CREATING SPACE FOR LAWYERS TO BE ETHICAL: DRIVING TOWARDS AN ETHIC OF TRANSPARENCY

Burnele V. Powell*

I. INTRODUCTION

Ostensibly there is little to connect the harried lawyer facing an ethical dilemma and the frazzled driver at an accident-prone intersection. The lawyer who miscalculates whether a former employer’s non-compete clause bars his client from selling a newly invented device does not appear to have much in common with the rush-hour driver at a major intersection. Nor does it appear at first glance that a second lawyer, who serves simultaneously as outside counsel to a corporation and personal counsel to its chief executive officer, can learn much from a driver who, for safety’s sake, has chosen to drive with her daytime

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3. Another crash avoidance feature is daytime running lights. Activated by the ignition switch, daytime running lights increase vehicle conspicuity during daylight hours, making it easier to detect approaching vehicles. A 2002 Institute study reported a 3 percent decline in daytime multiple-vehicle crash risk in nine U.S. states concurrent with the introduction of daytime running lights. Many manufacturers are beginning to make the lights standard on their vehicles.
running lights on. But if the first lawyer wants genuinely to be prepared to confront competency issues, or the second, her potential conflict of interest, they would both be advised to think like that driver at the intersection. They need to focus strategically on the circumstances of their situation. The lawyers especially might ask the kinds of questions that traffic engineers are increasingly trying to get drivers to ponder. Rather than roadway signs and ethical rules drivers and lawyers would be better served focusing some measure of attention on the structure of their environments.

Thus, the road that metaphorically connects the ethical intersections of the law and the crowded intersections of our public streets has much to teach us. Even if we are prepared to go down this road, however, we must recognize that it will not be easy to reach our destination. Fortunately, we have models—even legends—to inspire our efforts. In 1994, for example, the American Bar Association’s Center for Professional Responsibility established an award, which annually honors a lawyer whose service to the law and public, like Michael Franck, demonstrates the highest commitment to professionalism and legal ethics. In a 1998 ceremony honoring a “lifetime of original and


5. Consider some of the questions most frequently asked by the Insurance Institute for Highway Safety:

• What are the most common types of urban crashes?
• Which crashes are most likely to cause injuries?
• Where and when do urban crashes occur?
• What traffic engineering countermeasures can officials implement?
• Can tougher law enforcement help?
• Can vehicle design changes help?

See Highway Safety, supra note 3 (numbering omitted).

6. See infra note 103 and accompanying text (addressing Transparency, Redundancy, Accountability, Notice, and Synchronicity (viz., the Jungian notion of “fitting” psychologically)).

7. Michael Franck (1932-1994) served for nearly twenty-five years as State Bar Executive Director of the State Bar of Michigan in which capacity he rendered extraordinary service, including distinguished leadership of the 1975 Clark Commission’s landmark study of lawyer discipline and exercising a pivotal role in the six-year-long development of the Kutak Commission’s Model Rules of Professional Conduct.

8. If the description “old school” were to have an icon, it would be Michael Franck. Think of a wrestler, well past middle-age, but whose every move and focused bearing suggests that with two weeks in the gym he would be ready for the big match. You would want him on your team—
influential scholarship in the field of lawyers’ ethics,” Monroe Freedman was honored as the fifth recipient of the Franck Award Medal. The ABA took particular note that Professor Freedman’s scholarly contributions had heightened the legal profession’s understanding of ethics to a degree that was transformative. “[H]is scholarship,” the announcement said, “has shaped the debate in legal ethics, beginning with his 1966 article ‘The Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions.’”

Today, fifty years after his celebrated critique of the defense counsel’s perjury trilemma, it is amusing that it was ever seriously thought that there could be a discussion of legal ethics that did not involve an exchange of hard and critical questions—questions reflecting the sharpest contentions about the instrumental ends of rules and sanctions. To a great extent Professor Freedman represents a

anybody would. More important, whether you wanted him on your team or not, he was going to be there. I was not surprised when, in the last stage of life, he gathered himself to come to Chicago to be honored as the recipient of the first Michael Franck Award. Months before he had already demonstrated that his was an uncompromising commitment to the legal profession: From the hospital bed, where he was battling late-stage cancer, Franck forwarded detailed suggestions and corrections on the Draft Proposed Model Rules for Lawyer Disciplinary Enforcement (eventually adopted by the American Bar Association House of Delegates, August 11, 1993, and amended August 5, 1996, February 8, 1999, and August 12, 2002).


12. The “Classic Trilemma,” as formulated by Freedman, in regards to the practice of criminal law, involves:

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<td>1.</td>
<td>Is it proper to cross-examine for the purpose of discrediting the reliability or credibility of an adverse witness whom you know to be telling the truth?</td>
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<td>2.</td>
<td>Is it proper to put a witness on the stand when you know he will commit perjury?</td>
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<td>3.</td>
<td>Is it proper to give your client legal advice when you have reason to believe that the knowledge you give him will tempt him to commit perjury?</td>
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13. Today we take for granted the responsibility of lawyers (and especially the legal academy) to demand rigorous debate, but that was not the world that Freedman confronted. Court of Appeals Judge Warren E. Burger, who was later to become United States Supreme Court Chief Justice, called upon the D.C. Bar to sanction Freedman. See GEOFFREY C. HAZARD, JR., KONIAK AND CRAMPTON, THE LAW AND ETHICS OF LAWYERING 375-82, 376 (3d ed. 1999).
watershed; he was among the earliest proponents of a legal ethics that rejects \textit{a priori} assumptions in favor of a studied focus on the actual needs of clients in an adversary system. Standing with but a very few,\textsuperscript{14} he was among the first to understand the importance of the legal services delivery system to the achievement of justice. Intellectually, he blazed the trail that the Supreme Court would belatedly follow, arguing that the right of lawyers to advertise rests on constitutional principles, the denial of which is debilitating for lawyers and clients, but especially burdensome for the poor and indigent.\textsuperscript{15} And it was Professor Freedman who urged the legal profession’s growth in understanding how the concept of “knowing” shapes the scope, fairness, and ultimate legitimacy of rules intended to impose responsibilities on lawyers.\textsuperscript{16}

Thus it is Professor Freedman who we, like the ABA, honor as a hero in his own time,\textsuperscript{17} as a man, a scholar, and a lawyer whose “ideas were first considered controversial . . . [but] have since become an integral part of the law governing lawyers.”\textsuperscript{18}

This article, as part of the Hofstra University School of Law symposium honoring him\textsuperscript{19} and consistent with the recognition that he has garnered during a lifetime of service,\textsuperscript{20} embraces the tradition of challenge that Monroe Freedman personifies. It takes as given that it is the responsibility of scholars continuously to push the boundaries of thought about legal ethics and professionalism beyond their settled limits.\textsuperscript{21} In short, it acknowledges the truth that is implicit in Freedman’s

\textsuperscript{14} It would be remiss not to acknowledge that there were others charging the ramparts, especially Professors Geoffrey C. Hazard, Jr. and Andrew L. Kaufman.

\textsuperscript{15} See FREEDMAN, LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM, at 117-21 (1975) [hereinafter FREEDMAN, LAWYERS’ ETHICS] (arguing that it is a lawyer’s obligation to seek out clients in need of legal representation via solicitation); see also Bates v. State B. of Ariz., 433 U.S. 350, 382 (1977) (holding unconstitutional a ban on lawyer advertising).

\textsuperscript{16} See id. at 51-55.

\textsuperscript{17} As a personal note, I recall with pleasure having a small role in conferring Monroe Freedman’s Michael Franck Award from the ABA Center for Professional Responsibility, and at that time, honoring his lifetime of original and influential scholarship in the field of lawyers’ ethics. While it would be inappropriate to discuss the voting process—who voted which way and how many votes were received—I can say that this was probably the easiest decision that the Center for Professional Responsibility’s Michael Franck Award Committee ever had to make. That it was well deserved is testified to by all the reasons that this symposium celebrates over its few days.

\textsuperscript{18} Recipient Biographies, supra note 9.


\textsuperscript{20} Professor Freedman has been honored with the ABA Michael Franck Award for Professional Responsibility (1998), Martin Luther King Humanitarian Award (1986), and the Lehman-LaGuardia Award for Civic Achievement (1996), among many others.

\textsuperscript{21} Of course, the views here are my own, expressed in the hope that those that are negatively received will, as with Monroe Freedman, be understood more favorably fifty years hence and that
scholarly and professional advocacy: The process of transformation is never complete; we (and our institutions) evolve, if at all, through endless reexamination. Sometimes that examination will be conceptual, as when we were challenged by Freedman to understand the down-side of prohibiting lawyer advertising. At other times, it will be structural, as when the legal profession is called upon to confront new technologies, such as the use of faxes, e-mail and cell phones. At times, though, our focus will be both conceptual and structural, as the issues will be so interdependent that movement in neither sphere is possible absent a simultaneous breakthrough.

The discussion here is most nearly of the last kind; it involves the need to resolve a conceptual point so that we can address a seemingly resistant structural one. Thus, the discussion below, as my title suggests, has two purposes. It addresses what is meant by the need to create space to be ethical—a structural question—and how we might the positive will be taken as demonstrating that his intellectual courage, humanity, and imagination has touched us all.

22. See supra note 15 and accompanying text.

23. Dealing with changes to our material culture always poses new dilemmas. While our capacity to do more—faster, cheaper, aesthetically, and dynamically—races ahead, the assumptions and formal rules that govern the world that produced those changes lags behind, locked in strategic battles aimed at assuring that yesterday’s winners will not become tomorrow’s losers. See Burnele V. Powell, Somewhere Farther Down the Line: MacCrate on Multiculturalism and the Information Age, 69 WASH. L. REV. 637, 661 (1994) (concluding that the legal professorate and the practicing bar “must recognize that all future social enterprises will take place in a world of heightened communication that is increasingly more diverse, racially, culturally, ideologically and otherwise”).


