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1994]

Giannella Lecture

ZEN AND THE ART OF LAWYERING*

JAMES L. MCHUGH**

I am honored to deliver the Giannella lecture in this 20th anniversary year of the death of this marvelously talented, devoted and creative teacher. I was privileged to be one of Donald Giannella's students. In Villanova's tradition of great teachers, Professor Giannella was truly one of the greatest. Donald took seriously the art of teaching. He brought to teaching a combination of delight, imagination and exceptional creativity. He knew that the best work a teacher can do is to show students the path to their self-development. By the very example of his classroom presence, he showed us the skills and attitudes which are essential for the art of lawyering. Watching Donald Giannella teach was a study in focus on the moment, attention to the purpose of the exercise and mindful imagination in finding ways to present ideas or confront problems. We came to law school wanting to learn how to be good lawyers. All we had to do was watch Professor Giannella in a classroom. He was fully and mindfully focused on the moment, and that is the essence of the art of lawyering.

I will use this opportunity tonight to reflect upon what Professor Giannella and his colleagues were teaching when I was a student here and upon the connection between that teaching and the essential skills of the art of lawyering.

But I will first tell you about a most wonderful coincidence. Last year's Giannella lecture, delivered by John Frohnmayer, concluded with a poem. The poem was written by a poet named Sam Hazo. And just as Professor Giannella was my teacher—so was Sam Hazo. The first class that Sam Hazo taught when he began his teaching career at Duquesne University in the fall of 1955 was the first class I attended as a freshman student at that University. Incredibly, also during that first hour, Professor Hazo and I somehow discovered that we had both been the Editor-in-Chief of the same

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(1295)

high school newspaper. Sam Hazo is both a great teacher and a great poet. I took every Sam Hazo class that I could fit into my schedule. As I honor Donald Giannella, I also honor Sam Hazo, not just as a great poet, which he is, but as one of the truly significant teachers of my life. Today, he remains at Duquesne and he is also the Director of the International Poetry Forum. And, in October of 1993, he was honored by being designated as the State Poet of Pennsylvania, the first person in history so honored.¹

Professors Hazo and Giannella are teachers of the same mold: thoughtful, insightful teachers who recognize that their mission is not solely to impart information, but to urge their students to set out upon the path of their own personal growth. I am here as an indebted former student of both of these talented, generous men.

The words of Samuel Hazo with which John Frohnmayer concluded his lecture are again quite relevant to our discussion tonight:

I wish you what I wish myself: hard questions and the nights to answer them, the grace of disappointment and the right to seem the fool for justice. That's enough. Cowards might ask for more. Heroes have died for less.²

These are words worth noting by those who take our profession seriously. Lawyering at its best is not just a means to income. We are essential guardians of a crucial element of the fabric of our culture. And if we do not find some very hard questions as we look at the state of our profession today, we are not paying attention. If we think those hard questions have easy answers, we are not paying attention. And if we think that we need not address these hard questions, we are not paying attention. The zen master tells his students: "Pay attention! Pay attention! Pay attention!" This is equally sound advice for lawyers.

Let us look at what all this might have to do with those valuable lessons great teachers like Donald Giannella taught us. First, it is important to emphasize that I am not a learned zen master—let that be absolutely clear. Why then is this lecture presumptuously titled "Zen and the Art of Lawyering?" Well, if zen thinking can be applied productively to such diverse subjects as motorcycle mainte-

1. PITT. POST-GAZETTE, October 24, 1993, at B1.

2. SAMUEL HAZO, *To a Commencement of Scoundrels*, in BLOOD RIGHTS 5-6 (U. of Pittsburgh Press 1968) (excerpt from poem).

nance³ and archery,⁴ why not lawyering? Is maintaining motorcycles and shooting arrows really all that different than lawyering? And if Professor Ernest Roberts, another of my Villanova mentors, could talk about “Bats and Owls and the Insane Moon” in the 1991 Giannella lecture,⁵ I hope I might be accorded at least some latitude to explore the sublime.

