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Ethics in Practice

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Law, as Reinhold Niebuhr once noted, is a "compromise between moral ideas and practical possibilities."[1] The same is true of legal ethics. How lawyers reconcile the tension between moral aspirations and pragmatic constraints is important not just for the profession but also for the public. Lawyers play a crucial role in the structure of our private affairs and social institutions. This role carries multiple, sometimes competing responsibilities to clients, courts, and society generally. Lawyers also face conflicts between their professional obligations and personal interests. A central challenge of legal practice is how to live a life of integrity in the tension between these competing demands.[2]

This essay, like the collection that it introduces, provides an overview of ethics in practice. Most issues are matters of long-standing concern: Plato's condemnation of advocates' "small unrighteous souls" has echoed for centuries.[3] But while lawyers' ethics have never lacked for critics, only recently have they become a subject of formal rules and significant study. Not until 1969 did the American Bar Association (ABA) adopt a Model Code of Professional Responsibility with binding disciplinary rules. And not until 1974 did the ABA require law schools to offer instruction in legal ethics. Yet the decades that followed have witnessed an outpouring of codification, commentary, and curricular initiatives on professional responsibility. In the mid-1980s, the ABA adopted a revised set of standards, the Model Rules of Professional Conduct, and national, state, and local bar organizations launched a wide range of professionalism efforts: commissions, courses, centers, conferences, and codes.[4]

Despite this cottage industry, chronic ethical dilemmas remain unresolved. Part of the problem involves a lack of consensus about what the problems are, and what values should be most central to professional life. But at least some aspirations are broadly shared. The public deserves reasonable access to legal assistance and to

legal processes that satisfy minimum standards of fairness, effectiveness, and integrity. And the profession deserves conditions of practice that reinforce such standards in the service of social justice.

Such values, however self-evident in theory, have proven difficult to realize in practice. Much of the difficulty involves the bar's failure to address the institutional and ideological structures that compromise moral commitments. The discussion that follows focuses on these structures: the economic conditions, adversarial premises, and regulatory frameworks that shape ethics in practice. Until the bar addresses the underlying forces that drive professional choices, a wide gap will persist between the ideals and institutions of lawyers' working lives.

The Economic Structures of Practice

In some respects, the bar is a victim of its own success. No occupation offers a surer path to affluence and influence. Law is the second highest paying profession, and lawyers play leading roles in the nation's political and economic life.[5] Yet the expectation of doing well *and* doing good has proven increasingly difficult to realize, at least at the level that most practitioners hope to achieve. The last half century has brought fundamental changes in the structure of professional practice that are at odds with professional values. Competition and commercialism are increasing; collegiality and civility are headed in the opposite direction. Most practitioners agree that those trends will continue.[6] There is little corresponding consensus about what, if anything, to do about it.

Legal practice has become increasingly competitive along multiple dimensions. Over the past three decades, the legal profession has more than doubled in size. The growing number of lawyers has intensified competition and diminished the informal reputational sanctions once available in smaller professional communities. Heightened price consciousness among corporate clients, together with the erosion of anticompetitive restraints, also has forced closer attention to the bottom line. These pressures have led to more instability in client and collegial relationships and more constraints on professional independence. Sophisticated purchasers are increasingly likely to shop for representation on particular matters, rather than to build long-term relationships with a single lawyer or law firm.

Such trends have yielded some benefits in terms of increased efficiency and responsiveness to client concerns. But they have come at a considerable cost. As private practice becomes more competitive and transactional, lawyers face greater pressure to accept troubling cases or to satisfy clients' short-term desires at the expense of other values. Without a stable relationship of trust, it is risky for counsel to protest unreasonable demands or to deliver unwelcome messages about what legal rules or legal ethics require. In the study of litigation abuse described in Austin Sarat's essay, one participant put it bluntly: there is "no market for ethics."[7] If clients want to play hard ball, lawyers may come to see it as the only game in town.

Increases in the size and competitiveness of legal workplaces have had other unwelcome effects. As organizations grow larger, collegiality and collective responsibility become more difficult to sustain. So too, as partnership becomes harder to achieve and less likely to insure job security, fewer lawyers feel long-term institutional loyalty. Such environments offer inadequate incentives for mentoring junior attorneys and monitoring collegial conduct. It is, in short, a culture of increasing competition and declining commitment; clients are less committed to lawyers, lawyers are less committed to firms, and partners are less committed to associates.

Preoccupation with the bottom line has compromised other commitments as well, and one obvious casualty is pro bono work. Few lawyers come close to satisfying the ABA's Model Rules of Professional Conduct, which provide that "a lawyer should aspire to render at least 50 hours of pro bono publico legal services per year," primarily to persons of limited means or to organizations assisting such persons.[8] In fact, most attorneys offer little such assistance; the average for the profession as a whole is less than one half hour a week.[9] Part of the reason involves firm policies that fail to count pro bono activity toward billable-hour requirements or to value it in promotion and compensation decisions.[10]

Such policies undermine lawyers' personal and professional values. Pro bono contributions play an important, however partial, role in meeting the bar's unrealized commitment to equal access under law. Such work also has been crucial in giving purpose and meaning to professional life. Practitioners who lack the time or support for such experiences often feel short-changed. Indeed, the greatest source of disappointment among surveyed lawyers is the sense that they are not "contributing to the social good."[11] The bar's failure to provide more support for pro bono activities represents a significant lost opportunity for the profession as well as the public.

Another troubling byproduct of the preoccupation with profit has been the escalation of working hours. Over the last half century, lawyers' average billable hours have increased from between 1,200 and 1,500 hours per year to between 1,800 and 2,000. What has not changed are the number of hours in a day. To charge honestly at current levels, given average amounts of nonbillable office time, requires 60-hour weeks.[12] Expectations at most large firms are even greater. Such sweatshop schedules have compromised professional values in several respects. It has become increasingly difficult to insure equal opportunity for lawyers with substantial family and community commitments. Excessive workloads also create pressures to inflate hours and contribute to psychological difficulties that impair performance.

Working schedules are a major cause of the continued glass ceiling for women in the legal profession. Although 45 percent of new entrants to the bar are women, they fail to advance as far or as fast as men with similar credentials and experience.[13] As is clear from the gender bias task forces reviewed in Deborah Hensler and Judith Resnik's essay below, women remain significantly underrepresented in positions carrying greatest power, status, and economic rewards. Part of the explanation lies in fe-

male attorneys' disproportionate share of family obligations and the unwillingness of legal employers to make appropriate accommodations. Most law firms are what sociologists label "greedy institutions."[14] They preach an ethic of total availability and equate reduced schedules with reduced commitment. Lawyers with competing values generally end up with second-class status. Many drop off partnership and leadership tracks, leaving behind a decision-making structure insulated from their concerns.

