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Opening Remarks: Professionalism

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Rhode: Opening Remarks: Professionalism
OPENING REMARKS: PROFESSIONALISM

DEBORAH L. RHODE*

I. INTRODUCTION

It is, at these gatherings, generally thought appropriate and occasionally even desirable for one of the conference conveners to provide some introductory inspiration. Since that role has fallen to me, I want first to seize the occasion for a brief word of gratitude and recognition. In my twenty-odd years as a legal academic, I have worked on many conferences, but never have I encountered anyone as committed and conscientious as Roy Stuckey. For all that is good about this event, we have his vision and values to thank. If that leaves me responsible for the rest, it is a small price to pay for the opportunity to work with Roy and his dedicated staff.

Let me begin with a word about how we came to lure you here. My involvement started with a gathering at last year's ABA meeting of the Consortium of Professionalism Initiatives. After a series of glowing accounts of professionalism centers' activities by their directors, the unwelcome subject of evaluation intruded: "Has anyone ever tried to discover whether any of this makes any difference in actual practice?" someone asked. This was not viewed as a friendly question. It was followed by much discussion about the costs and difficulties of systematic research. An unacknowledged but unmistakable subtext to the conversation was that if positive effects could not be documented, many of those present would just as soon not know it. Finally, one veteran of bar politics put the point directly: "There's a sense out there among judges and bar leaders that there's a problem. We have to do *something*." "Well, yes," I acknowledged, "but shouldn't we have a more informed basis for deciding whether the 'something' that we *are* doing is the most effective use of our time and resources?"

When Roy Stuckey first mentioned the idea of a conference, I related this experience. "Well," he said, "Why don't we talk about that?" One thing led to another, and here we all are. My hope is that our conversation will be one of a series that gives more searching scrutiny to what exactly professionalism efforts seek to accomplish and whether our growing cottage industry of initiatives is well suited to the task. In that spirit, let me raise some preliminary questions and concerns.

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II. THE “PROFESSIONALISM PROBLEM”

A threshold question is whether we are all on the same page, or even in the same book, with respect to what we are trying to fix. I have long argued that a central part of the “professionalism problem” is a lack of consensus about what exactly the problem is, let alone how best to address it.¹ “Professionalism” has become an all-purpose prescription for a broad range of complaints, including everything from tasteless courtroom apparel to felonies like document destruction.² For some lawyers, the term evokes some hypothesized happier era “just over the horizon of personal experience,” when law was less competitive and commercial and more collegial and civil.³ For other lawyers, the concept carries less appealing symbolic freight. These nostalgic appeals seem like opportunities for pompous platitudes and selective recollection. After all, the good-old days were never all that good for many lawyers who did not fit within well-off white male circles, or for many clients who paid the price of anticompetitive bar practices.⁴

Moreover, whatever consensus exists about professionalism at the symbolic level often fades when concrete practices or sanctions are at issue. It is no accident that the bar’s strategies of choice for addressing the issue have been education and voluntary civility codes, which run the risk of papering over much that is problematic in bar regulatory structures. Educational programs can focus on uncontroversial topics or raise, without resolving, disputed ones. And civility codes are adept at fudging contentious choices. For example:

[A lawyer should] be a vigorous and zealous advocate on behalf of [a] client while recognizing, as an officer of the court, that excessive zeal may be detrimental to [a] client’s interests as well as to the proper functioning of our system of justice.⁵

1. See DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 2, 83 (2000) [hereinafter *IN THE INTERESTS OF JUSTICE*]; Deborah L. Rhode, *The Professionalism Problem*, 39 WM. & MARY L. REV. 283, 284 (1998).

2. See generally *Principles of Professional Courtesy*, VA. LAW., July 1, 1989, at 29, 30-31 (asking attorneys to maintain a “neat and tasteful appearance” and to shake hands with opposing counsel).

3. Marc Galanter & Thomas Palay, *The Many Futures of the Big Law Firm*, 45 S.C.L. REV. 905, 908 (1994).

4. See Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657, 674 (1994); *IN THE INTERESTS OF JUSTICE*, *supra* note 1, at 135-37, 169-170; DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 101-32 (2d ed. 1995).

5. STATE BAR OF ARIZ., *A LAWYER’S CREED OF PROFESSIONALISM*, § C(1); see also OR. STATE BAR, *STATEMENT OF PROFESSIONALISM*, at 368 (advising lawyers to represent clients “zealously,” yet “in a responsible manner”).

[A lawyer should] within the framework of vigorous representation, advocacy, and duty to the client, be firm, yet tolerant and non abusive of ineptness or the inexperience of opposing counsel.⁶

[A lawyer should] attempt to avoid bullying, intimidating[,] or sarcastic questioning of witnesses except as reasonably proper under circumstances reasonably related to trial tactics.⁷

Such standards command widespread support because they dodge the difficult issues. Who can disagree with rules that are not really rules but only aspirations and that tell lawyers not to be bullies unless “necessary” or “proper”? The issue really worth discussion is how to determine when zeal is unnecessary or “excessive.” When does “vigorous” representation demand taking advantage of opposing counsel’s ineptness? On questions involving hard tradeoffs between individual clients’ interests and societal values, most civility codes are diplomatically vague. And those that take a position in favor of the broader concerns are often in tension with bar disciplinary rules and judicial decisions. Yet as the ABA has been at pains to emphasize, “nothing contained in such a [voluntary] creed shall be deemed to supersede or in any way amend . . . existing standards of conduct.”⁸

