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Ronald D. Rotunda
Prof. of Law, University of Illinois

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Comments

Lawyers and Professionalism: A Commentary on the Report of the American Bar Association Commission on Professionalism

Ronald D. Rotunda *

I. INTRODUCTION

If we look at what lawyers say about lawyers, a general theme quickly emerges. Lawyers like—indeed, love—other lawyers and the law. Louis Nizer, for example, rhapsodized that “law is truth in action. It is man’s highest achievement, because it is the only weapon he has fashioned whose force rests solely on the sanctity of reason.”¹ Another New York lawyer, Harrison Tweed, wrote:

I have a high opinion of lawyers. With all their faults, they stack up well against those in every other occupation or profession. They are better to work with or play with or fight with or drink with than most other varieties of mankind.²

While lawyers may wax eloquently about the legal profession, the general public wanes eloquently. Artists often capture the public mood; life reflects art. Years ago in London, I purchased a printed entitled, “The Law Suit.” In the center is a cow, representing the law suit. On the right is the plaintiff, pulling her head. On the left is the defendant, tugging at the tail. And in the center? In

* Professor of Law, University of Illinois; Reporter for the Illinois State Bar Association Committee on Professionalism; B.A., 1967, Harvard College; J.D., 1970, Harvard Law School. This article was presented on April 7, 1987 at Loyola University School of Law. The lecture, entitled, “Inquiry Into Contemporary Problems of Legal Ethics: Lawyers and Professionalism,” was made possible by a grant from the law firm of Baker and McKenzie. The author would like to acknowledge consultation with Peter H. Lousberg, Thomas S. Johnson, and the other members of the Illinois State Bar Association Committee on Professionalism. The author also would like to thank Professors Richard L. Marcus, Steven Lubet, and L. Harold Levinson for reading the manuscript and offering suggestions. The views expressed are those of the author.

1. L. NIZER, *MY LIFE IN COURT* 523 (1961).

2. B. BOTEIN, *TRIAL JUDGE* 149 (1952) (quoting Harrison Tweed).

the center is the barrister, milking the law suit for all that it is worth.

Poets as well as artists have their fingers on the public pulse. Carl Sandburg has this to say about lawyers:

When the lawyers are through
 What is there left, Bob?
 Can a mouse nibble at it
 And find enough to fasten a tooth in?

Why is there always a secret singing
 When a lawyer cashes in?
 Why does a hearse horse snicker
 Hauling a lawyer away?³

Sandburg's perception of lawyers is hardly new. Davy Crockett, the "King of the Wild Frontier," wrote in his autobiography that when he was a magistrate, his decisions were fair, because he did not know "the law," but he knew about "common justice and honesty."⁴ To the viewpoint of artists, poets, and backwoodsmen we can add the position of popular culture. I could fill a whole hour telling lawyers jokes. Two people searching for grave rubbings were walking in the famous cemetery in the crowded Wall Street area. One noticed a tombstone that read: "Here lies a lawyer and an honest man." He said to his companion, "This cemetery must really be crowded; they're burying them two to a grave."

Several years ago, then Chief Justice Burger became concerned that the general public saw lawyers in a bad light, what he called a "moving away from the principles of professionalism." Moreover, he thought that the bad public perception had increased in recent years.⁵ He also thought that lawyers had become less professional over the years; in particular, he was concerned with legal advertising.⁶ The ABA president at the time, John Shepherd, generally

3. K. LLEWELLYN, *THE BRAMBLE BUSH: OF OUR LAW AND ITS STUDY* 142 (1960) (quoting Carl Sandburg, *The Lawyers Know Too Much* (1951)).

4. D. CROCKETT, *THE LIFE OF DAVID CROCKETT, THE ORIGINAL HUMORIST AND IRREPRESSIBLE BACKWOODSMAN: AN AUTOBIOGRAPHY* 99-100 (1902):

I was appointed one of the magistrates My judgments were never appealed from, and if they had been, they would have stuck like wax, as I gave my decisions on the principles of common justice and honesty between man and man, and relied on natural born sense, and not on law learning to guide me; for I had never read a page in a law book in all my life.

5. ABA COMMISSION ON PROFESSIONALISM, ". . . IN THE SPIRIT OF PUBLIC SERVICE:" A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM (1986) [hereinafter ABA COMMISSION REPORT].

6. When the Supreme Court first ruled that advertising is commercial speech protected by the first amendment, Burger was in the dissent. *Bates v. State Bar*, 433 U.S.

agreed with the Chief, and an ad hoc Commission on Professionalism came into being.⁷ Today, I would like to comment on the report recently produced by that Commission. The product of nearly two years of work, it is entitled: “. . . In the Spirit of Public Service:” A Blueprint for the Rekindling of Lawyer Professionalism.⁸

II. AN OVERVIEW OF THE COMMISSION'S WORK

In the short time allowed, I will only be able to focus on a few of the suggestions offered by the ABA Commission on Professionalism. I cannot be exhaustive, and I hope that the Commission members will forgive me if I fail to discuss all of the proposals, and spend most of my time on those parts of the report with which I disagree. Before I begin, a few general comments are in order.

First, a theme reflected in the Commission's work is the belief that the legal profession is changing and this change is for the worst. The Commission members therefore conclude that professionalism is in decline. I agree the profession is changing, but is the direction down? The charge of decline is serious, and deserves to be supported by more than anecdotal analysis. The jokes and popular view of lawyers that exist today are hardly new. They did not suddenly spring out, like Pallas Athena from the forehead of Zeus. Nearly a century ago, Roscoe Pound discussed the “causes of popular dissatisfaction” with the bar, and listed as a major cause of that dissatisfaction the “making of the legal profession into a trade.”⁹ In 1905, Brandeis concluded that lawyers have “become largely part of the business world.”¹⁰ Two decades earlier, Bran-

350, 386 (1977) (Burger, C.J., concurring in part, and dissenting in part). ABA President Shepherd's charge to the Commission specifically included a study of advertising. ABA COMMISSION REPORT, *supra* note 5, at v.

7. The group is called a “Commission” rather than a “Committee” because, in the ABA lexicon, a Commission includes lay members while a Committee does not.

8. The ABA Commission Report is reprinted, *inter alia*, in 112 F.R.D. 243-312 (1987). All citations are to the original booklet published by the ABA. The ABA Board of Governors authorized the Commission in December 1984. The Report was published nearly two years later.

