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INTRODUCTION

BRINGING LEGAL REALISM TO THE STUDY OF ETHICS AND PROFESSIONALISM*

Douglas N. Frenkel
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INTRODUCTION

WHILE claims of “crisis” in the legal profession had been heard before, the early 1990s was an era of unprecedented public and journalistic attention to the work of lawyers generally, and to problematic conduct and case outcomes in particular.¹ Inside the profession, too, this period witnessed an explosion of concern over the decline of civility, if not ethics, and the search for means of remedying the situation.² At the same time, the legal profession, like the rest of the commercial world around it, was reportedly confronted with structural changes, including heightened competitive business pressures, that have impacted the way in which services are delivered.

It was against this backdrop that the ABA Section of Litigation launched *Ethics: Beyond the Rules*. Sensitive to claims of increased incidents of litigator incivility and unethical conduct, the study sought to gain a better understanding of the forces that shape the quality of decision-making by litigators who are confronted with ethical dilemmas.

I. OUR WORKING HYPOTHESIS: THE SIGNIFICANCE OF ENVIRONMENTAL FACTORS

We began the study with the premise that in the legal profession, as elsewhere, ethical behavior and high levels of professionalism are variable achievements. We assumed, as earlier writers had suggested, that particular environments, structures, and incentives may encourage lawyers to behave in an ethically appropriate fashion, and

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1. In the decade preceding this study, for example, lawyers' lives and work were showcased in the popular media of television (e.g., *LA Law*, *Court TV*, full-time law correspondents on news programs) and published fiction (e.g., the novels of John Grisham and Scott Turow). In print journalism, such newspapers as the *American Lawyer*, *National Law Journal*, and *Legal Times* were in their second decade of publication, while major newspapers began to devote regular columns to the law (e.g., the *New York Times* “At the Bar” column by David Margolick).

2. See Committee on Civility, Seventh Fed. Jud. Cir., Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit (1992), reprinted in 143 F.R.D. 441 (1992).

that other environments can send different signals.³ In this sense, professionalism is a social product enacted and defined in the decision-making and behavior of lawyers.

The major assumption of this project was that neither hortatory professional ideologies nor the promulgation of rules themselves can provide reliable protections against both incivility and overtly unethical behavior in litigation. Just as legal realists discovered a gap between law on the books and law in action⁴ and urged prudent lawmakers to attend to the social factors that explained why the rules were followed, this project sought to inject an element of realism into the current discussion of professionalism.⁵

According to earlier research, the settings in which lawyers work are among the most powerful, contextual factors shaping enactments of professionalism. As Nelson and Trubek suggest: "[I]t is in the legal workplace that we find real conflicts over how practice should be organized. It is there that the presence and power of professional ideology often is least visible and least understood."⁶ According to this view, the profession's workplaces can be understood in terms of the extent to which they socialize their members concerning professional norms and in terms of their role as agents of social control, policing the behavior of their members.⁷ With these propositions in mind, *Ethics: Beyond the Rules* chose to focus on litigators working in large corporate law firms—professional organizations traditionally identified as being at the pinnacle of professional prestige and ethicality, but which have seen several highly publicized ethical scandals in recent years.⁸

It is widely recognized that the bar's demography has changed dramatically in the last three decades.⁹ A great numbers of lawyers now

3. David B. Wilkins, *Everyday Practice Is the Troubling Case: Confronting Context in Legal Ethics*, in *Everyday Practices and Trouble Cases* 68, 71 (Austin Sarat et al. eds., 1998).

4. See Roscoe Pound, *The Limits of Effective Legal Actions*, 27 *Int'l J. Ethics* 150 (1917).

5. See, e.g., David B. Wilkins, *Legal Realism for Lawyers*, 104 *Harv. L. Rev.* 468, 469 (1990) (arguing that the traditional model of legal ethics is premised on formalist assumptions about the constraining power of legal rules).

6. Robert L. Nelson & David M. Trubek, *Arenas of Professionalism: The Professional Ideologies of Lawyers in Context*, in *Lawyers' Ideals/Lawyers' Practices: Transformations in the American Legal Profession* 177, 179 (Robert L. Nelson et al. eds., 1992).

