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TOWARD ABANDONING ORGANIZED PROFESSIONALISM

Thomas D. Morgan*

I. INTRODUCTION

The perceived decline in lawyer "professionalism" generates anguished cries. "Has our profession abandoned principle for profit, professionalism for commercialism?," the American Bar Association ("ABA") Commission on Professionalism asked in 1986.1 While the "answer cannot be a simple yes or no," readers were told, "the practices of some lawyers cry out for correction."2 Lawyer Peter Megargee Brown has been less restrained, decrying a profession of "rascals" engaged in "widespread greed, hype, and self-dealing,"3 while lawyer Sol Linowitz writes bitterly of his "betrayed profession."4 Even Yale Law School Dean Anthony Kronman has joined the chorus, describing law as a profession that "now stands in danger of losing its soul."5

One must respect the chagrin and sadness that underlies these accounts of professional decline, although as Deborah Rhode wryly notes, "[I]lawyers [seem to] belong to a profession permanently in

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2. Id.
In this Article, however, I suggest that lawyers are unlikely to fix what is genuinely wrong with the legal profession until we abandon the quest for what I call today's "organized professionalism."  

A. The Commonsense Meaning of Professionalism  

Opposing professionalism will be an uphill battle. Lawyers take pride in professional status. If pride were all that were at stake, challenging the label would not be worth the effort, but much more is involved.  

At the outset of any discussion of professionals and professionalism, of course, one has to acknowledge that those terms are used in widely different ways. For many generations, medicine, law, theology, and teaching were considered to be the only "learned professions." Now, however, we speak of professional musicians, professional athletes, and even professional dog walkers.  

Given this reality, sociologist Eliot Freidson describes the "commonsense idea of professionalism" as a "social label applied to a limited number of occupations considered to be in some way superior to ordinary occupations." Indicators of the superiority include "relatively high prestige, extended, specialized training, and being paid for one's  

6. DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 1 (2000). Lots of examples support Professor Rhode's observation, for example, early in the last century, one prominent law school dean complained that "in the dominant attitude, the Law is no more than a trade, an occupation, a business." John H. Wigmore, Introduction to ORRIN N. CARTER, ETHICS OF THE LEGAL PROFESSION, at xxi, xxi (1915).  

7. The ABA Section of Legal Education and Admission to the Bar has been a leader in professionalism efforts, first creating a Task Force on Law Schools and the Profession and then its own Professionalism Committee. See generally SECTION OF LEGAL EDUC. AND ADMISSION TO THE BAR TASK FORCE ON LAW SCH. AND THE PROFESSION, ABA, NARROWING THE GAP, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT: AN EDUCATIONAL CONTINUUM (1992) [hereinafter MACCRATE COMM'N]; SECTION OF LEGAL EDUC. AND ADMISSION TO THE BAR PROFESSIONALISM COMM., ABA, TEACHING AND LEARNING PROFESSIONALISM (1996) [hereinafter TEACHING AND LEARNING PROFESSIONALISM]. The Standing Committee on Professionalism of the ABA Center for Professional Responsibility coordinates efforts for the American Bar Association as a whole. See generally WORKING GROUP ON LAWYER CONDUCT AND PROFESSIONALISM, ABA, A NATIONAL ACTION PLAN ON LAWYER CONDUCT AND PROFESSIONALISM (1999).  


work.” The objective measure of success in this sense of professionalism, in turn, is whether actual performance by the professional of whatever kind measures up to the level that the public has been led to expect.

Even I agree that lawyers should strive to be “professionals” in this commonsense use of the term, and estimates of current improvement or decline in such professionalism tend to be mixed. For example, today’s best lawyers are probably smarter, know more law, and are harder working than at almost any time in history. Their role in public leadership and their efforts to see that legal service is widely available to all citizens, however, have likely declined.

Use of at least this kind of impressionistic data to evaluate this sense of lawyer professionalism is probably inevitable, but it will not be the focus of this Article.

Neither will this Article criticize “professionalism” as it is used to describe “civility,” or what I call “acting like a responsible grown-up.” Such civility does not require less than fully committed representation of a client but it does requires avoiding ad hominem attacks on opposing parties and counsel and showing respect for public officers and tribunal rules. There is nothing about my argument against organized professionalism that requires any less.

II. THE CONCEPT OF ORGANIZED PROFESSIONALISM

What I am calling “organized professionalism” is based on the more analytic view taken by sociologists such as Freidson who describe professionals as “members of a specialized occupation [that] control their own work.” In order to achieve such control, such a profession must be “organized as an identifiable group.” Organization is required so that the members can regulate “recruitment and training [and]
entrance into the labor market,” and establish “the procedures and criteria by which performance is organized and evaluated at work.”

Anyone with economic training, of course, recognizes those classic “professional” traits as also the characteristics of a cartel. To avoid antitrust liability and to insulate its members against competition attracted by the higher fees a cartel can charge, a profession must seek government protection of a specially-defined scope of work. To get such protection, Freidson suggests, the public “must be persuaded that the body of knowledge and skill ascribed to the occupation is of such a special character to warrant privilege.” That conclusion, in turn, will be based on other claims such as: “the functional importance of the body of knowledge and skill,” “its intrinsic cultural importance,” “its unusually complex and esoteric character,” the “serious consequences [that] can result from poor work,” and the fact that the “occupation as a corporate body is able to control itself without abusing its privilege” because of the “good character” as well as the competence of its members.

Application of those principles to the legal profession’s traditional self-description is obvious and not accidental. Jerold Auerbach, Richard Abel, and others have traced the efforts of American lawyers since at least the eighteenth century to create the sense that they are entitled to be such an organized, self-regulating group. I will not repeat the history here, although one must at least mention de Tocqueville’s oft-quoted description of lawyers as America’s “aristocrats”:

The special knowledge that lawyers acquire in studying the law assures them a separate rank in society; they form a sort of privileged class among [persons of] intelligence. Each day they find the idea of this superiority in the exercise of their profession; they are masters of a

19. Id.
20. See, e.g., MILTON FREEDMAN, CAPITALISM & FREEDOM 137-60 (1962); RICHARD A. POSNER, OVERCOMING LAW 33 (1995). “The history of the legal profession is to a great extent, and despite noisy and incessant protestation and apologetics, the history of efforts by all branches of the profession, including the professoriat and the judiciary, to secure a lustrous place in the financial and social-status sun.” Id.
22. Freidson, supra note 11, at 220.
23. Id. at 220-21.
necessary science, knowledge of which is not widespread; they serve as arbiters between citizens, and the habit of directing the blind passions of the litigants toward a goal gives them a certain scorn for the judgment of the crowd. Add to this that they naturally form a body. It is not that they agree among themselves ... but community of studies and unity of methods bind their minds to one another as interest could unite their wills.25

Lawyers quote less often what de Tocqueville says in the immediately following passage, but it helps to illustrate why the relationship between lawyers and the public has been uneasy:

Hidden at the bottom of the souls of lawyers one therefore finds a part of the tastes and habits of aristocracy. They have its instinctive penchant for order, its natural love of forms; they conceive its great disgust for the actions of the multitude and secretly scorn the government of the people.26

Indeed, in the years after de Tocqueville’s visit, lawyers as a group lost much of their luster in the public mind. Educational standards to become a lawyer became low or nonexistent; if Abraham Lincoln could become a celebrated lawyer after studying by the fireside, so could anyone else.27 The effort to portray lawyers as a separate and superior class faded, arguably only to be reborn with the creation of local bar associations after the Civil War and the ABA in 1878.28

26. Id.
27. One can argue that the effort to preserve lawyers’ historic sense of themselves as leaders of the republic underlies the two best nineteenth century accounts of lawyers’ ethics. These were DAVID HOFFMAN, A COURSE OF LEGAL STUDY (Arno Press 1972) (1836), and GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (5th ed. 1907).
28. The developments are chronicled in detail in POUND, supra note 9. The motivating ideal, as articulated by Dean Wigmore in 1915, sounds as if it could have been written today:

The law as a pursuit is not a trade. It is a profession. It ought to signify for its followers a mental and moral setting apart from the multitude,—a priesthood of Justice.

