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Fiduciaries-Corporate and Lawyers

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Mr. Chairman, members of the Indiana State Bar Association, officers of the Indiana Bankers' Association, ladies and gentlemen:

I have chosen for the title of my address, "Fiduciaries—Corporate and Lawyers," because I purpose developing in the course of my talk the parallel lines of fiduciary obligations that do or should govern the conduct of corporate fiduciaries, as well as the conduct of lawyers. If you do not mind, I shall deliberately leave the main highway of my subject for a while to take a road not so frequented and yet perhaps a little more interesting. I promise you the detour will lead us back to the main highway.

Many attempts have from time to time appeared in literature in which authors of imagination and brilliance have projected their vision of the future form of society through interesting description. Such, of course, are Bellamy's Looking Backward, Samuel Butler's Erewhon and H. G. Wells' When the Sleeper Wakes. There also have been such keen satires on society as Dean Swift's Gulliver's Travels. Recently there appeared a very interesting satire in which the author, Owen Johnson, describes society in the year 2181. John Bogardus had been put into a frigidrome in 1929, scientifically frozen and awakened to find himself in a society governed entirely by women, where men were preserved only for purposes of continuing the race and were kept herded like prize cattle. Naturally, one turns to ascertain what position lawyers would occupy in such a state of society. Johnson describes this scientific future civilization as follows:

"The highest caste is called the Minervenes. This comprises the highest types of mind, the scientists, the philosophers, the teachers, the doctors and the governors or administrators."

"What has become of the lawyers?"

"I'm not sure I understand what you mean by lawyers. What were lawyers? Do you mean law makers?"

"On the contrary," I hesitated before an obvious witticism before replying. "Lawyers interpreted the laws. In my day there were so many laws..."
and so often in conflict that no one ever contemplated any step without recourse to a lawyer."

"Laws that have to be interpreted. How strange!"

"But how can you leave property without a lawyer to draw up the will?"

"There is no one to leave property to. Everything returns to the state, and the state fixes the income of each according to merit."

"But surely there are such things as income taxes?" Acquilla shook her head. "But in your life don't you buy or sell?" "Certainly, but all this is arranged through government agencies." "Then there were the corporation lawyers who found the way to accomplish results that were seemingly forbidden by laws."

"There are no privately owned corporations."

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"Manifestly, then, there is no need of lawyers. This, I admit cheerfully, is a great progress."

A little later in the book, where the men are found in a field playing games, John Bogardus asks, "But why don't they begin to play?" observing a score of figures in conclave. Dianne answers:

"Why, the teams aren't yet on the field."

"But the—"

"Oh, those are the officials."

"Twenty-four officials!"

"I confess, dear, that I am not familiar with the great masculine sport," said Dianne, "but I believe that such a vast body of legislation has grown up about the game that not only each player has to be watched by two officials, but each team has to be represented by legal experts to argue on the interpretations which may arise."

"Then lawyers do exist!" I exclaimed."

You will observe that from this speculation on the scientific future of civilization, we are led to believe that lawyers as a class will exist even when there are no income taxes, no corporations—no, not even banks or trust companies. We may be certain that there will be two things that will survive—lawyers and games of sport, and lawyers will interpret and enforce, as they do now, the rules of the game.

Now, there is a difference between the phrase "sport," as descriptive of a man, and the term "sportsman." We describe as "a good sport" usually a man who can take his losses coolly, as does a gambler; but a good sportsman is a different person altogether. We sometimes think that sportsmanship is really the play of competitive spirits and we have taken much of the competition of business over into sport. A good sportsman, in
the true sense, has written an article in the Atlantic Monthly for January, 1932, which I commend to those who would get the most out of their outdoor play. The title of the article is: "Play Hard," and the point of it is that American sportsmanship on the whole takes the attitude that a game is something "which one should go in to win. To play fair, but to play hard; to give one's best, and if possible to win."

"Let's see if we can't break a hundred this morning. Then we will attempt to break ninety next week, and eighty next month. Why? Because it seems eminently desirable to do so, because trying hard and breaking records is part of our sporting credo."

The result is, as the author points out, we get very little change in what we turn to upon the golf course from the competitive action in the business world. "Look around," he says, "and you will notice that we are a country of men old and worn at forty, gray-haired, tired, exhausted, when we should be at our physical and mental best. Abroad there are fewer champions and record breakers, but there men work, enjoy life, and play until they are fifty, sixty, seventy; abroad they take things more casually, the competitive spirit in life and sport is not for ever urging them on and on and on until they are burned out."

There is no finer sportsman than the English gentleman. Even when the contest is hard and there is the desire to win, the English gentleman is at his best. I take for my purpose two incidents in the life of Sir Edward Marshall Hall, the great English trial lawyer. ("For the Defense." The Life of Sir Edward Marshall Hall. By Marjoribanks.) Sir William Wilcox was the chemical expert in the Greenwood trial, a capital case defended by Sir Edward Marshall Hall in 1920. There was a sharp duel between Hall, for the defense, and Wilcox, one of the prosecution's principal witnesses. Sir Edward, says his biographer, was a very sick man throughout the trial; he could neither stand up nor sit down without physical discomfort. Says Marjoribanks:

"It is interesting to go behind the scenes and discover that the long duel between the Crown expert and the defending advocate was made physically possible only by the skill and kindness of the former."

"Sir William had been giving medical treatment and assistance at the Ivy Bush Hotel throughout the trial to Marshall Hall, and, if it had not been for this, the latter would never have fought his way through this strenuous case as he did."
The other incident is this. In 1912 Sir Rufus Isaacs was Attorney-General and prosecutor in the famous Seddon trial, in which Sir Edward Marshall Hall successfully defended Seddon. Following the trial Sir Rufus wrote Sir Edward the following letter:

"March 15th.

