether representation was "likely to be adversely affected" was unclear. Further, it was unclear who determined whether it was "obvious" the lawyer could continue to provide adequate representation.[115] Was that determination made by the lawyer at the time of representation, or by another, such as a disciplinary panel, in hindsight?

The Code did not include in any Disciplinary Rule a prohibition on a lawyer drafting a will and naming himself a beneficiary. The only caution given to lawyers was stated in EC 5-5, which permitted a lawyer to accept a "gift" from a client that was "voluntarily offer[ed]," but required that "before doing so, [the lawyer] should urge that his client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances."[116] More particularly, "[o]ther than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client."[117] The most significant problem with EC 5-5 was its lack of clarity. It did both too much and too little. It applied to all "gifts" from clients. In any instrument written for the client, the lawyer benefiting from the instrument could not draft it, "[o]ther than in exceptional circumstances."[118] How one ascertained whether such circumstances existed was unstated. The good news for lawyers was that the ABA made the Ethical Considerations "aspirational" only. The bad news was that this declaration did not bind states unless they so decided. The Special Committee attached a footnote to the end of EC 5-5. It cited only the *Richards* case from Nebraska.[119]

Canon 5 of the Code also indicated ethical limits on lawyers engaged in business activities with clients. In EC 5-3, it noted that the "self-interest of a lawyer resulting from his ownership of property in which his client also has an interest or which may affect property of his client may interfere with the exercise of free judgment on behalf of his client."[120] It followed up with DR 5-104: "Limiting Business Relations with a Client."[121] A lawyer "shall not

113. CODE OF PRO. RESP. DR 5-105(B)-(C) (AM. BAR ASS'N 1969).

114. CODE OF PRO. RESP. DR 5-105(B) (AM. BAR ASS'N 1969).

115. CODE OF PRO. RESP. DR 5-105(B) (AM. BAR ASS'N 1969).

116. CODE OF PRO. RESP. EC 5-5 (AM. BAR ASS'N 1969).

117. CODE OF PRO. RESP. EC 5-5 (AM. BAR ASS'N 1969).

118. CODE OF PRO. RESP. EC 5-5 (AM. BAR ASS'N 1969).

119. CODE OF PRO. RESP. EC 5-5 N.4 (AM. BAR ASS'N 1969). EC 5-6 permitted a lawyer who drafted a will to be named its executor, as long as this was the client's decision uninfluenced by the drafting lawyer, but "care should be taken by the lawyer avoid even the appearance of impropriety." CODE OF PRO. RESP. EC 5-6 (AM. BAR ASS'N 1969).

120. CODE OF PRO. RESP. EC 5-3 (AM. BAR ASS'N 1969).

121. CODE OF PRO. RESP. DR 5-104 (AM. BAR ASS'N 1969).

enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure."[122] This standard seemingly required a conflict of interest at the time of the business transaction, required an assessment of the client's then-existing state of mind, and provided for an exception based on consent after full disclosure. It did not specifically assess the ethical duties of a lawyer representing a client with whom that lawyer was already engaged in some business, leaving the subject to the application of more broadly-stated rules.

From the mid-1960s to the mid-1970s, the issue of the lawyer-beneficiary arose again (and again) in Wisconsin. In *State v. Eisenberg*,[123] the defendant was publicly reprimanded for drafting a will for his uncle which left the uncle's estate to the lawyer's mother, sister of the testator.[124] The will also disinherited the testator's wife and children.[125] The Supreme Court of Wisconsin concluded that Eisenberg should have reasonably expected that a will contest would occur, that the relationship of Eisenberg to the heir (his mother) would arouse suspicion, and that his actions would damage the reputation of lawyers.[126] Thus, he should not have drafted the will, nor served as its executor.[127] In 1968, that court, in *State v. Collentine*,[128] went well beyond its rule in *Horan*. It held that, from now on, "a lawyer may be the scrivener of a will in which he is a beneficiary only when he stands in relationship to the testator as the natural object of the testator's bounty and where under the will he receives no more than would be received by law in the absence of a will."[129] Otherwise, "this court will conclude that the preparation of such a will constitutes unprofessional conduct."[130] If the client demanded the lawyer draft such a will, "it is the absolute duty of the attorney to refuse to act."[131] This was so even when the lawyer urged the client to find another counsel, even when no evidence of undue influence existed, even when no "natural object of the testator's bounty" existed, and even when the estate was insolvent.[132] The court's rule, because prospectively applied,

122. CODE OF PRO. RESP. DR 5-104(A) (AM. BAR ASS'N 1969).
123. 138 NW.2d 235 (Wis. 1965).
124. *Eisenberg*, 138 N.W.2d at 235.
125. *Id.*
126. *Id.* at 237–38.
127. *Id.* at 237.
128. 159 N.W.2d 50 (Wis. 1968).
129. *Id.* at 53.
130. *Id.*
131. *Id.*
132. *Id.*

meant John Collentine was not subject to discipline, but he remained responsible for the "damage he ha[d] done the legal profession."[133]

Despite this language, the Wisconsin Supreme Court was not finished with this issue. Lawyer Vartak Gulbankian was suspended from the practice of law for at least sixty days for drafting a will two days before the testator's death, making Gulbankian's sister the sole heir of an elderly friend of the Gulbankian family.[134] The court noted that the will was drafted before its decision in *Collentine*, so its more stringent rule was inapplicable.[135] And in the sixth case decided by the Wisconsin Supreme Court on the topic since *Horan*, it suspended Robert Gonyo from the practice of law for six months. Gonyo wrote a will including himself as a beneficiary; he also engaged in a number of acts of unprofessional behavior, including "use of his status as district attorney-elect to influence continuance of a criminal prosecution of his client" and bringing "criminal charges against attorneys" who filed ethics complaints against him.[136]

3. 1974–1980

Lawyer Stanley Krotenberg was appointed guardian of Marie Barber in 1971.[137] Less than six months later, Krotenberg drafted a will for her.[138] In the will, she left $20,000 to Krotenberg's wife in trust for their son's college education.[139] A second will was soon written, bequeathing "everything I own to Stanley Krotenberg to distribute funds to orphan children of Tucson, Arizona."[140] This will "was both prepared and executed after the initiation of legal proceedings" investigating his actions as Barber's guardian.[141]

133. *Collentine*, 159 N.W.2d at 53. *See also* State v. Haberla, 159 N.W.2d 11 (Wis. 1968) (holding, in opinion released the same day as *Collentine*, that lawyer should be reprimanded for drafting will that named him sole beneficiary); State v. Beaudry, 191 N.W.2d 842 (Wis. 1971) (reprimanding severely lawyer Beaudry, who had a young and inexperienced lawyer draft will giving Beaudry entire estate of testator, and noting actions occurred before *Horan* decision); *see also In re* Jones, 462 P.2d 680, 680 (Or. 1969) (declaring that a lawyer who writes a will and is a beneficiary "should know, without being told, that when a client wants to make a testamentary provision for the benefit of the lawyer, that lawyer should withdraw from any participation in the preparation or execution of the will").

134. State v. Gulbankian, 196 N.W.2d 730 (Wis. 1972).

135. *Gulbankian*, 196 N.W.2d at 731–32.

136. Matter of Gonyo, 245 N.W.2d 893, 894 (Wis. 1976).

137. *In re* Krotenberg, 527 P.2d 510, 511 (Ariz. 1974).

138. *In re* Krotenberg, 527 P.2d at 511.

139. *Id.*

140. *Id.*

141. *Id.*

Krotenberg's defense was that, while his actions might have looked bad, he was "pure in heart."[142] The Arizona Supreme Court concluded that it possessed "no device for measuring purity of heart."[143] The Court noted, "[we] must arrive at our decision on the basis of the facts presented to us. We are concerned not only with evil but the appearance of evil as well."[144] Arizona had adopted the 1969 ABA Code. The Arizona Bar's Board of Governors recommended that Krotenberg be disciplined.[145] It relied on Disciplinary Rule 5-101, which prohibited a lawyer from taking a matter when a conflict of interest might affect the lawyer's "independent professional judgment."[146] It also found applicable "more specifically, Articles 5—5 and 5—6," the equivalent of EC 5-5 and 5-6, and recommended that Krotenberg be disciplined.[147] The Arizona Supreme Court did not state the disciplinary provisions on which it based its decision, but it suspended Krotenberg from the practice of law for six months.[148]

A 1980 case, holding that a lawyer was ethically permitted to draft a will naming himself a beneficiary,[149] illustrates the shift from two decades earlier. John Amundson was a lawyer in Bowman, North Dakota, a town of about 1,500 persons in the early 1960s.[150] From his early childhood, he had a close relationship with Nelius and Margit Nelson, a married couple who had no children.[151] In 1963, the couple asked Amundson to write a will for each spouse.[152] Margit was unsatisfied with Amundson's draft of her will because she wanted to include a provision including Amundson as a beneficiary.[153] He told them "it was unusual for a lawyer to draw the will, to be the executor, and to be named as a beneficiary in the will."[154] He also told them "another lawyer could draw the will, but that if Margit wanted him to draw the will he would do so in order that people would know he was directly involved."[155] They insisted, and Amundson did as Margit directed.[156]

142. *Id.* at 512.
143. *In re* Krotenberg, 527 P.2d at 512.
144. *Id.*
145. *Id.*
146. *Id.* at 511; *see also* CODE OF PRO. RESP. DR 5-101 (AM. BAR ASS'N 1969).
147. *Krotenberg*, 527 P.2d at 511.
148. *Id.* at 512.
149. Disciplinary Bd. v. Amundson, 297 N.W.2d 433, 438 (N.D. 1980).
150. *Amundson*, 297 N.W.2d at 434.
151. *Id.* at 435.
152. *Id.*
153. *Id.*
154. *Id.*
155. *Amundson*, 297 N.W.2d at 435
156. *Id.*

Margit died in July 1973; Nelius predeceased her.[157] Amundson failed to efficiently probate Margit's estate, and he also failed to communicate effectively and fully with other heirs.[158] An ethics complaint against Amundson was filed in late 1979.[159] The North Dakota Disciplinary Board found, in addition to the failures above, that Amundson had violated the North Dakota Code of Professional Responsibility (based on the 1969 ABA Code) by drafting a will in which he was a beneficiary and executor.[160] Though there existed "a close personal relationship between the respondent and Margit Nelson," that relationship did "not excuse the conduct involved, but has been considered by this panel in mitigation."[161] The Board recommended a public reprimand.[162]