25. See City of Reno v. Reno Police Protective Ass’n, 59 P.3d 1212, 1218 (Nev. 2002) (addressing whether attorney’s right to claim privilege for a communication was lost by its e-mail transmittal); see also Waiver of Privilege by Disclosure, 34 CAL. L. REVISION COMM’N REPORTS 265, 327-28 (2004), available at http://clrc.ca.gov/pub/Printed-Reports/REC-WaiverPriv.pdf (last visited Apr. 18, 2006); SPECIAL COMM. TO REV. THE ABA MODEL RULES 2002, REP. TO THE FLA. B. BD OF GOVERNORS app. D, at 192 (proposing that “when a lawyer learns before receiving the document that it was inadvertently sent to the wrong address . . . [t]he new comment clarifies that the lawyer may properly return the document unread and, in so doing, ‘commits no act of disloyalty by choosing to act in accordance with professional courtesy’”), available at http://www.floridasupremecourt.org/decisions/probin/04-2246_AppendixDFinalReport.pdf (last visited Apr. 18, 2006).


27. See infra notes 99-106 and accompanying text (answering why we are a profession that has expended considerable time, energy, and resources on ethics, but with little effect).

28. See infra notes 103-04 and accompanying text (discussing the concept of shared space).
come to see the space in which we operate as informing our actions within it—the conceptual pairing.29

Briefly stated, I argue that as a result of the human tendency to discount environmental influences and overstate the importance of individuals’ psychological dispositions, the legal profession has largely approached discussions about lawyer ethics and professionalism in a manner that is inherently incapable of increasing lawyers’ compliance with the profession’s standards of ethics. Accordingly, in Part II, I focus on two problems which have reflected the legal profession’s longstanding inability to achieve adequate returns on its investment of time, energy, and resources.30

In Part III, I turn to an examination of why our underlying analysis has prevented us from adequately addressing those archetypal problems. I identify the legal profession’s faulty premise as related to a general misunderstanding of the relationship between rules and rule-compliance.31 However, since that failure—a failure most helpfully viewed as a characteristically human failure—is not peculiar to the legal profession, I outline its contours through the perspectives of engineering and social psychology. Thus, we identify a phenomenon that strongly suggests that environmental factors play a much more significant role in the organization of behaviors than is commonly appreciated and turn to the psychological literature to provide an empirical explanation for our misunderstanding.

Finally, in Part IV, I suggest initiatives for an examination of legal ethics based on a new conceptualization—one that is informed by the ideal of transparency.32 The transparent legal ethics that I propose seeks to learn from our misunderstanding and move towards an environment in which law is practiced in a manner that reflects understanding that how we organize our activities in the course of practicing law is every bit as critical, if not more so, to achieving compliance with legal standards as has been our past reliance on critiquing rules, inculcating our principles, exhorting commitment, and imposing sanctions.

29. See infra notes 105-06 and accompanying text (revealing a divergence of theory and reality).
30. See infra Part II.A (examining Professionalism) and Part II.B (addressing Populism).
31. See infra notes 99-106 and accompanying text (confronting a shared inability of professionalism and populism correctly to diagnose the true cause of their unhappiness with the profession).
32. See infra Part V (proposing a new paradigm).
II. TWO PERSISTING PROBLEMS: PROFESSIONALISM AND POPULISM

Over the years I have become increasingly skeptical of the legal profession’s expressions of concern about lawyers and their ethics. Feeding those qualms has been the profession’s recurring lapses into trendiness—swinging from one supposed solution to elevate the profession’s ethical behavior to another. No conference on lawyer ethics seems complete without the introduction of some new nostrum to cure what ails the profession. Historically, the resulting picture is one of a profession lurching from one failed solution to another. Already the pre-Freedman era has been mentioned as an “era of pabulum,” in which legal ethics was widely viewed as a process of modeling character, making it an ideal job for the dean of the law school. Prior to

33. Although I am not unconcerned about the perceptions of nonlawyers, I am less troubled. From outside the profession theirs must necessarily be a critical perspective. In many instances they have interests, agendas, and priorities that are antithetical to fair process, equality, tolerance, and justice. See generally Burnele V. Powell, What Clients Want and Why They Can’t Have It, 52 EMORY L.J. 1135 (2003) (suggesting clients most want to win even when “winning” might not be based on the merits). My concern is with the degree to which one believes that the legal profession is in entropy. See generally MARY ANN GLENDON, A NATION UNDER LAWYERS (1994); ANTHONY T. KRONMAN, THE LOST LAWYER (1993); SOL M. LINOWITZ, THE BETRAYED PROFESSION (1994); DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE (2000); WILLIAM SIMON, THE PRACTICE OF JUSTICE (1998).

34. Over the past two decades those trends have included more than a dozen proposed solutions for what ails the legal profession, including: Attorney Apprenticeship Programs; Bridge the Gap Programs; Law Firm Discipline; Ethics Schools; Pervasive Ethics; Professionalism Codes; Mandated Re-taking of the Multistate Professional Responsibility Exam; Mandatory Ethics Continuing Legal Education (CLE); Expanded/Mandatory Lawyer Pro Bono; Law School Mandated Pro Bono Programs; Permanent Disbarment; and Mandated Re-taking of the Oath for Admission to Practice.

35. See supra notes 10-18 and accompanying text.

36. One characterization put it this way:
For many years the subject of legal ethics was unique in most law schools for reasons other than its overarching relevance. The course was the ugly duckling of the curriculum, viewed with distaste by many students and most law professors. Traditionally, the class was short on intellectual content and long on platitudes: students were admonished in the most general terms to be not just good, but very, very good. All too often the result was like a semester-long commencement speech, and its delivery often fell by default to overworked deans or adjuncts.


37. Id. at 1-2. Professor Ellen C. Yaroshefsky, Clinical Professor of Law and Director, Jacob Burns Center for Ethics in the Practice of Law, observed that in that era, the dean of the law school would typically say: I’m here to tell you that ethics is about why you “shouldn’t take people’s monies—lose all their money and lose their cases on purpose.” Ellen C. Yaroshefsky, Remarks at the 2005 Hofstra Law School Ethics Symposium: Lawyers’ Ethics in an Adversary System (Nov. 1, 2005).
that we experienced the gentleman’s club era, when legal ethics was thought to be a matter of deportment.38

To move beyond these personal-character based models took Monroe Freedman’s39 critical eye and commitment to focusing the profession on the real-world consequences of its efforts.40 Indeed, Freedman’s postmortem on the “era of pabulum,” in the preface to his pathbreaking Lawyers’ Ethics in an Adversary System41 continues to serve as both a diagnosis and an implicit challenge to find an alternative way forward:

There are probably a number of reasons for the profession’s persistent failure to face up to the nature of its own responsibilities. One reason, undoubtedly, is that the issues really seem to defy satisfactory solution. Another, probably, is the assumption that practitioners will instinctively do the right thing or, if there are some who will not, that it is useless even to try to induce in those people an awareness of what the norms are or should be.42

However, recognizing the need for a solution that rejects the view of legal ethics as primarily about instinctive character is only the first step. In an era of complexity43 for the legal profession fully to commit to

38. Professors Aronson, Devine, and Fisch succinctly summarize the focus of the era:

The lectures of two 19th-century law teachers are credited with laying the doctrinal foundations of modern ethics codes in the United States. David Hoffman’s “Fifty Resolutions in Regard to Professional Deporment” were begun in 1822 and reprinted in his A Course of Legal Study (2d ed. 1836). George Sharswood’s “A Compend of Lectures on the Aims and Duties of the Profession of the Law” (1854) developed into his treatise Legal Ethics (1884).


39. Freedman, himself, served as Dean of the Hofstra School of Law, 1973-77.

40. My reference is to the kinds of contentious issues already mentioned: client perjury, see supra notes 12, 16 and accompanying text; lawyer advertising, see supra note 15 and accompanying text; and the proper understanding of scienter (that the lawyer knew, or should have known the resulting consequences) when imposing lawyer disciplinary sanctions, see supra note 16 and accompanying text.

41. See FREEDMAN, LAWYERS’ ETHICS, supra note 15, at vii-ix. For more analysis, see generally Freedman, Professional Responsibility, supra note 11.

42. FREEDMAN, LAWYERS’ ETHICS, supra note 15, at vii.

43. Mark the beginning of the period of complexity from roughly 1964 to 1984, during which time the ABA produced the 1983 Model Rules of Professional Conduct and followed them with further amendments in 1989. The progression from the Code of Professional Responsibility to the Model Rules evidences the profession’s growing seriousness about facing up to the nature of its responsibilities.
rules that are appropriate and efficient, it will also have to cure its hyperopia. The legal profession must self-prescribe lenses that correct the fundamentally flawed way it sees lawyers and lawyer regulation. Rather than viewing lawyer misconduct as a reflection of an offending lawyer’s failure to learn what was expected, the legal profession must begin to understand that the psychological disposition of lawyers—indeed, that of any actor—may be largely irrelevant to whether that lawyer adheres to or violates a code of professional conduct. Thus, the legal profession must begin the truly complex task of incorporating from other disciplines perspectives such as attribution theory. It must grasp the fundamental precept that, for humans, knowing what to do and doing what one knows to do are not the same things.

44. Serious regulation requires not only an understanding that the power exists to regulate, but also an appreciation of when more informal processes, such as jawboning, adverse publicity, or even shaming, would be a better response.

45. Even if the decision is made to regulate, there remains the issue whether such efforts will be effective. One of the things that has undermined the lawyer regulatory process is the sense that many lawyers have that the rules exist, in large part, for show and, thus, were never intended to be effective. In that cynical view, they would not be enforced against large law firms, the politically connected, or anyone wealthy enough to make the process a costly one.

46. The state of legal ethics is aptly analogized to the medical condition of farsightedness. There is little debate about what is seen on the horizon; the debate (or lack thereof) is about what is observable immediately before us. Are bad lawyers bad people or good people gone bad? Did their learning fail or was it that they never learned? All that seems agreed upon is that bad lawyers hurt the legal profession and must be dealt with.