We are fortunately not alone as we look at the link between law schools and the art of lawyering. In 1989, the American Bar Association Section of Legal Education and Admissions to the Bar established an ambitious task force. The task force was given the daunting title: *Law Schools and the Profession: Narrowing the Gap*. The task force published its Report in 1992, and it is an exciting document.⁶ At its core is a brave statement of what the task force concluded are the fundamental lawyering skills and professional values. The Report also addresses how these skills and values can be developed prior to law school, during law school and after law school. The report wisely recognizes that these stages of development are intrinsically linked and that the process must continue throughout our careers. It also makes a compelling case for developing much greater connections between the teaching of law and the practice of law.

Few would be surprised by the Report’s findings of the skills deemed to be fundamental. They are:

Problem Solving
 Legal Analysis and Reasoning
 Legal Research
 Factual Investigation
 Communication
 Counseling
 Negotiation
 Litigation and Alternative Dispute Resolution
 Organization and Management of Legal Work
 Recognizing and Resolving Ethical Dilemmas.⁷

3. ROBERT M. PIRSIG, *ZEN AND THE ART OF MOTORCYCLE MAINTENANCE* (MORROW 1974).

4. EUGEN HERRIGEL, *ZEN AND THE ART OF ARCHERY* (Pantheon 1953).

5. E.F. Roberts, *Bats and Owls and the Insane Moon: The Search for the Republic’s Unwritten Constitution*, 36 VILL. L. REV. 1559 (1991).

6. *Legal Education and Professional Development—An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR (1992) [hereinafter *Legal Education and Professional Development—An Educational Continuum*].

7. *Id.* at 138-40.

While we are not surprised by the skills identified, some would be surprised by the call for greater partnership between those who teach and those who practice our profession. There certainly has not been a great amount of such partnership in the past. We should applaud this recommendation and look for ways to make it a reality. We can also applaud the fact that Villanova Law School has already begun to examine how the Report recommendations might be implemented in its curriculum. Hopefully increasing numbers of practitioners will also begin to see the wisdom of introducing more professional development activity into their own professional agendas—and hopefully we will see increasing connection and cooperation between our practitioners and our teachers.

This continuum of learning, before law school, during law school, and after, is fundamental to good lawyering. It is this link between the teaching and the doing which brings us to the zen of the art of lawyering.

An essential first principle of zen philosophy is that every moment is important. Thus, the origin of the exhortation to “pay attention.” Bernard Glassman, a zen teacher who has fascinated even the *Wall Street Journal* because he also runs a successful business,⁸ has observed: “Don’t work in order to do something else. Honor your work . . . Your work is the most important thing in the world, when that’s what your doing. And I don’t care what it is. That’s because your every action is the most important thing your doing from morning to night.”⁹

Donald Giannella and his fellow professors at Villanova had a rather successful method of stimulating the members of my class to “pay attention” to the moment. They made awesomely clear the harsh fact that not all of us were going to survive the first year. In fact, they told us that probably only half of us who started would graduate. They were correct. That got the attention of many of us — and we certainly took far more moments seriously than we might otherwise have chosen to do. We were advised to read every assigned case, attend every class, record in our notebooks every question and hypothetical that was posed by the professor, outline every course and form study groups to discuss and debate the issues. Those of us who followed that advice learned that every moment was indeed valuable and important. We had a daily sense of ur-

8. *Blending Zen and the Art of Philanthropic Pastry Chefs*, WALL ST. J., Jan. 2, 1992, at 12.

9. Bernard Glassman, *Yellow Brick Road*, Address at the Naropa Institute in Boulder, Colorado (March 20, 1989).

gency. And while we certainly felt apprehension, many also found that working in an environment where we shared the commitment to paying attention was both stimulating and satisfying.

Of course, one might question the wisdom of how that motivation was instilled. There is a significant difference between the external motivation prompted by fear and the internal motivation originating from one's own personal commitment. However, experiencing the satisfaction of paying attention was truly valuable. That realization of the importance of each moment, if carried beyond law school into the practice of law, provides the focus and attention that is absolutely necessary if the lawyering is to be fully effective and personally satisfying. Let me emphasize that I am not suggesting that lawyers must work every hour or moment of every day. Paying attention has very little to do with the number of hours worked or billed. But, if we want this profession to be satisfying, we must take our work seriously in every moment we are doing it.