Amundson challenged only the conclusion concerning his drafting of Margit's will.[163] The North Dakota Supreme Court first concluded Amundson did not violate the Code by naming himself executor of the estate in the will he drafted for Margit, as his decision did not create an appearance of impropriety.[164] Second, it surveyed published cases and noted the lack of "consensus" among states about lawyers who found themselves in a position similar to Amundson.[165] It did note the issue was of "less concern" in older cases than in more recent cases, which increasingly found such action to be unprofessional conduct subject to some disciplinary sanction.[166]

Third, it held the lengthy relationship between Amundson and the Nelsons fit the category of "exceptional circumstances" (EC 5-5), thus permitting him to name himself a beneficiary in Margit's will.[167] EC 5-5 was additionally inapt because Amundson's actions in 1963 predated the Code's existence. He was not subject to discipline for drafting Margit's will.[168]

State courts failed to reach an agreed-upon standard by 1980. However, a 1972 Comment in the *Nebraska Law Review* noted four approaches, each

157. *Id.*
158. *Id.*
159. *Id.* at 435–36.
160. *Amundson*, 297 N.W.2d at 436.
161. *Id.*
162. *Id.*
163. *Id.* at 436–37.
164. *Id.* at 438.
165. *Amundson*, 297 N.W.2d at 438.
166. *Id.*
167. *Id.* at 442.
168. *Id.* at 442. His actions, and inaction, in communicating with the heirs and in probating Margit's estate were unprofessional, for which he was reprimanded. *Id.* at 444; *see also* People v. Berge, 620 P.2d 23 (Colo. 1980) (suspending lawyer from practice of law for ninety days not for using undue influence on client, but in communicating in way that misled heirs at law and using non-independent lawyer to draft testator's will).

of which viewed skeptically a bequest to a lawyer-draftsman of a will.[169] None of the cases cited in the Comment were from Iowa. But the trend was clear; lawyers were subjected to public reprimands and suspensions from law practice by 1972. The *Richards* case, dating from 1957, ended with a suspension of one year.[170] Other published cases had led to suspensions of up to six months.[171] Further, the 1969 ABA Code was adopted by the Iowa Supreme Court in late 1971.[172] Iowa's version retained the "aspirational" caution of EC 5-5: Naming oneself a beneficiary in a will drafted by the lawyer was strongly disfavored.[173] The existence of an exception based on undefined "exceptional circumstances" should have been cold comfort for any Iowa lawyer drafting a will and including himself as a beneficiary.[174]

John D. Randall drafted Lovell Myers's will in March 1973.[175] This simple will named him both executor and Myers's sole heir. The estate was worth at least a million dollars then, and rampant inflation boosted the estate's value over the next three years.[176] The will implicitly disinherited "natural objects of the testator's bounty," Myers's daughter and two grandsons.[177] When Randall drafted Myers's will, he was on notice that his decision to do so would likely be subject to ethical scrutiny and a challenge by Marie Jensen, Myers's only child.

C. The Iowa Rules of Lawyer Conduct, 1958–1975

The ABA's 1908 Canons of Professional Ethics were not adopted by the Supreme Court of Iowa until 1958.[178] To enforce those Canons, the Iowa Supreme Court created a Grievance Commission. Complaints about lawyers were reviewed initially by the Iowa State Bar Association Committee on Professional Ethics.[179] It heard an average of one case per year in its first

169. William L. Killion, *Considerations of Professional Responsibility in Probate Matters*, 51 NEB. L. REV. 456, 467–71 (1972).

170. *Richards*, 84 N.W.2d at 150.

171. *See, e.g.*, *Krotenberg*, 527 P.2d at 512; *Gonyo*, 245 N.W.2d at 895.

172. Lee Gaudineer, *Ethics: The Grievance Commission*, 22 DRAKE L. REV. 114, 115 n.8 (1972); IOWA CODE OF PRO. RESP. FOR LAWYERS at 39 (1971) (publishing Supreme Court Order of Oct. 4, 1971) (copy on file with author).

173. *See id.* at 14–15.

174. *See id.*

175. Comm. on Pro. Ethics v. Randall, 285 N.W.2d 161, 163 (Iowa 1979).

176. *Id.* at 161.

177. *Id.*

178. Gaudineer, *supra*, note 172, at 114 n.1.

179. *Id.* at 115.

seven years, and the grievance process suffered due to "[s]elective prosecution" and the lack of utility of the Canons to discipline lawyers.[180] The result was little meaningful discipline of unethical lawyers.

In 1970, "with a few minor changes," the Iowa State Bar Association recommended adoption of the 1969 ABA Code.[181] "[A]fter adopting another minor change," the Supreme Court adopted the Iowa Code on October 4, 1971.[182] The *Iowa Code of Professional Responsibility for Lawyers* was published soon thereafter by order of the court, and a copy was sent without charge to each member of the Iowa bar.[183] The court's order adopting the Code was printed at the end of the *Iowa Code*. It listed the Iowa amendments of the ABA Code, which included amending one Ethical Consideration (deleting the third sentence of EC 2-20) and making eleven changes to the Disciplinary Rules. No other changes to the ABA Code were noted in the court's order.[184] None of these amendments were relevant to the case against John Randall.

A year after adopting the Code, the ABA published the Clark Report, which excoriated the American legal profession for failing to protect the public by not disciplining lawyers who violated their ethical duties.[185] The ABA created a special committee to craft and implement standards of disciplinary enforcement. In Iowa, disciplinary enforcement was placed with a re-structured Grievance Commission. It consisted of four panels of five members each divided into geographic districts. The Commission possessed the power to dismiss a complaint or to reprimand a lawyer. If it concluded that a lawyer should be suspended or disbarred, it made its recommendation to the Iowa Supreme Court, which alone possessed the authority to issue those sanctions.[186] Once someone complained about a lawyer's professional conduct, the Iowa Bar Association Committee on Professional Ethics and Conduct formally filed the complaint. The hearing before a panel of the Grievance Commission was adversarial. Panel members, in addition to counsel for the parties, were permitted to ask questions.[187] Because each panel consisted of five members, the possibility of a division of members existed. Lee Gaudineer, staff counsel for the Committee on Professional Ethics and Conduct

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180. *Id.* at 115 n.8.

181. *Id.*

182. *Id.*

183. IOWA CODE, at 39–40.

184. *Id.*

185. Report of the Spec. Com. on Eval. of Disc. Enforcement, 95 A.B.A. REP. 783 (1970); Michael Franck, *New Life for Lawyer Self-Discipline: The Disciplinary Report of the Clark Committee*, 54 JUDICATURE 383 (1971) (author was Committee Reporter).

186. Gaudineer, supra note 172, at 116.

187. *Id.* at 117.

and the author of a 1972 law review article discussing the Iowa lawyer disciplinary system, ignored what happened in such a case. It appeared implicitly that a majority decision was sufficient.

Gaudineer's article was published in the September 1972 issue of the *Drake Law Review*. In less than a year, Gaudineer declared, thirty-four cases had been filed and heard by the Grievance Commission in its new iteration.[188] Five had concluded in "outright disbarments," and nine other lawyers were suspended from the practice of law for up to two years.[189] This disciplinary onslaught apparently slowed considerably. The Commission was formally required to report to the Supreme Court for the 1974–1975 fiscal year.[190] This report indicated two lawyers were disbarred by the court, with two Commission recommendations of disbarment awaiting court decision.[191] These lawyers stole from their clients, were convicted of a felony and practiced law in defiance of a court order, or failed to file income tax returns.

Though Gaudineer was counsel for the ethics committee, and not a member of the Grievance Commission, he declared the Grievance Commission's position on how it reached the appropriate sanction: "The final judgment is not what judgment is warranted as a penalty to the offender, but what judgment is necessary as a deterrent to others, as protection for the bench and bar, and as an indication to laymen that the ethics of the profession will be maintained."[192] If Gaudineer meant the Commission avoided "penalizing" the offending lawyer because discipline cases were not criminal in nature, his statement is sensible. But if he used "penalty" as a synonym for "sanction," then his assertion was the Commission lacked any interest in making decisions or recommendations based on the nature of the lawyer's unprofessional conduct. Gaudineer suggests by omission that the Commission's recommendation had nothing to do with the necessity of protecting the general public or those who consumed legal services. Instead, the sanction was to (1) deter other lawyers, (2) protect the image of the bar, and (3) signal to the public that lawyers can be trusted to vigilantly maintain their ethical standards. This resulted in deleterious consequences for John Randall.

188. *Id.* at 119.

189. *Id.* at 120.

190. My thanks to Christine Mayberry of the office of the Clerk of the Iowa Supreme Court, who found this and later annual reports in the archives of the Clerk's office. (copy on file with author).

191. REPORT OF THE GRIEVANCE COMM'N, 1974-1975, July 1, 1975, at 3–4 (copy on file with author). Several other lawyers were suspended for up to 36 months, also for failing to file tax returns. *Id.* The Iowa Supreme Court suspended three lawyers for failing to pay into the client security fund. *See Lawyers Suspended*, NEWS BULL., IOWA ST. BAR ASS'N, Aug.-Sept. 1975, at 9.

192. Gaudineer, *supra* note 172, at 121.

III. THE CASE OF JOHN RANDALL

A. John Randall, Lawyer

John Randall received his law degree in 1923 from the State University of Iowa, was admitted to the bar, settled in Cedar Rapids, and entered the practice of law.[193] He owned his own law firm, and like most lawyers of his generation and geographic location, he was a general practitioner.[194] Randall practiced law in Cedar Rapids until he was disbarred in November 1979.[195]

Before his election as ABA President for the 1959-1960 year, Randall served as the Chairman of the ABA House of Delegates and its Unauthorized Practice of Law Committee, as an ABA representative working with a handful of professional organizations and entities (*e.g.*, American Institute of Accountants) mapping the boundaries of the practice of law, and as co-chairman of the joint conference of the ABA and AALS on Professional Responsibility.[196]

After serving as ABA President, Randall remained active in the ABA, lobbying successfully for the creation of the Section on General Practice, and serving as its first chairman in 1963.[197] He subsequently served as chairman of the Grants Committee of the American Bar Endowment.[198] In the early 1970s, Randall's name disappears from the *ABA Journal*.[199] He continued to practice law in Cedar Rapids.[200]

B. Lovell Myers, Gilbert Morningstar, and John Randall

The Committee on Professional Ethics formally filed its complaint against Randall in May 1978. The parties disagreed about a number of facts, including when Randall first represented Lovell Myers.[201] They agreed on the following: in 1946, Randall assisted Myers in clearing some judgments

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193. Appendix at 428, Comm. Pro. Ethics v. Randall, 285 N.W.2d 161 (Iowa 1979) (No. 63172) [hereinafter *Randall App*.]. This section is based on published news reports, the Appendix and briefs filed with the Supreme Court in the Randall case, and the published cases disbarring Randall in state and federal court. The Appendix includes most of the transcript of the Grievance Commission hearing. A copy of the Appendix and appellate briefs were graciously sent to the author from the clerk of the Iowa Supreme Court and are on file with the author.

