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Professional Responsibility

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PROFESSIONAL RESPONSIBILITY

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In preparing an article for the annual faculty symposium, the writer usually looks back over the past year for significant legislative acts and judicial decisions. Primarily, we are trying to bring to the attention of the practicing bar the developments which have occurred. Last year's article[1] is illustrative.

A review of all of the Louisiana cases touching on the Legal Profession since last year's article revealed nothing new, with the possible exception of *L.S.B.A. v. Chatelain*.[2] There were the usual number of discipline cases, perhaps even a few more than usual, and the usual number of malpractice cases. There were several "reasonable fee" cases and five or six "effective assistance of counsel" decisions.

On the legislative side, however, there was an extremely important development. "Rule eleven" was made a part of the Louisiana Code of Civil Procedure in article 863 and article 1420. In addition, *local* bar associations around the country were adopting "lawyer creeds" and Justice Sandra Day O'Connor expressed her dismay at unlimited legal advertising.

No matter what a lawyer picks up to read these days he finds someone in authority exhorting "professionalism." Mr. Wood Brown, III, president of the Louisiana State Bar Association, characterizes this subject as one of the "hot items" among the organized bar nationwide.[3] He refers to a dissenting opinion by Justice Sandra Day O'Connor in *Shapero v. Kentucky Bar Association*[4] in which she outlines several of the elements of what constitutes a "learned profession." Justice O'Connor was writing in opposition to unrestricted lawyer advertising.[5]

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1. Mengis, Developments in the Law, 1986-1987—Professional Responsibility, 48 La. L. Rev. 437 (1987).

2. 513 So. 2d 1178 (La. 1987). The Supreme Court held that a lawyer's trust account had a public aspect and records thereof could be subpoenaed by the Professional Responsibility Committee of the State Bar Association.

3. Brown, President's Message, 36 La. B.J. 72 (No. 2 Aug. 1988).

4. 108 S. Ct. 1916 (1988).

5. Other articles which define and discuss what a "profession" is are: Wade, Public Responsibilities of the Learned Professions, 21 La. L. Rev. 130 (1960); Pipkin, Law School Instruction in Professional Responsibility: A Curricular Paradox, 1979 Am. B. Found. Res. J. 247; Stason, Why a Profession?, 21 La. L. Rev. 153 (1960); Provosty, President's Message, 34 La. B.J. 192 (1986).

In the United States District Court for the Northern District of Texas, Dallas Division, the court en banc has established standards designed to govern the conduct of attorneys engaged in civil litigation.[6] These standards stress the lawyer's duty to the judicial system (the obligation of candor, diligence, and respect to the judiciary), as well as his obligation of courtesy and cooperation toward opposing counsel.[7] In the same locality the Dallas Bar Association has recently adopted "guidelines of professional courtesy" and a "lawyer's creed," both of which stress the lawyer's obligation to use the judicial system properly and responsibly.[8]

Most of us are familiar with the report of the Commission on Professionalism to the Board of Governors and the House of Delegates of the American Bar Association that was released in August of 1986.[9] We see the same thing stressed in this report as in all of the other literature on professional responsibility: a lawyer true to his profession realizes that he has awesome privileges and responsibilities in what we call the "system of justice." Michael Davis, writing in the Georgetown Journal of Legal Ethics,[10] defined "professionalism" as putting your profession first. He continued:

> To declare yourself a lawyer is to profess more than knowledge or experience of legal work. It is, in effect, to claim that you have the education lawyers are supposed to have, passed the tests lawyers are supposed to pass, that you have made the commitments lawyers are supposed to make. Among those commitments is the commitment to act in accordance with a code of ethics, such as, *The Model Rules of Professional Conduct*, *The Model Code of Professional Responsibility*, or some similar code (depending on where the lawyer practices).[11]

One of the elements that is always included in any definition of "professionalism" is self-regulation. This is accomplished in Louisiana by the Model Rules of Professional Conduct, which became effective on January 1, 1987. Those rules emphasize, more than did the Code of Professional Responsibility, the lawyer's duties toward the system of justice and nonclients, or third parties. Complementing these rules are

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6. These standards were set out in Dondi Properties Corp. v. Commerce Savings and Loan Ass'n, 121 F.R.D. 284 (N.D. Tex. 1988).