How the present attitude has come about is easy to see. ... In a country where all men started even and each man had to earn his living,—where tradition and privilege were cast aside, ... the law took its place with other livelihoods; and its gainful aspect became emphasized. And then ... came the commercial expansion following the Civil War; and the lawyer was more and more drawn into the intimate relations as adviser of the business man. And now, in the large cities, the commercial standards have spread to the Law, and the profession has been merged into the trade.

Nevertheless, that is all an error. That is, the inherent nature of things demands always that the law shall be a profession.

Wigmore, supra note 6, at xxii-xxiii.
But even efforts in the first fifty years or so of the ABA's existence were relatively modest. In the quarter-century from 1878-1902, for example, the ABA was a group of less than 2000 lawyers who met informally each summer, by invitation only, at Saratoga Springs, New York.29 Its purposes were said to be: "(1) To advance the science of jurisprudence; (2) To promote the administration of justice; (3) To promote uniformity of legislation throughout the union; (4) To uphold the honor of the profession; and (5) To encourage cordial intercourse among the members of the American Bar."30

After the turn of the century, the ABA tried to expand its influence. It held its meetings around the country, and grew from 1718 members to just over 29,000 by 1936.31 In 1908, early in this expansion period, the ABA adopted its first Canons of Professional Ethics that served as a model for subsequent state lawyer conduct standards.32 The ABA's role in law school accreditation began in 1923.33 But it was not until 1936 that the ABA organized itself into the broad national organization that we know today.34 The Great Depression

29. Lawyers had to be selected by state bar organizations to attend the meetings of the new national organization. See Gerald Carson, A Good Day at Saratoga 3-6 (1978); Edson R. Sunderland, History of the American Bar Association and Its Work 3-14 (1953).

30. Sunderland, supra note 29, at 17. The ABA created standing committees and later sections through which to work between annual meetings; the first of these was the Committee (later the Section) on Legal Education and Admission to the Bar. See id. at 28. In 1892, it created an auxiliary organization, the Commissioners on Uniform State Laws, see id. at 50, and in 1900, the Association of American Law Schools, as a home for the nation's "reputable law schools." Id. at 47.

31. See Albert P. Blaustein & Charles O. Porter, The American Lawyer: A Summary of the Survey of the Legal Profession 292-99 (1954). A new ABA purpose, promotion of "uniformity of judicial decision" was added in 1919, see Sunderland, supra note 29, at 17, and when the American Law Institute was created in 1923, the ABA urged state consideration of its work. See id. at 91.

32. Commentators have observed that the Canons give lawyers a more public-interested role than do the Model Rules. See, e.g., Susan D. Carle, Lawyers' Duty to Do Justice: A New Look at the History of the 1908 Canons, 24 Law & Soc. Inquiry 1, 1 (1999); Russell G. Pearce, Rediscovering the Republican Origins of the Legal Ethics Codes, 6 Geo. J. Legal Ethics 241, 241-42 (1992). What those analyses tend to downplay is that at the time it promulgated the Canons, the ABA probably represented less than two percent of the American bar. Compare Abel, supra note 24, at 280 (noting that in 1900, the number of lawyers was 109,140), with Sunderland, supra note 29, at 40 (noting that in 1903, the ABA had 1718 members). They were not written as representative of then-current practice or with an expectation of general enforcement. See Carter, supra note 6, at 27-29. For a helpful account of issues arising under the Canons, see generally AM. BAR FOUND. & ABA, Opinions of the Committee on Professional Ethics with the Canons of Professional Ethics Annotated and Canons of Judicial Ethics Annotated (1967 ed.).

33. See Sunderland, supra note 29, at 91. For a less flattering account of the purposes and effects of ABA influence during this period, see, for example, Auerbach, supra note 24, and Robert Stevens, Law School: Legal Education in America from the 1850s to the 1980s, at 20-34 (1983).

34. See Sunderland, supra note 29, at 173.
was in its darkest days and President Roosevelt had created the New Deal with which many lawyers were uncomfortable. Just two years earlier, then-Judge Stone had said:

We meet at a time when, as never before in the history of the country, our most cherished ideals and traditions are being subject to searching criticism. . . .

. . . It is true, if tradition and history are guides, that we may rightly look to the Bar for leadership in the preservation and development of American institutions. Specially trained in the field of law and government, invested with the unique privileges of his office, experienced in the world of affairs, and versed in the problems of business organization and administration, to whom, if not to the lawyer, may we look for guidance in solving the problems of a sorely stricken social order?35

The ABA saw itself as providing that guidance in the nation’s darkest hours. Governing authority in the ABA was shifted from an Assembly of ABA members to a new House of Delegates representing not only individual members, but also state bar associations and other significant professional groups.36 Among the first proposals that the “new” ABA then aggressively opposed was President Roosevelt’s court packing plan.37

35. Harlan F. Stone, The Public Influence of the Bar, Address at the Dedication of the Law Quadrangle, University of Michigan (June 15, 1934), in 48 Harv. L. Rev. 1, 2 (1934). Justice Stone continued:

Throughout the history of Anglo-American civilization, the professional groups have been among the most significant of those non-governmental agencies which promote the public welfare. Although in smaller measure . . . their function has been not unlike that of the medieval guilds. . . . While it has not inherited the completely independent status of the English bar, to no other group in this country has the state granted comparable privileges or permitted so much autonomy. No other is so closely related to the state, and no other has traditionally exerted so powerful an influence on public opinion and on public policy.

Id. at 4-5.

36. See Sunderland, supra note 29, at 173-76. Among the other groups represented in the House of Delegates were the American Law Institute and the American Judicature Society. See id. The meeting at which these changes were adopted is reported in great detail in Current Events, 22 A.B.A. J. 587, 660 (1936).

37. See, e.g., Sylvester C. Smith, Jr., The Present Situation in the Fight to Save the Court, 23 A.B.A. J. 401, 402 (1937); Frederick H. Stinchfield, The Supreme Court Issue, 23 A.B.A. J. 233, 236 (1937). The same volume of the ABA Journal contains a discussion by a member of the House of Delegates about the need to increase lawyer income by reducing the number of new lawyers. See John Kirkland Clark, Limitation of Admission to the Bar, 23 A.B.A. J. 48, 49-50 (1937). For an account of other causes in which the ABA got involved, see Rayman L. Solomon, Five Crises or
III. THE SURVEY OF THE LEGAL PROFESSION

During World War II, professional reform was a relatively low priority issue. Thus, the key development in the effort to organize lawyers into a coordinated profession seems to have been the ABA’s now almost-forgotten Survey of the Legal Profession ("Survey").\textsuperscript{38} The Survey was conceived as the war was coming to an end.\textsuperscript{39} Thousands of lawyers had gone into military service, leaving their families and closing their offices.\textsuperscript{40} Many questioned what the lawyer-soldiers would find when they came home.\textsuperscript{41} What would be the nature of the substantive law and what would be the circumstances of their practice?

