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# ARTICLES

## THE FALL AND RISE OF PROFESSIONALISM

*Thomas D. Morgan\**

### I. INTRODUCTION

In recent years, there has been an increasing concern among lawyers that the legal profession may be declining in “professionalism.” Professionalism is not a self-defining term; indeed, it is greatly overused today. There are professional football players, professional models and even professional wrestlers. The question, then, is what it means to be a professional for purposes of trying to decide whether lawyers are more professional or less professional than before. Although several definitions might be offered, I would assert that traditional professions seem to have at least three attributes.<sup>1</sup>

First, professional skills are intellectual in character and result from an extended period of training. That distinguishes “professions,” as used in this article, from professional wrestlers—wrestlers may have some training, but it is not usually in intellectual skills. Second, professional services are, in general, beyond assessment by a typical client. In other words, the people who consult these professionals are unable to distinguish and evaluate well the service rendered by the professional. Third, professional concerns transcend the problems of particular individuals. The professions historically have been institutions that have had some element about them that is beyond the purely private transacting of day-to-day activity. This element recognizes that the professional’s work has a significance to the society as a whole.

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This article is adapted from a speech presented in a Symposium on Legal Ethics at T. C. Williams School of Law on November 16, 1984. Since that symposium, Professor Morgan has been appointed Reporter to the A.B.A. Commission on Professionalism. The views expressed in this article should not be attributed to that commission or any of its members.

1. See Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 704-05 (1977).

There has not been a significant change in either of the first two characteristics of professionalism as applied to lawyers. Law still requires an extended period of study and is primarily intellectual. The law continues to be sufficiently mysterious that clients generally do not understand it without the lawyer's help. It is the third characteristic—the sense of professional concerns which transcend problems of particular individuals—which has undergone significant change.

The focus of this article is upon this third element of “professionalism.” As an institution, a group of individuals with a common calling, we as lawyers seem to be losing a sense of ourselves as trustees of a tradition of justice, a tradition which is important in preserving a sense of social unity. The lawyer's role in this tradition is as important as his or her role in protecting the rights of individual clients. This is not an argument against representing clients, but many lawyers seem to have come close to a point where they emphasize the short-range concerns and rights of their clients to the exclusion of everything else. Unfortunately, this often seems to be the case because it is in a lawyer's best interest to do so. I believe that it is because of lawyers' preoccupation with the desires of the client, to the exclusion of all else, that lawyers have been experiencing a period of decline in professionalism—a decline which has been going on for at least fifteen or twenty years. This article will briefly examine this decline. It will, however, also suggest some hopeful signs that the legal profession may be moving toward an enhanced sense of professional calling.

## II. DEVELOPMENT OF LAWYER PROFESSIONALISM

It is always dangerous to try to recall the good old days that never were, but contemplate the following principle which our forebearer lawyers were asked to affirm: “I will never plead the Statute of Limitations when based on the mere [passage] of time; for if my client is conscious that he owes the debt, and has no other defense than the legal bar, he shall never make me a partner in his knavery.”<sup>2</sup> That message, and certainly the rhetoric, seem strange. It represents, however, the view of a preeminent American lawyer one hundred fifty years ago. The lawyer, David Hoffman, was among the first to try to articulate, in a systematic way, the professional standards that existed in the legal profession.

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2. D. HOFFMAN, A COURSE OF LEGAL STUDY 754 (2d ed. 1846).

Hoffman's perspective on lawyers and the pressures they felt led him to conclude:

What is wrong is not the less so from being common. And though few dare to be singular, even in a right cause, I am resolved to make my own, and not the conscience of others, my sole guide. What is morally wrong cannot be professionally right, however it may be sanctioned by time or custom. It is better to be right with a few, or even none, than wrong, though with a multitude. If, therefore, there be among my brethren any traditional moral errors of practice, they shall be studiously avoided by me, though in so doing I unhappily come in collision with what is (erroneously, I think) too often denominated the "policy of the profession." Such cases, fortunately, occur but seldom, but, when they do, I shall trust to that moral firmness of purpose which shrinks from no consequences, and which can be intimidated by no authority, however ancient or respectable.<sup>3</sup>

Mr. Hoffman was not alone in his views. George Sharswood of Philadelphia, following Hoffman by twenty years, said:

Always seek to have a clear understanding of your object: be sure it is honest and right, and then march directly to it. The covert, indirect, and insidious way of doing anything is always the wrong way. It gradually hardens the moral faculties, renders obtuse the perception of right and wrong in human actions, and weighs everything in the balances of worldly policy. . . . It may be going too far to say that it is ever advisable to expose the weakness of your client's cause to an adversary, who may be unscrupulous in taking advantage of it; but, it may be safely said, that he who sits down deliberately to plot a surprise upon his opponent, and which he knows can succeed only by its being a surprise, deserves to fall, and in all probability will fall, into the trap which his own hands have laid.<sup>4</sup>

These are demanding ideas and, admittedly, probably not every lawyer 100 to 150 years ago adhered to them. What is important for us to see, however, is that Hoffman conveys an overt sense that lawyers have a calling higher than, or certainly different than, the individualistic concerns of each given client. Sharswood, too, conveys the idea that a lawyer is somehow different than just a "hired gun" or "mouthpiece" for a particular client who engages his or her services.

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3. *Id.* at 765.

4. G. SHARSWOOD, *PROFESSIONAL ETHICS* 96-97 (1854).

The same ideas were reflected in influential codes of ethics adopted later. The Alabama Code, the first to directly articulate enforceable standards for lawyers, reflected such ideas and provided that:

Nothing has been more potential in creating and pandering to popular prejudice against lawyers as a class, and in withholding from the profession the full measure of public esteem and confidence which belong to the proper discharge of its duties, than the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is an attorney's duty to do everything to succeed in the client's cause.

An attorney "owes entire devotion to the interest of his client, warm zeal in the maintenance and defense of his cause, and the exertion of the utmost skill and ability," to the end that nothing may be taken or withheld from him, save by the rules of law, legally applied. . . . Nevertheless, it is steadfastly to be borne in mind that the great trust is to be performed within and not without the bounds of the law which creates it. The attorney's office does not destroy man's accountability to the Creator, or loosen the duty of obedience to law, and the obligation to his neighbor; and it does not permit, much less demand, violation of law, or any manner of fraud or chicanery, for the client's sake.<sup>5</sup>

That canon of ethics was adopted by an official bar association less than 100 years ago. As recently as sixteen years ago, in 1969, before the adoption of what is now thought of as the "traditional" Code of Professional Responsibility, law students and lawyers were told:

No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. Correspondingly, he advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to im-

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5. ALA. CODE OF ETHICS Canon 10 (1887), *reprinted in* 118 Ala. XXVI-XXVII (1897).

press upon the client and his undertaking exact compliance with the strictest principles of moral law. . . . But *above all* a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.<sup>6</sup>

Throughout our history, then, demands have been placed on American lawyers which transcend the lawyers' responsibilities to the short-run interests of the client. The demands were expressed almost 150 years ago and have continued to be expressed almost to the present day. Recent attitudes about professional ethics—new codes and statements of rules governing lawyers—must be examined against this backdrop.

### III. RECENT CHANGES IN PROFESSIONALISM

The thrust of new codes of professional responsibility has been to direct the conduct of lawyers in very precise and enforceable language. This trend is well illustrated in Virginia's new Code of Professional Responsibility.<sup>7</sup> Unfortunately, what was lost in the process of drafting these new codes was more than just hortatory language about being nice to one's neighbor. What was lost was the real call in the Canon of Ethics—the formal beacons for the profession—to go beyond the goal of solely representing and furthering the interests of clients.

As an illustration of the precise language of recent codes, analyze DR 7-107(H) of the ABA Model Code of Professional Responsibility:

During the pendency of an administrative proceeding, a lawyer . . . shall not make or participate in making a statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication if it is made outside the official course of the proceeding and relates to:

- (1) Evidence regarding the occurrence or transaction involved.
- (2) The character, credibility, or criminal record of a party,

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6. CANONS OF PROFESSIONAL ETHICS Canon 32 (1908) (emphasis added) [hereinafter cited as CANONS].

7. VA. CODE OF PROFESSIONAL RESPONSIBILITY (1983) [hereinafter cited as VA. C.P.R.].

witness, or prospective witness.

(3) Physical evidence or the performance or results of any examinations or tests or the refusal or failure of a party to submit to such.

(4) His opinion as to the merits of the claims, defenses, or positions of an interested person.

(5) Any other matter reasonably likely to interfere with a fair hearing.<sup>8</sup>

The language is precise, carefully tailored and enforceable. The substance of the section is a sound minimum standard. Unfortunately, the language is not uplifting and hardly calls a lawyer to a sense of moral duty. There is little in this or any other of the disciplinary rules which calls lawyers to a standard of behavior that is higher than the plumber or hairdresser who is licensed, or the public utility which has a certificate of public convenience.

