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Enactments of Professionalism: A Study of Judges' and Lawyers' Accounts of Ethics Civility in Litigation

Cover Page Footnote
William Nelson Cromwell Professor of Jurisprudence & Political Science, Amherst College. I am grateful to my colleagues in the project, Ethics: Beyond the Rules, for their stimulating intellectual companionship and to Douglas Frenkel for his helpful comments on an earlier draft of this paper.
ENACTMENTS OF PROFESSIONALISM: A STUDY OF JUDGES’ AND LAWYERS’ ACCOUNTS OF ETHICS AND CIVILITY IN LITIGATION*

Austin Sarat**

“There is no market for ethical practice.”
—Associate in a large firm

“Clients buy our integrity.”
—Partner in a large firm

“It is not the way it was twenty years ago. Tough. Get with it. Law is a business.”
—in-house counsel in a major corporation

“Our is a cry for guidance . . . . We need clarification on ethical issues.”
—Associate in a large law firm

“Ethical behavior is a function of the economic freedom of the firm. The more profitable a firm, the better its ethical climate.”
—Partner in a large firm

“Big firms aren’t bastions of ethics. It is their profit that they care about.”
—in-house counsel in a major corporation

“I assume that lying (in the discovery process) is routine.”
—Plaintiff’s lawyer

INTRODUCTION: THE LANGUAGE OF CRISIS AND THE POLITICS OF PROFESSIONALISM

Periodically the legal profession, or more precisely some part of the profession, discovers or declares that the profession as a whole, or an important segment of it, is in “crisis.”

Crises in the profession do not

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** William Nelson Cromwell Professor of Jurisprudence & Political Science, Amherst College. I am grateful to my colleagues in the project, Ethics: Beyond the Rules, for their stimulating intellectual companionship and to Douglas Frenkel for his helpful comments on an earlier draft of this paper.

1. Quotations of statements made by study participants are taken from the author’s notes or from the transcripts of the study’s structured group discussions. The transcripts, which are confidential to protect the identities of study participants, are on file with Professor Robert Nelson of the American Bar Foundation. For a brief description of the study, see Mark C. Suchman, Working Without a Net: The Sociology of Legal Ethics in Corporate Litigation, 67 Fordham L. Rev. 837, 838-42 (1998).

just happen; they are "created" and marketed by particular segments of the bar hoping to mobilize their colleagues to deal with what are perceived to be pressing problems. At the same time, the marketing of crisis is part of an ongoing competition for status, prestige, and recognition that marks all social groups. To call something a crisis is to label a particular set of events in such a way as to add a sense of urgency to our responses to those events; it is in this sense a political gesture designed to evoke particular responses. In different historical periods different entrepreneurs shop different crises, and each period is marked by its own level of receptivity to such marketing. In some periods, claims about a crisis have been well and eagerly received; in others, there have been few takers.

During the late 1980s and the 1990s, the climate for the marketing of crisis has been thought to be quite good. It is good because we are witnessing important shifts in the demographics and conditions of law practice, shifts which leave particular segments of the bar feeling that times are changing in ways that endanger values to which they are deeply attached. Moreover, the growth of specialized media—The American Lawyer, The National Law Journal, etc.—means that there are ready vehicles through which entrepreneurs can get widespread publicity about different crises. Labeling crises within the legal profession as constructed or marketed, however, is not meant to denigrate those for whom the problems seem quite "real" and pressing, or to suggest that those problems are themselves simply matters of perception. It does not deny the importance of the underlying events (e.g., uncivil behavior, hiding documents, etc.) which may occasion the use of the crisis label. Yet, noting their constructed character may be useful in reminding us that one person's crisis is another person's healthy change; what one segment of the bar bemoans as indicative of decline, another, in an increasingly divided and segmented profession, may celebrate.

The "crisis" of the 1980s and 1990s goes to the heart of the legal profession's traditional self-understanding. It is one in which market forces threaten to overwhelm the partially anti-market orientations that go by the name "professionalism," in which previously taken-for-granted ways of doing business among the most prestigious sectors of the bar can no longer be taken for granted, and in which one of the major success stories of the twentieth century—the large law firm—faces substantial challenges. As Marc Galanter and Thomas Palay

3. See id. at 168-73.
argue: "Today there is a palpable anxiety and dismay within the legal profession concerning the commercialization and the concomitant decline of professionalism in the setting of the big law firm."

As market forces take on greater and greater salience and the competitiveness of the legal market increases, the very meaning and viability of professionalism as an ideal guiding law practice is being called into question. Lawyers at all levels of the profession today ask themselves, with unusual urgency, whether their work is really more of a business than a profession, and whether the allegedly genteel ways of a romanticized bygone era can be recaptured. They ask themselves whether the norms of professionalism are still viable in the face of an expanding bar, increased competitiveness, and growing incivility in lawyer-to-lawyer relations.

Against this backdrop, more than a decade ago the American Bar Association's Commission on Professionalism (the "Stanley Commission") issued a "Blueprint for the Rekindling of Lawyer Professionalism." The Stanley Commission exemplified one style of crisis entrepreneurship, observing that "the practices of some lawyers cry out for correction." The Stanley Commission further noted that growing diversity and specialization in the bar was, in part, responsible for that fact. While it recognized various ways in which some of the most cherished ideals of the profession were (and are) under attack, it reaffirmed their continuing validity. In response to new conditions and new challenges, the Stanley Commission tried to provide a coherent identification of the demands that professionalism makes on all lawyers. Despite growing diversity among lawyers, and in the face of increasing commercialism, the Stanley Commission argued that lawyering continues to be a distinctive and cohesive occupational pursuit, that it is, and should be, a profession, not a business. Moreover, it is a profession guided by ideals of practice for which the values of efficiency and the mechanisms of cost-benefit calculations are an inadequate substitute. Using the words of Roscoe Pound, the Stanley Commission described lawyers as united by a "common calling" and

9. Id. at 1.
10. See id. at 2.
12. See Stanley Commission, supra note 8, at 50-51.
insisted that, despite their differences, lawyers share "common ideas of professionalism."\(^{13}\)

In its effort to lend coherence to the idea of professionalism and to identify commonality and unity among lawyers, the Stanley Commission viewed professionalism as a set of essential attributes, the possession of which sets particular occupations apart from others.\(^{14}\) This view seeks solidity in the idea of professionalism and uses that idea to explain why certain occupational groups can claim particular privileges that are not accorded to all occupations. Yet, this view has not gone unchallenged.\(^{15}\) Critics suggest that professionalism cannot be reduced to a set of essential attributes, that it is not a thing, and that what professionals do, lawyers in particular, is not as easily distinguishable from business as some of its defenders assert. "[N]umerous commentators," David Wilkins argues, "have demonstrated that the bar is only able to assume that most lawyers embrace noncommercial values by consciously blinding itself to the many instances in which lawyers (including bar leaders) have aggressively pursued their own economic interests to the detriment of both clients and the legal system."\(^{16}\) As the critics see it, professionalism is an ideology and a way of describing the political project through which occupations seek con-

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\(^{13}\) Id. at 10. As against the view put forward by the Stanley Commission, one might expect that the remarkable diversity in the legal profession (of social background, of types of practice, and of settings in which law is practiced) might conceivably be bridged by shared ideas of professionalism and a common perception of possible problems and preferred solutions, or it might just as likely be reflected in a comparable diversity in what lawyers believe about their work and its social value. Additionally, such diversity might well be reflected in widely varied reactions to any effort to market a "crisis" of the profession at large. See David B. Wilkins, Everyday Practice Is the Troubling Case: Confronting Context in Legal Ethics, in Everyday Practices and Trouble Cases 68, 81-82 (Austin Sarat et al. eds., 1998).