The title of this Report might win an award from THE NEW YORKER magazine as the mixed metaphor of the month. A blueprint might be used for rebuilding, but not for rekindling—unless one is going to burn the blueprint. But I prefer to comment on substance, lest some reader focus on my own stylistic *faux pas*.

9. Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. Rep. 395, 415 (1906). Complaints against lawyers did not start with Roscoe Pound. See, e.g., J. HIGGINS, *SAMPSON AGAINST THE PHILISTINES OR THE REFORMATION OF LAWSUITS* (1805); D. HOFFMAN, *FIFTY RESOLUTIONS IN REGARD TO PROFESSIONAL DEPARTMENT* (1836), reprinted in 2 AM. L. SCH. REV. 230 (1906).

10. BRANDEIS, *The Opportunity in the Law*, in BUSINESS: A PROFESSION (1913),

deis remarked, Bryce of England had come to a similar conclusion.¹¹ The view that legal professionalism is in decline seems to be a constant theme in the historical literature: every generation appears to observe that in the good old days, things were better. What *new* information did the Commission discover in order for it to conclude that the profession has changed for the worse, and that, in the past, lawyers were more professional?

The ad hoc Commission was quite concerned that a poll concluded that only seven percent of corporate users of legal services believe that lawyers are increasing their professionalism, while over two-thirds see professionalism as decreasing. Similarly, over half of the state or federal judges surveyed thought lawyer professionalism is decreasing.¹² The poll results sound alarming, but what do they mean? How did the questioners define "professionalism"? Why did the respondents think that it is decreasing? The Commission answers none of these questions. Instead, we find buried in the footnotes an acknowledgement that the poll results are unpublished; the sampling was not scientifically chosen; and the survey was non-random.¹³ We aren't even told how the crucial questions were phrased. Yet this poll is the only specific evidence offered.

What about the good old days, *before* legal professionalism is said to have declined? Those were the days when it was popularly assumed that the bar was immune to the antitrust laws because it was a "profession," not a "business."¹⁴ In those good old days, local bar associations, at the urging of the ABA,¹⁵ would discipline lawyers who charged less than the suggested minimum fees.¹⁶ Lawyers should not compete because law is a profession.

reprinted in G. HAZARD & D. RHODE, *THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION* 15-16 (1985) [hereinafter HAZARD & RHODE].

11. HAZARD & RHODES, *supra* note 10, at 16. The Commission, near the end of its Report, acknowledges this comment, made by Bryce in 1885 and quoted by Brandeis in 1905. ABA COMMISSION REPORT, *supra* note 5, at 55. The Commission fails to explain why its conclusion that the good old days were better and the decline in professionalism is recent is consistent with the observations of Brandeis or Bryce.

12. ABA COMMISSION REPORT, *supra* note 5, at 3.

13. *Id.* at 59 n.20.

14. *Compare* Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608 (1935) with Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

15. In 1974, the ABA House of Delegates removed a sentence of Ethics Canon ("EC") 2-18 which had existed since the ABA adopted the Model Code in 1969. That sentence read: "Suggested fee schedules and economic reports of state and local bar associations provide some guidance on the subject of reasonable rates." ABA, Annotated Code of Professional Responsibility 99 (A.B.F. 1979). See also ABA SPECIAL COMMITTEE ON ECONOMIC OF LAW PRACTICE, LAWYERS' ECONOMIC PROBLEMS AND SOME BAR ASSOCIATION SOLUTIONS 21-28 (1959).

16. See, e.g., Goldfarb v. Virginia State Bar, 421 U.S. 773, 777-78 (1975).

“[C]ompetition,” the bar claimed in the *Goldfarb v. Virginia State Bar*¹⁷ decision, “is inconsistent with the practice of a profession because enhancing profit is not the goal of professional activities”¹⁸ The bar also quietly said, as the *Goldfarb* decision equally noted, that lawyers, because of their competition with each other, were “committing economic suicide.”¹⁹ The Court in *Goldfarb*, we may recall, considered these arguments and held that the bar’s enforcement of minimum fee schedules violated the antitrust laws.²⁰ As a wild guess, I suspect that the middle class has preferred the lower fees that are the legacy of *Goldfarb*.²¹

Please do not misunderstand me. The ABA Commission on Professionalism does not advocate a return to the good old days of minimum fees. Yet, interestingly, it does note that lawyers are ex-

17. 421 U.S. 773.

18. *Id.* at 787. Remnants of this theory are still found in portions of the ABA Model Code of Professional Responsibility. EC 2-16 provides that members of the “legal profession” must “receive adequate compensation for services rendered, and reasonable fees should be charged in appropriate cases to clients able to pay them.” EC 2-17 repeats the refrain: “adequate compensation is necessary in order to enable the lawyer to serve his client effectively.” ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-16, 2-17 (1982).

19. *Goldfarb*, 421 U.S. at 787 n.16.

20. *Id.* at 790-92. Cf. M. FRIEDMAN, CAPITALISM AND FREEDOM 152 (1962), in which Professor Friedman summarizes a similar argument by medical doctors who urge the need for high fees:

I am not saying that individual members of the medical profession, the leaders of the medical profession, or the people who are in charge of the Council on Medical Education and Hospitals deliberately go out of their way to limit entry in order to raise their own incomes. That is not the way it works. Even when such people explicitly comment on the desirability of limiting numbers to raise incomes they will always justify the policy on the grounds that if “too” many people are let in, this will lower their incomes so that they will be driven to resort to unethical practices in order to earn a “proper” income. The only way, they argue, in which ethical practices can be maintained is by keeping people at a standard of income which is adequate to the merits and needs of the medical profession. I must confess that this has always seemed to me objectionable on both ethical and factual grounds. It is extraordinary that leaders of medicine should proclaim publicly that they and their colleagues must be paid to be ethical. And if it were so, I doubt that the price would have any limit. There seems little correlation between poverty and honesty. One would rather expect the opposite; dishonesty may not always pay but surely it sometimes does.