7. See Ted Schneyer, *Professional Discipline for Law Firms?*, 77 *Cornell L. Rev.* 1, 6-11 (1991).

8. See, e.g., *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 858 P.2d 1054, 1084-85 (Wash. 1993) (holding that the trial court erred in failing to sanction the defendant for discovery abuse where they failed to produce smoking gun documents which fell within legitimate discovery requests).

9. See Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 *Tex. L. Rev.* 639, 664-65 (1981); Barbara A. Curran & Clara N. Carson, *The Lawyer Statistical Report: The U.S. Legal Profession in the 1990s* 1-14 (1994).

work for someone other than themselves in increasingly large and bureaucratic settings.¹⁰ This means that fewer lawyers have clients in the traditional sense, and most of the work of corporate firms is seen only by other lawyers. Lawyers in large firms work at the nexus of several competing systems of normative regulation.¹¹ Ethical strictures may at times conflict with the pressures, incentives, and customs peculiar to the large law firm. Fidelity to the codified norms of the profession may not coincide with institutional objectives or strategies for professional advancement in an impersonal work environment.

Earlier writings suggest that as professional organizations increase in size and complexity, patterns associated with a "punishment centered bureaucracy" become more apparent.¹² Marc Galanter and Thomas Palay predicted that, in the large firm, "the development of a firm culture through social control and prospective monitoring will play an active role in mitigating opportunistic conduct."¹³ Prior research had also posited that firm structures may have an immediate impact on the behavior of lawyers in litigation. On the other hand, research showed that in large, highly compartmentalized firms, there is relatively little interaction between lawyers in different "castes" or specialties.¹⁴ Eliot Freidson's research on the medical profession suggested that where compartmentalization is particularly strong, individuals conduct themselves in accordance with the norms of their segmented reference group.¹⁵ Under such circumstances, lawyers, like doctors, may have little knowledge of, or interest in, acts of or policies concerning professionalism outside their immediate group, absent the kind of gross and obvious deviance that threatens the partnership and brings widespread, unfavorable publicity. We wanted to examine these claims with a view toward determining whether solutions to problems could be found at the organizational level.

We began this project sensing that, within the same firm, lawyering and ethical concerns may be experienced differently by senior and junior lawyers. As Galanter and Palay recognize, "the situation of the junior lawyer is more precarious and more pressured."¹⁶ Given the pressure to attain partnership, evaluation procedures, and promotion patterns, associates and partners may occupy substantially different

10. See Marc Galanter & Thomas Palay, *Tournament of Lawyers: The Transformation of the Big Law Firm* 1-3, 120 (1991).

11. See David B. Wilkins, *Who Should Regulate Lawyers?*, 105 Harv. L. Rev. 799, 817-27 (1992).

12. See Paul D. Montagna, *Professionalization and Bureaucratization in Large Professional Organizations*, 74 Am. J. Soc. 138, 144 (1968) (citations omitted).

13. Galanter & Palay, *supra* note 10, at 120 (citations omitted).

14. See Ervin Smigel, *The Wall Street Lawyer: Professional Organization Man?* 195-96 (1964).

15. See Eliot Freidson, *Profession of Medicine: A Study of the Sociology of Applied Knowledge* 366-68 (1970).

16. Marc Galanter & Thomas Palay, *The Transformation of the Big Law Firm*, in *Lawyers' Ideals/Lawyers' Practices*, *supra* note 6, at 31, 60.

professional worlds and respond to substantially different professional pressures in daily decision-making.

Finally, we were curious about the role that firm status—its history, self-image, reputation, and financial stability—may play in conditioning the behavior of its members. There is at least anecdotal evidence that some firms consciously cultivate a reputation for extreme aggressiveness and the most fanatic forms of zealous advocacy.¹⁷ Such a reputation may affect the firm's working climate as well as the kinds of lawyers and cases it attracts. In such a firm one might expect to see high tolerance for incivility and a take-no-prisoners professional style. By contrast, where firm management feels financially and psychologically secure and, as a result, does not exert pressure to push the limits of professionalism in the name of entrepreneurial needs, different manners should prevail.