These competing messages are well illustrated by a Missouri Supreme Court decision in which the justices divided almost evenly about duties of professionalism.⁹ The case involved a lawyer who obtained a default judgment for the plaintiff and then received a letter from the defendant’s attorney requesting a schedule for discovery.¹⁰ That attorney was under the mistaken impression that an answer had been filed.¹¹ The plaintiff’s lawyer waited until after the time had passed for the defendant to set aside the judgment and then notified opposing counsel of the adverse result.¹² Four justices concluded that the lawyer had acted appropriately in protecting his client’s interest and declined to set aside the judgment.¹³ Three dissenters maintained that the lawyer should have notified opposing counsel of the mistake in time to set

6. *Principles of Professional Courtesy*, *supra* note 2, at 31.

7. *Id.* at 30.

8. A.B.A. HOUSE OF DELEGATES, 113 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 25 (1988).

9. *Sprung v. Negwer Materials, Inc.*, 775 S.W.2d 97 (Mo. 1989).

10. *Id.* at 100-01.

11. *Id.* at 98.

12. *Id.* at 101.

13. *Id.*

aside the judgment.¹⁴ The Chief Justice insisted that the failure to do so should “shock all right-thinking lawyers.”¹⁵

Such cases suggest the difficulties that arise when bar leaders want to have it both ways (to encourage both vigorous representation of clients and fairness to other parties) or to remain ambiguous about which way the leaders want it. We now have aspirational civility standards advising attorneys not to exploit their adversaries’ inadvertent mistakes but mandatory ethical rules demanding deference to clients’ legal objectives.¹⁶ On other issues, where civility and disciplinary provisions are similar, the rationale for redundant standards is by no means clear. If the problem is that lawyers too often violate the bar’s current code, “the answer surely is not to devise another,” particularly one without sanctions.¹⁷

It is scarcely self-evident that those most in need of civility instruction will pay attention to guidance in aspirational form. Rather, it seems likely that those lawyers will share the view expressed by one litigator in a recent *National Law Journal* op ed column. In his judgment, bar civility initiatives were “just stalking horses for legal wimpery.”¹⁸ As a practical matter, he argued, “It’s a dangerous distraction for any lawyer to spend much time thinking about what he owes to other lawyers. My objective has always been, and remains, to win for my client. Not by a little, but by a lot.”¹⁹

That world view is not without its rewards. One of the nation’s most notoriously uncivil practitioners is also one of the highest earners. Texas personal injury lawyer Jo Jamail is legendary for foul language and sharp practices. He is also one of the American bar’s most well-compensated lawyers and, by the mid-1990s, had an estimated net worth of \$950 million.²⁰ Such examples underscore an observation made during the overview of Washington D.C.’s voluntary civility code: “Ultimately, . . . the market is going to drive

14. *Id.* at 102.

15. *Sprung*, 775 S.W.2d at 109 (Blackmore, C.J., dissenting).

16. See MODEL RULES OF PROF’L CONDUCT, R. 1.2(a) (1998) (“A lawyer shall abide by a client’s decisions concerning the objectives of representation . . . and shall consult with a client as to the means by which they are to be pursued.”); MODEL CODE OF PROF’L RESPONSIBILITY, EC 7-7 (1980) (“In certain areas of legal representation not . . . substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client . . .”); *id.* at EC 7-8 (“[T]he decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client . . .”); *id.* at DR 7-101(A)(1) (“A lawyer shall not intentionally . . . [f]ail to seek the lawful objectives of his client through reasonable available means permitted by law . . .”).

17. John B. Harris, *Should New York Adopt Code of Civility? No*, N.Y. L.J., Aug. 11, 1997, at 2.

18. Shawn Collins, *Be Civil? I’m a Litigator!*, NAT’L L.J., Sept. 20, 1999, at A21.

19. *Id.*

20. See generally Roger E. Schechter, *Changing Law Schools to Make Less Nasty Lawyers*, 10 GEO. J. LEGAL ETHICS 367, 379 n.43 (1997) (quoting the transcript of a deposition involving Jamail); *The Forbes 400: Index By Rank*, FORBES, Oct. 13, 1997, at 418, 420 (listing Jamail’s net worth as \$950 million in 1997).

this. I'm not advocating incivility but if clients want 'pit bull' lawyers who engage in pit bull tactics . . . then that's what those clients are going to get."²¹

The question that such observations raise is whether we can significantly affect lawyers' conduct through exhortatory standards, particularly if they do not affect the reward structures of practice. Yet this is not a question that professionalism leaders have been inclined to address. Over one hundred state and local bars have adopted voluntary civility codes.²² Yet an exhaustive search reveals no systematic effort to determine whether they influence behavior in practice.

