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**Ronald D. Rotunda: An Advocate for  
Standards of Professional Conduct in the  
Legal Profession:\***  
*The Relentless Pursuit of the Professional  
Responsibility of Lawyers Holding America's Lawyers  
Accountable*

*John S. Dzienkowski\*\**

I. INTRODUCTION

Ronald D. Rotunda was an excellent student at Harvard College and Harvard Law School, and he became a lifelong student of the law.<sup>1</sup> For over forty years, he continued to research and write on so many varied topics in constitutional law and legal ethics.<sup>2</sup> Ronald Rotunda taught thousands of students how to become better lawyers. His body of works made him one of the most frequently cited legal academics in the country.<sup>3</sup> Early on in Ronald Rotunda's academic career, he decided to take on some of the most controversial topics directly, and that mantra continued throughout his life.<sup>4</sup>

After law school, Ron Rotunda clerked on the Second Circuit for Judge Mansfield and began his legal career at Wilmer, Cutler & Pickering in Washington.<sup>5</sup> Two years later, he accepted a position that would help shape his entire career. In April 1973, Ron became Assistant Majority Counsel for the Senate Select

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<sup>1</sup> See Curriculum Vitae of Ronald D. Rotunda 2 (last updated Dec. 18, 2017) (on file with Chapman University Dale E. Fowler School of Law), <https://www.chapman.edu/our-faculty/files/curriculum-vita/Rotunda-Ronald-CV.pdf> [<http://perma.cc/K33X-T88D>].

<sup>2</sup> See *id.* at 5–52.

<sup>3</sup> See Brian R. Leiter, *Brian Leiter's Top 119 Cited Faculty 2002–03*, BRIAN LEITER'S L. SCH. RANKINGS, [http://www.leiterrankings.com/faculty/2002faculty\\_impact\\_cites.shtml](http://www.leiterrankings.com/faculty/2002faculty_impact_cites.shtml) [<http://perma.cc/DJT6-ZBZA>] (listing Professor Rotunda as the eleventh most cited law faculty member in the U.S.).

<sup>4</sup> Note, throughout this Article, I refer to many of my own personal experiences and conversations in working with Professor Rotunda. Throughout this Article I refer to my dear friend and colleague as Ron.

<sup>5</sup> See Rotunda, *supra* note 1.

Committee on Presidential Campaign Activities.<sup>6</sup> In his work for the Senate, he developed interests in constitutional law and legal ethics.

This Article focuses on Ron Rotunda's views on legal ethics developed through a lifetime of teaching, writing, and consulting in this subject. I am privileged to have met Ron in an interview at the University of Illinois. The judge I clerked for, Robert Keeton, told me in 1985 to make sure to develop teaching and writing interests in legal ethics, and Ron decided to become my mentor. Over the years, we corresponded and met at various conferences and, eventually, he asked me to join his American Bar Association (ABA) treatise on professional responsibility.<sup>7</sup> Eventually, Ronald Rotunda and Thomas Morgan asked me to join their casebook on the same subject.<sup>8</sup> My thirty year friendship with my mentor, Ron, has taught me so much about writing and thinking about legal ethics problems. In this Article, I present to you my views on Ronald Rotunda's perspective on the subject of legal ethics.

First, I will examine Ron Rotunda's role in elevating the subject of legal ethics into a legal discipline central to lawyers and legal education. Second, I will explain how Ron Rotunda believed that rules and norms are needed to constrain human frailties, and his adherence to clearly written and transparent standards. Finally, I will examine his belief in accountability and civility. Each of these sections will give examples from his writing and life to illustrate his philosophy of legal ethics.

## II. PROFESSIONAL RESPONSIBILITY AS A LEGAL DISCIPLINE

Before Watergate, the subject of professional responsibility was an elective in law school.<sup>9</sup> Most lawyers in the 1900s had developed their practices skills under the 1908 ABA Canons of Professional Conduct.<sup>10</sup> Those original 32 Canons tended to focus upon clear wrongs and aspirational standards.<sup>11</sup> As law practice became more complex to reflect the industrialization of the

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<sup>6</sup> See *id.*

<sup>7</sup> See RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, *LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY* (2005–2006 ed. 2005).

<sup>8</sup> See THOMAS D. MORGAN, RONALD D. ROTUNDA & JOHN DZIENKOWSKI, *PROFESSIONAL RESPONSIBILITY: PROBLEMS AND MATERIALS* (11th ed. 2011).

<sup>9</sup> *The Legacy of Watergate: Rethinking Legal Ethics*, LANDMARK CASES OF THE U.S. SUP. CT., [http://landmarkcases.org/en/Page/728/The\\_Legacy\\_of\\_Watergate\\_Rethinking\\_Legal\\_Ethics](http://landmarkcases.org/en/Page/728/The_Legacy_of_Watergate_Rethinking_Legal_Ethics) [<http://perma.cc/PCQ4-A2SG>] (following Watergate, “[f]or the first time, by the late 1970s, every law school in the country offered a course on professional responsibility”).

<sup>10</sup> See Am. Bar Ass'n, *Report of the Thirty-First Annual Meeting of the American Bar Association* 567, 575–86 (1908); see also James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 *FORDHAM L. REV.* 2395, 2395–96 (2003) (discussing the history of the 1908 Canons).

