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WHAT NEEDS FIXING?: “SO OBVIOUS, AND SO EASILY DONE”

Burnele V. Powell*

The tradition here at Hofstra’s Conference on Legal Ethics is in some ways like that described by Arthur Schlesinger, Jr., in his characterization of Washington, D.C., which he reportedly described as a city “where the sternest purpose lurks behind the greatest frivolity.”

But, perhaps, it was Pamela Harriman, the gold standard by which we measure “purposeful eating,” who gave us the instruction best: that one should never give a party without having a serious agenda.

I have a serious agenda, one that mixes the subjects of food and food for thought. My agenda is to discuss what I see as the likely outcome if the legal profession proves unable to recognize and then deal with the central question of this Conference: What Needs Fixing?

In those three words, we have not simply framed a question; we have called for a personal commitment. Implicitly we are asked whether we, as a profession, can face up to the issues and concerns that a modest bit of introspection and listening to clients and the public would reveal.

In those three words—What Needs Fixing?—we are given a challenge. Beyond simply asking what is broken, we are challenged to declare whether we have the will to repair whatever it is that our inquiry tells us has come undone, broken down, or simply stopped running.

At the outset, let me confess that I am undecided about the proper answer to the question of whether we have the will to act. The title of this Article marks me, at least, as agnostic on the point: “So Obvious, and So Easily Done.”

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2. See id.
You might ask whether I am applauding us—the legal profession—for doing what obviously and so easily should have been done, or condemning us for not doing what so obviously and easily might have been done.

It is a little bit of both. On the one hand, there is much to be applauded by a legal ethicist. As a profession, we have come a long way since David Hoffman (1879), George Sharswood, and the 1908 ABA Canons.

And we are not satisfied simply to have replaced the Model Code of Professional Responsibility with the efforts of the Kutak Commission’s Model Rules of Professional Conduct. It is clear that as a profession we continue to spend more time, more energy and more money—involving more people, organizations and public hand-wringing about our ethics—than, perhaps, any organization in the world that is not a religious body.

And what has it gotten us?

Well, just think about it. Assuming that the work of the ABA’s Ethics 2000 Commission is completed this winter in Philadelphia, we will have undertaken three rewrites of our basic professional standards in just the past thirty-three years.

In our short memories, too, we have:

(1) Witnessed the continued growth and maturity of the National Organization of Bar Counsel;
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(2) Increased funding, nationwide, for the nation's lawyer disciplinary systems;

(3) Witnessed the founding of the Association of Professional Responsibility Lawyers (APRL);\(^8\)

(4) Seen more and more jurisdictions adopt the Multistate Professional Responsibility Examination (MPRE);\(^9\) and

(5) Gone from a closed profession—a "club"—to a profession constantly examined by all aspects of mass communications (newspapers, magazines, television, and the Internet, being the most prominent).\(^{10}\)

Moreover, in the last five years, alone, we have seen:

(1) The publication of the Restatement's "Law of Lawyering" by the American Law Institute;\(^{11}\)

(2) America's first formal, profession-wide debate of the issue of multidisciplinary practice (an issue that we can now expect the various state jurisdictions to resolve);\(^{12}\) and

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8. APRL was founded in 1990 by lawyers seeking, among other interest, to enhance the education of and communications among lawyers involved in the representation of respondents in lawyer disciplinary proceedings and the interest of lawyer clients in legal malpractice cases. See Association of Professional Responsibility Lawyers, By-Laws of Association of Professional Lawyers, at http://www.aprl.net/ (last visited Nov. 11, 2002).


12. The ABA Commission on Multidisciplinary Practice was named in August 1998, by then-ABA President William G. Paul and charged with studying the issues and making recommendations about the ethical rules that ought to govern the professional relations of lawyers and other professionals. See generally American Bar Association, Center for Professional Responsibility, About the Commission, available at http://www.abanet.org/cpr/mdp_abt_commission.html (last visited Sept. 19, 2002).
(3) A continuing (and thoughtful) examination of the issue of multijurisdictional legal practice.¹³

Beyond these macro-level developments, we can also point with pride to several discrete “fixes” we have already made along the way. Due to recent actions (or developments we can expect in the near future), we have:

(1) Banned sexual relations between lawyers and clients;¹⁴

(2) Required that conflicts of interest waivers be confirmed in writing;¹⁵ and

(3) Allowed sophisticated clients under the guidance of a lawyer to waive paternalistic conflict of interest protections.¹⁶

Then, too, even while the immediate prospects seem dim, because of rejection by the ABA House of Delegates, momentum continues to grow for:

(1) Requiring that fee agreements be in writing;¹⁷ and

(2) Permitting lawyers to reveal a client’s future crimes and frauds of any nature.¹⁸

¹³. The ABA Commission on Multijurisdictional Practice was appointed by then-ABA President Martha Barnett in July 2000, to study ethical and legal issues related to the need expressed by many lawyers to be able to address legal issues and represent clients beyond their home jurisdictions. See Christine R. Davis, Approaching Reform: The Future of Multijurisdictional Practice in Today’s Legal Profession, 29 Fla. St. U. L. Rev. 1339, 1341 (2002).


¹⁵. Ethics 2000 has proposed Model Rule 1.0 to require a client’s consent to a representation be in writing in many instances, if it includes a conflict waiver. See MODEL RULES OF PROF’L CONDUCT R. 1.0(b) (proposed 2000).

¹⁶. Ethics 2000 proposed that Model Rule 1.7 might, under certain conditions, allow for prospective waivers of conflicts of interest. See id. R. 1.7(b) (proposed 2000).

¹⁷. Ethics 2000 has proposed that Model Rule 1.5, “Fees,” be amended to require lawyers to communicate in writing specific terms of the fee and the scope of representation. See id. R. 1.5 (proposed 2000).

¹⁸. Ethics 2000 has proposed that lawyers be permitted to disclose client confidences to the extent necessary to prevent reasonably certain death or substantial bodily harm and to prevent the client from committing a crime. See id. R. 1.6 (proposed 2000). Thus, it would extend the lawyer’s discretion to disclose to instances of fraud that are likely to result in substantial financial injury if it
This list is, by any fair measure, an impressive testament to the work of lawyers—indeed, to the work of the legal profession.

Still, while I applaud what has been accomplished, I am nevertheless convinced that, as yet, we have made only a modest beginning. We are still at least a decade from fully addressing the issues that we can today see out on the horizon and still further from addressing those that will only be revealed over an extended time.

So even while applauding these steps forward, I am concerned, to use an agricultural metaphor, that in our failure to give attention to several issues, we may already be suffering the rotting of our crops in the grain bins even as we applaud ourselves in anticipation of next year’s harvest.

In this regard, I want to ask you to think about another short, graphically rich metaphor that relates to my point.

This reference is to a story, out of the book I am recommending to you from my summer reading list: Jared Diamond’s GUNS, GERMS, AND STEEL: THE FATES OF HUMAN SOCIETIES.¹⁹

Yes, the book is about human societies. Or as Diamond so poignantly puts it: It is an attempt to answer the question put to the author by his friend Yali, a New Guinea native. Essentially, Yali had asked: “‘Why is it that you white people developed so much cargo and brought it to New Guinea, but we black people had little cargo of our own?’”²⁰

Although Yali’s question might be fairly interpreted in many different ways, I want you to understand it in the way that Diamond uses it to make his larger intended point. He wants us to focus on the course of human evolution, history, and language.²¹ Human growth in these areas, you see, provides the context in which mealtime foods are directly relevant to us this afternoon.

First, though, I must give you that all too brief summary of Diamond’s major thesis. Fairly or not, I would reduce it to this: “You are what you eat.”


²⁰. Cargo are “material goods ... ranging from steel axes, matches, and medicines to clothing, soft drinks, and umbrellas.” Id. at 14.

²¹. See id. at 15-17.
But more than that point, Diamond uses his story to describe how, you are not only what you eat, but also that you are what you grow to eat—be that livestock or grain.

To this basic point, Diamond adds his most salient assertion: The chief effect of being what you eat is that you are also what eats you. Furthermore, the things that eat each of us are the germs and viruses associated with what we eat and grow.

But Diamond is a bit more complex than this. He also reminds us that what you eat and grow is correspondingly a product of the tools you use to master what you eat and grow. (Accordingly, your daily tools and ultimately your weapons reflect the technologies you have invented to advance your efforts at eating and growing to eat.)