21. The empirical evidence available thus far shows that legal advertising has tended to lower fees (but not quality of work performed) because of increased competition. See, e.g., Choper, *Consequences of Supreme Court Decisions Upholding Constitutional Rights*, 83 MICH. L. REV. 1, 166-69 (1984). Major, established law firms now engage in extensive legal advertising. Wilkie Farr & Gallagher, in New York, paid \$5,000 a month in late 1985 when it hired a public relations firm. Gray, *More Lawyers Reluctantly Adopt Strange New Practice—Marketing*, Wall St. J., Jan. 30, 1987, at 19, col. 4 (Midwest ed.). Advertising has also improved the public image of lawyers. Middleton, *Ads Pay Off—In Image And Income*, Nat’l L.J., Mar. 5, 1984, at 1, col. 4.

periencing "more competition,"²² that nonetheless the supply of lawyers is increasing dramatically,²³ that the average lawyer does not earn nearly as much as the most highly paid lawyers,²⁴ and that more corporations are reducing the demand for outside law firms by using in-house counsel to cut legal costs.²⁵

The Commission specifically objects to what it calls "exorbitant beginning salaries" paid to young lawyers at Wall Street Firms, resulting in "additional economic pressure on those firms, the individuals working there, and on firms that are competitive with them."²⁶ Forgive me if I am confused. Wall Street firms, I suspect, pay those exorbitant starting salaries because that's what it takes to draw enough talented and hardworking people to the metropolitan jungle we call New York. If all the Wall Street firms became more "professional" and paid less to their new associates, what would happen to the money that otherwise would have gone to the young associates? The Commission Report does not suggest a rebate of legal fees to the corporate clients; law firms, after all, are not eleemosynary institutions. And if they are, large corporate clients are not typical recipients of charity. Perhaps the money would go to the partners. If so, I don't understand why that result is more "professional" than the present system.²⁷

22. ABA COMMISSION REPORT, *supra* note 5, at 9.

23. *Id.*

24. *Id.* at 8.

25. *Id.* at 9. It is said of the ABA that "[p]ower does not even flow from the top down, it just stays at the top." Drew, *The Rule of Lawyers*, N.Y. Times, Oct. 7, 1973, § 6 (Magazine), at 16. Moreover, popular commentators charge that the ABA's social conscience diminishes, if not disappears, when a proposed course of action suggests lawyer's incomes, or the interest of corporate clients, will be adversely affected. *Id.* at 16, 58.

Academics, as well, have made somewhat similar observations. See, e.g., Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977); Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689 (1981).

26. ABA COMMISSION REPORT, *supra* note 5, at 8 &n.*. Higher starting salaries have not caused any overabundance of supply. Major law firms have complained that "they can't hire lawyers fast enough to keep up with the crush of work." Even with the high salaries, the major law firms have more than survived: "These are boom times for the legal community," says Ed Kaufman, a partner with Los Angeles-based Irell & Manella, which posted revenue of \$40 million last year, up 20% from 1985." Gray, *Law Firms' Big Fee Hikes Reflect Higher Pay and Booming Business*, Wall St. J., Mar. 19, 1987, at 35, col. 4 (Midwest ed.).

27. My Wall Street friends tell me that a major reason for the high starting salaries there is that the law firms must compete with the investment bankers. A young investment banker out of school only two or three years can earn between \$100,000 to 165,000 per year. The young lawyer, therefore, often considers a career in investment banking instead of law. The investment bankers can earn so much because federal regulation, the Glass-Steagall Act, limits outside competition. In order to allow for competition, various efforts are now being made to modify the Glass-Steagall Act, Banking Act of 1933, Pub.

In the good old days, before professionalism had declined, the organized bar sought to prohibit efforts by unions to help their members find legal services. The Commission notes the Supreme Court decision that invalidated such prohibitions, *Brotherhood of Railroad Trainmen v. Virginia*,²⁸ but then appears to favor the view of the dissent, which the Commission quotes favorably. The dissent in *Brotherhood of Railroad Trainmen* disparaged the majority position because it “relegates the practice of law to the level of a commercial enterprise.”²⁹ The majority, utilizing a freedom of association rationale, allowed unions to recommend to their members those lawyers willing to take the workers’ Federal Employers’ Liability Act cases.³⁰ Is this decision another weight on the scale against professionalism?³¹

In the good old days, there was also no advertising of lawyers’ services. As a consequence, the lay public—not the corporate or other institutional users of legal fees, but the great middle class—often greatly over-estimated the cost of various legal tasks, such as

L. No. 66-89, 48 Stat. 184 (1933), codified in scattered sections of 12 U.S.C. 2, 3, and 6. More competition should reduce prices. See Sherman, *C.E.O.’s Take On the Investment Bankers*, Fortune Mag., April 27, 1987, at 57, col. 3. Regarding the Glass-Steagall Act, see, Hacker & Rotunda, *The SEC’s Ectoplasmic Theory of an Issuer as Applied to Educational and Charitable Institutions, Bank Trustees, and Other Exempt Issuers*, 65 CALIF. L. REV. 1181 (1977).

28. 377 U.S. 1 (1964).

29. *Id.* at 9 (Clark, J., joined by Harlan, J., dissenting), cited with approval in ABA COMMISSION REPORT, *supra* note 5, at 5.

30. See generally, 3 R. ROTUNDA, J. NOWAK, AND J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §§ 20.41, 20.54 (1986) [hereinafter R. ROTUNDA, J. NOWAK, AND J. YOUNG].

31. The ABA Commission does not advocate the removal of ethical roadblocks to the establishment of “Legal Maintenance Organizations” (“LMO’s”), the legal equivalent of Health Maintenance Organizations (“HMO’s”). Note that medical doctors have joined and marketed HMO’s without losing their status as professionals. In fact, the approving reference to the *Brotherhood of Railroad Trainmen* dissent, ABA Commission Report at 5, suggests that the various members of the Commission may embrace restrictions like those in the ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-103 (1982). See generally Morrison, *Bar Ethics: Barrier to the Consumer*, TRIAL, Mar.-Apr. 1975, at 14. The increase in the number of HMO’s have caused a drop in expenses. A “strong dose of competition works wonders.” Gannes, *Strong Medicine for Health Bills*, Fortune Mag., Apr. 13, 1987, at 70, 71, col. 2. We should lower lawyers’ fees and increase access to legal services through competition, not be preaching against greed. See *supra* note 27.

People who use lawyers, the statistics tell us, tend to like lawyers more than the people who have never used them. The ABA Commission acknowledged that fact. ABA Commission Report at 3 (“clients generally think well of their own lawyers.”). See also B. CURRAN, THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY 264 (A.B.F. 1977). Thus, to the extent that bar rules that discourage “L.M.O.’s” are lifted, providing the general public with more access to legal services, the general public attitude about lawyers should rise. Ironically, however, the Commission does not advocate the removal of such barriers.

drawing up a simple will, or advising on the effects of an installment sales contract.³² The Supreme Court eventually allowed advertising and rejected the argument that lawyers are "above trade."³³ Some argue that it is undignified for a lawyer to advertise; the Commission noted that many lawyers are concerned about undignified ads.³⁴ Bankers, however, have advertised for a long time, and we do not think less of that profession. (In fact, a few years ago, my local bank gave me a complete set of flatware for opening a savings account; the status of bankers did not therefore diminish in my view.) In any event, the evidence shows that advertising has lowered fees and helped clients.³⁵ Isn't that what a profession (as opposed to a cartel) is supposed to do?

