



2001

## Real World Pressures on Professionalism

Thomas D. Morgan

Follow this and additional works at: <https://lawrepository.ualr.edu/lawreview>



Part of the [Legal Ethics and Professional Responsibility Commons](#)

---

### Recommended Citation

Thomas D. Morgan, *Real World Pressures on Professionalism*, 23 U. ARK. LITTLE ROCK L. REV. 409 (2001).  
Available at: <https://lawrepository.ualr.edu/lawreview/vol23/iss2/3>

This Article is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in University of Arkansas at Little Rock Law Review by an authorized editor of Bowen Law Repository: Scholarship & Archives. For more information, please contact [mmserfass@ualr.edu](mailto:mmserfass@ualr.edu).

## REAL WORLD PRESSURES ON PROFESSIONALISM

*Thomas D. Morgan\**

It is good to focus attention on professionalism. More than a study of rules, consideration of professionalism can give us pride in our traditions, greater confidence in the health of the legal profession, and hope for a positive future. Defining professionalism remains difficult,<sup>1</sup> but it is fair to say that most of us think we know it when we see it. Law school programs try to identify where today's lawyers fall short in their professionalism efforts and to suggest how we can come closer to the ideal. Those are appropriate and worthy objectives.

It is not my intention to throw cold water on that effort. On the other hand, I believe that the decline in professionalism many tend to see today is not entirely the result of personal failings of lawyers. Indeed, the perceived decline has occurred at a time when some of the brightest, most idealistic lawyers in our history have assumed leadership roles in law firms and the bar. Curing the problems of professionalism may indeed turn out to require personal transformations in some attitudes of some lawyers, but I am going to suggest that many problems of professionalism are less within our control and thus require more than exhortation for solution.

You may conclude that I am offering excuses—that I am saying: “The system made us do it.” I hope to avoid that. What I will suggest is that the legal profession now faces a transformed world, one that the rhetoric of earlier generations often does not address very well. I will argue that it is only when we think about that changed reality that we can address issues of professionalism in a way that can make a

---

\* Oppenheim Professor of Law, George Washington University. This paper served as a basis for a discussion of professionalism at the University of Arkansas at Little Rock at a program held February 25-26, 2000.

1. In its 1986 Report, “. . . IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM,” the American Bar Association Commission on Professionalism surveyed the various definitions of professionalism and selected the one offered by Dean Roscoe Pound. “The term refers to a group . . . pursuing a learned art as a common calling in the spirit of public service—no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose.” ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953).

difference. In the remainder of this essay, I suggest eight pressures on professionalism with which I believe we have to come to terms.

### I. GROWTH IN THE NUMBER OF LAWYERS

First, an inescapable reality facing today's lawyers is the increased number of colleagues chasing the same legal work. In the last twenty-five years, the number of American lawyers has roughly tripled, from about 300,000 in the mid-1970s to about 1,000,000 today.<sup>2</sup> Fortunately, the demand for lawyers has also increased, although not proportionately. University of Chicago economist Peter Pashigian studied the legal profession several years ago and demonstrated that the most important stimulus for the need for legal services is not the degree of regulation, not the receptivity of courts to new legal theories, indeed it is not anything internal to the legal system. Instead, the demand for legal services correlates most closely with growth in the gross domestic product, the level of economic activity in the country generally.<sup>3</sup>

The number of lawyers has grown sharply, but with the exception of recessions in the late 1970s and early 1990s, the nation's gross domestic product in constant dollars has grown almost as fast as the number of law graduates. As a result, the "surplus" of lawyers that we have to account for is less than might first appear, but work I did in the mid-1990s to update the Pashigian numbers suggests that, even given the solid economic growth in recent years, the nation has produced a supply of lawyers now roughly fifteen percent greater than present demand would justify.<sup>4</sup>

Thinking about such a point is important to understanding the kind of analysis I hope to put forth. One million lawyers have been minted. Even if we were to regret that, it would do no good to assign blame. Nor is the development something we should necessarily regret. The largest source of the growth in numbers results from a new interest in

---

2. The most carefully collected data on the legal profession remain BARBARA A. CURRAN, ET AL., *THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980s* (1985), and BARBARA A. CURRAN & CLARA N. CARSON, *THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN THE 1990s* (1994).