The ethical considerations of the Canons of Ethics are not much different. Talked of as aspirational,<sup>9</sup> they really do not aspire to anything. For the most part, the ethical considerations merely repeat the disciplinary rules. Occasionally, ethical considerations may state ideas not found in the disciplinary rules, but even these different ideas do not call lawyers to a sense of moral purpose. They do not articulate a sense that the lawyer is part of a vocation—a calling which may involve issues significant to the future of society itself.

If all that was wrong with new codes and statements of rules governing lawyers was the fact that the language is dull, or that it no longer contains the homilies of its predecessors, there would be little cause for additional comment. It seems, however, that there has been more than a change in rhetoric. The change in language seems symptomatic of a much deeper phenomenon that has important implications worthy of consideration.

The concern with the change in language is that the rules governing the professionalism of lawyers no longer reflect the traditions from which we have come. What we do as lawyers for a client affects more than just a given transaction for that particular client at that particular time. An attorney's actions can affect peo-

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8. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (1979).

9. *Id.* Preliminary Statement.

ple—clients and others—and the way they relate to each other for a period well into the future. The professional, often religious-based concerns which required or suggested that a lawyer consider the effect his or her role could have on the long-run welfare of society were reflected in the predecessors of today's codes. Because of the change in language, these concerns are no longer reflected.<sup>10</sup> This change, I suggest, has been a part of a shift within the profession away from the lawyer's obligations to society, a shift away from professionalism and closer to the legal profession becoming merely another regulated industry.

#### IV. WHY HAS THE APPROACH TO PROFESSIONALISM CHANGED?

Several reasons can be suggested for why the 1969 Model Code was necessary and why it made the changes it did. First, the change in rhetoric was an intentional reflection of the rights revolution of the 1960's. As a result of that revolution, the standards required for taking away a lawyer's license had to be more strict than they had been previously.<sup>11</sup> Until about the 1960's, it was not uncommon for lawyers to be disbarred based on a standard not much more specific than "conduct unbecoming a lawyer."<sup>12</sup> In enforcing such an exceptionally broad standard, the general attitude was that unethical conduct would be apparent when it was seen.

In the 1960's, the attitude of the profession shifted. Lawyers had to transform what had theretofore been a "cleaning our own house" notion of the profession, to a notion that the lawyer basi-

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10. The current code contains no provision which parallels Canon 32 of the 1908 Canons of Professional Ethics. The only remaining language in today's code which suggests that the lawyer consider the effect an action may have on society is found, not in the Canons, Ethical Considerations or Disciplinary Rules, but in the Preamble to the Code. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble (1979) ("[I]n the last analysis it is the desire for the respect and confidence of the members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct.").

11. See, e.g., *Baird v. State Bar*, 401 U.S. 1 (1971) (cannot deny bar admission for failure to answer overbroad questions not legitimately related to the fitness to practice law); *Cord v. Gibb*, 219 Va. 1019, 254 S.E.2d 71 (1979) (applicant's living with a man not her husband not sufficient basis to deny admission to practice; irrelevant whether her conduct "would lower the public's opinion of the Bar as a whole"). Although both of these are bar admission cases, the standards they establish have been highly influential in setting disciplinary standards as well.

12. See generally Comment, *Controlling Lawyers by Bar Associations and Courts*, 5 HARV. C.R.-C.L. L. REV. 301 (1970) (discussing standards previously used in controlling a lawyer's admission to the bar and subsequent conduct).



cally had a right to be in business.<sup>13</sup> Lawyers became systematic about due process and transformed the substantive standards to reflect that change in view. Other substantive changes were made, in large part, as a protective measure. Bar associations in general, and the Virginia Bar in particular, were frequent targets for law suits. Some bar activities which should not have been undertaken had been justified in the name of professionalism.<sup>14</sup> Both rhetoric and standards of conduct were changed, largely out of a fear that the prior standards would result in additional costly law suits.