"My Dear Marshall . . . do let me say how much I admired your defense, and whole conduct of the Seddons' case. Your five minutes' outburst for Mrs. Seddon made a most powerful impression; and, in my view, did much—if not the most—for her acquittal. His case was a terribly difficult one—the chain was as complete as circumstantial evidence can make it—and you had a very hard task, when it was so plain to all that the man had such a covetous nature, and was such a shrewd, cunning fellow. But I didn't mean to discuss the case. I wanted to say again what I said in your absence, in my speech, that it was a really magnificent forensic effort, and the whole defense was conducted by you in accordance with the highest traditions of our profession. I know you won't think it impertinent for me to write this to you. It is meant, and will be understood by you, as the expression of an opponent, who loves to see work well and nobly done. . . . .

"Yours ever,

"Rufus D. Isaacs."

I think you will agree with me that these are fine illustrations of the sportsman-like spirit of the great leaders of the English bar. The ability to achieve this poise and elevation which makes a gentleman elicits our admiration, even when we fail to live up to the fine standard ourselves. Take as an illustration this: You are playing a keen match with a friend. You have had a splendid drive; your brassie has landed you on the green with a fairly good chance of a birdie. Your friend and adversary has landed in the sand bunker on his second. It looks like your hole. Easily but carefully he takes his niblick and with an explosion shot he lifts his ball out of the trap, it drops on the green, slowly meanders up to the cup and drops in. You miss your shot. Can you say, "That was a fine shot, old man; it was simply bully" and really mean it, really feel it? If you can, then you are a true sportsman.

Perhaps you think I am wandering from my subject. I assure you I am not. I want to make clear that true sportsmanship means self-restraint and that whether we fall from the high standards of our profession or not, the rules of the game in our canons of ethics are the rules which should govern gentlemen and true sportsmen; and before I take my seat I hope to persuade you that we need more of this spirit in the commercial
as well as in the professional world. As late as 1888 Lord Chief Justice Coleridge permitted himself to say in the great Mogul Steamship Case:¹

"It must be remembered that all trade is and must be in a sense selfish; trade not being infinite, nay, the trade of a particular place or district being possibly very limited, what one man gains another loses. In the hand to hand war of commerce ... men fight on without much thought of others, except a desire to excel or to defeat them. Very lofty minds, like Sir Philip Sidney with his cup of water, will not stoop to take an advantage, if they think another wants it more. Our age, in spite of high authority to the contrary, is not without its Sir Philip Sidneys; but these are counsels of perfection which it would be silly indeed to make the measure of the rough business of the world as pursued by ordinary men of business."

But since the time when this was written a great change has come over us. The heads of large corporations have public responsibilities and trustee obligations. We are witnessing a conflict between standards, old standards dying hard and slowly under the advance attack of the new. While it is true that executives still must plan to avoid "going into the red," there is a substitution of the long range view of profit-making in place of the old short range. Business men are looking beyond the tips of their noses. Business institutions are no longer mushroom affairs, built up on pioneer lines or for short term operation. They are continuing corporate entities, with ownership distributed among stockholders who hold on to their shares, passing on to future generations their interests in these great entities. The borrowing capacity of our great railroads, our great utilities, our large industrial enterprises depends upon a credit established on the basis of confidence that management will look to tomorrow as well as today, and continue from today for many tomorrows. Immediate gains are being subordinated to substantial security. Out of the recent debacle has come something for the future. More emphasis is placed on security and stability than on large profit gains based on sharp turns of the market. I think we may look forward with confidence to business standards and practices which more and more will take on the color of the older and more traditionally minded professions. The profit making motive may still lead lawyers, as well as business men, to violate the rules of the game, but in the business world there are increasing number of good sportsmen who know already the long range value to all who play the

¹ 21 L. R. Q. B. D. 544, 553-4.
game of conforming like gentlemen and true sportsmen to the rules of the game. Here is a definite contribution we lawyers may make. First we can hold fast to our own rules and standards of professional conduct, and secondly, we can explain the reasons for them to our friends and working colleagues in the business world. Perhaps, too, when they understand them, they will apply them in their own field, for their own good and for the good of society.

We have a long series of experiences, we lawyers. We have what we call traditions. We have what we call codes of ethics. These rules of the game have a philosophy back of them, a philosophy which is not always understood. May I take you into the field of the set of rules which I am satisfied is not clearly understood, either by lawyers or by business men? Under our traditional standards and under our existing canons of ethics, lawyers have imposed upon themselves self-denying ordinances. One of them is Canon 27. Let me read it to you:

**ADVERTISING, DIRECT OR INDIRECT**

The most worthy and effective advertisement possible, even for a young lawyer, and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust. This cannot be forced, but must be the outcome of character and conduct. The publication or circulation of ordinary simple business cards, being a matter of personal taste or local custom, and sometimes of convenience, is not *per se* improper. But solicitation of business by circulars or advertisements, or by personal communications or interviews, not warranted by personal relations, is unprofessional. It is equally unprofessional to procure business by indirection through touters of any kind, whether allied real estate firms or trust companies advertising to secure the drawing of deeds or wills or offering retainers in exchange for executorships or trustee- ships to be influenced by the lawyer. Indirect advertisement for business by furnishing or inspiring newspaper comments concerning causes in which the lawyer has been or is engaged, or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the lawyer's positions, and all other like self-laudation, defy the traditions and lower the tone of our high calling, and are intolerable.²

What is the philosophy underlying this canon? In these days, when almost every kind of service, as well as every kind of merchandise, is introduced by salesmanship and advertising, what is there about the professional man's services that precludes the use of modern methods in the development, let us say, of his usefulness to others?