Similarly, in the good old days, it was unethical for an ACLU attorney to write a letter to a prospective client in order to advise her of her legal rights and to offer free legal assistance. The Supreme Court also invalidated that effort of the South Carolina State Bar to protect its profession.³⁶

In short, the Commission has not demonstrated that professionalism has, in fact, declined. Justin Stanley, the chairman of the Commission, has said that it was "fairly easy" to conclude that there has been a decline in professionalism.³⁷ Perhaps it was too easy. I suspect the lay public would not prefer the good old days.

I am no Pollyanna, but I do think that matters are getting better, not worse. We always have had lawyers who cheat, who commingle client trust funds, who aid their clients' securities violations by drafting documents that knowingly fail to disclose material facts.³⁸

32. *Bates v. State Bar*, 433 U.S. 350, 370 n.22 (1977).

33. *In re Primus*, 436 U.S. 412 (1978).

34. ABA COMMISSION REPORT, *supra* note 5, at 27. To its credit, the Commission notes, "it seems probable that it is principally lawyers—not clients—who are concerned about the style and message of certain legal advertising." Of course, as the Commission correctly observes, ads that are truly misleading or dishonest should be forbidden.

35. See, e.g., Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 MICH. L. REV. 1, 166-69 (1984). See also *supra* note 28.

36. *In re Primus*, 436 U.S. 412 (1978). The Commission acknowledges the case, though it erroneously identifies the lawyer as working for the NAACP. See ABA COMMISSION REPORT, *supra* note 5, at 6. Contrast *Ohralik v. Ohio State Bar*, 436 U.S. 447 (1978), where the in-person, face to face solicitation involved overreaching by the disciplined lawyer. See generally 3 R. ROTUNDA, J. NOWAK, & J. YOUNG, *supra* note 30, § 20.31 (1986).

37. *Professionalism, Pragmatists or Predators?*, 75 ILL. B.J. 420 (R. Rotunda ed. 1987) (quoting J. Stanley, chair, ABA Commission on Professionalism).

38. See, e.g., Power, *Partners Sue Ivan Boesky, Related Firms*, Wall St. J., Mar. 23, 1987, at 3, col. 4 (Midwest ed.) (major law firm, Fried, Frank, Harris, Shriver & Jacobson, sued by institutional investors and others for preparing prospectus and other documents which failed to disclose material facts).

Whenever we have a large enough barrel of apples, it is a statistical certainty that some will be bad. What is encouraging is that lawyers are less reluctant to sue other lawyers when meritorious cases develop; fortunately, the conspiracy of silence that has long been associated with medical malpractice cases has been less prevalent in legal malpractice cases.³⁹ In addition, many states have now revamped, revitalized, and modernized their disciplinary machinery.⁴⁰

The organized bar and the general public are also now more aware of problems in the legal system than in the past. A lawyer recently testified before the Illinois State Bar Association Committee on Professionalism that the threat of legal malpractice has made him more careful, forcing him to keep up on recent changes in the law.⁴¹ Successful malpractice cases against lawyers do tend to get the attention of other lawyers. That's good. That is not a sign of decay, but renewal—not decline, but advance. The legal system is cleaning up the problems of incompetence. Times have changed, but in terms of promoting professionalism, the times have gotten better, not worse. Much still needs to be done, of course, but the movement is in the right direction.⁴²

My last point in this overview, before we consider some of the specific recommendations, relates to that amorphous concept "professionalism." This vague term certainly has favorable connotations, but what does it mean? The Commission appears to justify

39. *E.g.*, Gray, *Courting Trouble: A Lawyer Who Sues Other Lawyers Wins Cases But Few Friends*, Wall St. J., Nov. 5, 1986, at 1, col. 1 (Midwest ed.); Hill, *The Bar at Bay*, Wall St. J., Feb. 3, 1976, at 1, col. 1 (Midwest ed.).

Contrast G.B. SHAW, *THE DOCTOR'S DILEMMA* (1911) (preface), reprinted in 1 BERNARD SHAW: COMPLETE PLAYS WITH PREFACES 1, 8 (1962): "[E]very doctor will allow a colleague to decimate a whole countryside sooner than violate the bond of professional etiquette by giving him away."

40. *See, e.g.*, DuMouchel, *The Attorney Grievance Commission: Update*, 60 MICH. BAR. J. 734 (1981); Gray, *Standards for Lawyer Discipline and Disability Proceedings and the Evaluation of Lawyer Discipline Systems*, 11 CAP. U.L. REV. 529 (1982); Outcault & Peterson, *Lawyer Discipline and Professional Standards in California: Progress and Problems*, 24 HASTINGS L.J. 675 (1973); Vernon, *Illinois Code of Professional Responsibility: A New Blueprint for Disciplinary Enforcement*, 30 DEPAUL L. REV. 365 (1981).

41. Testimony before ISBA Committee on Professionalism, Open Hearing of Mar. 13, 1987, held in Champaign, IL. *See also* Comment, *Attorney Professional Responsibility: Competence Through Malpractice Liability*, 77 NW. U.L. REV. 633(1982).

42. Another example of the movement in the right direction: it was not until 1956 that the ABA eliminated the requirement that the applicant disclose his or her race in the application for membership. *See* 81 A.B.A. Rep. 211 (1956). The race disclosure requirement had effectively excluded blacks. *See* RAUH, *The Lawyer's Obligation to the Public Interest*, in *THE LAWYER'S PROFESSIONAL INDEPENDENCE: AN IDEA REVISITED* 9 (ABA 1985).

various advantages for the members of the legal profession merely by defining "profession" to include those advantages.

The Commission first offers a definition proposed by Roscoe Pound over thirty years ago. A profession is 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."⁴³ I have no quarrel with this particular definition because it merely defines a term: it does not purport to be a theory of how society should deal with a profession.