The multistate bar exam unfortunately helps to enforce this view of ethics as only specified minimum standards. Many states require all candidates for the bar to take the Multistate Professional Responsibility Examination (MPRE) that requires them to know in great detail the text of the Code of Professional Responsibility.<sup>15</sup> One needs to know the phrase in a particular disciplinary rule or ethical consideration that applies to the particular situation. Nothing in the study for the multistate bar exam requires a student to think for a moment of himself or herself as a professional and what he or she would do in a real-life professional situation. The MPRE requires and drives students to think of themselves as people subject to a code much like the Internal Revenue Code. As a result, many students become people who know the law of professional ethics but do not have any richer sense of themselves as professionals. They are less likely, not more, to be driven by some kind of inner conscience.

The second main cause for the decline in professionalism seems to be the growth in the number of lawyers. This observation is not to criticize that growth, but simply to say that one of the consequences of rapid and massive growth is that professionalism tends to be a casualty. As recently as 1970, the nation had about 350,000 practicing lawyers. Today, there are about 650,000.<sup>16</sup> Even at

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13. In *Baird*, the Supreme Court expressly recognized that "[t]he practice of law is not a matter of grace, but of right for one who is qualified by his learning and moral character." 401 U.S. at 8.

14. See, e.g., *Bates v. State Bar*, 433 U.S. 350 (1977) (Bar cannot prohibit attorneys from advertising in a newspaper if advertisement is not false or misleading); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (Bar Association's publication of a minimum fee schedule violates antitrust laws); *Brotherhood of R.R. Trainmen v. Virginia State Bar*, 377 U.S. 1 (1964) (Bar cannot prohibit organizations from channeling claims of its members to a select group of lawyers).

15. As of 1984, 24 states required that applicants take the MPRE. See ABA, *COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS* 20-21 (1984).

16. It is difficult to state this number precisely, but there were estimated to be 585,000

350,000 lawyers, most major cities had 2000 or 3000 lawyers and smaller cities had several hundred. Now the numbers are much, much larger. This can be contrasted with England, for example, where the whole country has under 5000 barristers.<sup>17</sup> Even that is a fairly significant number for them. But one reason the British can enforce a higher standard of professional behavior, at least in their trial bar, may be because they do have this smaller body.

When many lawyers know each other and expect to see each other again, they remember an act of misconduct or unprofessional behavior for a period well into the future. This results in a kind of informal discipline that causes people to recognize that it is important to adhere not only to the letter of the rules but to a substantially higher standard. Today, by contrast a lawyer can be disbarred and found later still practicing law.<sup>18</sup> The disbarred attorney can be in an area in which he essentially never sees the same opponent twice. No one knows who he is. The judges do not know him. He goes from court to court and handles a variety of different kinds of cases, and nobody ever bothers to check up on him. In short, the bar in some areas has so many lawyers that it has become increasingly difficult to take serious note of the decline in the professional conduct of any given individual.

A third reason for this decline in professionalism may be that the rewards of success today are so high for the really successful practitioners that there is very little incentive to invest one's time in issues that transcend the private client. This is not a call for lower lawyer income. Certainly, many lawyers in this country have incomes that are not remarkable by any means. The point is that the rewards of really successful practice in the profession, and the ease with which that success can be lost, create a tremendous drive toward stretching every point and pursuing every advantage to demonstrate to clients that they are receiving services which are better than the service the people down the street (who will hap-

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lawyers in 1985. In addition, law schools will graduate about 35,000 potential new lawyers each year. See Taylor, *Demographics of the American Legal Profession*, in *THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION* 48 (G. Hazard & D. Rhode eds. 1985).

17. SENATE OF THE INNS OF COURT AND THE BAR, 1982-83 ANNUAL STATEMENT 95.

18. For some reported examples of this occurring, see *In re Peterson*, 274 N.W.2d 922 (Minn. 1979) (disbarred attorney denied readmission to the bar, in part, because of his repeated instances of practicing law and holding himself out as a lawyer while disbarred); *Hoots v. State ex rel. Okla. Bar Ass'n*, 486 P.2d 722 (Okla. 1971) (attorney denied reinstatement to the bar because he practiced law while disbarred); *In re Easler*, 275 S.C. 400, 272 S.E.2d 32 (1980) (attorney found in contempt of court for practicing law after disbarred).

pily take their case) can provide. Again, there is nothing wrong with high quality lawyering. However, the sense of professionalism can be expected to be reduced as the cost of engaging in professional activity goes up. The economists call this an opportunity cost. If one engages in more professional activity and that causes the loss of a key client or brings about less per hour to the firm, that loss is perceived as a price tag on professionalism. As the price becomes higher in today's increasingly competitive market, one would expect to see an incentive at least to have the amount of professionalism reduced.

