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Professionalism: The Necessity for Internal Control

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PROFESSIONALISM: THE NECESSITY FOR INTERNAL CONTROL

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United States society has historically been competitive. This is a necessary outgrowth of the American focus on the individual and the corresponding ideals of an individual's freedoms. While there are rules to govern every kind of competition, and the public superficially adheres to the idea that how one plays the game takes priority over whether one wins or loses, in almost every aspect of our society winning is the only gain that is valued. In most situations, one's honesty, fairness, or decency seems to be overshadowed by the pursuit of victory at all costs.

Perhaps we have to accept this emphasis on winning as vital to competition in society and business, but such a perspective must never be entertained in the law. What must not be blurred is the recognition that, unlike business and society in general, the law is a profession with obligations that extend both to the client and to the public. Lawyers cannot strive merely for their clients' victories, regardless of the truth of their claims. In the legal profession, the end never justifies the means.

At the present time, both the legal profession and the public are focusing on professionalism and ethics in the law. New Model Rules of Professional Conduct have been approved by the American Bar Association and are being discussed and considered by the various state bar associations across the United States.[1] Apparently sparked by Watergate, and reinforced by the complicity of lawyers in other crises of the social order, the current mechanics of the law as a profession are being scrutinized.[2] Standing in the shadow of an alarming

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1. The Model Rules of Professional Conduct were adopted by the House of Delegates of the American Bar Association on August 2, 1983. At the time of the writing of this article the following states had adopted the Model Rules either in their entirety or with some modification: Arizona, Arkansas, Connecticut, Delaware, Florida, Idaho, Indiana, Louisiana, Maryland, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Virginia, Washington, and Wyoming. It should be noted, however, that rather than adopting the form of the Model Rules, Oregon and Virginia amended their respective Model Codes by incorporating the substance of some Model Rules. Additionally, North Carolina amended its rules by taking structure and substance from both the Model Rules and the Model Code of Professional Responsibility.

2. *See* Frug, *The Proposed Revisions of the Code of Professional Responsibility: Solving the Crisis of Professionalism, or Legitimating the Status Quo*?, 26 VILL. L. REV. 1121, 1122, (1981) (perceived

number of recent bribery accusations involving judges, a situation of particular concern to one of the authors who has spent over thirty-five years on the trial bench, it is worthwhile to reflect on the system of regulation within the legal profession.

The law is said to be a self-regulated profession.[3] What constitutes a profession, or a professional, is a matter to which scholars have devoted considerable attention. Dean Roscoe Pound has described a profession as:

> a group of men pursuing a learned art as a common calling in the spirit of public service—no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose. Gaining a livelihood is incidental, whereas in a business or trade it is the entire purpose.[4]

The origin of the law as a profession can be traced to medieval times. The ancient legal profession was regarded as a learned one along with theology and medicine, distinguishable from craft and trade associations by demarcations of society, economy and education.[5] Members of the professions were generally men from leading families[6] who trained in the classics rather than in elaborate

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crisis in legitimacy of professionalism, manifested in the undermining of the current role of legal profession in social order, purportedly has prompted the legal profession to revise its ethical rules).

3. *See* Rubin, *The Legal Web of Professional Regulation*, in REGULATING THE PROFESSIONS 29, 31 (R. Blair & S. Rubin eds. 1980).

4. R. POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953). *See also* Greenwood, *Attributes of A Profession*, SOC. WORK 45, 45 (July 1957) ("professions" possess systematic theory, authority, community sanction, ethical codes, and culture); Goode, *Community Within A Community: The Professions*, 22 AM. SOC. REV. 194 (1957) ("profession" is community without physical locus). What purports to make a profession a community are the following characteristics:

> (1) Its members are bound by a sense of identity. (2) Once in it, few leave, so that it is a terminal or continuing status for the most part. (3) Its members share values in common. (4) Its role definitions *vis-a-vis* both members and non-members are agreed upon and are the same for all members. (5) Within the areas of communal action there is a common language, which is understood only partially by outsiders. (6) The Community has power over its members. (7) Its limits are reasonably clear, though they are not physical and geographical, but social. (8) Though it does not produce the next generation biologically, it does so socially through its control over the selection of professional trainees, and through its training processes it sends these recruits through an adult socialization process.