Originally proposed by the ABA Section of Legal Education and Admission to the Bar, the Survey examined those questions by inquiring into the “much wider problem of finding out what lawyers actually do in present-day society and whether they are adequately meeting the needs of the public.”\textsuperscript{42} Lawyers recruited to participate in the Survey were a who’s who of the American Bar. The project’s first Director was Dean Arthur T. Vanderbilt of New York University.\textsuperscript{43} When Dean Vanderbilt became Chief Justice of New Jersey, he was succeeded by Boston lawyer Reginald Heber Smith, long revered as the guardian of the legal aid movement in the United States.\textsuperscript{44}

Results of the Survey have been published in over 150 books and articles, most by well-known authors.\textsuperscript{45} For example, Harvard’s Dean Roscoe Pound wrote the book on the history of lawyers and their bar associations.\textsuperscript{46} Chief Judge Orie Phillips of the Tenth Circuit wrote the volume on the extent of lawyer compliance with the Canons of Ethics.\textsuperscript{47} Dean and former American Association of Law Schools president Albert

\textsuperscript{38} See BLAUSTEIN & PORTER, supra note 31, at 2.
\textsuperscript{39} See id.
\textsuperscript{40} Reginald Heber Smith, Survey of the Legal Profession: Its Scope, Methods and Objectives, in POUND, supra note 9, at v, vii.
\textsuperscript{41} See id.
\textsuperscript{42} Id. Although not an “official” Survey publication, the best collection of Survey findings is BLAUSTEIN & PORTER, supra note 31.
\textsuperscript{43} See id. at xi.
\textsuperscript{44} See id. at xii.
\textsuperscript{45} These works include ALBERT J. HARNO, LEGAL EDUCATION IN THE UNITED STATES (1953), ORIE L. PHILLIPS & PHILBRICK MCCOY, CONDUCT OF JUDGES AND LAWYERS (1932), and POUND, supra note 9.
\textsuperscript{46} See generally POUND, supra note 9.
\textsuperscript{47} See generally PHILLIPS & MCCOY, supra note 45.
J. Harno of Illinois wrote a book on legal education, and Professors Zechariah Chafee, Jr., Maynard Pirsig, and Elliott Cheatham all conducted important studies for the Survey.

In part, the Survey reflected a concern about the economic health of the postwar legal profession. As one author candidly described the problem:

This large number of students in the law schools presents a difficult problem of placing the young law graduates after they are admitted to practice and is symptomatic of the possible serious overcrowding of the bar in the future. The problem is not likely to become lessened so long as government aid is available to veterans. As one law dean has put it, the question some day will arise as to whether the veteran will go on relief or enroll in a law school.

Another dimension of the Survey, however, was its renewal of the vision of lawyers as the principal custodians of American law and the American way of life. Reginald Heber Smith’s introduction to Dean Pound’s volume asserts this centrality of the lawyer’s role:

Under a government of laws the lives, the fortunes, and the freedom of the people are wholly dependent upon the enforcement of their constitutional rights by an independent judiciary and by an independent bar.

The legal profession is a public profession. Lawyers are public servants. They are the stewards of all the legal rights and obligations of all the citizens.

At first reading, that sentiment sounds noble and almost self-deprecating. In context, however, it can be seen to be another assertion that the content as well as the administration of the law is the province of lawyers. Dean Pound explained:

48. See generally Harno, supra note 45.
49. See Zechariah Chafee, Jr., Changes in the Law During Forty Years, Address to the Rochester Bar Association (June 6, 1950), in 32 B.U. L. REV. 46 (1952) (describing differences in practice faced by modern lawyers as a result of creation of the workers’ compensation system and the rise of administrative agencies).
52. Homer D. Crotty, Who Shall Be Called to the Bar?, 20 B. EXAMINER 173, 175 (1951).
53. See Smith, supra note 40, at vii.
54. See id.
55. Id. (emphasis added).
[T]he word law has two meanings. One is ... the legal order: The regime of adjusting relations and ordering conduct by the systematic application of the force of a politically organized society. The other is ... the body of authoritative models or patterns of decision which, because they are applied by the courts in decision of controversies, serve as guides of conduct to the conscientious citizen, as threats to the wrongdoer, as grounds of determination to the magistrate, and as bases of prediction to the counsellor. ... From antiquity it has been found that law in the first sense can only be maintained by law in the second sense and that law in the second sense requires lawyers.  

...  

... Under our polity many political questions are as well legal and many legal questions are also political. Thus our constitutional polity is so legal as to be dependent upon lawyers for interpretation, application and maintenance against official absolutism and legislative encroachment.  

A dangerous lack of lawyer professionalism, Pound thought, threatened lawyers’ ability to meet this public obligation. In language that, taken out of context, became central to the later Report of the ABA Commission on Professionalism, he reflected on a view of lawyers that he feared might be repeated in the postwar period:

Instead of a profession, an organized body of men pursuing a learned art in the spirit of a public service, the era of emergent democracy, in its leveling zeal, and the succeeding era of hegemony of the frontier, in its faith in the ability of any man to do anything and its zeal for unrestrained individual freedom, sought to substitute for the profession pursuing a learned art, an uneducated, untrained trade pursuing a money-making calling in the spirit of a business.
The authors of a summary volume about the Survey's findings explained why Pound had focused so specifically on organized bar associations as the salvation of the profession. "It is only through organization, Pound declares, that the spirit of public service can be developed and maintained and crucial types of public service be rendered effectively." Pound himself said:

It is the bar association, not the individual lawyer, that can maintain high educational standards insuring a learned profession, that can maintain high standards of character as a prerequisite of admission to practice, that can formulate and maintain high standards of ethical conduct in relations both with clients and with courts. The public has a deep interest in having a well-organized bar as part of the machinery of administering justice in a complex social and economic order.

IV. WHY IS THIS IMPORTANT TODAY?

Although now almost forgotten, the Survey was the mainspring for many of the efforts by the ABA and other bar associations to organize the legal profession during the 1950s and 1960s, a period now dubbed the "golden age" of the American bar. One can, of course, question that characterization. The profession lacked diversity, bar admission was

60. See BLAUSTEIN & PORTER, supra note 31, at 283-84.
61. Id. An official summary of Survey findings was never published, but Blaustein and Porter had been assistants to Reginald Heber Smith and published this “unofficial” summary with his approval. See id.
62. POUND, supra note 9, at 11. In an Epilogue to his book, Dean Pound expressed a fear that the growth of large law firms would make lawyers seek trade union representation. See id. at 354. He called for lawyers “bred to a professional tradition,” and aspired to have the legal profession be a group of public-spirited citizens who would stand against the growth of big government. See id. at 353-62.
63. The ABA’s role in the selection of federal judges, for example, begun in 1952, was inherent in the view that lawyers were responsible for the quality of the law and lawmakers. See Roberta Cooper Ramo & N. Lee Cooper, The American Bar Association’s Integral Role in the Federal Judicial Selection Process: Excerpted Testimony of Roberta Cooper Ramo and N. Lee Cooper Before the Judiciary Committee of the United States Senate, May 21, 1996, 12 ST. JOHN’S J. LEGAL COMMENT. 93, 97 n.17 (1996).
65. See BARBARA A. CURRAN ET AL., THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980s tbl.1.3.1 (1985). From 1950 to 1970, the proportion of women lawyers ranged between 2.5% and 2.8%. See id. The number of minority lawyers does not even seem to have been recorded before about 1970. See, e.g., ABEL, supra note 24, at 288. Even critics of the current state of the bar recognize that calls for the good old days must

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denied on political grounds, and accessible programs of group legal services were largely outlawed, and lawyers in many states were required to charge at least specified minimum fees. Indeed, one can describe most Supreme Court cases about the legal profession since the mid-1950s as invalidating ethical standards spawned by the Survey.

The legal profession has radically changed since the Survey was undertaken, of course, but the sense of a once "golden age" remains, perhaps because the 1950s and 1960s were a time when lawyers' lives were relatively stable. An associate who worked hard could expect mentoring from senior lawyers, would very likely become a partner, and would ultimately retire from the firm in which he began his practice. Along the way, he would have earned an above-average income, worked on a variety of cases, and been a leader in community organizations.

That perception of a lawyer's world is virtually unrecognizable in many quarters today. Lawyers increasingly "eat what they kill," i.e., get paid based on cases they bring to the firm more than for the professional work they do on those cases. Partnership is difficult to attain, and even once received, it is often little valued as lawyers abandon one firm...