The same is true of educational programs on professionalism. Of course, as someone who teaches ethics for a living, I want to tread carefully here. I would not do what I do in my day job if there were not some basis for hoping that it does some good. This hope rests on a reassuringly substantial body of research indicating that well-designed courses can improve capacities for ethical judgment and that ethical judgment can affect ethical conduct.²³ But while the contributions of education should not be undervalued, neither should they be overstated. Few professionalism programs are sufficiently sustained and intensive to affect moral reasoning or to counteract strong situational pressures that push in opposite directions.²⁴

Although most states now require attorneys to take several hours a year of continuing legal education courses in ethics, no jurisdiction has attempted to determine whether these episodic, largely exhortatory experiences have any affect on practice.²⁵ Yet research involving other professions, such as medicine and accounting, has found no relationship between performance and participation in continuing education.²⁶

21. *Civility in the Legal Profession: Can Voluntary Standards Change Behavior?*, WASHINGTON LAW., Sept./Oct. 1998, at 34, 36.

22. See IN THE INTERESTS OF JUSTICE, *supra* note 1, at 82, 230 n.4.

23. See *id.* at 202; Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 42 (1992) [hereinafter *Ethics by the Pervasive Method*]; Deborah L. Rhode, *Into the Valley of Ethics: Professional Responsibility and Educational Reform*, 58 LAW & CONTEMP. PROBS. 139, 149-50 (1995) [hereinafter *Into the Valley of Ethics*].

24. For identification of the kinds of interactive learning most likely to be effective, see *Into the Valley of Ethics*, *supra* note 23, at 144 n.13. For analysis of the power of situational pressures, see David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31 (1995); James E. Moliterno, *An Analysis of Ethics Teaching in Law Schools: Replacing Lost Benefits of the Apprentice System in the Academic Atmosphere*, 60 U. CIN. L. REV. 83 (1991); and *Ethics by the Pervasive Method*, *supra* note 23, at 45-47 (examining the types of interactive learning most likely to be effective).

25. For state requirements, see Barry Sullivan & Ellen S. Podgor, *Respect? Responsibility and the Value of Introspection: An Essay on Professionalism in the Law School Environment*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 117, 129 n.30 (2001). For the absence of evaluation, see TASK FORCE ON MANDATORY CONTINUING LEGAL EDUC., REPORT TO THE BOARD OF GOVERNORS OF THE DISTRICT OF COLUMBIA BAR: EVALUATION AND RECOMMENDATIONS ON MCLE FOR THE DISTRICT OF COLUMBIA BAR 33 (1995).

26. See Victor J. Robino, *MCLE: The Downside*, 38 CLE J. 14, 15-16 (1992); JOEL E. HENNING, MAXIMIZING LAW FIRM PROFITABILITY: HIRING, TRAINING AND DEVELOPING PRODUCTIVE LAWYERS § 5.00, at 5-4 to 5-5 (2000).

In short, the popularity of recent professionalism initiatives rests not on evidence that they are effective but rather on experience that they are uncontroversial. Educational programs and voluntary codes are relatively inexpensive and uncontested symbolic gestures. They affirm our professional aspirations without the inconvenience of adherence. The appeal of such strategies is by no means unique to law. For example, in the wake of the Columbine High School shooting, legislators around the nation vowed to take action.²⁷ The United States House of Representatives, after defeating gun control measures, voted to authorize states to post the Ten Commandments in public schools.²⁸ And the Louisiana State Senate, after attempting to protect gun manufacturers from product liability suits, passed a law requiring students to address teachers as “Ma’am” and “Sir.”²⁹ When asked if the bill would truly help avoid school violence, its sponsor answered: “‘Hell, I don’t know. But we’ve got to do something.’”³⁰

My hope is that this conference can begin from a similar premise but encourage more promising responses. In that spirit, let me suggest two guiding principles that should inform our inquiry. One involves access, the other accountability.

III. ACCESS TO JUSTICE

“Equal justice under law” is one of America’s most firmly embedded and widely violated legal principles. It is a familiar flourish in professionalism rhetoric, but it has been missing or marginal among professional priorities. The result is a shameful irony: the nation with the world’s highest concentration of lawyers has among the least adequate systems for legal assistance. An estimated four-fifths of the civil legal needs of America’s poor remain unmet.³¹ Similarly, two- to three-fifths of the needs of middle-income individuals are unaddressed.³² Resources for indigent criminal defense are also capped at such

27. See Mike Soraghan, *Fight Looms on Gun Control, Ballot Initiative Likely if Legislature Balks*, DENVER POST, Dec. 26, 1999, at A1.

28. H.R. 1501, 106th Cong. §1202 (1999).

29. Editorial, *Be Civil, or Else*, L.A. TIMES, June 26, 1999, at A19.

30. *Id.* (quoting Senator Don Cravins).

31. For a discussion of the unmet needs of the poor, see A.B.A. CONSORTIUM ON LEGAL SERVS. & THE PUBLIC, AGENDA FOR ACCESS: THE AMERICAN PEOPLE AND CIVIL JUSTICE 23-32 (1996) [hereinafter AGENDA FOR ACCESS]; LEGAL SERVS. CORP., SERVING THE CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 12-13 (2000); and Alan W. Housman, *Civil Legal Assistance for the Twenty-First Century: Achieving Equal Justice for All*, 17 YALE L. & POL’Y REV. 369, 402 (1998).