3. See B. Peter Pashigian, *The Market for Lawyers: The Determinants of the Demand for and Supply of Lawyers*, 20 J.L. & ECON. 53 (1977); B. Peter Pashigian, *The Number and Earnings of Lawyers: Some Recent Findings*, 1978 A.B.F. RES. J. 51 (1978); B. Peter Pashigian, *Regulation, Preventive Law, and the Duties of Attorneys*, in *THE CHANGING ROLE OF THE CORPORATE ATTORNEY* (William J. Carney ed., 1982).

4. See Thomas D. Morgan, *Economic Reality Facing 21st Century Lawyers*, 69 WASH. L. REV. 625 (1994).

law school among women and members of minority groups, both of which had theretofore been greatly under represented among lawyers and whose presence in the bar has added clearly needed diversity.

On the other hand, growth in a profession this extensive and this rapid—whatever its source and however demand has grown—has the inevitable effect of reducing the level of informal sanctions that characterized earlier efforts to enforce professionalism. One is much more likely to treat a professional colleague well when one expects to meet that lawyer again. One can more afford to let professional conduct deteriorate, however, when the number of lawyers decreases the likelihood of dealing with the lawyer again and the penalty for boorishness goes down.

My point, then, is that it is not enough to decry the decline in professionalism without acknowledging that some of its source may be like the growth in the number of lawyers—a growth that in itself is beyond our control and not altogether bad. In the kind of real world we face, solutions to the problems of professionalism will require more imagination and effort than simple exhortation.

## II. INCREASED PRESSURE FOR MARKETING AND PROFITABILITY

A second important pressure on professionalism has come from the vigorous efforts of lawyers to market their services. They have been permitted to do this overtly for more than twenty years, and many of us welcomed the *Bates* decision that permitted lawyer advertising.<sup>5</sup> We had worried that particularly potential middle-income clients were having difficulty knowing what lawyers charged and which ones had an interest in their kinds of cases. We hoped that one effect of lawyer advertising would be to overcome that deficit in information.

But the law of unintended consequences affects changes in ethical standards as it does so much of human activity. What I and others did not adequately foresee was how quickly the freedom of lawyers to advertise would be seized upon by lawyers and firms to justify marketing their practices to all kinds of potential clients. I am not second-guessing the constitutional validity of lawyer advertising, but what is constitutional is not inherently consistent with professionalism.

---

5. See *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977). I cannot escape at least some association with the decision; the Court cited Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977). See *Bates*, 433 U.S. at 372-73 nn.25 & 27.

I find that a great many lawyers condemn the ads they see on television from the personal injury bar but simultaneously adopt a no-holds-barred effort to attract and hold lucrative clients. The result seems to have been an increase in meanness within the bar and a decline in professional values. In many law partnerships, the dominant ethic has become "you eat what you kill," i.e., originating business is all that counts. Civic activity and pro bono work do not get much credit under that rule unless the lawyer's notoriety makes him or her a rainmaker. Few either measure or reward the extent to which the lawyer's work enhances the community.

Further, when a given lawyer or practice group is unhappy with its share of firm profits under this model, the group simply moves to another firm, and the process continues. Controversies over when and what kind of active recruiting of the former law firm's clients a departing lawyer may undertake—what one writer has called the "ethics of grabbing and leaving"<sup>6</sup>—are almost always unseemly and typically not in the long-run interest of either clients or lawyers as a profession.<sup>7</sup> What is ultimately worse, the dream of achieving broad distribution of legal services that led many of us to favor lawyer advertising remains distant.

### III. PRESSURES TOWARD COST CONTROL IN OUR CLIENTS

A third real life pressure that may affect lawyer professionalism is the degree of competitive pressure that our clients now experience in markets that are constantly expanding and changing shape. Such competition will hopefully benefit consumers everywhere, but clients have and will experience competition in the form of a need to control costs. Many businesses have closed offices and laid off managers who thought they had lifetime security. Making the transition to a global economy—one served by the Internet for which few managers had been trained—has been hard on many people, but not making this transition cannot be an alternative for clients who hope to survive at all.

Until now, lawyers have enjoyed relative immunity from this pressure, but that immunity cannot last. Among the major costs clients

---

6. ROBERT W. HILLMAN, LAW FIRM BREAKUPS: THE LAW AND ETHICS OF GRABBING AND LEAVING 145 (1990). See also Robert W. Hillman, *The Law Firm as Jurassic Park: Comments on Howard v. Babcock*, 27 U.C. DAVIS L. REV. 533 (1994).

