South Carolina Law Review

Volume 54 | Issue 4 Article 5

Summer 2003

Defining the Challenges of Professionalism: Access to Law and Accountability of Lawyers

Deborah L. Rhode
Stanford Law School

DEFINING THE CHALLENGES OF PROFESSIONALISM: ACCESS TO LAW AND ACCOUNTABILITY OF LAWYERS

DEBORAH L. RHODE*

Perhaps the only downside of cosponsoring a conference with the University of South Carolina School of Law Nelson Mullins Riley & Scarborough Center on Professionalism, particularly when it is their generosity that makes it all possible, is that you are deeply indebted to its superb director Roy Stuckey. And if he asks, you do things that you would never otherwise dream of doing—like speaking after Dennis Archer. But having been cajoled into that position, I follow the sage organizing principle of vaudeville: never follow a magic act with another magic act.

So let me not try to duplicate that inspirational call to action, but instead raise a few sobering questions about what we are about, both here and in much of our other work. A recent cartoon in the *New Yorker* put out one possible version of that question. It features an attorney peering into the firm's reception area and inquiring plaintively, "Ms. Burney, do we have anything on right and wrong?"[1] Given that this is a conference on professionalism, I assume that our files need no more of that. Rather, we are all here because we share a basic commitment to the professionalism ideal and to the values of personal integrity and public service that it implies. But there is also much about professionalism rhetoric and the way it is invoked that should give us pause.

Indeed, if memory serves, and it probably does because there is a written record, I made a similar observation at the last conference on professionalism that our centers jointly sponsored two years ago. As I noted then,

> 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

*Conference Co-Chair, Professor and Director of the Keck Center on Legal Ethics and the Legal Profession, Stanford Law School.

1. 78 NEW YORKER 64 (2002).

> the problem is, let alone how best to address it. "Professionalism" has become an all-purpose prescription for a broad range of complaints, including everything from tasteless courtroom apparel to felonies like document destruction. 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. 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 bore the costs of anticompetitive bar practices.[2]

I went on to suggest that the challenge before us was to give some greater content to the professionalism ideal and to learn more about how best to promote it. Too much of our cottage industry of professionalism initiatives–centers, conferences, commissions, commentary, and codes–is never evaluated in any systematic way. The impetus for much of this work is a shared sense that there is a problem out there, and, as one bar leader put it, "We have to do *something*."[3] But as I asked (I hope rhetorically) at our last conference, should we not have a more "informed basis for deciding whether the 'something' that we *are* doing is the most effective use of our time and resources?"[4] In particular, I identified two dimensions on which I believed our strategies were falling short: access to justice and accountability for professional regulation. I closed with the hope that the Conference could help "remind us of our aspirations, and demand that we do better." [5]

In due course, these remarks were published as part of the symposium proceedings in the *South Carolina Law Review*. And like so much else on the subject, they quickly vanished into the void with no discernable trace. The professionalism parade proceeds merrily on, fueled by the comfortable but unsupported assumption that all of its

---

2. Deborah L. Rhode, *Opening Remarks: Professionalism*, 52 S. C. L. REV. 458, 459 (2001) (footnotes omitted).

3. *Id.* at 458 (quoting an unnamed participant at a meeting of the Consortium on Professionalism at the American Bar Association, 2000).

4. *Id.*

5. *Id.* at 471.

hoopla is doing good in the world. As one recent overview, again in the *South Carolina Law Review,* happily concluded, recent judicial initiatives "[s]lowly but surely . . . [are] beginning to have an impact on the way that American lawyers think about the reality of their relationship to [professional values like] truth and honesty."[6] Would that it were so, but we have no real evidence for it.

So too, the background materials for this Conference are filled with fine intentions and noble aspirations. To cite just one example, the Colorado Bar Association Professionalism Reform Initiative Task Force wants schools to discuss the "corrosive effects of dishonesty" and wants individual lawyers to "look inward, to examine their own behaviors and to emphasize the spiritually liberating effects of honest and truthful conduct on one's own life . . . ."[7] With all due respect, if such calls to action were effective, we would not need professionalism initiatives or symposia like this. Indeed, the recent spate of ethics scandals should remind us of how wide the gap can be between professionals' avowed principles and workplace practices. Enron, as business ethicists have noted, "was long regarded as an exemplary corporate citizen."[8] And companies with model ethical codes and high social responsibility ratings have often failed to institutionalize their commitments.[9] The kinds of ethical initiatives that make for good public relations and splashy professionalism programs do not necessarily translate into moral behavior if strong economic incentives are pointing in the opposite direction.

Although that point should be obvious, it can too readily escape the attention of those like us—educators and bar leaders—who have more control over the aspirational agenda than the financial realities of legal practice. I was reminded of that point last fall, when invited to spend time with the Nebraska state judges' professionalism committee. It had a very small budget and a very large agenda. Apparently unaware of my reputation for drizzling on professionalism parades, its members were eager for my thoughts on where to begin with their

---

6. W. William Hodes, *Truthfulness and Honesty Among American Lawyers: Perception, Reality, and the Professional Reform Inititive*, 53 S.C. L. REV. 527, 548 (2002).