<sup>11</sup> See Am. Bar Ass'n, *supra* note 10.

nation, the ABA added Canons 33 through 47 to address the expanded role of lawyers.<sup>12</sup>

The organized legal profession realized that the 1908 Canons needed more than the mere addition of a few rules—the profession needed a different approach to regulating lawyers altogether. Between 1924 and 1964, the ABA organized five different committees to propose a complete revision to the 1908 Canons.<sup>13</sup> Four of these groups disbanded without any proposals.<sup>14</sup> The fifth group, the Wright Committee, created in 1964, managed to develop the Model Code of Professional Responsibility, which was adopted by the House of Delegates in 1969.<sup>15</sup> Ron was a second and third year student at Harvard Law School at this time.

By the time Ron Rotunda entered law practice at Wilmer, Cutler & Pickering,<sup>16</sup> the states began to consider the adoption of the Model Code.<sup>17</sup> The shift from the Canons to the Model Code represented an evolution in the regulation of lawyers. The Canons merely contained prohibitions of clear wrongs and aspirational standards, while the Model Code had Canons (aspirational broad statements), Disciplinary Rules (specific mandatory guidance for lawyers to follow), and Ethical Considerations (suggested—but not mandatory—broader guidance for lawyers).<sup>18</sup> The Model Code sought to give lawyers far more detail in how to represent clients in an adversary system.<sup>19</sup> Ron's formative training as a young lawyer introduced him to this new code of conduct for regulating lawyers.

Ron Rotunda, as a lawyer for the Senate Committee investigating President Nixon, gained a unique window into a lawyer President by supervising government lawyers for the Executive Branch and President Nixon's private lawyers, led by Professor Charles Alan Wright, who argued for a broad view of executive privilege before the United States Supreme Court.<sup>20</sup> The summer of 1974 witnessed the unanimous decision of the

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<sup>12</sup> Altman, *supra* note 10, at 2396 n.8.

<sup>13</sup> See John S. Dzienkowski, *Ethical Decisionmaking and the Design of Rules of Ethics*, 42 HOFSTRA L. REV. 55, 60–64 (2013).

<sup>14</sup> See *id.* at 61.

<sup>15</sup> See *id.* at 61–62.

<sup>16</sup> See Rotunda, *supra* note 1.

<sup>17</sup> See Douglas R. Richmond, *Why Legal Ethics Rules are Relevant to Lawyer Liability*, 38 ST. MARY'S L.J. 929, 935 (2007) (explaining how the Model Code of Professional Responsibility became effective in January 1970 and was subsequently adopted by most states).

<sup>18</sup> See MODEL CODE OF PROF'L RESPONSIBILITY (AM. BAR ASS'N 1980).

<sup>19</sup> See, e.g., *id.* at EC 7–19.

<sup>20</sup> See Rotunda, *supra* note 1; see also Charles Alan Wright, *Law Expert Who Aided Nixon*, L.A. TIMES (July 8, 2000), <https://www.latimes.com/archives/la-xpm-2000-jul-08-me-49649-story.html> [<http://perma.cc/59LN-NEZR>].

Court, holding that executive privilege based upon grounds of general interests of confidentiality must yield in a criminal case involving the President.<sup>21</sup> And, the rule of law prevailed in the Watergate case to lead to many positive changes.<sup>22</sup>

The Watergate scandal involved so many members of the legal profession that Marc Galanter noted that this incident accelerated the decline in the legal profession.<sup>23</sup> One of the lawyers working for President Nixon during the Watergate scandal, Egil “Bud” Krogh, Jr., said, “In law school, I took this curious course on ethics . . . [b]ut there was nothing about conflicts or the role of lawyers. We were in completely unknown territory. I was completely unprepared. My loyalty to Richard Nixon was personal and total.”<sup>24</sup> John Dean echoed similar thoughts, “When I was White House counsel, I thought Richard Nixon was my client.”<sup>25</sup> Perspectives such as these have undergone dramatic change since the 1970s.

The lessons of Watergate influenced Ron Rotunda’s views on how lawyers should be governed by the rule of law, developed through careful consideration of all of the relevant policies.<sup>26</sup> In one of his first writings on the subject of legal ethics, Ron reviewed a book by Monroe Freedman on legal ethics.<sup>27</sup> Monroe Freedman was well-known for his position on how lawyers should deal with a criminal defendant client’s decision to commit perjury on the stand in a criminal trial. Monroe Freedman argued that, because of the power of government prosecution and the defendant’s constitutional rights, lawyers should never disclose client perjury in a criminal trial.<sup>28</sup> Ron Rotunda, as an assistant professor, critiqued this view as not taking into account important legal rules and failing to consider the policy

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<sup>21</sup> See *United States v. Nixon*, 418 U.S. 683, 713 (1974).

<sup>22</sup> See Tom Brokaw, *Politicians come and go, but rule of law endures*, NBC NEWS (Aug. 6, 2004, 12:12 PM), [http://www.nbcnews.com/id/5593631/ns/us\\_news-nixon\\_anniversary/t/politicians-come-go-rule-law-endures/#.XLiCVihKiM8](http://www.nbcnews.com/id/5593631/ns/us_news-nixon_anniversary/t/politicians-come-go-rule-law-endures/#.XLiCVihKiM8) [<http://perma.cc/MN8Z-4JF7>].