32. For a discussion of the unmet needs of middle-income consumers, see AGENDA FOR ACCESS, *supra* note 31, at 23-32; A.B.A. CONSORTIUM ON LEGAL SERVS. & THE PUBLIC, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS 14-15, 23-25 (1994); and ROY W. REESE & CAROLYN A. ALDRED, A.B.A. CONSORTIUM ON LEGAL SERVS. & THE PUBLIC, LEGAL NEEDS AMONG LOW-INCOME AND MODERATE-INCOME HOUSEHOLDS: SUMMARY OF FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY 19-40 (1994).

ludicrous levels that adequate trial preparation is a statistical rarity and a sure route to financial ruin.³³

While the legal profession is not, of course, a primary cause of these problems, neither has it assumed sufficient responsibility for their solution. The organized bar has targeted most of its efforts toward increasing financial support from the government and voluntary pro bono contributions from lawyers.³⁴ Neither effort has proven close to adequate.

The federal government, which provides about two-thirds of the funding for civil legal aid, now spends only about eight dollars per year for those officially classified as poor, an amount accounting for less than one percent of the nation's total expenditures on lawyers.³⁵ No state guarantees civil legal assistance for the indigent, and many have followed Congress's example by excluding entire categories of the "undeserving poor" from assistance: prisoners, undocumented immigrants, and individuals with claims involving abortion, homosexual rights, or challenges to welfare-reform legislation.³⁶ Most bar efforts to increase support for criminal defense have been equally unsuccessful. Statutory fees for out-of-court work are as low as twenty dollars or twenty-five dollars per hour, and ceilings of one thousand dollars or lower are common for felony cases.³⁷ In some states, teenagers selling sodas on the beach earn more than court-appointed counsel.³⁸ Analogous constraints arise in public defender offices that generally operate with crushing caseloads.³⁹

33. See sources cited in Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 101, 1041 & nn. 9-14 (2001); *infra* notes 37-38.

34. See generally William Reece Smith, Jr., *Legal Aid in the United States: Directions for the Future*, 5 MD. J. CONTEMP. L. ISSUES 193, 194-95 (1994) (discussing the importance of federal resources and pro bono programs).

35. According to the most recent figures available, in 1998 there were approximately 35,574,000 persons below the poverty level. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 484 tbl.763 (119th ed. 1999). The 1998 budget for the Legal Services Corporation was \$283 million. OFFICE OF MGMT. & BUDGET, ANALYTICAL PERSPECTIVES: BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2000, at 595 (1999). Estimated expenditures by the Legal Services Corporation for Fiscal Year 2000 are \$337 million. *Id.* at 1164 tbl.11.3 (1999).

36. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504, 110 Stat. 1321, 1321-54 to -57 (1996); see also 45 C.F.R. §§ 1610-1642 (1999).

37. See DAVID COLE, NO EQUAL JUSTICE 83-85 (1999); JIM DWYER ET AL., ACTUAL INNOCENCE 183, 188 (2000); RICHARD KLEIN & ROBERT SPANENBERG, A.B.A. SECTION OF CRIMINAL JUSTICE, THE INDIGENT DEFENSE CRISIS 5-6 (1993); Jayson Blair, *The Lawyers Live to Fight Again*, N.Y. TIMES, June 25, 2000, at E5; Jane Fritsche & David Rohde, *Lawyers Often Fail New York's Poor*, N.Y. TIMES, April 8, 2001, at A1, A27; Marcia Coyle, *Hoping for \$75 an Hour*, NAT'L L.J., June 7, 1999, at 1, 18; Bob Herbert, *Cheap Justice*, N.Y. TIMES, Mar. 1, 1998, at 15; Joel Strashenko, *Manhattan Lawyers Latest to Challenge Attorney Fees*, ASSOCIATED PRESS NEWSWIRE, Feb. 25, 2000.

38. DWYER ET AL., *supra* note 37, at 184.

39. See COLE, *supra* note 37, at 83; DWYER ET AL., *supra* note 37, at 184; Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1850-51 (1994); J. Michael McWilliams, *The Erosion of Indigent Rights: Excessive Caseloads Resulting in Ineffective Counsel for Poor*, A.B.A. J., Mar. 1993, at 8. Excessive caseloads are common among private practitioners who specialize in court-appointed

Under such circumstances, it is scarcely surprising that most counsel plead their clients guilty without any significant factual investigation.⁴⁰ What is surprising, and deeply disturbing, is the judiciary's willingness to tolerate the inadequate representation that is common in indigent defense. Courts have declined to find ineffective assistance of counsel where attorneys were drunk, asleep, on drugs, or parking their cars during key parts of the prosecution's case.⁴¹

So too, although professionalism leaders have been at pains to applaud the "quiet heroism" and "extraordinary accomplishments" of pro bono efforts, such claims suggest more about the bar's capacities for self-delusion than self-sacrifice.⁴² Although accurate data are hard to come by, recent surveys indicate that in most states less than one-fifth of lawyers participate in pro bono programs for the poor.⁴³ The profession as a whole averages less than thirty minutes per week and under fifty cents per day in support of such programs.⁴⁴

cases. IN THE INTERESTS OF JUSTICE, *supra* note 1, at 61; Jane Fritsche & David Rohde, *Caseloads Push System to Breaking Point*, N.Y. TIMES, April 9, 2001, at A1 (describing lawyer with 1600 cases in single year, and thirteen others who exceeded Legal Aid Society limits).

