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New York Law School
Commencement Address
Sunday, June 11, 1989

The Duty of Competence

Dean Simon, Members of the Board of Trustees, Faculty
Colleagues, Graduates, Families and Friends of the Graduates,
Honorees, Ladies and Gentlemen:

Exactly thirty-three years ago, in June of 1956, I
participated in commencement exercises as a member of the
graduating class at New York Law School. I do not remember the
name of the commencement speaker, nor do I remember the speaker's
topic. This should give you some sense of the importance of what
I am about to say. Nevertheless, I am happy to be here. At my
age, I am happy to be anywhere.

It is customary for commencement speakers to congratulate
the families of the graduates for their encouragement, support
and understanding, and I do not hesitate to do so. But no one
understands more about family sacrifices than the graduates
themselves. As I walked in today, I overheard a young graduate
expressing his gratitude to his parents in these words: "Mom and
Dad, I am about to receive my law degree and have finally
completed my formal education. I know you both have worked very

hard for me over the years. But just think -- after today, you can go out and work very hard for yourselves."

In handing out kudos on this auspicious occasion, we must not omit the distinguished members of the faculty, whose instruction, guidance and interest have inspired in the graduates a sense of justice as well as a knowledge of the law. I dare say that each member of the graduating class, through the herculean efforts of this faculty, is now able to examine any contract and determine at once whether it is oral or written. One member of the class told me that she always will remember the inspirational remarks made by a senior professor on the first day of Orientation three years ago. The professor said: "You are about to embark on a course of study that will try your very souls. Some of you will make it, and some of you will crack. Those who crack will be lawyers." You all have cracked, and I congratulate you.

But enough of congratulations! My duty today is to furnish a bit of advice to the graduates as they go out into the world of the law. My advice is this -- Don't go! Having discharged my duty, I turn now to discuss with the graduates a matter of serious concern to me and, I hope, to them -- the lawyer's duty of competence. In this, I assure you, I shall bear in mind the story of the long-winded politician who once began a speech with these words: "I speak not only for today but for the generations to come." One member of his audience immediately responded: "I

hope you don't talk until they get here."

The very first rule of the Model Rules of Professional Conduct speaks of the lawyer's duty of competence. It provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." There is a good reason why the duty to be competent is the first rule of professional conduct. It is because an incompetent lawyer cannot respond to the needs of her or his client. The lawyer who violates the duty of competence is unable to perform the service she or he is licensed to provide and may in fact cause serious harm. A lawyer lacking in competence is undeserving of a place in the legal profession.

To be competent professionally, and to properly advise and represent clients, a lawyer must cultivate a number of qualities. The most important, to my mind, is thorough preparation. I do not know for sure, but I speculate that one or two among you may once have been unprepared in class during the past three years. Such a phenomenon is so rare that I even hesitate to mention it. Nevertheless, I tell my own students at the beginning of the term that an unprepared law student can easily become an unprepared lawyer. Of course, an unprepared law student may receive a low grade or fail the course. But a lawyer who is unprepared for the trial of a case, the argument of an appeal, the drafting of a document or the advising of a client is open to a malpractice

action, a disciplinary proceeding, or both. For when a person entrusts his or her liberty, fortune or even life to one who violates that trust by inadequate preparation, there is a breach of the sacred responsibility that every lawyer undertakes in the representation of a client.

Unfortunately, there exists within the legal profession a small but readily identifiable number of attorneys who fail their clients in this regard. I have had the unwelcome opportunity to see and hear some of these attorneys during my career at the bar and during my service of almost fourteen years as a trial and appellate judge. I have heard the arguments of appeals by lawyers who were unfamiliar with the authorities cited in their briefs. I have observed the difficulties encountered by trial counsel who met their own witnesses for the first time in the courtroom. I have listened to the complaints of clients whose attorneys gave them incorrect legal advice. I have examined legal instruments so poorly drawn that one provision contradicts another. I have examined pleadings that were incomprehensible. I have witnessed the appalling consequences of incomplete research in the law and of inadequate investigation of the facts. The sad part is that all of these could have been avoided by thorough preparation.

I could say that all lawyers maintain a knowledge of the law sufficient for them to be considered truly competent professionals. I could say that, but it wouldn't be true. A

recent survey by the American Bar Association shows "Failure to Know the Law" as ranking second on the list of predominant errors giving rise to malpractice claims. The duty of competence requires that the counselor have a grasp of the substantive law bearing on the client's problem as well as the procedural law necessary to advance the client's cause.

Nobody knows better than you graduates, after three years of strenuous and demanding study, that the law constantly changes and that the only way to keep current is to continue your studies. Statutes are enacted, amended and repealed; administrative regulations are adopted, revised and rescinded; and case law precedents are established, modified, distinguished and overruled as the rules governing society ebb and flow. The study of law therefore must be a lifelong endeavor. Many publications and programs have been established to assist attorneys in this endeavor. Yet, there are those who are not even knowledgeable about the specific fields of law in which they practice. I well remember hearing the argument of a reputed expert who urged upon my Court a precedent that had long since been overruled by the Supreme Court. This lawyer was totally unaware of the latest case, although it was determinative of his appeal. An attorney's failure to keep herself or himself current as to the law affecting a client's interests is inexcusable.