\(^{14}\) For an elaboration of these attributes, see generally Wilbert Moore, The Professions: Roles and Rules 95 (1970) (explaining that although professionals have a "strong sense of collective identity," they still must compete with each other); Everett C. Hughes, Professions, in The Professions in America 1, 4 (Kenneth S. Lynn ed., 1965) (noting that "occupations try to change themselves or their image, or both, in the course of a movement to become 'professionalized' "); and Harold L. Wilensky, The Professionalization of Everyone?, 70 Am. J. of Soc. 137, 138 (1964) (noting that the "traditional model of professionalism, based mainly on the 'free' professions of medicine and law, misses some aspects of the mixed forms of control now emerging among salaried professionals").

\(^{15}\) See, e.g., Terence J. Johnson, Professions and Power 21-38 (1972) (discussing professionalization and professionalism); Magali Sarfatti Larson, The Rise of Professionalism: A Sociological Analysis 113 (1977) ("The monopolistic tendency inherent in all projects of professional reform becomes all the more visible; meritocratic justifications are still too weak to legitimize closure of access."); Robert W. Habenstein, Critique of 'Profession' As a Sociological Category, 4 Soc. Q. 291, 297 (1963) (discussing "[a] variant of sociological thinking about 'profession' . . . [which] is . . . a set of rationalizations about the worth and necessity of certain areas of work which, when internalized, gives the practitioners a moral justification for privilege, if not license").

\(^{16}\) Wilkins, supra note 13, at 82 (citation omitted).
trol of the market for their services. Appeals to lawyers to act professionally or to live up to the highest standards of the profession in their conduct are, in this view, as much for external consumption as they are genuine appeals for reform.

 Critics present professionalism as a rhetorical device that disguises the pursuit of self-interest as public spiritedness. Moreover, while the Stanley Commission emphasized the underlying unity of lawyers, critics highlight stratification and conflict. They argue that particular segments of the bar periodically mobilize a crisis of professionalism to assert and protect their own privileged position against the challenges of other lawyers or of outside groups. Professionalism is, in this view, an excuse for excluding those groups or marginalizing new entrants to the bar. Thus, instead of helping to build consensus, it is part of a top-down social control effort.

Today, the problems of professional self-regulation that were highlighted by the Stanley Commission do not seem to fall quite so neatly into this elite control, top-down model. Whereas twenty or thirty years ago the focus of much concern within the organized profession was the solo practitioner operating at the margins of the profession today, the marketed crisis seems to be located within the elite of the profession.

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17. See, e.g., Richard L. Abel, Why Does the ABA Promulgate Ethical Rules?, 59 Tex. L. Rev. 639, 653 (1981) (stating that "all occupations in a capitalist system seek to control the markets in which they sell their labor") [hereinafter Abel, Ethical Rules].
18. See, e.g., Jerold S. Auerbach, Unequal Justice: Lawyers and Social Change in Modern America 12-13 (1976) (presenting a historical framework "for comprehending the ominous gap between the services dispensed by the legal profession and equal justice"); Freidson, supra note 11, at 4 (noting that the word "profession" is used really only by occupations that have a "hunger for prestige"); Ivan Illich, Disabling Professions, in Disabling Professions 11, 15-20 (1977) (discussing the dominance of professionals in the twentieth century).
19. See, e.g., Richard L. Abel, Lawyers, in Law and The Social Sciences 369, 395 (Leon Lipson & Stanton Wheeler eds., 1986) (noting that the hierarchic structure within law firms leads to a division between associates and partners); John Hagan et al., Class Structure and Legal Practice: Inequality and Mobility Among Toronto Lawyers, 22 L. & Soc'y Rev. 9, 22 (1988) (finding that "the legal profession is highly stratified in the size of the capitalist class and the managerial and supervisory bourgeoisie").
21. See generally Auerbach, supra note 18, at 128-29 (arguing that "as long as merit was defined by the professional elite to correlate with social class and ethnic origins, mobility and fluidity were tightly controlled, and the availability of legal resources and the possibility of equal justice were sharply curtailed").
22. See Abel, Ethical Rules, supra note 17, at 653-67.
It is being used as a tool in a more horizontal status competition in which problems are identified by some high status practitioners and attributed to others of similar status. Among these lawyers there is, as Robert Nelson and David Trubek point out, a "general sense that lawyers [have] lost control of their markets, workplaces, and careers..." In addition, some of the most visible and damaging breaches of professional norms now occur within large, respected law firms in metropolitan areas. Whereas twenty or thirty years ago the organized profession attempted to police and prevent gross ethical breaches, lawyers are presumed today to cut corners, evade rules, and respond to what seem to many to be incompatible demands for high quality work at cut-rate prices. As a result, the daily reality of law practice seems, according to many lawyers, less rewarding, less secure, and noticeably less civil.

In this context, professionalism should be regarded as neither a set of essential attributes nor a singular tool produced and used by the powerful sector in a struggle to suppress the powerless. It is far too vague, complex, and contradictory to serve either purpose. Even the Stanley Commission acknowledged, although it did not make much of that acknowledgment, that professionalism "is an elastic concept the meaning and application of which are hard to pin down."

This elasticity makes professionalism available as symbolic capital in the clash of cultures among lawyers. Professionalism today, however, is a highly contested concept, the symbolic capital of which varies from one part of the bar to another. Because it is robust in its credible meanings, it provides the conceptual terrain for status politics within the bar and is used by different interests to claim respectability and legitimacy. Yet, because its meanings are so hard to pin down, it is a terrain which can never be confidently secured. Its elasticity means that professionalism can be appropriated and deployed by lawyers representing a wide range of interests and approaches to practice. That elasticity invites the generation of competing "accounts" of their

values and activities by different groups of lawyers.\textsuperscript{30} It provides a terrain within which justifications, excuses, and explanations can be provided for conduct by one segment of the bar which another finds objectionable.\textsuperscript{31}

Today, professionalism, whatever its role may be in generating accounts, justifications, excuses, and explanations, is no longer the unquestioned, hegemonic value to which all lawyers proclaim adherence. As one lawyer working as in-house counsel for a major corporation put it, "The language of professionalism is a smokescreen." This lawyer's critique of professionalism is but one of an increasing number of such criticisms from within the profession itself.\textsuperscript{32} Important voices within the profession now openly proclaim that law is, and should be, a business because business values are themselves more than adequate in policing lawyers' conduct, and in insuring the efficient, cost-effective delivery of high quality legal services. As Wilkins explained, "In the 1980s, . . . elite law firms raised the \textit{business} aspects of their practices to unprecedented heights."\textsuperscript{33}

In this view, good lawyering requires that lawyers understand the limits of their own knowledge and competence. The good lawyer knows enough not to try to substitute either his moral values or his business judgment for that of someone who "knows his own business." Above all else, lawyers are supposed to know what they are talking about and only to talk about what they know. Civility is only important to the extent that it facilitates productivity. Thus, not only is the meaning of professionalism contested, but its hold on lawyers' allegiance may be eroding. In the face of that erosion, the identification of an allegedly "common" crisis in professional values seems unlikely to mobilize anything close to universal recognition and assent.