Related to this point, the financial pressures in the practice of law today are such that one often cannot afford to look beyond the short-range and the practical. Mergers and division of firms are occurring throughout the country seemingly every week. It is not uncommon today to find a situation in which a respected professional in a firm, an individual who has invested hundreds of hours in bar association and civic activities, is basically run out of his firm by a group of the other partners who want a marginally larger share of the pie than they would get if this "unproductive individual" remained. Of course there may be many other factors in such situations which are not brought to light. However, even the suggestion that this has happened may bring home to some lawyers the personal cost of "too much" professionalism. There is such a premium on bringing in the hours, and bringing in the clients, that practicing attorneys run the very real risk of losing a sense that lawyers are trustees of a tradition which was given to them when they were admitted to the bar and which they have to hand off at the end of their careers.

But once again if all that is done is to decry this decline in professionalism, such criticism may be a waste of time. Fortunately, however, lawyers seem to be doing something about the problem.

## V. THE TURN OF THE TIDE

I have a sense today that at least some lawyers are now taking seriously, as individuals and as a group, the kinds of professional concerns that perhaps many lawyers have been forgetting.

First, the Model Rules of Professional Conduct have recognized, in a way the Code of Professional Responsibility did less well, that a lawyer's obligations extend not only to the client, but also to the legal system, and particularly to third parties who are affected by

the lawyer's behavior. In the Model Rules, for example, the lawyer now has express obligations to third parties and even to one's opponent<sup>19</sup>—those individuals other than clients who are affected by what the lawyer does and how he or she conducts the case.

Some of those issues were raised before,<sup>20</sup> but they are now grouped together in Part 4 of the ABA Model Rules. The adoption of those rules was not without debate and struggle, but the fact that they have been recaptured in a national document seems significant. The Virginia Bar rules are also impressive;<sup>21</sup> particularly in the areas of perjury disclosure or intention to commit a crime,<sup>22</sup> the rules are courageous and not in the short-run interest of the individual client. The rules also are not in the short-run interest of the bar, assuming the bar is erroneously viewed as a place where people pay big money to "get off."

Second, the Model Rules substantially increase the possibility of using referral fees.<sup>23</sup> Granted, some people may doubt that this is an increase in professionalism. Referral fees, however, are not necessarily ambulance chasers' devices. One of the explanations for the rapid growth in the size of law firms, for example, and the consequent impersonality of law practice that has come about from the 100, 200, or 500 member law firms, is the practical need to combine a number of specialities under one roof. This kind of organizing allows a firm to provide full service to a client in a context in which the primary lawyer does not have to feel insecure about the ability to retain the client on the one hand, and to be fairly compensated for the overall contribution that he or she makes to the case, on the other hand. In the large firm, this compensation is not calculated on a time records basis, but on some kind of reason-

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19. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.3 ("When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.").

20. Some of the requirements found in Part 4 of the Model Rules are scattered throughout the Disciplinary Rules embodied under the general terms of Canon 7 of the Code. For example, Rule 4.4, which outlines the requirement that an attorney respect the rights of third persons, finds its counterpart in DR 7-102, 7-106 and 7-108 of the Model Code.

21. Some of the improvement was accomplished by incorporating ideas from the Model Rules, but several of the ideas or means of expression are original.

22. VA. CPR DR 4-101(C)-(D) are especially demanding.

23. Compare MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(e) (allowing a division of fees without regard to the individual services performed, provided there is a "written agreement with the client [and] each lawyer assumes joint responsibility for the representation") with MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-107(A) (requiring in all instances that fee splitting be in proportion to the services performed by each lawyer).

able division of the fee. One logical way to return to somewhat smaller firms is to make it convenient and practical to share cases between firms. A lawyer from firm *A* must be able to work out some arrangement with a lawyer from firm *B* so that the two can work on a case as if they were partners. Obviously, no lawyer should refer a case to the highest bidder, but the adoption of Rule 1.5(e) in the Model Rules, and the corresponding provision in Virginia<sup>24</sup> which allow lawyers to reach more effectively accommodations of this kind, is an important move in the right direction. Smaller law firms may well lead to greater personalization of law practice and, with that, possibly a greater sense of personal professional responsibility.