That process takes a toll, not just on those with family commitments but on the profession as a whole. Lawyers have fewer opportunities for the community involvement, public service, and personal enrichment that build professional judgment and sustain a socially responsible culture. Even when measured in more narrow economic terms, current workplace priorities yield short-term profits at the expense of long-term gains. Employers who allow flexible and reduced schedules typically find increases in efficiency, morale, recruitment, and retention.[15] The inadequacy of such opportunities in legal practice, together with the escalation of "normal" working hours, also carries a substantial cost. Overwork is a leading cause of lawyers' job dissatisfaction, and their exceptionally high rates of stress, depression, and substance abuse.[16] Such personal problems are, in turn, a primary cause of neglect, incompetence, and related performance problems.[17]

The preoccupation with profit and billable hours contributes to other troubling conduct, particularly on matters involving legal fees. As Chief Justice Rehnquist has observed, if practitioners are expected to meet current billing requirements, "there are bound to be temptations to exaggerate the hours put in."[18] These temptations have fostered a range of abuses, reflecting everything from flagrant fraud and "creative timekeeping" to intentional inefficiency. The frequency of such abuses is difficult to gauge and police because it is often impossible to verify whether certain tasks are necessary and whether they require, or actually consume, the time charged for completing them. However, 40 percent of surveyed lawyers acknowledge that some of their work is influenced by a desire to bill additional hours, and auditors find questionable practices in about a quarter to a third of the bills that they review.[19] Such practices include inflating hours, overstaffing cases, performing unnecessary work, or double billing multiple clients for the same task. Under an hourly billing system, the temptation is to leave no stone unturned as long as lawyers can charge by the stone. In a few egregious cases, personal expenditures have been recast as litigation expenses: dry cleaning for a toupee, or running shoes labeled "ground transportation."[20] Such examples, together with the high cost of routine legal services, have fueled public skepticism about the fairness of lawyers' fees. Fewer than 5 percent of Americans believe that they get good value for the price of legal services.[21]

Although corporate clients have become more adept at monitoring and comparing prices, some abuses remain difficult to detect. Unsophisticated one-shot purchasers are especially vulnerable. Many of these individuals lack adequate information to assess the reasonableness of charges for nonroutine services. And in most

class action litigation, no individual plaintiff will have sufficient incentives to challenge attorneys' fees. Nor will any one else. As Susan Koniak's and George Cohen's essay in this volume makes clear, opposing parties may agree to unduly generous compensation for counsel if it substantially reduces remedies for the class.[22] Overburdened trial courts often are reluctant to second guess such settlement provisions if the effect will be to prolong time-consuming litigation.

This absence of oversight creates obvious potential for abuse, particularly in contingent fee cases. For middle- and lower-income clients, the only way to finance litigation is generally through contingency agreements. These arrangements give counsel a share of any recovery, and no payment if the case is unsuccessful. Although such fee agreements are a crucial means of providing access to legal assistance, they often present conflicts of interest. Attorneys generally would like the highest possible return on their work; clients would like the highest possible recovery. For most claims of low or modest value, lawyers want a quick settlement. It frequently does not pay to prepare a case thoroughly and hold out for the best terms available for the client. Conversely, in high-stakes cases, once lawyers have invested substantial time, they may have more to gain from gambling for a large recovery than clients with inadequate incomes and immediate needs.[23]

A related problem is that a lawyer's return bears no necessary relationship to the amount of work performed or to the risk actually assumed. In many cases where liability is clear and damages are substantial, the standard one-third recovery will provide a windfall for the attorney. If defendants make an early settlement offer, plaintiffs' lawyers can end up with huge fees for minimal services. In some widely publicized cases, the amount of work actually done was so insignificant that it would amount to an hourly rate between $20,000 and $35,000.[24] In theory, clients can challenge contingency arrangements that yield unreasonable fees. In practice, few individuals do so because litigation is expensive and judges have been unreceptive. Courts lack the capacity to monitor even a small fraction of the approximately one million new contingent-fee cases filed each year.[25]

Trial judges also lack the ability or inclination to insure effective representation in other contexts, particularly in criminal cases involving appointed counsel for indigent defendants.[26] Yet the economic conditions of practice for these lawyers work against adequate trial preparation. Most cases are handled either by grossly understaffed public defenders or by private practitioners who receive minimal flat fees or low hourly rates. Compensation generally is capped at wholly unrealistic levels, often a $1,000 or under for felony cases. Thorough preparation is a quick route to financial ruin.[27] Defendants who hire their own counsel do not necessarily fare better. Most of these individuals have incomes just over the poverty line and cannot afford substantial legal expenses. Their lawyers typically charge a flat fee, payable in advance, which creates obvious disincentives for extensive work. These economic conditions help account for the high frequency of plea bargains in indigent criminal defense. About 90 percent of defendants plead guilty, and in the large majority

of these cases counsel have interviewed no prosecution witnesses and filed no defense motions.[28]

These are not, however, the cases that attract media attention. The result is a wide gap between public perception and daily practice. Most Americans believe that the justice system coddles criminals and that lawyers routinely get their clients off on technicalities. In the courtrooms that the public sees, zealous advocacy is the norm. O. J. Simpson's lawyers left no angle unexplored. But their reputations were on view and their client could afford to pay. Neither is true in the vast majority of criminal cases. For many defendants, it is better to be rich and guilty than poor and innocent.

Yet seldom are judges with already unmanageable caseloads willing to oversee counsels' performance. In one representative survey, courts rejected 99 percent of claims alleging ineffective assistance of counsel.[29] The extent of judicial tolerance is well illustrated by a Texas murder case, in which a defense lawyer fell asleep several times during witnesses' testimony and spent only five to seven hours preparing for trial. In rejecting claims of ineffective representation, the judge declared that "[t]he Constitution says that everyone is entitled to an attorney of their choice. But the Constitution does not say that the lawyer has to be awake."[30]

Nor does the Constitution say that the poor are entitled to any legal assistance for civil matters. In the absence of explicit guarantees, or adequate government funding for poverty law programs, over four-fifths of the legal needs of the poor remain unmet.[31] Many middle-income Americans also are priced out of the market for services. An estimated one-third of their personal legal problems are not addressed and many collective concerns go unremedied.[32] Less than one percent of the nation's lawyers are engaged in full-time public interest practice, and the resources to pursue legal issues of broad social importance fall far short.[33] Not only do a vast array of needs lack any representation, but others are ineffectively addressed because the parties cannot afford the necessary assistance. Equal access to justice is what we enshrine on courthouse doors, not what we institutionalize in practice.

These inadequacies in legal services pose ethical issues for lawyers on both an individual and collective level. What are lawyers' responsibilities when they personally confront situations in which important interests are inadequately represented? And what are lawyers' responsibilities when they design rules for the profession in a world of unequal representation? Prevailing adversarial structures have worked against ethically satisfying responses. A system that presupposes equal, zealous representation of opposing interests copes poorly in a world of unequal resources, information, and incentives.

The Structure of an Adversarial System

The central premise of the American legal system is adversarial; it assumes that the pursuit of truth and protection of rights are best achieved through partisan presentations of competing interests. Under this framework, the basic obligation of American lawyers is to advance their clients' objectives "zealously within the bounds of the law."[34] According to the Preamble of the Model Rules of Professional Conduct, "when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done."[35]

There are a number of difficulties with this assumption. The first is that it equates procedural and substantive justice. Whatever emerges from the clash of partisan adversaries is presumed to be just. But even if both parties are well represented, the result may be inequitable because the underlying law or process is flawed. Wealth, power, and prejudice can skew legislative and legal outcomes. Decision makers may lack access to relevant information; single-interest groups may exercise undue influence over governing laws; unconscious race or gender bias may compromise trial judgments; and formal rules may be under- or overinclusive because the costs of fine tuning are too great. Moreover, the assumption that lawyers' role is simply to advance their clients' interests misdescribes a central aspect of the professional relationship. As William Simon's essay in this volume makes clear, attorneys' presentation of information and options inevitably helps shape clients' objectives.

Other defenses of zealous advocacy rest on equally questionable assumptions. The claim that adversarial clashes are the best means of determining truth is not self-evident or supported by any empirical evidence. Why should we suppose that the fairest possible outcomes will emerge from two adversaries arguing as unfairly as possible from opposing sides? It is not intuitively obvious that self-interested advocacy will yield more accurate accounts than disinterested exploration, particularly when the advocates have unequal information and resources. The vast majority of countries do not have an adversarial structure; they rely primarily on judges or investigating magistrates, not partisan advocates, to develop a case.[36] Nor do lawyers generally rely on adversarial methods outside of the courtroom; they do not hire competitive investigators.