7. Id. at 287.

8. Id.

9. ". . . in the Spirit of Public Service:" A Blueprint for the Rekindling of Lawyer Professionalism, 112 F.R.D. 243 (1986).

10. Davis, Professionalism Means Putting Your Profession First, 2 Geo. J. Legal Ethics 341 (1988).

11. Id. at 342.

several recent amendments to articles 863 and 1420 of the Louisiana Code of Civil Procedure.[12] These amendments introduce a sort of "rule eleven" into Louisiana's civil procedure.[13]

At this point it would seem pertinent to stop and ask ourselves if all of this emphasis on professionalism is working. In conjunction with mandatory continuing legal education, this writer speaks on ethics throughout the state of Louisiana. Anecdotal evidence from both lawyers and judges indicates that the answer must be a resounding no. But why? Surely there must be more than one reason. Would lawyers and the public be better off with no self-regulation? Are we truly, as Mr. Michael Garth Moore wrote to the National Law Journal in 1987, members of "a trade, like the plumber, the carpenter and the cabinetmaker," and therefore not susceptible to self-regulation?

It appears to this writer that the necessity perceived by the United States District Court for the Northern District of Texas, the Dallas Bar Association, the Legislature of Louisiana and the Congress of the United States to supplement the positive expressions of the lawyer's ethical duties is in fact a recognition that the current system is not working.

Is Better Self-Regulation the Answer?

It has long been a tenet of a national consumer organization called HALT (Help Abolish Legal Tyranny) that self-discipline can never work because of the inevitable conflict of interest one encounters in applying disciplinary constraints to oneself. This same organization repeatedly questions the whole concept of professionalism among attorneys, and advocates the destruction of "the myth that lawyers are anything other than business people delivering a service." It seems to the writer that the greatest fan of the position taken by HALT has been the United States Supreme Court. In a series of cases beginning with *In re Griffiths*[14] and ending with *Shapero v. Kentucky Bar Association*,[15] the Supreme Court of the United States has made it perfectly clear that there is no such thing as a "learned profession" exemption from the Sherman Antitrust Act or the first amendment to the United States Constitution.

It may be helpful to contrast some of the duties and responsibilities of a lawyer who considers himself a member of a learned profession,

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12. 1988 La. Acts No. 442.

13. Act 442 introduced new sanctions for improper use of the judicial process, and in that way closely parallels Fed. R. Civ. P. 11, known in practitioner's jargon as "rule eleven."

14. 413 U.S. 717, 93 S. Ct. 2851 (1973).

15. 108 S. Ct. 1916 (1988). The court's position was developed in the interim by Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S. Ct. 2004 (1975); Bates v. State Bar of Arizona, 433 U.S. 350 97 S. Ct. 2691 (1977); and Zauderer v. Supreme Court of Ohio, 471 U.S. 626, 105 S. Ct. 2265 (1985).

and thereby bound by a code of ethics, with those of a lawyer who considers himself simply a tradesman. The lawyer who considers himself a professional exhibits these attributes:

> His primary goal is public service through the promotion of an efficient system of justice.
>
> He observes a ban on competition that includes no fee cutting, no advertising, and no direct solicitation.
>
> He respects and carries out his duty to represent indigents without compensation.
>
> He considers pro bono work an obligation.
>
> He charges only reasonable fees.
>
> He owes a fiduciary duty to his clients and considers the relationship between himself and his client to be personal, unique, and fiduciary.
>
> He is familiar with and attempts to abide by the Model Rules of Professional Conduct.
>
> He acknowledges that his constitutional rights may sometimes be limited by his oath as an attorney at law.
>
> He attends continuing legal education seminars not because such attendance is mandatory, but because he regards it as his duty to continue to be competent.
>
> He protects the confidentiality of all matters relating to the representation of his client.
>
> He is candid and respectful to the court and fair to all others.
>
> He believes that duty to his client or duty to the system of justice are interrelated, and that service to the one serves the other.