Yet, undoubtedly, professionalism continues to provide some segments of the bar "maps of problematic social reality"\textsuperscript{34} which help constitute and express their particular interests and energize their concerns about such things as the ethics and civility of litigation. Professionalism gives meaning to the social relations, histories, and activities of these lawyers and connects their ideas and values with their interests and positions. It always takes on meaning in the localities and conditions in which lawyers practice.\textsuperscript{35} Place and time shape the fragments and configurations used to construct the maps of social reality which claim the label of professionalism.

\textsuperscript{31} See id. at 47-52.
\textsuperscript{32} See generally Simon, \textit{supra} note 24, at 586 (noting "that few lawyers ever achieved the ability . . . to express their public commitments in their work").
\textsuperscript{33} Wilkins, \textit{supra} note 13, at 88 (emphasis added).
\textsuperscript{34} See Clifford Geertz, \textit{The Interpretation of Cultures} 220 (1973).
\textsuperscript{35} See Nelson & Trubek, \textit{Arenas of Professionalism}, \textit{supra} note 7, at 179.
Despite its local origins and the contested terrain on which it is deployed, professionalism is nonetheless proclaimed in global terms.\textsuperscript{36} Its proponents continue to define contingent practices as universal and necessary,\textsuperscript{37} advancing their understanding of appropriate professional practice as the only conceivable understanding. In this context, any claim to professionalism masks its particular view of law practice by asserting its claim to general respect and allegiance. Each claim seeks to provide an exclusive, normatively coherent and authoritative portrait of lawyering.

At the heart of this idea of lawyer professionalism is a vision of autonomy and ethical practice,\textsuperscript{38} of civility and decorum in the daily life of lawyers, and of lawyers committed to and regulated by a set of principles encoded in the profession's Model Rules. The image of lawyer as statesman looms large as the unspoken model to which lawyers should aspire.\textsuperscript{39} In this image, lawyers' ethics go beyond strict adherence to professional rules. Rather, they reflect the dictates of practical wisdom, a capacious sense of the public interest, and a judicious ability to see and reconcile the client's long-term interest with the best interests of both law and the society it serves. As Robert Gordon explains, this conception entrusts lawyers

\begin{quote}
with a distinctive political mission in a commercial republic, that of being the bearers of an autonomous public-regarding civic culture, \\
\ldots to make them real and effective not just in the occupation of public office but in every corner of social life, including most definitely the practice of advising and representing clients.\textsuperscript{40}
\end{quote}

In this image, the lawyer "harmonize[s] the pursuit of private interest with the universal interest of the whole."\textsuperscript{41} Lawyers would, as a result, ennoble the private realm and, at the same time, provide discipline in public affairs.

Professionalism so conceived envisions a horizontal, peer-oriented system of social control, in which each lawyer is responsible for his or her own conduct and accountable solely to his or her peers within the

\begin{itemize}
\item \textsuperscript{36} See Larson, \textit{supra} note 15, at xvi, 7 (1977).
\item \textsuperscript{37} See, e.g., Roberto Mangabeira Unger, False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy 594 (1987) (noting two constructive forces at work on social life, including restless experimentation with ideas and acceptance of one another).
\item \textsuperscript{38} See Robert W. Gordon & William H. Simon, \textit{The Redemption of Professionalism?}, in Lawyers' Ideals/Lawyers' Practices, \textit{supra} note 2, at 230, 230-31 (explaining that professionalism consists of an institutional element of autonomy and a moral element focusing on ethics).
\item \textsuperscript{40} Robert Gordon, Lawyers as the American Aristocracy 2-3 (1986) (unpublished manuscript, on file with the Fordham Law Review).
\item \textsuperscript{41} \textit{Id.} at 9.
\end{itemize}
profession as a whole. The recently marketed crisis in the profession reveals that this idea of professional self-regulation, in which each lawyer takes primary responsibility for policing his or her own conduct, is being challenged by the organization of the profession itself. Today, many lawyers practice in large organizations—law firms—which are arranged hierarchically and which expose lawyers to behavioral norms and pressures distinctive in large scale organizations. In these organizations, demands for loyalty and responsiveness to the explicit directions or the implicit desires of superiors are real and pressing, and profitability is as much a watchword as professionalism.

The allegedly unifying ideal of lawyer professionalism is further challenged by environmental forces pushing the “bottom line” as the measure of professional performance. Professionalism may be enacted minimally at the level of conformity to the profession’s rules, but it may also, and as importantly, be enacted within the wide range of discretion and judgment left open to professionals practicing within the high pressure world of the large law firm. Conformity to the profession’s rules creates an abstract level of ethical propriety. Yet, professionalism also is enacted daily in manners and styles of conduct toward clients, other lawyers, and legal officials.

What follows are the accounts of various participants in a study of professionalism in the context of litigation, of their explanations for problems of incivility and hyper-adversarial behavior in that process, and of their response to the “crisis” in ethics and civility. It is a description of talk, namely, the way judges and lawyers talk about their work—in particular, their work as participants in, and managers of, civil litigation, and about their own behavior and the behavior of others. This talk is significant in its own right because it details the way judges and lawyers see their worlds and the extent to which perceptions and beliefs are or are not shared. It assists in the mapping of patterns of agreement and conflict in recognition of and in response to problems, as well as the extent to which there is a common understanding of the crisis in big-firm litigation practice.

The research reported below is part of an effort to understand the current “crisis” and to see how, if at all, it is reflected in the accounts given by judges and lawyers of the way litigation is conducted. This paper first attends to accounts of the nature of the adversary system and its impact on litigation practices, then focuses on accounts of the

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44. See Wilkins, supra note 13, at 80.
existence and importance of distinctive cultures in large law firms, and
finally moves on to a discussion of the dynamics of law practice and
the impact of those dynamics in leading otherwise responsible profes-
sionals into what some perceive to be professionally questionable or
undesirable conduct.

In evaluating those accounts, three factors should be considered. The first is the elasticity of professionalism and the ways it is mobil-
ized in struggles within the bar. This paper focuses on professionalism
as an ideology, or, more particularly, the way ideologies of work, framed as accounts of conduct in litigation, are presented by judges
and lawyers. The second factor to consider is the great diversity and
segmentation of the bar and the fact that lawyers who practice in large
firms occupy distinctively different professional worlds and roles from
plaintiffs' lawyers and in-house counsel with whom they are in regular
contact. Here, professional values meet business values head-on; the
word "business" is taken to be as apt a description for the practice of
law as is the more venerable language of the learned professions. Fi-
nally, the third consideration is the fact that the ethical ideal of self-
discipline and self-regulation runs up against the reality of practice in
large firms. It is in this context that one might examine Ethics: Be-
yond the Rules and the "crisis" to which this project is itself a
response.

I. The Adversary System and the "Default" Norms
of Professionalism

Discussion among judges and lawyers about litigation and the
problems of ethics and civility was, perhaps not surprisingly, inextrica-
bly linked to discussions about the adversary system. As reflected in
comments by the lawyers and judges who participated in the discus-
sions of Ethics: Beyond the Rules, the adversary system and the ideal
of zealous advocacy are both still alive and well. All of the partici-
pants—though to varying degrees—seem to subscribe to a version of
what David Luban calls the "dominant picture" of the lawyer's role.
In this conception,

The adversary system of justice . . . lays the responsibility on each
party to advocate its own case and to assault the case of the other
party. Since this battle of arguments is conducted by lawyers, they
have a heightened duty of partisanship toward their own clients and
a diminished duty to respect the interests of their adversaries or of
third parties. The adversary system thus excuses lawyers from com-
mon moral obligations to nonclients.