47. A case on point is In re Breen, 830 P.2d 462 (Ariz. 1992), where the court explained:

The Committee recommended that Respondent be suspended from the practice of law for two years and that, as a condition of reinstatement, he be required to pass the State Bar exam on the subject of ethics and successfully complete either twelve hours of continuing legal education in the field of ethics or a course in ethics at an accredited law school.

Id. at 463. But my criticism is not that retaking the ethics portion of the state’s bar exam was mandated. Rather it is the lack of empirical evidence that retaking the bar exam improves lawyer conduct coupled with the unexamined assumption that lawyer wrongdoing occurs because lawyers do not know what is required of them and can be addressed by assuring that they have such knowledge.

48. Under the heading “Moral People versus Moral Actions,” Morgan and Rotunda have asked and answered the relevant question in this regard:

Is there a difference between what we want a lawyer to do and the kind of person we want a lawyer to be? Should the law demand only that a lawyer comply with applicable rules of professional conduct, or should it be concerned that a lawyer be a person who will seek to act morally in each of life’s situations?

THOMAS D. MORGAN & RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY: PROBLEMS AND MATERIALS 17 (8th ed. 2003). The consideration to which they point helps to provide an answer: “Many people assume that personal and professional standards are congruent. That is, if someone has good moral sense, his or her behavior will necessarily comply with professional standards. But professional ethics are not synonymous with moral conduct.” Id.

49. See infra notes 59-62 and accompanying text (regarding attribution theory).
More challenging, still, the legal profession must accept that reconsideration of the knowing-doing assumption may require unsettling reexaminations of some of its most treasured iconography. In the era of complexity, in other words, we must accept that lawyer regulation will inevitably become even more complex. Such a development could have tectonic implications. Shifts in values, implicating even the most sacrosanct assumptions of the legal profession, are likely to result. Accordingly, the discussion below considers the unintended roles that two of the more recent high-profile initiatives, the movements for professionalism and populism, have played in inhibiting the full emergence of the era of complexity.

A. Professionalism

The starting point for a discussion about professionalism is with recognition that it is not only an aspiration; it is a movement. What next stands out is that after some twenty years as an influential presence within the legal profession, there still is no consensus about its definition or utility. The New Mexico Commission on Professionalism defined professionalism as “conduct consistent with the tenets of the legal profession as demonstrated by a lawyer’s civility, honesty, integrity, character, fairness, competence, ethical conduct, public service, and respect for the rule of law . . . .” Although not inconsistent with other

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50. The assertion that professionalism has achieved the status of a movement refers to both the efforts of its proponents to proselytize for its principles and policies and the manifest success of those efforts over a roughly twenty-year period. Googling the phrase “Lawyer Professionalism” yielded 2,290,000 hits, including one for the movement’s own magazine, THE PROFESSIONAL LAWYER, a quarterly publication of the ABA Center for Professional Responsibility. Professionalism has also generated assorted centers, creeds, standards, and reports, many of which have been chronicled by the movement’s own consortium. For example, see The National Institute for Teaching Ethics and Professionalism (NIFTEP), http://law.gsu.edu/ccunningham/Professionalism/NIFTEP/ (last visited Apr. 19, 2006), which consist of The Louis Stein Center for Law & Ethics at Fordham University; The Mercer University School of Law Center for Legal Ethics and Professionalism; The Nelson Mullins Riley & Scarborough Center on Professionalism at the University of South Carolina; The Stanford Center on Ethics; and The W. Lee Burge Endowment for Law & Ethics at Georgia State University.

51. Deborah L. Rhode, in Professionalism, 52 S.C. L. REV. 458, 459 (2001), describes the problem:

A threshold question is whether we are all on the same page, or even in the same book, with respect to what we are trying to fix. I have long argued that a central part of the “professionalism problem” is a lack of consensus about what exactly the problem is, let alone how best to address it. “Professionalism” has become an all-purpose prescription for a broad range of complaints, including everything from tasteless courtroom apparel to felonies like document destruction.

attempts to give content to the concept, the definition says little more
than that professionalism is a positive expression of concern about what
it means to be a lawyer, over and above what is specifically spelled out
by the rules. Because of this non-legalistic focus, however, it is not
surprising that professionalism has sometimes been derided as being
about, “Well, let’s get away from those hard rules—those things you
could be sanctioned for—and really pay attention to the things that
matter to good lawyering, like personal relationships and amicability,
which reflect that we are good people.”

Despite its limitations, the movement to imbue the legal profession
with a sense of professionalism has been one of the legal profession’s
most enduring and celebrated initiatives. As impressive, though, is that it
is a relatively young effort, tracing its beginnings to the 1986 ABA
“Stanley Commission” Report’s attempt to define and inspire a
commitment to the concept of professionalism, . . . In the Spirit of Public Service:” A Blueprint for the Rekindling of Lawyer Professionalism. Since that beginning, the legal profession has
embraced the effort with an unequivocal passion, incurring few critics
and resulting in numerous initiatives, programs, symposiums, reports,
codes, oaths, and other affirmations. With only a few notable exceptions,
including the clarion voice of Monroe Freedman and a handful of other

53. The name of the report, itself, invokes an earlier use of the term, as it relies on Dean
Roscoe Pound’s definition: “The term refers to a group pursuing a learned art as a common calling
in the spirit of public service—no less a public service because it may incidentally be a means of
livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose.”
ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953).
54. In 1986, the American Bar Association Commission on Professionalism studied
professionalism and published a report entitled . . . In the Spirit of Public Service:” A Blueprint for the Rekindling of Lawyer Professionalism. That report cited:
Lawyers’ efforts to comply with the rules is [sic] sharply on the rise . . . Lawyers’
professionalism may well be in steep decline.

[Although] lawyers have tended to take the rules more seriously because of an increased
fear of disciplinary prosecution and malpractice suits. . . . , [they] have also tended to
look at nothing but the rules; if conduct meets the minimum standard, lawyers tend to
ignore exhortations to set the standards at a higher level.

The ABA’s observation reflects a crucial distinction: while a canon of ethics may cover
what is minimally required of lawyers, “professionalism” encompasses what is more
broadly expected of them—both by the public and by the best traditions of the legal
profession itself.

ABA COMM’N ON PROFESSIONALISM, ” . . . IN THE SPIRIT OF PUBLIC SERVICE:” A BLUEPRINT FOR
THE REKINDLING OF LAWYER PROFESSIONALISM 7 (1986).
(admitting everybody is in favor of civility in the abstract, but questioning at what cost).
skeptics in legal academia, the proposition that the legal profession should be committed to professionalism has gone largely unchallenged.

The basic premise of the unexamined professionalism movement (and as well as for populism\(^{56}\)) is easily, though not frequently, stated: To improve the ethical behavior of lawyers, lawyers must be taught better and must better learn what they are taught. To this axiom professionalism adds that the focus should be on the ethos of the profession, rather than its substantive rules. Professionalism is, thus, presented as a sympathetic yet distinct alternative to professional ethics. But in an important way, the claim of distinctiveness is overstated. The focus on the profession’s ethos, rather than its substantive rules, ignores the fact that professionalism and another supposedly distinct critique, populism, share a common aspect. Both efforts are dispositional, in that they share an underlying assumption that how lawyers act and why they act are connected. Both accept that when lawyers encounter circumstances in the world, they will be able to respond appropriately by referencing responses that have been developed over time as a result of teaching and learning.

Michael Ross and Garth J.O. Fletcher, have identified the task of understanding causal relationships in the social context as falling within the agenda of theories of attribution.\(^{57}\) They note, in particular, that correspondence theory “derives its name from the concept of correspondent inference,” the act of “[p]erceivers mak[ing] inferences when they infer another’s personal dispositions directly from behavior,” which they believe corresponds to such a disposition. “[F]or example, perceivers may infer a disposition of kindness from a kindly act. Thus, inferences are correspondent when the behavior and the disposition can be assigned similar labels (e.g., kind).”\(^{58}\)

For the lay observer, though, the efforts of Jones and Davis’s “perceiver” are equally understood as efforts to “get inside the heads” of the actors whom they observe. The observer perceives human action and attributes its cause to the existence of a corresponding psychological disposition on the part of the actor. Further, attribution theory holds that the strength of ascription will likely vary depending on the extent to

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56. See infra notes 68-78 and accompanying text.
57. Michael Ross & Garth J.O. Fletcher, Attribution and Social Perception, in 2 Gardner Lindzey & Elliot Aronson, Handbook of Social Psychology 73-122, 75 (1985) ("Jones and Davis (1965) described how an ‘alert perceiver’ might infer another’s intentions and personal dispositions (personality traits, attitudes, etc.) from his or her behavior.").
58. Id. at 75 (emphasis added).
which the observed act has stability,\textsuperscript{59} intentionality,\textsuperscript{60} is proximate,\textsuperscript{61} and is consistent with the covariation principle.\textsuperscript{62}

It is because of its focus on cognitive processes that I view professionalism as a soft movement. In essence, the problem is that when it comes to professionalism we do not understand the problem. The questions we are asking are simply the wrong ones. We are asking: “Does the lawyer understand the rule? Does the lawyer have the requisite \textit{mens rea}—intent—to justify being punished under the rule?”\textsuperscript{63}

Professor Lisa Lerman\textsuperscript{64} has offered an illuminating examination of the Michael Romansky case,\textsuperscript{65} involving a billing-partner at a major Washington D.C. law firm who was charged with intentionally over-billing clients. Faced with Romansky’s claim of innocence, the trial judge had to resolve such questions as: whether the standards governing billing practices were clear enough; whether Romansky was lying or simply mistaken with respect to the details of his billing records; and whether Romansky had read, or otherwise understood relevant explanations of appropriate and inappropriate billing practices. Each of these inquiries involves issues of importance. In the context of a criminal prosecution, they are critical to understanding Romansky’s culpability and, therefore, his fitness to practice law.\textsuperscript{66} Moreover, because criminal law standards are incorporated by reference into the ethical standards governing lawyers,\textsuperscript{67} they also represent a significant aspect of the

\textsuperscript{59} “People are inclined to attribute actions to stable or enduring causes, rather than to transitory or variable causes.” \textit{Id.} at 74; see also Fritz Heider, \textit{The Psychology of Interpersonal Relations} 79-124 (1958).