In a legal realist model, one expects that ethics and civility in litigation would also be responsive to structures of incentives and control outside the firm. Here, three kinds of actors play key roles. First are the clients—increasingly in the form of in-house counsel who are in charge of managing litigation and retaining and supervising law firm attorneys on behalf of the businesses for which they work.¹⁸ The signals they send, the demands they make, and the expectations they communicate are likely to be very important in shaping behavior of outside counsel in litigation. These effects are especially important in an environment where clients may be less likely to have ongoing relations with one outside firm than in the past.

The second key actor outside the firm who shapes the conduct of litigation is the judge. It is her role to supervise and control that conduct, interpreting rules and setting a tone about what kinds of behavior are acceptable and what kinds are not. To the extent that judges take a hands-off attitude, other incentives will prevail in shaping the decisions lawyers make and the way they behave.

The third group of actors is the lawyers themselves, because their conduct may be responsive to the behavior of their adversaries. In this sense, litigation is social. Yet it is by no means clear how, when, and where the behavior of an adversary sets a tone, and how that behavior interacts with any incentives and controls available in the culture of the firm, in the relationship with in-house counsel, and in the expectations of judges. There was little doubt in our minds that a full

17. See Connie Bruck, *Enemy of the Maimed: Is He 'Anti-Human'?*, Am. Law., Sept. 1979, at 1, 21-23; Steve Weinberg, *Hardball Discovery*, A.B.A. J., Nov. 1995, at 66.

18. See Abram Chayes & Antonia H. Chayes, *Corporate Counsel and the Elite Law Firm*, 37 Stan. L. Rev. 277, 277-78 (1985); Robert Eli Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 Ind. L.J. 479, 506 (1989).

account of the variations in ethics and civility in litigation would have to account for these factors and that interaction.

Finally, litigation is, of course, a dynamic process. General styles of practice, as well as incentive structures both inside and outside firms, are filtered through the myriad factors that shape every case. Thus we would expect differences in litigation behavior in different areas of law and in cases with different stakes. Class-action, "bet-your-company" cases should produce pressures that are different in degree and kind from routine, smaller matters.

It is against this background—an effort to bring legal realism to the study of legal ethics and to examine behavior in litigation—that *Ethics: Beyond The Rules* was organized.

II. METHODOLOGICAL DISCUSSION

Prompted by the concerns outlined above, the Litigation Section of the American Bar Association enlisted the assistance of a team of legal scholars, ethicists, and social scientists to examine the issue. The initial phase of the study was organized around intensive weekend-long discussion groups with selected groups of lawyers. Over two extended weekends we conducted separate sessions for partners and associates, respectively, from five leading firms in each of two major cities.¹⁹ A total of ten partners and nine associates took part in the weekends. Four of the partners and three of the associates were women. All participants were promised confidentiality and anonymity outside of the discussion room. The sessions involved a combination of group discussion techniques. Early sessions began with discussions of short case studies based on real cases that raised questions about litigation decisions, especially as to disclosure in discovery.²⁰ Other sessions asked the lawyers more directly to discuss questions about their own firms and their own experiences. One-on-one interviews were conducted with all participants at one weekend session. During the other weekend, the group was divided into smaller discussion groups for a portion of the program. All sessions were taped and transcribed.

19. Prior to these two-city weekend sessions, we tested this "lawyers talking" qualitative research format with seventeen ABA Section of Litigation volunteers. These were almost all partners, roughly half male and half female, from all over the country. The main discussion vehicle was a videotape entitled "Professional Responsibility in Pretrial Litigation: The Morgantown Civic Center Collapse," produced by the University of Pennsylvania Center on Professionalism, which depicts a variety of classic examples of "gaming" in pretrial discovery.

20. The major case study, used with all groups, was based on the events reported in a Washington matter, *Washington State Physicians Insurance Exchange & Ass'n v. Fisons Corp.*, 858 P.2d 1054 (Wash. 1993). See Report, *Ethics: Beyond the Rules*, 67 Fordham L. Rev. 691, app. at 885-87 (1998) [hereinafter Report] (discussing *Fisons* material used in our study).