Following this definition, however, the Commission offers another. What distinguishes a "profession" from other occupations? Well, says the Commission, a mere occupation becomes a profession when its members have "special privileges," such as "exclusive licensing" and "self-regulation."⁴⁴ Why should a profession have such special privileges? The Commission's answer is easy: by definition it has them. The Commission has taken some very serious issues debated in the literature⁴⁵ and in the case law⁴⁶ and dismissed them by using a definition to substitute for a theory—a definition, by the way, which could just as equally apply to a cartel rather than the learned profession of the law.⁴⁷ That is why George Bernard Shaw said that professions are "conspiracies

43. R. POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953), quoted in ABA COMMISSION REPORT, *supra* note 5, at 10. The language became part of the title in the Commission Report. Judge Grady brought the definition to the attention of the Commission. ABA COMMISSION REPORT, *supra* note 5, at 10 & n.58.

44. ABA COMMISSION REPORT, *supra* note 5, at 10 (definition of Professor Eliot Freidson of New York University). Regarding the importance of language and "mere words," see generally R. ROTUNDA, *THE POLITICS OF LANGUAGE* (U. of Iowa Press 1986).

45. For example, regarding self-regulation, the ABA Standards for Lawyer Discipline and Disability Proceedings § 3.4 (1979), propose that a third of the members of the hearing panel be nonlawyers. To increase public accountability, others have proposed that a majority or more of the members of the agency regulating lawyers be laypeople. See, e.g., J. LIEBERMAN, *THE TYRANNY OF THE EXPERTS: HOW PROFESSIONALS ARE CLOSING THE OPEN SOCIETY* 14-17 (1980); C. WOLFRAM, *MODERN LEGAL ETHICS* 46 (1986). Regarding unauthorized practice, see Cavanagh & Rhode, *The Unauthorized Practice of Law and Pro se Divorce: An Empirical Analysis*, 86 *YALE L.J.* 104 (1976); Christensen, *The Unauthorized Practice of Law: Do Good Fences Really make Good Neighbors—Or Even Good Sense?*, 1980 *AM. B. FOUND. RES. J.* 159; Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 *STAN. L. REV.* 1 (1981).

46. See, e.g., *Johnson v. Avery*, 393 U.S. 483 (1969) (certain unauthorized practice restrictions invalidated).

47. See generally Rotunda, *The Word "Profession" Is Only a Label*, 4 *LEARNING & THE LAW* 16 (ABA Section on Legal Education and Admission to the Bar (1977)).

against the laity."⁴⁸

So much for this overview. Let us now consider some of the Commission's specific proposals.⁴⁹

III. LITIGATION

The Commission, after several times condemning what it calls the "scorched-earth" strategy of litigation,⁵⁰ offers several recommendations to address the problem. While Justin Stanley, the chairman of the Commission, has said that recommendations in the nature of platitudes are useless,⁵¹ several of the proposals fall in that category. For example, the Commission recommends that the "[b]ar should place increasing emphasis on the role of lawyers as officers of the court, or more broadly, as officers of the system of justice."⁵² Clients, also, should "appreciate the importance to society of maintaining the system of justice."⁵³ I doubt anyone disagrees with these recommendations. We also favor motherhood and the flag.

The Commission tells us that there is too much litigation consuming "vast amounts of time and money."⁵⁴ Yet the Commission is also aware that various expert studies have concluded that a litigation explosion simply may not exist.⁵⁵ In fact, the "number of disputes actually litigated in the United States does not appear to be rising much faster than the population as a whole."⁵⁶ The in-

48. G. B. SHAW, *DOCTOR'S DILEMMA* (preface) (1911), reprinted in 1 BERNARD SHAW: *COMPLETE PLAYS WITH PREFACES* 9 (1962).

49. I do not purport to be exhaustive.

50. ABA COMMISSION REPORT, *supra* note 5, at 3, 51.

51. *Professionals, Pragmatists or Predators?* 75 ILL. B.J. 420 (R. Rotunda ed. 1987) (quoting J. Stanley, Chair, ABA Commission on Professionalism).

52. ABA COMMISSION REPORT, *supra* note 5, at 13.

53. *Id.*

54. *Id.* at 3. See also *id.* at 3 ("scorched-earth" strategy of litigation"); *Id.* at 41 ("filing of frivolous motions and complaints . . . and taking unwarranted appeals gluts our system of justice"); *id.* ("litigation today frequently resembles the dance marathons of the 1930's . . .").

55. *Id.* at 39 n.*

56. Bok, *A Flawed System of Law Practice and Training*, 33 J. LEG. EDUC. 570, 571 (1983) (emphasis omitted). Bok adds: "Our courts may seem crowded, since we have relatively few judges compared with many industrial nations. Nevertheless, our volume of litigated cases is not demonstrably larger in relation to our total population than that of other western nations." *Id.* (emphasis in original). See generally Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983) [hereinafter Galanter]. The "litigation rate in the 1970's is about half of what it was during the early nineteenth century." *Id.* at 38. See also *id.* at 61-69.

In the federal courts, for example, from 1960 to 1980, the number of cases filed increased (from 0.5 per thousand, to 0.9 per thousand), but the average number of cases per

creased talk of the litigation crisis may tell us more about the public relations expertise of insurance companies than anything else.⁵⁷ Nonetheless, the Commission members assert that the litigation crisis exists, and that assumption forms of basis of several of their recommendations.

The Commission tells us that litigation is so expensive that plaintiffs presenting just claims often settle for too little, because they cannot afford to litigate them; yet defendants also improperly

federal judge stayed about the same. And, from 1900 to 1980, the length of civil cases shortened, from about 3.5 years in 1900 to 1.16 years in 1980. Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 SO. CALIF. L. REV. 65, 81-85 (1981).

In 1960 Justice Charles Breitel, then of the New York Appellate Division, complained of the "decline in litigation . . ." stating there "are fewer contract cases. There are fewer equity cases. . . . It is the public that is the loser in the decline of the litigation process and the litigation bar." Breitel, *The Quandary in Litigation*, 25 MO. L. REV. 225, 232 (1960).

The "litigation rate in the 1970's is about half of what it was during the early nineteenth century." Galanter, *supra*, at 38.