\textsuperscript{60} “Personal dispositions are more readily inferred from intentional actions than from unintentional actions.” Ross & Fletcher, \textit{supra} note 57, at 74; see also Heider, \textit{supra} note 59, at 100-01.

\textsuperscript{61} The use of \textit{proximate} here is my own, in deference to the already long-established legal doctrine of proximate cause. As Ross and Fletcher summarize Heider, however, the point made is that: “He further speculated that a hydraulic relation is perceived to exist between causes within the person and causes within the environment. The more the person is seen as causing an action, the less causal influence the environment will be perceived to exert and vice versa.” Ross & Fletcher, \textit{supra} note 57, at 75; see also Heider, \textit{supra} note 59, at 80, 257.

\textsuperscript{62} “This principle states that an effect is attributed to an event (cause) that is present when the effect is present, and absent when the effect is absent.” Ross & Fletcher, \textit{supra} note 57, at 75; see also Heider, \textit{supra} note 59, at 170-71.

\textsuperscript{63} See \textit{supra} notes 16, 40 and accompanying text (regarding knowing and scienter, respectively).

\textsuperscript{64} Lisa G. Lerman is Professor of Law and Director of the Law and Public Policy Program at The Catholic University of America, Columbus School of Law.

\textsuperscript{65} \textit{In re} Romansky, 825 A.2d 311 (D.C. 2003).

\textsuperscript{66} See \textit{supra} note 16 and accompanying text (concerning Monroe Freeman’s pioneering role in urging lawyer disciplinary efforts to appreciate the importance of \textit{knowing}).
lawyer regulatory system. But even as necessary questions for the imposition of sanctions under the present regulatory approach, they are an insufficient line of inquiry to raise the regulatory process to the next level.

As important as our present line of inquiry is, our questions are still not the ones that we ought to be asking. We do not ask what we can do as a profession to make a difference in the way in which those who interact with us as clients are treated. Nor do we ask what the legal profession might have done to reduce the chances that Romansky would violate the applicable standards. We do not fail to ask these questions because the profession lacks genuine interest in having more ethical lawyers, but because at the present stage we are still more interested in examining what is going on in the heads of lawyers—their psychological dispositions—than we are committed to dealing with the practical impacts of lawyers on clients, the courts, the public, the profession, and even themselves.

67. The ABA Model Rules of Professional Conduct provide:

It is professional misconduct for a lawyer to:

(b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects . . . .


68. The lawyer regulatory system is multilayered. Its centerpiece is the code of ethics adopted by each jurisdiction, in most instances based, at least in part, on recommendations proposed by the ABA. See generally, e.g., MODEL CODE OF PROF’L RESPONSIBILITY (1969); MODEL RULES OF PROF’L CONDUCT (1983); MODEL RULES OF PROF’L CONDUCT (2005). But the system also includes the guidance offered by court decisions of the various jurisdictions, including: the United States Supreme Court; ethics opinions issued for voluntary guidance by the respective bar associations of the jurisdictions; the informal interpretations of ethics law offered by legal experts, including lawyer associations such as the American Law Institute (publisher of the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS); rules issued by federal regulatory agencies, which affect lawyers (e.g., Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified as amended in scattered sections of 11, 15, 18, 28, and 29 U.S.C.)); and negligence law, as applied through malpractice. See, e.g., Simpson v. James, 903 F.2d 372 (5th Cir. 1990) (holding attorney liable where conflict of interest was proximate cause of client’s injury); Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn. 1980) (holding attorney liable for negligent rendering of advice regarding viability of possible claims of action by victim and surviving spouse); DeMaris v. Asti, 426 So. 2d 1153 (Fla. Ct. App. 1983) (finding attorney who drafted will had duty of care to both the testator and beneficiaries). Cf. MORGAN & ROTUNDA, supra note 48.
B. Populism

Shorn of the caveats and qualifications, the populist notion of legal reform asserts that the primary obstacle to reform of the legal profession—the obstacle to taking the profession to the next level—is the involvement of lawyers. The fact that lawyers are regulated by other lawyers is proof-positive that the wolf is guarding the flock, regardless of the sheep’s clothing provided by participation of the state courts, their bar disciplinary offices, state bar associations, and various national organizations. If progress is to be achieved, the populists suggest a ready alternative: lawyers should be regulated, commission-like, as is typical for real estate agents, veterinarians, and cosmetologists.

Removing lawyers from the regulatory process would, more specifically, entail excluding them from any leadership role in the promulgation of rules of professional conduct. The ABA, for example, would be denied its historic role as national convener of lawyer and

69. See infra note 70.

70. Populists vary greatly and can be found within and outside the legal profession. What they characteristically share is a belief that the legal profession is in trouble, a strong sense of what the profession can be (if it only would), and a long list of what the profession has not yet done, which serves as proof of what it is incapable of doing. Consider, for example, the following introduction to the legal profession:

Law can be a high calling, but there are risks and temptations that accompany professionalism. As noted, professions generally regulate themselves. But self-regulation can become self-protection. At times, talk of professionalism has been used to keep blacks, immigrants, women, Catholics, and Jews out of the legal profession. Arguably, lawyers have regulated prices, and prohibited advertising, solicitation, and unauthorized practice in order to limit competition. As you study the rules of our profession, consider whether some of the rules merely protect lawyer interests.


72. After acknowledging that in recent years “many state courts have begun to take seriously their legislative responsibility regarding the governing rules of attorney conduct,” one commentator has bluntly offered:

I suggest that they do more. Indeed, the very fact that the current major revision of the governing rules of attorney conduct is being performed once again by the ABA demonstrates the need for judges to consider their role in the process . . . . But the ABA is still running the show, and nothing will be recommended without the approval of the ABA House of Delegates. I think that the time has come for the judiciary to run the show, just as the Judicial Conference controls the process of federal court rulemaking, with the ABA and other groups playing an important role as consultants.

nonlawyer volunteers. It might continue to sponsor symposiums, forums, and hearings, but any special role, such as liaison relationships with the Conference of Chief Justices or the informal presumption given ABA work-products (e.g., the Model Rules process) would be eliminated. Rather than allow the nation’s courts to cooperate with the ABA (or presumably any other lawyer-led organization) the populist would primarily look to nonlawyers to provide regulatory insight and oversight.

Notwithstanding that the great variation among groups advocating legal populism makes it impossible to say precisely how they would reorganize lawyer regulation, the broad outlines are clear. At a minimum, the make-over would involve measures to assure that any organized voice for lawyers be subordinated to regulators who are neither lawyers nor brought to the process by (or on behalf of) lawyers. Thus, the actuality that lawyers are not self-regulated in any meaningful sense is lost on populists. They are unable to appreciate either the extent or significance of processes that typically culminate in the highest court in a jurisdiction exercising independent authority to promulgate rules and impose sanctions. Nor does it matter that the populist model envisions a significant transfer of a state’s judicial branch authority to its executive counterpart—not to mention the lack of equivalent benefit. And although it is possible that a particular populist scheme might reject the use of executive branch-based commissions, one is left to wonder why any oversight authority that ultimately reported to a jurisdiction’s high court would not look as suspect as any other wolf in sheep’s clothing.

Ultimately, though, the flaw involves more than questions of structure; the flaw is the populist notion itself. Like professionalism, the theory is simply another variation on the knowing-doing assumption. It is, again, the belief that the legal profession can be improved only if the ethical obligations of lawyers are better taught and better learned. Being

73. Id.
74. Id. at 158-59.
75. See supra note 68 and accompanying text (mentioning the role of the ALI).
77. The option exists for a supreme court to establish administrative oversight through a body that answers directly to it, rather than to an executive branch agency. A judicial branch agency, however, would do nothing to assuage populists’ concern that as a consequence of lawyers being overseen by judges, lawyers are, in effect, regulating themselves.
78. See supra notes 46-49 and accompanying text.
unconvinced, however, that lawyers are today performing any more ethically than in the past, populists conclude that only the subordination of lawyers to the popular will can bring about that transformation.

Thus, to the assumption that lawyers do not do, because they do not know what to do, populists add the element of distrust—a disbelief that lawyers are capable of reforming themselves. It follows, then, that if lawyers cannot do it themselves, the public—meaning anybody who is not a lawyer—will be better served if the profession’s critics have responsibility for writing and implementing the rules for the profession. Rather than self-interested lawyers seeking to exploit the regulatory system, the task would then be properly assigned to individuals who are driven by nothing more sinister than common sense, the public interest, and a desire to rescue the justice system from its elitist captors.

Admittedly this picture of populism’s view of the lawyer regulatory system is painted with a broad brush. Socio-politically it also gives only passing acknowledgement that nascent movements frequently have multiple and contradictory voices. The strident voices, however, may be no less important even though they are extreme. Indeed, charged rhetoric should be expected given the options: achieve the strength to caricature the opposition or fade into oblivion. Without the cartoon image of obsequious, indolent judges—manipulated like puppets by self-serving, powerful and greedy lawyers working through state bar associations and national forums—populism would lack the foil that provides its rationale.

The reality remains, however, that although it has for several years been part of the background noise associated with discussions of lawyer ethics and regulation, populism has made little headway as a reform movement. Of course, that failure might simply confirm the alleged stifling effects of the legal profession, but it is more likely that there are two other causes. First, the model of the lawyer regulatory system that populism describes is not simply over-simplified; it is historically inaccurate. Second, and more generally, the knowing-doing assumption79 on which populism and its professionalism cohort rest is, itself, fundamentally flawed. We turn, then, to consider a brief history of state supreme courts’ rulemaking to illustrate the openness of the process and the independence of the courts. Thereafter, and for the second point, we turn to consider the fundamental error that prevents us from creating space for lawyers to be ethical.