The adversary system excuse carries as a corollary the standard
conception of the lawyer's role, consisting of (1) a role obligation
. . . that identifies professionalism with extreme partisan zeal on be-

half of the client and (2) the "principle of non-accountability," which insists that the lawyer bears no moral responsibility for the client's goals or the means used to attain them.48

This rhetorical commitment to adversarialism was manifest as large-firm lawyers discussed, among other things, counseling their clients about disclosure obligations in discovery, their own obligations of candor, and preparing witnesses in depositions. In each of these situations, being "tough" and being ready to fight for the interests of their client is, as Luban's argument suggests, the first prerequisite to being a good lawyer.49 "Tough," as one judge observed about the behavior of lawyers in litigation, "is the default position." Large-firm lawyers, both partners and associates, plaintiffs' lawyers, and in-house counsel all agreed, even as they deeply disagreed about many other things, that their understandings of professionalism were structured by an adversary system which is "set up to be a fight" and in which the norm is, "when in doubt—be tough."

This norm was played out, we were told, throughout the entire litigation process, including discovery. As one judge explained, "Gamesmanship is the norm in discovery. This is firm taught. Associates often feel that what they do in discovery is make or break . . . . Young lawyers are afraid; they fear releasing documents that may turn out to be relevant." "Discovery," one plaintiffs' lawyer quipped, "is antics with semantics." The structure of the adversary system itself, along with the default norm of toughness, was seen by some lawyers and judges to be in tension with the norms of disclosure which, at least in theory, are supposed to govern discovery. These accounts suggest that contentiousness and hyper-adversarialism in discovery arise, in part, because lawyers are unable (or unwilling) to disconnect the adversarial norms that govern litigation from their behavior in the discovery process. In some instances, as one judge put it, "The adversary system seems to have become an end in itself. It is almost as if lawyers play the game for its own sake."

What Luban calls the "dominant picture" of the lawyer's role was reflected in the fact that several of the participants in Ethics: Beyond the Rules confidently acknowledged the distinction between the rules by which their conduct is governed and ordinary morality.50 In making this distinction, they provide an excuse for engaging in conduct that "ordinary" people would neither understand nor condone. Such participants argue that they are not "priests" whose responsibility it is to engage in moral counseling with their clients, nor do they have a duty to temper their representation in light of some set of moral criteria external to the legal system itself. As one lawyer put it, "I don't

48. Id. at xx.
49. See id.
50. See id. at 105-07.
want to have a moral dialogue. The client didn’t hire me to be a phi-
losopher. If he wants that kind of advice he can go to a priest.” Or, as
another said, “The fundamental problem of ‘beyond ethics’ is that the
justice system is not established for moral judgment. . . . The system is
not set up to answer moral questions.”

Lawyers make judgments and enact professionalism already in-
scribed within a system that values aggressiveness more than sensitiv-
ity and defines success as winning within a set of rules whose basic
soundness most of the participants do not question. If there are
problems in litigation, this argument would suggest, the problems are
endemic to the adversary system.

Embrace of the adversary system as the default position also was in
the background of the explanations partners and associates provided
in response to questions having to do with “coaching” witnesses in
preparation for depositions. While several lawyers denied that they
“coach” witnesses (“educate” or “prepare” were the preferred terms),
all of them talked about the need to get witnesses ready by reminding
them to tell the truth and not to try to win the case during discovery.
But the injunction to tell the truth is based on a particular understand-
ing of the truth, namely, to tell only that part of the truth which is
necessary to be responsive to the questions as they are asked. Such a
position is not considered either unethical or uncivil; it is part of an
adversary process in which each side carries the burden of making its
own case. Typically, witnesses are told to “give answers that will not
seem unresponsive, but that also won’t open up areas of inquiry.”
Some lawyers also report that they prepare witnesses by informing
them of what others have said on the subject and by reminding them
that it is “okay to say you don’t remember.” Each of these practices
reinforces the adversarial emphasis—the truth, but not the whole
truth until and unless asked. The lawyer’s skill is knowing what has to
be said to be responsive, and, at the same time, to say that and nothing
more.

When asked to put this adversarial view of truth in the context of
complaints about unethical or uncivil behavior in litigation, most of
the large-firm partners with whom we spoke seem to have a well-
honed sense of tactics that are involved in simply being good, aggres-
sive advocates, and the tactics that go beyond aggressiveness to incivil-
ity. While it is okay to make repeated objections as to form or to use
breaks to throw off questioners in depositions, or to take advantage of
a less experienced lawyer, it is not okay to threaten routinely to seek
sanctions or to call the opposing counsel or party names.

Yet, finding the line between aggressiveness and incivility may not
be so easy for lawyers in other positions in large firms. Associates are
told to be aggressive and are “chastised for not being aggressive
enough.” As one said: “People are passed over for depositions when
they lack a reputation for aggressiveness.” And another explained
that "it is valuable to have a reputation as a hardball litigator." Moreover, partners believe that associates sometimes go too far in the direction of aggressiveness early in their careers; associates, some partners suggest, tend to think of the other side as "the enemy." But, as several partners note, with experience, good lawyers find ways to be aggressive without being uncivil. In this climate, associates have to figure out for themselves the limits of tolerable behavior within a complex framework of rules and expectations.

Despite the effort to market a "crisis" concerning behavior in litigation, there was no consensus among those who participated in this project, nor I suspect is there a consensus in the profession as a whole, as to what constitutes aggressiveness without incivility. There was agreement, however, among the judges and lawyers we studied that what is clearly ethically problematic behavior rarely occurs in discovery. As one lawyer said: "Lawyers don't want to lose their licenses by engaging in clear misconduct." The ethically problematic behavior that would bring such a sanction is forbidden by applicable rules of the legal system and the legal profession. Beyond that is the "adversary system excuse" which treats behavior which would be unacceptable in other contexts as unproblematic—even if it is not desirable—and which assigns ultimate responsibility for the moral content of a client's position to the client himself. As one in-house lawyer said about another lawyer's failure to clearly and correctly frame a discovery request, even if the other lawyer knew what was being asked for: "The adversary system is not designed to encourage defense lawyers to tell plaintiffs that they asked the wrong question."

Here, as elsewhere, when they talk about the standards that they set for themselves, lawyers produce accounts which focus on the situation-specific character of their enactments of professionalism. How they behave is, as one lawyer put it, a function of "the case, the client, and the opposition." "Lawyers," as another explained, are "hired for their judgment" and must be left to make judgments about the limits of adversariness. Yet, the conditions for exercising (good) judgment are often not present. One judge remembered that, as an associate in a large firm, "I did document production myself. It was often at three o'clock in the morning that I had to decide whether some document was relevant. I received little mentoring, and I operated under great pressure. Both make it difficult to exercise judgment."

As they accounted for the judgments that they did make, many of the lawyers studied seemed somewhat inconsistent. They sometimes said they strictly adhered to the "playing by the rules" conception of their role; yet at other times, they spoke about the rules as providing...

only the minimum content of professionalism or the floor above which they have individual aspirations or standards. They claimed that those aspirations or standards, as much as the rules themselves, help them distinguish between appropriate and inappropriate tactics and behavior. Thus, for most, it is okay to use tactics that lead opponents down dead-ends, to delay in order to raise costs, and to use discovery to "harass" opponents. But all of this must be done without name calling, without doing anything dishonest, and in the name of a "plausible" position or goal.