The Comment to the first Rule of Professional Conduct tells

us that, through proper study, "[a] newly admitted lawyer can be as competent as a practitioner with long experience" and even "can provide adequate representation in a wholly novel field." It is therefore apparent that appropriate legal knowledge can be acquired as you go along. Every lawyer has to start someplace. The key is to read, research, write and review until there is sufficient legal knowledge to solve the client's problem. If after study doubt remains, the rules of professional responsibility counsel association or consultation with, or reference to, another attorney with the necessary knowledge of the field of law in question.

Legal competence also requires the application of various technical skills, many of which you already have acquired through your law school training. Analysis of legal precedent, identification of legal issues, distillation and summary of relevant facts, legal research, writing and draftsmanship and oral communication all are skills with which you are at least somewhat familiar. Actual practice will provide you with the opportunity to improve these skills and acquire others, such as the drafting of specialized instruments and pleadings, the discovery and evaluation of evidence, effective trial methods, negotiation techniques and effective discourse with clients. The solution of all legal problems requires one or more of the skills I have mentioned. The honing of those skills, like the acquisition of legal knowledge, is a lifelong enterprise for

those who practice the profession of law.

Lawyers entering practice today sometimes find it difficult to develop necessary professional skills. The new lawyer, especially in the larger firms, often is assigned very narrow duties and has no opportunity to evolve even the most basic skills. Some of my former law clerks, who have entered the legal world of the mega-firm and the mega-buck, complain bitterly of the lack of broader tasks as well as the absence of mentors to aid in the development of their skills. In my day, a new lawyer would begin to learn trial methods, for example, by carrying the briefcase of a senior lawyer to court. After observing some trials, the new attorney might be permitted to examine a witness or open to a jury. Ultimately, there would come the opportunity to try a case in a court of inferior jurisdiction. And so on. Today, it would seem, the pressures of modern law firm practice, including the need for billable hours, make the apprenticeship approach impractical. This is much to be regretted and is worthy of the thoughtful attention of the Bar. I think that most young lawyers would be willing to take a little bit less salary in return for a little more training at the early stages of their careers.

Partners are another matter. I very much enjoy the story of the partner who was checking in at the Pearly Gates. The Angel at the Gates said: "You are 95 years old and must have enjoyed good health to have arrived at such a ripe age." The partner

responded: "There must be some mistake. I am only 45." The Angel shuffled through some papers and said: "You are right. I was looking at your time records."

Without the capacity to manage a practice efficiently, the most prepared, knowledgeable and skillful lawyer cannot be classified as competent. Essential to good management in a law office is the establishment of calendar and docket control systems. The American Bar Association survey that I referred to earlier shows "Failure to Calendar" as ranking first on that list of predominant errors giving rise to malpractice claims. Lawyers who let a statute of limitations pass, who miss scheduled court dates or who fail to make timely filings are victims of their own inefficiency. Their clients are victims as well. Good management requires that lawyers institute management systems. It requires that lawyers keep track of fees, salaries, clients' funds, office expenses, forms and supplies, equipment, advances and miscellaneous overhead costs. An efficient law office has a good filing system and an adequate library, as well as complete financial records. There is a business aspect to the practice of law that I think has been overemphasized in recent years. I do not believe, however, that it should be overlooked. A client is not well-served by a lawyer's poor management. Neither is the lawyer.

There are many ways for lawyers to learn management techniques and to develop management abilities. Courses and

publications on the Economics of Law Practice are available from various bar associations. I think that Law Office Management should be a required law school course. Perhaps that is because I have reviewed so many cases that have revolved around law office failure. In this age of computers, there are available commercially a number of computerized information systems for law offices. Docket and calendar reminder systems have been computerized. Materials and forms of all kinds are available to lawyers who need them for effective practice management.

My fellow alumni, we live in a time of declining public respect for the legal profession and of diminishing self-respect on the part of lawyers themselves. The ABA Commission on Professionalism reported that only 6 percent of corporate users of legal services rated all or most lawyers as deserving to be called professionals. 55 percent of state and federal judges questioned in a poll said lawyer professionalism is declining. The City Bar Association recently was told: "You protect the least competent among you, the least disciplined among you, the least ethical among you."

A profession has been defined as the pursuit of "a learned art as a common calling in the spirit of public service, its work no less a public service because it is also a means of earning a livelihood." Perhaps we have gotten away from that definition. It remains for you, the new generation of lawyers, to restore pride to the profession by providing competent service to

clients, by maintaining high ethical standards, by demonstrating concern for your fellow men and women, and by understanding that there is no legal profession unless there is a commitment to public service on the part of each of its members. Ours is an ancient, honorable and caring profession, whose first concern always is the welfare of others. It is the cornerstone of our democracy. It is frequently reviled, but no man or woman in this Republic would be safe without it. Every one of you now is responsible for it.

I know that you will be competent lawyers and that you will serve your clients well -- that you will be thoroughly prepared, knowledgeable and skillful in your work and that you will have well-managed law offices. I know that you will practice in the spirit of public service and that you will see that the profession regains its rightful place in society. I know that you will have successful and rewarding careers at the bar. I know these things will come to pass because you are graduates of New York Law School.

Thank you.