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# Professionalism in the Practice of Law: A Symposium on Civility and Judicial Ethics in the 1990s

## FOREWORD

MARY M. DEVLIN\*

Psychologists (at least popular psychologists) tell us that role conflict creates stress, but that stress can have positive effects—on healthy individuals. Are there 800,000 role-conflicted, stressed-out lawyers in the United States? Probably not. But there are too many creating unhappiness for their clients, for other lawyers, and for judges.

The legal profession in the United States did not divide itself into the English system of barristers and solicitors.<sup>1</sup> Instead, admission to the Bar is admission to all forms of practice—within the bounds of competence. The ABA *Model Rules of Professional Conduct* explicitly recognize the existence of

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1. In the colonial era, "a few jurisdictions sought to set up grades after the English system [but] these attempts came to naught." ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 163 (1953). In 1990, to address problems caused by the barrister/solicitor divided system, including disadvantages to clients, Parliament enacted proposals to allow solicitors to appear as advocates in higher courts—to the dismay of barristers. See Andrew Walker, *A Right of Audience: Solicitors, Barristers, and the Future of England's Divided Profession*, 5 *RESEARCHING LAW: AN ABF UPDATE*, Winter 1994, at 2.

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different roles within the American legal profession.<sup>2</sup> For example, the lawyer's particular responsibilities in the role of "Counselor" are specified in one section of the *Model Rules*,<sup>3</sup> and those of "Advocate" in another.<sup>4</sup> Other particular responsibilities from serving in roles as government employee<sup>5</sup> or judge or arbitrator<sup>6</sup> are also recognized in the *Model Rules*.

One healthy way to deal with stress (per our popular psychologists) is to analyze its causes. This issue of the *Valparaiso University Law Review* is devoted to self-analysis of the legal profession and its standing in American society. The reader interested in this issue may also be interested in Jane Jacobs's recent analysis of the ethical systems guiding our social and economic lives.<sup>7</sup> Entertaining enough to overcome the inherent pedantry of the format of a Platonic dialogue, Jacobs explores two systems of values that conflict in working life: the "commercial moral syndrome" and the "guardian moral syndrome." While a judge is a "guardian" whose precepts prohibit the sale of judicial services, says Jacobs:

[a] lawyer in private practice is free to accept any client she chooses and trade her advice, knowledge, and forensic skill for a fee. A respectable trading transaction. But as soon as that lawyer accepts an appointment to a regulatory agency, or wins election to a legislative post, the same kind of behavior, maybe even with one of her same old clients, converts to criminal bribe taking.<sup>8</sup>

Thus, the private practice of law is, in Jacobs' view, an anomaly, fitting

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2. "A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1994). A lawyer's responsibilities in these roles can mean:

however, [that] conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional conduct prescribe terms for resolving such conflicts. Within the framework of these Rules, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

*Id.*

3. MODEL RULES OF PROFESSIONAL CONDUCT Rules 2.1 - 2.3 (1994).

4. *Id.* Rules 3.1 - 3.9.

5. *Id.* Rule 1.11.

6. *Id.* Rule 1.12.

7. JANE JACOBS, SYSTEMS OF SURVIVAL: A DIALOGUE ON THE MORAL FOUNDATIONS OF COMMERCE AND POLITICS (1992).

8. *Id.* at 61.

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completely into neither the commercial nor guardian systems.<sup>9</sup> Is this good? (After all, Jacobs is a philosopher.) Yes, says Jacobs:

provided the lawyer has the skills and temperament for both, and many do. Good lawyers understand the distinctions. Of course, just as some guardian lawyers take bribes or other private benefits—like promises of lucrative future private employment—so do some lawyers in private practice use adversarial tricks and cunning in what ought to be straightforward commercial arrangements. That always makes trouble. It also makes people distrust and hate lawyers.<sup>10</sup>

The note on the Scope of the *Model Rules of Professional Conduct*, adopted by the ABA House of Delegates in 1983, explains that the rules do not “exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules.”<sup>11</sup> These unenumerated considerations apparently are at the core of the professionalism movement.

In 1985, the American Bar Association appointed a Commission on Professionalism as the result of a recommendation by former Chief Justice Warren E. Burger and ABA President John C. Shepherd who both observed that “the Bar might be moving away from the principles of professionalism and that it was so perceived by the public.”<sup>12</sup> In its conclusion, the Commission noted that “[p]erhaps the golden age of professionalism has always been a few years before the time that the living can remember.”<sup>13</sup> But, the Commission concluded that “it is proper—indeed it is essential—for a profession periodically to pause to assess where it is going and out of what traditions it has come.”<sup>14</sup>

Continuing in this spirit of professional self-assessment is the work of the Committee on Civility of the Seventh Federal Judicial Circuit, described in this issue by its chair, Judge Marvin E. Aspen. The Seventh Circuit Committee’s definition of civility in litigation as “professional conduct . . . of judicial personnel and attorneys”<sup>15</sup> is interesting in its inclusion of judges. This inclusion apparently resulted from the Committee’s survey which found

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9. *Id.* at 115.