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69. See, e.g., id. at 793 (holding that lawyer minimum fee schedules violate federal antitrust law); Bhd. of R.R. Trainmen v. Virginia, 377 U.S. 1, 8 (1964) (holding that a state may not prohibit unions referring members to lawyers); Schware v. Bd. of Bar Exam'rs, 353 U.S. 232, 247 (1957) (holding that the state may not deny bar admission based on past Communist Party membership).
70. The 221,000 lawyers in 1950, for example, doubled to 442,000 in 1980, and redoubled to more than one million today. See CURRAN ET AL., supra note 65, at 4 tbl. I.1. Only about 5,500 lawyers were women in 1950, compared to over 200,000 today. See id. The number of minority lawyers was not even counted in 1950 and is sketchy and unreliable even today. See SPECIAL COMM. ON THE LAW GOVERNING FIRM STRUCTURE AND OPERATION, N.Y. STATE BAR ASS'N, PRESERVING THE CORE VALUES OF THE LEGAL PROFESSION: THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS 12 (2000) [hereinafter N.Y. STATE BAR ASS'N]; see also ABEL, supra note 24, at 288 tbl.30.
71. See, e.g., GLENDON, supra note 64, at 20.
72. See, e.g., LINOWITZ, supra note 4, at 29-30.
73. The use of the masculine form in this account reflects the overwhelming proportion of male lawyers during this period. This story is told especially well in LINOWITZ, supra note 4, and GLENDON, supra note 64.
74. See LINOWITZ, supra note 4, at 32.
75. The literature on the competition for partnership includes GALANTER & PALAY, supra note 64. The analysis there is helpfully qualified in David B. Wilkins & G. Mitu Galati, Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms, 84 VA. L. REV. 1581 (1998) (discussing the competition in law firms for partnership positions).
for another offering more glamorous promises. Lawyers compete, not for places in heaven, but to achieve a high firm ranking in the American Lawyer profits-per-equity-partner tables.

What I observe—and in this Article challenge—is an effort to deal with the new reality by turning back toward the cartel-like attitudes of the 1950s. Nowhere is this regressive approach easier to see than in the ABA’s response to the phenomenon of multidisciplinary practice.

Business clients today face a world more complex and competitive than almost any could have imagined even a few years ago. Local production and local markets in many industries are now only a memory. The new reality involves low-cost worldwide instant communication, tariff protection that is low or nonexistent, workers producing goods, or parts of goods, in all corners of the world at low prices, and technological changes that render investments obsolete long before they have yielded the return that justified making them in the first place.

Realities such as these have driven many lawyers’ business clients to consulting firms for global advice. Often, but not necessarily, such consulting organizations are adjuncts of accounting firms operating worldwide. In the work of such consulting firms, domestic American legal issues are part—but typically only a part—of any future course of action for a client that the consultant will recommend. As part of their internal staffing, such firms have hired lawyers to participate in their work of formulating business plans, drafting possible contract documents, and making regulatory filings.

In spite of a report from its own Commission that proposed limited recognition of such organizations as providers of services with which

76. See LINOWITZ, supra note 4, at 32.
78. See LINOWITZ, supra note 4, at 100-01.
79. See Morgan, supra note 21, at 416.
81. See Dziekonski & Peroni, supra note 80, at 84.
82. See id. at 105.
83. There is a large literature on multidisciplinary practice. See generally Daly, supra note 80; Dziekonski & Peroni, supra note 80; Lawrence J. Fox, Accountants, the Hawks of the Professional World: They Foul Our Nest and Theirs Too, Plus Other Ruminations on the Issue of MDPs, 84 MINN. L. REV. 1097 (2000).
lawyers might cooperate, the response of the ABA was swift and unyielding. Current ethical rules governing most American lawyers forbid a lawyer's forming "a partnership with a nonlawyer." That rule has been understood, for example, to forbid a lawyer's working with an organization controlled by nonlawyers if that organization gives legal advice to its clients. The ABA voted down an amendment to the Model Rules of Professional Conduct that would have facilitated lawyer cooperation with all such organizations, including social service agencies that wanted to provide legal services as part of a comprehensive package of services to the poor.

A. The Fragile Character of Cartels

One can criticize on several grounds the ABA's reaction to the possibility that clients might seek legal advice from lawyers working in organizations other than law firms. My focus here, however, is on the House of Delegates' assumption that they can get away with trying to prohibit such advice and the long-term costs of trying to do so.

Cartels in a wide variety of industries have long tried to enforce restrictions on terms of dealing with their clients. Sometimes, the

84. See generally Comm'n on Multidisciplinary Practice, ABA, Report to the House of Delegates (1999).
87. Ultimate defeat of the proposals came in August 2000 when the ABA House of Delegates adopted a proposal to develop rules making cooperation even more difficult. For an excellent discussion of the issues surrounding multidisciplinary partnerships, see, for example, Daly, supra note 80; Dzienkowski & Peroni, supra note 80; Laurel S. Terry, A Primer on MDPS: Should the "No" Rule Become a New Rule?, 72 Temp. L. Rev. 869 (1999).

Another example of the divergence between the results of ABA rule making and the ethical judgments of others can be seen in the ABA House of Delegates' reaction in August 2001 to a proposal to permit lawyer disclosures to help prevent the consequences of a financial fraud committed by the lawyer's client and in which the lawyer's services were used. See Model Rules, supra note 85, R. 1.6. In the face of many state provisions permitting or requiring such disclosures, the ABA maintained its prohibition. See id. On an earlier debate about such issues, see generally Ted Schneyer, Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct, 14 Law & Soc. Inquiry 677 (1989); cf. Ted Schneyer, Policymaking and the Perils of Professionalism: The ABA's Ancillary Business Debate as a Case Study, 35 Ariz. L. Rev. 363 (1993).

restrictions succeed for a while. Ultimately, however, such restrictions tend to be overcome, and it is likely to be the clients and their other service providers—not the lawyers—who prevail.  

First, lawyers’ ethical restrictions can be effective only insofar as they can bar others from delivering particular services deemed to be legal services. Traditionally, bar associations have had unauthorized practice of law committees whose responsibility has been to seek injunctions against such services. Increasingly, however, the effectiveness of such efforts has been minimal, in part because such cases are expensive to bring, particularly against well-financed adversaries. When the State Bar of Texas tried to enjoin provision of legal services by accounting firm Arthur Andersen, for example, the complaint was dismissed out of hand.  

Indeed, legislatures have effectively overruled efforts by lawyers to stake out particular areas of practice as their own. When Texas tried to enjoin sale of a CD-ROM called Quicken Family Lawyer, for example, legislation was adopted within a month declaring such sales to be legal. Arizona even amended its constitution to assure real estate brokers the right to fill in the blanks on a real estate sales contract.  

Second, legal ethics restrictions affect only people who are licensed lawyers. One way lawyers can avoid discipline for cooperating with multidisciplinary organizations is to disbar themselves voluntarily, i.e., to resign from the bar in jurisdictions in which they are licensed. Such former lawyers bring all their professional skills to a project; they simply avoid exposure to professional discipline. Third, if U.S. lawyers bar consulting firms from delivering legal services in the United States, clients can get the services from firms

90. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4 cmt. b (1998) [hereinafter RESTATEMENT, LAWYERS].  
91. See, e.g., LAWS. MAN. ON PROF. CONDUCT (ABA/BNA), 14 CURRENT REPORTS 356 (1998); id. at 542, 544.  
92. See id.  
93. See, e.g., H.R. 1507, 76th Leg., Reg. Sess. (Tex. 1999) (providing that the practice of law did not include the sale and distribution of computer software if the products state clearly and conspicuously that the products are not a substitute for the advice of an attorney).  
95. See ARIZ. CONST. art. 26, § 1.  
96. See MODEL RULES, supra note 85, pmbl. (discussing how the rules govern the conduct of lawyers); Terry, supra note 87, at 896-97.  
97. See Terry, supra note 87, at 896-97.
operating out of Canada or Europe.\textsuperscript{98} The ABA seems to think it is still operating in a world in which communication and travel are difficult. Clients know better, and so do the multidisciplinary practice firms.