Id. at 194 (citations omitted). A professor of law describes a professional as one who "employs intellectual and technical knowledge and skills that have been obtained by a substantial investment in education and training." Kissam, *Antitrust Law, the First Amendment, and Professional Self-Regulation of Technical Quality*, in REGULATING THE PROFESSIONS 144 (R. Blair & S. Rubin eds. 1980). Purportedly an "ideal" professional is one who, along with developing a high degree of knowledge, engages in a social service that is both essential and unique. D. CAMPBELL, DOCTORS, LAWYERS, MINISTERS: CHRISTIAN ETHICS IN PROFESSIONAL PRACTICE 21 (1980).

> [The professional] must develop the ability to apply the special body of knowledge that is unique to the profession[,] . . . is part of a group that is autonomous and claims that right to regulate itself[,] . . . recognizes and affirms a code of ethics[,] . . . exhibits a strong self-discipline and accepts personal responsibility for actions and decisions.

Id. at 21-24.

5. *See* Rubin, *The Legal Web of Professional Regulation*, in REGULATING THE PROFESSIONS 29, 32 (R. Blair & S. Rubin eds. 1980). The professions preceded vocational societies, which were formed in Europe in the eleventh and twelfth centuries. *Id.*

6. *See* H. DRINKER, LEGAL ETHICS 5 (1953).

apprenticeship programs.[7] Professional training was concerned with learning how one should act, as well as with the much more difficult task of learning why, and when, not to act. Professionals commonly had little regard for the competition and *caveat emptor* of the crafts because they were not wholly dependent on their professions for their livelihood.[8]

While the crafts and the learned professions had social, economic, and educational differences, significant distinctions were not present in the initial organization of these entities.[9] The special training that was concomitant with each craft or profession generated solidarity among the various associations' memberships.[10] The centrality of licensing in the trades and the professions, a concept which persists today, arose from these early organizations.[11] Although viewed by some as a way to restrict individuals from freely pursuing occupations,[12] the early regulatory structures nevertheless served to focus on an entity's expertise, and thereby gave autonomy of control to the associations' individual practices.[13] Since that time, the adoption of a special set of rules to regulate members has been a characteristic attributable to the professions.[14]

In the United States, however, the professions have not always been as closely regulated as they have been in Europe. Historically, there has been animosity toward regulated professions in this country, particularly toward a regulated legal profession.[15] Laws that were passed prohibiting the practice of law in seventeenth century Virginia, for example, proved unworkable.[16] In addition, during the nineteenth century some states felt that regulated professions were undemocratic and passed constitutional provisions that provided every voter of good moral character a natural right to practice law.[17]

Leaders of the bar attempted to stop what was seen as growing "commercialism" in the essentially unregulated legal profession during the latter part of the nineteenth century, and began a movement to reestablish standards of character, education, and training for the profession.[18] Within this synergy, the Alabama State Bar Association in 1887 formulated the first Code of Professional Ethics for the American legal profession.[19] Subsequently, in 1908, the Ameri-

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7. *See* Rubin, *supra* note 5, at 32.

8. *See* H. DRINKER, *supra* note 6, at 5.

9. *See* Rubin, *supra* note 5, at 32.

10. *Id.*

11. *See* Gross, *The Myth of Professional Licensing*, AM. PSYCHOLOGIST 1009, 1011 (1978). While professions used licensing arrangements to establish a charter of autonomy, similar control was exercised by craft guilds. *Id.* at 1011-12.

12. *See* M. FRIEDMAN, CAPITALISM AND FREEDOM 138-44 (1962). Medieval guilds demonstrated a system for controlling who was permitted to follow a designated pursuit. *Id.* at 138.

13. *See* Gross, *supra* note 11, at 1010-11.

14. *See* W. MOORE, THE PROFESSIONS: ROLES AND RULES 113-16 (1970).

15. *See* H. DRINKER, *supra* note 6, at 19-21.

16. *See* R. POUND, *supra* note 4, at 136.

17. *See* H. DRINKER, *supra* note 6, at 19.

18. *Id.* at 20.

19. 118 Ala. XXIII (1899). Along with David Hoffman's 1834 "Fifty Resolutions in Regard to Professional Deportment" and George Sharswood's 1854 "An Essay on Professional Ethics," the Code of Ethics as adopted by the Alabama State Bar Association was a principal antecedent to the

can Bar Association promulgated a set of professional principles known as the Canons of Professional Ethics, which were adopted in whole or in part throughout the United States.[20] A consensus grew among the bar, however, that the Canons were incomplete, unorganized, and failed to recognize the distinction between the inspirational and the proscriptive.[21] Hence, in 1969, the Code of Professional Ethics was promulgated by the American Bar Association.[22] Most recently, in 1983, the American Bar Association adopted the Model Rules of Professional Conduct as the alternative to the Code of Professional Responsibility, part of which was purported to be ambiguous and contradictory.[23] According to the late Robert J. Kutak, former Chairman of the American Bar Association Commission on Evaluation of Professional Standards, the Model Rules define the law of lawyering and seek to guide the conscientious lawyer to balance competing duties in the professionally responsible representation of cli-