The widely-shared norm of discovery is, as previously suggested, to "make the other side work." Under this norm, the obligation is on the lawyer seeking information to know what he wants and to frame a request which is both accurate and comprehensive. Even if one knows what the other side is after, one should not produce it unless or until one is specifically asked. So strong is this norm that when lawyers were presented with a rendition of a case (*Fisons*) in which defense lawyers initially responded to a discovery request in a narrow and evasive fashion and in which eventually a highly relevant document was illegitimately withheld, they focused almost as much on what they saw as the incompetence of the lawyer seeking that information, who did not adequately follow-up on the initially evasive response, as on the ethically problematic behavior of the respondent. As one participant noted, "Refusal to answer (a discovery request) is not an ethical problem because plaintiffs counsel can remedy it (through motions to compel)." Or, as another said, "The limited response should have been a red-flag. The plaintiff's lawyer must have been inexperienced. What we need to explain is what caused him to stop asking."

Moreover, many of the participants in this project said that the kind of behavior portrayed in *Fisons*—narrowing responses, delaying production, etc.—was typical. One of the judges talked about that case and observed that: "There was nothing unusual about it. It happens in every case." Another judge expressed a similar view: "*Fisons* isn't unusual at all. The fact that documents are often hidden never comes out. There is usually no consequence at all to an attorney for hiding documents. What matters is keeping the client and winning the case." And, as an in-house counsel said when asked to speculate about why discovery problems like those in the *Fisons* case occur: "The norm is that one generally responds as narrowly as possible. You keep stonewalling and reply as narrowly as possible. You don't volunteer anything in the hope they'll wear down."

Responses to the *Fisons* case were not, however, all so accepting. Some participants insisted that instead of evading or consciously nar-

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rowing a response, defense lawyers have an obligation to state an objection and allow a judge to decide the question. Others suggest that it is always better to deal with a bad document—either by making an early and appropriate settlement offer, or by disclosing it in order to avoid latter allegations of cover-up and misconduct.

Whatever their view of the propriety of the Fisons case, several judges and in-house counsel accounted for the persistence of the "discovery game" exemplified in that case in terms of the economics of the large law firm in which discovery disputes run up billable hours. As one judge put it: "Discovery rules are supposed to facilitate truth seeking, but in practice that is the last thing they are. They are a cash-cow for lawyers for whom discovery is about hiding the pea."

This game is reflected in what is widely perceived to be a growth in adversariness in discovery and in litigation. As one partner in a large firm put it: "Today people believe that you succeed by always being unreasonable and always bullying." Discovery and litigation, in this view, are both less civil and fraught with what some lawyers saw as unnecessary rancor and unpleasantness. This change, several argue, is a result of growth in the bar; in a large bar, one is less likely to know, and therefore trust, the lawyer on the other side. In addition, the growing prominence of in-house counsel in managing litigation, some partners alleged, has resulted in increased pressure for aggressiveness from the consumers of litigation services.

Accounting for growing adversariness in discovery, some associates note what they see as a generational difference within some of their firms in the litigation styles of older and so-called "middle generation" partners. The middle generation tends to be more aggressive, more prone to "asshole" behavior. Associates speculate that this generational difference arises because the middle generation came of age during the 1980s when there was a substantial growth in the economic pressures on, as well as the economic opportunities for, large law firms. Recognition of a generational shift is present, but less marked, among the partners who participated in this project.

The generational shift explanation, of course, is at odds with the adversary system, dominant conception explanation. But this tension rarely was noted by our participants. In employing such an explanation, however, they fuel the rhetoric of decline which in turn plays an important role in the explanations of those marketing a crisis in litigation. The generational shift explanation also opens up the question of how, if at all, the large law firm functions to maintain and reproduce high standards of conduct in litigation; whether there are distinctive firm cultures; and whether those cultures matter in structuring lawyers' enactments of professionalism.
II. THE CULTURE OF THE FIRM

What role does the so called “culture of the firm” play in the accounts provided by judges and lawyers of the conduct of litigation? How effective are firms at socializing their members into the highest standards of professionalism, at providing effective structures of social control, and at responding to problems of incivility or to breaches of ethics? Do firms have distinctive cultures that encourage ethical behavior and discourage abuses and uncivil behavior? The answers to these questions seemed to vary by the position of lawyers within firms. Thus, while they acknowledged that the present is unlike the past, most partners nonetheless continue to believe that firms have distinctive cultures, and that those cultures function well in socializing their members. As one said about her firm: “We do adhere to a culture. We have learned in this culture.”

Associates, however (even some in the same firms as partners who expressed confidence in the existence and significance of firm culture), were less ready to concede that firm culture existed and expressed greater uncertainty about the socialization and social control roles of the firms in which they worked. Furthermore, the assertion that firm culture matters, combined with the considerable imprecision as to its meaning and significance, were typical of the accounts provided by judges, plaintiffs’ lawyers, and in-house counsel. While some spoke confidently of their ability to “identify a law firm by its style of litigation,” others were more uncertain, believing instead that litigation style varies more lawyer-by-lawyer rather than firm-by-firm.

Firm culture, if it exists, is said to be reproduced through what one partner described as “conscious efforts to bring in ‘people like us.’” Another suggested that “core values exist and are transmitted to our associates . . . . ‘Be honest with the court, your clients, and your opponents. You will follow the rules and more.’” Still another contended: “Firms matter in exercising control over deviants. We have a firm culture that encourages our lawyers to be honest and ethical. This is our bread and butter.” Throughout the study, if references were made to firm culture, they were made in rather abstract terms; the content of firm culture was equated with the least controversial content of professionalism. Questions of style, judgment, and the way professionalism is enacted in the daily conduct of litigation seem to exist below the threshold at which firm culture asserts itself.

Moreover, even among partners, there was a recognition that firm culture today may not be all that it is cracked up to be. Many acknowledged that in the current environment, there is less mentoring in their firms than before. Rather than the informal learning by close observation of an experienced lawyer that used to help socialize associates into the firm and its culture, there is now less time available for such activities. Responsibility for the decline in such informal mentoring is assigned to corporate clients who are said to be no longer willing
to absorb the costs of allowing associates to learn by observation. “Clients used to invest in mentoring for young associates. Today, because they aren’t committed to the firm, they don’t want to invest in that anymore.”

In response, firms have instituted formal training programs for their associates. What was once an easy, accepted part of big-firm practice has taken on a more studied and formal character. Firms create Professional Responsibility Committees, institute lunches among partners to discuss targeted questions about professional conduct, and/or designate ombudsmen to whom questions about ethics and professionalism can be referred. Thus, if one just looked at the organization chart, one would think that firms were deeply invested in their socialization and social control functions.

Some partners, however, acknowledged that firm culture becomes harder to maintain and identify as firms get larger and more specialized. As one partner said, “The notion of a firm culture becomes more abstract and diffuse as the firm gets larger.” Or, as another said, “We have a strong firm culture about misconduct within the litigation department, but the overall culture of the firm is weakening . . . . It is fraying around the edges.” The disaggregation of firm culture into the cultures of its subdivisions may be especially consequential in litigation because it means that the aggressiveness which is the hallmark of the litigator is not tempered by regular, informal interactions with lawyers in other departments with different professional norms and styles.

This disaggregation also means that there may be less control of, and accountability for, individual enactments of professionalism than might appear from the organization of committees, lunches, etc. As one partner bluntly admitted, “One doesn’t monitor one’s partners.” Or, as another put it, “given the large size of firms you end up having less confidence about the behavior of others.” While several partners conceded that there may be uncivil, hyper-aggressive litigators in their firms, they suggested that there is little that could or should be done about them. Controlling their behavior is impossible so long as it stays within the range of the rules. Within that range everything is a matter of personal style and judgment.