<sup>23</sup> Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805, 812 (1998).

<sup>24</sup> Mark Curriden, *The Lawyers of Watergate: How a ‘3rd-Rate Burglary’ Provoked New Standards for Lawyer Ethics*, ABA J. (June 2012), [http://www.abajournal.com/magazine/article/the\\_lawyers\\_of\\_watergate\\_how\\_a\\_3rd-rate\\_burglary\\_provoked\\_new\\_standards](http://www.abajournal.com/magazine/article/the_lawyers_of_watergate_how_a_3rd-rate_burglary_provoked_new_standards) [<http://perma.cc/8BQF-J7HG>].

<sup>25</sup> *Id.*

<sup>26</sup> See John Dean, *R.I.P. Ron Rotunda—A Man Responsible for Watergate’s Most Lasting Positive Impact*, VERDICT (Mar. 16, 2018), <https://verdict.justia.com/2018/03/16/r-p-ron-rotunda-man-responsible-watergates-lasting-positive-impact> [<http://perma.cc/R734-3MQ7>].

<sup>27</sup> See Ronald D. Rotunda, *Review of Freedman’s ‘Lawyers’ Ethics in An Adversary System*, 89 HARV. L. REV. 622, 622 (1976) (reviewing MONROE H. FREEDMAN, *LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM* (1975)).

<sup>28</sup> Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1477–78 (1966).

considerations on both sides of the issue.<sup>29</sup> Although Ronald Ron's critique was forceful, it was done with respect and eloquence. He acknowledged that these issues were difficult ones which needed careful debate and consideration.<sup>30</sup>

Ron Rotunda went to law school at a time when legal ethics was an optional course,<sup>31</sup> and just a few years later, legal ethics became a mandatory course for all law students graduating from ABA-accredited schools.<sup>32</sup> At the Illinois College of Law, Ron and Tom Morgan set out to develop materials for the teaching of legal ethics in this post-Watergate world.<sup>33</sup> They witnessed the ABA's passage of the Model Code and saw the development of standards far more detailed than in the 1908 Canons. Ron Rotunda and Tom Morgan needed to balance the teaching of mandatory disciplinary rules with aspirational ethical considerations. They saw the evolution of legal ethics as it developed into a substantive law field addressing the professional responsibility of lawyers.<sup>34</sup>

Ronald Rotunda and Tom Morgan decided the best way to teach law students who had no experience in the practice of law was to develop narrative problems and to ask questions.<sup>35</sup> At that time, there were only a handful of published cases dealing with ethics issues. Thus, they organized their casebook on professional responsibility into eight chapters illustrated by forty problems.<sup>36</sup> Their casebook soon carved out a niche in the teaching of professional responsibility that has remained dominant for almost half a century. In Ron's words, "[t]hose problems and the basic organization of the book have remained very similar over the years, even though the answers to many of the questions have changed because the rules have changed."<sup>37</sup> The narratives presented mere hypotheticals to students, and now decades later, Ron noted, "Sadly, life imitates art, and at this point, we have

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<sup>29</sup> See Rotunda, *supra* note 27, at 623 (stating that Freedman's "conclusions are suspect").

<sup>30</sup> See *id.*

<sup>31</sup> See Ronald D. Rotunda, *Teaching Professional Responsibility and Legal Ethics*, 51 ST. LOUIS U. L.J. 1223, 1224 (2007) ("During law school, I never took a class in Professional Responsibility or Legal Ethics. There was no requirement to take such a course, and, like most students, I never did.").

<sup>32</sup> See Roger C. Cramton & Susan P. Koniak, *Rule, Story, and Commitment in the Teaching of Legal Ethics*, 38 WM. & MARY L. REV. 145, 148 (1996) (noting that the ABA adopted, in August 1973, the requirement that law schools teach legal ethics to students).

<sup>33</sup> See Rotunda, *supra* note 31, at 1224–25.

<sup>34</sup> See *id.* at 1225–26.

<sup>35</sup> See *id.* at 1226.

<sup>36</sup> See generally RONALD D. ROTUNDA & THOMAS D. MORGAN, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY (1st ed. 1976).

<sup>37</sup> See Rotunda, *supra* note 31, at 1226.

many examples of lawyers paying the price for ethical violations that the past punished less harshly or not at all.”<sup>38</sup>

Ron Rotunda continued to teach and write about professional responsibility.<sup>39</sup> His scholarship focused on the intersection of client misconduct, lawyer duties to clients and the legal system, and confidentiality and privilege issues. These are the very issues that confronted President Nixon’s lawyers. Ron Rotunda wrote on topics such as insider trading, representing corporations, and whistleblowing.<sup>40</sup> When lawyers represent entities, whether they are government clients or corporate clients, the issues and questions are very similar. His work forced lawyers, scholars, and the regulators to examine these issues in detail. Ron Rotunda frequently criticized the organized bar when he believed they had failed to properly address a pressing issue for lawyers.<sup>41</sup> He chastised the American Law Institute for failing to faithfully restate the law governing lawyers.<sup>42</sup> Ron Rotunda spoke his views, even when they were unpopular. In the end, he wanted a better legal profession, in a better society.<sup>43</sup>

In 2000, the American Bar Association Center for Professional Responsibility, sought an author to write a book on professional responsibility. They turned to Ronald Rotunda and he produced a work with over five hundred pages of commentary on the law of lawyering.<sup>44</sup> *Legal Ethics: The Lawyer’s Deskbook on Professional Responsibility*, published annually, has become a standard reference text for lawyers and judges researching the field.<sup>45</sup>

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<sup>38</sup> *Id.* at 1227.