40. In recent studies, between one-half and four-fifths of counsel entered guilty pleas without interviewing any prosecution witnesses, and four-fifths did so without filing any defense motions. See Fritsche & Rohde, *supra* note 37, at A1 (noting that some lawyers spend only a few minutes on each case); Mike McConville & Chester Mirsky, *Guilty Plea Courts: A Social Disciplinary Model of Criminal Justice*, 42 SOC. PROBS. 216 n.1 (1995) (discussing inadequacy of factual basis for guilty pleas in state and federal criminal cases); Margaret L. Steiner, *Adequacy of Fact Investigation in Criminal Lawyers' Trial Preparation*, 1981 ARIZ. ST. L.J. 523, 538 (finding only 31.1% of the attorneys surveyed interviewed all the prosecution witnesses who later testified at trial).

41. See COLE, *supra* note 37, at 87; Bright, *supra* note 39, at 1856; Bruce A. Green, *Lethal Fiction: The Meaning of 'Counsel' in the Sixth Amendment*, 78 IOWA L. REV. 433, 500-01 (1993); Stephen J. Schulhofer, *Effective Assistance on the Assembly Line*, 14 N.Y. U. REV. L. & SOC. CHANGE 137, 143 (1986); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1958 (1992).

42. Robert L. Haig, *Lawyer-Bashing: Have We Earned It?*, N.Y. L.J., Nov. 19, 1993, at 2; see Robert A. Stein, *Leader of the Pro Bono Pack*, A.B.A. J., Oct. 1997, at 108.

43. Talbot D' Alemberte, *Tributaries of Justice: The Search for Full Access*, 25 FLA. ST. L. REV. 631, 642 n.9, 646-47 (1998); David E. Rovella, *Can the Bar Fill the LSC Shoes?*, NAT'L L.J., Aug. 5, 1996, at A26; STATE BAR OF TEXAS, CIVIL LEGAL SERVICES TO THE POOR IN TEXAS: EXECUTIVE SUMMARY, (2000), at <http://www.texasbar.com/attyinfo/probono/legpoor.htm> (Jan. 14, 2000). The only state with higher reported contribution levels is New York. See STATE OF N.Y. ADMIN. BD. OF THE COURT, REPORT ON PRO BONO ACTIVITY OF NEW YORK STATE BAR, available at <http://www.courts.state.ny.us/probono/pbrpt.htm> (last visited Jan. 3, 2001) (reporting that 47% of the attorneys who responded to the survey perform pro bono services). Accurate information is limited because only one state, Florida, requires reporting of contribution levels. See Talbot D' Alemberte, *Florida's New Pro Bono Program: A Bold Step Toward Access to Justice*, A.B.A. J., April, 1992, at 8. Many lawyers also take liberties with the definition of pro bono and include uncompensated or undercompensated work. See Candace Crowley & Al Butzbaugh, *State Bar Coordinates Private Endowment and Operations Funding for Civil Legal Aid*, 78 MICH. B. J., 1094, 1095 (1999).

44. N.Y. ADMIN. BD. OF THE COURT, *supra* note 43; see also D' Alemberte, *supra* note 43; FLA. BAR ONLINE, ACCESS TO THE LEGAL SYSTEM (2000), at <http://199.44.15.3/BIPS799.nsf/BIP+list> (August 2000) (indicating that Florida lawyers

Contribution levels among the bar's most affluent members reflect a particularly dispiriting distance between professional principles and actual practices. Fewer than one-fifth of the nation's one hundred most financially successful firms meet the ABA's standard of fifty hours a year per attorney of pro bono service.⁴⁵ Although recent salary wars have pushed compensation levels to new heights, this affluence has eroded, rather than expanded, support for pro bono programs.⁴⁶ Over the past decade, while professionalism efforts steadily increased and the average revenues of the most successful firms grew by over fifty percent, those firms' average pro bono hours declined by one-third.⁴⁷

Not only have most lawyers failed to assist those in greatest need of assistance, they have failed to support other strategies for addressing those needs. Reform proposals are not in short supply, such as procedural simplification, adequate courthouse services for pro se litigants, access to qualified nonlawyer providers, and mandatory pro bono requirements.⁴⁸ All of these measures could assist millions of Americans now priced out of the legal system. The bench and the bar could also provide greater protection for indigent clients with court-appointed counsel. Obvious strategies include more remedies for ineffective performance and more court-enforced requirements that states provide adequate resources and fees.⁴⁹ The merits of such proposals have been reviewed at length elsewhere and need not be rehearsed here. My point is simply to suggest that realistic strategies for increasing access should be a core professional priority. While truly equal opportunities for justice may

contributed \$1,861,627 between July 1, 1997 and June 30, 1998); Interview with Mildred Wilson, Florida State Bar Membership Office (Aug. 2000) (indicating that in December 1998, the Florida bar had 58,789 members).

45. Aric Press, *Eight Minutes*, AM. LAW., July 2000, at 13. Only one-third of the nation's large law firms have committed themselves to meet the ABA's Pro Bono Challenge, which requires contributions equivalent to 3% to 5% of gross revenues. Interview with Esther Lardent, Pro Bono Institute (Aug. 2000).

46. See Kate Ackley & Bryan Rund, *Pro Bono Casualty of the Salary Wars*, LEGAL TIMES, Apr. 10, 2000, at 1, 18; Mark Hansen, *Trickle-Away Economics: Cost of High First-Year Salaries May Be Borne by Pro Bono Recipients*, A.B.A. J., July 20, 2000, at 20; Roger Partoff, *Too Rich to Give*, AM. LAW., Apr. 2000, at 15; Anthony Perez Cassino, *Skyrocketing Pay and Public Service*, N.Y. L.J., Mar. 31, 2000, at 24.