79. See supra notes 46-49 and accompanying text; see also infra Part IV.
III. PROFESSIONALIST AND POPULIST AT THE TABLE

In 1999 I served as chair of the ABA Center for Professional Responsibility’s Coordinating Counsel. That year the Center’s annual gathering, The National Conference on Professional Responsibility, was held in La Jolla, California. In attendance were more than a hundred lawyers from the National Organization of Bar Counsel (“NOBC”); a couple of dozen members of the Association of Professional Responsibility Lawyers (“APRL”); federal and state judges—including some from the highest courts of their jurisdictions; chairs and members of the various committees that make up the Center; and from throughout the nation numerous ethics counsels from law firms, large and small; academics (primarily legal ethics professors); critics of the legal profession; and numerous lawyers, paralegals, and journalists. All were drawn to what—even in its first twenty-one years—had by reputation become the nation’s premier gathering of legal ethics wonks.

What made this conference particularly memorable was that the morning session featured a discussion of the Birbrower case, which had only recently been decided by the Supreme Court of California. The case involved the New York-based Birbrower law firm, which had made several brief trips to California in the course of representing a California corporation in connection with a contract dispute under California law. The attorney’s activities included advising on tactics and strategy, interviewing potential arbitrators, attempting to negotiate a settlement, and when settlement talks failed, initiating pre-trial and arbitration proceedings. Of these activities, the court held that, except in limited circumstances that were inapplicable, California’s unauthorized practice of law statute prohibited anyone not admitted to the California State Bar from giving legal advice or preparing instruments in California. To that

80. The ABA Center for Professional Responsibility (the Center or CPR) operates through the Coordinating Council, which consists of the chairs of the ABA’s presidentially appointed committees and commissions focused on legal ethics, lawyer professionalism, and administration of the Center, including: the Standing Committee on Client Protection; Standing Committee on Ethics and Professional Responsibility; Standing Committee on Professional Discipline; Standing Committee on Professionalism; and CPR/Section Officers Committee Joint Committee on Professionalism and Ethics. In addition, liaisons are appointed to the Center from the ABA Board of Governors, the Conference of Chief Justices, the Association of Professional Responsibility Lawyers, the National Client Protection Organization, the National Organization of Bar Counsel, and the ABA Law Student Division.
81. Id.
83. Id. at 3.
84. Id. at 5.
unsurprising result, however, the California Supreme Court added the dictum that sent shockwaves through the legal profession and reverberated throughout the conference: Not only was an attorney who was unlicensed to practice in California barred from collecting a fee for services rendered, but no California lawyer could affiliate with an out-of-state lawyer for purposes of rendering such services.\textsuperscript{85}

Discussion of \textit{Birbrower} became the talk of the conference. Upon being drawn into one such animated exchange, the question was put to me directly: “As chair of the Center, what are you going to do about this?”\textsuperscript{86} Despite the reality that I, personally (or even as a member of the Center) had little capacity to do much, I nevertheless put aside my reservations. I recognized that the lawyer regulatory process is not about individual interest or concerns; it is about serving the larger public interest.\textsuperscript{87} My response, then, was not intended, as the populist would have it, to push an agenda—for it was clear at the time that this was a question for which there was, as yet, no answer and, thus, there could be no agenda.

I responded that, “Yes, this is an issue that we will need to find a way to take up, and the Center definitely has an interest in doing so.” I suggested that as a first step, we should pursue a national retreat on the subject to develop a white paper that could sort through the contending points of view, crystallize the issues, and provide a basis for requesting that the ABA establish a national blue ribbon commission to address \textit{Birbrower} and related problems of multi-jurisdictional practice.

From one of several brief, impromptu, corridor conversations among attendees at a national conference on professional responsibility emerged an idea that over the next few months grew into a national debate.\textsuperscript{88} That debate involved all of the nation’s state jurisdictions and potentially touched the practice and livelihoods of the entire legal profession.

\textsuperscript{85} Id. at 4 n.3.

\textsuperscript{86} Lack of perfect recall prevents me from identifying all of the individuals who were in that fateful discussion. My strong recollection, however, is that among the six to eight persons gathered were the following: Bruce A. Green, Louis Stein Professor of Law, Fordham University School of Law; Anthony E. Davis, Hinshaw & Culbertson LLP’s Legal Professional Responsibility & Ethics Practice Group; Stephen Gillers, Emily Kempin Professor of Law, New York University School of Law; and Lucian T. Pera, Armstrong Allen, PLLC, Memphis, Tennessee.

\textsuperscript{87} The choice to participate, then, is often as much about a desire to be at the table—to be a part of the search for a solution—as about anything personal. Satisfaction comes in knowing that the very fluidity of the process—involving, as it does, individuals brought together in common cause from across the profession and the nation—means that there is a chance that something of high importance will be accomplished.

\textsuperscript{88} It is a debate, then, that has already lasted for six years, continuing even as this Article winds through the process of publication.
profession (not to mention having implications for business and commerce, nationally and internationally).

The Stein Center for Law and Ethics at Fordham University School of Law, with the enthusiastic support of Dean John D. Feerick and Professors Bruce A. Green and Mary C. Daly, agreed to host the retreat under the sponsorship of the ABA Center for Professional Responsibility. James E. Towery, Chair of the ABA Standing Committee on Client Protection, served as chair for the retreat and coordinated the several national telephone conference calls that preceded it. The Symposium on the Multijurisdictional Practice of Law was held, March 10-11, 2000, at Fordham University in New York City. The invitation-only symposium was co-sponsored by the American Corporate Counsel Association, the Attorneys’ Liability Assurance Society and the ABA Sections of Business Law and Litigation. Symposium participants included supreme court judges, bar presidents, bar counsel, bar admissions experts, legal educators, corporate counsel, professional liability lawyers, litigators, arbitrators/mediators, and regulatory counsel. The participants worked in discussion groups and examined broad areas of legal representation in which multijurisdictional practice is increasingly common. The groups discussed public policy and lawyer regulatory concerns affecting multijurisdictional practice, as well as possible alternative regulatory frameworks.

Following publication and circulation for comment of the conference’s white paper, as chair of the Coordinating Council, I transmitted the report to the ABA President and Board of Governors with a request that a national blue ribbon panel be convened (1) to consider the issues raised by the symposium participants, and (2) to present policy recommendations on the multijurisdictional practice of law for possible consideration by the House of Delegates. As a result, ABA President Martha Barnett appointed the Multijurisdictional Practice Commission in July 2000 and charged it with studying the Symposium white paper, analyzing current practice activities in relation to multijurisdictional practice, and making such policy recommendations as might be appropriate given the need nationally and internationally.

89. Norris Professor of Law, Fordham University School of Law; Dean, 1982–2002.
90. Bruce A. Green is Louis Stein Professor of Law, Fordham University School of Law.
91. Mary C. Daly is now Dean of the St. John’s University School of Law.
92. Professor Green’s white paper, Assisting Clients with Multi-State and Interstate Legal Problems: The Need to Bring the Professional Regulation of Lawyers into the 21st Century (ABA Center for Prof’l Responsibility, June 2000), available at http://www.abanet.org/cpr/mjp-bruce_green_report.html, became informally known as “Green’s white paper.”
93. Formally, the Multijurisdictional Practice Commission was charged with responsibility to:
After a year of hearings and deliberations around the country, the Multijurisdictional Practice Commission, chaired by Wayne J. Positan, filed a report and recommendations to the ABA House of Delegates. The Commission urged that the courts of the United States adopt major changes in the way they handled the multijurisdictional practice of law.

After debate by the ABA House of Delegates in August 2002, the ABA adopted as policy the view that a major overhaul of state court rules governing multijurisdictional practice was warranted. Thereafter, the Joint Committee on Lawyer Regulation, chaired by Professor Stephen Gillers, was charged with implementation of the Commission’s recommendations urging consideration and adoption of similar amendments to the lawyer rules of professional conduct. As a result, various jurisdictions convened their own blue-ribbon commissions to undertake independent reviews of their rules governing multijurisdictional practice. In each jurisdiction, scrutiny similar to that given by the ABA (often including the naming of a state blue ribbon commission) was undertaken. Today, the supreme courts of roughly half of all jurisdictions have adopted rules similar to or the same as the newly amended Model Rule 5.5 regarding multijurisdictional practice.

This account of how the multijurisdictional practice reforms evolved demands our focus because it belies the conspiratorial theory on which the populist critique rests. It reveals, instead, that the process is too broad, contentious, participatory, idiosyncratic, and democratic to bear any resemblance to the caricature of populist rhetoric. Without, here, even considering the related issues of financial cost, the need to achieve national legitimacy and standing for proposed solutions, or the

[[1] Research, study and report on the application of current ethics and bar admission rules to the multijurisdictional practice of law[;] . . . [(2)] analyze the impact of those rules on the practices of in-house counsel, transactional lawyers, litigators and arbitrators and on lawyers and law firms maintaining offices and practicing in multiple state and federal jurisdictions[;] . . . [(3)] make policy recommendations to govern the multijurisdictional practice of law that serve the public interest and take any other action as may be necessary to carry out its jurisdictional mandate[; and (4)] review international issues related to multijurisdictional practice in the United States.


94. Chair of the ABA Commission on Multijurisdictional Practice from 2000-2002.

95. The Model Rules of Professional Conduct were also amended (Rules 5.5 and 8.5) in August 2002, based on House debate of Reports and Recommendations made by the Multijurisdictional Practice Commission.

96. See supra note 86.

sheer effort required for the coordination of volunteers on a national basis, the process described makes the case that however well intended its proponents may be, those who would equate the regulation of the legal profession to common licensing efforts lack understanding. They have not grasped the complexity of the lawyer regulatory system, the resources that must be devoted to the process, or the imagination necessary to the accomplishment of such regulation, or all three.