Now let us consider the lawyer who is simply a tradesman:

> He may engage in any lawful type of competition, which would include cutting fees, advertising, and direct solicitation of business.
>
> He may charge what the market will bear.
>
> He cannot be forced to work for nothing.
>
> He owes no one pro bono services.
>
> He does not acknowledge that he is a member of any special class subject to any special privileges, nor does he acknowledge that he is subject to any special rules or supervision.
>
> He vigorously claims every constitutional right that anyone

else has.

He regards competence as a competitive advantage pursued for economic benefit.

His relationship with his clients is not necessarily personal, nor is it unique in any sense, and it is fiduciary only to the extent required by the laws of the state.

Confidentiality is governed only by the evidentiary privilege.

He owes no duty of candor to the court or fairness to others, and he does not recognize any rules of etiquette either toward his brother lawyers or toward court officials.

He considers "officer of the court" to be an empty title.

No matter what the Louisiana State Bar Association does with self-regulation or discipline, it is not going to bridge the chasm between these two very different attitudes. It is futile therefore to say, as so many bar officials do, that more and better regulation is necessary. All one has to do to disabuse himself of the idea that more efficient disciplinary regulation would make our troubles go away is to review what has been the subject of discipline over the years since the Clark report in 1970. The vast majority of cases in which serious sanctions were imposed involved either convictions for serious offenses or findings of manifest dishonesty (commingling, embezzlement, or outright theft). Matters such as overcharging, representing conflicting interests, violations of confidentiality, abuse of judicial procedures, and lack of candor to the tribunal usually have been decided by the courts in specific cases, and if there has been any follow-up in the disciplinary process, it has not reached the public stage except in isolated instances.

But it is here where so many problems lie. Many attorneys see nothing ethically wrong with misusing the system of justice as long as it is advantageous to their clients or as long as it is profitable to them. The courts are taking corrective measures, but such steps should not be necessary. In a recent law review article, Professor L. Ray Patterson discusses a 1986 Georgia Supreme Court decision that created new tort-abusive litigation.[16] Legal procedure should be a vehicle to early determination of real disputes. Using procedural devices to prevent that early determination perverts the adversary system. Such abuse of the system has led some to conclude that the adversary ethic itself is unsound,[17] a view which the writer does not share. It must give pause to consider,

16. Patterson, Yost v. Torok: Taking Legal Ethics Seriously, 4 Ga. St. U.L. Rev. 23 (1988).

17. Shaffer, The Unique, Novel, and Unsound Adversary Ethics, 41 Vand. L. Rev. 697 (1988).

however, that professional standards are maintained by *compulsive* rather than *voluntary* adherence to the Model Rules. Perhaps this is why the federal court in Dallas feels that it is necessary to do more than simply adopt by rule of court the Model Rules of Professional Conduct or the Model Code of Professional Responsibility. Obviously Federal Rules of Civil Procedure Rule 11 was designed to force compliance with what are now Rules 3.1, 3.2, 3.3 and 3.4 of the Model Rules. Although this writer certainly has not conducted a survey, he would suspect that lawyers are much more apt to pay attention to and follow the admonitions of Rule 11 than the admonitions of Rules 3.1 and following.

Justice O'Connor, in her dissenting opinion in *Shapero*, said:

> One distinguishing feature of any profession, unlike other occupations that may be equally respectable, is that membership entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or though the discipline of the market.[18]

As this statement demonstrates, Justice O'Connor recognizes that adherence to ethical rules cannot really be enforced unless the vast majority of lawyers and judges adhere to them as a matter of conscience. In Louisiana this insight brings us squarely up against the integrated bar association. Every lawyer, in order to practice in Louisiana, must belong to the Louisiana State Bar Association. However, that association, as an arm of the Supreme Court of Louisiana, simply cannot impose regulations on its members that are more restrictive than those the Supreme Court of the United States will allow. But what about a voluntary association of Louisiana lawyers? Certain trial lawyer associations in the United States have adopted sets of ethical rules for their members. To some extent, this is what the Dallas Bar Association is doing.