194. *See id*.

195. *Id*.

196. *State Delegates Nominate New Officers and Governors*, 45 A.B.A. J. 368, 369 (1959).

197. 88 A.B.A. REP. 50 (1963) (listing officers).

198. *American Bar Endowment Grants Program Announced*, 57 A.B.A. J. 430 (1971).

199. A Boolean search for Randall on HeinOnline found no mention of his name from the early 1970s until his disbarment proceedings.

200. *Id*.

201. The Committee concluded Randall represented Myers in his 1942 divorce; Randall testified he initially met Myers in 1946.

against him and helped him avoid a mortgage foreclosure on land Myers had purchased from his parents.[202] Soon, Randall and Myers formed a joint venture. Randall funded (or arranged and/or guaranteed the funding of) the purchases and the operation of the farm, and Myers operated the farm business.[203] In 1952, some of those operations were incorporated—apparently for tax reasons—as Myers Farms, Inc.[204] The cropland was transferred from the joint venture to the corporation in 1967—also for tax reasons.[205] Each owned 50% of the corporation. Over a quarter-century, Myers Farms, Inc. operated successfully. By the mid-1970s, the corporation owned about 2,500 noncontiguous acres of land.[206] Randall (or someone in his law firm) completed and filed the corporation's tax returns, as well as Myers's annual income tax return, the tax returns of a woman who lived with Myers, and of a Myers Farms, Inc. employee, Gilbert "Gib" Morningstar.[207] Randall took no fee for completing any of these tax returns.[208]

From 1946, when the Randall-Myers joint venture began, until the end of 1974, Gilbert Morningstar was the foreman of Myers Farms.[209] That title fails to indicate the depth of the relationship between Morningstar and Myers. Morningstar worked for Myers beginning in the late 1930s.[210] They renewed their relationship after the end of World War II. They were each other's "best friend,"[211] and in Randall's words, "absolutely inseparable."[212] They spent some time together nearly every day. For years, Myers Farms, Inc. grew crops not only on its own land, but on land leased from Morningstar.[213]

Their relationship changed beginning on February 16, 1973, when Morningstar's wife Evelyn went to the Linn County courthouse. Gilbert testified they were planning on writing their wills, and before doing so, they needed information regarding the land they owned in the county.[214] When looking for the deed for the "Hess" property, an 80-acre plot of farmland they purchased in early 1956,[215] Evelyn discovered a warranty deed had

202. *Randall App.*, *supra* note 193, at 429–30 (testimony of John D. Randall).
203. *Id.* at 430–32.
204. *Id.* at 433.
205. *Id.* at 434–35.
206. *Id.* at 33 (opening statement of Lee Gaudineer at Grievance Commission hearing).
207. *Randall App.*, *supra* note 193, at 436–38 (testimony of John D. Randall).
208. *Id.* at 17 (letter of John D. Randall to John Gamble, Oct. 12, 1977), 437–39, 455 (testimony of John D. Randall).
209. *Id.* at 149.
210. *Id.* at 150.
211. *Id.* at 175 (testimony of Gilbert Morningstar).
212. *Randall App.*, *supra* note 193, at 509 (testimony of John Randall).
213. *Id.* at 158.
214. *Id.* at 164 (testimony of Gilbert Morningstar).
215. *Id.* at 156 (testimony of Gilbert Morningstar).

been filed in 1967 with the county clerk memorializing the transfer of the Hess property to Myers Farms, Inc. from the Morningstars.[216] The 1967 warranty deed—the Morningstars claimed—was a fraud, for their signatures had been forged.[217]

Evelyn told Gilbert what she had found. Gilbert decided to arrange a confrontation with Randall and Myers the following morning, a Saturday. At Randall's office, Gilbert accused them of stealing his property, and stormed out. He testified that Myers followed him and admitted the warranty deed was a fraud.[218] Later that day, Randall, on behalf of the corporation, went to the Morningstar home and gave them a signed quitclaim deed.[219] There allegedly existed a February 28, 1956, unrecorded deed transferring the Hess property from the Morningstars to Randall and Myers, which predated—by one day—a recorded deed transferring the property to the Morningstars. This, Randall subsequently claimed, was evidence that he and Myers were the lawful owners of the property.[220]

Unsurprisingly, Morningstar initially refused to continue to work for Myers and the corporation. Morningstar soon changed his mind and returned as foreman, assured by Myers that a mortgage put on the Hess property by the corporation would soon be lifted. A year later, when the mortgage remained in place, Morningstar sued Myers, Randall, and Myers Farms Inc., alleging fraud in the 1967 warranty deed.[221] He left the corporation at the end of the year.[222] The defendants filed a cross-claim asking that title to the Hess property be quieted in them, based on a copy of the unrecorded 1956 deed.[223] Randall served as Myers' attorney in this case from its beginning in mid-1974 until late 1975, when Randall said he finally convinced Myers to hire another attorney, Richard Nazette.[224] Randall also served as the attorney for the corporation throughout the litigation. The case was settled in early 1979, nearly three years after Myers' death.[225]

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216. Morningstar v. Myers, 255 N.W.2d 159, 160 (Iowa 1977).

217. *Randall App., supra* note 193, at 165 (testimony of Gilbert Morningstar); *Morningstar*, 255 N.W.2d at 159. Under oath at his December 20, 1975, deposition in the Morningstar lawsuit, Myers admitted signing the Morningstars' names on the 1967 warranty deed. *Randall App., supra* note 193, at 471.

218. *Randall App., supra* note 193, at 167.

219. *Id.* at 166–69.

220. *Morningstar*, 255 N.W.2d at 160.

221. *Id*.

222. *$340,000 Suit Filed Over Title to Linn Farm*, CEDAR RAPIDS GAZETTE, Apr. 29, 1974, at 11; *Randall App., supra* note 193, at 172–73 (testimony of Gilbert Morningstar).

223. *Morningstar*, 255 N.W.2d at 161.

224. *Randall App., supra* note 193, at 372–74 (testimony of Richard Nazette); *Morningstar*, 255 N.W.2d at 160 (listing counsel).

225. *Linn Couple Awarded out-of-court Settlement*, CEDAR RAPIDS GAZETTE, Jan. 24, 1979, at 7A; *Randall App., supra* note 193, at 548–49 (the settlement was noted by the Grievance Commission in its Findings of Fact).

On March 14, 1973, a month after Evelyn discovered the 1967 warranty deed for the Hess property, Randall drafted a will for Myers, which was executed that day. The will consisted of four short paragraphs on one page.[226] Item II began, "Having been associated with John D. Randall, Sr., for many years and having accumulated property with him, it is my wish that upon my death, he shall have all of my property."[227] It ended by reiterating his property was to go to "my friend, John D. Randall, Sr."[228] The will also made Randall the executor of the estate. The original will was filed—not in office files—but in Randall's private desk drawer.[229] After Myers died in February 1976, his daughter Marie and her husband Warren went to Randall's office to discuss the continued operation of the corporation's farm business.[230] Randall asked them whether they knew of any will.[231] They answered no, and Randall "denied possession of any such will."[232] A week after Myers died, Randall posted an advertisement in the local newspaper giving notice of probate of Myers's estate.[233] Randall claimed he had forgotten about Myers's will during his conversation with Marie and Warren.[234]

Marie learned of the existence of her father's 1973 will through Gilbert Morningstar, who saw the notice in the paper and went to the courthouse to obtain several copies.[235] She sued to set it aside.[236] Randall and Marie settled the case in mid-1977.[237] He paid her $700,000 and conveyed title to one of the corporation's farms and agreed to pay estate taxes and costs.[238] The remainder of the estate went to him. The settlement was valued at over $1.5 million.[239] While her suit was pending, Marie sent a letter to the Grievance Commission charging Randall with unethical conduct.[240]

A Committee of the Grievance Commission was investigating Marie's assertions by late 1977. In November 1978, the Grievance Commission of the Committee on Professional Ethics held a multi-day hearing on the charges in the Linn County courthouse.[241]

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226. *Randall App.*, *supra* note 193, at 7 (Lovell Myers's Last Will and Testament).
227. *Id*.
228. *Id*.
229. *Id.* at 475.
230. *Id.* at 55–56 (testimony of Marie Jensen).
231. *Randall App.*, *supra* note 193, at 56 (testimony of Marie Jensen).
232. *See id.* at 55–56 (testimony of Marie Jensen).
233. CEDAR RAPIDS GAZETTE, Feb. 27, 1976, at 13.
234. *Randall App.*, *supra* note 193, at 56, 475.
235. *Randall*, 285 N.W.2d at 163.
236. *Attorney Sued over Actions on Estate*, CEDAR RAPIDS GAZETTE, Nov. 19, 1976, at 10.
237. *Randall App.*, *supra* note 193, at 60–61 (testimony of Marie Jensen).
238. *Id*.
239. *Randall*, 285 N.W.2d at 163.
240. *Randall App.*, *supra* note 193, at 74–75 (testimony of Marie Jensen).
241. Dale Keuter & John Krekeler, *Court Committee Considering Discipline of C.R. Attorney*, CEDAR RAPIDS GAZETTE, Dec. 15, 1978, at 3.

C. The Charges

Randall was charged with two counts of violating the Iowa Code of Professional Responsibility for Lawyers (Iowa Code). The first and most important count focused on Randall's actions in drafting a will for Myers which named Randall as both his sole heir and the estate's executor. Randall was accused of violating the following provisions of the Iowa Code: (1) DR 1-102(A)(1), (3), (4), and (6); and (2) EC 1-5, EC 5-5, EC 5-6, and EC 9-6.[242] DR 1-102, titled "Misconduct," includes six broadly stated subsections, including forbidding a lawyer to "[v]iolate a Disciplinary Rule," or to "[e]ngage in illegal conduct involving moral turpitude."[243]

These disciplinary rules are pitched at a relatively high level of generality. This allowed one count of unprofessional conduct to lead to multiple disciplinary rule violations.