In almost all cases, the partners and associates from the two-cities group were selected at random from lists of litigators who had been at their firms for a minimum of three years. Some effort was made to insure a gender balance within each group. The random selection process within firms produced a set of partners that varied in age and family circumstances.²¹

The second phase of the data collection, almost a year after the first round, was based on discussions with separate groups of judges, plaintiffs' lawyers, and inside counsel in the same two cities in which we conducted the first round. The goal was to examine the working hypothesis concerning defense firm litigators by conducting similarly-structured discussions with those professionals who most frequently come into contact with, and potentially influenced, the conduct of those previously studied defense lawyers. We used a similar format for all the sessions. Each session began with a discussion of the same case study as had been used with the defense lawyers²² and moved through a series of topics concerning the participants' experiences in the discovery process. In each city we spent one-half day with the judges, one day with plaintiffs' lawyers, and one day with inside counsel. The academic observers took turns leading the discussion and posing questions. The sessions in one city were taped and transcribed.

In total, we talked to ten state or federal judges and magistrates, sixteen plaintiffs' lawyers, and sixteen inside counsel in the two cities. The judges and magistrates were selected in part for their experience with management of civil cases. We selected well-known plaintiffs' lawyers who had reputations as specialists in types of litigation that would pit them against attorneys from large law firms, including securities, antitrust, employment, product liability, and medical malpractice. Overall, the participants in this category were senior and financially successful. Inside counsel were chosen positionally. We first identified the corporations in each locale with significant law departments, and then approached either the general counsel or senior litigation counsel. Although these three groups were small and in no way approximated random samples, we succeeded in gathering rather diverse groups.²³ These extended conversations produced the data from which each researcher produced an independent report and analysis of what they heard.

21. The sample of large-firm lawyers we spoke with cannot be defended as representative on statistical grounds and our conversations with them must be seen as preliminary. But while their numbers are small, the nineteen randomly selected lawyers in the two-city group, and, for that matter, the seventeen ABA volunteers in the "test" run, seemed to represent a diversity of viewpoints and practices from within leading firms.

22. See *supra* note 20.

23. As a group, the plaintiffs' lawyers were probably less diverse in status and background than the judges or corporate counsel. They did, however, represent a wide spectrum of substantive specialties.

III. OVERVIEW OF OBSERVATIONS²⁴

The project *Ethics: Beyond the Rules* paints a canvas of the world of large-firm litigation in the mid-1990s and presents the interpretation of those images by scholars who study professions. Each presents a unique approach to this data, reflecting his own training and background and the different levels—of tone as well as content—on which the lawyers' conversations could be heard. The five papers in this collection, however, are remarkable in their consistency of description and in the similarity of their observations. This reflects the overall patterns exhibited in the talk of our groups of lawyer-subjects. Themes that run through all of the papers can be summarized as follows.

A. *The Power of the Adversary Norm*

To one degree or another, all of the researchers saw the problems in this area as inseparable from the structural underpinning of the litigator's work—the adversary system and its expectation of partisan conduct amidst a neutral, amoral stance—the so-called “dominant” or “standard” conception. They saw and heard the adversary norm as alive and well, some opining that nothing short of basic structural change will alter the climate of litigation.

In this world, information is marshaled competitively, competence is paramount, and advantages in resources or ability are to be exploited in the name of honoring the primacy of the duty to favor one's client. The greater the stakes, the harder the fight. Attention to the functioning of the system or to the justice of outcomes is secondary at best. Ethics is a matter of steering, if necessary, just clear of the few unambiguous prohibitions found in rules governing lawyers, i.e., that which is not unlawful is required if the client wants it.