An equally fundamental difficulty follows from a qualification that bar ethical codes acknowledge but do not adequately address. For situations when an opposing party is not "well represented," the Model Rules Preamble offers neither guidance nor reassurance. Yet, as noted above, unequal access to justice is the rule not the exception in the American legal system. In a society that tolerates vast inequalities in wealth and costly litigation procedures, it is likely that in law, as in life, the "haves come out ahead."[37] Among bar leaders, the usual "solution to this problem is not to impose on counsel the burden of representing interests other than those of his client, but rather to take appropriate steps to insure that all interests are effectively represented."[38] How that representation can realistically be achieved and financed is a matter conveniently overlooked.

Prevailing ethical rules also fail adequately to address the structural incentives and strategic opportunities that undermine the search for truth. Although bar rhetoric casts lawyers as "officers of the court" with a "special responsibility for the quality of justice," that role in practice is highly limited.[39] Apart from prohibitions on mis-

conduct such as fraud, perjury, and knowing use of false testimony, which are applicable to all citizens, ethical codes impose few concrete obligations concerning the pursuit of truth. For example, attorneys may present evidence that they reasonably believe (but do not know) is false; they may withhold material information; they may pursue strategies primarily designed to impose expense and delay as long as that is not their only purpose; and they may mislead opponents or decision makers through selective presentation of facts and artful coaching of witnesses.[40] As Geoffrey Hazard notes, the adversary system in practice is less a search for truth than an exercise in theater, in which lawyers present clients in their "forensic best," and victory, not veracity, is the ultimate goal.[41]

Similar problems arise with the bar's traditional rights-based justifications for zealous advocacy. Such justifications implicitly assume that *any* legal interest deserves protection. This assumption confuses legal and moral rights. Some conduct that is socially indefensible is technically legal, either because it is too costly or difficult to prohibit, or because decision-making bodies are uninformed or compromised by special interests. An ethic of undivided client loyalty has encouraged lawyers' assistance in some of the most socially costly enterprises in recent memory: the distribution of asbestos and Dalkon Shields; the suppression of health information about cigarettes; and the financially irresponsible ventures of savings and loan associations.[42]

To justify zealous advocacy in such contexts requires selective suspension of the moral principle at issue. If protecting individual rights is the preeminent value, why should the rights of clients trump everyone else's? Yet under bar ethical codes and prevailing practices, the interests of third parties barely figure. As a practical matter, this difference in treatment makes perfect sense. Clients are, after all, the ones footing the bill for advocates' services. But from a moral standpoint, such selective concern often is impossible to justify, particularly when the client is an organization. A corporation's "right" to maximize profits through unsafe but imperfectly regulated methods can hardly take ethical precedence over a consumer's or employee's right to be free from reasonably avoidable risks. Moreover, an attorney's refusal to assist legal but morally dubious conduct does not necessarily compromise individual rights. Unless the lawyer is the last in town, his or her refusal to provide representation will not foreclose client choices. It may simply prompt clients to rethink the ethical consequences of their conduct or incur the costs of finding alternative counsel.

The over-valuation of client interests is especially unsettling on issues of confidentiality. The ABA's Model Rules, like its earlier Model Code, prohibit lawyers from revealing confidential information except under highly limited circumstances. The Model Rules do not *require* disclosure of confidential information except where necessary to prevent fraud on a tribunal. Nor do the Rules even *permit* such disclosure to prevent noncriminal but life-threatening acts or to avert massive economic injuries.[43] Although a growing number of states have expanded the circumstances in which disclosure is permissible, few have adopted any broad mandatory provisions.

It bears note that the most widespread and longstanding exception to confidentiality obligations is for lawyers attempting to defend their own conduct or to collect unpaid fees.[44]

From the profession's perspective, these rules make sense. They give lawyers maximum scope to protect their own interests and those of paying clients. From the public's perspective, however, it is not self-evident why attorneys have the right to reveal anything to collect a bill but not the responsibility to prevent far more significant injuries. Bar ethical rules have, for example, authorized withholding information that would exonerate a wrongfully convicted defendant facing execution or that would reveal substantial health or product safety risks.[45] Nothing in the bar's traditional defense of confidentiality offers adequate justification for such practices.

The most common rationale for confidentiality protections parallels the most common rationale for the adversary system. The argument is that legal representation is essential to protect individual rights, and that effective representation depends on clients' willingness to trust their lawyers with confidential information. This claim is not without force, but it fails to justify the scope of current confidentiality protections. Concerns about individual rights cannot explain why confidentiality principles should shield organizational misconduct. Nor do such concerns explain why the rights of clients should always take precedence over the rights of innocent third parties, particularly where health, safety, or financial livelihood are at risk. The exceptions to current confidentiality obligations are equally hard to justify. If less self-interested decision makers were responsible for formulating the rules, it seems highly unlikely we would end up with the current version. Would any group other than judges require disclosure to prevent a fraud on a court but not to save a life? Would anyone outside the bar permit disclosures to help lawyers collect a modest fee but not to prevent a massive health or financial disaster? Indeed, in one of the only comparative surveys on point, over four-fifths of nonlawyers believed that lawyers should disclose confidential product safety information, while three-quarters of lawyers indicated they would not make such disclosures under current rules.[46]

Attorneys generally claim that unless they can promise confidentiality, clients would withhold relevant information. But current rules are riddled with exceptions and indeterminacies that few clients comprehend. It is by no means clear that adding some further limitations would frequently foreclose attorneys' access to crucial facts. In one New York study, about two-thirds of clients reported giving information to their lawyers that they would still have given without a guarantee of confidentiality.[47] Even individuals who might want to withhold compromising information may be unable to do so either because their lawyer will have other sources for the information, or because their need for informed legal assistance will outweigh the risks of disclosure. Historical, cross-cultural, and cross-professional data make clear that practitioners have long provided assistance on confidential matters without the sweeping freedom from disclosure obligations that the American bar has now obtained. Businesses routinely channeled compromising information to attorneys be-

fore courts recognized a corporate privilege. And many individuals are reasonably candid with accountants, financial advisers, private investigators, and similar practitioners who cannot promise protection from disclosure obligations.[48]

Both in theory and in practice, the bar's traditional defenses of adversarial practices fall far short. The premium placed on client interests, however economically convenient for the profession, poses substantial costs for society. Current norms offer ample opportunities to evade, exhaust, and exploit opponents. The result is a justice system that too often fails to deliver justice as most participants perceive it. Three-quarters of Americans believe that litigation costs too much and takes too long; 90 percent believe that wealthy litigants have unfair advantages.[49] The problems are especially pronounced in large cases, where pretrial discovery abuses remain common.[50] All too often, the pursuit of truth is waylaid by the "antics with semantics" that current rules have failed to control.[51]

In the long run, the profession as well as the public pays a price for such conduct. As Robert Gordon's essay makes clear, the legal system is a common good that cannot function effectively in the face of unrestrained partisanship. Failure to observe basic principles of honesty and fairness erodes the procedural frameworks and cultural values on which the justice system depends.[52] Excessively adversarial ideologies and institutions also have constrained the profession's capacities in problem solving. Carrie Menkel-Meadow's essay identifies the inadequacies of partisan principles in preserving relationships, providing remedial flexibility, expressing community values, and enabling party participation.[53]

Yet these inadequacies are readily overlooked by a profession that has come to see adversarial advocacy as an end in itself. The result is what David Luban describes as a "corruption of judgment."[54] Lawyers' rationalizations for minor abuses and injustices create a climate in which serious ethical lapses no longer appear serious. Over time, deception and delay, inequalities in access and outcomes, come to seem like inevitable byproducts of adversarial processes. If they are a problem, they are someone else's problem. Judges and clients blame lawyers; lawyers blame clients, judges, and other lawyers. A constant refrain in studies of adversarial misconduct is that it is always "the other fella's fault."[55]

G. K. Chesterton observed that abuses in the legal system arose not because individuals were "wicked" or "stupid," but rather because they had "gotten used to it."[56] The problem is compounded when those same individuals are responsible for their own regulation.