If you are successful in this enterprise you get more food, which leads to more people, which leads to more ideas, which leads to more technology, which leads to the ability to dominate everybody else with whom you come into contact who has less. Beyond that, those with whom you come into contact will not only lack your technology and social organization, but perhaps of overriding importance, they will lack your germs and viruses. In many instances, then, when it comes to war, they will be dead before they even get a good look at you or even have an opportunity to understand the source of their extremist condition.

My point, is simply this: In complex systems—including societies—larger, more diverse, more flexible, and more innovative societies tend to overrun and absorb societies that are not as vigorous. And the dominant societies do it in so many different ways—through so many interactions—that it is impossible to predict or even to track the details of the changes that will take place.

My concern, without attempting fully to detail it here is that if we do not watch out, we (the legal profession) will likely become the food—the institutionally absorbed social entities—of a future era.

If we cannot accomplish changes that are responsive to the ones that follow, I fear that we will be weaker for it and, as such, more vulnerable to interests with bigger cargo—the legislature or Congress; other professions (e.g., the accountants and engineers); or, perhaps, even other societies.

For our purposes, I have grouped my list of ten recommended changes—the needed fixes—in three categories. Think about them as appetizers, entrees, and deserts.
I. APPETIZERS

Let's start appropriately, with appetizers. Appetizers are things that would be nice to do, but are not necessarily crucial:

1. **Long-arm Jurisdiction**—If you deliver legal services in a jurisdiction in which you are not licensed, you ought to be subject to discipline in that jurisdiction, including the equivalent of being disbarred.

2. **Universal Lawyer Identification Numbers**—If you practice law in the United States, you should have a discrete identification number that can be used to track your conduct as a lawyer.

3. **High-tech Client Orientations & Records**—Every lawyer who has a client should provide a video for the orientation of new clients. All clients should have remote computer access to their files and calendar.

II. ENTREES

Now let's move on to entrees. Entrees are really substantial problems that must be dealt with now:

4. **Common Liability for Client Protection**—No client should be allowed to lose any money as a result of lawyer embezzlement or other wrongdoing.

5. **Mandatory Lawyer Malpractice Insurance**—The price of rendering services as a lawyer must include the cost of protecting clients against the lawyer's mistakes.

6. **Law Firm Discipline**—In a world where the firm offers the advantage of deep and redundant expertise, the firm—in addition to the individual lawyer—must take actions to reconstitute the small social environments through which professional lawyers were held accountable.

7. **Law Firm Sabbatical Review**—Every entity that delivers legal services should regularly undergo an internal self-assessment followed by a site-visit and review of its operations.

8. **Lawyer Advice to Undercover Agents** (and others engaged in legitimate "testing")—We should draw the lines governing
unrepresented persons\textsuperscript{22} and lying\textsuperscript{23} in the way that is most advantageous to the public and legal profession.

\section*{III. DESSERTS}

Finally, it's time for a selection of desserts. Desserts are innovations that are not necessary but will make the legal profession more enjoyable and better able to serve the interest of clients:

(9) \textit{Senior Counsels Forum}\textemdash A twice yearly retreat, for example, the twelve most distinguished members of the bar, plus the deans within the jurisdiction should come together to pronounce on the ethics and professionalism issues of the day.

(10) \textit{Judicial Conclaves}\textemdash Trial court level judges should be assigned to call the roll for a cohort of active lawyers.

In these ten steps there is more than enough to fix. What's more, they are all so obvious and so easily done.

Our task now is to understand that each of these little dishes, if consumed feast-like, has the capacity in combination with the others to make us whole and strong. Conversely, if we are not ready (or can't get ready quickly enough) to consume this meal, perhaps we should get ready to be consumed.

\textit{Bon appetit!}

\footnotesize
\textsuperscript{22} ABA Model Rule 4.3, "Unrepresented Persons," provides, essentially, that if there is a reasonable possibility of being misunderstood, a lawyer must not give legal advice to an unrepresented person, except to advise them to seek counsel. See MODEL RULES OF PROF'L CONDUCT R. 4.3 (1983).

\textsuperscript{23} ABA Model Rule 4.1. "Truthfulness in Statements of Others," provides that, "In the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person."