<sup>39</sup> See Rotunda, *supra* note 1, at 5–52.

<sup>40</sup> See, e.g., Ronald D. Rotunda, *When the Client Lies: Unhelpful Guidelines from the ABA*, 1 CORP. L. REV. 34 (1978); Robert C. Hacker & Ronald D. Rotunda, *The Reliance on Counsel Defense in Securities Cases: Damage Actions versus Injunctive Actions*, 1 CORP. L. REV. 1471 (1978); Robert C. Hacker & Ronald D. Rotunda, *The Duty to Take Remedial Action*, 2 CORP. L. REV. 159 (1979); Robert C. Hacker & Ronald D. Rotunda, *Waiver of Attorney-Client Privilege*, 2 CORP. L. REV. 250 (1979).

<sup>41</sup> See, e.g., Ronald D. Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting “Diversity” But Not Diversity of Thought*, HERITAGE FOUND. (Oct. 6, 2016), <https://www.heritage.org/report/the-aba-decision-control-what-lawyers-say-supporting-diversity-not-diversity-thought> [<http://perma.cc/KKN3-UCPV>].

<sup>42</sup> See Ronald D. Rotunda, *Increased Controversy Over the Future of American Law Institute*, VERDICT (June 20, 2016), <https://verdict.justia.com/2016/06/20/increased-controversy-future-american-law-institute> [<http://perma.cc/45UV-5WA7>].

<sup>43</sup> See Rotunda, *supra* note 31, at 1224 (recounting three of Ron’s early memories of legal ethics that had an influence on his views: “Legal ethics told us that it was *unethical* to charge too low a fee; that it was *unethical* for banks to compete with lawyers—even when the bank used lawyers duly admitted to the bar to perform competently a service, at no charge, for its customers, who did not complain. And, finally, given the restrictions on competition with lawyers, it should not be surprising that lawyers can make a lot of money” (emphasis in original)).

<sup>44</sup> See ROTUNDA & DZIENKOWSKI, *supra* note 7.

<sup>45</sup> See *id.*; see also Lucian T. Pera, *In search of an ethics guide*, ABA BUS. L. SEC. (Nov./Dec. 2006), <https://apps.americanbar.org/buslaw/blt/2006-11-12/pera.shtml>

The ABA chose Ron Rotunda even though they knew he had criticized their positions in the past and would continue to do so. The ABA never once asked him to change a word, even when Ron Rotunda complained that a newly enacted rule was unconstitutional.

In conclusion, Ron Rotunda's experiences working on the Senate Watergate Committee influenced his views about lawyering in the wake of client crime.<sup>46</sup> His academic career was devoted to convincing others that legal ethics was a substantive field of law. And, that the individual rules needed to be properly crafted to give lawyers specific guidance. Ron Rotunda was an important agent of change for professional responsibility. His work in the field has left an important contribution to the legal profession.<sup>47</sup>

### III. THE IMPORTANCE OF CLEARLY WRITTEN AND TRANSPARENT RULES TO CONSTRAIN THE MORAL FRAILTIES OF LAWYERS

As a devout Catholic, Ron believed that, overall, human beings are good people capable of being tempted to commit sin, since self-interest can often cloud a human being's judgment. He witnessed a President and Vice President become involved in illegal activities, and, he saw well-educated lawyers make mistakes of law and judgment.<sup>48</sup> The number of lawyers involved in the Watergate scandal made an indelible impression upon Ron and that affected how he thought about the design of the ethics rules.<sup>49</sup>

In discussing the attorney's duty to report misconduct of other lawyers to disciplinary authorities (currently codified in Model Rule 8.3), Ron Rotunda stated:

First, most lawyers do obey the law. The good apples still outnumber the bad apples; so if the law says that lawyers must report (even if the client instructs them not to report) and the information is not protected by the evidentiary privilege, then lawyers will report. Second, many lawyers who do come across truly serious misconduct by other lawyers want to report to the disciplinary authorities. They are normally reluctant, on mere suspicion or slight infractions, to raise their fingers and accuse their fellow lawyers, but when the action is serious enough and the evidence is convincing, the empirical data indicates that lawyers desire to bring corrupt members of the bar to the attention of the disciplinary authorities.<sup>50</sup>

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[<http://perma.cc/6WAD-KBQV>] (recommending Ron Rotunda's work for the regular lawyer in need of an ethics guide).

<sup>46</sup> Dean, *supra* note 26.