The four ethical considerations Randall was alleged to have violated included both the broad responsibility of the lawyer to "maintain high standards of professional conduct" (EC 1-5) and the more specific responsibility that the lawyer not draft a will when "his client desires to name him beneficially," "[o]ther than in exceptional circumstances" (EC 5-5).[244]

The second count alleged that Randall violated the Iowa Code by representing Myers in the Morningstar litigation when his "interests were antagonistic to as well as being in conflict with the interest, personal and financial, of Lovell Myers."[245] Randall allegedly violated four disciplinary rules, the most important of which concerned the broad rule that the lawyer is to avoid representing a client when the client's interests diverge from the lawyer's (DR 5-101(A)).[246] Count II also alleged that Randall violated EC 5-1, 5-2, and 5-3, each of which urged the lawyer to protect the client's interests, even at the expense of self-interest.[247]

D. The Evidence

One striking aspect of the Randall grievance hearing is its traditional understanding of the goals of each party: Regarding the will, the complainant's overarching contention was that Lovell Myers had "natural objects of his bounty"—his daughter Marie and her two sons—who received nothing from

242. *Randall App.*, *supra* note 193, at 1–7 (listing allegations in complaint against Randall).

243. CODE OF PRO. RESP. DR 101-2 (AM. BAR ASS'N 1969).

244. *Randall App.*, *supra* note 193, at 4; CODE OF PRO. RESP. EC 1-5 (AM. BAR ASS'N 1969); CODE OF PRO. RESP. EC 5-5 (AM. BAR ASS'N 1969).

245. *Randall App.*, *supra* note 193, at 5.

246. *Id.*

247. *Id.* at 4–6.

his estate.[248] Once it is demonstrated that Lovell and Marie had some kind of relationship, disinheritance must be viewed suspiciously. On the other hand, Randall offered evidence that Myers was "headstrong," opinionated, and more likely to be a bully than to be bullied.[249] Myers was not the type to be susceptible to undue influence, whether from Randall or anyone else. The second count, alleging Randall had a conflict of interest in representing Myers in the Morningstar litigation, was tied to John Randall's state of mind in March 1973, when he drafted the will of Lovell Myers.[250] The parties adduced little evidence regarding what Randall did (or didn't do) in representing Myers against Morningstar. The issue was whether Randall believed, after February 17, 1973, Myers had conspired with Morningstar to "take" Randall's (or some of the corporation's) property.[251] If Randall believed Myers betrayed him, he could not represent Myers' interests as well as his own, contrary interests.

The hearing began mid-November 1979. Neither side offered expert testimony.[252] The Committee, through lead counsel Lee Gaudineer, emphasized several unusual factors in the making of Myers's will, and of its execution. The Committee offered testimony, adopted by the Grievance Commission, that Myers only "glanced" at the will before he signed it and signed it without it being read to him.[253] It also hammered on smaller points, such as Randall's absence from the room where two witnesses watched Myers sign the will, and that Randall put Myers' will in his desk drawer rather than the filing cabinet where all other wills were filed.[254] The Commission also found that, on or before the will was made on March 14, 1973, Randall "suspected a conspiracy between Morningstar and Myers to defraud the respondent."[255] What it failed to find expressly were the uncontroverted facts that (1) John Randall did not advise Myers, orally or in writing, to seek independent counsel to review his will before signing it, or (2) tell Marie Jensen of the existence of her father's will when she and her husband met with Randall shortly after her father's death, nor communicate with her that it existed after he found it shortly after their meeting.

The Grievance Commission's formal findings of fact on Count II were less helpful. It declared that "for many years the respondent, John D. Randall

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248. *See, e.g.*, *id.* at 42-50 (testimony of Marie Jensen) (emphasizing on direct examination familial relationship between Myers and Marie Jensen).

249. *Id.* at 62.

250. *Randall App.*, *supra* note 193, at 4–6.

251. *Id.* at 533–34, 547.

252. *Id.* at i–iv (listing witnesses).

253. *Id.* at 548 (Grievance Commission finding of fact).

254. *Id.* at 475 (testimony of John Randall).

255. *Randall App.*, *supra* note 193, at 547. The Supreme Court agreed. *Randall*, 285 N.W.2d at 164 (quoting Randall's deposition in *Morningstar* lawsuit).

and Gilbert Morningstar had an attorney-client relationship as well as an employer-employee relationship."[256] The latter claim was a great stretch, though Randall made inconsistent responses on this issue.[257] Morningstar was formally employed by the corporation[258] and realistically supervised by Myers. The former finding assumed both that completing an annual tax return created an attorney-client relationship (about which Randall waffled) and that such a relationship continued indefinitely (Randall had represented Morningstar in a dog bite case that ended well before 1973).[259] Lawyers did not then routinely write letters informing a client that their relationship had ended; once the purpose of the employment of the lawyer was completed, it was simply assumed.[260] The 1969 ABA Code did not broach the topic of how a lawyer determined when an attorney-client relationship ceased. If the attorney-client relationship always continued absent some affirmative statement by the attorney terminating it, then Randall was prohibited from representing the corporation or Myers in any lawsuit filed by Gilbert Morningstar. Second, the Grievance Commission found Randall represented Myers in the *Morningstar* case "and at the same time represented his own interests and the interests of the corporate entity, Myers Farms, Inc."[261] That is ethically impermissible only if Randall and Myers had a conflict of interests. The conflict, as touched on only in relation to Count I, Myers's 1973 will, was the finding that Randall believed Myers and Morningstar were conspiring to defraud him.

The Grievance Committee credited Morningstar's testimony that Myers confessed to him on February 17, 1973, that he forged the 1967 warranty deed.[262] It lacked specific evidence that John Randall knew Myers had forged the deed; in fact, Randall denied knowing this fact before the December 20, 1975, deposition of Lovell Myers in the Hess property lawsuit.[263] Circumstantial evidence that Randall did know of Myers' confession included Morningstar's testimony that he confronted both Randall and Myers and accused them of fraud, Randall's providing on behalf of Myers Farms Inc. a quitclaim deed to Morningstar the same day, and that Marie Jensen and her

256. *Randall App.*, *supra* note 193, at 546.

257. *Id.* at 455 (testimony of John D. Randall).

258. *Id.* at 27, 182.

259. *Id.* at 180 (testimony of Gilbert Morningstar).

260. The 1908 Canons of Professional Ethics ignored the issue of the duties a lawyer owed a former client. The 1969 Code of Professional Responsibility included only a few cautions, *see* DR 2-110 and DR 5-105. The 1983 Model Rules of Professional Conduct considered more thoroughly such duties in Rule 1.9.

261. *Randall App.*, *supra* note 193, at 549.

262. *Id.* at 547.

263. *Id.* at 471, 536–37.

husband were called to see if they would replace Morningstar.[264] That circumstantial evidence, when Morningstar sued in mid-1974, was such that Randall should have refused to represent Myers. One complicating factor was that the defendants in the Morningstar fraud suit pled "similar denials and affirmative defenses."[265]

Randall defended his decision to draft Myers's will in several ways: first, it was made at Myers's insistent request; second, neither Randall, nor anyone else had exercised undue influence on the "stubborn," "headstrong" Myers; and third, Myers had his own reasons for disinheriting his daughter. Turning to EC 5-5 and EC 5-6, the fact that they had been in business for nearly thirty years, and "friends" as well as business partners, meant this was one of those few instances that met the "exceptional circumstances" exception.[266]

Randall also denied a conflict of interest in representing Myers in the *Morningstar* lawsuit. Randall denied using any confidences of Myers for his benefit or for the benefit of Myers Farms, Inc. He denied harboring "ill thoughts" of Myers in February and March 1973, and he denied that he wanted to use the forged warranty deed to extract a settlement from Myers that favored him.[267] Randall claimed he learned only upon reading Myers's December 20, 1975, deposition testimony that Myers forged the signatures of the Morningstars on the 1967 warranty deed.[268] By then, he no longer represented Myers.[269]

E. The Decisions

1. The Grievance Commission

In its conclusions of law, the Grievance Commission adopted wholesale the complaint of the Committee on Ethics. Randall was found to have violated every Disciplinary Rule and Ethical Consideration with which he was charged in each of the two counts.[270] These totaled eight Disciplinary Rules and seven Ethical Considerations. According to the Commission, Randall "violated the letter and the intent of each of" the charged provisions of the Iowa Code.[271] It specifically rejected Randall's claim that "exceptional cir-

264. *Id.* at 167–70, 50–51.
265. *Morningstar*, 255 N.W.2d at 160.
266. *Randall App.*, *supra* note 193, at 9–11, 24, 473–75.
267. *Id.* at 510–12.
268. *Id.* at 465.
269. *Id.* at 471, 536–37.
270. *Id.* at 549.
271. *Randall App.*, *supra* note 193, at 549.

cumstances" permitted him to write the will naming him the sole beneficiary.[272] It held that the circumstances in this case were "diametrically opposed and exactly opposite" of the (unstated) justifications considered in determining "exceptional circumstances."[273] In support of this conclusion, it cited an Ohio case, *Bar Association v. Ramey*.[274] *Ramey*, like Randall, involved a lawyer who drafted a will that named him the sole beneficiary.[275] It was also distinctly different in terms of the personal and business relationship between Ramey and the client, which involved no friendship and little apparent care by Ramey for his client as a human being.[276] Additionally, Ramey was the sole trustee of the client's money, and any disbursements from the trust lessened his inheritance.[277] Finally, Ramey's actions resulted in a public reprimand, not disbarment or even a suspension.[278]

Next, the Commission chastised Randall for bringing to the public "notoriety" for his "public record of actions … against others."[279] Such action "erodes and destroys public confidence in the law and lawyers."[280] The Commission's specific concern was unstated. However, it appeared that Randall used what would soon be called "scorched earth" tactics in defending himself from the will contest initiated by Marie Jensen and the fraud claim made by Morningstar. Randall admitted to suing Marie Jensen and her law firm for "malicious prosecution and an abuse of process."[281] To sue a possible heir (and her lawyers) challenging the probate of a will giving to its drafter the testator's entire estate on those grounds at best borders on meritless. And once the Morningstars sued for fraud, Randall filed a cross-claim that he and Myers owned the Hess property.[282] The basis for the cross-claim was an unrecorded copy of a deed (no original was ever produced) conveniently dated one day before the Morningstars recorded their deed. Randall's decision not to take any action to claim ownership of the Hess property from the time of the February 1973 confrontation through the filing of the fraud suit by Morningstar over a year later was inconsistent with his later insistence that he and Myers owned it. Randall's behavior in litigating the will and Morningstar lawsuits was likely the target of the Commission's ire. Finally, it particularly noted that Randall "has held high office in the associations of his profession

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272. *Id.* at 550–51.
273. *Id.* at 551.
274. *Id.* (citing Columbus Bar Ass'n v. Ramey, 290 N.E.2d 831, 833 (Ohio 1972)).
275. *Ramey*, 290 N.E.2d at 833.
276. *Id.*
277. *Id.*
278. *Id.* at 835–37.
279. *Randall App.*, *supra* note 193, at 552.
280. *Id.*
281. *Id.* at 526.
282. *Id.* at 528.; *Randall*, 285 N.W.2d at 163.

and particularly the presidency of the American Bar Association."[283] It did not explain the relevance of that statement to its recommendation. If it meant to suggest Randall was subject to a higher standard of care than an ordinary Iowa lawyer, that was not a part of the law. But it was a part of the culture.