47. Press, *supra* note 45, at 13.

48. See FAMILY LAW SECTION COMM. ON THE PROBATE AND FAMILY COURT, MASS. B. ASS'N, FIRST REPORT OF THE FAMILY LAW SECTION COMMITTEE ON THE CRISIS IN THE PROBATE AND FAMILY COURT 29-34 (1997); A.B.A. STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., RESPONDING TO THE NEEDS OF THE SELF-REPRESENTED DIVORCE LITIGANT 12-13 (1994); Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 562-601 (1994); Russel Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Role of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2028-47 (1999); Jona Goldschmidt, *How Are Courts Handling Pro Se Litigants?*, 82 JUDICATURE 13, 21 (1998); Dianne Molvig, *Growing Solutions to 'Unmet Legal Needs': Commission Issues Key Recommendations*, WIS. LAW., Aug. 1996, at 10, 13.

49. See COLE, *supra* note 37, at 83, 95; DWYER ET AL., *supra* note 37, at 259; Rhode, *supra* note 33, at 137.

be an implausible ideal, adequate access is an attainable aspiration, and lawyers should assume greater responsibility for its achievement.

IV. ACCOUNTABILITY OF THE PROFESSION

An equally crucial obligation involves accountability. As bar ethical codes and professionalism campaigns have long acknowledged, lawyers owe responsibilities, both individually and collectively, to clients, the legal system, and society generally. As representatives of clients, lawyers have duties of confidentiality, loyalty, and competence. As officers of the justice system, they have obligations to promote justice; to provide equitable and efficient processes of dispute resolution; and to respect core values of honesty, fairness, and good faith on which that process depends. As members of a largely self-regulating profession, lawyers have responsibilities to ensure that their governing rules and enforcement structures serve public rather than professional concerns. The difficulty, of course, is that the needs of clients, courts, and society sometimes push in conflicting directions. And in resolving those conflicts, lawyers, like any occupational group, can readily lose sight of the points at which self-interest and societal interests diverge. Too many members of the bench and bar view professional ethics largely as individual, not institutional, responsibilities: too few take seriously any obligations to improve the system as a whole.

Although the bar has long insisted that its regulatory structures are designed to protect the public, the public has had almost no voice in their design. Standards of conduct have been drafted, approved, and administered by bodies composed almost exclusively of lawyers.⁵⁰ When nonlawyers are represented in the regulatory system, they rarely have the background, resources, numerical strength, or accountability to provide a significant check on professional self-interest.⁵¹ Yet on the infrequent occasions when its opinions are solicited, the public expresses considerable skepticism that its concerns are well-served by bar regulatory processes. A majority of Americans believe that lawyers file too many lawsuits,⁵² charge excessive fees,⁵³ and have a monopoly over matters that could be resolved as well and with less expense by nonlawyers.⁵⁴ Less than one-third of the nonlawyers surveyed believe that

50. Only one nonlawyer served on the commissions that drafted the ABA's Model Code of Professional Responsibility and its Model Rules of Professional Conduct, and only one nonlawyer sits on the Ethics 2000 Commission that is recommending modifications. No nonlawyers serve in the ABA House of Delegates, which ratifies model ethical rules, or on state supreme courts, which adopt them.

51. See *IN THE INTERESTS OF JUSTICE*, *supra* note 1, at 16.

52. Gary A. Hengstler, *Vox Populi: The Public Perception of Lawyers: ABA Poll*, A.B.A. J., Sept. 1993, at 60, 63.

53. *Id.* (reporting that 55% of those surveyed think lawyers 'charge excessive fees').

54. Deborah L. Rhode, *The Delivery of Legal Services by Nonlawyers*, 4 GEO. J. LEGAL ETHICS 209, 218 (1990).

the profession does a good job disciplining itself,⁵⁵ and only one-fifth consider lawyers honest and ethical.⁵⁶

Such views have not, of course, gone unnoticed within the bar. When asked to identify the most important problems facing the profession, lawyers put public image and credibility at the top of their lists.⁵⁷ But most attorneys also believe that their unfavorable image is unjustified and based on ignorance.⁵⁸ And their preferred responses are strategies to improve the profession's public image, not to increase its public accountability. In California, for example, even though few surveyed lawyers think that the discipline system is effective, ninety percent want the bar to retain authority over the process.⁵⁹ Many attorneys also want more active public relations efforts, and states have responded with a variety of initiatives. Last year, the South Carolina Bar instituted sensitivity training for cranky court personnel, the Louisiana Bar produced a video profiling lawyers who feed the homeless at soup kitchens, and the Ohio Bar sponsored a television advertisement featuring school children who talk proudly about their parents' legal careers.⁶⁰ In the classroom portrayed in the Ohio advertisement, a boy explains that his father "protects people,"⁶¹ and a girl chimes in that her mother also "helps sick and hurt people."⁶² Their teacher appears visibly startled when the students explain that their parents are not police officers or doctors: "They're lawyers!"⁶³

If prior experience is any guide, these public relations campaigns will fall short of their intended objective. As then-ABA President Jerry Shestack noted about such initiatives, "The cost is prohibitive, the outcome doubtful and the idea professionally unappealing."⁶⁴ "Professionalism," he added, "is no sport

55. See M/A/R/C RESEARCH, A.B.A. PERCEPTIONS OF THE U.S. JUSTICE SYSTEM 77, (1999), available at <http://www.ABANet.org/media/perception/perceptions.pdf>.