7. COLO. BAR ASS'N PROFESSIONAL REFORM INITIATIVE TASK FORCE, INTERIM REPORT TO THE BOARD OF GOVERNORS (May 2002), *available at* http:www.cobar.org/group/index.cfm?category=288&EntityID=upadm

8. David Vogel, *Recycling Corporate Responsibility*, WALL ST. J., Aug. 20, 2002, at B2; *see also* Marjorie Kelly, *The Next Step for CSR: Economic Democracy*, BUS. ETHICS, Aug., 2002, at 10 ("waxing nostalgic" over recent ethics scandals).

9. Mike Healy & Jennifer Iles, *The Establishment and Enforcement of Codes*, 39 J. BUS. ETHICS 117, 122 (2002); Gordon Marino, *The Latest Industry to Flounder: Ethics, Inc.*, WALL ST. J., July 30, 2002, at A14; Vogel, *supra* note 8.

extended list of potential projects: conferences, consortia, conclaves, civility codes, and so forth. I offered the discomforting response that no one really knew the answer to that question since no one was evaluating the impact of such professionalism initiatives.

I then asked a series of what may have seemed awkward questions about what exactly the committee was trying to accomplish and how it would define success. These were not matters on which members' discussion had focused, and there was not much of a consensus. One primary objective was to improve lawyers' image. Drawing on recent popular opinion polls, I questioned whether the public was likely to be much impressed by bar professionalism initiatives unless they actually affected the behavior that caused greatest concern–dishonesty and greed.[10] And I expressed polite skepticism that the lawyers most responsible for those problems would be much affected by episodic professionalism programs or aspirational codes.[11]

I made a similar observation concerning the committee's other main objective: altering uncivil behavior. Since most of what fueled members' concerns were already violations of bar ethical rules, I suggested that perhaps the best use of the committee's resources would be to improve the disciplinary process rather than to develop hortatory professionalism initiatives. And I proposed that some greater judicial attention might usefully focus on an issue that is at the top of the public's, if not the profession's, concern: access to justice.[12]

I am not sure that these were welcome insights. But I remain convinced that they are the ones that we should be communicating more effectively in professionalism circles. It is a shameful irony that the nation with the world's highest concentration of lawyers fails to address over four-fifths of the legal needs of the poor, and prices most ordinary problems of middle-income citizens out of the system entirely.[13] Even in criminal cases, where indigent defendants are in theory entitled to "effective assistance of counsel," few in practice receive it. The crushing caseloads and ludicrously low fee awards available for court-appointed counsel generally preclude thorough preparation.[14] Quick pleas with no investigation are the rule, not the

---

10. *See* DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE 3-4 (2000).

11. *See id.* at 91-92; *see also* Paul Tremblay, *Shared Norms, Bad Lawyers, and the Virtues of Casuistry*, 36 U.S.F. L. REV. 659, 707 (2002) (doubting law schools will effect significant change within law firm culture in the short term).

12. *See* Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1789-1808 (2001) (recounting examples of where attention is needed).

13. *See id.* at 1785 n.1 (listing sources describing unmet legal needs of the poor).

14. *See* DAVID COLE, NO EQUAL JUSTICE 83-85 (1999); Catherine Greene Burnett et al., *In Pursuit of Independent, Qualified, and Effective Counsel: The Past and Future of Indigent Criminal Defense in Texas*, 42 S. TEX. L. REV. 595, 626-30

exception. In some jurisdictions, attorneys may handle as many as 900 felony matters a year, and fee caps of under a thousand dollars per case are common.[15] That rate does not even cover overhead, and in the few prosecutions that go to trial, kids selling sodas on the beach may have higher hourly earnings than criminal defense counsel.[16] In this system, it is often far better to be rich and guilty than poor and innocent. Inadequate representation rarely results in reversal.[17] Even in death penalty cases, individuals have been convicted when their attorneys were asleep, on drugs, or parking their cars during key parts of the prosecution's case.[18] Equal justice is what we inscribe on court house doors; it does not begin to describe what goes on inside.

Although many lawyers acknowledge the problem, they generally place responsibility for solutions anywhere and everywhere else. Bar leaders think legislatures should allocate sufficient resources for civil legal assistance and indigent criminal defense; judges agree, but have declined to require it under constitutional and statutory provisions.[19] Judicial and bar leaders also believe that lawyers should provide more pro bono assistance but, again, have declined to mandate it. Although many lawyers have extraordinarily distinguished records of voluntary legal service, the average for the profession as a whole is nothing to be proud of: less than half an hour a week and under fifty cents a day.[20] An all too common view, as Oscar Wilde once put it, is that "duty is what one expects from others . . . ."[21]

So too, although most Americans view our legal system as a model for the rest of the world, when it comes to access to justice, our performance leaves much to be desired. Many nations make far more generous provisions for the have-nots, and rely on more cost-effective

---

(2001); Steven J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1989 (1992); Bob Herbert, *Cheap Justice*, NEW YORK TIMES, Mar. 3, 1998, at 15.