<sup>47</sup> See Pera, *supra* note 45 (noting Rotunda's guide "includes a pretty complete treatment of almost every ethics issue you will ever see").

<sup>48</sup> See Rotunda, *supra* note 31, at 1225.

<sup>49</sup> See *id.* at 1225–26.

<sup>50</sup> Ronald D. Rotunda, *The Lawyer's Duty to Report Another Lawyer's Unethical Violations in the Wake of Himmelfarb*, 1988 U. ILL. L. REV. 977, 992 (1988).



He argued that a clear rule requiring disclosure serves an important function. It reinforces the societal goal of bolstering the effectiveness of the disciplinary system.<sup>51</sup> A rule requiring disclosure reduces the “internal debate” within the reporting lawyer’s conscience “to weed out the corrupt element” in light of the view that disclosure involves snitching, squealing, or tattling.<sup>52</sup> In Ron Rotunda’s view, a rule is needed to tip the analysis in the direction for a properly functioning regulation of lawyers.<sup>53</sup>

Ron Rotunda viewed many problems of ethics as issues that involved the balancing of binary interests. For example, in Watergate, the lawyers were balancing protecting their perceived client, Richard Nixon, even when they knew the conduct at issue involved crimes and fraud. In some instances, clients specifically ask lawyers to follow a directive. In other instances, the disclosure involves a confidence. Yet in others, the disclosure might injure the legal interests of the client. In some cases, the conflict can come from an interest of the lawyer—sometimes, another client or a personal interest of the lawyer. In each of these cases, Ron Rotunda wanted a debate of the policy considerations on each side and a clear rule to govern the lawyer’s conduct. And, throughout his career, the law clearly moved to protecting the tribunal, the rule of law, the legal profession, and society as a whole.

It is not an accident that some of Ron Rotunda’s early work involved client crimes, and, in some cases, corporate misdeeds. In his first work in the legal ethics area, he confronted Monroe Freedman’s view that lawyers should not violate client confidences and should not make any disclosures when a criminal defendant client intends to commit perjury on the stand.<sup>54</sup> Ron Rotunda confronted this argument in several different ways. First, he noted that confidentiality and privilege are not absolute and have many exceptions under the rule of law and when performing one’s professional employment.<sup>55</sup> Ron Rotunda complained that Monroe Freedman did not acknowledge any of these exceptions and did not make a normative argument for complete confidentiality in his criminal defense context.<sup>56</sup> Second, Ron Rotunda pointed out that the rules protect many

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<sup>51</sup> See *id.* at 978.

<sup>52</sup> *Id.*

<sup>53</sup> See *id.* (“[M]alpractice suits and motions for disqualification are not the only way—nor are they supposed to be the primary way—to enforce the minimum ethics of the legal profession.”).

<sup>54</sup> Rotunda, *supra* note 27, at 622–23.

<sup>55</sup> *Id.* at 624.

<sup>56</sup> *Id.* at 625.

different interests.<sup>57</sup> Although clients are one important interest group, the rules must also consider “the lawyer’s responsibility to his fellow attorneys, to the public, to the court, and to himself.”<sup>58</sup> Ron Rotunda argued that rules of professional conduct balance those different interests in complex ways to resolve difficult ethics issues, and that a single interest analysis was incomplete.<sup>59</sup> Third, Ron Rotunda did not believe that clients will be less forthright with lawyers about the facts even if lawyers inform clients that they should not commit perjury on the stand and warn them that if they do, the lawyer has some obligation to the court.<sup>60</sup> And finally, Ron Rotunda was not so sure that a lawyer who elicits perjurious testimony from a client does not violate a statute that forbids subornation of perjury.<sup>61</sup> In the end, Ron Rotunda did not want lawyers to continue to assist and represent individual, government, or corporate clients involved in crimes or frauds on the court.

When the ABA adopted the Model Rules in 1983, Ron Rotunda was similarly critical of the effort because it stopped short of requiring disclosure of client crime that did not involve death or bodily harm.<sup>62</sup> His thorough article methodically goes through the duties of lawyers when their clients commit crimes under the 1908 ABA Canons, the 1969 Model Code, and the newly adopted 1983 Model Rules.<sup>63</sup> Ron Rotunda strongly disagreed with the voices within the ABA that stated any inroad into client confidentiality would significantly undermine the attorney-client relationship.<sup>64</sup> But, he accepted the difficult choices that the drafters had to balance and was content with the compromise:

The final draft of the Model Rules does forbid blowing the whistle on the client, but it allows the lawyer to wave the red flag. This final draft draws some very fine distinctions. But since the effect of a notice of withdrawal is to wave the red flag and put almost everyone on clear notice, the concept of a notice of withdrawal is a significant addition to the law of ethics. . . . The responsibility of a lawyer to blow the whistle, or to withdraw silently or noisily, or to continue representation as if nothing had happened, is an important matter for the courts and practitioners. The Model Rules tell us that a lawyer need not be a hired gun. Nor is the lawyer a Pontius Pilate, who tries to wash his or her hands of the whole affair and silently walk away. Nor is the lawyer a fifth columnist or an undercover cop on the

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<sup>57</sup> *Id.* at 628.

<sup>58</sup> *Id.* (footnote omitted).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 630–31.