Randall's unprofessional conduct was "so reprehensible and so flagrantly violative" of the Iowa Code that it should not be "tolerated."[284] The Commission unanimously recommended Randall be "disbarred from the practice of law and not be reinstated thereafter."[285]

2. The Iowa Supreme Court

On November 14, 1979, the Iowa Supreme Court issued its opinion in *Randall*, unanimously agreeing (with one member not participating) with the Grievance Commission's recommendation after the court's *de novo* review.[286] Randall was disbarred.[287] The Iowa Supreme Court held that Randall violated Ethical Consideration 5-5 when he wrote Myers' March 1973 will.[288] It broadened the rule against lawyer as beneficiaries as it thunderously concluded, "We have passed from the era in which it can be argued it is professionally acceptable for a lawyer to draw a client's will in his own favor unless undue influence can be shown."[289] Randall also violated the Iowa Code by representing a defendant in the Morningstar case despite a conflict of interest.[290] It differed with the Commission about the precise nature of the conflict. The Commission focused on Randall's decision to represent Myers; the court found fault with Randall representing Myers's half-interest in the corporation throughout the litigation.[291] Again, it denounced Randall's actions: "The conflict, even according to Randall's own testimony, was flagrant and inexcusable."[292]

The court's decision was premised on two factual findings that "stung" it. First, it "was a sham to testify that, after drawing a will bequeathing himself upwards of two million dollars and then placing the will in his own desk drawer, he forgot about it."[293] Second, it disbelieved Randall's claim that he

283. *Randall App.*, *supra* note 193, at 553.
284. *Id.*
285. *Id.* at 553–54.
286. *Randall*, 285 N.W.2d at 161.
287. *Id.* at 165.
288. *Id.*
289. *Id.*
290. *Id.*
291. *Randall*, 285 N.W.2d at 164–65.
292. *Id.*
293. *Id.*

first learned about Myers's forgery after December 20, 1975.[294] It found that Randall believed, soon after the February 1973 confrontation, that Morningstar and Myers were conspiring to defraud Randall, and that he represented the corporation to protect his interests from those of Myers.[295] Randall's testimony was "less than forthright."[296]

It is difficult to believe Randall "forgot" about Myers' will, but it is irrelevant. Randall soon found the will. He then published it for probate and never informed Marie. Randall's failure to communicate with a potential heir echoed several earlier lawyer-beneficiary cases.[297] That should have been the crucial fact. Additionally, the court made much of the size of Myers's estate, but that too was largely inconsequential. Whatever its value, the bequest to Randall was not a reasonable legacy, but an extraordinary one. Finally, the court misled the reader when it wrote, "Myers then returned to Randall's office and told him what he had done."[298] Insofar as that statement implies Myers confessed his forgery, it goes beyond the evidence. Randall testified that Myers asked him to give Morningstar a quitclaim deed so Myers wouldn't go to jail.[299] Myers did not, in Randall's testimony, admit to forging the Morningstars' signatures.[300] Of course, it doesn't take much to infer from Myers's statement that he must have done, or believed he had done, something criminal. Morningstar's accusation of fraud in taking his land strongly suggested a problem with the 1967 warranty deed. That Myers might have forged the Morningstars' signatures on that deed should readily have come to Randall's mind. And as the court correctly noted, Randall's later claim that Myers and Morningstar were conspiring against him fails to make ethical his conduct in representing Myers or the corporation.[301]

The court's opinion was more troublesome in its embrace of EC 5-5 as a standard for disciplining lawyers. The 1969 ABA Code included a Preliminary Statement, which defined its three parts: the Canons, Ethical Considerations, and Disciplinary Rules. The Canons stated "axiomatic norms," the Ethical Considerations were "aspirational," a "body of principles,"[302] and the Disciplinary Rules were, "unlike the Ethical Considerations, … mandatory in character."[303] The Iowa Code adopted the ABA's Preliminary Statement

294. *Id.*
295. *Id.* at 164.
296. *Randall*, 285 N.W.2d at 165.
297. *Id.*
298. *Id.*
299. *Randall App.*, *supra* note 193, at 583.
300. *Id.*
301. *Randall*, 285 N.W.2d at 165.
302. CODE OF PRO. RESP. Preliminary Statement (AM. BAR ASS'N 1969).
303. *Id.*

word-for-word.[304] How did the Iowa Supreme Court reason a violation of an Ethical Consideration was unprofessional conduct subject to disbarment when the Iowa Code declared otherwise?

The *Randall* court supported its conclusion by citing *Committee on Professional Ethics v. Behnke*,[305] released in March 1979. The Grievance Commission concluded that John Behnke had violated EC 5-5 in drafting a will making himself a contingent beneficiary and executor of two clients' estates, but had not violated a Disciplinary Rule.[306] Commission members were divided on the disciplinary sanction, with a majority recommending a multi-year suspension or disbarment.[307] Behnke argued that he could not be disciplined for violating an Ethical Consideration only.[308] The *Behnke* court disagreed, but offered a conclusion, not an explanation.[309] That conclusion was based on a 1976 case that itself offered merely a conclusion, *Matter of Frerichs*.[310] The *Frerichs* court declared that Ethical Considerations, deemed "aspirational" *by the court itself* in adopting the Iowa Code in 1971, were actually mandatory.[311]

> All lawyers practicing before this court are bound by the canons and the provisions of the Iowa Code above set out. They are not free to view them merely as aspirational. A canon cannot be ignored by an attorney on the claim he believes it conflicts with his view of a constitutionally protected right. The purpose of the canons as explained by the ethical considerations, disciplinary rules and adjudicated decisions is to show him the professionally acceptable route through questions or doubts he may have regarding such conflicts.[312]

Iowa lawyers were bound to obey all provisions of the Iowa Code; they were "not free to view them merely as aspirational."[313] Why lawyers were "not free to view them merely as aspirational"[314] is unexplained. The "purpose" of the Canons, Ethical Considerations, Disciplinary Rules, and decisional law was to show Iowa lawyers a "professionally acceptable route."[315]

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304. *Compare* ABA CODE OF PROFESSIONAL RESPONSIBILITY (1969) *with* IOWA CODE OF PROFESSIONAL RESPONSIBILITY FOR LAWYERS.
305. *Randall*, 285 N.W.2d at 165.
306. Comm. on Pro. Ethics v. Behnke, 276 N.W.2d 838 (Iowa 1979).
307. *Behnke*, 276 N.W.2d at 839-40.
308. *Id.* at 840.
309. *Id.*
310. *In re* Frerichs, 238 N.W.2d 764, 769 (Iowa 1976).
311. *Frerichs*, 238 N.W.2d at 769.
312. *Id.*
313. *Id.*
314. *Id.*
315. *Id.*

The court appeared to use "acceptable" as a synonym for "required," rather than "permitted." This, of course, is a guess, for the court offers no explanation of its phrase, a "professionally acceptable route."[316] It ignores its own Preliminary Statement that declares the Ethical Considerations "aspirational."[317] That Statement immediately thereafter distinguishes the Ethical Considerations from the Disciplinary Rules by making the latter mandatory, "unlike" the former.[318] Ignoring the Preliminary Statement enables the court to avoid confronting a self-made contradiction.

The court appeared to understand its difficulty, for it earlier in *Frerichs* discussed the role of Ethical Considerations in the Iowa Code: "They constitute a body of principles upon which the lawyer can rely for guidance in many situations, including the one before us."[319] A body of principles that guide a lawyer is distinct from rules that compel a lawyer. The 1969 ABA Code was explicitly structured to encompass three different aspects of professional behavior; only Disciplinary Rules were apt for the purpose of imposing discipline.

The reason for the *Frerichs* court's failure to explain itself seems a result of its motivation. It was intent on chastising a lawyer who had charged the Iowa Supreme Court with "willfully" ignoring constitutional questions the lawyer posed in several appeals.[320] The court deemed Frerichs's statements as accusing the court of criminal deceit.[321] Frerichs challenged the court's integrity and defended his actions in part on free speech grounds.[322] Such an affront needed to be addressed. Frerichs needed to be sanctioned to signal to the Iowa Bar the repercussions one might face. The niceties of interpreting the Iowa Code took a back seat to making an example of Frerichs. That may have included ignoring the text of the Preliminary Statement of the Iowa Code that made Ethical Considerations "aspirational."