10. *Id.*

11. MODEL RULES OF PROFESSIONAL CONDUCT Scope (1994).

12. AMERICAN BAR ASSOCIATION COMMISSION ON PROFESSIONALISM, “. . . IN THE SPIRIT OF PUBLIC SERVICE:” A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM, at v (1986).

13. *Id.* at 55.

14. *Id.*

15. *Interim Report of the Committee on Civility of the Seventh Federal Judicial Circuit*, 143 F.R.D. 371, 378 n.1 (1991).

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dissatisfactions among both the Bench and the Bar with each other. Judge Aspen believes that it is simplistic to attribute civility problems in litigation to changes in our society and examines a variety of causal factors, some of which may be more pronounced—for now—in a large metropolitan area. Clearly, the Seventh Circuit has blazed a trail that others are following.

Dean Edward McGlynn Gaffney pursues the cautions to judges in the Seventh Circuit's Standards to an "imperative of judicial civility." He illuminates the early post-Revolutionary period when, still in the English tradition, dissenting opinions were not written by gentlemen. This restraint was soon overcome, and Dean Gaffney recounts some of the great dissents and discusses their role in American jurisprudence. He concludes that judges of appellate courts need to exercise care in the drafting of their dissents.

Judge Aspen and Dean Gaffney have an unstated premise that was perhaps best stated by Rodney King when he said that we're all in this together. Perhaps that is the origin of the call for civility—otherwise known as the Golden Rule.

Justice Brent E. Dickson and Julia Bunton Jackson describe efforts on the part of the Bench and the Bar nationwide to promote lawyer civility. These efforts include committees and commissions, court decisions and rules, programs, publications, oaths, and creeds. Especially noteworthy is the American Inns of Court movement that addresses two frequently identified causes of incivility, lack of collegiality and of mentoring.

John C. Buchanan explores the symptoms of the demise of the profession's standing in the public's eyes and proposes a society of lawyers committed to standards of professionalism. This fascinating concept reflects a phenomenon of fairly recent vintage. While it is unlikely that lawyers and judges have succumbed to general societal influences such as media portrayals of violence, it is true that the professions have become more overtly competitive in the past fifteen years. An organization, such as Mr. Buchanan proposes, might carve a niche based on such standards in the market for legal services. Clearly, not only the profession, but the consumers of legal services are seeking alternatives.

Professor Amy R. Mashburn presents a provocative challenge to discussions of professionalism and civility with the thesis that they are class-based and biased to the views of large firms. Professor Mashburn suggests that such efforts divert attention from problems such as failures of the attorney regulatory and disciplinary systems.

Professor Burnele V. Powell posits a transformation in the lawyer regulatory and disciplinary systems to a consumer orientation, heralded on by the work of the ABA Commission on Evaluation of Disciplinary Enforcement

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(McKay Commission). Notable in this transformation are recommendations for reassertion of the judiciary's direct control over and public accountability of lawyer discipline systems, consumer-friendly mechanisms such as a central intake office for complaints, and lawyer-friendly mechanisms to assist those in trouble.

Dealing with the enforcement of judicial ethics, Professor Les Abramson analyzes how recusal motions are dealt with in the various states. Can the judge decide or should the motion be considered by another judge? As with lawyer disciplinary systems, the identity of the decision-maker is crucial to the perceived integrity of the process.

Dean Howard T. Markey, former Chief Judge of the Federal Circuit, proposes mandatory continuing education courses for judges in judicial ethics. I respectfully suggest that legal ethics topics be included in ethics courses for judges to keep them apprised of this developing area of the law and able to address conduct in their courtrooms.

Here is the assessment of Alexis de Tocqueville of the American legal profession in the 1830s:

If I were asked where I place the American aristocracy, I should reply, without hesitation, that it is not among the rich who are united by no common tie, but that it occupies the judicial bench and the bar.

The more we reflect upon all that occurs in the United States, the more shall we be persuaded that the lawyers, as a body, form the most powerful, if not the only counterpoise to the democratic element. . . . [Lawyers] secretly oppose their aristocratic propensities to the nation's democratic instincts, their superstitious attachment to what is old to its love of novelty, their narrow views to its immense designs, and their habitual procrastination to its ardent impatience.<sup>16</sup>

This was written just as almost all educational requirements for admission to the Bar were eliminated, and bar organizations disappeared in the excesses of Jacksonian democracy.<sup>17</sup> But even with more stringent Bar requirements today, de Tocqueville's comments serve as a cogent indictment of modern professionalism. Lawyers should be aware of these criticisms and join the movement toward professionalism.

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16. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 125 (Richard D. Heffner ed., 1984).

17. See POUND, *supra* note 1, at 223-49.