The alleged fraying of firm culture is not only a function of size and specialization. It is, in addition, attributed to the increased recruitment of laterals, people socialized into the culture of one firm who are brought into a different firm at a senior level and who are valued primarily for their skills at getting and keeping clients. “In the classic big firm,” Galanter and Palay wrote, “almost all hiring was at the entry level. Partners were promoted from the ranks of associates. Those who left went to corporations or smaller firms, not to similar large firms . . . . But starting in the 1970s, lateral movement became more
frequent." Many of the partners with whom we spoke noted the
significance of laterals in explaining changes in, and the weakening of,
the culture of the large law firm. "Having laterals," one said,
"changes the level of assurance that one can feel that there would be a
uniform response to any problematic situation in litigation." Or as
another noted in describing his firm: "It is now the internal culture
versus the outside invaders."

Laterals play an important symbolic role in signaling the transfor-
mation of the values of the firm and in providing an ideological light-
nning rod. They provide convenient, symbolic markers of the transition
from the hegemony of professional values, of collegiality and commu-
nity within the firm, to the hegemony of business concerns, from pro-
fessionalism to profit. Indeed, some partners contend that ethically
questionable conduct by partners who do a particularly good job in
bringing business to the firm is likely to be overlooked.

Finally, the presence of laterals marks a significant transformation
in the expectation of permanency and stability in firms. While lawyers
in the past spent their entire careers with the same firm, today there is
much greater mobility, as lawyers sell themselves and their client gath-
ering skills to the highest bidder. There is, in addition, much greater
uncertainty among lawyers because they can no longer assume that
making partner means a lifetime of security. This uncertainty is, in
these explanations, related to the way big-firm lawyers behave in liti-
gation. Indeed, one plaintiffs' lawyer quite emphatically insisted that
incivility and hyper-adversarialism, where it occurs among large-firm
lawyers, is simply an external manifestation of the internal life of the
firm. As he put it:

They live internally in a cannibalistic world. They have no regard
for each other . . . . They don't act differently toward their adver-
saries than they do toward each other. If you are a great lawyer, but
don't bring in fees, you are fired. The only common value among a
firm of 300 lawyers is money. There will be no other common
values.

Not surprisingly, the world of the firm seems quite different from
the perspective of associates than it does from the perspective of part-
ners. As this Article has already suggested, firm culture played a
much less significant role in the accounts associates provided. As a
group, they were much less clear and certain about the existence of
the firm culture. One associate noted that "ethics is talked about the
first day and never talked about again. There may be a culture at the
top, but it doesn't filter down." Associates reported that they learned
most by observing senior associates as well as partners, and that the
firm most effectively transmitted its values not through formal mecha-

54. Marc Galanter & Thomas Palay, The Transformation of the Big Law Firm, in
Lawyers' Ideals/Lawyers' Practices, supra note 2, at 31, 50.
nisms, but through the stories that were told about what happened in a specific case. "The problem deposition," one associate explained, "becomes part of the lore of the firm." Several associates argued that large firms want and expect "quality work" even if the definition of quality work is amorphous or idiosyncratic to particular partners. Most of the associates seemed to share the view of one who said, "I feel imprinted by the partners I work for—not by the firm."

When they were asked to discuss their own standards and aspirations as professionals and whether their standards were widely shared in the firms where they worked, most associates were unable to identify with confidence the shared norms or aspirations of the firms. As one said, "I have no idea how widely shared my standards of professional conduct are in our firm." Or, as another explained: "My firm is very large. . . . You don’t know what the standards are of most of the lawyers in the firm. You only know from the lawyers with whom you work directly."

Nonetheless, many associates believe that there are a large range of things that their firms could or should do to encourage greater cohesion and promote high standards of professional conduct. These included: refraining from rewarding associates and partners who engage in uncivil behavior; stopping catering to clients who want hyper-aggressive lawyering; talking about and using ethical practices as a criteria in evaluating associates; having associates evaluate partners’ litigation behavior; and reducing reliance on billable hours (which allegedly contributes to hyper-aggressiveness).

Associates also say that the partners within their firms are less sensitive than they should be to the climate concerning ethics and professionalism: "Partners think everything is fine." Another suggested that partners "do not see that ethics is of inherent value. Ethics is treated as a matter of sanctioning people for bad behavior rather than rewarding good behavior." Associates reached no consensus, however, about the extent to which they were "on their own" in making judgments and identifying norms of professionalism that their firm would value. Some associates confidently asserted that "unethical behavior is an aberration" and that "there is a clear sense that the firm matters in setting ethical expectations." Others reported considerable "give and take among associates about how to handle cases." But several shared the sentiment of one who, like the judge quoted earlier, said, "Most of the time you are working by yourself—collaboration is absent. As a result, I have no clue what our firm culture is."

After listening to the accounts of partners and associates, one cannot have great confidence that firms today have distinctive cultures into which their lawyers can predictably be socialized. Firms are too large, segmented, and structured to maximize lawyer independence to sponsor a single set of values except at the most general level. Even if firm cultures do exist, they do not seem to be geared toward policing
the everyday, often subtle, choices that lawyers make about their practice styles. Socialization seems too incomplete and social control in large firms seems too deferential, except when confronted with gross violations of clear ethical norms, to ensure uniformly admirable enactments of professionalism.

III. The Dynamics of Litigation: The “Not in My Backyard” Syndrome

One might think that the willingness to concede that firm culture does not play a consistently reliable role in controlling lawyer conduct might be associated with a willingness on the part of those making such a concession to accept personal responsibility for problems in litigation. What is striking, however, as one listens to judges and lawyers talk about ethics and civility in litigation, is the extent to which each group presents itself as a “victim” of forces over which it believes it has little or no control. Furthermore, they blame others for “forcing” them to be more aggressive, and sometimes uncivil, than they would be otherwise. Some of the forces onto which blame is shifted in these accounts already have been named or alluded to—economic pressures, increased competitiveness within the profession with a resulting emphasis on business and commercial values, the increased number of laterals, etc. Notably absent, however, are recommendations concerning how best to respond to, or anticipate, changing environmental forces, and strategies for preserving or promoting professional values.

In the accounts provided by partners in large firms, the chief source of problems is the changing nature of their relationship with clients. While, at one time, firms established long-term, continuing relations with clients, today, as these accounts would have it, those relationships are more difficult to find. One partner explained: “There is no longer law firm-client loyalty. Clients are increasingly looking for and getting an attack dog. People are very eager to satisfy the client who often is sending a mixed message. They want someone who is tough, but they don’t want to pay the cost.” One of the judges with whom we spoke agreed, saying that “firms are not rewarded for being ethical.” “Who is the client looking for?” this judge asked rhetorically. “The client is going to look for someone who will do almost anything to win their case.” Another judge suggested that “clients are worse than the lawyers they are hiring . . . . Increasingly we are dealing with a business; the obligations of a profession run in the opposite direction.” Still another noted that “defense lawyers are under a lot of pressure. Inhouse counsel is the master . . . . No one is looking for a reasonable defense lawyer. The message sent is ‘Take no prisoners.’”

In this environment, the emphasis, in the accounts of partners in large firms, is on pleasing the client rather than on developing a counseling relationship. Clients want to conduct their own document
searches in response to discovery requests. In addition, there may be great pressure from clients to limit discovery. "In-house counsel," one lawyer told us, "generally want you to take a narrow interpretation of a document request. When they take this position it makes it harder to convince the business people to be reasonable." Big-firm lawyers say that they are driven to heightened levels of aggressiveness to please clients who can easily take their business elsewhere. "Today," one lawyer said, "you hear less talk about victories in court than about victories in getting clients." This message is one which is transmitted to associates, who seek to impress partners by showing their bravado and toughness in discovery.