When *Behnke* was published in March 1979, the court relied on *Frerichs* to reiterate its view that aspirational Ethical Considerations were mandatory disciplinary standards.[323] The *Behnke* court's extensive reliance on a poorly reasoned decision led the court again to fail to explain itself. The *Behnke* court quoted the above statement from *Frerichs*, noted that it had applied Ethical Considerations in five other disciplinary cases, and though in each of

316. *Frerichs*, 238 N.W.2d at 769.
317. *Id*.
318. *Id*.
319. *Id.* at 766.
320. *Id.* at 765.
321. *Frerichs*, 238 N.W.2d at 767.
322. *Frerichs*, 238 N.W.2d at 768. The case was decided well before Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991), which held unconstitutional as void for vagueness a Nevada ethics provision restricting types of attorney speech.
323. *Behnke*, 276 N.W.2d at 840.

those cases the lawyer was also disciplined for violating a Disciplinary Rule, concluded that fact made no difference.[324] Finally, it refused in *Behnke* to re-examine *Frerichs*.[325]

Thus, when Randall's case reached the Iowa Supreme Court right after *Behnke* was released in 1979, *Behnke* and *Frerichs* served, however modestly, as precedent that a violation of the Ethical Considerations triggered lawyer discipline. But the court faced a specific problem with regard to EC 5-5. In December 1977, the court amended the Iowa Code to make it a violation of Disciplinary Rule 5-101(B) for a lawyer (or another lawyer in the lawyer's firm) to draft a will and include himself as a beneficiary unless the lawyer and testator were family.[326] Additionally, EC 5-5 was amended to eliminate the "exceptional circumstances" exception.[327] This amendment "came out of the John Randall case."[328] The Iowa Supreme Court made mandatory in December 1977 what was earlier aspirational. The timing of this amendment—after its decision in *Frerichs*, but before its decision in *Behnke*, and before Randall's hearing at the Grievance Commission but after Marie Jensen had filed her ethics complaint against Randall—suggested its interpretation of the Iowa Code in *Frerichs* was exceptional. In other words, the timing of this amendment suggested the court's decision to make Ethical Considerations mandatory in *Frerichs* was due to the case's facts, a lawyer's attack on the court itself. But the court doubled down its "aspirational means mandatory" interpretation in *Behnke*. That paved the precedential path for its decision in *Randall*.

The court quickly dismissed Randall's contention that Ethical Considerations were aspirational. Its reasoning was again modest. First, it cited *Behnke* for the proposition, "A violation of EC 5-5 part and parcel of our ethical code would be unethical conduct."[329] Next, it rejected Randall's claim that "exceptional circumstances" permitted him to draft Myers's will that left him the entire estate.[330] Other than concluding that no such circumstances existed, the court finished with its announcement that drafting such wills was unprofessional, even when no evidence of undue influence existed.[331]

The court was careful to apply only EC 5-5 to Randall's March 1973 action and not DR 5-101(B), adopted in December 1977. But it was careless

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324. *Id*.

325. *Id*.

326. *In the Supreme Court of Iowa*, NEWS BULL. IOWA ST. BAR ASS'N, Jan. 1978, at 1 (reprinting amendment).

327. *Id*.

328. Brief and Argument for Appellant at 8, Comm. on Pro. Ethics v. Randall, N.W.2d 161 (Iowa 1979) (No. 63172) (quoting letter of John H. Neiman, Nov. 29, 1977) (copy on file with author).

329. *Randall*, 285 N.W.2d at 165.

330. *Id*.

331. *Id*. at 165.

in declaring what Randall should have known when he drafted Myers' will. *Behnke* was the only Iowa case similar to *Randall*. A review of the annual reports of the Committee on Professional Conduct and Conduct to the Iowa Supreme Court for the years 1975-1976 through 1978-1979 do not include any case other than *Behnke* involving a lawyer-beneficiary. Cases from most other states (*e.g*., Wisconsin) focused on the likelihood or possibility the lawyer used undue influence to obtain a gift from a testator.[332] The Grievance Commission's hearing in *Behnke* occurred during the summer of 1977, based on a complaint first reviewed by it in 1976.[333] It decided *Frerichs* in 1976. These events all occurred after Randall drafted Myers' will. EC 5-5, which the *Behnke* court held "part and parcel of our ethical code," making any violation of it "unethical conduct,"[334] surely put Iowa lawyers on notice as of March 21, 1979. But how was an Iowa lawyer to know that before *Behnke* or *Frerichs*? The Iowa Code's text divorced aspirational Ethical Considerations from mandatory Disciplinary Rules, mimicking the 1969 ABA Code. The drafters of the ABA Code emphasized the distinction between Ethical Considerations and Disciplinary Rules.[335] It was more than reasonable to interpret the Iowa Code the same way before *Frerichs*. Again, a modestly perceptive lawyer practicing law in Iowa in early 1973 should have been aware that drafting a will that gave the testator's entire estate to the lawyer would generate a will contest and might subject the lawyer to discipline. And if that lawyer looked at the published record in other states, including the border state of Wisconsin, that lawyer should have known that discipline might be suspension from the practice of law for up to a year.[336] But it had not led to disbarment before *Randall*.

The court's conclusion regarding Randall's conflict of interest was relatively brief. Once the court decided that Randall, shortly after the February 1973 confrontation, was suspicious that Myers and Morningstar were working together to cheat him, it was clear Randall could not represent Myers or the corporation and himself at the same time.

Despite its modest length, the court's characterization of Randall's conduct was operatically indignant. It described Randall's actions as "outrageous," "flagrant and inexcusable," and his arguments as "without merit,"

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332. *See, e.g*., State v. Horan, 123 N.W.2d 488 (Wis. 1963).

333. *Annual Report of the Committee on Professional Ethics and Conduct to the Iowa Supreme Court*, Minutes, Case 76-91, at 12 (annual report for 1976–1977) (copy on file with author).

334. *Behnke*, 276 N.W.2d at 844.

335. *See Preliminary Statement*, ABA CODE OF PRO. RESP. (noting Ethical Considerations were "aspirational in character" while Disciplinary Rules were "mandatory in character," "unlike the Ethical Considerations.").

336. *See supra* text accompanying notes 96–155.

and testimony "less than forthright."[337] The court clearly signaled its intention: Randall was disbarred.

Randall became the first lawyer to be disbarred for writing a will that named him as the testator's sole beneficiary. The court never mentioned Randall's past presidency of the ABA. But it didn't have to, for others had already made that connection.

The March 1, 1979, issue of the *Des Moines Register* published a story on its front page about the Grievance Commission's published recommendation that Randall be disbarred.[338] The Grievance Commission had noted, as one of its conclusions of law, Randall's former high office. The *Register* discussed the Grievance Commission's recommendations and subsequently quoted Roland Grefe, President of the Iowa State Bar Association: "[T]he message is clear that whoever violates the professional code in Iowa is going to be held to account, and that's the same for everybody, and I don't care if it's Rollie Grefe or Joe Zilch."[339] Grefe was also asked if the Grievance Commission's recommendation was "tougher on Randall because of his former post" as ABA President.[340] He didn't think so, but it was "a possibility."[341]

Four days later, the *Register* published an editorial opinion listing Randall's accomplishments and honors, contrasting them with the Grievance Commission's recommendation of disbarment for his "irresponsible, improper, unprofessional and unethical" conduct.[342] The editorial, possibly to impress its lay readers, noted that Randall was charged with violating fifteen provisions of the Iowa Code.[343] The editorial's last sentence was surely music to the bar's ears: "Regardless of the outcome, the Iowa bar has again shown that its self-disciplinary mechanism works."[344] How the editorial could so conclude was baffling, for the hearing had been closed. It worked, apparently, because the Grievance Commission had recommended the bar's most severe sanction. This recommendation was enough; the bar had followed the rule of law and shown neither fear nor favor to the most powerful of Iowa lawyers.

The assumption that the Grievance Commission might be cowed by a past president of the ABA may have been a consequence of the American bar's failure to police itself for nearly all of its history. By the late 1970s, a view that the bar was unwilling or unable to sanction (formerly) powerful

337. *Randall*, 285 N.W.2d at 164.

338. *High Court Unit Urges Disbarment of Lawyer*, DES MOINES REG., Mar. 1, 1979, at 1 (copy on file with author).

339. *Id.* at 12a.

340. *Id.*

341. *Id.*

342. *Trauma for the Bar*, DES MOINES REG., Mar. 5, 1979, at 8A (copy on file with author).

343. *Id.*

344. *Id.*

lawyers was unsupported by recent events. The New York Appellate Division disbarred Richard Nixon in July 1976 on five counts of obstruction of justice concerning the Watergate scandal.[345] Other lawyers linked to Watergate were also disbarred, including former Attorney General John Mitchell[346] and John Dean, Nixon's White House counsel who testified against Nixon in the Watergate hearings.[347]

At the same time the Iowa Supreme Court amended the Iowa Code to prohibit a lawyer from writing a will that included him as a beneficiary, the state bar's Board of Governors "authorized publishing in the News Bulletin every disciplinary decision involving a lawyer when the matter is filed with the Supreme Court and has become a matter of public record."[348] Its timing was excellent. Even though the Grievance Commission would not hear the case against Randall for nearly a year, the "John Randall" case was well known to Iowa bar leaders. The *News Bulletin* of the state bar published the names of twelve lawyers in its August 1978 issue, including John Behnke.[349] The following year, it listed John Randall as one of three matters (another noted the suspension of Behnke) of public record, to demonstrate the bar's transparency.[350] It also posted notice of Randall's disbarment.[351]

Roland Grefe's admission that it was "a possibility" that the Commission was tougher on Randall than other lawyers seemed clear by comparing Randall with John Behnke. As stated in the court's opinion in *Behnke*, for over a decade Behnke had "repeatedly prepared wills [for two elderly siblings] which named him beneficially."[352] One lawyer testified that Behnke did so contrary to the wishes of the siblings.[353] He received from these clients two loans—which he claimed were gifts—with no due date for repayment. He went to a nursing home to have one sibling sign a new will that again made Behnke a contingent beneficiary, despite evidence the testator was in poor

345. Tom Goldstein, *New York Court Disbars Nixon for Watergate Acts*, N.Y. TIMES (July 9, 1976), https://www.nytimes.com/1976/07/09/archives/new-york-court-disbars-nixon-for-watergate-acts-nixon-disbarred-by.html.

346. Morris Kaplan, *Mitchell is Disbarred in State for His Watergate Conviction*, N.Y. TIMES (July 4, 1975), https://www.nytimes.com/1975/07/04/archives/mitchell-is-disbarred-in-state-for-his-watergate-conviction.html.

347. *Court Petition Filed to Disbar Agnew for Tax Evasion*, N.Y. TIMES (Nov. 13, 1973), https://www.nytimes.com/1973/11/13/archives/court-petition-filed-to-disbar-agnew-for-tax-evasion-dean-in.html (noting John Dean's suspension from the practice of law to become disbarment upon conviction).

348. *Board of Governors Recommends Advertising Rules*, NEWS BULL. IOWA ST. BAR ASS'N, Dec. 1977, at 1, 2.