Third, there has been an increasing tendency in this country for lawyers to recognize the desirability, and indeed the necessity, of using mediation and other dispute-resolution techniques instead of treating matters as appropriate only for litigation. Many lawyers have recognized these options for years and others have tended to be pushed to them by the requirements of necessity. The fact that there is this greater recognition on the part of many lawyers about the importance to society of having fewer people pounding away at each other at enormous costs, pain, bitterness, anger and time in the litigation setting is a hopeful sign. Lawyers are acquiring a broader sense of the consequences of their actions; they are not just asking the question, "Do I make a bigger fee if I take this case to trial than if I get the matter settled?"

Fourth, from the perspective of a writer in the area of legal ethics, it is intriguing to see the demand for materials that ask more than what the law is. Today it is very difficult to sell a case book that does not contain at least an acknowledgement of the philosophical and moral issues underlying a lawyer's decisions. Indeed, Professors Geoffrey Hazard and Deborah Rhode have come out with a book of nothing but history, philosophy, and economics.<sup>25</sup> The book consists of a whole series of articles and readings on the roles lawyers adopt and the implication of the decisions they make on people they affect and on the society in which they live. The point is, that professors and students around the country are demanding that when they study professional responsibility, they study the broad topic of Ethics as well as the narrow area of legal

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24. VA. C.P.R., *supra* note 7, DR 2-105(D).

25. See THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION (G. Hazard & D. Rhode eds. 1985).

ethics. Such a development is not going to change everybody's moral sensibilities. It is not going to suddenly transform everybody into a good person. On the other hand, the fact that people are asking the kinds of questions that those materials raise seems to be a genuinely important sign. As such questions become and continue to be important to lawyers, we will likely see a return to the kind of professional awareness and sense of real calling that once characterized the profession.

Of course, there still is some distance to go. Lawyers have by no means reached the renaissance of the professionalism that was called for in some of the quotations with which we began. There still are several areas in which there is a real job to do.

## VI. AREAS FOR IMPROVEMENT

One area in which lawyers must rethink the demands of professionalism involves mandatory *pro bono* activity. The requirement was put forth in an early draft discussion of the Model Rules<sup>26</sup> and virtually "hooted" down.<sup>27</sup> It was rejected in spite of the fact the ABA House of Delegates had gone on record in favor of the concept just five years earlier in 1975.<sup>28</sup> As an abstract proposal it was desirable; as a specific disciplinary requirement, it was unacceptable. There is a statement of the desirability of *pro bono* in the Model Rules today,<sup>29</sup> but nothing more.

The issues surrounding mandatory *pro bono* work are not easy. There is a question of what would qualify as *pro bono* service. Whether serving on a bar committee to study more efficient billing practices would constitute *pro bono* services is the kind of issue that people debate. What constitutes such service, whether everybody should have to do it, whether lawyers should be able to support institutions serving public interest causes instead of doing the work themselves, and by what authority a court can compel anybody to engage in *pro bono* service are all real issues. Finally, the question arises whether lawyers are behaving morally when doing *pro bono* service because somebody told them they had to instead

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26. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.1 (Discussion Draft 1980) (Rule requiring an attorney to render *pro bono* public service).

27. See G. HAZARD & W. HODES, THE LAW OF LAWYERING 491-92 (1985).

28. See ABA SPECIAL COMMITTEE ON PUBLIC INTEREST PRACTICE, IMPLEMENTING THE LAWYER'S PUBLIC INTEREST OBLIGATION (1977).

29. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1983) ("A lawyer should render public interest legal service.").

of because they genuinely recognize the professional obligation to do it. The debate, however, was symbolic of the question of whether lawyers see it as part of their professional calling to be part of something larger than a series of private economic transactions. The conclusion must be that lawyers still have some distance to go in this regard.

A second area in which a growth in professionalism is still needed involves the debate over the duty or the right to disclose planned client fraud. This was another area where at least the ABA Model Rules failed to take a step that would have embodied an obligation broader than to the client.<sup>30</sup> The attorney-client privilege never has allowed a lawyer to withhold evidence of client fraud, or at least it has never required it.<sup>31</sup> An attorney now can be compelled, consistent with the attorney-client privilege, to answer questions in court about client fraud. The only real issue for the Model Rules was whether the lawyer could volunteer the fact that his or her client was going to defraud somebody. At least the debate on this issue lasted a little longer than the *pro bono* issue generated, but the ABA finally defeated quite clearly the notion that such disclosure could be voluntarily made.