Large-firm lawyers note that business clients take the same bottom-line attitude toward their legal work that they take toward everything else and seem less interested in securing and supporting high levels of professionalism. If there are problems in litigation, corporate clients are responsible. Yet, perhaps not surprisingly, the accounts of in-house lawyers have a very different flavor to them. Typical were the comments of one in-house counsel who said:

I insist on a thorough cost-benefit analysis in every case. Outside counsel don’t do this . . . . The outside lawyer starts with a ‘leave no stone unturned’ attitude. But every case does not require a Cadillac defense. We insist that they ask whether the cost justifies the benefit.

Partners respond by arguing that such cost-benefit thinking leads to great cost-cutting pressures, to the point that they often feel that the client is unwilling to pay for sufficient preparation. It may, in fact, be that incivility is a substitute for being well-prepared. “It is no longer sufficient to be good. You have to be the toughest or else your client won’t be satisfied.”

Business clients have established their own well-staffed in-house legal offices. As a result, today they are more sophisticated as consumers of legal services. They demand the highest quality service at discount prices. But, in our conversations, they often seemed disdainful of, or hostile to, the large law firms with whom they deal. As one said, “Why should I pay $500 per hour? There is a lot of high quality lawyering around. I can get as good lawyering in Texas as I can in New York.” Or, as another inside lawyer explained, “outside firms whine and want to maintain their high incomes. Large-firm lawyers need to face facts. There are a large number of top-quality lawyers around who will do it for less. ‘We want to lower your annual income.’”

In-house counsel blame outside lawyers for hanging on to an outmoded ethos of professionalism instead of embracing a business ethos. Here we see the limits of the Stanley Commission’s model of professionalism as the governing ideology of the bar. “[Large law firms] are behind on the learning curve,” one in-house lawyer observed. “They
look at bodies and billable hours to support partnership income.” Moreover, in this view, hyper-adversarialism and incivility occur because “outside counsel only care about proving that they are the best lawyers in town. They end up creating more problems than they solve.” As one participant said: “Law firms use everything to make things hard on the other side. They play on trivia, they play on tactics.”

Several in-house counsel noted what they saw as the economic interest of the hourly fee lawyer to “churn” cases and to use discovery disputes to run up fees. Thus, in-house lawyers were deeply suspicious of large-firm litigators, who “are slow to respond to change. For the large-firm lawyer the mere fact that we are asking them to do things differently means that it is by definition not as good.” “Consumers of legal services,” one in-house counsel explained, “are forcing change. For us efficiency is the key value.” “Law firms,” he said, “haven’t yet caught up with the business environment.” Or, as another colorfully asserted, “It is like the family farm. Law firms will go the way of the family farm.” Still another said that the complaints that one hears from large-firm lawyers are a function of the fact that “the reigns on them are tighter. Many senior partners are disappointed with diminishing access to senior executives. . . . It is a threat to their ego to have to deal with the general counsel’s office.” From the point of view of in-house counsel, there is indeed nothing special about legal services; they can be purchased by a business like any other fee-for-service commodity, and they should be evaluated like any other supplier. Perhaps not surprisingly some plaintiffs’ lawyers share this view. For them lawyering is a form of commercial activity; it is, as one flatly stated, “just a business.”

In relations between big-firm lawyers and their corporate clients, we see the clash of two different and deeply held views of what law practice should be like—one of which emphasizes autonomy, the other responsiveness, one which imagines itself as the carrier of the practical wisdom of a learned profession, the other which seeks to subject lawyers to business values. In the words of one in-house lawyer, “Professional ethics are the same as business ethics.”

This difference of views cannot be overcome by the mere assertion that law is a profession, no matter how often that assertion is repeated. Unless or until the bar deals explicitly with this difference in perspective, mutual suspicion, if not outright hostility, between big-firm litigators and litigation managers of large corporations will continue. However, the externalization of responsibility, the “not in my backyard” accounting for problems in litigation, is, in the accounts of in-house counsel, not limited to blaming big firms. In-house lawyers also blame problems in litigation on plaintiffs’ lawyers who, in their view, bring frivolous cases, use the discovery process to try to figure out whether they have a case, and seek to extort payments just for
ceasing to be a nuisance. "I had the experience," one lawyer explained, "of saying to a plaintiff's lawyer that we had been mistakenly named in a case. They said 'How much is it worth to you to let you off the case?'" "We are abused," another contended, "by the extent of discovery. Litigation is often just a fishing expedition." Or, as another put it, "We are on an unfair playing field."

Plaintiffs' lawyers likewise argue that the litigation playing field is not even. They suggest, however, that the rules favor defendants who are able to gain advantage just by "playing the game" in which "delay" is itself a kind of victory. They say that defendants, with or without the cooperation of their lawyers, routinely withhold relevant information and seek to hide incriminating documents. "Defendants know that they can come out on top by withholding." In their accounts, several plaintiffs' lawyers explained that outside lawyers typically adopt "a win-at-all-costs mentality in order to show how tough they are," and that this attitude is essential to keep their corporate clients. As one observed: "Defense lawyers cannot practice without withholding stuff. Having a reputation for honesty and being forthright means losing clients . . . . The result is that no one produces what they are supposed to produce." Moreover, several plaintiffs' lawyers suggested, echoing the views of some of the in-house counsel, that there is a kind of mutuality of interest between themselves and outside counsel. "Defense lawyers love us. When I get in a case, it means that their fees will be run up." In this view, plaintiffs' lawyers and their big firm counterparts understand the nature of the "game"; in-house counsel typically do not. Thus, when the latter get involved, "they really screw up the works. They are the client, and they personalize the litigation . . . . They make it harder to do business." Indeed, from our conversations with different groups of lawyers, this observation seemed true. In-house counsel display a deep sense of grievance about the behavior of plaintiffs' lawyers and the conduct of litigation.

To the extent that plaintiffs' lawyers push the limits of civility or adopt a hyper-adversarial posture, they, like other lawyers with whom we spoke, argue that they are "forced" to do so in order to establish credibility with corporate defendants and their lawyers. "You have to get to the point where the defendant's lawyers respect you. To get to that point you have to keep on attacking. You have to make them fear you." Aggressiveness is presented then as a defensive and strategic response to a posture of non-disclosure and cover-up that plaintiffs' lawyers say is a routine response to their legitimate requests for information. "You have to beat up the defendant," one lawyer explained, "until they give up."

Given this climate, in-house counsel, while conceding that everything depends on the case and the stakes, were divided about how tough and aggressive they want their outside lawyers to be in response. While one observed that, "The lawyer who isn't aggressive
enough doesn't get another case," another said that "the general rule is that we do not want to be easy in depositions . . . . The tone set is to be aggressive within the rules, to zealously defend the company . . . . This often means reveal as little as possible as late as possible." Others noted, however, that, "outside counsel often go beyond where I think they should. They try to show how good they are by being tough." Another lawyer suggested that the "pitbull" loses credibility. A third described what he called "the life-cycle of litigation in large firms" which involves "overenthusiasm, followed by boredom, followed by cold feet." Outside lawyers were said to "be afraid to lose a case. They try to avoid any risky strategies. They fear they will fall into disfavor." The response of in-house lawyers is to insist on close communication and "partnering." Large-firm lawyers, in turn, tend to see these actions as limiting their professional autonomy and turning them from lawyers into technicians.