<sup>61</sup> *Id.* at 632.

<sup>62</sup> See Ronald D. Rotunda, *The Notice of Withdrawal and the New Model Rules of Professional Conduct: Blowing the Whistle and Waving the Red Flag*, 63 OR. L. REV. 455, 471 (1984).

<sup>63</sup> See generally *id.*

<sup>64</sup> See *id.* at 477.

beat. Instead, the Model Rules in this area attempt to balance complex and competing interests and to steer between disclosure and silence in order to assure that zealous representation does not become overzealous representation.<sup>65</sup>

This demonstrates how carefully Ron Rotunda balanced the role of the lawyer as the advocate of the client, with the lawyer's duties to society. He steadfastly argued against lawyer complicity in client crimes and frauds, yet he understood the complications if the lawyer were to completely abdicate obligations to the client.<sup>66</sup> At least until the Enron, Worldcom, and Tyco scandals of the 2000s, withdrawal was a compromise he could live with for the modern lawyer confronted with client crimes and fraud.<sup>67</sup>

#### IV. THE IMPORTANCE OF ACCOUNTABILITY AND CIVILITY

"Sunlight is said to be the best of disinfectants; electric light the most efficient policeman," noted Ron Rotunda, quoting Justice Brandeis, in a discussion of how government can drain the swamp.<sup>68</sup> Ron Rotunda was a strong defender of transparency in government and in regulation.<sup>69</sup> In this discussion, I focus upon his views in the areas of professional responsibility, but these principles pervaded his thoughts regardless of the subject area. Ron Rotunda believed that open debate and discussion led to better decision making even when the discussions were difficult or heated.<sup>70</sup>

In the late 1980s, the Illinois Supreme Court issued a very influential decision on a lawyer's duty to inform the disciplinary authorities about another lawyer's misconduct.<sup>71</sup> The decision involved an attorney who had been hired by a client whose first personal injury lawyer had stolen a large portion of her tort settlement.<sup>72</sup> The attorney negotiated a settlement that included an agreement not to report the first lawyer to the bar authorities.<sup>73</sup> When the first lawyer did not pay the settlement, a lawsuit was filed, and the court discovered the agreement not to report the first lawyer to the bar.<sup>74</sup>

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<sup>65</sup> *Id.* at 484 (footnote omitted).

<sup>66</sup> *See id.* at 474–75.

<sup>67</sup> MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(2), 1.6(b)(3), 1.16 (AM. BAR ASS'N 2018).

<sup>68</sup> Ronald D. Rotunda, *How to Drain the Swamp? Use a Flashlight*, VERDICT (Mar. 27, 2017), <https://verdict.justia.com/2017/03/27/drain-swamp-use-flashlight> [http://perma.cc/TN3K-QXNJ].

<sup>69</sup> *See, e.g.*, Ronald D. Rotunda, *Cameras in the Supreme Court*, VERDICT (Nov. 9, 2015), <https://verdict.justia.com/2015/11/09/cameras-in-the-supreme-court> [http://perma.cc/88LN-YS7V] (arguing in favor of cameras in the courtroom because "[w]e deserve to know about the caliber of our [J]ustices without any reporters interpreting for us").

<sup>70</sup> *See* Rotunda, *supra* note 50, at 996.

<sup>71</sup> *See In re Himmel*, 533 N.E.2d 790, 795–96 (1988).

<sup>72</sup> *See id.* at 791.

<sup>73</sup> *See id.*

<sup>74</sup> *See id.*

The Illinois Supreme Court ultimately suspended the second lawyer for making such an agreement when he possessed unprivileged information about the theft of client funds.<sup>75</sup> Ron Rotunda did not let the court escape with this single pronouncement. He challenged the court to answer several questions that its ruling created and to offer clearer guidelines for practicing lawyers:

(1) to what extent does the reporting rule apply to a lawyer who is asked to represent another lawyer accused of offenses like fraud or conversion, (2) how soon after the lawyer first learns of another lawyer's misconduct must the lawyer file the mandated report, (3) to what extent does the lawyer's duty of zealous representation of the client affect the lawyer's duty to report, especially in cases where the reporting might hurt the client's cause of action, and (4) how much knowledge must the lawyer acquire before the mandatory duty to report is created. These are serious and important issues, and the Illinois Supreme Court should discuss them in detail. Preferably, the court will proceed by carefully drafted rules; attorneys who have their livelihood on the line deserve fair warning rather than after the fact rule making by case law.<sup>76</sup>

This is the craft of Ron Rotunda that made him so influential. One ruling leads to dozens of other issues, all of which need careful consideration. Sadly, the questions posed by Ron Rotunda in 1988 still have not been completely answered by the regulators of the legal profession. Lawyers continue to grapple with the questions raised by Ron Rotunda as they apply the current Model Rule 8.3 to their practices.<sup>77</sup>

Ron Rotunda agreed with the underlying decision of the Illinois Supreme Court, pushing lawyers to remember their obligations to the bar.<sup>78</sup> However, he was not going to stop at one decision. Ron Rotunda decided to take a closer look at the disciplinary process and pointed out that “neither we nor the Illinois Supreme Court should naively think that the *Himmel* decision, by itself, will make any dramatic difference in lawyer discipline, because the number of lawyers who report is not the only bottleneck.”<sup>79</sup> Another issue in his view was the procedures and practices of the Illinois disciplinary system.<sup>80</sup> In Ron Rotunda's view, a process of abatement—waiting until any underlying lawsuit is completed—would have allowed the torts lawyer to continue to practice law as long as any other dispute

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<sup>75</sup> See *id.* at 796.