Once again the question is not easy. The question of when the lawyer knows a fraud is going to be committed is difficult. The questions, "What do I do about it?," "Who do I tell?," and "How do I prevent it?" are at least as hard. But once again there is a symbolic character to the issue when lawyers say to themselves, not that the issue is difficult and care must be taken in resolving the dilemma, but instead say the duty is to the client and only to the client no matter who gets hurt. Again, we as lawyers still have some way to go in thinking about what our calling really is.

A third area in which growth in professionalism has been slow is the American attitude on contingent fees. The contingent fee is a practice that unquestionably has made it possible for some people

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30. Rule 4.1 requires an attorney to disclose a material fact in order to avoid assisting a client in a criminal or fraudulent act unless such disclosure is prohibited by the confidentiality rules. The confidentiality rules allow voluntary disclosure in those instances where disclosure is reasonably believed to be necessary to prevent the client from committing a criminal act which may result in death or substantial bodily harm. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983). As contained in the 1982 Revised Final Draft, this rule would also have allowed voluntary disclosure if the client's conduct was fraudulent or criminal, and if the conduct could have resulted in economic or property loss, as well as serious personal injury or death. See *id.* Rule 1.6 (Revised Final Draft 1982).

31. See 8 J. WIGMORE, EVIDENCE § 2298 (J. McNaughton ed. 1961).

to maintain litigation they otherwise could not have maintained. Unfortunately, it also helps contribute to a system in which litigation that probably never should have been brought is brought because it seems potentially profitable to the attorney filing the action. Clients basically see that they have nothing to lose by filing a case. Even though they may have some costs that theoretically they are ultimately liable for, they expect that they will never have to pay. Since the client has nothing to lose and the lawyer either has some time on his or her hands or for some other reason thinks the suit may be worth filing, it is likely that there are many suits in the courts today that would not have been brought under a different system. The results obtained ought to be and are a significant factor in judging the reasonableness of attorney's fees.<sup>32</sup> But a contingent fee, ordinarily a fee in which the client has no down-side risk, seemingly should not be allowed except in a very limited class of cases in which it can actually be shown that the litigation has some intrinsic merit and could not, in fact, be filed some other way. People do not pay the full cost of litigating their cases.<sup>33</sup> There is a whole court system that has been established by the public for allowing legitimate grievances to be maintained. A sense of professionalism must be developed which says that the court system is not to be used if the parties involved are basically engaged in long-shot litigation, hoping that victory in a few cases will justify maintaining law suits in many situations in which they are *not* likely to succeed.

## VII. CONCLUSION

The question of whether or not we as lawyers are more or less professional today than we used to be is an important one. It appears that for a significant period of time we have become less professional. An increase in economic pressures, the understandable desire and drive for due process in handling lawyer discipline cases, and the very size of the profession itself have all tended to push us more and more into an individualistic, self-protective style of behaving.

On the other hand, there appears to be the beginning of a turnaround, an increase in professionalism characterized by a greater

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32. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 (a)(4); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106 (B)(4).

33. See Morgan, *supra* note 1, at 710-11.



recognition of the advantages of mediation and alternative dispute resolution, the greater possibility of achieving the advantages of a large firm without forming a large firm, and a reflective attitude on the part of lawyers toward moral and philosophical concerns—a greater awareness about what we as lawyers are doing and why we are behaving as we are.

The final question is what can one do about professionalism? That is always a difficult problem—the profession is so large and we lawyers are each so small. On the other hand, a man named Robert J. Kutak accomplished more for professionalism than almost anyone I know in the course of his all too short life. Bob Kutak came from Omaha, Nebraska, which few think of as the birthplace of national leaders. He was a successful lawyer there, and he became the Chair of the Committee on Evaluation of Professional Standards without any real expectation that he was going to have a lot of impact on the legal profession. He was simply a man who looked hard and seriously at the question of the state of the profession and asked what one person or one group of individuals could do. Those who saw Bob Kutak in action and observed the product he produced recognize that he symbolizes what one individual can accomplish. Certainly, as lawyers, each of us can have an impact in our own states and communities if we are willing to try. Even if we do not have the nationwide impact of Bob Kutak, at the very least, we can remember and practice the admonition of Canon 32 quoted earlier:

No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. . . . But, above all, a lawyer will find [his or her] highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest [person] and as a patriotic and loyal citizen.<sup>34</sup>

It is an old-fashioned idea expressed in old-fashioned terms, but it is not a bad credo for us today.

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34. CANONS, *supra* note 6, Canon 32.