Chief Justice Burger and others have complained about the "litigation explosion." See, e.g., Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 567 (1975); Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 275 (1982); Tribe, *Too Much Law, Too Little Justice: An Argument for Delegalizing America*, ATLANTIC MONTHLY, July 1979, at 25. But Professor Galanter concludes, after extensive examination of the statistics and comparison with the litigation experience in other countries, that the literature complaining about the so-called litigation explosion shows "a strong admixture of naive speculation and undocumented assertion." Galanter, *supra* at 62. He states:

I have argued that the hyperlexis reading of the dispute landscape displays the weakness of contemporary legal scholarship and policy analysis. We have seen the announcement of general conclusions relevant to policy on the basis of very casual scholarly activity. The information base was thin and spotty; theories were put forward without serious examination of whether they fit the facts; values and preconceptions were left unarticulated. Portentous pronouncements were made by established dignitaries and published in learned journals. Could one imagine public health specialists or poultry breeders conjuring up epidemics and cures with such cavalier disregard of the incompleteness of the data and the untested nature of the theory? If the profession's claim to expertise in such matters as disputes and litigation is to be taken seriously, it will need to adopt ground rules to require more respectful touching of the data bases. It will have to recognize that the collection of data and the development of coherent and tested theories for interpreting it are an inescapable collective responsibility of a group that purports to proffer expert opinions about the arrangements of public life. The career of the "litigation explosion" literature does not offer much reassurance that the legal profession and legal education are prepared to exercise such responsibility.

Id. at 71.

57. See, e.g., Hunter & Angoff, *Tort-Reform Legislation . . . Ought to Reduce Premium*, Wall St. J., Feb. 11, 1987, at 20, col. 3 (Midwest ed.) (insurance companies claim that laws which limit tort victims compensation will not result in lower premiums, thus contradicting claims of insurance industry's public relations arm); *Tort Tales: Old Stories Never Die*, Nat'l Law J., Feb. 16, 1987, at 39, col. 1 (in spite of growing body of statistical research, insurance companies and others publicize anecdotes of outrageous tort verdicts; these war stories are false).

settle unjust claims for the same reason.⁵⁸ Yet the Commission also urges more efforts at settlement.⁵⁹ While the Commission is concerned about the alleged increase in litigation, it also recommends that lawyers take on more *pro bono* activities,⁶⁰ although the result will be more *pro bono* litigation. The Commission says that "as a society [we] are 'overlawed',"⁶¹ and perhaps overlawyered,⁶² but the middle class is under represented.⁶³ Yet more representation for the middle class may lead to more litigation. These positions may appear a little inconsistent, but they assure that all readers of the Commission Report will agree with it—at least half the time.

In order to reduce the litigation crisis that the Commission Report postulates, the Commission urges litigants to place more emphasis on "alternative methods of dispute resolution." Law schools, we are told, should instruct in this area,⁶⁴ and bar associations should support expanded use of such alternative methods.⁶⁵ The Commission is pleased that at least two-thirds of the law schools now offer courses in negotiation and alternative dispute resolution.⁶⁶ Lawyers and their clients should realize, advises the ABA Commission, that "making the first move" toward settlement is not a sign of weakness.⁶⁷

The Commission members apparently did not realize that when lawyers and law professors teach negotiation, it is standard to instruct the negotiator to "induce [the] opponent to make the first offer."⁶⁸ Although the ABA Commission says that no one should be reluctant to make the first move toward settlement, an ABA sponsored text advises that the "party who made [the] first offer will be at a disadvantage . . ."⁶⁹ Maybe it's a good thing that not

58. ABA COMMISSION REPORT, *supra* note 5, at 39. In 40% of the personal injury tort lawsuits filed in 1985 (866,000 suits), the jury awarded nothing; this percentage has not fluctuated more than three points in the last twenty-five years. Herman, *Million-Dollar Verdicts and Other Rarities*, Wall St. J., Apr. 8, 1987, at 26, col. 3 (Midwest ed.).

59. ABA COMMISSION REPORT, *supra* note 5, at 40.

60. *Id.* at 47.

61. *Id.* at 32.

62. *Id.* at 51.

63. *Id.*

64. *Id.* at 12, 18.

65. *Id.* at 13, 38.

66. *Id.* at 40 n.**.

67. *Id.* at 40.

68. C. CRAVER, FUNDAMENTALS OF EFFECTIVE LEGAL NEGOTIATING 12 (ALI-ABA Professional Development Series 1985).

69. *Id.*

everyone takes a negotiation course: if all lawyers did, no one would be left to make the first move.

Empirical studies show that lawyers usually are not the ones pushing to litigate. It is often the case that the lawyers for both sides urge settlement; it is the clients who refuse to compromise.⁷⁰ At other times, as Yale University Law Professor Owen Fiss has noted, the pressure to settle leads to unjust results; settlement is not always a good thing.⁷¹

The Commission also specifically recommends use of arbitration in order to decrease the amount of litigation. We must keep in mind that arbitration has its own pitfalls. As one commentator has remarked, "arbitrators are, well, arbitrary."⁷² Arbitration does not provide the litigant with the protection of rules of discovery, rules of evidence, findings of fact, or conclusions of law.⁷³ Arbitrators,

70. B. CURRAN, *supra* note 31, at 229 (survey showing that 87% of the respondents agreed with the following statement: "Lawyers try hard to solve their client's problems without having to go to court"; and 80% agreed with the following statement: "Most lawyers' work consists of helping clients arrange their affairs so as to avoid future problems and disagreements.").

Compare, for example, American lawyers to Australian lawyers. "In Australia, 19% of the instances in which a lawyer was consulted in a grievance did not mature into a dispute. The U.S. figure is 24%. In other words, American lawyers are more likely to dampen disputes." Galenter, *supra* note 56, at 60. Americans may appear to be more likely to *file* lawsuits than Australians, apparently because filing is culturally more a part of the settlement process. *Id.* Yet Australians are substantially more likely to complain of troubles than are their U.S. counterparts and somewhat more likely to engage in an actual dispute. Fitzgerald, *Grievances, Disputes and Outcomes: A Comparison of Australia and the United States*, 1 LAW IN CONTEXT 15, 25 (1983).

Of course, on a more general level, the Commission is correct: law schools should also strive to reevaluate their curriculum so as to improve legal education. See generally Kelly, *Education for Lawyer Competency: A Proposal for Curricular Reform*, 18 NEW ENG. L. REV. 607 (1983).

71. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Fiss, 11 LITIGATION 3 (Fall 1984).

72. Scheibla, *Big Decision, Can You Sue a Broker?*, Barron's, Mar. 2, 1987, at 16, col. 3.

For a thorough study and critique of Alternative Dispute Resolution ("ADR"), including a case study of the Neighborhood Justice Center in Kansas City, see C. HARRINGTON, *SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT* (Greenwood Press 1985).