7. For a different view, see Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229 (1995).

face are lawyers' fees. We can talk at bar association meetings about the quality service we provide, and we can judge that quality by internal professional standards, but the ultimate test of the demand for our services is going to be whether clients find them worth what they cost. That, in turn, will be determined by standards not entirely within our professional control.

Indeed, clients have found ways around some of our traditional professional standards as they try to manage their legal costs. One such client response has been to bring work in-house. Doing so not only tends to permit clients to avoid what they see as high law firm billing rates, but it allows payment of compensation in the form of stock and bonuses tied more directly to the client's success than payment of hourly rate bills can ever be.

Lawyers with high professional standards have understandably been concerned about a loss of independence and possible overreaching associated with too great a financial involvement in their clients' affairs.<sup>8</sup> On the other hand, professionalism can seem counterproductive if client welfare is in fact enhanced by better linking lawyer compensation to the lawyers' contributions to the client's overall effort. If our definition of professionalism is not consistent with reality as clients see it, we can wonder how reliable a guide our definition really is.

#### IV. INCREASING SPECIALIZATION

A fourth external reality with which lawyers must come to terms is the importance of specialized expertise in modern practice. An individual lawyer who knows all there is to know about an aspect of international tax law, for example, is a resource few clients would find it worthwhile to develop internally. Thus, we might predict that lawyers in private practice are most likely to be retained to meet specialized needs at particular times.

If this analysis is correct, we should expect to see the continued growth of law firms with a common name but made up of key individuals or practice groups that operate with some autonomy. The phenomenon has a very positive side; it can allow us to serve clients better. However, we can predict that a bar composed of narrow specialists will be less unified around broad professional concerns than we like to think

---

8. Model Rule 1.8(a) regulates lawyers' business dealings with a client. The issue of lawyer stock options was the cover story in a recent ABA Journal. See Debra Baker, *Who Wants to Be a Millionaire*, 86 A.B.A. J., Feb. 2000, at 36.

the bar once was. As just one indicator, membership in the American Bar Association used to be consistently fifty percent of all lawyers; now it is down to about thirty-five percent.<sup>9</sup> The ABA still represents a lot of other lawyers, but even within the ABA, the largest sections tend to be those that represent specialists rather than general concerns<sup>10</sup> and a majority of lawyers seem to be joining more specialized bar associations or no associations at all.

Again, this pressure on professionalism is inevitable and results from forces outside our control, so the problems it creates will take unusual imagination to address. My own guess is that law firms will be the institutions through which we will want to work to make increased professionalism a reality. Even today, specialized practice groups join large, multi-city organizations in part because of the credibility and reputation for quality control the firms enjoy. Clients as well as lawyers have a stake in having our professional standards encourage law firms to exercise appropriate control over their lawyers so as to preserve and develop the value of the reputation that is a firm-wide—indeed, a community-wide—asset.<sup>11</sup> It is through action of those firms, then, that practical steps to improve professionalism might best be taken.

#### V. OPTIONS PROVIDED BY ALTERNATIVE DELIVERY OF LEGAL SERVICES

A fifth reality undercutting traditional professionalism may be clients' increasing recognition that it does not take a law school graduate to do many things that lawyers usually see as the practice of law. Law firms know that, of course, and have long used paralegal and other support personnel working under the lawyer supervision ethical standards require. Within an organizational client, however, lawyer supervision need only be provided if it is cost-effective to do so. Even preparation of court documents can be done by non-lawyers within a

---

9. See American Bar Association, Division for Media Relations and Communication Services, *Profile and Overview of the American Bar Association* (visited Oct. 13, 2000) <<http://www.abanet.org/media/overview/home.html>>. That website reports that the ABA had 349,000 lawyer members in 2000. *Id.*

10. The largest sections are Litigation with about 60,000 members and Business Law with over 50,000 members. See American Bar Association, Section of Litigation, *Section of Litigation Home Page* (visited Nov. 27, 2000) <<http://www.abanet.org/litigation/members/home.html>>; American Bar Association, Section of Business Law, *60 Year Anniversary* (visited Nov. 27, 2000) <<http://www.abanet.org/buslaw/60years.html>>.

11. See Richard W. Painter, *The Moral Interdependence of Corporate Lawyers and Their Clients*, 67 S. CAL. L. REV. 507 (1994).

business organization in a manner to which our professional requirements cannot effectively speak.

