

Summer 2003

## Introduction

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## INTRODUCTION

ROY T. STUCKEY\*

This symposium is built around the proceedings of a professionalism conference and articles related to it. The conference, *Enhancing the Accountability of Lawyers for Unprofessional Conduct*, was held in Charleston, South Carolina, on September 27-29, 2002. It was cosponsored by the Nelson Mullins Riley & Scarborough Center on Professionalism at the University of South Carolina School of Law and the Keck Center on Legal Ethics and the Legal Profession at Stanford Law School.

When you organize any conference, it is difficult to know what its outcome will be. Professor Deborah Rhode of Stanford Law School and I had several goals for our second professionalism conference together.<sup>1</sup> With the help of an active national planning committee, we decided that the primary objective would be to produce concrete, practical, and effective strategies for improving the professionalism of lawyers. We also wanted to include a significant segment on “measuring professionalism.” Finally, we wanted participants to discuss how to carry forward the work of the conference, possibly by creating a global program for defining and measuring the professionalism of lawyers and judges.

Our agenda was ambitious, and we can claim only partial success. As you will see in this Book, the participants in Charleston considered a wide range of professionalism issues and proposed a variety of thoughtful and creative ways to improve the conduct of lawyers. Unfortunately, for reasons that are now evident, the strategies proposed at the conference are neither comprehensive nor complete. On the topic of measuring professionalism, our second goal, I believe we established that professionalism can be described and measured, but we also learned that more research is needed and implementation will be difficult. We did not produce a global program for following up the work of the conference. Although we agreed that many of the problems we discussed are encountered in other countries, we

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\*Professor of law and the director of the Nelson Mullins Riley & Scarborough Center on Professionalism at the University of South Carolina School of Law.

1. The first conference was *Improving the Professionalism of Lawyers: Can Commissions, Committees, and Centers Make a Difference?* in Savannah, Georgia, on October 20-21, 2000. The proceedings and related articles are published in 52 S.C. L. REV. 443 (2001).

concluded that developing and coordinating a global program for addressing these common problems is a project best left to existing organizations such as the American Bar Association, the International Bar Association, and others.

Why are the strategies proposed in Charleston neither comprehensive nor complete? One reason is that the issues involve complex and frequently competing policies, values, and perspectives, and it is difficult to understand them fully over the course of a weekend, much less to develop complete solutions.

For example, consider a proposal that was made after the conference ended.<sup>2</sup> The proposal was to create a publically accessible data base where judges could report professional misconduct like discovery abuse, incivility, repeated lateness for court, and lack of candor to the court. The proposal quickly drew a response that allowing judges to report unadjudicated instances of misconduct would raise procedural due process issues and potential liability for injury to reputation.<sup>3</sup> The writer characterized it as a “gossip data bank” and pointed out that judges would be influenced in their decisions, actions, and behavior by the gossip they found in the data bank. The author felt this would be especially unfair since the information would be almost entirely negative and would not give a balanced view of the lawyer.

In response to this, another participant, while not endorsing the data bank concept, pointed out that “judges do gossip, and maybe it’s better that they do it in the open.” At least this way, a lawyer would know about his bad reputation and have an opportunity to mend his ways or to refute the accusations. The writer surmised that a workable alternative might be to develop a gossip-sharing system in which judges would be required to substantiate their ascriptions of unprofessional conduct and in return lawyers could post rebuttals on the data bank, kind of like consumers are permitted to do with negative credit reports. Another participant pointed out that lawyers are regularly asked to fill out evaluations of judges, the results of which

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2. When we ran out of time in Charleston, some participants still wanted to offer and discuss additional proposals. Since we could not stay together in Charleston, the participants were added to the professionalism list-serve and invited to submit additional proposals. An active exchange of e-mails transpired for over a week. (The professionalism list-serve was created to facilitate discussions about professionalism issues among lawyers, judges, and academics. For information about the professionalism list-serve and how to join it, look on the professionalism website at <http://professionalism.law.sc.edu>.)

3. Another participant challenged whether or not a gossip data bank would give an offended lawyer a cause of action for injury to reputation. The question was not resolved through subsequent exchanges.

are made public, then queried why we should not invite judges to fill out evaluations of lawyers and make the evaluations public.

Eventually, the original proponent re-entered the discussion to suggest establishing a data base on which judges could only post comments praising exemplary conduct. This drew a response doubting the reliability of any information a judge might post, stating that there are more appropriate and effective ways for judges to deal with unprofessional conduct, and questioning whether judges have the time or inclination to post either positive or negative comments to a data bank.<sup>4</sup>

As with so many other ideas raised during the conference, the participants in the on-line discussion did not reach any consensus about the wisdom or folly of the gossip data bank proposal, nor did they finish describing the pros, cons, or possible mechanics of implementing the idea.<sup>5</sup>

The other reason why many of the proposals from the conference are neither comprehensive nor complete is that the scope of issues

4. It was pointed out during this discussion that the ABA maintains a national data bank of adjudicated cases involving lawyer misconduct. It was also noted that adjudicated cases represent a tiny fraction of complaints filed against lawyers.