In law, like life, *process* is every bit as important as the end product. We will not always win. If winning is the test of our skills or worth, we are doomed to an unhappy number of failures. We will not land every client, win every case, or obtain all we seek in every negotiation. Peter Matthiesson, in his book *The Snow Leopard*¹⁰ provides a day-by-day account of several months of trekking through the Himalayas in search of the rare snow leopard. Matthiesson did not find the snow leopard which he sought. By some standards, his quest would have been judged as not successful, he failed. But his book does not mourn the lack of success nor even dwell upon it. Instead, it focuses upon the tasks of each day, treating the ordinary and the extraordinary with equal respect. Matthiesson eloquently and vividly explains this focus: "Life is not your regrets of the past; nor is it your fantasy of the future. Your life is whatever you are doing, right now."¹¹ Wisdom for lawyers.

Some of us may have spent a portion of our law school life focused on a fantasy of the future—of being out of law school, of being successful, respected lawyers. And when some of us were associates in law firms we may have entertained the fantasy of being a partner. And later, we may still have all sorts of other fantasies about where this life will lead us. But our life is what we are doing right now.

My classmates and I frequently thought that what we were do-

10. PETER MATTHIESSON, *THE SNOW LEOPARD* (Viking 1978).

11. Peter Matthiesson, Address at the New York Zen Community, Yonkers New York (February 1989).

ing in law school had little to do with law practice. We arrived at law school expecting to attend classes which would teach us what the law was and how to perform tasks like write briefs, try cases and draft contracts. What we found instead were professors who asked impossible questions to which we responded with inadequate answers. What was going on? What was going on was that Donald Giannella and his colleagues were delivering to us the message that from that day forward *we* were responsible for figuring out what we needed to know and do and say. *We* were responsible for influencing the future — by what we did at that very moment. And they were teaching us that the first, and most important task in each moment of lawyering, is to pay attention, to be open to all of the problems and all of the possibilities. “Spotting the issues” they called it. We were successful as students only to the extent that we saw a high percentage of the issues that each situation presented. It may have seemed like a narrow focus, but after 32 years of lawyering I now know, and am constantly reminded, that this is the very foundation of every one of the essential skills of the art of lawyering.

The zen teachers instruct their pupils in a concept called “beginners mind.” The beginner’s mind is uncluttered with preconceived notions, it is open to all reality, whatever that reality might be. Shunryu Suzuki describes it as: “If your mind is empty, it is always ready for anything; it is open to everything. In the beginner’s mind, there are many possibilities; in the expert’s mind, there are few.”¹² And this is the lawyering mindset that is necessary if we are to fully understand the scope of a problem and imagine the range of possible solutions and courses of action. And we not only begin with this beginners mind, we maintain it even as we grow in experience and wisdom. We reassess the strategy and tactics as facts and events evolve and as our beginner’s mind enables us to become progressively wiser and see the issues with greater clarity and imagination. We remain ever mindful and alert. Knowing the law, understanding what the courts have said and what the legislature has enacted is certainly essential. So are all the other skills defined by the ABA Report. These tasks require effort, discipline and intellectual capacity. But that alone does not an artful lawyer make. Seeing all of the issues and possibilities is the real foundation of all those other skills and the basis upon which we build. If that foundation is flawed, the end result is at risk.

This practice of “beginner’s mind,” of “paying attention,” is what Professor Giannella and his colleagues were teaching us in

12. SHUNRYU SUZUKI, ZEN MIND, BEGINNER’S MIND 21 (Weatherhill 1970).

those days of socratic dialogue when we wanted them to give us answers instead of asking those impossible questions. Starting with an unencumbered mind, a mind free to recognize the infinite range of possibilities, a mind that does not prejudge: that is the foundation and the essence of the art of truly skilled lawyering.