² *Canons of Professional Ethics, No. 27, American Bar Association.*
It so happened that as I was thinking about this address, there came to my breakfast table two letters, one addressed to Mrs. and the other addressed to Mr. As I opened mine, I found myself cordially addressed as "Dear Friend" and I looked to find the name of the writer, and in front of his name was "Dr." In most intimate fashion he said he took the liberty of addressing "this message" to me. He assured me that he had been highly successful as a dentist and that while recommendation was a dentist's best advertisement and he preferred to secure his patients in this manner, he would briefly enumerate some of the facts which made his success possible. Before arriving at the special features, he listed ten different elements as factors which had made his success possible. I shall summarize them briefly. His offices were well supplied with all the latest equipment for the performance of modern dentistry; all plate and bridge work made in his own laboratories on the premises; all extractions carefully done with gas or Novocaine; all instruments carefully sterilized; he uses the X-ray before commencing work and no charge is made for the X-ray; only a fine grade of tooth is employed and only a high grade of gold used; all fillings, inlays and crowns are carefully made; and, notice this soothing, appealing sentence: "Gentle and sympathetic treatment, combined with unlimited patience is my objective and that of my associates at all times." Mrs. didn't read hers. I turned mine over to her and asked her what she got out of it. The first reaction was, "Well, I guess he needs the practice." Then I said: "Would you employ a dentist of that sort?" Mrs. replied: "First I would like to know some of his patients." "Well, does the letter really inspire confidence in his professional skill?" The answer was, "No." Now, the gentleman had violated the codes of ethics of the medical profession. Probably many people attracted by this kind of solicitation, did not regard his self-praise either as poor sportsmanship, poor ethics or poor business; and yet to anyone who knows anything at all about professional service, the fact that a man exalts and extols his own virtues is *prima facie* evidence that he is not fit to practice his profession. We are all aware that publicity seeking, conspicuity, front-page spectacular playing up of cases is resorted to by men in our profession. We know our own opinions of such men. Their practices make them but contemptible in our eyes. Undoubtedly, the gullible are led astray. We know that probably the most expert, the most efficient, the most reli-
able, the most trustworthy lawyers are those of whom the general public hears very little, if anything. In the old days, when the trial lawyer was the dramatic figure in the community, in the pioneer days of Lincoln, trial work, skilfully done, made of the lawyer a dramatic hero. In some parts of the country this is probably still true, but in the great metropolitan centers the really great lawyers are those of whom the public hears little or nothing. They are like the great surgeons, selected by their professional brethren because of their skill, and if it is accompanied by a native modesty it enhances the personality of the man. As a matter of fact, except for a few men at the bar, we are all of us dependent for our rise upon the commendation of our brethren. I can see in my memory's eye clearly the three men, older than myself, who, at various critical points in my career, took me upon their shoulders and lifted me up. I know today that if it were not for the confidence of lawyers, which I am not sure I deserve, I would not have much of my present practice.

Is the discriminating selection of professional men on the basis of character and ability something of value to the community? Is professional employment to follow blatant, noisy self-exploitation? Is that in the interest of the community? You know the answer. In New York the New York Academy of Medicine and the County Medical Society recently issued a set of instructions to physicians, which, while approving the use of the press, the lecture platform, periodicals and the radio for the purposes of furnishing legitimate scientific information to the public, condemned without restraint such forms of publicity as exploited individual physicians through mention of their names in the public press. Even the newer professions are already alive to the importance of these restraints. In a book dealing with the ethics of the profession of accountancy, by A. P. Richardson, published under the auspices of the American Institute of Accountants, it is said:

"The professional man who solicits the patronage of potential clients must have an argument to adduce if he hopes to succeed. Without hope of success who would debase himself to such a low point as to solicit? The argument can only be praise of one's self, for that is what is offered for sale. It is not merchandise nor commodity nor tangible thing, but merely something immaterial, one's mental equipment and natural ability augmented by training and education—at least that is what is supposed to be offered. In order to convince the prospective buyer that these incorporeal
assets exist, it is necessary to mention them in a laudatory way, which must be repugnant to anyone with a sense of propriety. Can anyone imagine that a soliciting accountant or lawyer or any other man would call upon a possible client and offer his services without saying something in praise of them? All of us are imbued with a spirit of vanity. If we are truthful we admit that we think kindly of ourselves; but in the process of polishing barbarity into civilization, conceit is one of the things which must be obscured. The peacock may be a beautiful bird, but no one thinks very well of his manners. Yet the person who goes about selling himself must extol his own virtues much as the peacock spreads his tail."

I think as practical men we appreciate the difference between selling merchandise by advertisement and salesmanship and selling professional services. If I go to one of the large department stores and buy something, I am not seriously injured if I do not get my full money's worth. Under the liberal treatment of the department stores, I can return the merchandise; but even if I cannot, I take my loss and never go there again. But if I go to a dentist, I know that he can do me a permanent injury while I am in his chair, in his physical control. I know that a lawyer can do a client a permanent injury by drafting a document which does not adequately express his purpose. I know also that permanent injury can be done by inducing someone to put his property into an irrevocable trust. What are the principles that govern the conduct of a fiduciary? They are the highest principles of fidelity and trust. Never, never must the fiduciary put himself in the position of setting up his own self-interest against that of the beneficiary of the trust. We lawyers know the rule. I quote from Pomeroy:

"The Duty Not to Accept Any Position or Enter into Any Relation, or Do Any Act Inconsistent with the Interests of the Beneficiary.—This rule is of wide application, and extends to every variety of circumstances. It rests upon the principle that as long as the confidential relation lasts the trustee or other fiduciary owes an undivided duty to his beneficiary, and cannot place himself in any other position which would subject him to conflicting duties, or expose him to the temptation of acting contrary to the best interests of his original cestui que trust. The rule applies alike to agents, partners, guardians, executors and administrators, directors and managing officers of corporations, as well as to technical trustees."