56. See Hengstler, *supra* note 52, at 62. For a further discussion of the declining public respect for lawyers, see Leslie McAneny, *Nurses Displace Pharmacists at Top of Expanded Honesty and Ethics Poll*, Gallup News Serv., available at <http://www.gallup.com/poll/releases/pr991116.asp> (Nov. 16, 1999); Leslie McAneny & David W. Moore, *Annual Honesty and Ethics Poll*, GALLUP POLL MONTHLY, Nov. 1999, at 2; Randall Samborn, *Tracking Trends*, NAT'L L.J., Aug. 9, 1993, at 20.

57. Amy E. Black & Stanley Rothman, *Shall We Kill All the Lawyers First?: Insider and Outsider View of the Legal Profession*, 21 HARV. J. L. & PUB. POL'Y 835, 856 (1998); *Law Poll: Lawyers Concerned About Their Image and Credibility*, 69 A.B.A. J. 440, 440 (1983); Wes Hanson, *Reflections on Lawyers: Josephson Institute, Other Polls Hold a Mirror to the Profession*, 23/24 ETHICS EASIER SAID THAN DONE, December 1993, at 35.

58. Haig, *supra* note 42, at 2; Hengstler, *supra* note 52, at 60.

59. DEBORAH R. HENSLER & MARISSA E. REDDY, THE INST. FOR CIVIL JUSTICE, CALIFORNIA LAWYERS VIEW THE FUTURE: REPORT TO THE COMMISSION ON THE FUTURE OF THE LEGAL PROFESSION AND STATE BAR 16-18 (1994).

60. David Wallis, *Some Lawyers Try to Make Nice*, N.Y. TIMES, Nov. 28, 1999, at E3.

61. *Id.*

62. *Id.*

63. *Id.*

64. Jerome Shestack, *Respecting Our Profession*, A.B.A. J., Dec. 1997, at 8.

for the short-winded.”⁶⁵ The only way to improve the profession’s image is to improve its performance. And that will require more than episodic educational programs or aspirational codes. Significant progress is unlikely without fundamental changes in bar ethical rules, enforcement practices, and reward structures.

Here again we do not lack for promising proposals, and this conference adds more. Let me close by singling out a representative example: reforming state bar disciplinary systems. Current systems generally dismiss about ninety percent of complaints without investigation.⁶⁶ Although some of these complaints are clearly unmerited and reflect unhappy outcomes rather than unethical conduct, other complaints are excluded because disciplinary agencies are understaffed and underfunded. As a consequence most agencies decline jurisdiction over performance issues such as “mere” negligence, neglect, or overcharging. In theory, clients could bring malpractice claims for such abuses; in practice, such remedies are too expensive to pursue except in the infrequent circumstances in which liability is reasonably clear, damages are demonstrably substantial, and the lawyer has adequate insurance or assets available to cover a judgment.⁶⁷ The vast majority of cases fall through the cracks, and only a minority of state bars offer alternative dispute resolution systems to address these claims.⁶⁸ Moreover, the limited available evidence on the performance of such systems suggests that they are often more responsive to the concerns of lawyers than clients.⁶⁹

Not only does the disciplinary process fail to provide remedies for most complaints, the remedies that it does provide are demonstrably inadequate. For example, in California fewer than two percent of complaints result in public sanctions.⁷⁰ Seldom does the system impose requirements like reimbursement

65. Jerome Shestack, *Defining Our Calling: Focus on Professionalism Benefits Individual Lawyers and Justice As a Whole*, A.B.A. J., Sep. 1997, at 8.

66. A.B.A. COMM’N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, CENTER FOR PROF’L RESPONSIBILITY, *LAWYER REGULATION FOR A NEW CENTURY* xv (1992) [hereinafter COMM’N ON EVALUATION OF DISCIPLINARY ENFORCEMENT]; GEOFFREY G. HAZARD, JR. ET AL., *THE LAW AND ETHICS OF LAWYERING* 936 (3d ed. 1999).

67. For limits in malpractice remedies, see A.B.A. STANDING COMMITTEE ON LAWYERS’ PROFESSIONAL LIABILITY, *LEGAL MALPRACTICE CLAIMS IN THE 1990S* 12, 16 (1997); John Gibeaut, *Good News, Bad News in Malpractice*, A.B.A. J., Mar. 1997, at 101; Manuel R. Ramos, *Legal Malpractice: Reforming Lawyers and Law Professors*, 70 TUL. L. REV. 2582, 2612 (1996).

68. A.B.A. COMM’N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, *supra* note 66, at 129.

69. See James E. Towery & Linda L. Harrington, *California’s Mandatory Fee Arbitration Program*, PROF. LAW., Nov. 1997, at 18, 20; Jean Fleming Powers, *Ethical Implications of Attorneys Requiring Clients to Submit Malpractice Claims to ADR*, 38 S. TEX. L. REV. 625, 632-38 (1997).