The Structure of Professional Regulation

Leaders of the organized bar have long asserted that their organization is not, after all, "the same sort of thing as a retail grocers' association."[57] If they are right, it is for the wrong reasons. Lawyers no less than grocers are motivated by parochial concerns. What distinguishes professionals is their ability to repackage occupational interests

as societal imperatives. The American bar retains far more control over its own regulation than any other occupational group. This freedom from external oversight too often serves the profession's interests at the expense of the public's.

The self-regarding tendencies of self-regulating processes are, however, matters that the bar discretely overlooks. Rather, the profession has long insisted that its regulation should remain under professional control. Courts have asserted inherent authority to regulate the practice of law and have delegated much of that power to the organized bar. According to the Preamble of the ABA's Model Rules, self-regulation "helps maintain the profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice."[58] Although this argument has considerable force, it cannot justify current regulatory structures. Protecting the bar from state control serves important values, but total professional autonomy and government domination are not the only alternatives. Many countries with an independent bar have more public accountability than the American legal profession and have involved more nonlawyers in the oversight process. Unlike regulatory bodies in these countries, the ABA Commissions that drafted the Code and the Model Rules, as well as the "Ethics 2000" Commission considering revisions, have been composed almost exclusively of lawyers.[59]

This bias in the drafting phase is exacerbated by a ratification process in which only the bar is entitled to vote. Although final approval rests with state supreme court judges, they are, by training and temperament, members of the profession, sympathetic to its interests, and often dependent on its good will for their reputation and support. Such a decision-making framework is hardly conducive to a disinterested accommodation of the interests at stake. Nothing in the history of the bar's own self-regulation suggests that lawyers are exempt from the natural human tendency to prefer private over public ends and to lose sensitivity to interests at odds with their own.

Part of the problem is tunnel vision. Without doubt, most lawyers and judges involved in bar regulation are committed to improving the system in which they work. What is open to doubt is whether a body of rules drafted, approved, and administered solely by the profession is the most effective way of realizing that commitment. No matter how well intentioned, lawyers regulating lawyers cannot escape the economic, psychological, and political constraints of their position. Those constraints compromise both the content and enforcement of ethical standards.

Bar leaders have long proclaimed that the primary purpose of regulation is to protect the public. In fact, the debates over ethical standards make clear that on many issues the overriding purpose has been to protect the profession *from* the public. Lawyers' concerns about liability to clients and third parties have dominated debates over advocacy, confidentiality, competence, and fees. The result has been to codify the minimum requirements that a highly self-interested constituency is pre-

pared to see enforced in disciplinary or malpractice proceedings. In response to practitioners' objections, the Model Rules drafting commission dropped provisions requiring disclosure of material facts or information necessary to prevent imminent risks of life or substantial bodily harm. Also deleted were provisions mandating written fee agreements, cost-effective services, and fairness and candor in negotiating behavior, as well as prohibitions on drafting unconscionable clauses and procuring unconscionable results.[60]

The bar similarly has resisted proposals, including some from its own expert commissions, designed to increase public access to legal services. Opposition from lawyers has repeatedly blocked proposed requirements of even minimal contributions of pro bono services.[61] Bar objections also prompted ABA leadership to bury a report by its Commission on Nonlawyer Practice. The report's hardly radical recommendation was that states reconsider their sweeping prohibitions on lay competition in light of consumers' interest in obtaining affordable services as well as protection from unqualified or unethical providers.[62] Despite the vast range of unmet legal needs among low- and middle-income consumers, the organized bar has resisted such recommendations. It has also blocked proposals to license nonlawyer specialists, to permit greater competition from already licensed groups like accountants or real estate brokers, and to provide substantial courthouse assistance to pro se litigants.[63] Although the profession has long insisted that its concern is consumer protection and that the "fight to stop [nonlawyer practice] is the public's fight," the public itself has remained notably unsupportive of the campaign.[64] On the rare occasions when their views have been solicited, Americans have rated the performance of lay providers of routine services higher than lawyers and have overwhelmingly agreed that many legal tasks could be completed as effectively and less expensively by nonlawyer specialists.[65] Evidence concerning the performance of such specialists here and abroad similarly suggests that consumers would benefit from less restrictive rules on lay practice.[66]

They would also benefit from more adequate disciplinary and malpractice structures. "Too slow, too secret, too soft, and too self regulated"—that is how the public views the discipline system, according to a prominent 1992 ABA commission report. As the commission also acknowledged, much of this popular criticism is "justified and accurate."[67] Similar acknowledgments have surfaced in virtually every major study that the bar has undertaken. Yet all of those studies have recommended that the profession retain control over the regulatory process. In one particularly striking survey, only 20 percent of lawyers believed that the disciplinary system did a good job, but some 90 percent believed that the bar should continue to conduct disciplinary activities.[68]

In justifying this continued authority, bar leaders have emphasized the importance of insuring that "those individuals . . . who pass judgment on attorney conduct be knowledgeable regarding the practice of law."[69] But in fact, the disciplinary complaint processes proceed on precisely the opposite basis. They rely almost exclusively on clients as a source of information about ethical violations. Those with the most knowledge concerning practice standards—lawyers and judges—rarely report misconduct. And ethical rules requiring attorneys to make such reports are almost never enforced.[70]

This failure to disclose misconduct reflects a combination of social, psychological, and economic factors. Part of the problem involves the difficulty that Geoffrey Hazard's essay describes: many legal-ethics standards, like other ethical principles, are formulated in broad abstract terms. How they apply in particular cases is often difficult to determine. What constitutes an "incompetent" performance or "unreasonable" fee are highly fact-specific questions, and lawyers usually have no incentive to acquire the relevant information. Disciplinary structures reflect what economists view as classic free-rider/common action-problems. Attorneys who report misconduct benefit society and the profession as a whole, but seldom gain any personal advantage.

As a consequence, bar agencies depend almost exclusively on complaints from clients, along with felony convictions, as a basis for discipline. These sources are highly inadequate. Clients frequently lack sufficient information or incentives to file grievances. Some forms of attorney misconduct, such as discovery abuse, benefit clients; other violations are difficult to detect or prove. Bar disciplinary agencies dismiss about 90 percent of complaints without investigation because the facts alleged do not establish probable cause or fall outside agency jurisdiction.[71] Grievances involving neglect, "mere" negligence, or fee disputes generally are excluded on the ground that disciplinary agencies lack adequate resources and other remedies are available through malpractice suits or alternative bar-sponsored arbitration processes.[72] However, malpractice litigation is too expensive for most of these matters. Seldom does it make sense to sue unless the conduct is egregious, the damages are substantial, and the lawyer has malpractice insurance. Over a third of the bar does not. Nor do most states offer alternative dispute-resolution programs to resolve minor grievances. The programs that are available almost always are voluntary, and clients most in need of assistance seldom find their attorneys willing to cooperate.[73]

A further problem involves the inadequacy of sanctions. Less than 2 percent of complaints result in public discipline such as reprimands, suspensions, or disbarment.[74] Although some grievances clearly are without basis, and reflect dissatisfaction with outcomes rather than deficiencies in attorney performance, the infrequency of significant sanctions also reflects fundamental problems in the regulatory process. Most disciplinary agencies are underfunded and understaffed.[75] To varying degrees, these agencies depend on good relations with the profession, which controls their budget and monitors their performance. Many of the judges and bar leaders who regulate the regulators have a "there but for the grace of God go I" attitude toward all but the most serious misconduct.