Parties may not occupy positions of conflict of interest. The Colorado Court of Appeals said in *British Assurance Company v. Cooper*, 6 Colo. App. 25:

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3 Pomeroy, Equity Jurisprudence (4th), Vol. 1, Sec. 1077, p. 2473.
"The views of contracting parties are supposed to be in conflict. During the negotiation the interest of each is uppermost in his own mind, and his efforts are directed to securing a recognition of that interest. If he acts by agent, he is entitled to the exclusive services of the agent in the transaction, and to the full benefit of the agent's judgment and ability in making terms with the other party. It is manifest that where the same person assumes to act for both parties to a bargain he takes upon himself duties which are incompatible. If he is honest, leaving out of consideration any unconscious bias which might incline him toward one or the other side, the utmost that can be expected of him is impartiality; but impartiality is exactly the qualification which is inconsistent with agency. The agent is chosen to represent the interest of his principal against the hostile interest which he is to meet. He cannot discharge his duty and be impartial. It is therefore impossible for a person acting in the same transaction for two opposing parties to perform his duty to both; and a contract made by him in this double capacity may be avoided by either party, unless it was so made by his express authority, or unless with full knowledge of the facts, he afterwards ratified it. And it is not necessary for the purpose of avoiding it that the contract should be tainted with fraud, or be disadvantageous to the complaining party. The right to repudiate it grows out of the nature of the transaction itself, and is not connected with any question of fraud, or of benefit or detriment which might accrue from it to him."

*Shanley's Estate v. Fidelity Union Trust Co.* was an action to enjoin a corporate trustee from selling securities owned by the trust estate. It appeared that the trustee in its representative capacity owned stock of certain companies which had been leased to the Public Service Company and in which the Public Service Company held a controlling interest and with which the Public Service Company intended to merge. The Public Service Company had offered to purchase the stock of these companies from holders thereof. The trustee threatened to sell the stock of the trust estate. Some of the directors of the trustee were also directors of the Public Service Company and the trustee was the financial agent of that company. Vice Chancellor Backes, in enjoining the sale, said:

"Our trustee is not possessed of an independent and impartial judgment as to the advisability of selling the stock, and, if it be advisable, at what price. A half dozen or more members of its board of directors are directors of the Public Service Company. They represent both buyer and seller. As stockholders of the Public Service Company they have a pecuniary interest in the sale. It may be slight, but that is unimportant. They are our trustees, and the law demands of trustees the utmost fidelity. It does not tolerate personal dealing with the trust estate nor permit the

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*4 138 Atl. 388 (N. J. 1927).*
making of a penny's profit. The rule is grounded in sound morals and is reflected in the supplicating words of the Lord's prayer, 'Lead us not into temptation.' This is not an imputation upon the motives of the directorate of our trustee, but a simple statement of an elemental doctrine of the obligations of trustees. Further, these directors of our trustee owe a corresponding duty of loyalty to the Public Service Company, of which they are also trustees—directors are trustees. A trustee cannot serve two masters with sharply conflicting interests, equally well. It has been tried before. It cannot be done. A simple illustration: The directors of our trustee are in conscience bound to consider only the welfare of our wards and strive for the best price obtainable; as directors of the Public Service Company, their duty is no less to secure the most favorable terms. The true balance is infinite. Trustees are not privileged to experiment with it. In the dilemma in which it found itself, the course open to our trustee was to apply to the court for instructions, not to compel our wards to appeal for protection.”

It is clear that in the performance of his duties the fiduciary must never be governed by the element of profit. He occupies a position wholly different from that occupied by the ordinary businessman. The rule in the Mogul Steamship Case has absolutely no application to fiduciaries. The rule of caveat emptor is excluded from consideration. Not only must you refrain from misleading the person with whom you are dealing, but you must affirmatively disclose to him every fact which may possibly have a bearing upon the problems that are disclosed. Under these circumstances, it is impossible for a lawyer observing the rules of law which govern fiduciaries, as well as the standards of professional conduct set down for him by his profession, to occupy a dual relation. He cannot act for the trust company that is to receive the trust and for the donor or the will maker who is creating the trust. The very nature of the relationship is such that each party must have a lawyer disinterestedly pointing out the obligations and the implications of the document about to be executed. The suggestion that, by common consent, a lawyer may act for two parties of conflicting interest is out of order where the relationship is solicited by one of the parties. The assumption that, because the client is recommended to me by a trust company, whom he has already decided upon as the trustee, and thereby has removed the question of dual responsibility by his own action, is out of order. If I am to act as his lawyer I must be absolutely free and unrestrained to criticise the trust company itself which is under consideration as trustee. There is not a lawyer in any great metropolitan center who has not information upon which he should and must base
a discriminatory selection of banks or trust companies for fiduciary duties. He must exercise that judgment as freely as the family doctor does in advising upon the selection of a surgeon. He must have no self-interest in the selection. He must be free to say that two trustees should serve, instead of one. If we are to select fiduciaries as we select lawyers, on the basis of their character qualification, how shall we do this if there is no discrimination? Do we say that all lawyers are competent and qualified to perform the specific services called for in the given situation? Do we say that every lawyer is competent as a trial lawyer? Do we not discriminate between A and B, even to considering the nature of the case that is to be tried? I have no hesitancy in saying that, in my own city, my contact with corporate fiduciaries is such that I rate three or four of them far above all the others in the character of service they furnish, in the kind of men at the head of their trust departments, in their consideration of the delicate and subtle questions that come up in connection with a trust. I would not lend my hand to a document which selected any one of a number of corporate fiduciaries in New York whose record in certain cases I chance to know. That knowledge belongs to my client. It is part of my experience and skill which he is entitled to have when he comes to me.