It may well be that, at least in this instance, the professionalist\(^98\) and populist complaints are those that are so often warned against: when the perfect becomes the enemy of the good. In their wildest imaginings, the professionalist cannot hope to find a better situation when disparate interests of the legal profession were able to rise to the ideal in order to find consensus on a matter that entwined so many issues: the public interest, jurisprudence, equity, money, power, politics, class, comity, commerce, and international relations, to name just a few. Nor can populist rhetoric sound anything but hollow in the face of an effort that bore all of the hallmarks of participatory democracy in an advanced bureaucratic nation.

Perhaps, then, there is another reason why the professionalist-populist critique falls short. I argue below that the problem arises from the shared inability of professionalism and populism correctly to diagnose the true cause of their unhappiness with the profession. From the left, as it were, the professionalists see too little of the cooperative, communal profession for which they hunger. On the right, the populists are equally convinced that the problem lies with clubby insiders who have captured the profession and now either prevent lawyers from understanding their obligation to serve the public interest or who seek at every opportunity to undermine them in their efforts. Interestingly, though, from neither perspective—professionalist or populist (left or right)—is there recognition that they are actually united in a common misunderstanding and that it is their views of the legal profession based on that misunderstanding that actually burden the effort to improve. We turn next, therefore, to a description of that common ground and consideration of how, figuratively speaking, it represents the space where lawyers can be more ethical.

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\(^98\) The word “professionalist” is used here intentionally, to refer to the lawyers who advocate professionalism. Although I could find no precedent for the term, I also could find no substitute for it.
IV. THE COMMON MISTAKE: ‘THE RELATIONSHIP BETWEEN KNOWING AND DOING’

Response to the critiques presented by professionalism and populism begins with the quandary that each perspective has long-wrestled with, but to little effect. Each sees a profession that has expended considerable time, energy, and resources on ethics with only mixed results. Simply to describe the situation is to beg the question: How can it be that the profession, which by comparison to almost any other spends so much time and effort in introspective analysis of its ethics, is able to show so few gains? But the need continually to ask the question may also signal something else. It may tell us that we are asking the wrong question because we are focused on the wrong solution.

A fresh perspective is required—one that first recognizes that despite having failed to eliminate instances of wrong-doing by lawyers nationwide, it cannot be argued that there has been no improvement in lawyer ethics or that further optimism is unwarranted. By virtually any measure, the legal profession is today better regulated—and, to that extent, rendering better service—than ever has been the case. The nostalgic call for the good old days notwithstanding, today is when more

99. See generally Burne V. Powell, The Limits of Integrity or Why Cabinets Have Locks, 72 FORDHAM L. REV. 311 (2003). Indeed, I raised it previously during the Howard Lichtenstein Legal Ethics Lecture, The Limits of Morality: Why the Cabinets Need Locks, Hofstra School of Law (Nov. 13, 2002), as a concern about the way in which, as a profession, we regulate ourselves.

100. This excludes, perhaps, the clergy, but there is even room for doubt there. See generally Posting of N.C. to http://mediamatters.org/items/200508220006 (Aug. 22, 2005, 16:40 EST) (discussing how “Pat Robertson, host of Christian Broadcasting Network’s The 700 Club and founder of the Christian Coalition of America, called for the assassination of Venezuelan President Hugo Chavez”); Thomas Richstatter, Forgiveness in Our Church Today: Key to Healing, CATHOLIC UPDATE (St. Anthony Messenger Press & Franciscan Commc’ns, Cincinnati, OH), Apr. 2003, available at http://www.americancatholic.org/Newsletters/CU/ac0403.asp; see also Weblog: Guilty of Killing Abortion Doctor, Christianity Today, http://www.christianitytoday.com/ct/2003/111/31.0.html (last visited Apr. 21, 2006) (featuring a compilation of online articles that report religious news worldwide). This weblog included numerous examples that make this point:

Ignoring repeated threats from Hindu fundamentalists, . . . group . . . is going ahead with a film on the life of Australian missionary . . . killed by Hindu extremists . . .

. . .

Extremism [is] rising in Pakistan, [with] unprecedented violence . . .

. . .

Police arrest Church of God clergyman [in East Africa] over demolished church structures. . . .

. . .

Church votes to fire pastor who had service during Super Bowl . . .

Id.
lawyers are engaged in more activities for the social and economic good than at any time in our nation’s history.

Despite a tendency to worry and self-flagellate, it cannot be missed that even while helping to move the nation forward, the legal profession, itself, has made dramatic strides. It is today a better profession by almost any measure, and that is particularly so when measured against the legal profession’s traditional aspirational, regulatory, and managerial ambitions. Measured objectively, the legal profession can do more than take solace; it is entitled to take genuine pride in its strength over an extended period and for a continuing commitment to even further achievement.

But if that is the case, why talk of the need to create space to be ethical and professional? The answer, of course, is that the legal profession can still do better and for that matter, a lot better. We now have the benefit of what has been learned from other disciplines and an appreciation for another, ostensibly very different, regulatory process. In that context, the issues also involve expectations of rule compliance, oversight, and possibly severe consequences in the event of an infraction—not to mention fundamental concerns about how rules might most effectively be articulated.

My reference is to a regulatory effort described by Sara Lyle in a New York Times article about the work of Hans Monderman, a traffic engineer working in the Netherlands. The gist of the article was that, when asked to engineer a design for an accident-plagued intersection, instead of doing what everybody thought he was assigned to do, he did the opposite. He got rid of the signs and things that normally come to mind when thinking of a high-volume, multi-use, urban, intersection. He stripped the intersection of the stop lights, stop signs, and regulatory signs that variously instruct drivers on their every move. He did away with the traffic signs, the directions, the warnings, the threats to drivers, passengers, and pedestrians that we (not to mention, the de facto community of social and regulatory planners) have come to rely on.

Monderman’s approach was, in short, to take a counterintuitive approach: that it shouldn’t matter that drivers and pedestrians did not have the rules of the road posted for them. They did not need speed signs or signs indicating left turn and right turn or pedestrian walks or

101. I take this position knowing that it is a proposition that runs counter to the assertions of, perhaps, the majority of our symposium speakers. Many are convinced that the profession is going to hell in a hand basket; we are not regulating anybody; and the notion of lawyer regulation is all part of a big conspiracy.

anything like that. To the question how can people be taught to drive carefully, and to act more safely, his response was tantamount to declaring, “Don’t tell them anything at all!” Not only was his intersection virtually naked, stripped of all lights, signs and road markings, but there was no division between the road and the sidewalk. It was basically a brick square.

Yet, at this intersection the beauty of Monderman’s application of a concept of shared space—there’s that space reference again—immediately makes clear that both physically and philosophically his view of regulation rests on a premise that is different from the usual. By contrast with the usual intersection—and here you might think about your own familiar intersection—this one reflects a different logic. Unlike the usual case, this one does not share the expectation that by teaching (or at least reminding people of what they have been taught), we can increase the probability that actors will do what they are supposed to do.

At Monderman’s Crossing, as I will call it, the directions, warnings and threats are disdained in favor of another vision. Reliance is not placed on a presumed knowledge of the rules or a smothering effort to direct users with regulatory cues. For Monderman, the concepts of drivers knowing what to do and doing what they are expected to do are viewed as separate. Knowing rules may be helpful, but such knowledge has little to do with compliance. Instead, compliance has most to do with the concrete environments in which drivers operate—not the abstract rules that are supposed to govern driving. The underlying assumption, therefore, is as clear as Monderman’s instruction: Don’t look at the rules; look at the road and the other drivers.

103. As applied to the law-practice environment, the issues also involve questions of how an actor takes behavioral cues from the place and people that surround her. Thus, decisions can be made based on the context of a particular environment or in expectation of it (for example, when a lawyer intentionally creates an environment in anticipation of future circumstances). The relevant questions will often overlap. Always applicable will be five fundamental questions: How visible is the conduct? (Transparency); Are others expected to repeat the actor’s conduct? (Redundancy); Are the actors going to be held personally accountable for any resulting problem? (Accountability); Who else knows of the actions being proposed? (Notice); Taking account of all the actors and possible consequences, does the proposed decision seem to be correct—Does it feel right? (Synchronicity). In addition, the circumstances might suggest other questions: Who are the actors? Where physically are they acting? What constraints or inducements arise from the circumstances of their actions?

104. This approach has historical resonance. In the 1950s, Burma Shave is attributed the following ditty:

The story of Johnathan Day

Here lies the body of Jonathan [sic] Day,
Who died disputing the right of way,
For those interested in lawyer regulation, Monderman’s advice is worth heeding. It drives home—forgive the pun—an important point: As a profession, lawyers are experiencing regulation as a divergence of theory and reality. Rather than a focus on how the legal profession might shape ethical rules to bring about specific lawyer behavior, our discussions, classrooms, and conferences are too heavily focused on the theory, policies, and language of legal ethics. The legal profession has mistaken the necessary work of law-giving—commandments, codes, rules, opinions, summaries, and reviews—to be the whole of lawyer regulation when it is, in fact, only the critical part. The legal profession has missed that the aim of regulation, in ethics or otherwise, is to bring about specific conduct. When Holmes said, “The life of the law has not been logic; it has been experience,” he was not urging that logic be rejected or treated as irrelevant. It was an understanding of the law’s connection between expectation and result that he was urging.

Thus, if the legal profession aims also to seek tangible results, rather than simply try to assure that a lawyer knows, for instance, the difference between a concurrent and serial conflict of interest, it will have to adjust its focus. More emphasis will have to be given to pragmatic questions: What is it that the legal profession knows about how lawyers operate? How are rules expressed in the practice-world context? Can we, to use a pseudo-engineering term, make our rules dummy-proof? How can the legal profession assure that lawyers understand its rules? Can the profession create situations in which lawyers are actually called upon to practice practicing law?