349. *Disciplinary Proceedings*, NEWS BULL. IOWA ST. BAR ASS'N, Aug. 1978, at 18.

350. *Profession Ethics and Grievance Commission Matters*, NEWS BULL. IOWA ST. BAR ASS'N, Mar. 1979, at 8.

351. *Ethics Matters*, NEWS BULL. IOWA ST. BAR ASS'N, Dec. 1979, at 12.

352. *Behnke*, 276 N.W.2d at 846.

353. *Id*.

health and with an absence of evidence that Behnke was asked to prepare such a will. When no employees at the nursing home would witness its execution, Behnke served as a witness.[354] The court suspended his license indefinitely, with the opportunity for reinstatement after three years.[355]

When the court decided *Randall* eight months after *Behnke*, it made no comparison, leaving lawyers uncertain how Randall's conduct was qualitatively worse than Behnke's decade-long effort to wring a bequest out of his father's old friends and former law clients. *Randall* was, however, again praised by the *Des Moines Register's* editorial writers. In an editorial, "Disbarment Deserved," the *Register* began, "With a former president of the American Bar Association standing accused before them, the Iowa Supreme Court justices must have felt at least a twinge of an inclination to spare him from the disgrace of being driven from the legal profession."[356] Instead, the court did what it needed to do, and the Iowa Bar's members, concluded the editorial, "should feel satisfied, and proud, that it was detected and punished through the channels established for that purpose."[357]

The editorial's praise repeated its earlier error: at a time when the reputation of lawyers was sinking, John Randall's case was mischaracterized as standing up to the powerful for the betterment of profession and public. But if John Randall once possessed some kind of power, that was no longer the case. He was 79, twenty years distant from his ABA heyday. The record showed no appearances on his behalf from famous lawyers or politicians. The Iowa Supreme Court, on the other hand, had all the power the state's constitution gave it, subject to minimal review by the Supreme Court of the United States.[358]

Randall was no angel, and his actions deserved some type of condemnation. But he was also a convenient scapegoat who made it easy for Iowa disciplinary authorities to demonstrate "toughness," resolve, and devotion to the rule of law. Already in his 70s when the Morningstar confrontation occurred, Randall may have felt he was played for a fool. And to exact vengeance, Randall may have decided the cost Myers was going to pay was to leave Randall his entire estate. That cost, to the seemingly cold-blooded Myers (all he left to the woman he had lived with for a long time was to name her as the beneficiary of a very modest life insurance policy, and of course he left nothing to his daughter), was no cost, for he paid only after he died.

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354. *Id.*

355. *Id.*

356. *Disbarment Deserved*, DES MOINES REG., Nov. 27, 1979, at 14A (copy on file with author).

357. *Id.*

358. The states possess the authority to regulate members of the legal profession subject to meeting the constraints of the federal Constitution, see, e.g., *In re* Anastaplo, 366 U.S. 82 (1961) (holding constitutional Illinois refusal to license applicant to the practice of law for refusing to answer questions related to Communist Party affiliation).

If Myers was setting a trap for Randall, it is clear Randall's anger clouded any rational understanding that writing such a will could only end badly for him.

Randall petitioned the Iowa Supreme Court to rehear his case. It denied his request.[359] He then petitioned the Supreme Court of the United States. It was unanimously denied, with Randall's former ABA acquaintance Justice Lewis F. Powell, Jr., recusing himself.[360]

3. The Eighth Circuit

Randall then took the extraordinary and likely frivolous action of filing a federal civil rights claim against the individual members of the Iowa Supreme Court and its Grievance Commission.[361] He also objected to orders in the two federal district courts in Iowa disbarring him. The civil rights claim was dismissed.[362] Randall appealed. The United States Court of Appeals for the Eighth Circuit consolidated the appeal and the two disbarment orders and added the issue of Randall's fitness to practice law before the Eighth Circuit. The Eighth Circuit affirmed the dismissal of Randall's civil rights claim and the two disbarment orders, and disbarred him from the practice of law before it.[363]

Randall claimed he was "singled out" by Iowa disciplinary authorities as a "past president and other high official of the American Bar Association."[364] Although this was possible, as discussed, he was responsible for his own predicament. The Eighth Circuit noted Iowa had disciplined other prominent lawyers, blunting Randall's claim.[365] It mentioned but made no further comment that no other prominent Iowa lawyer was disbarred. Though "severe," disbarment was within the range of permissible sanctions, and the court would not "second-guess" Iowa's decision.[366]

The Eighth Circuit's decision disbarring Randall in its court was both banal and bizarre. Like many federal courts then, it adopted Iowa's lawyer

359. Richard Haugh, *Randall Asks Supreme Court to Reinstate Law License*, CEDAR RAPIDS GAZETTE, Feb. 11, 1980, at 9A; Roland Krekeler, *Randall Disbarment Challenge Rejected*, CEDAR RAPIDS GAZETTE, May 21, 1980, at 12A.

360. Randall v. Comm. on Pro. Ethics, 446 U.S. 946 (1980).

361. John Carlson, *Ex-President of Bar Sues Iowa High Court*, DES MOINES REG., Apr. 12, 1980, at 4A (copy on file with author).

362. *Ex-ABA Head's Suit is Dismissed*, DES MOINES REG., June 15, 1980, at 7B (copy on file with author).

363. *In re* Randall, 640 F.2d 898 (8th Cir.), *cert. denied sub. nom.* Randall v. Reynoldson, 454 U.S. 880 (1981).

364. *Randall*, 640 F.2d at 903.

365. *Id.*

366. *Id.* at 904.

ethics code as its own.[367] Doing so allowed it to adopt the position that a violation of an Ethical Consideration (which the court strangely called an Ethical Canon, thus confusing the overarching Canons with the Ethical Considerations of the Code) alone was sufficient for the lawyer to be subject to discipline. It cited and followed *Behnke* and *Frerichs*.[368] The Eighth Circuit then inaccurately claimed the ban in EC 5-5 was "a long-standing prohibition against that practice."[369] It declared that EC 5-5 was "only a restatement of old Canon 9" of the 1908 ABA Canons.[370] Canon 9 had nothing to do with drafting a will and naming yourself a beneficiary. The court's reference was inexplicable. To bolster the conclusion that this was an old, well-settled statement of law, the court cited seven cases involving ethics complaints for drafting a will from which the lawyer benefited, and other misconduct. Those cases ranged from 1931 to 1974. All demonstrated undue influence, which the Iowa Supreme Court disclaimed in *Randall*. The Eighth Circuit did not cite the 1957 *Richards* case noted in the 1969 ABA Code, which stated no such prohibition existed. It also failed to cite any cases from nearby Wisconsin, which also would have demonstrated the unsettled state of the law. Finally, the court failed to mention that the most severe sanction in the seven cited cases was suspension from the practice of law for one year. In disbarring Randall from its own court, the Eighth Circuit found the law it wanted, not that which existed.

Again, a petition for a writ of certiorari to the Supreme Court was denied.[371]

IV. A PYRRHIC VICTORY

In 1982, two former leaders of the New Jersey Bar were indicted.[372] *Bar Leader*, an ABA magazine, pondered how a bar association should address the issue in light of "the image of the bar."[373] It prosaically concluded the filing of criminal charges against any lawyer "hurts" the profession's image.[374] One quoted commentator was Edward Jones. Jones had recently re-

367. Even to the present, few federal courts have created rules of professional conduct specifically applicable to the practice of law in federal courts.

368. *Randall*, 640 F.2d at 905.

369. *Id*.

370. *Id.* at 905. The court may have been thinking of Canon 9 of the 1971 Iowa Code (identical to the 1969 ABA Code), which was titled, "A Lawyer Should Avoid Even the Appearance of Impropriety." This was closer, but EC 5-5 was located within Canon 5 of the Code.

371. Randall v. Reynoldson, 454 U.S. 880 (1981). Powell again recused himself.

372. *How Should Bar Respond When Leader is Indicted*, BAR LEADER, July-Aug. 1982, at 7, 8.

373. *Id.*

374. *Id.*

tired as executive director of the Iowa State Bar Association. Jones referenced the disbarment of John Randall, and opined, "The press and the public admired the bar for taking one of its [most] prominent people to task."[375]

The editorials published in the *Des Moines Register* suggested that the state's most prominent newspaper agreed. To claim the public better admired the bar after Randall's disbarment appears unlikely. For all of John Randall's alleged stature, the *New York Times* printed just one Associated Press brief that noted the recommendation that Randall be disbarred.[376] It did not publish a follow-up story informing readers of Randall's disbarment. When Randall died in 1983, the *Des Moines Register* did not print an obituary. Iowans were not polled on their opinion of the legal profession after Randall's disbarment. Americans were, and the results showed lawyers were distrusted by most by the end of the 1970s. Gallup Polls taken in 1976, 1977, 1981, and 1983 reported between 24-26% of respondents rating the legal profession very high or high in terms of "honesty and ethical standards."[377] The last three polls took place after Richard Nixon's disbarment, and none showed any change in the public's view of the legal profession.

More telling was the Iowa Grievance Commission's post-*Randall* disciplinary case against lawyer G. Gifford Morrison, decided in 1982 based on acts occurring in 1979.[378] Morrison was a long-time lawyer for Laura Casper. Casper was personally fond of Morrison and his wife, Sarah Lu Morrison. She had known Morrison for over fifty years. She had no living descendants.[379] According to the Iowa Supreme Court's opinion, "[a]t one time" (no date is given by the court), Casper executed a will bequeathing $10,000 to Morrison: "Upon learning this was an ethical violation Morrison advised her to remove the provision."[380] The court does not state whether Morrison wrote this will; his subsequent action implies he did. At some point late in her life, Morrison became Casper's conservator. Although the court is unclear, it appears she executed a will and a codicil drafted by Morrison on August 23, 1979.[381] That will gave to Sarah Lu Morrison Casper's "fur coat, and any other personal effects in my home that she desires."[382] The will also included a request "that both ordinary and extraordinary fees be allowed both to my

375. *Id.*

376. *Ex-Bar Head May be Disbarred*, N.Y. TIMES, Mar. 2, 1979, at A13.

377. *Honesty/Ethics in Professions*, GALLUP POLL, https://news.gallup.com/poll/1654/honesty-ethics-professions.aspx; Ariens, *supra* note 21, at 173 (noting polls).