There is another consideration, and you will see that while I have been on a detour in the early part of our travels, I am now on the main highway. The rules of sportsmanship require that they shall apply to Class A men, as well as Class B men and Class C men. If the sand wedge is not to be used in the sand trap, though it may mean a stroke in the game, it must not be used by Class A men and forbidden to Class C men. If the development of practice by solicitation is forbidden to those lawyers whose practice is commercial or negligence cases, there should be no discrimination in favor of men who can get business through the active solicitation and advertising of corporate banks and trust companies. There cannot be one law for the Sanhedrin and another for the congregation. There has been some misunderstanding on this subject on the part of men of outstanding leadership at the bar, who have not seen clearly the implications of the fiduciary principle as applied to the relationship between trust companies and lawyers. But I am happy to report to you that in our city, after several years of careful study, a clear and explicit statement has been made by the two
leading bar associations of the city and county. Let me read it to you:

"Persons contemplating the making of a will or the establishment of a trust should be fully advised by their own counsel before decision on matters such as (a) whether a trust should be created at all, (b) what should be its duration, (c) whether it should be revocable or irrevocable, (d) what qualifications are desirable for executor or trustee, (e) how many fiduciaries should be named, and (f) what should be the powers, immunities and compensation of any such fiduciary.

"Decisions on all of these points are of serious importance and in many cases irrevocable; and the desires of a prospective fiduciary may frequently conflict with the best interests of the testator or creator of the trust or of the beneficiaries thereof.

"There should be no divided allegiance upon the part of the lawyer drawing or advising with respect to a will or trust agreement.

"In the judgment of the Associations a lawyer should not advise a prospective testator or donor as to the making of a will or trust if the lawyer already occupies a relationship to a proposed or potential fiduciary which might embarrass him in advising fully and freely as to all matters involved in the formation and terms of such trust. Such embarrassment exists where the prospective testator or creator of the trust has come to the attorney at the instance of any person or institution seeking to be named as fiduciary.

"Moreover if an attorney habitually obtains clients as a result of solicitation of fiduciary relationships by a corporate fiduciary, and such solicitation is known to the attorney, he is acquiescing in the indirect procurement of professional employment and taking the benefits thereof.

"The Associations recognize as an exception to the foregoing principles, that past relations of trust and confidence may result in an attorney being peculiarly qualified, and consequently under a duty, to advise a client in regard to his will or a contemplated trust. In such case he may do so, irrespective of relations with the prospective fiduciary, if after full disclosure the client so requests.

"Lawyers should refrain from assisting in or encouraging the distribution to laymen of form wills or trust indentures or similar documents, and should endeavor to stop the practice, because of the danger in the use of such documents without the revisions and corrections that are necessary to meet the needs and intentions of the individual client under advice of his own counsel."

It has been suggested that a strict literal reading of this announcement would preclude a lawyer from accepting a single client on the recommendation of a bank or trust company. Why should a bank or trust company be precluded from giving information as to the ability and qualifications of a lawyer if called upon by a depositor? Theoretically nothing can be said in opposition to this, and I don't think the associations meant that
the interpretation should be taken so literally; but the lawyer must be on his guard. It so happens that, discussing the topic I am discussing before you tonight, at a meeting of a small group of lawyers in New York, this very question came up and one of the lawyers present told this story. A young lawyer opened his office on Main Street in a thriving town. On the same street was also the office of the local trust company. Some of its officials knew the young man and his name was added to the list of lawyers which the trust company maintained. When a customer of the trust company had need of a lawyer and did not know to whom to go, the trust company would suggest to the customer some one of the lawyers on its list. So it happened presently that a woman having in mind the creation of a trust was sent to our young friend. He went over the situation with her and finally gave it as his opinion that she ought not to create a trust. Nothing happened. Later a man appeared at the little office, armed with the suggestion from the trust company that there should be included in the trust he was about to create a provision that the trustee might invest the trust funds in securities other than those declared legal for trustees by the state. The trust deed was drawn by the young lawyer but the provision was not included. A little later something did happen and what happened was this. On Main Street an official of the trust company met the young man and he indicated very clearly that this young man had disappointed him very, very much. Later our friend found that the trust company knew as well as he did that there were fifteen other lawyers in the town, and that thereafter the sixteenth and newest member of the group would be forgotten when a customer of the trust company wanted to select a lawyer.

I think I have covered this phase of the discussion so that you will understand the underlying philosophy, and I feel confident that, as the leaders of banks and trust companies come to understand more fully this philosophy, they will themselves see its value. For of what use is it carefully and painstakingly to build up a reputation for efficiency and honor, if all are placed upon the same level and the retainer or the business is to go to the loudest and boldest and most pressing of your competitors? I think that the fine men who have been at the head of large banking institutions have allowed this problem to fall into the hands of advertising men, go-getters, high powered salesmen, who are utterly ignorant of the fiduciary principle, and in con-
sequence the banking profession, as such, has been lowered and demeaned. What an error to publish and distribute such a document as this:

YOUR FAMILY, YOUR PROPERTY AND YOUR WILL

Blank Bank and Trust Company, Blankville

You should choose a trustee that will not only give expert and constant business management to your estate, but will also give to your beneficiaries sympathetic personal consideration in the matters which they bring to the trustee's attention.

Our institution will give the personal interest which you desire your family affairs to have. While we are impartial in family disputes, we deal with each personal problem of a man's family in a friendly, individual way. Our officers welcome discussion of these matters, and are always available for this purpose.

Finally, a trust institution is of unquestioned financial responsibility. This is highly important. Often a man in appointing his wife or other individual will relieve the person appointed of the necessity of providing a bond, out of a desire not to offend the person. This question need not arise at all when we are appointed, as our financial responsibility under our charter assures complete protection.

Note that this is in the form of a printed circular, to be used by every trust company, without change. Suppose we lawyers got up a circular of this sort and sent it around, advising the public of the importance of our legal services and told everybody that every lawyer at the bar was equipped to perform his work on the same basis of equality. Would that be helpful to the community in bringing to the top the better men?