Nor is this avoidance of lawyers limited to organizational clients. Legal information and advice is increasingly available to individuals planning their own affairs, drafting their own documents, and even appearing pro se in litigation. Books of legal information have been around for many years, of course, but the Internet now makes such information ubiquitous. The Legal Information website at Cornell Law School, for example, receives over eight million "hits" each week.<sup>12</sup> Some of the contact may be from lawyers, of course, but others are undoubtedly from individuals trying to solve their own problems.

Last year in Texas, an unauthorized practice of law challenge against the sale of the Quicken Family Lawyer CD-ROM for use by individuals trying to draft their own legal documents met with success.<sup>13</sup> From the standpoint of lawyers, use of such tools may seem foolish, but to many of our potential clients, the difference between the cost of a CD-ROM and a lawyer-drawn instrument makes the wise choice clear. Notwithstanding lawyer views, the Texas legislature promptly took the side of client freedom and made clear that sale of such computer software is not the unauthorized practice of law.<sup>14</sup> My point is not to encourage clients to do without lawyer services, but their desire for choice is a reality we cannot ignore in defining what our professional standards should be.

## VI. MOVE TOWARD PUBLIC FUNDING OF LEGAL SERVICES FOR THE POOR

The creation of the Legal Services Corporation represents a sixth and possibly controversial illustration of what I believe is a pressure on professionalism. My point is not to condemn the idea of publicly-funded legal services. Like many of the developments outlined in this article, such programs represented changes in response to real public

---

12. Telephone interview with Peter Martin, Professor of Law, Cornell University (Feb. 7, 2000). Professor Martin was one of the leaders of the effort to develop the Cornell website. A "hit" is counted each time information is requested. Several could be associated with a single user's visit, so the number of persons using the site each month is considerably less. The number of users increases each month, furthermore, so the actual figure should be confirmed if the precise number is important to the reader. *Id.*

13. *See Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, 1999 WL 47235 (N.D. Tex. Jan. 22, 1999), *vacated and remanded*, 179 F.3d 956 (5th Cir. 1999).

14. *See* THOMAS D. MORGAN & RONALD D. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 601-02 (7th ed. 2000).

needs. My point here, as it was in discussing the earlier developments, is to say that some desirable changes can put unintended but real pressures on lawyer professionalism. Here, it is reflected in a reduction of lawyers' sense of obligation to assume responsibilities that are properly ours.

Model Rule 6.1 asserts that "a lawyer *should aspire* to render . . . pro bono publico legal services . . ." When the rule first appeared in the Kutak Commission's 1980 Discussion Draft, however, it demanded more. "A lawyer *shall render* unpaid public interest legal service," the rule said, and the recipients of service were broadly defined. "A lawyer may discharge this responsibility by service in activities for improving the law, the legal system, or the legal profession, or by providing professional services to persons of limited means or to public service groups or organizations." But each lawyer was to "make an annual report concerning such service to appropriate regulatory authority."<sup>15</sup>

The bar reacted to the proposal for mandatory service, issued after creation of the publicly-funded program, extraordinarily. It almost disbanded the Kutak Commission over the very suggestion that a lawyer is required to give something back to his or her community.<sup>16</sup> The absence of a minimum hour requirement did not make the rule palatable. The ABA exists to help lawyers *against* such public service, the argument seemed to be. The ABA sent the Commission back to the drawing boards.<sup>17</sup>

In fairness, I should note that the case for mandatory provision of pro bono legal services is not self-evident to everyone. There is a responsible argument that it is morally more desirable that lawyers

---

15. The Discussion Draft produced by the ABA Commission on Evaluation of Professional Standards (a.k.a. the Kutak Commission) is reproduced beginning at page 67 of THOMAS D. MORGAN & RONALD D. ROTUNDA, 1980 SELECTED NATIONAL STANDARDS SUPPLEMENT TO THOMAS D. MORGAN & RONALD D. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY (1976). At that time, the rule quoted was Rule 8.1.

16. In fairness, the disciplinary rules of the ABA Model Code of Professional Responsibility did not deal directly with pro bono work, so we should probably be grateful that the Model Rules say anything at all.