70. Nancy McCarthy, *Bar Starts to Rebuild Discipline*, CAL. ST. B.J., Mar. 1999, at 1; Leslie C. Levin, *The Emperor’s Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1, 39-46 (1998); John P. Sahl, *The Public Hazard of Lawyer Self-Regulation: Learning from Ohio’s Struggle to Reform Its Disciplinary System*, 68 U. CIN. L. REV. 65, 69, 82-87 (1999).

that could benefit clients or impose significant penalties that might antagonize bar leaders, prosecutors, or other powerful officials.⁷¹ Only a handful of states authorize permanent disbarment, discipline of law firms, public disclosure of complaints, or sanctions against lawyers who fail to report ethical violations.⁷² All of these practices must change. If an informed and disinterested agency were designing the process, they undoubtedly would. The challenge lies in finding ways to nudge a self-interested profession in similar directions.

The same point could be made about a host of other issues that should be the subject of professionalism initiatives. Many bar ethical standards are insufficiently demanding or overly self-protective. They do too little to prevent overrepresentation for clients who can afford it and underrepresentation of everyone else. Litigation and fee abuses are too frequently unremedied, and non-client interests are too seldom protected.⁷³ Obfuscation and obstruction are common features of trial practice,⁷⁴ and money often matters more than merits.⁷⁵ Yet despite the cottage industry of commentary identifying these problems, judicial, administrative and legislative officials encounter significant disincentives to address them. Judges depend on the bar for their reputation, advancement, and sometimes campaign support. Constraints of time and resources also work against adequate judicial review of lawyers'

71. In a survey of 380 cases of documented prosecutorial misconduct, it was found that none resulted in disciplinary action. Ken Armstrong & Maurice Posley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, at A1.

72. See IN THE INTERESTS OF JUSTICE, *supra* note 1, at 161-64; Ann Davis, *The Myth of Disbarment*, NAT'L L.J., Aug. 5, 1991, at A1; Laura Gatland, *The Himmel Effect*, A.B.A. J., Apr. 1997, at 24, 24-25; Sahl, *supra* note 70, at 105-11; Darryl Van Duch, *Best Snitches: Illinois Lawyers*, NAT'L L.J., Jan. 27, 1997, at A25.

73. For a discussion of litigation abuses, see IN THE INTERESTS OF JUSTICE, *supra* note 1, at 82-89; John Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 508-09 (2000); Austin Sarat, *Ethics in Litigation: Rhetoric of Crisis, Realities of Practice*, in ETHICS IN PRACTICE 145, 155-58 (Deborah L. Rhode ed., 2000). For a discussion of fee abuses, see WILLIAM G. ROSS, *THE HONEST HOUR: THE ETHICS OF TIME-BASED BILLING BY ATTORNEYS* (1996); Lisa G. Lerman, *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 12 GEO. J. LEG. ETHICS 205, 228-52 (1999); John J. Marquess, *Legal Audits and Dishonest Legal Bills*, 22 HOFSTRA L. REV. 637, 643-44 (1994). For discussion of third-party interests, see IN THE INTERESTS OF JUSTICE, *supra* note 1, at 87-89; RALPH NADER & WESLEY J. SMITH, *NO CONTEST* 70-93, 194-218 (1996); RICHARD ZITRIN & CAROL M. LANGFORD, *THE MORAL COMPASS OF THE AMERICAN LAWYER: TRUTH, JUSTICE, POWER, AND GREED* 94-117 (1999); Robert W. Gordon, *Why Lawyers Can't Just Be Hired Guns*, in ETHICS IN PRACTICE 42, 47-51 (Deborah L. Rhode ed., 2000).

74. See Beckerman, *supra* note 73; Gordon, *supra* note 73; Sarat, *supra* note 73; Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B. C. L. REV. 525, 532 (1998) (finding that almost half of surveyed litigators reported problems in obtaining relevant documents). See generally NADER & SMITH, *supra* note 73, at 102-03.

75. See FRANKLIN STRIER, *RECONSTRUCTING JUSTICE* 77-78 (1994) (discussing how mismatch in adversaries' resources can skew outcome).

performance.⁷⁶ So too, most elected officials see little to gain from challenging an interest group as powerful as the organized bar on issues of regulatory reform, especially since consumers have not mobilized around these concerns. The same is true of disciplinary agencies, which depend directly or indirectly on bar support.

Countering these disincentives is no small challenge, which is why professionalism initiatives like this one remain worthy of our best efforts and continued support. Independent ethics centers can serve as our collective conscience. They can jog us from complacency, remind us of our aspirations, and demand that we do better. To borrow from Wallace Stevens's, *The Man With the Blue Guitar*, we "cannot bring a world quite round," but we must "patch it as [we] can."⁷⁷ It is an honor to be part of a distinguished group that shares this commitment.

76. See Beckerman, *supra* note 73, at 567; Sarat, *supra* note 73, at 159; A.B.A. CONFERENCE OF CHIEF JUSTICES, A NATIONAL ACTION PLAN ON LAWYER CONDUCT AND PROFESSIONALISM 49 (1999) available at <http://ccj.ncsc.dni.us.natlplan.htm>.

77. Wallace Stevens, *The Man with the Blue Guitar*, in THE COLLECTED POEMS OF WALLACE STEVENS 165, 165 (5th ed. 1961).

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