15. *See* RHODE, *supra* note 10, at 61; Burnett et al. *supra* note 14, at 626-29; Rhode, *supra* note 12, at 1789.

16. JIM DWYER ET AL., ACTUAL INNOCENCE 188 (2000); *see also* Rhode, *supra* note 12, at 1789 (describing compensation rates for court-appointed defense counsel).

17. One systematic study found that over ninety-nine percent of federal claims of ineffective assistance of counsel were unsuccessful. *See* Victor F. Flango & Patricia McKenna, *Federal Habeas Corpus Review of State Court Convictions*, 31 CAL. W. L. REV. 237, 259-60 & tbls. 12-13 (1995).

18. *See* Rhode, *supra* note 12, at 1800 (citations omitted).

19. *See id.* at 1801-03; Burnett et al., *supra* note 14, at 640.

20. *See* Rhode, *supra* note 12, at 1810 (citations omitted).

21. OSCAR WILDE, *A Woman of No Importance*, *quoted in* THE WIT AND HUMOR OF OSCAR WILDE (Alvin Redman ed., 1959).

procedures for delivering ordinary services to the haves.[22] As I hope this Conference will suggest, we could learn much from their example.

We could also profit from more searching review and cross-cultural comparisons on issues of professional accountability. Our own bar regulatory structures are deeply flawed. In order to protect the independence of lawyers, courts have largely monopolized authority over the practice of law. However, most judges lack the time, inclination, and expertise to oversee effective regulatory structures.[23] Rather, they have delegated much of their authority to the organized bar, which has obvious difficulty accommodating public interests that often conflict with its own.

The inadequacy of bar ethical codes and enforcement processes has emerged clearly over this past year as lawyers' roles in debacles like Enron began to unfold.[24] What is equally clear is that if our profession cannot do a better job at getting its own house in order, others will do it for us. A case in point involves recent federal legislation requiring lawyers to disclose evidence of a material violation of securities law to a company's senior executive or board of directors, or face loss of practice privileges before the Securities and Exchange Commission (SEC).[25] In opposing the legislation, then ABA President Robert Hirshon voiced the bar's traditional objection to governmental intrusions on professional autonomy: lawyers were already subject to rules of conduct and "[w]e don't need the S.E.C. to be drafting new codes of ethics."[26] But perhaps we do, if the bar cannot, or will not, develop appropriate regulatory standards on its own.

Dennis Archer has rightly noted in his comments here that this new judicial legislation raises several concerns. But so too, do the bar's current ethical rules. And part of what should engage our concern is the ABA's repeated failures to adopt even the watered-down discretionary disclosure provisions for client frauds

---

22. *See* Rhode, *supra* note 12, at 1814; *see also* RHODE, *supra* note 10, at 135-41 (describing alternatives to lawyers as a way of expanding access to justice).

23. *See* RHODE, *supra* note 10, at 145-46, 160; Benjamin H. Barton, An Institutional Analysis of Lawyer Regulation–Who Should Control Lawyer Regulation: Courts, Legislature, or the Market? (unpublished manuscript, on file with the author).

24. *See generally* Deborah L. Rhode & Paul D. Paton, *Lawyers, Ethics, and Enron*, STAN. J.L. BUS. & FIN. 9 (2002) (analyzing and addressing legal profession's role in Enron collapse).

25. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, 784; Rhode & Paton, *supra* note 24, at 12-13.

26. Jonathan D. Glater, *Round Up the Usual Suspects. Lawyers, Too?*, N. Y. TIMES, Aug. 4, 2002, at E4 (quoting Hirshon).

recommended by its own Ethics 2000 Commission.[27] The profession's historic unwillingness to accept adequate obligations to prevent financial disasters points up the limitations in a regulatory process controlled by and for lawyers. Protecting the independence of the profession is an important value, but it is not our only value and it needs to be tempered by public accountability.

It is these issues of accountability and access that should dominate our professionalism debates, not the mind-numbing platitudes that the genre typically inspires. In searching for some less pontifical way to bring that point home, I decided that my lawyer humor collection could use some refurbishing. Google, I was reliably informed, would surely have something suitable. Well probably it does, but the candidates are buried among (at latest count) some 807,000 legal humor sites. That, of itself, raises a question worth our attention. What have we done, or—more to the point—not done, to deserve the outpouring of animosity on many of those sites? Answering that question might help us think more clearly about what is lacking in our profession and in our debates about professionalism. My hope is that this Conference can take us one step further in that direction.

27. DEBORAH L. RHODE & GEOFFREY HAZARD, JR., PROFESSIONAL RESPONSIBILITY AND REGULATION, 68-69 (2002); Rhode & Paton, *supra* note 24, at 27.