5. Other proposals that were submitted on-line after the conference ended include the following:

- Law schools should devote more attention and energy throughout all three years of law school to teaching students about the values and standards of the legal profession, particularly the importance of truthfulness, honesty, and integrity. In addition to modifying their curriculums, law schools should improve the rigor of their internal disciplinary codes and enforcement procedures, impose severe penalties for breaches involving untruthfulness or dishonesty, and require and expect students to report violations of disciplinary codes.
- States should require new lawyers to take a professionalism course staffed by experienced leaders of the bar and judiciary.
- Bar admissions authorities and bar associations should develop systems of sequential practice admission where lawyers begin practice with limited licenses and acquire the privilege of handling more complex or specialized matters only upon post admission assessment of their knowledge, skills, and adherence to the standards of the legal profession.
- New lawyers should be assigned to experienced lawyers who agree to serve as mentors. Alternatively or in addition, bar associations should hire experienced lawyers to serve as mentors, similar to "practice advisors" in Canada.
- Incentives should be provided for in-firm policing of unprofessional conduct and personal problems that may lead to unprofessional conduct.
- The discipline system should be more consistent, prompt, and severe.
- Judges should be more willing to publically express their negative views of lawyers who engage in misconduct. Judges should have the authority, tools, and willingness to deal with abuses, including fines, reprimands, and diversion programs.

considered at the conference was too broad, and the participants' interests and expertise were too diverse. During the concluding session, which is not reproduced in this symposium, the participants were asked to consider what would be the best process for developing effective strategies to enhance the professionalism of lawyers. A consensus emerged rather quickly that conferences seeking global solutions to professionalism issues, such as the one in Charleston, cannot produce comprehensive solutions because there are simply too many issues to consider in depth at a general conference and the types of issues are too varied for a non-specialized group to address successfully.

The participants decided that a more effective approach would be to target specific areas of concern and then convene representatives of groups with the expertise to develop solutions and the power to implement them. Although there was not enough time in Charleston to develop a complete list of areas of concern, the group felt that some of the areas in which improvements are needed include the following: conceptual issues (such as defining standards of professionalism), disciplining lawyers and judges, providing access to justice, education before and after admission to practice, judicial professionalism, assessment of professionalism (entry level, peer review, and re-certification), developing incentives that are tied to lawyers' incomes, overcoming the politics of reform, and raising consciousness about the issues and their impact on the legal profession and the societies in which we live.

The Charleston participants also identified some of the groups that should be involved in fashioning solutions to various types of professionalism issues. For example, if the objective is to improve our systems for disciplining lawyers and judges, the following groups, and others, should have a place at the table: the National Organization of Bar Counsel, the Conference of Chief Justices, the American Bar Association (including the Center for Professional Responsibility and various sections, divisions, and committees), legal educators, other professions with disciplinary powers, client security funds, consumer advocates, law firm managing partners, malpractice insurers, the Association of Professional Responsibility Lawyers, and even representatives from other countries with expertise in lawyer discipline.

If the subject is how to improve access to justice, one may want to seek input from the following groups in addition to the more obvious choices: providers of paralegal education, providers of on-line, self-help forms and information, publishers of do-it-yourself manuals, and alternative dispute resolution experts.

Hopefully, the conference and this symposium produced many seeds that will germinate at some point and be nurtured to maturity by individuals and organizations that have the expertise and power to affect meaningful change. The future of the legal profession in the United States and around the world depends on it.

In conclusion, I want to express my appreciation to my coconvener, Deborah Rhode, the members of the planning committee, the faculty and all participants who came to Charleston, Dean John Montgomery of the University of South Carolina School of Law, Nelson Mullins Riley & Scarborough LLC, two law students who have made many valuable contributions to the NMR&S Center on Professionalism—Rachel North-Coombes and Alice Whitesides, my administrative assistant Lisa Hines, USC Law School's special events coordinator Cyndi Nickerson, our business manager Kathy David, and the staff of the Law Review, particularly editor in chief Mikell Harper, senior articles editor Sarah Montgomery, and symposium editor Jennifer Cooke. Each of these people, and others, contributed to the success of the conference and this symposium.