Harvard psychology Professor Ellen Langer, explains this concept in terms that are perhaps more accessible by our western minds. She calls it “mindfulness.” Langer describes mindfulness as being open to new information—willing to hear even the information we do not like. Another essence of mindfulness is being able to look at a issues from different points of view—seeing the perspectives of the opposing attorney, the judge, the jury, the layman, the public. Another is being able to create new categories and contexts—for example, what we see as a problem will look entirely different if we can view it as an opportunity. Mindfulness also focuses on the process of the work as being where the real art is located, not in the final product.¹³

Much of law is a creative process. Judgment, that element we all look for in evaluating lawyers, is not a course in law school and is probably not genetic. Judgment is being mindfully open to the possibilities, recognizing and accepting reality and then having the courage to act. For lawyers, this all begins with those impossible questions and inadequate answers. Make no mistake, we are talking about the hardest part of lawyering. It requires moment-by-moment concentration and attention. We will often wonder off and be distracted. But it is not for us to be perfect; it is instead for us to accept the struggle.¹⁴ Beginner’s mind is not a skill we learn once and then simply apply. Suzuki cautions: “The most difficult thing is always to keep your beginner’s mind. . . you should not say, ‘I know what Zen is,’ or ‘I have obtained enlightenment.’ This is also

13. ELLEN J. LANGER, *MINDFULNESS* 61-79 (Addison-Wesley 1989).

14. Henepola Guunaratana has observed that:

Concentration and mindfulness go hand-in-hand. Each one complements the other. If one is weak, the other will eventually be affected. Bad days are usually characterized by poor concentration. Your mind just keeps floating around. . . .

These distractions are actually the whole point. The key is to learn to deal with these things. Learning to notice them without being trapped by them. That’s what we are here for. This mental wondering is unpleasant, to be sure. But it is the normal mode of operation of your mind. Don’t think of it as the enemy. It is just the simple reality. And if you want to change something, the first thing you have to do is see it the way it is.

THE VENERABLE HENEPOLA GUUNARATANA, *MINDFULNESS IN PLAIN ENGLISH* 125, 131-32 (Wisdom Publications 1993).

the real secret of the arts: always be a beginner.”¹⁵

We spend our lives in efforts to acquire knowledge so that we will always know what the answer is, so that we will always know what advice to give, so that we will always be correct. We start with the image that the process of learning is a climb up a very steep mountain, and the goal is to learn it all and then to rest comfortably and secure atop the mountain. That is not reality, however. The reality is that when we cease learning and struggling, when we cease the climb, we are essentially no longer living. The essence of our powers, both as humans and as lawyers, is our ability to grow and expand, to create, to make things happen, to be productive. Time spent on cultivating, creating and assisting growth, is time spent in being productive and is also the source of great satisfaction.

These concepts are true of every task we confront in lawyering. Thirty-two years ago I did not realize that these concepts were at the heart of the teaching I experienced in this law school. Who would have thought that the wisdom of eastern thinkers might be found in the basic law school curriculum. But then, truth lurks somewhere in everything, and it is for us to uncover it. Michelangelo described his art as uncovering the form that was already in the stone - he removed the outer stone so that the form of the angel contained within could be seen.¹⁶ There is much in our lawyering art that is the same. The truth is within and it is for us to uncover that reality by recognizing and putting aside the distractions, irrelevancies and untruths which surround and obscure.

And that is the essence of the practice of law. The result is in the process. It is in the day-by-day, hour-by-hour practice of understanding the problem, thinking the problem, finding the issues, seeing all sides. Taking the project seriously at each moment, that is the art of lawyering. We are not unlike musicians. Lawyers, like musicians, practice and perform. We perform in oral arguments, briefs, negotiations, meetings and encounters with friend and foe. The true musician recognizes that art is not confined to the performance. For the true musician, each moment of practice is art itself, and if approached that way, then the performance may also be art. Practice is our day-to-day work. And engaged in fully, it too is an art and every bit as satisfying.¹⁷

15. Suzuki, *supra* note 12, at 22.

16. STEPHEN NACHMANOVITCH, *FREE PLAY, IMPROVISATION IN LIFE AND ART* 31, 34 (Perigee Books 1990).

17. Nachmanovitch observes that:

each tone we play is at once an exploration of technique and a full expression of spirit. No matter how expert we may become, we need to

These concepts have value beyond our individual practice of our art. Would it not be wise for mindful lawyers to apply their mindfulness not just to their day-to-day work, but also to the state of our profession? Are we not heading for trouble if we fail to do this—if we fail to pay attention? Think, for example, of the serious questions that have been raised in recent times concerning the functioning of our health care system. Does the legal system not pose some very similar difficulties? Our legal system is not now experiencing difficult, revolutionary changes and pressures. But what does the system's future hold? Maybe we should learn something from all those lawyer jokes.