<sup>76</sup> Rotunda, *supra* note 50, at 991.

<sup>77</sup> ROTUNDA & DZIENKOWSKI, *supra* note 7, § 8.3.

<sup>78</sup> See Rotunda, *supra* note 50, at 992.

<sup>79</sup> *Id.*

<sup>80</sup> See *id.* at 993.

was pending.<sup>81</sup> In the regulators' views, to involve discipline would give one party undue leverage over the civil dispute.<sup>82</sup> Ron Rotunda, using *Himmel* and another case where the Seventh Circuit noted that no disciplinary action had been taken against a real estate lawyer who committed fraud, critiques the disciplinary process as a major problem in regulating lawyers.<sup>83</sup>

Ron Rotunda's solution is to revamp the entire process and,

[T]reat disciplinary complaints like civil cases, where the [regulatory body] presents its case to a real judge and a jury of lay people. Then, public scrutiny of such proceedings, open to the public and not held behind closed doors, will serve as an independent check of the fairness of attorney discipline procedures.<sup>84</sup>

Ron Rotunda believed that transparency led to accountability, and we would all be better off if regulation took place in the open rather than behind closed doors.<sup>85</sup> He confronted sacred institutions and demanded that they act as they preach. And, he did so in the open, subject to both response and criticism.

About fifteen years after Watergate, in the late 1980s, the organized legal profession adopted a narrative that lawyers were "moving away from the principles of professionalism."<sup>86</sup> Many of these complaints were directed at changes in the legal profession: The rise of the big law firm, expanded use of advertising, increase in lawyer compensation, and the dramatic increase in litigation.<sup>87</sup> The organized profession's answer was to reintroduce concepts of professionalism to curtail this significant decline in the legal profession.<sup>88</sup> Ron Rotunda's response was consistent with his view that change is not a bad thing and that the legal profession needs to evolve with the times rather than hold on to outdated views of professionalism.<sup>89</sup> He opposed standards that were not grounded in current empirical standards and those that implemented amorphous rules.<sup>90</sup> But Ron Rotunda welcomed an open debate on how to improve the rules that guide the practice of law.

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<sup>81</sup> See *id.* at 993–94.

<sup>82</sup> See *id.*

<sup>83</sup> See *id.* at 994.

<sup>84</sup> *Id.* at 996 (footnotes omitted).

<sup>85</sup> See *id.*

<sup>86</sup> Ronald D. Rotunda, *Lawyers and Professionalism: A Commentary on the Report of the American Bar Association Commission on Professionalism*, 18 LOY. U. CHI. L.J. 1149, 1150 (1987) (noting the words of Chief Justice Burger).

<sup>87</sup> See *id.* at 1151–55.

<sup>88</sup> See *id.* at 1157.

<sup>89</sup> See *id.*

<sup>90</sup> See *id.* at 1157–58.

When many in the profession complained that we had too many lawyers in America, Ron Rotunda responded forcefully:

As the amount of economic activity increases, the number of lawyers needed to facilitate that economic activity increases proportionately. Lawyers go hand-in-hand with prosperity. Derek Bok was wrong. We have more lawyers because we have more prosperity. . . . Just producing more lawyers will not make us richer, any more than buying more Picassos will make us richer. But, as we become richer, we need more lawyers (and we develop a taste for acquiring Picassos). Lawyers neither cause prosperity nor stand in the way. Instead, they are more like grease that reduces friction in the economic machine. Lawyers implement economic activity even if they do not originate it. . . . As we get richer, we want better things, such as a cleaner environment, a safer workplace, and a more just society. For that, we need lawyers.<sup>91</sup>

This passion for lawyers pervaded his teaching and mentoring of students.

#### V. CONCLUDING REMARKS: A PERSONAL DRIVE TO CONFRONT TOMORROW'S CHALLENGES FOR THE LEGAL PROFESSION

So many established scholars make a choice to carve out an area and continue to write and research in their familiar territory. Such an approach makes sense because incremental jurisprudence in a scholar's area simply continues to reinforce that person's reputation. In the case of Ron Rotunda, he instead lived life taking on and embracing new challenges.

On a personal level, Ron was a first adopter of many new technologies. His love for classic cars, like Rolls Royce,<sup>92</sup> turned into a love for the energy efficient Tesla. He loved art and had an impressive collection including Picasso, Dali, and Miró. He also had one of the early monitor screens that flashed images from his collection of photographs. When he bought a home in California, he installed a state-of-the-art solar energy system so he could sell power back to the local electricity company. Ron Rotunda was an environmentalist,<sup>93</sup> not because it was trendy, but because he believed that American dependence on foreign energy sources

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<sup>91</sup> Rotunda, *supra* note 31, at 1232–36 (footnotes omitted).