B. The Concern About Protection of Lawyers' "Core Values"

Perhaps out of a realization that the ABA position cannot long survive simply as a matter of power, defenses have been advanced that the position is required as a matter of policy.\textsuperscript{99} The defenses are derived from the sense of unique lawyer roles and standards that motivated the ABA in the 1930s and later in the \textit{Survey of the Legal Profession}.\textsuperscript{100}

This time the arguments were contained in a report of the New York State Bar Association that identified seven "core values" said to be central to lawyers' conduct but not to the conduct of nonlawyers whom clients might consult.\textsuperscript{101} The values were said to be (1) preserving confidentiality, (2) avoiding conflicts of interest, (3) using independent judgment on the client's behalf, (4) providing competent service, (5) advocating with commitment, (6) assuring broad access to justice, and (7) preserving the rule of law in society.\textsuperscript{102}

These seven values are indeed both implicit in lawyer traditions and important to clients and the larger society. If sensitivity to such values were unique to lawyers, the case for preserving a lawyer monopoly in the name of professionalism might be strong. However, the case does not survive even cursory analysis.

Lawyers have no unique claim to these core values. The first four relate to the relationship between lawyer and client.\textsuperscript{103} The same values are part of the ideals of most professions and they are enforced as principles governing all agents, of whom lawyers are simply a subclass.\textsuperscript{104}

\textsuperscript{98} See Daly, \textit{supra} note 80, at 219, 220 n.5.
\textsuperscript{99} These defenses were advanced in a report of the New York Bar Association. See \textit{infra} notes 101-03 and accompanying text.
\textsuperscript{100} See discussion \textit{supra} Part III.
\textsuperscript{101} See N.Y. STATE BAR ASS'N, \textit{supra} note 70, at 310-22. The chair of the Committee was Robert MacCrake, former ABA President and long-time bar leader.
\textsuperscript{102} See \textit{id.} at 310-22.
\textsuperscript{103} See \textit{infra} text accompanying notes 101-02.
\textsuperscript{104} See \textit{RESTATEMENT, LAWYERS, supra} note 90, ch. 2, Introductory Note, at 124. The client-lawyer relationship is "derived from the law of agency. It concerns a voluntary arrangement in which an agent, a lawyer, agrees to work for the benefit of a principal, a client." \textit{Id.; see also} Deborah A. DeMott, \textit{The Lawyer as Agent}, 67 FORDHAM L. REV. 301, 301 (1998).
First, all agents, not just lawyers, are required to protect confidentiality. The Restatement of Agency explains the general principle to be that:

Unless otherwise agreed, an agent ... [may not] use or ... communicate information confidentially given him by the principal or acquired by him during the course of or on account of his agency ... to the injury of the principal, on his own account or on behalf of another, although such information does not relate to the transaction in which he is then employed, unless the information is a matter of general knowledge. 105

Second, the law requires all agents, not just lawyers, to avoid conflicts of interest:

Unless otherwise agreed, an agency is subject to a duty not to act or to agree to act during the period of his agency for persons whose interests conflict with those of the principal in matters in which the agent is employed. 106

Third, judgment free of outside temptations and influences is a general requirement for all agents, whether or not they are members of the bar.

Not only must an agent not act in the interests of other parties without the consent of all concerned, but he must not enter into transactions ... the effect of which may give the agent a self-interest in improperly advising his principal. 107
Finally, all agents, not just lawyers, must be competent to do the job for which they are retained. 108

The first four lawyer "core values," then, simply acknowledge that lawyers are fiduciaries. They must put their clients' interests ahead of their own rather than deal with clients at arms length. 109 Because trustees, other professionals, and agents generally are held to similar duties, however, values relating to the relationship with clients cannot justify giving lawyers a status that carries with it special privileges.110

The three other lawyer "core values"—solving disputes through advocacy, assuring broad access to legal services, and preserving the rule of law generally—address benefits that lawyers are said to confer on society more broadly.111 The best-known statement of the "public" role of the lawyer again comes from Dean Pound:

There is much more in a profession than a traditionally dignified calling. The term refers to a group of men pursuing a learned art as a common calling in the spirit of a public service—no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose. Gaining a livelihood is incidental, whereas in a business or trade it is the entire purpose.112

Even the public roles of a lawyer, however, do not justify a unique "professional" label.

First, many legal issues do not involve advocacy at all. Will drafting, perfecting a security interest, assuring merchantable title to real

independence from government influence. Those senses of "independence" will be discussed below. See infra notes 140-42 and accompanying text.

108. See RESTATEMENT, AGENCY, supra note 105, § 379 cmt. c.
109. See Crotty, supra note 52, at 179 (citing the autobiography of George Wharton Pepper).
110. See Page, supra note 105 (describing how accountants have similar duties of client confidentiality to that of lawyers).
111. See N.Y. STATE BAR ASS'N, supra note 70, at 310-22.
112. POUND, supra note 9, at 5. Some of Dean Pound's assumptions about how professionals act sound almost naive today:

[If an engineer discovers a new process or invents a new mechanical device he may obtain a patent and retain for himself a profitable monopoly. If, on the other hand, a physician discovers a new specific for a disease or a surgeon invents a new surgical procedure they each publish their discovery or invention to the profession and thus to the world. If a lawyer has learned something useful to the profession and so to the administration of justice through research or experience he publishes it in a legal periodical or expounds it in a paper before a bar association or in a lecture to law students. It is not his property. He may publish it in a copyrighted book and so have rights to the literary form in which it is expounded. But the process or method or developed principle he has worked out belongs to the world.

Id. at 5-6.
estate, and countless other legal services are used to head off trouble rather than win a battle. Furthermore, mediation and other forms of less formal dispute resolution can often work better without lawyers rather than with them.\footnote{See generally Carrie Menkel-Meadow, The Limits of Adversarial Ethics, in ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION 123 (Deborah L. Rhode ed., 2000).}

Further, effective advocacy is not limited to lawyers. Accountants vigorously advocate tax positions during audits or even before the Tax Court, for example.\footnote{See Dzienkowski & Peroni, supra note 80, at 187 n.474.} Indeed, the lawyers’ argument is circular. The reason we don’t see more nonlawyer advocacy is because advocacy has largely been reserved by law to lawyers.

Finally, it is not at all clear that advocacy is always a virtue. Lawyers may have a financial incentive to keep people fighting rather than solving their problems.\footnote{See, e.g., RHODE, supra note 6, at 123 (“While business leaders raise the most complaints about legal hypochondria, disputes between businesses are the largest and fastest growing category of civil litigation.”).} Today, much of the caseload in the courts consists of suits by one corporation that is trying to inflict costs on a supplier, customer or competitor.\footnote{On the nature of today’s litigation and the alleged litigation explosion, see, for example, Marc Galanter, Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. REV. 4 (1983); see also RHODE, supra note 6, at 120-24.} In an earlier day, we are told, lawyers did not brag about advocacy.\footnote{See LINOWITZ, supra note 4, at 2.} Conflict was to be avoided.\footnote{See id.; see also Michael H. Trotter, Profit and the Practice of Law: What’s Happened to the Legal Profession 127-40 (1997).} Lawyers saw themselves able to work out differences through cooperation.\footnote{See id.} The suggestion that lawyers are uniquely able to pursue their clients’ interests because they have the only licenses to go to court, then, is not a sufficient public value on which to rest the legal profession’s claim to special status.