B. *Externalizing Blame for Problems and Bad Outcomes*

Each group of lawyers sought to shift responsibility for systemic problems onto others with whom they interact. Plaintiffs' lawyers attacked the aggressive information withholding of defense counsel. The latter pointed to their disloyal, unreasonable clients and to frivolous, extortionate filings by, or incompetence of, plaintiffs' lawyers. Corporate clients complain about the over-aggressiveness of both lawyer groups, with everyone reactive in a system approximating a prisoner's dilemma. All blamed trial judges for failing to police the system. They, in turn, blamed the participants' and appellate courts' lack of support for tough sanctions. Researchers' reactions to this ranged from seeing it as an extension of the adversary stance and its

24. The term “observation” seems preferable to “findings” in light of the exploratory nature of this inquiry and the informality of the research methodology employed.

built-in conflict and contradictions, to the rhetoric of opponents in what is essentially a political fight and a massive case of denial.

C. *Heightened Market Competition and Resulting Insecurity*

Each paper in this collection confirms the widespread perception that large firms increasingly must compete for business and perform efficiently in order to remain profitable in the face of budget limits set by demanding clients. Firm-wide insecurity trickles down. Partners worry more about billing and longer careers than before, while junior lawyers are concerned most heavily with attaining partnership, as their odds have become more remote in recent years.

D. *Declining Relationships and Loyalties*

Loyalties that once prevailed in large firm practice and which may have served a host of behavior moderating functions, are disappearing. Once-regular clients have been transformed in the persons of in-house counsel, and are now transient purchasers of technical services. Reduced firm loyalty to its most junior lawyers is accompanied by a decline in the sentimental links²⁵ of more senior members looking for "exit" mobility²⁶ as "lateral" ship-jumpers. Given the growth of the bar and case filings, the "solitary bonds" that may have resulted from repeated litigation against the same lawyers are weakening, as opposing lawyers are now seen as one-time adversaries.²⁷

E. *The Weakness of Firm Culture*

While the papers differ a bit, most portray the large law firm as weak in terms of its role as a mode of ethics socialization or control. Researchers point to the irrelevance of formal mechanisms to lawyers' daily discretionary judgments,²⁸ and the lack of connection between ethicality and the reward system,²⁹ with large-firm litigation essentially an individual or small group activity. Clients hire lawyers, not firms.

Moreover, there were strong indications that firm ideology is not formally transmitted. The papers are uniform in citing decline in, or absence of, such elements as formal training or mentoring of junior

25. See Robert L. Nelson, *The Discovery Process as a Circle of Blame: Institutional, Professional, and Socioeconomic Factors that Contribute to Unreasonable, Inefficient, and Amoral Behavior in Corporate Litigation*, 67 *Fordham L. Rev.* 773, 787 (1998).

26. See Mark C. Suchman, *Working Without a Net: The Sociology of Legal Ethics in Corporate Litigation*, 67 *Fordham L. Rev.* 837, 869 (1998).

27. See Robert W. Gordon, *The Ethical Worlds of Large-Firm Litigators: Preliminary Observations*, 67 *Fordham L. Rev.* 709, 717-18 (1998).

28. See Nelson, *supra* note 25, at 789; Austin Sarat, *Enactments of Professionalism: A Study of Judges' and Lawyers' Accounts of Ethics and Civility in Litigation*, 67 *Fordham L. Rev.* 809, 826-27 (1998).

29. See Suchman, *supra* note 26, at 860.

lawyers in the area of ethical judgment.³⁰ They point to a lack of horizontal communication among lawyers, with partners unaware of, much less policing, each other's work, and the increase in size and geographic dispersal of firms coupled with stress occasioned by demands of technology-based communications. All discuss the absorption of laterals from other firms as part of the declining stability and increased "contamination" from heightened lawyer mobility, both in joining and leaving the firm. Only in hiring did firms seem to have a program aimed at promoting a coherent culture. If internal firm cultures exist, they are probably confined to small departmental work groups.

As evidence of this weakness, the papers uniformly describe the widely divergent perceptions of senior and junior lawyers about the climate in their firms and the prescription for addressing problems. Each notes the contradictory messages inherent in firms' efforts to cultivate two images simultaneously: tough "junkyard dogs" to attract clients, but civil and ethical practitioners to please judges and recruit law school graduates. The resulting void of guidance to junior lawyers may well be filled by other powerful systemic or environmental influences, especially the conduct of lawyers from other firms with whom associates interact. Culture can thus be seen as exogenous,³¹ reflecting or reinforcing the similarity of firms generally.