Similar problems arise with malpractice litigation as a remedy for incompetent or unethical conduct. Despite the recent growth in claims, a large number of valid

grievances are never filed because the stakes are insufficient or the attorney has no malpractice insurance and it is seldom worthwhile to sue uninsured lawyers. About half of the claims that are filed fail to satisfy the profession's highly demanding standards of proof.[76] To obtain any remedy, plaintiffs must show not only that their lawyers' performance fell below prevailing practices, but also that it was the sole cause of quantifiable damages. That burden generally requires a trial within a trial; claimants need to establish that but for the lawyer's malpractice, they would have been successful in the matter on which they sought legal assistance. For criminal matters, barriers to recovery are even higher and usually insurmountable: clients must prove that they actually were innocent of the crime charged and that their attorney's inadequate performance was responsible for their conviction.[77] In many jurisdictions, not even violations of bar ethical rules are sufficient to establish malpractice. The rules themselves emphasize that they are not intended to define standards for civil liability, and some courts have excluded evidence of noncompliance.[78]

Malpractice case law also imposes undue limits on who can recover for violations of professional standards. The bar has long resisted extending liability to nonclients, and courts have usually agreed. Litigants typically cannot recover for dishonest or abusive conduct by their opponents' lawyer on the theory that concern about such remedies might interfere with zealous advocacy. Similar reasoning in some jurisdictions has served to deny third-party claims by buyers or investors who reasonably relied on attorneys' negligent misrepresentations. These decisions hold lawyers to lower standards than used-car dealers.[79]

Long-standing inadequacies in bar regulatory frameworks argue for a more accountable alternative. If, as the profession insists, its ultimate objective is protecting the public, then the public should have a greater role in the process. No occupational group can make unbiased judgments on matters where its own status and livelihood are so directly at issue.

Alternative Frameworks

Bar discussions of the "crisis of professionalism" generally vacillate between sweeping descriptions of the problem and dispiritingly ineffectual proposals to address it. That mismatch is not entirely surprising. Lawyers as a group are diverse, divided, and anything but disinterested on matters affecting self-regulation. The politics of professional reform make it easier to lament lost ideals than to invite the cost and conflict involved in institutionalizing them. But more could be accomplished if a greater number of lawyers, individually and collectively, addressed the structural sources of the ethical problems they confront.

An obvious place to start is the economic conditions of practice. The tension between profit and professionalism is too self-evident to overlook, but also too uncomfortable to acknowledge fully. The result has been various strategies of confession and avoidance. So, for example, the ABA's Commission on Professionalism framed

the central question: "Has our profession abandoned principle for profit, professionalism for commercialism?" The answer, it turned out, "cannot be a simple yes or no."[80] The commission's report acknowledged that economic pressures were compromising ethical values. But, like other professionalism initiatives, its impact has been largely symbolic and its efforts to "rekindle" a sense of social responsibility through education and exhortation have fallen far short.

Significant progress will require more fundamental changes in the conditions of practice. Most of the necessary reforms follow directly from the diagnosis set forth above. Lawyers' working environments should aim to foster a decent quality of life, a basic equality of opportunity, and a commitment to social justice. Such environments will require realistic billable-hour requirements and adequate accommodations for those with significant family and pro bono commitments. Part-time schedules should be plausible options, and public service should be rewarded in practice as well as principle. Although such reforms are not without short-term costs, the long-term gains are likely to be considerably greater. More humane and flexible schedules yield improvements in job satisfaction, morale, recruitment, retention, and efficiency.[81] And pro bono service provides opportunities not only for personal fulfillment but also for valuable training, contacts, and recognition.[82]

If these benefits are as substantial as recent research suggests, the question then becomes why so many legal workplaces have failed to respond. Why have lawyers so often opted for short-term profits at the expense of broader values? At least part of the explanation may lie in the widespread tendency to overvalue money in comparison with other workplace characteristics that are in fact more likely to yield enduring satisfaction. People generally believe that 25 percent more income would significantly increase their happiness and that more money is the change in circumstance that would most improve the quality of their lives.[83] They are generally wrong. As a wide array of research makes clear, people quickly adjust to higher earnings and their expectations and desires increase accordingly.[84] At attorneys' income levels, the cliche is correct: money does not buy happiness. The priority that many lawyers and law firms attach to salaries compromises other goals that are more central to fulfillment, such as time for families and friends, and choice of work that is morally and intellectually satisfying.

A related problem is that individuals who fail to find such meaning in their legal practice often feel a sense of deprivation that fuels heightened financial demands. Attorneys working too hard on matters they care too little about have greater needs to live well outside work. Patterns of compensatory consumption can then become self-perpetuating. As lawyers become accustomed to high incomes, luxuries become necessities and relative salaries become ways of keeping score. The problem is compounded by surveys that rank law firms based only on profit, and by the difficulties of gaining consensus within any particular firm about the relative importance of other values. Since almost everyone gives high priority to money, it can displace goals on which preferences are more divided.

Changing these priorities is no easy task, but some modest progress may be possible through better information. Few law school curricula or continuing legal education programs address issues of workplace structure and career satisfaction, and few efforts have been made to rate employers on values other than profitability. If more comparative data were available on quality of life and pro bono issues, it might provide significant leverage for reform.

Lawyers and legal employers could also be rated along other ethical dimensions. For example, information could be centrally compiled and published on matters such as disciplinary violations, malpractice judgments, and judicial sanctions for discovery abuse. Bar leaders and regulatory bodies could work together to develop best practice standards on ethical issues and procedures for certifying compliance. These standards could include educational programs, practice guidelines, oversight committees, mentoring strategies, and reporting channels. Voluntary bar associations in particular substantive fields could also adopt heightened ethical requirements. Organizations such as the American Academy of Matrimonial Lawyers, and the ABA Tax Section already have developed more specific and morally demanding codes than the prevailing Model Rules.[85] Lawyers' willingness to comply with such codes and to meet best practice standards could serve as a reputational signal for clients, courts, and colleagues. Analogous approaches have had modest positive effects in other contexts where organizations have been evaluated on ethical dimensions, such as compliance with environmental standards or international bribery and sweatshop prohibitions. Developing reputational rewards and sanctions for the legal profession could push in similar, socially responsible directions.

A further set of reforms should focus on adversarial institutions and ideologies. A more ethically satisfying framework would build on one central premise: lawyers should accept personal moral responsibility for the consequences of their professional actions. Attorneys' conduct should be justifiable under consistent, disinterested, and generalizable ethical principles. These principles can, of course, recognize the distinctive needs of lawyers' occupational role. Morally responsible decision making always takes into account the context in which a person acts. The extent of attorneys' responsibilities for client conduct would depend on their knowledge, involvement, and influence, as well as on the significance of values at stake. So, for example, the importance of protecting free speech for unpopular causes or fair trials for criminal defendants may justify zealous representation despite other costs. But such cases should not set the standard for partisanship in cases where no such principles are at stake.

Unlike the bar's prevailing approach, this alternative framework would require lawyers to assess their conduct in light of all the societal interests at issue in particular practice contexts. An advocate could not simply retreat into some fixed conception of role that denies personal accountability for public consequences or that unduly privileges the interests of lawyers and clients. Nor should attorneys invoke some

idealized model of adversarial and legislative processes to justify zealous advocacy. Rather, they must assess their actions against a realistic backdrop in which wealth, power, and information are unequally distributed, not all interests are adequately represented, and most matters never will reach a neutral tribunal. Client trust and confidentiality are entitled to weight, but they must be balanced against other equally important concerns. Lawyers also have responsibility to prevent unnecessary harm to third parties, to promote a just and effective legal system, and to respect core values such as honesty, fairness, and good faith on which that system depends. "What if everyone did that?" should become a common check on adversarial excesses. Attorneys need to consider the cumulative impact of their individual decisions on the effectiveness of legal processes.