Second, while assuring broad availability of legal services is a noble core objective of the legal profession, it is unfortunately not a reality. Indeed, no responsibility to provide free or reduced rate legal service is imposed on lawyers in any U.S. jurisdiction,\footnote{See, e.g., MODEL RULES, supra note 85, R. 6.1.} and when the

\begin{thebibliography}{113}
\bibitem{114} See Dzienkowski & Peroni, supra note 80, at 187 n.474.
\bibitem{115} See, e.g., RHODE, supra note 6, at 123 (“While business leaders raise the most complaints about legal hypochondria, disputes between businesses are the largest and fastest growing category of civil litigation.”).
\bibitem{116} On the nature of today’s litigation and the alleged litigation explosion, see, for example, Marc Galanter, Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. REV. 4 (1983); see also RHODE, supra note 6, at 120-24.
\bibitem{117} See LINOWITZ, supra note 4, at 2.
\bibitem{118} See id.
\bibitem{119} See id.; see also Michael H. Trotter, Profit and the Practice of Law: What’s Happened to the Legal Profession 127-40 (1997).
\bibitem{120} See, e.g., MODEL RULES, supra note 85, R. 6.1.
\end{thebibliography}
ABA Commission considering changes in lawyer obligations recently took up a proposal to require such service, the proposal was rejected.\textsuperscript{121}

Voluntary legal aid societies around the country certainly deserve praise for delivering services to the very poor since at least the founding of the New York Society in 1876.\textsuperscript{122} However, the history of providing legal services to the poor and middle class often has had almost as much to do with serving the needs of lawyers as those of clients.\textsuperscript{123} Concerns about meeting the legal needs of "persons of moderate means" arose at the end of World War II as soldiers who had received free legal services while in the military came home and needed to buy houses, start businesses, and the like.\textsuperscript{124} The expressed concern was about how to meet their needs. "Lawyer reference plans" (now lawyer referral services) were one response; legal services offices were another.\textsuperscript{125}

But an equally large concern was the economic condition of lawyers documented by Lloyd K. Garrison and the ABA Special Committee on the Economic Condition of the Bar in 1938.\textsuperscript{126} In 1939, then-Solicitor General Robert H. Jackson proposed meeting the needs of the middle class as the way to get lawyers back on their feet, and he said it would take a willful effort by a strong bar organization to make that happen.\textsuperscript{127} The bar also tried to limit bar admission and increase unauthorized practice restrictions.\textsuperscript{128}

In the context of the time, legal clinics for the poor were seen as a way to give experience to law students and practical training to young lawyers who had gone into military service and wanted to get experience before setting out on their own.\textsuperscript{129} Returning lawyer veterans had been denied G.I. Bill benefits because the government reasoned they were already trained.\textsuperscript{130} Creation of the Legal Services Corporation, indeed,
was in part a government response to a need that lawyers individually had refused to assume.\textsuperscript{131} However lawyers might like to claim the core value of furthering access to the legal system, then, their basis for doing so is questionable.

Turning to the final "core value" of preserving the rule of law, it can be argued that a lawyer's duty to see that clients obey the law is as great as the duty to protect clients against abuses the legal system can impose on them.\textsuperscript{132} The argument from history is that de Tocqueville and others saw lawyers as disinterested in and above the fray of commercial dealings.\textsuperscript{133} The nation's founders, it is said, made some things matters of law because they did not want them to be the subject of partisan dispute.\textsuperscript{134}

As one writer puts it:

[The ideal of the "independent professional" as public servant haunts the minds of many American lawyers, not just their academic critics. The independent professional displays expert judgment while remaining relatively unspecialized and is thus familiar with the wide range of legal issues into which his clients' diverse endeavors draw him. He cultivates collegiality with professional peers without being diverted from his own life plan. He maintains independence from clients' interests while retaining and enhancing their business. He devotes serious attention to pro bono and periodic public service without enduring economic sacrifice, doing both "good" and "well" while not striving directly to do either. In this conception of the lawyer, practitioners are understood as integral components of a society's legal system who happen to be compensated by private

\textsuperscript{131} See id. The organized Bar was also concerned that if lawyers did not at least appear to assume such public responsibilities, the government would "socialize" the profession:

For selfish and unselfish reasons we hope that the new world will be attracted by our form of government and the American way of life so that, in other nations, free peoples will set up democratic regimes and institutions.

In order that our general system may make its maximum appeal, and because we are not hypocrites, we are engaged in reexamining our own institutions. We want to keep what is good, and add what is found needed.

Law is the foundation of our whole structure. We are determined that it shall be strong. We know that law is not self-enforcing, and that lawyers are essential.

\textit{Id.} at 444.


\textsuperscript{133} See \textit{id.} at 14–15.

\textsuperscript{134} See, e.g., PAUL G. HASKELL, \textit{WHY LAWYERS BEHAVE AS THEY DO} 85-92 (1998); LINOWITZ, supra note 4, at 4, 9-18 (stating that the rule of law is diminished when lawyers see their role as helping clients get what they want, rather than what they are entitled to).
payment, not as part of the market for human services whose services happen to involve interactions with the legal system.¹³⁵

The first problem with such a view of lawyers, of course, is that lawyers cannot truly be independent of their clients. Quite apart from their status as fiduciaries who are legally required to pursue the interests of clients, people do not retain a lawyer to preserve the rule of law; they retain a lawyer to get a useful service.¹³⁶ As one lawyer has explained:

"We only exist because of the client. Without the client there's no need to have a lawyer! And we exist to solve people's problems. So if you're the type of person who doesn't want to solve somebody else's problem, you should not be practicing law."¹³⁷

Indeed, historians record that lawyers have been assisting participants in corporate affairs at least as long as there have been corporations.¹³⁸ Lawyers were long one of the few educated groups in society.¹³⁹ Entrepreneurs sought lawyers out for introductions into the corridors of power and money.¹⁴⁰ Indeed, lawyer creativity in helping business executives go beyond what the law seemed to permit has arguably been one of the things that has made U.S. economic development as dynamic as it has been.¹⁴¹

What observers like to think happened is that lawyers also restrained the excesses in which corporate officials would have engaged,¹⁴² and legend says that this restraint was exercised with a view to the public interest.¹⁴³ Elihu Root is quoted as saying, for example, that

¹³⁶. For one attempt to describe the value added by lawyers, see generally Ronald J. Gilson, Value Creation by Business Lawyers: Legal Skills and Asset Pricing, 94 YALE L.J. 239 (1984).
¹³⁹. As business people are themselves well educated and connected, the lawyer has become more valued for information than counsel and advice. See Macklin Fleming, Lawyers, Money, and Success: The Consequences of Dollar Obsession 3-6, 47-54 (1997).
¹⁴⁰. See id.
¹⁴¹. See id.
¹⁴². In the old days, relationships with clients and within firms were more like family. See Linowitz, supra note 4, at 30-32. Now the pursuit of money has arguably replaced all that. See id. Law practice has become more competitive and lawyers more personally insecure. See Trotter, supra note 119, at 194-96. Indeed, now, it is probably in the interest of corporate counsel to keep lawyers uncertain about what work will be coming their way. See generally Mark Stevens, Power of Attorney: The Rise of the Giant Law Firms 17-36 (1987).
¹⁴³. There certainly was rhetoric to that effect at the time the ABA first prepared its Canons of Ethics in 1908. See generally Carle, supra note 32; Pearce, supra note 32.
"half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop." However, even statements like Root's provide no evidence that clients took such advice from lawyers. All that we really know about lawyers' preserving the rule of law and assuring client compliance with it, then, comes from lawyers' claims. Their reliability is hardly a basis for granting lawyers unique professional status.

C. The Realistic Future of Lawyering

It seems inescapable to conclude that lawyers today are simply some persons among many who would like to provide services to clients. To the extent those services have value, the lawyers will be retained. To the extent someone else provides services of more value, the clients will turn elsewhere. If clients want to hire lawyers or others as employees to give them advice on any subject, they can do that too. Clients can hire specialists in particular fields when they need them, and take or leave their advice as they wish. As discussed earlier, lawyers' efforts to limit whom the clients are free to consult, are likely doomed to fail.