73. Scheibla, *supra* note 72, at 16, col. 3. Even a strong proponent of securities arbitration admits that "the Uniform Code of Arbitration should be amended to give customers a role in selecting their arbitrators"; the term "public arbitrator" should be "redefined to exclude lawyers and others who work for firms that serve the securities industry as advisers"; and the Uniform Code of Arbitration "must ensure that arbitrators make a good-faith effort to follow federal law when customers raise federal statutory claims. Arbitrators should be required to sign a sworn statement to this effect when they submit their final decision." Shell, *Keep Broker-Client Disputes Out of Court*, Wall St. J., Mar. 3, 1987, at 34, col. 3 (Midwest ed.). See also Note, *Federal and State Securities Claims: Litigation or Arbitration*, 61 WASH. L. REV. 245, 260-61 (1986) (securities arbitration

unlike judges, are discouraged from giving reasons for their decisions. The President of the American Arbitration Association candidly advised, "Written opinions can be dangerous because they identify targets for the losing party to attack."⁷⁴ Arbitration is like sausage: if we knew how it was made, we'd be much less confident of the results.

The Supreme Court, as you may know, recently held that broker-dealers can force their customers who have signed predispute arbitration agreements to arbitrate securities fraud claims brought under Securities and Exchange Commission Rule 10b-5 and Section 10(b) of the Securities and Exchange Act of 1934.⁷⁵ The broker-dealer insists on arbitration, while the customer refuses. The broker-dealer in that case knows of the advantages of arbitration. In a securities arbitration, often the chairperson is another stockbroker. We should not be surprised if a broker-dealer is not the most detached, neutral observer to judge his fellow broker-dealer.⁷⁶ The broker-dealer who is the arbitrator in one case may well be the respondent in the next case. So-called independent arbitrators on the securities arbitration panel often include practicing lawyers who represent other broker-dealers and have a similar mind-set.⁷⁷ It is not surprising that the defendant seeks compulsory arbitration because the defendant views that as being in its best interest. Nor is it surprising that plaintiffs have different interests. What is surprising is the ABA Commission's failure to acknowledge this difference in interests.⁷⁸

does not protect investors and must be "substantially improved"); Note, *Arbitrability of Claims Arising Under the Securities Exchange Act of 1934*, 1986 DUKE L.J. 548 (many flaws exist in securities arbitration; these flaws severely hurt investors).

Regarding the importance and advantage of civil jury trials, see Lousberg, *On Keeping the Civil Jury Trial*, 43 NOTRE DAME LAWYER 344 (1968).

74. Scheibla, *supra* note 72, at p. 33, col. 4. *Accord* R. COULSON, BUSINESS ARBITRATION—WHAT YOU NEED TO KNOW 26 (1980).

75. *Shearson/American Express, Inc. v. McMahon*, 107 S. Ct. 2332 (1987).

76. Scheibla, *supra* note 72, at 16, col. 3. See also Chemerinsky, *Protecting Lawyers from their Profession: Redefining the Lawyer's Role*, 5 J. OF LEGAL PROF. 31, 34 (1980) (lawyers likely to derive their personal beliefs from their professional behavior; thus, when lawyers represent clients' positions, eventually lawyers adopt clients' attitudes). Cf. Rotunda, *The Combination of Functions in Administrative Actions: An Examination of European Alternatives* 40 FORD. L. REV. 101, 102-03 (1971).

77. Scheibla, *supra* note 72, at 16, col. 3. See also *Merit Insurance Co. v. Leatherby Ins. Co.*, 714 F.2d 673 (7th Cir.), *cert. denied*, 464 U.S. 1009 (1983) (courts reluctant to set aside arbitration even when arbitrators are in conflict of interest position).

78. It is often in the interest of the defendant to delay if liability is likely (or possible), and if the court provides no prejudgment interest. Yet the Commission badly asserts: "Both plaintiffs and defendants have a substantial interest in securing a quick, inexpensive and certain resolution." ABA COMMISSION REPORT, *supra* note 5, at 40.

In an effort to reduce expensive litigation, some courts now require the parties to engage in so-called "mandatory" arbitration, followed by a full trial if either party objects to the arbitration award. At this trial, evidence of the arbitration and the results are inadmissible.⁷⁹ The hope, apparently, is that this pre-litigation hurdle will encourage settlement. Although these efforts are well-intentioned, they may well result in more expense, not less, and increased delay, not expedition. This new procedure requires the parties to cross an extra hurdle before they reach trial, when the jury verdict really is mandatory and not advisory. Even if the extra hurdle produces more settlements, the results may nevertheless be unjust.⁸⁰

The Commission praises those law schools that now offer courses in alternative dispute resolution and negotiation.⁸¹ To learn of alternative remedies is, of course, useful, but let us not be naive. Teaching future lawyers about negotiation, settlement, and arbitration will not make them less litigious. We law professors don't have that much power to change human nature. The Commission exaggerates our influence. A recent study of German legal ethics suggested that the German training of lawyers appeared to promote a system much *less* litigious than our own. Yet appearances were deceiving. When one looked below the surface, the study demonstrated that the German legal system was just as litigious as the system here. Germany, like the United States, turns out an enormous number of lawyers each year, though the numbers may be deceiving because Germany, unlike the United States, distinguishes between advocacy and advice. German law heavily regulates fees in an effort to encourage settlement, but, in practice, such regulation has increased lawyer fees and has delayed settlement, because the German lawyers often postpone settlement until the eleventh hour in order to increase their regulated fees. Lawyers in Germany, like lawyers in this country, commonly believe that their legal opponents engage in frivolous motions and frivolous appeals, and in delaying actions.⁸² We may look wistfully to

79. See, e.g., 15 BAR REPORT 5 (Wash. D.C. Bar, Feb.-Mar. 1987).

80. ABA COMMISSION REPORT, *supra* note 5, at 40 n.**.

81. See Fiss, *Against Settlement*, 93 YALE L. J. 1073 (1984); Fiss, 11 LITIGATION 3 (Fall 1984).

82. Luban, *The Sources of Legal Ethics: A German-American Comparison of Lawyers' Professional Duties*, 48 RABELS ZEITSCHRIFT 245, 281, 284 (1984).