Bar leaders often object that these responsibilities are too vague to serve as the basis for an ethical code, or that lawyers have no special right or expertise to determine what justice requires. But these objections are highly selective. We routinely ask judges, juries, and prosecutors to pursue "justice" or to determine "fairness," and we impose significant penalties on businesses for not acting in "good faith." Lawyers charge substantial fees for interpreting such requirements. The interpretative process is no different when lawyers' own actions are involved. Attorneys should consider the justice of their actions, not because they have special moral expertise, but because they deserve no special moral exemption.

Under this alternative framework, lawyers' ethical responsibilities should extend not only to the cases that they accept and the strategies that they pursue, but also to the structure of the justice system. As architects of ethical codes and legal procedures, lawyers should help to develop a range of "appropriate dispute resolution processes" that can respond to the particular individual and societal interests at stake.[86] For many controversies, it may be possible to craft structures in which money matters less and the merits matter more than is currently the case. The adversary system is not an end in itself and the bar should take a leadership role in developing more cost-effective alternatives.

A final cluster of reforms should focus on bar regulatory structures. Increasing the public accountability of professional oversight should be a key priority. The design of an adequate system does, however, present special challenges. Political control of regulatory processes does not guarantee public protection. Legislatively created oversight agencies often suffer from the same problems of understaffing, underfunding, delays, and capture by regulated groups as bar authorities.[87] And governmental control of regulatory structures pose risks of retaliation against lawyers representing unpopular causes. Yet some progress is likely through frameworks that balance concerns for both public accountability and professional independence. One promising proposal by a California task force would have created a regulatory commission subject to state supreme court control but independent of the organized bar. That commission would have included both lawyers and nonlawyers with expertise in con-

sumer protection; some members would have been chosen by the legislature, some by the governor, and others by the judiciary.[88] Such structural reforms could produce a more responsive system than the prevailing one.

However these accountability issues are resolved, fundamental changes are essential on other fronts. First, disciplinary agencies need more information about misconduct. One obvious strategy is to enforce rules requiring lawyers to report ethical violations by other lawyers. Illinois, the only state that has attempted to do so, has seen a dramatic increase in such reports after its supreme court suspended an attorney for failing to disclose fraud by his client's previous lawyer.[89] Bar agencies also could take more proactive steps to identify disciplinary violations. For example, enforcement officials should initiate investigations based on judicial findings of malpractice, overcharging, and discovery abuse.[90] Disciplinary agencies could also encourage reports from clients by publicizing complaint processes, helping parties file grievances, and requiring attorneys to distribute a "consumer bill of rights" including information about remedial options.

A related set of reforms should focus on improving responses to reported misconduct. Bar disciplinary systems need significantly more professional staff, investigatory resources, and remedial options. Only a few jurisdictions allow permanent disbarment, no matter how serious the offense, or authorize discipline for law firms as well as individual lawyers. Such sanctions should be universally available. Firms should be liable where responsibility for misconduct is broadly shared and reflects failures to provide adequate education, supervision, reporting channels, or remedial responses.[91] Malpractice standards also should be strengthened and all attorneys should be required to carry liability insurance. Remedies should be available for violations of bar ethical rules and for performance that does not conform to reasonable persons' expectations.[92]

Courts and administrative agencies also should become more involved in enforcing ethical standards. The judiciary should have expanded responsibilities and resources to monitor the litigation misconduct, fee-related abuses, and ineffective representation noted earlier. Government agencies should play a more active role as employers, purchasers, and regulators. Agencies can demand a higher standard of conduct than bar disciplinary rules require, both for their own employees and for private practitioners who provide government-subsidized legal services. Further efforts should also be made along the lines developed by the Securities and Exchange Commission and the Office of Thrift Supervision to hold lawyers accountable for facilitating client fraud.[93]

Finally, more attention should focus on increasing access to justice. Obvious strategies include more procedural simplifications, additional pro bono and government-subsidized services, and greater reliance on qualified nonlawyer providers. Although the organized bar needs to play a central role in these reform efforts, decisions about lay competition should not rest with those whose status and income is so directly at risk.

This is not a modest agenda, and significant progress will require sustained efforts on the part of both the profession and the public. These efforts should start with law schools. Although ABA accreditation standards require schools to offer instruction in professional responsibility, the vast majority satisfy their obligation with a single mandatory course that focuses on bar disciplinary codes. Too often, the result is "legal ethics without the ethics."[94] Students learn what the codes require but lack foundations for critical analysis. Topics like access to justice, the quality of professional life, or the limits of bar regulation generally receive inadequate attention. Most students get too little theory and too little practice; classroom discussions are too far removed from real life contexts and too uninformed by insights from other disciplines, other professions, and other cultures. Few schools require pro bono service or make systematic efforts to integrate legal ethics into the core curricula. This minimalist approach to professional responsibility marginalizes its significance. Educational priorities are apparent in subtexts as well as texts. What the core curriculum leaves unsaid sends a powerful message that no single course can counteract.

Research on ethics in practice has been similarly neglected. On many key issues, our knowledge base is embarrassingly thin. We know too little about strategies that might prevent misconduct or improve regulatory processes. Despite an enormous expenditure of effort on drafting and redrafting ethical rules, little attention has focused on how those rules play out in practice. Do differences in state confidentiality rules significantly affect lawyer-client communication or protections for third parties? What efforts by courts and disciplinary agencies have been most effective in controlling discovery abuse? We also know too little about how to educate and enlist the public on a plausible reform strategy. Lawyer bashing is in ample supply but thoughtful critiques and constructive proposals are not.

Any adequate reform agenda will require a clearer understanding of lawyers' ethical problems and the tradeoffs involved in addressing them. Professional responsibility is an evolving ideal in which both the profession and the public have a common stake. The challenge is for these constituencies to work together toward standards that can be justified in principle and reinforced in practice. That agenda does not seem unduly idealistic. On matters of public interest not involving their own regulation, lawyers have been crucial in bridging the gap between ideals and institutions. By turning similar energies inward, the bar may narrow the distance between ethical aspirations and daily practices.

Notes

1. Reinhold Niebuhr, *The Nature and Destiny of Man* (New York: Charles Scribner's Sons, 1941), 2: 302.

2. See Anthony Kronman, quoted in "On Making Lawyers Truly Officers of the Court," *The Responsive Community*, Fall 1996, 44.

3. Plato, *The Dialogues of Plato*, trans. B. Jowitt (New York: Random House, 1937), 175.

4. Working Group on Lawyer Conduct and Professionalism, *A National Action Plan on*

Lawyer Conduct and Professionalism: Report to the Conference of Chief Justices Committee on Professionalism and Lawyer Competence (August 13, 1998); American Bar Association (hereafter cited as ABA), *Promoting Professionalism: ABA Programs, Plans, and Strategies* (Chicago: ABA, 1998).

5. Peter Passell, "Earning It: Royal Blue Collars," *New York Times*, March 22, 1998, E1.

6. Nancy McCarthy, "Pessimism for the Future," *California Business Journal*, November, 1994, 1.

7. Austin Sarat, "Ethics in Litigation: Rhetoric of Crisis, Realities of Practice," infra.

8. ABA, *Model Rules of Professional Conduct* (Chicago: ABA, 1998, Rule 6).

9. Deborah L. Rhode, "Cultures of Commitment: Pro Bono Service as a Professional Obligation," infra.

10. ABA, Model Rules, Rule 6.1; Carroll Seron, *The Business of Practicing Law* (Philadelphia: Temple University Press, 1996), 129–35; sources cited in Rhode, "Cultures of Commitment," infra.