You will observe that I have not said anything up to this time about the corporate practice of the law. In New York, after about fifteen years, we have practically eliminated the corporate practice of the law. I have given in a footnote, Section 280 of our Penal Law, which has been most effective, but in addition

5 Corporations and voluntary associations not to practice law.

It shall be unlawful for any corporation or voluntary association to practice or appear as an attorney-at-law for any person other than itself in any court in this state or before any judicial body, or to make it a business to practice as an attorney-at-law, for any person other than itself, in any of said courts or to hold itself out to the public as being entitled to practice law, or to render or furnish legal services or advice, or to furnish attorneys or counsel or to render legal services of any kind in actions or proceedings of any nature or in any other way or manner, or in any other manner to assume to be entitled to practice law or to assume, use or advertise the title of lawyer or attorney, attorney-at-law, or
equivalent terms in any language in such manner as to convey the impres-
sion that it is entitled to practice law, or to furnish legal advice, services or
counsel, or to advertise that either alone or together with or by or through
any person, whether a duly and regularly admitted attorney-at-law, or not,
it has, owns, conducts or maintains a law office or an office for the prac-
tice of law, or for furnishing legal advice, services or counsel. It shall
be unlawful for any corporation or voluntary association to solicit itself or
by or through its officers, agents or employees any claim or demand for
the purpose of bringing an action thereon or of representing as attorney-
at-law, or for furnishing legal advice, services or counsel to, a person sued
or about to be sued in any action or proceeding or against whom an action
or proceeding has been or is about to be brought, or who may be affected
by any action or proceeding which has been or may be instituted in any
court or before any judicial body, or for the purpose of so representing
any person in the pursuit of any civil remedy. Any corporation or volun-
tary association violating the provisions of this section shall be liable to a
fine of not more than five thousand dollars and every officer, trustee,
director, agent, or employee of such corporation or voluntary association
who directly or indirectly engages in any of the acts herein prohibited or
assists such corporation or voluntary association to do such prohibited acts
is guilty of a misdemeanor. The fact that any such officer, trustee, director,
agent, or employee shall be a duly and regularly admitted attorney-at-law
shall not be held to permit or allow any such corporation or voluntary
association to do the acts prohibited herein nor shall such fact be a de-
fense upon the trial of any of the persons mentioned herein for a violation
of the provisions of this section. This section shall not apply to any corpo-
ration or voluntary association lawfully engaged in a business authorized
by the provisions of any existing statute, nor to a corporation or voluntary
association lawfully engaged in the examination and insuring of titles to
real property, nor shall it prohibit a corporation or voluntary association
from employing an attorney or attorneys in and about its own immediate
affairs or in any litigation to which it is or may be a party, nor shall it
apply to organizations organized for benevolent or charitable purposes, or
for the purpose of assisting persons without means in pursuit of any civil
remedy, whose existence, organization or incorporation may be approved by
the appellate division of the supreme court of the department in which
the principal office of said corporation or voluntary association may be
located.

Nothing herein contained shall be construed to prevent a corporation
from furnishing to any person, lawfully engaged in the practice of law,
such information or such clerical services in and about his professional
work as, except for the provisions of this section, may be lawful, provided
that at all times the lawyer receiving such information or such services
shall maintain full professional and direct responsibility to his clients for
the information and services so received. But not corporation shall be per-
mitted to render any services which cannot lawfully be rendered by a
person not admitted to practice law in this state nor to solicit directly or
indirectly professional employment for a lawyer.

(Section 280, Penal Law, State of New York—Am'd by L. 1909, ch. 483.
to that, in the year 1914, our Committee on Unlawful Practice of the Law established the principle that the character of a corporation could be revoked if it undertook to practice law. The Attorney-General of the State, in the Matter of National Jewelers Board of Trade, held that unless the corporate entity ceased to furnish lawyers and lawyers' services, he would bring proceedings to revoke their charter. Since then almost every corporate entity against whom complaint has been made has very promptly indicated, either to our committee or to the district attorney, that it prefers to change its practices rather than to have its charter revoked. Moreover, in Matter of Pace and Stimson, where lawyers' services were furnished by an out of town corporation for the purpose of forming corporations, preparing charters, minutes and the like, our court held, in disciplinary proceedings, that the practice was unprofessional and that lawyers participating in such a practice would in the future be severely disciplined. The lawyers in question were honorable men and received merely a reprimand and a warning. I have put in a footnote, the references to the recent decisions in Ohio and Illinois. In Ohio the decision establishes the principle that the right to practice law is an exclusive franchise, and that any member of the bar may bring proceedings to restrain the practice of the law by anyone not authorized so to practice, whether it be an individual or a corporation. In Illinois the principle is established that a bank or trust company which practices law may be punished for contempt of court. So far as the banks and trust companies of New York City are concerned, as long ago as 1919 New York institutions publicly announced that they did not practice or desire to practice law or draw legal documents, nor have them drawn by their own counsel, and that it was the custom of most of the New York institutions to employ counsel for the testators or donors in legal matters concerning those estates or trusts. This position was reaffirmed in an address before the Committee on Unauthorized Practice of the Law of the

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American Bar Association, at Atlantic City, New Jersey, on September 16, 1931, by Merrel P. Callaway, Vice-President, Guaranty Trust Company of N. Y. In his address, which was entitled "Cooperation Between the Trust Companies and the Bar," Mr. Callaway said:

We explained (1919) that the New York institutions did not practice, or desire to practice, law, or draw legal documents, nor have them drawn by their own counsel, and that it was the custom of most of the New York institutions to employ counsel for the testators or donors in legal matters concerning those estates or trusts.