In other words, the legal profession must truly come to understand the teaching of Monderman’s Crossing: that it is not necessary to focus on the psychological disposition of lawyers in order to bring about the functional behavior the profession desires. To get them to do the right thing, the profession need not relegate its efforts to determining what is going on inside the heads of the lawyers it seeks to regulate.

He was right, dead right, as he marched along,
But he’s just as dead as if he’d been wrong.


106. See LOUIS MENAND, THE METAPHYSICAL CLUB 340-47 (2001) (“[H]e applied to his own special field the great nineteenth-century discovery that the indeterminacy of individual behavior can be regularized by considering people statistically at the level of the mass.”).
V. A NEW PARADIGM: RULES AS A FUNCTION OF A TRANSPARENT ENVIRONMENT

No, there is another approach to regulation. It is an approach that invites the legal profession to adopt a strategy that is informed by market and social psychology. Consider, for example, research describing how a group of individuals reacted when asked to rate the quizmaster of a supposed game show. The quiz was set up in the fashion of the old television quiz show, The $64,000 Question. The host asked the questions and then, upon the conclusion of the show, the contestants were asked what they thought about the quizmaster. Uniformly, the contestants said that the questioner was someone who was smart, witty, and informed—indeed, smarter, wittier, and more informed than they, the contestants being surveyed.

What is interesting about the response phenomenon is that usually respondents do not rank others higher than themselves. In the context of the study, however, they ranked others considerably higher. And they did so even when made to understand that, rather than the person who asked the question, each question was written by somebody else.

The question for the researchers was why: Why did the contestants aggrandize their quizmaster? The answer is that in this circumstance, too, the situation influenced the actors. Contestants tended to attribute to the quizmaster, the attributes of being witty, intelligent, et cetera, because that was the role the quizmaster was playing. It was as if they were saying, “If we are seeing conduct, then it must be a reflection of the quizmaster’s disposition”—what’s inside the quizmaster’s head.

In fact, the phenomenon has come to be known as the faulty disposition error (or more formally, the fundamental attribution error). It is the designation for the observation that, for most people, internal disposition matters more as a description of other’s behavior than the circumstances in which the observed behavior occurs. It is a phenomenon that has been observed in a variety of contexts, but most

107. The $64,000 Question television show dominated its broadcast era, 1955-58. Wikipedia, The Free Encyclopedia, explained the phenomenon:

On . . . The $64,[000] Question, contestants were asked questions devised by the series’ writer-researcher . . . . She attempted to make each question slightly more difficult than the preceding one. After answering a question correctly, the contestant had the choice to “take” the prize for that question or “leave it” in favor of a chance at the next question.

The first question was worth one dollar, and the value doubled for each successive question, up to the . . . final question, worth 64[000] United States dollars.

108. Id.
famously in a study by Darley and Batson. There, observers wrongly predicted that exposure to moral teachings and circumstances reinforcing the teachings of the Good Samaritan Parable would be determinative of whether seminary students would give assistance to a person they observed huddled in distress at the side of the road. In actuality, the significant factor determining whether a seminarian stopped to lend assistance was not whether the student had been prepped to give a talk on the theme of the Good Samaritan Parable, so that they had the appropriate lesson in mind. Nor did it matter whether they had previously given an altruistic reason for having chosen to study theology. The determinative factor, it turned out, was whether the seminarian was running late for their appointment at the time they encountered the apparent victim. Seminarians who had plenty of time before their next appointment stopped. Whether or not they had focused on the parable before starting out was not controlling; it was not what was in their heads but their situation.

Similarly, when observers were asked to gage the relative athletic prowess of two basketball teams, they had little difficulty identifying the superior team. It was the one they observed practicing in a well-lit gymnasium—not the one observed in a dimly-lit facility. The difficulty with their selection, however, was that the two teams had been pre-selected to assure that the skills of the players were comparable. But just as in the Good Samaritan study, the faulty dispositional error applied. The observers credited the disposition of the players—their will and capacity to play well—over the more likely impact of the dimly-lit and poorly equipped facility.

The Faulty Attribution Error reminds us, then, that the tendency to attribute human conduct to dispositional, as opposed to situational, factors appears deeply engrained in each of us. We do not escape its consequences, either as well-schooled seminarians or as those called upon to predict the supposedly educated behavior of such seminarians. Nor can we insulate ourselves from dispositional errors by relying on our powers of observation. The observers of the basketball players knew what they had observed, but they were unable to discount the physical

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111. Gladwell, supra note 109, at 165.
112. Id. at 160.
113. Or as Gladwell summarized the story: “[W]hat this study is suggesting . . . is that the conviction of your heart and the actual contents of your thoughts are less important, in the end, in guiding your actions than the immediate context of your behavior.” Id.
environment. Their need was to make sensible determinations—to have those they saw appear to be acting and thinking congruently. And problematically, as was demonstrated by the quiz show contestants, the need for such congruity is so strong that even when it was known that the actions were not the actor’s own, contestants still saw what they apparently wanted to see.

But fortunately there is another side to the Faulty Attribution Error. Because we are aware of the desire to make action and motivation congruent, we can change course. As with Monderman’s Crossing, awareness that in some instances it might be safer not to rely on assumptions of psychological disposition allows us to anticipate an alternative solution. Monderman’s decision to force drivers to focus on the circumstances of their environment, rather than to assume rule congruity, represented a radical departure from the approach usually taken by traffic engineers. It broke new ground and literally created a different kind of space for all who used it.

The meaning of Monderman’s Crossing, however, goes beyond the engineering of a traffic intersection. The broader meaning is that in many instances the environments in which actors operate have the capacity to influence behavior. Whether it is the courtyard’s simulation of the Road to Damascus, the quiz show’s staging, or differently lit gymnasiums, our actions are a product of our psychological interaction with the environment, not simply a product of what we know. When it comes to the regulation of lawyer ethics, then, the legal profession must resist the temptation to psychoanalyze lawyers. Worrying about whether lawyers are bad people who simply do not want to follow the rules, may result in more and harsher rules but it is doubtful whether an emphasis on new rules will result in more lawyers acting in a way that benefits clients, the courts, and the legal profession.

VI. CONCLUSION: TOWARDS A NEW AGENDA

The point is that the motivation for a lawyer’s conduct should not matter. Regulators, lawyers, legal ethicists, students, and anyone else thinking about the regulation of lawyers, should understand that Monderman’s Crossing teaches that lawyers, too, can be organized to operate in a transparent environment—one that is full of cues that encourage them to act appropriately.\footnote{115} The challenge, then, is to find

\footnote{114} We can choose, for instance, not to rely as drivers tend to do, on the assumption that because the traffic is moving orderly the drivers are reading and obeying the regulatory cues.

\footnote{115} I describe as cues, those factors that provide actors a sense of being in a reciprocally

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ways to invest more aggressively and creatively in the environmental
dynamics of ethics—what I will henceforth call transparent aspects. 116
By this approach, what I am calling for is an increased attention to the
arenas in which lawyers practice, so that we can ask the appropriate
questions: Are the operations of the lawyer such that other lawyers can
witness their conduct? Could another person easily follow their actions?
When actions, such as withdrawing money from a client’s trust account,
are taken, is the process one that takes place in a visible space? Do
multiple persons have to sign-off when there is a transfer or taking
possession of an asset? How many other people will have an opportunity
to see the lawyer engage in the particulars of practice (e.g., client
meetings, time-keeping, and the accepting of new clients)? Do we know
who the actors are at any time, and where the responsibility will
ultimately fall for their actions? Is there notice to others at the time that
significant actions are taken?

Without focusing on what lawyers are thinking, therefore, we can
build a lawyer regulatory system in which the expectation of compliance
is built into the practice environment. We can achieve greater
compliance and still commit to avoiding the present emphasis on the
psychological state of lawyers and the profession. Transparent ethics
offers both the middle ground between the irreconcilable critiques of
professionalism and populism, and a practice environment that can take
the profession to the next plateau in lawyer ethical compliance.
Accordingly, I suggest that the next era in legal ethics must move the
legal profession toward an ethics of transparency—an ethics of rules and
practice that make it increasingly difficult for lawyers to act out of the
sight of their colleagues, opposing counsel, the courts, and in some
instances, the public. Here are three highly preliminary proposals,
designed to assure that the new era is focused on a new agenda:

116. Here I have adopted the designation “transparent ethics.” On other occasions, I have used
the term “transvalued ethics.” Powell, supra note 99, at 311, 317 n.26. On still other occasions,
including in the oral remarks on which this Article is based, I have used the phrase “transactional
ethics.” Obviously, the terminology is evolving. The helpful suggestion of Associate Professor
Carol Needham has persuaded me that the term “transactional ethics” carries connotations that may
run contrary to my intentions. Having already moved away from “trans-valued,” feeling that it was
simply too open-ended, I have become comfortable with “transparent ethics.” The phrase not only
covers the sense of openness and visibility that is called for, but like the other phrases, provides an
anagram (“TRANS”) for the phrase’s important elements: (Transparency, Redundancy,
Accountability, Notice and Synchronicity).
1. Concerns have long been raised that prosecutorial misconduct at trial goes unsanctioned. In a move toward increased transparency, we should consider whether the time is right to create defense and prosecution panels to receive complaints about lawyer misconduct. As a matter of course, we might require that at the close of a trial, both the prosecution and defense file memorandums with the court describing any misconduct about which they became aware in the course of the trial.