## CONFERENCE AGENDA

### *Enhancing the Accountability of Lawyers for Unprofessional Conduct*

September 27-29, 2002  
Charleston, South Carolina

#### **Friday evening, September 27, 2002:**

6:30-8:00                    **Registration and Reception in the  
Embassy Suites Atrium**  
(Dinner on your own)

#### **Saturday, September 28, 2002:**

8:30-9:00                    **Registration**

9:00-9:10                    **Welcoming Remarks in the Colonial  
Ballroom**

Roy Stuckey, Conference Co-  
Convener

Professor and Director of the Nelson  
Mullins Riley & Scarborough Center  
on Professionalism, University of  
South Carolina School of Law

9:10-9:15                    **Introduction of Keynote Speaker**

William Hubbard, Esq., Nelson  
Mullins Riley & Scarborough, and  
President of the American Bar  
Foundation.



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9:15-9:45 **Keynote Address - Why is Accountability Important?**

Dennis W. Archer, President-Elect of the American Bar Association, former Mayor of Detroit, and former Chief Justice of the Supreme Court of Michigan

9:45-10:00 **Defining the Challenges**

Deborah L. Rhode, Conference Co-Convener Professor and Director of the Keck Center on Legal Ethics and the Legal Profession, Stanford Law School

10:00-10:15 **Formal vs. Informal Methods of Enhancing the Accountability of Lawyers**

W. Bradley Wendel, Professor, Washington and Lee University College of Law

10:15-10:30 **Break**

10:30-11:30 **Strategies for Enhancing the Accountability of Lawyers**

Panel 1: **Strategies for Appellate Courts**

Honorable E. Norman Veasey, Chief Justice, Supreme Court of Delaware  
Strategies for Trial Judges  
Honorable Ernest Borunda, Dean, The National Judicial College

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CONFERENCE PROCEEDINGS

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**Court-adopted Guidelines for Trial  
and Pretrial Conduct**

George Chapman, Esq, Thompson and  
Knight, Chair, Professionalism  
Committee, American College of Trial  
Lawyers Strategies for  
Professionalism Commissions Sally  
Winkler, Executive Director, Georgia  
Chief Justice's Commission on  
Professionalism

11:30-12:30

**More Strategies for Enhancing the  
Accountability of Lawyers**

Panel 2:

Strategies for Bar Associations  
Blan Teagle, Director, Florida Bar  
Center for Professionalism  
Strategies for Law Firms  
Robert J. Grey, Jr., Esq., LeClair  
Ryan, Chair, ABA Committee on the  
Future of the Legal Profession and  
Former Chair, ABA House of  
Delegates  
Ideas from the Malpractice Insurance  
Industry  
Margaret Hepper, Vice President,  
Lawyers Division of Aon  
The Public's Perspective  
Martha Ezzard, Esq., Columnist,  
Atlanta Journal Constitution

12:30 -1:30

**Lunch in the Embassy Suites  
Atrium**

1:30-3:00

**Small Group Discussions of  
Morning's Proposals and  
Development of Additional  
Strategies**

Facilitators:

- group 1: Honorable Roger Warren, President, National Center for State Courts
- group 2: Nathan Crystal, Professor, University of South Carolina School of Law
- group 3: Blan Teagle
- group 4: Deborah L. Rhode

Reporters:

- group 1: Bucky Askew, Director of Bar Admissions, Supreme Court of Georgia
- group 2: Michael Oths, Bar Counsel Attorney, State Bar of Idaho
- group 3: Sue Erwin Harper, Esq., Nelson Mullins Riley & Scarborough
- group 4: Adrian Evans

3:00-3:15

**Break**

3:15-5:00

**Reports from Small Groups and Debate of Proposals**

Facilitators:

Roy Stuckey and Deborah Rhode

7:00-9:00

**Reception and Dinner at the Aquarium**

(buses depart at 7:00 from corner of Hutson and Meeting Streets)

**Sunday, September 29, 2002:**

9:00-10:30            **Measuring Professionalism**

Moderator:           Roy Stuckey

Panelists:            Dr. Susan Case, Director of Testing,  
National Conference of Bar Examiners

Dr. David Stern, M.D, Associate  
Professor of Internal Medicine,  
University of Michigan School of  
Medicine, and member, Advisory  
Committee to the Outcome Project of  
the Accrediting Council for Graduate  
Medical Studies

Adrian Evans, Professor, Monash  
University School of Law, Australia

10:30-10:45           **Break**

10:45-11:45           **Developing a Global Program for  
Enhancing Accountability**

Presenters and Facilitators:

Neil Gold, Vice-President, Academic,  
and Professor of Law, University of  
Windsor, Windsor, Ontario, Canada,  
and international consultant on issues  
affecting the legal profession.

Mark Ellis, Executive Director,  
International Bar Association, and  
former Director, ABA/Central and  
East European Law Initiative

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11:45-Noon **Concluding Remarks**

Deborah Rhode