11. Donald W. Hoagland, "Community Service Makes Better Lawyers," in *The Law Firm and the Public Good*, ed. Robert A. Katzmann (Washington, D.C.: Brookings Institution, 1995), 104, 109; ABA, Young Lawyers Division Survey, *Career Satisfaction* (Chicago: ABA, 1995), 11.

12. See studies cited in Patrick Schultz, "On Being a Healthy and Ethical Member of an Unhealthy and Unethical Profession," 52 *Vanderbilt Law Review* 871 (1999); and Deborah L. Rhode, "The Professionalism Problem," 39 *William and Mary Law Review* 283, 300 (1998).

13. Deborah L. Rhode, "Myths of Meritocracy," 65 *Fordham Law Review* 585, 587 (1996); Cynthia Epstein et al., "Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession," 64 *Fordham Law Review* 291 (1995); ABA, Commission on the Status of Women, *Unfinished Business: Overcoming the Sisyphus Factor* (Chicago: ABA, 1995).

14. Lewis A. Coser, *Greedy Institutions: Patterns of Undivided Commitment* (New York: Free Press, 1974); Cynthia Fuchs Epstein, Carroll Seron, Bonnie Oglensky, and Robert Saute, *The Part Time Paradox: Time Norms, Professional Life, Family, and Gender* (New York: Routledge, 1999).

15. Juliet B. Schor, *The Overworked American: The Unexpected Decline of Leisure* (New York: BasicBooks, 1991), 10–12; Carrie Menkel-Meadow, "Culture Clash in the Quality of Life in the Law: Changes in the Economic Diversification and Organization of Lawyering," 44 *Case Western Reserve Law Review* 621, 658–59 (1994).

16. For dissatisfaction rates, see Shultz, "Unhealthy Profession"; and Rhode, "Professionalism Problem," 296–97. Attorneys are four times as likely to be depressed than the population and twice as likely to have substance-abuse problems (297). Michael J. Sweeny, "The Devastations of Depression," *Bar-Leader*, March–April 1998, 11; Laura Gatland, "Dangerous Dedication," *ABA Journal*, December 1997, 28. Lynn Preengenza, "Substance Abuse in the Legal Profession: A Symptom of Malaise," 7 *Notre Dame Journal of Law and Ethics* 305, 306 (1993).

17. See Deborah L. Rhode and David Luban, *Legal Ethics* (St. Paul: Foundation Press, 1995), 876–77.

18. William H. Rehnquist, "The Legal Profession Today," 62 *Indiana Law Journal* 151, 153 (1987).

19. Ralph Nader and Wesley J. Smith, *No Contest* (New York: Random House, 1996), 233–42; William G. Ross, *The Honest Hour: The Ethics of Time-Based Billing by Attorneys* (Durham, N.C.: Carolina Academic Press, 1996), 27–30.

20. Macklin Fleming, *Lawyers, Money, and Success* (Westport, Conn.: Quorum Books, 1997), 38-39; Lisa Lerman, "Gross Profits: Questions about Lawyer Billing Practices," 22 *Hofstra Law Review* 645, 649 (1994); John J. Marquess, "Legal Audits and Dishonest Legal Bills," 22 *Hofstra Law Review* 637, 643–44 (1994); Lisa Lerman, "Regulation of Unethical Billing" (unpublished manuscript, 1998); Darlene Richter, "Greed, Ignorance, and Overbilling," *ABA Journal*, August 1994, 64–66.

21. Marc Galanter, "Anyone Can Fall Down a Manhole: The Contingency Fee and Its Discontents," 42 *Depaul Law Review* 457, 459 (1994).

22. See George Cohen and Susan Koniak, "In Hell There Will Be Lawyers Without Clients or Law," infra; and John C. Coffee Jr., "The Corruption of the Class Action: The New Technology of Collusion," 80 *Cornell Law Review* 851 (1995).

23. Deborah L. Rhode, *Professional Responsibility, Ethics by the Pervasive Method* (Boston: Aspen, 1998), 799–804; Lester A. Brickman, "Contingency Fee Abuses, Ethical Mandates and the Disciplinary System: The Case Against Case-by-Case Enforcement," 53 *Washington and Lee Law Review* 1339 (1996).

24. Brickman, "Contingency Fee Abuses, 1345 n. 22.

25. Ibid., 1349; Lester Brickman, "ABA Regulation of Contingency Fees: Money Talks, Ethics Walks," 65 *Fordham Law Review* 247, 305–8 (1996); Michael Hytha, "'People's Lawyer' Gets Mild Penalty from State Bar," *San Francisco Chronicle*, August 8, 1997, A19 (describing private reproval for lawyer charging up to 46 percent on simple insurance claims).

26. Steven K. Smith and Carol J. DeFrancis, "Indigent Defense," United States Department of Justice, Bureau of Justice Statistics, Selected Findings, February 1996, 3 (Table 4).

27. Marcia Coyle, "Hoping for $75/Hour," *National Law Journal*, June 7, 1999, A1; Ronald Smothers, "Court-Appointed Defense Offers the Poor a Lawyer, But the Cost May Be High," *New York Times*, February 14, 1994, A12.

28. Mike McConville and Chester Mirsky, "Guilty Plea Courts: A Social Disciplinary Model of Criminal Justice," 42 *Social Problems* 216 (1995); Stephen J. Schulhofer, "Plea Bargaining as Disaster," 101 *Yale Law Journal* 1979, 1988 (1992); Kenneth B. Mann, "The Trial as Text: Allegory, Myth, and Symbol in the Adversarial Criminal Process–A Critique of the Role of Public Defender and a Proposal for Reform," 32 *American Criminal Law Review* 743, 803–12 (1995).

29. Victor E. Flango and Patricia McKenna, "Federal Habeas Corpus Review of State Court Convictions," 31 *California Western Law Review* 237, 259–60 (1995).

30. Bruce Shapiro, "Sleeping Lawyer Syndrome," *The Nation*, April 7, 1997, 27–29 (quoting Judge Doug Shaver).

31. Offices of Legal Services, State Bar of California, *And Justice for All: Fulfilling the Promise of Access to Justice in California* (San Francisco: State Bar of California, 1996), 17; Albert H. Cantrill, *Agenda for Access: The American People and Civil Justice* (Chicago: ABA, 1996), 26–27.

32. Cantrill, *Agenda for Access*, 26–27.

33. Rhode and Luban, *Legal Ethics*, 749–50; Pam Sturner, "At Stanford, a Forum for Public Interest Law," *San Jose Post Record*, March 17, 1999, 1.

34. ABA, Model Code of Professional Responsibility (Chicago: ABA, 1980), Ethical Consideration 7-1.

35. ABA, Model Rules, Preamble.

36. Rhode and Luban, *Legal Ethics*; David Luban, "The Adversary System Excuse," in *The Good Lawyer*, ed. David Luban (Rowman & Allanheld, 1984), 83.

37. Marc Galanter, "Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change," 9 *Law and Society Review* 95 (1974).

38. Abe Krash, "Professional Responsibility to Clients and the Public Interest: Is There a Conflict?," 55 *Chicago Bar Record* 31, 37 (1974).

39. ABA, Model Rules, Preamble.

40. See ABA, Model Rules, Rules 3.3, 4.1.

41. Geoffrey Hazard Jr., "Law Practice and the Limits of Moral Philosophy," infra.

42. See Paul Brodeur, *Outrageous Misconduct: The Asbestos Industry on Trial* (New York: Pantheon, 1985); Susan Perry and Jim Dawson, *Nightmare: Women and the Dalkon Shield* (New York: Macmillan, 1985), 208; David Margolick, "'Tobacco' Its Middle Name, Law Firm Thrives, for Now," *New York Times*, November 20, 1992, A1; *Lincoln Savings and Loan Association v. Wall*, 743 F. Supp. 901 (D.D.C. 1990).