F. *The Decline of the Counseling Function*

The papers in this collection uniformly point to the supplanting of outside lawyers by in-house counsel in terms of access to client decision makers. The structure and economics of the staffing of litigation contributes to this, as partners are largely absent from the processing of cases after their inception. With clients described as uninterested in moral dialogue, and firms motivated to please clients, the relative autonomy of the outside firm lawyer has declined, as her role shifts from wise counselor to purveyor of technical services.

G. *Pragmatism as Morality*

All of the papers, using slightly different labels, note the discussants' avoidance or suspicion of any moral calculus in their daily choices. Decision-making was described as "situational" or prag-

30. This was consistent with the finding of one recent study of Chicago hiring partners, in which approximately three-fourths of firms expected incoming lawyers to bring with them "sensitivity to professional ethical concerns." Only twenty-five percent indicated that this skill should be developed by the firm. See Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. Legal Educ. 469, 490 tbl.11 (1993).

31. See Suchman, *supra* note 26, at 868.

matic,³² thinking “realistic” and instrumental,³³ standards as external, and ethical limits defined solely by rules. Several researchers pointed to the lack of connection between daily adversarial work and the lawyer’s moral sense, with a moral sensitivity beyond the rules that is more apparent in associates than partners.

H. *Eroding Conditions for the Exercise of Judgment*

By increasingly working alone with little monitoring in face of efficiency, technology, and overall work volume pressures, the conditions under which lawyers—especially junior lawyers doing the bulk of initial rounds of discovery—make daily judgments are increasingly inhospitable to calm and reasoned analysis. Each individual lawyer can be seen as a decision-making system in a fragile equilibrium, balancing internal drives and standards against countervailing external and environmental forces that seem to be gathering strength.

CONCLUSION

It is important to note that this project did not aim to measure the magnitude of problems facing the world of large-firm litigators, whether at a level of crisis or otherwise. Indeed, the definition of the “problem,” if any, was itself a significant phase of the discussion in the early going. Moreover, the extent to which there is a problem to be solved depends largely on the lens through which the data is viewed. If measured by violations of clear rules regulating lawyers, most of the researchers accepted the participants’ views that, notwithstanding recent highly publicized cases and the reality that much conduct of this sort is undetected, such deviance is rare in large law firms.³⁴ When the frame shifts, however, to the broader landscape of discretionary competitive acts that, while arguably within the rules, are suppressive of truth in civil litigation or costly in human terms, the picture is different, with controversial conduct more widespread. There is no consensus as to what constitutes questionable conduct within this range, as the range itself is a reflection of our adversary system and its indeterminate partisanship norms.

As to the larger picture of how the current landscape measures up, reactions ranged from rejection of the claim of crisis, citing the cyclical and possibly political nature of such claim of crisis and the overall

32. See Carla Messikomer, *Ambivalence, Contradiction, and Ambiguity: The Everyday Ethics of Defense Litigation*, 67 *Fordham L. Rev.* 739, 746-47 (1998); Nelson, *supra* note 25, at 780-81.

33. See Gordon, *supra* note 27, at 730-31.

34. The informants down-played the extent of the problem of clear ethical lapses, surmising that the perception of an increased problem could be attributed to the increase in the sheer number of lawyers and thus of “bad apples,” the heightened journalistic interest in law practice, and the fact that firms no longer protect deviant colleagues from publicity.

satisfaction of our participants,³⁵ to viewing lawyers' problems as symptomatic of larger societal trends,³⁶ to guarded pessimism about the future in face of changing external pressures.³⁷ While no one was prepared to sound an alarm, all sensed that the trends and the ways our participants talked were not encouraging.

35. See Sarat, *supra* note 28, at 809-10; Suchman, *supra* note 26, at 874.

36. See Messikomer, *supra* note 32, at 768.

37. See Nelson, *supra* note 25, at 781-85, 791-92.

Notes & Observations