You will see, therefore, that our recent problems have been the problems of making our own canons of ethics applicable to lawyers for trust companies, so that no group should profit indirectly by any practice of soliciting or advertising, even though the soliciting or advertising be done by the client. The rules of the game are applied to Class A players, as well as Class B and Class C. Next we had the problem of making it clear that even lawyers who are not on the payroll of banks or trust companies must be sure that references to them by prospective testators or donors should not put them in the embarrassing position of serving conflicting interests. In the discussion of these phases of the matter, which, you will observe, deal wholly with the conduct of lawyers, we found ourselves studying the advertising of the trust companies and considering in what respects the form of advertising was consonant with the philosophy underlying the fiduciary relationship. Was there anything in the philosophy underlying our code of ethics which was applicable to the conduct of trust companies in their advertising? Personally I think there is, and I have attempted to indicate the lines of my reasoning in this presentation.

However, the extent to which the principles or the philosophy which I have been developing applies to the advertising of banks and trust companies for their trust department activities is a matter for the corporate fiduciaries themselves to determine. We think we have something to offer in the way of experience, since we are fiduciaries ourselves, not only when we act as executors or trustees but always. The relationship of attorney and client in all of its aspects is fiduciary. Certainly a profession that has existed as long as ours ought to have something to offer in the way of knowledge based upon experience. We have tendered it to the newer profession, to the profession of corporate fiduciaries. We do it in no spirit of hostility. We do
it in the common interest. We want the public to have faith in fiduciaries. We know that the best way of securing the best kind of fiduciary service is to have the public select discriminat-
ingly, on the basis of merit and character, and we know that wholesale and indiscriminate soliciting and advertising fail to achieve this end. It has been suggested that the corporate fiduciaries form their own organization along the lines of a bar association, and formulate for themselves their codes of ethics and take steps to see that these standards are observed. I do not know that there ever will be secured machinery like that of the disciplinary committees that we have in our bar associa-
tions. I do not see how you can work out a method of disbaring corporate fiduciaries who are guilty of unprofessional conduct. We lawyers spend a good deal of money in New York in this disbarment business, but I do not see yet how the fiduciaries are going to work out such machinery. And here let me get back to the beginning of my talk, to the elements of true sportsmanship, for I believe now we have reached a crisis in the evolution of economic society. I believe that we have come to the point where we can no longer rely upon the old-fashioned pioneer competitive methods of letting the devil take the hindmost. I do not know whether you like the word "collective" or not. You may think that it smacks of bolshevism or communism; but I think you are applying in your daily activities the principle of collective action. What is a corporation except a group, sometimes a very large group, of individuals who join together in collective activity? What are trade associations except a form of collective activity? Such excellent suggestions as have come from Mr. Gerard Swope of the General Electric Company for the organization of industry on the basis of self-government are in this category. That is a long story. The garment industries in New York have tried it. They have failed and they have succeeded. But it must come. There must be restraints which an industry as a whole puts upon its members. How far these restraints are to go we do not yet see clearly. Some of them have been pointed out by such excellent minds as Walker D. Hines. At the National Con-
ference on the Relation of Law and Business, held at New York University on October 26th, 1931, he said:

"In my opinion, arrangements to balance production with demand could be tested by a principle inherently sound and entirely practicable because its operation would be susceptible of being measured by attainable tests. For example, statistics are or should be available to indicate fairly what
is normal production and normal demand. An arrangement among the
producers that production shall be reasonably in balance with the demand
thus indicated and shall be open to readjustment as changes in the demand
become apparent is an entirely practicable arrangement and is readily dis-
tinguishable from arrangements which seek to create artificial shortages
regardless of demand."

It must come. Industry will go to rack and ruin if there is not
some agreement and understanding among those who constitute
the group. How far we shall change the Sherman Anti-Trust
Law we do not yet know. The general fear on the part of the
public is that the granting of power to groups to govern their
industry means the exploitation of the people by those who hold
the power. That is the philosophy back of the Sherman Anti-
Trust Law and the Federal Trade Commission, and we must
admit that historically there is a great deal of justification for
this fear. But there is coming the newer philosophy. This
philosophy carried the thought that we must permit collective
action by groups, not only in the interest of the group and all of
its members, but in the interest of society as a whole. Now,
how can you have effective collective action if you have not the
true spirit of sportsmanship? If men will not count their
strokes even when the other fellow is not looking, you cannot
play the game. Do we know what is happening in business to-
day? James A. Farrell, addressing the members of the Steel
Institute in May, 1931, said, in speaking of the inability of the
captains of the steel industry by voluntary effort to avoid
ruinous competition by selling below cost:

"I do not see any hope of better prices in our business until the presi-
dents of the companies are willing to stop this diabolical business—that is
the word—the most diabolical situation that ever was perpetrated in the
business—and it ought to be stopped.

* * * * * * * * * * * * * * *

"But it is not honest for us to go and sell our goods below the cost of
production and deprive our stockholders and our workmen of what they
are entitled to."

Let me give you a true story. It is vouched for by a member
of the bar, a friend of mine, who knows the facts. The names
are, of course, hidden. About twenty years ago in one of our
large cities there was a meeting of all the members of a certain
article of women's apparel, presided over by the president of the
association, a large manufacturer. The suggestion was made
at the meeting that the manufacturers had been cutting each
other's throats by selling a certain kind of article under $1.75 a dozen. A resolution was offered that all the members of the association should agree on a standard of production and quality and not cut under $1.75. The presiding officer, while the matter was under discussion, excused himself, seeing the motion was going to prevail, got a substitute to take his place and went off to the telephone. There he called up a number of cities in which there were large buyers, on the long distance telephone. He told the buyers what was going to happen, and stocked them up to the eyes at less than $1.75. When the resolution was passed, the other members of the association found that all the big business had been corralled.

In “The Coming of the Amazons” there appears this colloquy between John Bogardus and Dianne. She is taking him by aeroplane over the field where the men athletes, bred specially for the spectacles, are playing. Says Dianne:

“They are really good for nothing else and we never mate them with the higher castes.”
“What’s happening now?”
“The officials are searching the players, of course, before the game begins.”