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Canons of Professional Ethics adopted by the American Bar Association in 1908. W. TRUMBULL, MATERIALS ON THE LAWYERS PROFESSIONAL RESPONSIBILITY 4 n.2 (1957). Prior to the American Bar Association's adoption of the Canons of Professional Ethics, the Code as adopted by the Alabama State Bar Association served as a model to most of the other state bar associations in formulating their individual "codes" of ethics or "duties" of attorneys. H. DRINKER, *supra* note 6, at 23. The Code of Ethics, as adopted by the Alabama State Bar Association, stresses the need for high moral principles and sets forth the duties of attorneys:

> 1st. To support the constitution and laws of this State and the United States.
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> 2nd. To maintain the respect due to courts of justice and judicial officers.
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> 3rd. To employ for the purpose of maintaining the causes confided to them, such means only as are consistent with truth, and never seek to mislead the judges by any artifice or false statement of the law.
>
> 4th. To maintain inviolate the confidence, and, at every peril to themselves, to preserve the secrets of their clients.
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> 5th. To abstain from all offensive personalities, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which they are charged.
>
> 6th. To encourage neither the commencement nor continuance of an action or proceeding from any motive of passion or interest.
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> 7th. Never to reject, for any consideration personal to themselves, the cause of the defenseless and oppressed.

118 Ala. at XXIII. In focusing on the attorney's duties, the Alabama State Bar Association adopted fifty-six general rules to serve as guidance for its members. *Id.* at XXIII-XXIV.

20. The Canons of Professional Ethics were adopted by the American Bar Association at its thirty-first Annual Meeting on August 27, 1908. W. TRUMBULL, *supra* note 19, at 373.

21. *See* Wright, *The Code of Professional Responsibility: Its History and Objectives*, 24 ARK. L. REV. 1, 5 (1970).

22. *See* Model Code of Professional Responsibility, Preliminary Statement (1969). The Code is composed of three parts: 1) Canons—concise statements setting forth the basic duty of lawyers; 2) Ethical Considerations—statements of activity and conduct to which practitioners should aspire; and 3) Disciplinary Rules—statements setting forth minimum standards of conduct which must be met or a lawyer may be subject to disciplinary action. *Id.* The three parts of the Code of Professional Responsibility are separate but interrelated, serving both as an inspirational guide and as a basis for disciplinary action when minimum standards are not met. *Id.*

23. *See* Kutak, *Model Rules: Law for Lawyers or Ethics for the Profession*, 38 REC. A.B. CITY N.Y. 140, 142-43 (1983) (Model Rules seek to clarify, rationalize, and guide lawyers in matters where articulations in Code of Professional Responsibility were ambiguous, contradictory or silent).

ents.[24] The Model Rules are rules of reason, intended to provide a framework for the ethical practice of law.[25]

At the present time, members of the legal profession within the individual states are reviewing and reevaluating their self-regulating rules of conduct in light of the American Bar Association's adoption of the 1983 Model Rules.[26] As the profession presently undertakes its introspective study of rules of professional behavior, some thought should be given to the context in which the rules govern a lawyer's conduct.

When evaluating professional conduct, it is appropriate to reflect upon the fact that the law of the United States is built upon a system of precedents. Through reliance on precedents we use what was learned in the past to solve the problems of the present and avoid recurrence of these problems in the future. This system has permitted the common law to flourish and prevail, thus allowing our legal system to avoid set rules, the evolution of which is more akin to civil and canon law.[27]

When addressing the matter of appropriate professional conduct, however, the legal profession has chosen to implement a system of rules. Nevertheless, it should be clear to us that the complexities of moral judgment ever present in the professional life of a lawyer are not resolved by the presence of rules of professional conduct. Although rules and codes of professional responsibility will continue to play a role in defining and enforcing proper professional conduct, the efficacy of formal rules to regulate considerations that are morally relevant to a lawyer's conduct is questionable. Rather than viewing the rules as absolutes, attorneys may approach a rule governing particular conduct in terms of how many exceptions can be found within its stated perimeters.