That is not to say lawyers are doomed to oblivion. Many provide services that clients find valuable. Basically, lawyers are able to research the state of the law on particular issues. They are creative verbally and able to marshal facts and precedent in an effort to influence sources of power, i.e., courts, legislatures, and others. They help solve problems and help clients make things happen within parameters permitted by law.

The significant breakthrough that created modern businesses was the ability to deliver a standard product at a lower price and better quality than consumers could buy before. The same is true of successful law firms. In those firms, experienced people get together who have done a type of task many times before and who can deliver high quality services to their clients.

144. PHILIP C. JESSUP, ELIHU ROOT 133 (1938) (quoting Elihu Root).
145. For a recent attempt to describe the evolving world in which lawyers work, see generally John P. Heinz et al., The Scale of Justice: Observations on the Transformation of Urban Law Practice, 27 ANN. REV. SOC. 337 (2001).
146. See, e.g., FLEMING, supra note 139, at 3-6, 47-54.
147. See POSNER, supra note 20, at 47.
148. See FLEMING, supra note 139, at 3-6. That principle is arguably less true when unique litigation or other services are involved. Then, businesses may find themselves charged premium hourly rates even when the law firm is no better than other lawyers doing such a task for the first time.
Judge Richard Posner observes:

Something like the evolution of the textile industry from guild production to mass production, and the concomitant decline of artisanality, is occurring today in the market for legal services. 149

Technical and organizational innovations have increased the vigor of competition in the legal-services market, but they have also an independent significance for the transformation of the profession. The rise of the paralegal has demonstrated that much of the traditional work of lawyers can be done by nonlawyers. It has also made the production of legal services a less homogeneous activity. 150

Even the ABA has now recognized that law firms may find it helpful to offer nonlegal services that are “ancillary” to their regular legal practice to help meet recurring client needs. 151 It is hard, then, to find a principled basis to prevent others from hiring the same lawyers to provide their regular services through a multidisciplinary organization.

Whatever the form of the entities in which lawyers practice, however, the effect of competition on clients will have an inevitable impact on their lawyers. Efficient delivery of services will be essential and will put pressure on lawyer fees. 152 Whether or not lawyers bill by the hour, lawyers are likely to continue to feel overworked and to burn out more quickly than in earlier years. 153 Firms may have to return to the days of low associate-partner ratios so that more client work is done by

Another factor leading to the development and growth of law firms was that the rise of regulation made it impossible for a single lawyer to handle all the problems of a client. Thus, law firms serving clients had to develop pools of lawyers with varying specialties to bring to bear on a client’s problems. See generally LINOWITZ, supra note 4, at 69-112.

149. POSNER, supra note 20, at 47.

150. Id. at 66.

151. See MODEL RULES, supra note 85, R. 5.7.

152. See LINOWITZ, supra note 4, at 167-84. There may be pressure for more use of Alternate Dispute Resolution, although to the extent litigation is being employed to delay payment or impose other costs on an opponent, only one side is likely to want to reduce those costs. On the other hand, lawyers may have to change the methods by which law suits are financed. That will be likely to reduce lawyer control of litigation but put control in the hands of people who can control costs. See FLEMING, supra note 139, at 129-38.

153. See TROTTER, supra note 119, at 81-92, 100-26; see also PAUL M. BARRETT, THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA (1999). Barrett’s work is the story of Lawrence Mungin, a lawyer chewed up by the present system, but more generally an account of the depersonalization of modern practice from the perspective of a young lawyer. Mungin had been successful at two previous firms but then joined a third to work for a large rainmaker. See id. at 9-13. The practice that the rainmaker anticipated never developed, and the firm did a terrible job of helping Mungin work into the firm’s practice some other way. See id. at 113-30.
lawyers with experience, even if that cuts the short-term profitability of those firms.\textsuperscript{154}

To meet competitive pressures that clients will impose, law firms may have to cut back on office overhead, but other demands from clients may greatly increase the costs that law firms face. Some clients want to deal with law firms electronically, for example, a demand that does not allow the firms to defer the cost of becoming technologically literate.\textsuperscript{155}

On another front, competition for lawyer talent is likely to require firms to establish a more realistic balance between time spent at the office, money, and lifestyle.\textsuperscript{156}

Some fear that without the leadership of professional organizations and the insulation from competition provided by professional rules, the morality of lawyers' conduct will decline.\textsuperscript{157} However, individual lawyers, not their professions or other groups, must ultimately be the moral actors. Lawyers exercise moral authority by deciding which cases to take, which to decline, and by deciding how to act in their cases.\textsuperscript{158} Professional rules will never be enough to assure professional conduct; however, they may provide much helpful guidance to lawyers predisposed to act properly in the first place.\textsuperscript{159}

An often greater pressure on lawyers today is the fact that they must act as members of teams rather than as individual moral agents.\textsuperscript{160} That

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\item[154.] See, e.g., Trotter, supra note 119, at 141-56.
\item[156.] Law firms are going to have to give real client responsibility to young lawyers sooner in order both to train them and to keep them involved with the firm. See Fleming, supra note 139, at 92-96, 113-27. It costs a firm $200,000 to replace a second year associate, and close to half the associates at the average firm leave before they have been there four years. It may be much more profitable for firms to treat associates better from the outset rather than assuming pay will overcome all other issues. Giving associates the chance to work out an acceptable mix of pay and leisure may let them stay at the firm and improve the bottom line. See, e.g., Joan Williams & Cynthia Thomas Calvert, Don't Go! We Can Change, Legal Times, Feb. 5, 2001, at 20; see also Terry Carter, Your Time or Your Money, A.B.A. J., Feb. 2001, at 26, 26-27.
\item[159.] See Linowitz, supra note 4, at 4, 9-18 (stating that the rule of law is diminished when lawyers see their role as to help clients get what they want, rather than what they are entitled to); see also Fleming, supra note 139, at 105-12 (arguing that firms must find ways to improve their "integrity control," i.e., preventing billing fraud and avoiding being retained by dishonest clients, not just "quality control" in delivery of services).
\item[160.] See, e.g., Ted Schneyer, A Tale of Four Systems: Reflections on How Law Influences the "Ethical Infrastructure" of Law Firms, 39 S. Tex. L. REV. 245, 246 (1997) (noting that "the quality
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reality and hence that pressure to conform seems likely only to increase, and the consequent sense of personal insignificance may magnify the challenge of getting lawyers to resist improper conduct. Indeed, lawyers may disagree among themselves about what is morally required in a given situation.\textsuperscript{164} Even now, law firms and other practice organizations establish standards for their own lawyers and designate persons within those firms to whom lawyers may turn.\textsuperscript{162}

\section*{D. Revising the Meaning of Professionalism}

Much of the concern expressed in this Article is familiar to those who have thought about professions and professionalism,\textsuperscript{163} but it is hard to abandon concepts that have become such a part of lawyers' self-image. Thus, some have proposed to transform or redefine the concept of professionalism into something more meaningful to at least some lawyers.\textsuperscript{164}

First, sociologist Terrence Halliday suggests that the legal profession be seen as a way for lawyers to provide themselves an "intermediate" institution in an otherwise fragmented world.\textsuperscript{165} We all need such institutions, he suggests.\textsuperscript{166} Government is too distant and impersonal, the argument goes; other institutions are needed to help people work together effectively.\textsuperscript{167} The legal profession might be transformed into something important to lawyers in that process.