If there is one source of responsibility commonly identified in the accounts of all types of lawyers, it is the judiciary. If there is one thing that lawyers, whatever their type of practice and practice setting, seem to agree upon it is that judges hate to get involved in discovery disputes; most judges find managing discovery to be uninteresting, and as a result, many take a hands-off approach, leaving it to the lawyers to play the discovery game with relatively little supervision. One lawyer suggested that "discovery issues pose hard questions. Judges have to get into the nitty-gritty. It is a pain in the neck for judges."

Some of the judges we talked to agreed that they have great power to control behavior in litigation, which many conceded they do not use. As one said, "What the judge will tolerate sets the standard." Another commented: "Discovery abuses can be stopped by a judge. A lot of efforts to bend the rules come from a feeling of security that a judge will never look and see what they have done." Still a third noted that "discovery disputes are a nuisance . . . . If we get into the question of sanctions we have litigation within litigation . . . . Putting time into sanctions does not move the case toward resolution."

Yet judges, like the others with whom we spoke, do not typically accept responsibility. They, too, present themselves as "victims" and point to caseload pressures and/or their view that judges should not get into the business of "doing the lawyer's job for them" to explain why many do not get involved in managing discovery. "To find sanctionable conduct takes a lot of time," one judge explained, "so judges tend not to find such conduct." And as another judge said, "If we do impose sanctions for discovery abuse, we almost always get reversed on appeal. The result is that lawyers know that there are no teeth in the authority of the court." The "don't blame us" attitude toward litigation problems found in each group of lawyers with whom we spoke is alive in the judiciary as well.
CONCLUSION: A PROFESSION IN DENIAL? OR, "WHAT CRISIS?"

In the accounts of most of the lawyers and judges with whom we spoke two things stand out: first, ethical problems are not high on their list of concerns; second, when breaches occur, responsibility for incivility and for professional deviance is placed elsewhere—by large-firm lawyers on plaintiffs’ lawyers, in-house counsel, and judges; by plaintiffs’ lawyers on defendants and their lawyers who allegedly routinely hide documents and abuse discovery and on a “defense oriented” judiciary; by in-house counsel on plaintiffs’ lawyers who file frivolous cases and use discovery as fishing expeditions, on large firms that are reluctant to take risks and that are too interested in protecting their own privileges; and by judges on lawyers who do not take their professional obligations seriously enough and on appellate courts that routinely undo whatever trial judges try to do to manage the discovery process. Marvin Scott and Stanford Lyman call this style of account “scapegoating.”

Although the lawyers and judges with whom we spoke acknowledged that there are problems in civil litigation and in discovery, they believe that those problems are either inextricably bound up with the practices of the adversary system itself or the products of a few bad apples or “assholes.” As to the latter, there is no possible response. As to the former, those we interviewed believe deeply in the adversary system. In their view, it works; it serves our society well, even in the face of its excesses. Incivility and the occasional ethical lapse merely are part of the “price of doing business” in such a system.

While many of the lawyers and judges recognized the pervasiveness of hyper-adversariness in litigation and acknowledged that hiding documents was a daily occurrence, this perception existed side-by-side with the view that there is no “crisis” in the litigation system. “There is just a more thorough examination of big-firm practices,” one judge noted, “rather than a change of conduct.” From these responses, it seems that the effort to market a perception of crisis in litigation has not succeeded, at least not at the level of persuading lawyers and judges that there are deep systemic problems requiring systemic solutions.

Yet, the combination of factors that lawyers and judges describe—hyper-adversarial orientations combined with a weakened, or fraying, and segmented firm culture; pressures from clients animated by bottom-line, cost-benefit orientations; competitiveness driving lawyers to be tough as a way of pleasing clients; and the absence of reliable and consistent judicial supervision—all seem to encourage lawyers to get

55. Scott & Lyman, supra note 30, at 50.
56. Id.
close to the line at which aggression turns into incivility, and adversariness into breaches of ethics, rather than to stay far away from it. Thus, it should not be surprising that lawyers sometimes miss the mark. As Diane Vaughan explains in her recent book, *The Challenger Launch Decision*:

Two observations are generally held to be true. First, in industries and organizations where misconduct occurs, normative environments exist that conflict with those of the outside world: what society defines as illegal, deviant, or unethical comes to be defined in the industry and organization as normative. Second, these normative environments have a unidimensional character. Reflecting competitive pressures from the environment, organizational culture emphasizes production goals, which are presumed to be the driving force behind calculated decision making that culminates in volatile behavior.\(^5\)

What Vaughan says about organizations in general seems particularly appropriate to the world of litigation in large law firms in which lawyers' ethics, with their studied departures from ordinary morality, define the normative environment and in which production goals are increasingly emphasized. In such an environment, as Vaughan suggests, the tasks of socialization to appropriate conduct and social control of deviance are unusually difficult:

> Rather than contemplating or devising a 'deviant' strategy for achieving the organization's goals and then invoking techniques of neutralization in order to proceed with it or rationalize it afterward, they may never see it as deviant in the first place. How influential can the deterrent effects of punishment and costs be when environmental contingencies, cultural beliefs, and organizational structures and processes shape understandings so that actors do not view their behavior as unethical, deviant, or having a harmful outcome?\(^6\)

If we take seriously the need to respond to problems of ethics and civility in litigation and the rhetoric of crisis marketed by groups like the Stanley Commission, then we should learn several things from the accounts provided by judges and lawyers in * Ethics: Beyond the Rules*. First, some of those problems are indeed endemic to the adversary system itself. They cannot, and will not, be rooted out by any incremental reforms. Getting serious about those problems will require a serious re-examination of the so-called “adversary system excuse” and the “dominant conception” of lawyering which it encourages. To the extent that adversarial norms are embraced and put side-by-side with a discovery system that is governed by norms requiring disclosure, we should expect problems to occur. Perhaps the way to promote a more

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58. *Id.* at 408 (footnote omitted).
Civil climate in litigation and to avoid the most egregious ethical violations involves changing the structure of the adversary system itself.

Second, firms have a large role to play in monitoring and regulating the conduct of their lawyers, whether partners or associates. Surely a changed legal environment has placed great strains on the capacity of firms to play such a role. But unless and until firms muster the will to adapt to this changed environment in ways that are supportive of so-called professional values, little progress can be made.

Third, the culture of denial and the externalization of responsibility that accompanies it is itself a problem. Each segment of the bench and bar has earned its share of the blame for a litigation process that almost everyone concedes constantly grows less and less civil and more and more unmanageable. Until that blame is acknowledged, the attitude of “It’s the other fella’s fault” will continue to be matched with an attitude of “Let others clean up their act.” Both attitudes ensure that little impetus for significant change is likely to come from within the profession itself.

Finally, it may be that different, or more refined, answers would emerge if we studied behavior, not talk, and if we were able to test hypotheses about the conditions and contingencies that shape behavior in litigation. Yet, from the perspective of an interest in the ideological contests surrounding ideas of professionalism, and the accounts to which those contests give rise, it may be that the most important product of our work is a greater awareness of the real diversity in the profession—a diversity born not just of the different social backgrounds from which lawyers come, but also of the distinctive perspectives which are cultivated by those in different kinds of practices. In the face of this diversity, we might ask: “For whom do problems of hyper-adversariness and incivility, and the occasional, though highly publicized, breach of ethics constitute a crisis, and what power or influence can they mobilize to persuade others to change?” In answering that question, we may get one angle from which to understand where energy for reform is likely to emerge and what its likelihood of success might be.
Notes & Observations