The focus of any regulation of the legal profession should always be on a lawyer's responsibility to the individual client and to society, instead of on a lawyer's rights.[28] Whether expressed in terms of the "law" of legal ethics or a "code" of ethics, the necessity of exercising one's moral judgment when fulfilling one's professional duty is not precluded by the presence of rules or a code.[29] As we rely increasingly upon formalistic rules, we appear to be abandoning the underlying tenets of "professionalism."[30] In one sense, the movement toward rules as a substitute for morality reflects a popular tendency to assert that there are no moral absolutes: that the ideas of right and wrong are purely subjective and

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24. Kutak, *The Law of Lawyering*, 22 WASHBURN L.J. 413 (1983).

25. *See* Model Rules of Professional Conduct, Preliminary Statement (1969).

26. *See supra* note 1 for a discussion of the adoption of the Model Rules of Professional Conduct.

27. *See* Schwartz, *The Law and Its Development: A Synoptic Survey*, SO. ILL. U.L.J. 44, 46-47 (1978).

28. *See* Model Rules of Professional Conduct, Preamble (1983). A lawyer functions as a representative of clients, as an officer of the legal system and as a public citizen with a special responsibility for the quality of justice. *Id.*

29. It is acknowledged that within the framework of the Model Rules of Professional Conduct difficult issues of professional discretion may arise. *See id.* In such instances lawyers should exercise sensitive professional and moral judgment in seeking resolutions to those difficult issues. *Id.*

30. *See supra* note 4 and accompanying text for a discussion of the definition of a "profession."

hence not to be relied upon to govern behavior. But if study of the law teaches anything, it teaches that the old distinction between that which is *malum in se* and that which is merely *malum prohibitum* is a very real one. Failure to accept this fact may explain many of the problems which face our present society. That, however, is a matter beyond the scope of this dissertation.

When a problem or a dilemma arises, the professional ethos ideally should dictate that one's own professional standards should govern without the necessity of using specified rules as a shield for actions taken. If a lawyer makes an error in practice, it should be that lawyer's responsibility to take remedial means to rectify it. While this approach is admittedly altruistic, it may well mark the difference between a profession and a trade.[31] We expect those engaged in profitable businesses to have a reasonable degree of honesty. When profit prevails over honesty, however, criminal statutes are enacted to reinforce the expectation.[32] Unlike the person in business, one expects and demands that a lawyer exercise more than ordinary care. In addition to the inevitable external controls of proscriptive behavior of the internally regulated bar, an individual's internal controls are an integral part of professionalism. This introspective aspect of professionalism must reflect our obligation to the interest of the public as well as the interest of the client. When individual morality is exerted, so is the keystone of professionalism, regardless of formalized rules.

Historically, there have been other times when the underpinnings of the law seemed replete with competing forces. When Moses was asked to define the basic law by which people should be governed, his response was that the whole of the law is "Thou shalt love the Lord with all they heart, and they neighbor as thyself."[33] As a great lawyer said, "This is the whole of the law. All else is explanation."[34] When entangled in the struggle between the competing forces of society, self, and profession, or when tempted to use these competing forces to entangle someone else, we should look to the whole of the law for guidance. The inseparability of freedom and responsibility embodied therein serve as a test to our actions and our advocacy. Once the embodiment of the spirit of public service dissipates within our ranks, we are no longer truly professionals. We are

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31. *See supra* notes 5-8 and accompanying text for a discussion of the distinction between a profession and a trade.

32. *See, e.g.* 18 U.S.C. §§ 641-65 (1982) (embezzlement and theft);15 U.S.C. §§ 1-31 (1982) (monopolies and combinations in restraint of trade); 15 U.S.C. § 78ff (penalties for willful violation of Securities Exchange Act).

33. The earliest source of this quotation attributes these words first to Moses (*Deuteronomy* 6:5; *Leviticus* 19:18), and then to Jesus (*Matthew* 22:39; *Mark* 12:29-31; *Luke* 10:27). This idea of the law is basic to both the Jewish and Christian religions. While it is customary now to look at the ancient religious figures as equivalent to our religious leaders, they were regarded by their contemporaries as teachers of the law.

34. This quotation, probably apocryphal, is attributed to Hillel who, while being harassed by Roman soldiers, was ordered to recite the whole of the Jewish law while standing on one leg. Its source is no longer available. However, probably more accurate is the version given in IV THE JEWISH ENCYCLOPEDIA 398 (1909) in which Hillel was quoted as saying when talking to a prospective convert: "What is hateful to thee, do not unto thy fellow man: this is the whole law; the rest is commentary." Hillel was the leading teacher of law in Jerusalem in the time of King Herod.

then no different from manufacturers or merchandisers whose competitive behavior requires regulation by outside forces. Rather than relying on such forces of regulation, we must strive to be regulated by the forces of learning and conscience within ourselves. This is the embodiment of professionalism.