43. ABA, Model Rules, Rules 3.1, 1.6.

44. ABA, Model Rules, Rule 1.6.

45. See, for example, Arthur Powell, "Privilege of Counsel and Confidential Communications," 6 *Georgia Bar Journal* 334, 335 (1964) David Kaplan, "Death Row Dilemma," *National Law Journal*, January 25, 1988, 35; *Spaulding v. Zimmerman*, 116 N.W.2d 704 (Minn. 1962); *Balla v. Gambo Inc.*, 584 N.E.2d 104 (Ill. Sup. Ct., 1991).

46. Fred C. Zacharias, "Rethinking Confidentiality," 74 *Iowa Law Review* 351, 382–83 (1989).

47. Ibid.

48. Deborah L. Rhode, "Ethical Perspectives on Legal Practice," 37 *Stanford Law Review* 589, 614 (1985); Steven Lubet and Cathryn Stewart, "A 'Public Assets' Theory of Lawyers' Pro Bono Obligations," 145 *University of Pennsylvania Law Review* 1245, 1280–81 (1997).

49. ABA, *Perceptions of the U.S. Justice System* 59 (Chicago: ABA, 1999), 59.

50. See Symposium, "Conference on Discovery," 39 *Boston College Review* 517–840 (1998); and Litigation Ethics in "Ethics: Beyond the Rules," 67 *Fordham Law Review* 691–896 (1998).

51. Sarat, "Ethics in Litigation," infra. See also Working Group on Lawyer Conduct and Professionalism, *A National Action Plan*, 29, 50; and Rhode, *Professional Responsibility*, 187–88.

52. Robert Gordon, "Why Lawyers Can't Just Be Hired Guns," infra.

53. Carrie Menkel-Meadow, "The Limits of Adversarial Ethics," infra.

54. David Luban, "Wrongful Obedience: Bad Judgments and Warranted Excuses," infra.

55. Sarat, "Ethics in Litigation," infra; Douglas N. Frenkel, Robert L. Nelson, and Austin Sarat, "Introduction: Bringing Legal Realism to the Study of Ethics and Professionalism," 67 *Fordham Law Review* 697, 703 (1998).

56. G. K. Chesterton, "The Twelve Men," in *Tremendous Trifles* (New York: Dodd, Mead and Co., 1929), 57–58.

57. Roscoe Pound, *The Lawyer from Antiquity to Modern Times* (St. Paul: West Publishing Co., 1953), 7.

58. ABA, Model Rules, Preamble.

59. The Model Rules Commission and Ethics 2000 each had one lay member; the Code had none. See Rhode, *Professional Responsibility*, 48.

60. See Deborah L. Rhode, "Ethical Perspectives on Legal Practice," 37 *Stanford Law Review* 589, 611 (1985); ABA, Model Rules of Professional Conduct, Discussion Draft.

61. See Rhode, "Cultures of Commitment," infra.

62. ABA Commission on Nonlawyer Practice, *Nonlawyer Activity in Law-Related Situation: A Report with Recommendations*, 3–8 (Chicago: ABA, 1995).

63. Deborah L. Rhode, "Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice," 22 *New York Review of Law and Social Change*, 701 (1996).

64. ABA, *Committee on Evaluation of the National Conference on the Unauthorized Practice of Law* (1962), 153 (quoting former ABA president John Sattefield).

65. See surveys cited in Rhode, "Professionalism in Perspective," 709; Deborah L. Rhode, "Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions," 34 *Stanford Law Review* 1 (1981).

66. See the evidence summarized in Rhode, "Professionalism in Perspective," and "Policing the Unauthorized Practice."

67. ABA Commission on Evaluation of Disciplinary Enforcement, *Lawyer Regulation for a New Century* (Chicago: ABA, 1992), xx; Paula Hannaford, "What Complainants *Really* Expect of Lawyers' Disciplinary Agencies," 7 *Professional Lawyer* 4 (May 1996) (finding majority of complainants rated Virginia's system as poor or very poor).

68. Deborah Hensler and Marissa E. Reddy, *California Lawyers View the Future* (Santa Monica: Rand, 1994), 18.

69. Commission on the Future of the Legal Profession and the State Bar of California, *The Future of the California Bar* (San Francisco: State Bar of California, 1995), 103.

70. Darryl Van Duch, "Best Snitches: Illinois Lawyers," *National Law Journal*, January 26, 1997, A1; Laura Gatland, "The Himmel Effect," *ABA Journal*, April 1997, 24–28. See ABA, Model Rules, Rule 8.3, and Model Code, DR 1–103.

71. New York Bar Committee on the Profession and the Courts, *Final Report to the Chief Judge* (November 1995), 44; ABA Commission, *Lawyer Regulation*, xv.

72. Geoffrey Hazard Jr., Susan P. Koniak, and Roger Cramton, *The Law and Ethics of Lawyering* (Westbury, N.Y.: Foundation Press, 1994), 172.

73. "ABA Committee Proposes Rules for Lawyer-Client Mediation," 13 *ABA/BNA Lawyer's Manual on Professional Conduct* 398 (Dec. 24, 1997); ABA Commission, *Lawyer Regulation*, 129.

74. Rhode, *Professional Responsibility*, 72; Beth M. Daley, "Is the Illinois Disciplinary System Working?," *Legal Reformer*, Spring 1998, 3.

75. Nader and Smith, *No Contest*, 132; Rhode, *Professional Responsibility*, 70–72.

76. ABA Standing Committee on Lawyers' Professional Liability, *Legal Malpractice Claims in the 1990s*, 12, 16 (ABA: Chicago, 1996); John Gibeaut, "Good News, Bad News in Malpractice," *ABA Journal*, March 1997, 101; Manual Ramos, "Malpractice: Reforming Lawyers," 70 *Tulane Law Review* 2583, 2603, 2612 (1996).

77. Charles Wolfram, *Modern Legal Ethics* (St. Paul: West Publishing Co., 1986), 218–22. *Wiley v. San Diego County*, 966 P.2d 983 (Cal. 1998).

78. ABA, Model Rules, Scope; ABA, Model Code, Prefatory Note; Wolfram, *Modern Legal Ethics*, 207–15; Gary A. Munneke and Anthony E. Davis, "The Standard of Care in Legal Malpractice: Do the Model Rules of Professional Conduct Define It?," 22 *Journal of the Legal Profession* 33, 62–25 (1998).

79. *Goodman v. Kennedy*, 556 P.2d 737 (Cal. 1976); *Shatz v. Rosenberg*, 943 F.2d 485 (4th Cir.1991), cert. denied, 503 U.S. 936 (1992); John Leubsdorf, "Legal Malpractice and Professional Responsibility," 48 *Rutgers Law Review* 101, 111, 130–35 (1995); Bowman, "Lawyer Liability to Non-Clients," 97 *Dickinson Law Review* 267–76 (1993).

80. ABA, Commission on Professionalism, *In the Spirit of a Public Service* (Chicago: ABA Commission on Professionalism, 1986), 1.

81. Schor, *Overworked American*, 10–12; Menkel-Meadow, "Culture Clash," 658–59.

82. See sources cited in Rhode, "Cultures of Commitment," infra.

83. Robert Lane, "Does Money Buy Happiness?," *Public Interest*, Fall 1993, 56, 61; Robert Frank, "Luxury Fever" (unpublished manuscript, 1998).

84. David G. Myers, *The Pursuit of Happiness* (New York: William Morrow, 1992), 51–58 Lane, "Happiness," 61; Frank, "Luxury Fever," Chap. 8.

85. See American Academy of Matrimonial Lawyers, *Standards of Conduct* (Chicago