17. The next year, the Commission changed the requirement that a lawyer "*shall* render unpaid public interest legal services" to the current statement that a lawyer "*should* render public interest legal services . . . at no fee or a reduced fee." This was the Proposed Final Draft of the Model Rules and may be found beginning in THOMAS D. MORGAN & RONALD D. ROTUNDA, 1981 SELECTED STANDARDS SUPPLEMENT TO THOMAS D. MORGAN & RONALD D. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 67 (2d ed. 1981). The rule had by then received its present designation as Rule 6.1. In 1993, the rule was amended to assert an *aspiration* for a "50-hour" contribution of "pro bono publico legal services per year" but it remains only an aspiration.

volunteer such services. I use this example to raise a more basic point. I believe the decision to create the Legal Services Corporation, however wise in the interest of providing quality legal services to the poor, went a long way toward creating a sense in lawyers that providing legal services to the poor was no longer a lawyer professionalism issue. Overcoming that kind of pressure on professionalism is likely to require more than simple good will.

#### VII. EXCESSIVE CONCERN ABOUT CONFIDENTIALITY INSTEAD OF ITS PUBLIC IMPACT

Our own standards for protecting confidential client information creates a seventh pressure on professionalism. The ABA Model Rules now create a wide zone of protected information and only limited exceptions from that protection. Unlike the Model Code, however, ABA Model Rule 1.6 reduces the exceptions almost to the vanishing point.

Under the Model Code, a lawyer could reveal confidential information when required by law or court order. Thus, if a law required professionals to report cases of continuing child abuse about which a lawyer knew, the lawyer could be required by that law and thus permitted by the Model Code to make disclosures necessary to protect the child. Now, however, that dilemma has at least presumptively changed. The Comment to Rule 1.6 notes: "Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such supersession."<sup>18</sup>

Even more important, under the Model Code a lawyer could warn a potential victim against a client's intention to commit any crime. Under Model Rule 1.6, however, the only crimes that a lawyer may warn against are crimes that threaten the victim's death or substantial bodily harm.<sup>19</sup> A lawyer who knows that her client plans to go to a distant city in the indefinite future and assault a former business associate probably may not, Rule 1.6 says, call and warn the likely victim. If death or substantial bodily harm is not "imminent," the lawyer must keep the secret safe.

As is true with so many of the pressures on professionalism, one can argue that such rigorous protection of confidential client information

---

18. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6, cmt. ¶ 21 (1983).

19. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1983).

protects clients interest and thus is well within the professionalism tradition. However, interestingly, some of the most zealous advocates of strict confidentiality have not been the criminal defense lawyers whose violent clients appear in most of the hypotheticals; they have been corporate lawyers, some of whose clients make a lot of their money skating on the thin edge of criminal and fraudulent conduct that virtually no definition of professionalism would let a lawyer assist.

A bit of the history of the development of Rule 1.6 helps make the point. When the Kutak Commission considered the balance to be struck between confidentiality and public protection, it proposed two occasions for lawyer disclosure in addition to those finally adopted. Those were, first, "to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in . . . substantial injury to the financial interests or property of another," and second, "to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used."<sup>20</sup> It was the provision about protecting the public against significant financial fraud that was deleted by the ABA House of Delegates. It thus is another one of the classic stories of the Kutak Commission's good beginnings ultimately defeated by lawyers voting in what clearly seems to have been a perversion of any true sense of professionalism.<sup>21</sup>

Of course, ironically, Rule 1.6 that we have been discussing has proved to be the least influential of the Model Rules as the states have considered what they should demand of their own lawyers. Over thirty jurisdictions, for example, still permit a lawyer to disclose the client's intention to commit any crime. Ten states *require*—not simply permit—disclosure of the intent to commit a crime threatening death or substantial bodily injury. Forty states permit a lawyer to disclose a client's intent to commit a criminal financial fraud, a result again directly contrary to the ABA rule.<sup>22</sup>

---

20. The prior text is set out in the editors' note to THOMAS D. MORGAN & RONALD D. ROTUNDA, 2000 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 18 (2000).

21. A directly parallel phenomenon was the handling of Model Rule 1.13(c) discussing what the lawyer is to do if the highest authorities in an organization refuse to prevent a violation of law by or against the organization that threatens substantial harm to the organization. The original Kutak proposal was that the lawyer could take reasonable steps to protect the organization, including even reporting the matter to law enforcement authorities. Under the provision as adopted, however, the lawyer's only option is to resign as counsel. See THOMAS D. MORGAN & RONALD D. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 40 (7th ed. 2000).

22. A useful table providing this information may be found in MORGAN & ROTUNDA, *supra* note 20, at 133-53.

The conclusion I draw from these developments is that, if anything, lawyers acting at a national level have lost touch with what the public thinks our professional standards should be. At least insofar as protection of confidential information is concerned, when lawyers have tried to write the rules the result has been far different than when judges or legislators wrote the rules.