Experience also tells us that there are a significant number of attorneys who say that they want out, they want to do work that they find more fulfilling. We also know that there are teachers of law who profess little respect for the work of the professionals they are teaching students to emulate. And even our most solvent, sophisticated corporate business clients decry the excessive complications of the legal system in which they must operate. The complexity of laws and procedures are indeed part of the joke. The *Wall Street Journal* recently reported on the \$100,000 in lawyer fees spent to litigate a dispute over whether a co-op association or the apartment occupant had to pay the \$990 cost of installing safety bars on the apartment windows.¹⁸ Certainly, the clients had to provide a large measure of the madness that kept such nonsense going. But it couldn't have been done without lawyers.

But as that example illustrates, the ills of our legal system are not just the creation of the legal profession. As it has throughout our history, the legal system reflects the standards and values of the society. Some of the problems are actually reflections of our best and highest ideals—our desire for fairness, for equal rights, for business certainty. The forces that have brought us to the present are not all bad, but does that excuse us from confronting the problems? I think not.

Do I have solutions? No. I do not even purport to be able to clearly define the problems—although I do have a strong sense that the devils of complexity and cost are somewhere at the root of most

continually relearn how to play with beginner's bow, beginner's breath, beginner's body. Thus we recover the innocence, the curiosity, the desire that impelled us to play in the first place. Thus we discover the necessary unity of practice and performance

Not only is practice necessary to art, it is art.

Id. at 68.

18. WALL ST. J., Mar. 23, 1994, at A1.

of our issues. My message is that each of us has the capacity to apply our beginner's mind skills to the reality of our profession, to be open to alternatives and to new directions.

As Peter Matthiesson warns, we might make the mistake of choosing to dwell upon the regrets of the past—spend our energy lamenting the sad state of things, assigning blame and longing for earlier, more simple days. Matthiesson also warns that we might also err by dwelling on a fantasy of the future—the profession really does not have problems, these are really the problems of our society; as the economy improves the problems will resolve; there are no solutions, nothing is ever perfect and the non-lawyer world will continue to tolerate the imperfections; or someday there will be a revolution but it won't affect me. Many of the medical profession opted for one of these approaches and look at them scramble today as managed care and other major evolutions become increasingly larger realities. Matthiesson wisely advises the third approach—to recognize the reality and to know that life is what we do now, and accept that what we do now affects tomorrow. If we fantasize about tomorrow, that is what we will probably have for the future, a fantasy.

The choice, of course, is for each individual. However, some of us may recognize that we have obligations to our clients—an obligation, for example, to look for ways to make their legal encounters less complex, less costly. The ABA's Report on skills and values strongly suggests that we have such obligations. In addition to skills, the Report identifies the profession's four fundamental values. First, the provision of competent representation; second, striving to promote justice, fairness and morality; third, striving to improve the profession; and fourth, professional self-development.¹⁹ All of these values, at a minimum, call for lawyers to take steps in their every day practice, to make the system less costly and less complex.

Our clients are frequently confronted with staggering costs for dealing with controversy. Mindful lawyers who are paying attention might open themselves, for example, to the possibilities of alternative dispute resolutions (ADR). We can learn what it is and how and when it works, how it might work better and how it might be included in contracts we draft. Wherever possible, we can open ourselves to alternatives and look creatively for better ways. Do we really have a choice? I think not. I think that looking for better

19. *Legal Education and Professional Development—An Educational Continuum*, *supra* note 6, 140-41.

ways to serve our client is an absolute obligation.²⁰

ADR is just one example. We could discuss many more, but I think you understand the point. I recognize that there are those in our profession who will not be attracted to looking for new ways or who will not choose to confront the reality of our problems. There are also those who practice our profession solely as a quest for earnings. The zen thinker will not judge those who do not share the open vision of our art and will certainly acknowledge the need for adequate financial resources. But the zen thinker will not be satisfied by the quest for earnings alone. The zen thinker will find greater satisfaction in full openness to creativity and productivity. And therein lies the art of lawyering.