That is certainly a possible role for professional organizations. Bar associations today act as centers for networking, for example, as providers of continuing legal education, and as sources of informed and probity of a lawyer's work may depend crucially on the "ethical infrastructure" or internal controls" deployed in the workplace).

\begin{itemize}
\item 161. \textit{See, e.g.}, \textsc{Banks McDowell, Ethical Conduct and the Professional's Dilemma} 20-21 (1991).
\item 162. \textit{Cf.} \textsc{N.Y. Code of Prof'L Responsibility DR 5-105(E)} (2001) (requiring law firms to keep records of attorneys cases to reduce risk of client conflict).
\item 164. \textit{See, e.g.}, Moore, \textit{supra} note 163, at 774 (noting that many bar associations are encouraging pro bono work as "one way to let the public know that we are a profession," as well as encouraging other activities).
\item 165. \textit{See} \textsc{Terence C. Halliday, Beyond Monopoly} 16-24 (1987) (citing Durkheim for this idea in France and Magali Larson in the United States).
\item 166. \textit{See id.} at 18, 21.
\item 167. \textit{See id.} at 17-18, 21.
\end{itemize}
judgment about legal issues for legislatures, courts and agencies. But to any individual lawyer, a profession of a million-plus lawyers is far too large to be a intermediate institution in any realistic sense. Even in the roughly 400,000 member ABA, most active ABA members tend to work through sections or section committees that are typically smaller still.

The legal profession, then, is not itself a useful intermediate institution, and a sense of professional identity is not essential to a given lawyer’s sense of personal identity. Indeed, it may be that in many cases law firms have replaced bar associations as the principal intermediate institutions for their members. Firm culture more directly affects lawyer behavior, and firms can compete for the reputation to which they will aspire.

Second, Professor Deborah Rhode acknowledges lawyers’ lack of commitment to many of their core professional values but calls for a renewal of that commitment. In particular, she calls for a “culture of commitment” to making legal services available to all through broad provision of pro bono service.

It is possible that this kind of appeal to professional tradition will have more effect in the future than it has had in the past, but it is hard to see why. However justified in the abstract such appeals may seem, the pressures of modern practice seem likely to reduce their persuasiveness unless lawyers and firms see the service as consistent with their own interests.

And that may happen. Skadden Arps generated enormous good will for itself by creating the Skadden Fellowships for public interest

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168. For example, the ABA offers continuing legal education programs and information about the law designed to aid lawyers with their work. See About the ABA, ABA Network, at http://www.abanet.org/about.home.html (last visited Mar. 12, 2002).

169. At the end of the 2000-2001 association year, membership in the ABA reached a record high with 408,685 members. Of these, only 315,197 were lawyers; the rest were law students and nonlawyers. See Robert A. Stein, Membership at an All-Time High, A.B.A. J., Nov. 2001, at 66, 66-67.

170. Id.

171. See, e.g., Schneyer, supra note 160, at 246, 252-53.


practice, for example. Other firms see pro bono work as good training for lawyers and law firms may accept responsibility for such service as a way to attract lawyers as well as build a reputation for community service. Professor Rhode is not wrong to call for pro bono service, but the concept of “professionalism” seems likely to be neither necessary nor particularly helpful in realizing that objective.

Third, Professors Robert Gordon and William Simon see professionalism as a concept to be “redeemed” in ways that fit their own ideals. Each has previously argued that lawyers should maintain a critical independence from their clients’ values, an independence facilitated by the sense that lawyers as professionals are inherently different from other kinds of advisers. As they recognize, such a call for a radical departure from client values is unlikely to come out of a traditional bar association, so they posit smaller organizations to “give collegial support to members in developing their own conceptions of responsible practice.” If calling their ideas “professional” enhances formation of such support groups, the term should certainly be used. I simply believe that law firms or voluntary organizations of like-minded lawyers are even more promising settings for such collegial support.

V. CONCLUSION

It seems clear even from the work of Gordon, Simon, Halliday and Rhode that we are now a long way from the grandiose claims of Roscoe Pound, Reginald Heber Smith and others behind the Survey of the Legal Profession. Organized professionalism in the sense developed by the ABA in the first half of the twentieth century is—and should be seen as—dead.

Ignoble as it may sound, lawyers today are not guardians of the law. They are not legislators; they are not judges. They may become either or both, but until they do, they are just citizens. They should have respect for law and legal institutions, but so should everyone else.

175. See LINOWITZ, supra note 4, at 201-06. Indeed, it is said that European countries that have broken down the professionalism protection of the bar have done more to restore the public role of lawyers than the more cautious approach in this country. See Osiel, supra note 135, at 2047-48.
178. See Gordon & Simon, supra note 176, at 244.
If I am right, bar associations will and should continue to evolve into trade associations, not governors of an organized profession. There is nothing inherently wrong with trade associations; among other things, they can provide continuing education, occasions to socialize informally, and vehicles for lobbying. But they should be understood to be no more than what they are. The Bush Administration's removal of the ABA's special authority to review federal judicial candidates in advance of their nomination, for example, may have been self-defeating as a matter of politics, but it was right as a matter of principle. Lawyers can and do have opinions about judicial candidates, but their status as professionals should give them no formal role in judicial nominations.

Abandoning organized professionalism will not be easy. Lawyers tend to look backward, and bar leaders who have been financially successful under the current system have little incentive to face squarely the world as it is likely to become.

The same problem confronts legal education. Students are too often taught problems of the past while they prepare to live in the future. Professor Chafee observed that law students in 1900 were largely unprepared for the legal revolutions of the twentieth century, i.e., workers' compensation, income taxes, labor relations, and the growth of administrative agencies. It is perhaps no accident that, as lawyers, they were often among those most resisting such changes.

Law schools will have to become competitive. They will have to prepare students for what the students see they must become, whether or not that is a practicing lawyer as that term has been heretofore understood. This will create problems for those who believe law schools exist primarily to acculturate students into professional values, but it is likely to lead ultimately to better service to their clients.

179. See Amy Goldstein, ABA Weighs In On President's Court Nominees, WASH. POST., June 27, 2001, at A23.

180. The additional time required for ABA review can be used to delay Senate consideration of the nominees.

181. The authority had originally been granted in 1952, in the midst of the Survey of the Legal Profession, as exemplifying lawyers' central role in the administration of justice. See Ramo & Cooper, supra note 63, at 97 n.17.


183. See id.

184. See id. at 46.

185. See generally MACCRATE COMM'N, supra note 7 (identifying skills and values deemed to be essential for every lawyer). Dean Wigmore, in his Introduction to CARTER, supra note 6, said eloquently: "[I]f the law is thus set apart as a profession, it must have traditions and tenets of its own, which are to be mastered and lived up to. This living spirit of the profession, which limits yet uplifts it as a livelihood, has been customarily known by the vague term Legal
Looking back at the efforts to achieve organized professionalism, one must of course acknowledge that much more was involved than the conscious rationalizations of members of a cartel. Efforts to improve the law's fairness, to eliminate invidious discrimination, and to enhance opportunities for all our citizens have occupied the public careers of many of the nation's finest lawyers, often at real cost to themselves. We all benefit from the uniform laws, simplified procedures, and important reforms that they have to show for their work, and nothing in this Article is meant to show disrespect for those efforts or suggest that such work should end.

On the other hand, if lawyers cannot divorce those efforts from resistance to changes in practice that clients require, lawyers will hurt those clients but especially hurt themselves. The rhetoric of organized professionalism has outlived whatever usefulness it had. Certainly, the understanding of professionalism as requiring strong central organization and restrictive rules of practice should now and forever be abandoned.

Ethics. There is much more to it than rules of Ethics. There is a whole atmosphere of life's behavior. What is signified is all the learning about the traditions of behavior that mark off and emphasize the legal profession as a guild of public officers. And the apprentice must hope and expect to make full acquaintance with this body of traditions, as his manual of equipment, without which he cannot do his part to keep the law on the level of a profession.

Id. at xxiv.

186. In Judge Posner's words:

The homogeneity of professional training [today] produces a degree of consensus on professional issues that tricks the practitioners into believing they have a pipeline to the truth. The complexity of law's doctrines, the obscurity of its jargon, and the objectifying of "the law" are in part endogenous to the organization of the legal profession, rather than being exogenous factors to which the profession has adapted.