#### VIII. THE TRANSFORMATION OF THE LAWYER DISCIPLINE SYSTEM

The eighth and final pressure on professionalism I will outline here arises from the move to increasingly detailed lawyer discipline codes that began with adoption of the ABA Model Code in 1969. Once again, the objective was sound. Prior to 1969, the ABA Canons of Ethics had provided challenging rhetoric but little real guidance either to lawyers or disciplinary counsel. State bars could arbitrarily impose disciplinary actions on lawyers with unpopular political views,<sup>23</sup> or others found to have engaged in “conduct unbecoming a lawyer.” Thus, the promulgation of detailed standards that gave lawyers fair warning and due process was a wise and appropriate development.

The effect of the move from general aspirations to detailed standards, however, in the minds of many became a move from a reach for professionalism to a search for loopholes that would justify lower and lower standards of behavior. The “law of unintended consequences” was at work once again. I, for one, would not call for a return to the days of arbitrary discipline just to get a higher level of aspiration, but the challenge of increasing professionalism in a world of detailed, rule-based discipline is a real one.

The pressure is even greater when it is associated with the declining effectiveness of the lawyer discipline system in many jurisdictions. Certainly, the need for an effective discipline system has never been greater. Discipline that removes a lawyer’s license to practice protects future clients and third parties against at least some of the harm that lawyer might do. Effective discipline meets a need that no after-the-fact malpractice remedy can match.

However, the present state of lawyer discipline leaves a great deal to be desired. It is true that over the last thirty years or so almost all states have adopted a discipline system that uses full-time professional prosecutors and investigators. That has been an essential step. Discipline committees in most jurisdictions, however, remain composed

---

23. Cf. *e.g.*, *In re Anastaplo*, 366 U.S. 82 (1961) (refusing bar admission).

of volunteer lawyers who simply do not have the time to hear cases expeditiously now that the bar has tripled in size over twenty-five years.

At the risk of trying to prove a point with an anecdote, I would mention a factually very simple case that I have been following from a distance with some horror. The alleged lawyer misconduct occurred over five years ago. It took over two years for the discipline agency even to bring the case to hearing because of the backlog of other matters on its agenda. The hearing board held four days of hearings but those four days had to be scheduled over almost a twelve month period because of the conflicting and busy schedules of the volunteer board members. The board then gave the lawyer another year, including extensions of time, in which to file supplemental materials, and took over fifteen months in which to write its own opinion. All the while, the lawyer remained eligible to continue in practice and potentially injure hundreds of additional clients.

Because the proceedings are confidential, the complaining client was not permitted to attend the hearings—except to give his own testimony—or even learn what the lawyer offered as his version of what happened in the course of their relationship. And, even though the client believes the board now has made some finding against the lawyer, he is prohibited from knowing what that finding is, at least until a reviewing court acts on the matter at some time yet farther in the future.

Nothing here is meant to cast doubt on the sincerity or professionalism of those involved in lawyer discipline. What I simply mean is that none of us should be surprised when a system still staffed heavily by volunteers is ineffective in regulating the conduct of close to a million lawyers who every day handle other people's money and are in a position to engage in acts of misconduct that justify imposition of sanctions. Nor should we be surprised that clients victimized by lawyers do not feel themselves helped by a system whose proceedings remain largely hidden from their view.

The McKay Report, approved by the ABA House of Delegates in August 1991, recommended creating a professionally-staffed system within which a client could file a charge and get a decision ordering payment of damages as well as see traditional discipline imposed. That kind of system has not yet been created in any jurisdiction of which I am aware, but without something closely approaching it, I believe we will lack the leverage with which to force our brothers and sisters at the bar to take professional obligations seriously. It should not surprise us, then, when they then take obligations of professionalism even less seriously.

## IX. CONCLUSION

It has not been my intention to depress readers of this article. The task set forth by the conference for which the article was prepared is appropriate—indeed essential—if a sense of lawyer professionalism is to be enhanced. My object has been to encourage lawyers to get real—to see that the challenge of improving professionalism will require more than words. Further, I hope I have suggested that we be modest about our expectations of success; the law of unintended consequences has frustrated many previous attempts to achieve our purpose. If we act with a sense of realism and care, however, we may be able to look back on our efforts with pride that we have made a positive difference—both for our own contemporaries and for our children's children.