2. As another possibility, we might require that all lawyers be part of practice groups (that is to say, groups of anywhere from a half dozen to a dozen attorneys). The *quid pro quo* for being part of a practice group would be that lawyers could raise the fact that ethical issues had, first, been referred to a group as a mitigating factor in connection with any subsequent charge of ethical misconduct or malpractice.117

3. But perhaps we should go even further. It is time for the legal profession to consider whether we ought to re-conceptualize the entire lawyer regulatory process. Instead of the disciplinary counsel being charged with investigatory responsibility as the primary role to assure conformity with the rules, we should consider self-reporting as a much more significant aspect of the process. Any lawyer, for example, who believes that he or she has transgressed might undertake a self-investigation and submit a report and recommendation for sanctions to disciplinary counsel. Disciplinary counsel could then undertake any further investigation required and on that basis make an independent sanction recommendation to the jurisdiction’s highest court.118

So, can we create a more ethical profession by beginning to pay more attention to the environment in which lawyers practice? Yes, we can, but it will first require that we refocus our efforts. We must get out of lawyers’ heads and get into their offices and their practice venues. We must get past the fundamental attribution error and begin to focus on real fundamentals: what lawyers do—not what we and they already know they ought to do.

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117. Note that the ABA’s STANDARDS FOR IMPOSING LAWYER SANCTIONS, section 9.32(b) (1991), already provides for the consideration of the “absence of a dishonest or selfish motive” as a mitigating factor when imposing disciplinary sanctions.

118. Note that the ABA’s STANDARDS FOR IMPOSING LAWYER SANCTIONS, section 9.32(e), already provides for the consideration of a “full and free disclosure to disciplinary board or cooperative attitude toward proceedings” as a mitigating factor when imposing disciplinary sanctions.
QUESTION AND ANSWER

PROFESSOR SIMON: Thank you very much. You did surprise me. I would like to hear more about the practice group notion. Here is what concerns me. If you take any random representative group of lawyers who are practicing today, take a half a dozen of them, the odds are that most of them have not read the Code of Professional Responsibility or the Rules of Professional Conduct in quite a long time, and depending on their relationship with the person making the inquiry, there may be a very strong incentive to go easy on the person who’s making the inquiry to be a more approving body. That’s not an ethical violation, knowing that they have thereby granted immunity, and then when the people on the ethics panel have a question, hopefully, the ethics panel will go easy on them—be collusive and they’ll go easy on each other. So I’m sure that is not what you have in mind, and I want to just hear you elaborate more about how your structure would prevent that kind of collusion and self-protection rather than self-enforcement.

PROFESSOR POWELL: Well, there are a couple of things. I haven’t worked through in this model how we would organize the practice group—whether it would be assigned, whether it would be voluntary—but I’m leaning towards assigning such a group, or putting some rules in place that say that the folks in your group can’t be in your law firm.

With respect to the concern that most lawyers are not reading the rules of ethics, I say what better incentive would exist than to begin making the rules of ethics a part of a culture, as opposed to simply something that’s on the desk or in the library—that it actually becomes a working part of the way in which we practice law.

In terms of possible collusion with bar disciplinary council, I don’t think that there’s any great chance of that. Our present system essentially works as an effort in which determinations are made by some fact-finding body. A recommendation is made and is relied on and the sanction is ultimately something that is either approved or disapproved by the court. So at least here you would have a record of how this situation unfolded, and who was consulted in connection with it, and what kind of advice was given, et cetera. And all that simply becomes part of the record when the court decides what it wants to do.

And I remind people: We do not have a self-regulated profession. We have a largely self-regulated profession in the sense that most people who are involved in a regulatory system are lawyers. But it is a judicially regulated system in virtually every jurisdiction, and that means that it’s
the court that is ultimately reviewing and deciding whether a sanction is appropriate—whether the record on which the sanction is based is an appropriate record.

Let me take this as one additional opportunity to say something (or to speak to a point) that I restrained myself on yesterday. Someone made the comment—and I have heard it so many times that I really do wish that I had at least a dollar for every time I’ve heard that (I’m a dean and fund raising is an important function). But the comment was that the regulatory system is focused on small practice and solo practitioners and that the big firms—they escape it, and it’s all part of a collusive environment.

Well, if you think about what I have been saying about regulating the structure in which people practice, you may come to the—well, not strong conclusion—but to the hypothesis that I happen to assert. (And I say hypothesis because, quite frankly, I’m simply sick and tired of the fact that no one has really researched this in a significant way.) But the hypothesis that I have, is that lawyers who are working in environments where there is transparency and redundancy and accountability are likely to be lawyers who are not engaging in misconduct. And that’s the whole premise for what I’m arguing here.

And if you think about that in terms of the structure of the practice, who is more likely to be in that environment (where they’re being watched by a lot of different people a lot of the time, and there’s a lot of bureaucracy that they have to go through in order to do something)? Is it the small and solo practitioner who is operating in the office with a secretary or is it the person who’s operating in the context of a big firm and people are watching them coming and going? I think that my hypothesis would be that the more structured the environment, the less likelihood there is that there are going to be violations. That’s not to say that there aren’t coverups in big firms. I know that that goes on, but I think that there is at least another plausible big reason as to why you see disparity.

MS. STRETCH: Thank you, Burnele. I like the idea of more transparency, although I’m not sure I understood how that related to the Monderman’s Crossing, because I saw Monderman’s Crossing having no rules, so to speak, and you were required to proceed based on your judgment at the time, but either way maybe you can explain that a little, if it’s necessary. But I like more transparency and other countries sort of build in more transparency than we do.

One of the things I’ve sometimes wondered about, and I’d like your response to it: Maybe lawyers should be required to have an annual
review of their financials, which I think many other countries require. And even if just having an accountant—you have to pay for the accountant to check your trust account or what have you—I think that would be kind of an example maybe of what you’re talking about.

PROFESSOR POWELL: Yes, I agree that that would be a healthy thing.

Several years ago, at a forum such as this, I urged that law firms ought to be subject to sabbatical reviews—that we ought to change our regulatory process so that on a seven-year basis every law firm—and we can quibble about what is a law firm, but certainly every environment where clients are being represented as private individuals—should undergo a review and that should include a self study and an audit, such as we do with law schools. And as part of that, certainly, a review of books and things would be an appropriate thing. But, yes, I do believe that there should be those annual [financial] audits.

I would also suggest to you an additional point: I think that lawyers—we as a legal profession—should adopt the position that is taken in many of the Commonwealth countries. That is, we [ought to] guarantee that no client will ever lose a dollar to a lawyer. As a lawyer it is your responsibility to basically act as insurers against the loss of even a single cent by a client. At the end of the year, if we find out that a million dollars has been lost, we should divide that by the number of lawyers in the jurisdiction and pay our *pro rata* share. We ought to take on that as a commitment, as a profession.

MS. STRETCH: Lost by theft?

PROFESSOR POWELL: Yes, lost by theft. Thank you.

With respect to Monderman’s Crossing though, the thing that I would point out is that one of the reasons why it works is that there is so much transparency. You get to see everybody and what they are doing, and you then adjust your conduct in relation to it and that’s the key.

PROFESSOR FREEDMAN: Monroe Freedman. Burnele, one reason I’m so deeply fond of you is that you have such a wonderful heart, but one reason I frequently disagree with you is . . .

PROFESSOR POWELL: I knew it was coming.

PROFESSOR FREEDMAN: . . . the assumption . . . [that] the entire world is like that, and it’s not. I, in the past (in a considerable number of years), I’ve been involved in cases involving allegations of lawyer malpractice, conflict of interest, and so on. These typically involve the biggest, the most prominent law firms in the country . . . in the world. What they are to this very day (to a great extent) engaged in is
the most egregious, the most blatant, the most obvious kind of conflicts of interest. Anecdotal, it’s true.

I have a case right now—I hope it doesn’t last long; I’m trying to get out of this thing!—involving a firm that everyone in the room would recognize the name of and an awful lot of people throughout the world would recognize the name of. This firm took on a conflict of interest. Trust me: no issue. They then proceeded to sell out one client for the benefit of the other. Two years after one of the clients had made a complaint to the disciplinary committee which the firm had answered at great—too great expense—the partner who had been most involved—we’re talking about transparency; we’re talking about environment—in the conflict and selling out one client for the benefit of the other was deposed.

You would think that by that time, two years later, he would know what a conflict of interest is. His testimony demonstrates without any doubt whatsoever, the man does not have the foggiest notion of what a conflict of interest is. It just doesn’t work that simply.

Another anecdote, if I may, briefly. I had lunch with a graduate of this law school who is the managing partner of one of the major firms in the world, and with a new associate, a graduate of this law school at the same firm. And the associate said during the course of lunch, “I must say that one of the things that has impressed me with this law firm is how sensitive they are to ethical issues.” And the partner smiled, and said, “let me tell you something. We got burned very badly in a disqualification case a year ago, and we have been very careful ever since.”

It’s malpractice. It’s disqualification. Those are the sanctions and those are the things that work.

PROFESSOR POWELL: Well, I’m certainly not going to argue that sanctions don’t work. I think sanctions work too. The problem is, they don’t work well enough. And, you know, the fact of the matter is, I happen to agree with those who maintain that our regulatory system—even after I have said that I think we’re doing a much better job than we have ever done as a profession—is substantially underfunded in many, many jurisdictions. But even if it was well-funded, I have a doubt as to whether the approach that we are taking would clear out all of the wrongdoing. That’s just going to be part of it, and indeed, my contention is that because it is going to be a part of it, we have a choice. We can either stay on the present track, and say, because we know we’re going to have wrongdoing we’ve got to work harder to make sure that lawyers know what the conflict of interest rules are and that every single lawyer
knows that. Or you can take a different track, and say: Wait a minute! In a choice between protecting clients by teaching every lawyer what the conflict of interest rules are, or structuring the environment so that even if the lawyer doesn’t know, it’s going to be hard for the lawyer to engage in a conflict of interest, which do you choose?

Now, having said that, I’m not prepared to say now anything more than that I think this should be the agenda for the next ten or fifteen years—figuring out how you structure that kind of environment. I think that’s what our legal ethics courses should begin emphasizing and exploring. Every time we see a case, every time we hear a story, we ought to be simultaneously asking the question, is there anything that we could have done in terms of the structure of the practice that would have made that more difficult? Is there anything that we could have done that would have increased transparency, redundancy, accountability, notice? [Applause].