If we remain open and mindful and acknowledge the realities—those of cost and complexity for example—we will find new directions we might take in our everyday representation of clients as well as in our broader roles as bar association members, officers of the court, members of legislatures, etc. Some of these directions might involve substantive legal strategies. Some might involve institutional, technical, operational measures we might seek to initiate in our schools, courts, law firms and corporate offices. Some might be new directions in curriculum and in continued learning throughout our careers.

If we are to take brave steps we must also be open to working with others. The nation's law schools, for example, house a tremendous resource of energy and intellect. But, as the ABA Report instructs, the gap between the teaching and practicing elements of our profession has been far too great. Building a bridge across that gap will not be easy, but the mindful will see it as a means of opening all of us to new, productive and creative forces.

As we set out on this difficult path, we must also be prepared to make real commitments. Erich Fromm tells us that: "The first condition for more than mediocre achievement in any field . . . is to *will one thing*."²¹ And he gives these examples:

A bank robber needs to will one thing just as much as a scientist or a violinist, provided that they want to do what they're doing excellently or even competently. Halfheartedness leads one to prison, the others to becoming an unproductive and bored college professor or a member of a

20. The ABA Report included knowledge of alternative dispute resolution among the fundamental skills of lawyering. *Id.* at 139.

21. ERICH FROMM, *THE ART OF BEING* 31 (Continuum 1992).

second-class orchestra, respectively. Of course, if only amateur status is aspired to, matters are different: the thief will probably get into trouble, the scientist will likely feel frustrated, while the amateur violinist will thoroughly enjoy his activity for its intrinsic value, provided he does not expect to achieve excellence.²²

Fromm is telling us that we will not be able to travel the difficult path unless we pay attention and take each moment seriously. He is also warning that no one of us can address all of the issues. But if we seek to practice the art of lawyering, we must, at a minimum, be prepared to confront those issues that affect our clients. The zen thinker also would tell us that we must be prepared for a long travel. And as we travel, the question is not whether we have all the right answers, or whether we have taken all of the correct steps. Rather the question is whether we are on the correct road. At the end of each day the *Wall Street Journal's* zen businessman, Bernard Glassman, does not ask himself whether he has done everything correctly. He asks only whether he is on the right path.

For those who seek to make their lawyering an art, the path is the continuing openness of beginner's mind and full mindful focus on the reality of each moment. This is true whether we are dealing with the day-to-day issues of representation or the broader issues of the profession. Am I willing, as Sam Hazo implores, to wish for myself "hard questions and the nights to answer them, the grace of disappointment and the right to seem the fool for justice."²³ Donald Giannella's former students might also be comforted by other words of this poet. As we look at the challenges and the difficulty of the path, we may not feel as wise as we were in our youth. We may fear that in spite of our mindfulness, we may not find answers to all of the hard questions. Our wise poet offers this comfort:

You're less assured by what
assured you totally at twenty.
Questions outnumber answers now.
Some questions you can answer.
Others you live with, and that's
your answer. . . .²⁴

and further he tells us:

22. *Id.* at 31-32.

23. HAZO, *supra* note 2, at 5-6.

24. SAMUEL HAZO, *Amazement This Way Lies, in THE PAST WON'T STAY BEHIND YOU 3* (U. of Arkansas Press 1993).

Surely you have seen us
 spidering our way from piton
 to piton up sheer rock,
 trusting only in our feet
 and fingers and the rope of life
 between us.

We're certain
 of our goal but not the route.
 That's something we discover
 inch by inch by listening
 to what the mountain knows²⁵

Let us then be willing to ask the hardest question of all. It is that question asked by Bernard Glassman, to be posed at the end of each of our days as practitioners, as teachers and as students of the art of lawyering: am I on the right path?²⁶

25. SAMUEL HAZO, *Two Against the Mountain, in THE PAST WON'T STAY BEHIND YOU* 30 (U. of Arkansas Press 1993).

26. In addition to the works cited herein, the application of zen thinking and philosophy to everyday western life can be explored in other publications such as the following: BECK, *EVERYDAY ZEN* (Harper San Francisco 1989); BECK, *NOTHING SPECIAL* (Harper San Francisco 1993); and KORNFIELD, *A PATH WITH HEART* (Bantam 1993).