“These preliminaries,” we are told,

“were conducted with the minute fidelity of a police force. Not only were the nose guards, head guards, neck protectors, ear mufflers, shoulder, knee and elbow protectors searched for any metallic substance, but the soles of the shoes were displayed against the possibility of murderous spikes. That these precautions were not unnecessary was evidenced by the storm of boos and groans which accompanied the unmasking of several players, when the offenders were on the opposite side.”

I think we must all agree that if we are not more and more to resort to governmental control and regulation of business and yet are to achieve that kind of economic planning which can come only through collective agreement, we shall have to develop a self-discipline in trade and business, as well as in the professions, that is more consonant with the true ideals of sportsmanship than we have heretofore employed. Isn’t it too bad that the man who plays a game with you on Saturday afternoon and who will count every stroke whether you are looking or not, and will never ground his club in the sand trap, will think it is just clever business to do the very opposite on Monday morning, if you happen to be his competitor? I think we members of the
legal profession, looking over the field generally, must come to the conclusion that these traditional standards of the game which we have adopted are something of very great value to civilization, and that instead of allowing them to be washed down in the flood of pioneer competitive business, go-getting, eager salesmanship and advertising, we should hold fast to them as we hold fast to our homes. And I think that as the new profession of corporate fiduciaries comes more and more to appreciate that this is not just a matter of lawyers trying to get employment by eliminating competitors from the field, but goes to the very heart of healthy community standards and rests upon the effectuation as well as preservation of the fiduciary principle, more and more the rules of the game that we have found in our profession to be helpful will be taken over by them, as the accountants and the engineers and other professions are now taking them over. There will be restraints upon this matter of advertising and soliciting business by banks. If there is not, it will simply run riot and we shall pay the piper in the end, as we always do. We have got to build up a fine sense of responsibility, of subordination of self to a larger interest, of loyalty to the group, of observance of the rules of the game, of repression of the instinct to win by playing hard, which only too often means fouling the line. We must all join forces or else the self-seeking, individualistic, profit-making motive will engulf us all. In the Herald-Tribune magazine section of December 6, 1931, Count Sforza, reviewing conditions in Germany, says of Germany: "Virtually nobody believes any longer in the sanction of the individualistic principles of the nineteenth century." Of course, this point of view is spreading throughout the world. Conservative England is coming to this point of view. Men in our own country are coming to this point of view. The conservative New York Herald-Tribune in the same issue, discussing the testimony of Mr. Charles E. Mitchell, chairman of the board of the National City Bank, before the Senate Committee during the previous week, says the great economic issue "is not between governmental control and unrestrained private enterprise, but between regulation from Washington, and regulation from within industry." We must "modify the anarchy of free competition . . . curb the individual . . . control the forces of supply and demand in the interests of a more stable economic order." Isn't it clear that if there is to be this control, it must either come through rules of the game made by
the players themselves, or through some outside agency? Either there must be the force of law with governmental sanction and governmental power back of the rules, or it must come through the self-restraint, the self-discipline of those who play the game. In short, must we not learn, in industry, in trade, in banking, to apply the ordinary morality of the true sportsman to the business in hand? We must learn to be as rigorous in imposing upon ourselves the restraints of the rules of the game we play in the city on five days in the week as we are in imposing upon ourselves the rules of the game we play in the country over the week-ends or on holidays. That, indeed, is the essence of bar association activity. That is what we are doing in the field of establishing and maintaining big standards which we want to apply to all practitioners. We should like our friends, the corporate fiduciaries, to understand this point of view. It is very fundamental. And when they do understand it, we shall work together, lawyers and bankers, in a common endeavor to improve each other's position in the community as servants.

I am quite aware of the fact that there is a wide margin between the precepts of our profession and the practices of some of our members, and yet, having been chairman of the grievance committee of the state bar association of my state for five years, I am prepared to state that relatively—especially in these times of economic competition—I know of no group of men who have stood up to their fiduciary obligations in greater measure than the legal profession. The examples where men have fallen are conspicuous, as conspicuous as the divorce cases are, compared with the multitude of happy marriages and fine family relations. There is nothing sensational in a lawyer who performs his duty against his own self-interest. It does not make headlines in the newspapers, but it goes on just the same.

Only a few weeks ago the New York County Lawyers' Association tendered a dinner to a fine lawyer and a fine judge. When he arose to his feet to make response, he received the greatest ovation that I have ever heard tendered to a man performing public service quietly and modestly. His address had all the fine literary qualities of the scholar that he is. Near its end he struck a note and used a figure which I should like to borrow at this point:

"A myth has grown up about the profession of the law, a fable, a tradition, not always the truth as seen and realized in conduct, but none the less the chief thing about the profession, the thing that makes it worth
while, the thing that ennobles it, the thing that it really is in its best and truest moments, the thing without which, we may be sure, it would wither and die. The tradition, the ennobling tradition, though it be myth as well as verity, that surrounds as with an aura the profession of the law, is the bond between its members and one of the great concerns of man, the cause of justice upon earth."

It is perhaps too early to expect that the newer professions, that business itself shall be inspired by such a myth as this. I wonder how soon the standards of fiduciary responsibility, of single-minded devotion to duty, will dominate the business world, as indeed they dominate our profession? And yet as the days of unrestrained anarchic individualism pass by and newer days appear of group responsibility and self-government, perhaps our Bar standards of self-restraint, our experience in group control, our standards of fiduciary duty and responsibility may prove to be a real contribution. Certainly we should hold fast to them for ourselves, not in our own self-interest, but simply because in this rapidly changing world of ours they constitute some of the few possessions to which we can really hold fast with confidence in their enduring value. Indeed, as things look now, they may turn out to be the world's very best possessions.
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