378. Comm. on Pro. Ethics v. Morrison, 320 N.W.2d 564 (Iowa 1982).

379. *Id.*

380. *Id.*

381. *Id.* at 564–65. The court quotes a question from the grievance commission hearing indicating a "will" was executed on August 23, 1979. It later states the codicil was executed that date.

382. *Id.*

executor and attorney for the services and expenses in my estate."[383] The codicil directed "my executor be paid a commission of five percent on all real estate sold," in addition to the ordinary and extraordinary fees.[384] Morrison was named the will's executor and served as the attorney for the estate.

Casper soon died, and some beneficiaries objected to the bequest to Sarah Lu Morrison. She claimed neither the fur coat (which her husband bought) nor anything else of Casper's. Morrison collected ordinary and extraordinary fees, as well as an additional five percent commission on the real estate sold.[385]

Judge David Harris wrote the court's opinion in *Morrison*.[386] He was also the author of the court's decisions in *Frerichs* and *Randall*. After stating the facts above, Harris wrote the court was "offended" by the ordinary and extraordinary fee provision in the will.[387] The fees to the executor and attorney for the estate were not negotiable when the testator was also a ward of the lawyer writing the will. For his offensive behavior in August 1979, as the well-known *Randall* case headed to the Iowa Supreme Court with the recommendation that Randall be disbarred, Morrison was publicly reprimanded.[388]

Harris cited no cases in his opinion, making it impossible to discern how he distinguished *Randall* and *Behnke*. What is more puzzling in the opinion is the lack of clarity in stating what Morrison did and when he did it. *Behnke* was decided in March 1979, well before the August 1979 will or codicil was written. The Grievance Commission's recommendation to disbar Randall was news from March through November 1979, and scuttlebutt before. The amendment to the Iowa Code prohibited a lawyer from drafting a will when he was one of its beneficiaries.[389] This rule had been in effect for over eighteen months when Morrison drafted the August 1979 will and codicil. How was it Morrison that was not on notice that his conduct was unethical, and subject to disciplinary sanction? Surely he was on notice when *Behnke* was released on March 21, 1979, that a gift to his wife would be viewed negatively. The court sensibly pointed out that providing for extraordinary fees for the estate's executor and attorney in a will is unlikely to be an elderly testator-ward's idea.[390] That is one reason why the court declined to characterize Morrison as a scrivener. One might infer that permitting a claim for

383. *Id.*
384. *Morrison*, 320 N.W.2d at 565.
385. *Id.*
386. *Id.*
387. *Id.*
388. *Id.*
389. *In the Supreme Court of Iowa*, NEWS BULL. IOWA ST. BAR ASS'N, Jan. 1978, at 1 (reprinting amendment).
390. *Id.* at 565.

extraordinary fees was a way to transfer assets of the estate to Morrison, after Casper and Morrison realized a gift through the will was prohibited. And if a prior will gave Morrison $10,000, doesn't it seem plausible to infer that the extraordinary fees provision was a substitute for the original bequest, a way to give Morrison a part of Casper's estate to which he was not entitled as a lawyer-beneficiary?

The court studiously avoided this reasoning. Its only investigation into Morrison's state of mind was to conclude that Morrison was not attempting to mislead the Grievance Commission when "over-explaining" his perception that he was a scrivener, rather than draftsman, of Casper's last will and codicil.[391] The court offered no explanation for this conclusion. It concluded that Morrison may have been thoughtless in his actions, but those actions were not venal.

In 2000, *American Law Reports* published an annotation regarding discipline of lawyers who drafted a will or trust instrument and included themselves as beneficiaries.[392] The annotation supplanted one from 1964.[393] The reason for the 2000 annotation, twenty years after the disbarment of John Randall, was that lawyers continued to include themselves or family members as beneficiaries of wills and trusts. The trend toward greater suspicion of testamentary gifts continued, as most courts sanctioned lawyers who received gifts from clients. However, the annotation also found several cases holding EC 5-5 aspirational only, and not alone sufficient to subject the lawyer to discipline.[394]

The ABA's 1983 Model Rules of Professional Conduct were adopted by forty jurisdictions by the early 1990s.[395] Model Rule 1.8 listed a number of specific rules banning certain actions by lawyers because they created a conflict of interest between lawyer and client. Model Rule 1.8(c) was specifically directed to the lawyer as draftsman and beneficiary:

> A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a

391. *Id.* at 564.

392. Phillip White Jr., Annotation, *Attorneys at Law: Disciplinary Proceedings for Drafting Instrument such as Will or Trust Under Which Attorney-Drafter or Member of Attorney's Family or Law Firm is Beneficiary, Grantee, Legatee, or Devisee*, 80 A.L.R.5th 597 (2000).

393. R.E. Barber, Annotation, *Drawing Will or Deed under which He Figures as Grantee, Legatee, or Devisee as Ground of Disciplinary Action against Attorney*, 98 A.L.R.2d 1234 (1964).

394. White, *supra* note 392, at § 8.

395. *Alphabetical List of Jurisdictions Adopting Model Rules*, ABA (March 28, 2018), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/.

> spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.[396]

The Model Rule went back to the future. Rule 1.8(c) did not prohibit a lawyer from drafting a will naming the lawyer a beneficiary; it banned only the receipt of a substantial gift. Comment [6] couched the rule in terms of "general standards of fairness" and the avoidance of undue influence.[397] As standards of discipline, the Model Rules were generally framed in the negative. Henry Drinker's *Legal Ethics* had declared a slightly broader rule in the positive. A lawyer drafting a will for a longstanding and competent client was permitted to receive a "reasonable legacy."[398] Comment [6] also declared it permissible for a lawyer to receive from a client a "more substantial gift" than a "token of appreciation," though "such a gift may be voidable" if a presumption of undue influence arose.[399] With just a bit of squinting, one could interpret a reasonable legacy as something approximating a substantial gift. The ban against soliciting a substantial gift from a client reprised the idea that lawyers were to avoid even the appearance of impropriety. An exception was made for drafting a will for family members, as scrupulously defined in the rule.[400] In each provision, one heard the echo of Drinker's conclusion: it "depends on the surrounding circumstances."[401]

Randall's conduct in writing Myers's will and in representing Myers in the Morningstar litigation was deservedly sanctioned. Randall further harmed his cause in the legal tactics he took in both cases. His testimony at the Grievance Commission's hearing could fairly be characterized as dissembling, or in the gentler words of the Iowa Supreme Court, as "less than forthright."[402] And for a former ABA President to engage in such behavior made it appear even more outrageous. But Randall's disbarment was also a "just so" story: Here was the lawyer who had everything—honors, accolades, a good reputation, and wealth. He threw it away. He was responsible for his own downfall. His overweening pride and ego led him to betray his sacred duties to his client and friend. The Iowa authorities convinced themselves that they had no choice but to disbar him, if they were to maintain the integrity of the legal profession and the legal system's commitment to the rule of law. They did, however, have a choice. Maintaining the integrity of the legal profession may or may not have required Randall's disbarment. But

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396. MODEL RULES OF PRO. CONDUCT r. 1.8(c) (AM. BAR ASS'N 1983).
397. *Id*.
398. DRINKER, *supra* note 58, at 94.
399. MODEL RULES OF PRO. CONDUCT r. 1.8(c) cmt. [6] (AM. BAR ASS'N 1983).
400. *Id*.
401. DRINKER, *supra* note 58, at 94.
402. *Randall*, 285 N.W.2d at 165.

it did require the Iowa Supreme Court to explain fully and clearly why disbarment was the better choice.

V. CONCLUSION

Lawyers successfully claimed an outsized role in leading society in the aftermath of World War II.[403] That claim was a major justification for the creation of the Code of Professional Responsibility: "Lawyers, as guardians of the law, play a vital role in the preservation of society."[404] American society needed those guardians of the law to protect the rule of law, which "makes justice possible."[405] To fulfill this role, lawyers needed to reach for the "highest standards" of ethical conduct. Service as a guardian of the law was a moral undertaking. That meant drafting a Code that grappled with moral issues in the practice of law, not simply offering a number of minimum standards of conduct. The Ethical Considerations were to prompt lawyers to ask how they best understood their "relationship with and function in our legal system."[406] A system giving lawyers such great responsibility required every lawyer to "find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards."[407]

Shortly before he was elected ABA President, Randall gave a speech on the professional responsibility of American lawyers. It was published in the *ABA Journal*.[408] Randall borrowed from the final draft of the ABA-AALS Joint Statement on Professional Responsibility in speaking of the important role of the lawyer in American society. How did the lawyer demonstrate "dedication … to the enduring ideals of the profession?"[409] It was not sufficient for the lawyer to know the specific restraints found in the ABA's Canons of Ethics: a lawyer needed to understand the reasons that justified those restraints. Then, and only then, could a lawyer "reconcile fidelity to those he serves with an equal fidelity to an office that makes demands on his conscience transcending the involvements of immediate interest."[410] Randall failed to follow his own advice, for which he was disbarred.

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403. ARIENS, *supra* note 35, at ch. 5.
404. CODE OF PRO. RESP. Preamble (AM. BAR ASS'N 1969).
405. *Id*.
406. *Id*.
407. *Id*.
408. John D. Randall, *Our Professional Responsibility: Lawyers Make Freedom a Living Thing*, 43 A.B.A. J. 315 (1957).
409. *Id*.
410. *Id.* at 315.

Randall died on December 28, 1983. His obituary in the *Cedar Rapids Gazette* called him a "retired lawyer."[411] It may be true that in the mid-sized city of Cedar Rapids, where John Randall had spent his last sixty years, it wasn't disbarment that was the cruelest blow. It was, as the *Preamble* to the Code of Professional Responsibility declared, "[t]he possible loss of that respect and confidence [in the community that] is the ultimate sanction."[412] His heirs urged well-wishers to give money to the Presbyterian Church or to the American Bar Endowment.[413] He may have lost his way, but his love for the ABA stayed with him. That love was unrequited. The ABA memorialized those important members who had died the previous year. With but a brief notice in the *ABA Journal*, it ignored Randall's death.[414]

411. *Obituary*, CEDAR RAPIDS GAZETTE, Dec. 30, 1983, at 10A.
412. CODE OF PRO. RESP. Preamble (AM. BAR ASS'N 1969).
413. *Obituary*, CEDAR RAPIDS GAZETTE, Dec. 30, 1983, at 10A.
414. *Happenings*, 70 A.B.A. J. 146 (1984).