Lawyers who believe that adherence to traditional ethics enhances the system of justice, aids the public in general, and gives them a higher quality of life could form their own association and open their membership to all who share the same dedication to professionalism and are willing to give up some of their "rights" in order to present a united front. Of course, such an effort might be immediately labeled elitist, and the organization branded as a guild. But if a guild is dedicated to serving the public through a more efficient system of justice, what ground is there for complaint?

Some commentators have contended that the whole problem lies in lack of training in the law schools. If what they mean is that these

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18. Shapero v. Kentucky Bar Ass'n, 108 S. Ct. 1916, 1929 (1988) (O'Connor, J., dissenting).

schools have failed to teach the Code or the Rules, their charge simply does not hold water. What we have been teaching in law schools are the ethical rules adopted by the supreme court of our state as limited by the rulings of the United States Supreme Court. We do not teach "ethics," properly defined as "standards of right and wrong that prescribe what humans ought to do, usually in terms of rights, obligations, benefits to society, fairness or specific virtues."[19] Much of what appears in our Model Rules simply is not "ethics" at all, but is more akin to etiquette.[20] The old ban on fee cutting, advertising, and solicitation fall into this category. Thus, the problem is not that students are not taught that the profession they seek to embrace is dedicated to public service; rather, it is that students simply do not see such dedication in the other members of their profession when they begin to practice. The real economic peer pressure brought to bear on those entering our profession tends to produce a business-as-usual attitude.[21]

CONCLUSION

From all of these musings can we arrive at any conclusions that might be helpful to us as lawyers, to the more efficient working of the system of justice, and to the public in general? Mr. Ronald D. Rotunda, in an article entitled "The Word 'Profession' is Only a Label—And Not a Very Useful One,"[22] argues that the professional qualities of dedication to serving client interests—of rendering a service beyond self-interest, of duty, of a spirit of public service—are attributes of individuals, not of occupations. Perhaps it is time to acknowledge that there is no consensus in the legal profession in connection with standards of conduct that are proposed by bar associations. Perhaps we should also recognize that there is a national trend away from any one set of moral or ethical standards. What, then, should we do?

While admitting that there is no clear cut answer to this question, this writer offers the following proposals. First, the law schools should revamp their approach to the teaching of professional ethics. As a first step in this direction, each law professor should teach ethics in the broad sense as an integral part of his course. This is in essence the approach that Thomas Schaffer takes in his text on legal ethics.[23] The course in professional responsibility, which should be taught in the senior year, should in large part be devoted to an historical review of the

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19. 1 Issues in Ethics 2 (Oct. 1987).
20. Drinker, Legal Ethics 211, n.3 (1953).
21. Bowie, The Law: From a Profession to a Business, 41 Vand. L. Rev. 741 (1988).
22. Rotunda, 4 Learning & L. 16 (Summer 1977).
23. American Legal Ethics: Text, Reading and Discussion Topics (Matthew Bender, 1985).

various codes of ethics to demonstrate *why* we have such a code and how it is supposed to work. The remainder of the course should be dedicated to what is, in fact, a far less important subject, namely, mastery of the mechanical rules, which we should somewhat loosely refer to as the "Code of Ethics." As all lawyers know, this Code of Ethics, whether it be the Model Rules or the Model Code, simply does not have answers to the truly difficult questions facing lawyers. These answers can only be reached by the individual lawyer after serious reflection upon what he has been taught by his parents, his church, his teachers, and his law professors.

Second, a change of attitude must also be stressed by law professors and the courts. Trite though it may seem, lawyers must be expected to advance the system of justice, which inevitably will be beneficial to the clients, even at the expense of the lawyer's own economic welfare.