<sup>92</sup> Many individuals recount Ron's vintage Rolls while he taught at the University of Illinois. See Debra Cassens Weiss, *Constitutional and legal ethics scholar Ronald Rotunda dies at 73*, ABA J. (Mar. 20, 2018), [http://www.abajournal.com/news/article/constitutional\\_and\\_legal\\_ethics\\_scholar\\_ronald\\_rotunda\\_dies\\_at\\_age\\_73](http://www.abajournal.com/news/article/constitutional_and_legal_ethics_scholar_ronald_rotunda_dies_at_age_73) [<http://perma.cc/7G9S-YFU3>].

<sup>93</sup> See, e.g., *Affirming Congress' Constitutional Oversight Responsibilities: Subpoena Authority and Recourse for Failure to Comply with Lawfully Issued Subpoenas: Hearing Before the Comm. on Sci., Space, and Tech.*, 114th Cong. 121–22 (2016) (statement of Ronald D. Rotunda).

compromised our country. The vast majority of Ron's business affairs were completely paperless and online. Ron embraced change because he believed that the technological revolution helped to improve the lives of human beings.

Ron Rotunda also embraced change in our legal profession. He continued to identify new topics and examine how traditional legal ethics principles should apply. In 2017, some of his last commentaries were representative of his views about changes in lawyering. One of his last essays was about "Bitcoin and the Legal Ethics of Lawyers."<sup>94</sup> Ron Rotunda was responding to a recent ethics opinion from Nebraska that required lawyers to convert Bitcoin to dollars "immediately upon receipt[.]"<sup>95</sup> Ron Rotunda disagreed with the approach, and stated that whether lawyers were paid in dollars, euros, or Rolexes, the risk of volatility could be allocated between the lawyer and the client.<sup>96</sup> He believed the regulators had arrived at the wrong conclusion because they believed that only cryptocurrencies experienced volatility.<sup>97</sup> In Ron's words:

The future will bring us increasing change and an increase in the rate of change. We must examine the impact of these changes on lawyers, but we should not impose *special* rules on *novel* tools that are simply a new way of engaging in a traditional endeavor. Bitcoin is akin to an electric typewriter replacing a manual typewriter. We write the same things, but we do it faster.<sup>98</sup>

Another one of his commentaries titled, "Can Robots Practice Law?" analyzed whether this would violate unauthorized practice of law principles.<sup>99</sup> Ron's conclusion—one that he often mentioned—was that "AI will not eliminate lawyers any more than ATMs eliminated bank employees. It will change the way lawyers work and, by making lawyers more productive, it may well change the number of lawyers society needs."<sup>100</sup>

Ron Rotunda cared immensely about people, about law students, about our government officials, about the legal profession, and about the rule of law. He pushed each one of us to strive to be better on whatever we were working on. Ron Rotunda was so strong and vocal that we could not imagine that his life

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<sup>94</sup> Ronald D. Rotunda, *Bitcoin and the Legal Ethics of Lawyers*, VERDICT (Nov. 6, 2017), <https://verdict.justia.com/2017/11/06/bitcoin-legal-ethics-lawyers> [http://perma.cc/8FDT-E9UL].

<sup>95</sup> Nebraska Ethics Advisory Comm., Formal Op. No. 17-03, at 3100 (Neb. Supreme Ct., Advisory Board 2017).

<sup>96</sup> See Rotunda, *supra* note 94.

<sup>97</sup> See *id.*

<sup>98</sup> *Id.* (emphasis in original).

<sup>99</sup> Ronald D. Rotunda, *Can Robots Practice Law?*, VERDICT (Sept. 11, 2017), <https://verdict.justia.com/2017/09/11/can-robots-practice-law> [http://perma.cc/ER3H-PQQV].

<sup>100</sup> *Id.*

was at risk.<sup>101</sup> We honor his contributions to make the legal profession a better place. We respect his commitment to work and the rule of law. And, we are better off for his lifetime of passion and drive. It is difficult to imagine the field of professional responsibility without Ron Rotunda. Fortunately, his memory will continue to live on through his life work and the countless number of individuals he mentored.<sup>102</sup>

[W]hen [he] shall die,  
Take him and cut him out in little stars,  
And he will make the face of heaven so fine,  
That all the world will be in love with night,  
And pay no worship to the garish sun.<sup>103</sup>

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<sup>101</sup> Catie Kovelman, *In Memoriam: Ron Rotunda*, CHAP. U. (July 10, 2018), <https://news.chapman.edu/2018/07/10/in-memoriam-ron-rotunda/> [http://perma.cc/X4RG-KDX8] (quoting Professor Richard Redding, who remarked that Rotunda was “so vigorous and full of life”).

<sup>102</sup> Dean, *supra* note 26 (noting that Rotunda’s “wit and wisdom” remain behind in his writings).

<sup>103</sup> Ronald D. Rotunda, *DEDICATION to Walter R. Mansfield: Remembering Judge Walter R. Mansfield*, 53 BROOK. L. REV. 271, 277 (1987) (quoting WILLIAM SHAKESPEARE, ROMEO AND JULIET act III, sc. ii, lines 21–25 (Gordon McMullan ed. 2007)).