The Commission appears to have been influenced by Derek Bok's beliefs that the American legal system compares unfavorably with other systems. See generally Bok, *A Flawed System*, 85 HARV. MAG. 38 (May - June 1983). Bok's conclusions, however, rest on several fatal assumptions. See, e.g., Hay, *Law, Lawyers, and Legal Education: The*

Europe, but when we look more closely, we see ourselves in a mirror.⁸³

The Commission also urges trial judges to take a more active role in litigation in order to move it along. The Commission frankly concedes that when discretion is exercised, discretion will be abused. But we are told not to worry because the "reviewing courts should provide whatever counterbalance is needed."⁸⁴ It is unfortunate that the Commission is not more specific, and does not explain how a reviewing court should walk this fine line between deference to the trial court's discretion, and reversal of the trial court. Nonetheless, we all should applaud any efforts to move cases along, and reduce delay. In a few minutes I shall offer some of my own suggestions. But first, let us consider a more specific recommendation of the Commission.

The Commission urges judges to "impose sanctions for abuse of the litigation process."⁸⁵ Specifically, the Commission endorses Rule 11 and 26 of the Federal Rules of Civil Procedure.⁸⁶ Everyone hopefully now recognizes that lawyers should not file frivolous motions. Gone are the days when a respected lawyer like Bruce Bromley, who now has a chair named after him at Harvard Law School,⁸⁷ bragged:

Now I was born, I think, to be a protractor I quickly realized in my early days at the bar that I could take the simplest antitrust case that the Department of Justice Antitrust Chief could think of and protract it for the defense almost to infinity If you will look at the record [in *United States v. Bethlehem*

Bok Report, Report to the Chancellor for 1982-83, at 3-8 (1983); Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 51-59 (1983). See also Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUDIES 359 (1978); Meyerson, *Why There Are So Few Lawyers in Japan*, Wall St. J., Feb. 9, 1981 at 14, col. 3 (Midwest ed.) (nonlawyers in Japan often perform the kind of work that lawyers perform in the United States).

83. The German study concludes: "German legal ethics is adversarial ethics." Luban, *supra* note 82, at 280. See also *id.* at 207 ("Ultimately, the lesson may be that no system of procedural justice with a private bar can evade the paradox that underlies adversarial ethics—the paradox deriving from the fact that the system of justice creates its own antagonists.") (footnote omitted).

84. ABA COMMISSION REPORT, *supra* note 5, at 41.

85. *Id.* at 42.

86. Rule 11, Federal Rules of Civil Procedure governs "Signing of Pleadings, Motions, and Other Papers; Sanctions," and Rule 26(g), Federal Rules of Civil Procedure governs "Signing of Discovery Requests, Responses, and Objections." Cf. 28 U.S.C. § 1927 (1982).

87. The present Bruce Bromley Professor of Law is Arthur R. Miller, who ironically, teaches Civil Procedure. AALS, DIRECTORY OF LAW TEACHERS: 1986-87 at 569-70 (1986).

Steel, 315 U.S. 289 (1942)] you will see immediately the Bromley protractor touch in the third line. Promptly after the answer was filed I served quite a comprehensive set of interrogatories on the Government. I said to myself, "That'll tie up brother Hansen [the Antitrust Chief] for a while," and I went about other business.⁸⁸

Of course the system should not tolerate unjustified delay and frivolous motions. Litigation should be made less expensive, not more so. Yet existing empirical research suggests that rules like Federal Rule 11 compound the problem, not reduce it.

For example, Federal Judge Jack Weinstein has concluded: "[Rule 11 has] become another way of harassing the opponent and delaying the case. It's increased the tensions in litigation, and increased the amount of extra motions and extra appeals. To date, the effects have been adverse."⁸⁹ A systematic and thorough empirical study of Rule 11 satellite litigation supports Judge Weinstein's experience. That study showed that "there is a good deal of interjudge disagreement over what actions constitute a violation of the rule, only partial compliance with the desired objective standard, inaccurate and systematically biased normative assumptions about other judges' willingness to impose sanctions, and a continued neglect of alternative, nonmonetary means of response."⁹⁰ Thus, Rule 11, in practice, tends to be arbitrary. As a factual matter, the study also demonstrated that, thus far, Rule 11 has become primarily an anti-plaintiff tool used by defense counsel.⁹¹ In various appellate court cases the courts have recently cut back on various abuses by trial judges, but these courts have also noted the extra and unnecessary expense imposed on counsel and their clients out of all proportion to any perceived harm.⁹²

88. Bromley, *Judicial Control of Antitrust Cases*, 23 F.R.D. 417, 420 (1958).

89. N.Y. Times, Oct. 2, 1986, at 30, 31. See also Rosenberg, *The Federal Civil Rules After Half a Century*, 36 ME. L. REV. 243, 244 (1984).

90. S. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS 45 (Fed. Jud. Ctr. 1985). See also *id.* at xi.

91. *Id.* See generally Symposium, *Amended Rule 11 of the Federal Rules of Civil Procedure: How Go The Best Laid Plans?*, 54 FORD. L. REV. 1-140 (1985); Nelken, *Sanctions Under Amended Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313 (1986). See also Kaberon, *Rule 11 Sanctions Changing Practice in the Federal Courts*, 133 Chi. Daily L. Bull. at 1 (Apr. 25, 1987) (Second Circuit study showed average award against plaintiff or plaintiff attorney is \$6,229; average award against defendant or defense attorney is \$2,091).

92. See, e.g., *Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1541 (9th Cir. 1986); *Oliveri v. Thompson*, 803 F.2d 1265 (2d Cir. 1986); *In re Yagmans* 796 F.2d 1165 (9th Cir. 1986). Cf. DAMASKA, A FOREIGN PERSPECTIVE ON THE AMERICAN JUDICIAL SYSTEM, IN STATE COURTS: A BLUEPRINT FOR THE FUTURE 237, 240 (T. Fetter ed. 1978) (increase in "companion litigation" spawned by procedural rules).

One inherent problem in Rule 11 is that not everyone agrees what is a frivolous issue. Often one judge's frivolity is another judge's path-breaking decision.⁹³ I have talked to a number of lawyers about this problem; they often know exactly what is a frivolous claim: it is something they do not do; it is something engaged in by the opposing counsel.

I readily agree that some lawyers (defense counsel as well as plaintiff counsel) file frivolous motions. I suspect that Judge Weinstein does not dispute the point. Yet we both agree that adding another layer of motions and appeals is not the best way to simplify litigation. Judges can and should report to the appropriate discipline boards lawyers who abuse the system.⁹⁴ The Commission is absolutely correct that too many lawyers and judges presently fail to report.⁹⁵ More reporting would make frivolous motions most costly, would not add an extra layer of expense to the litigative process (because the complaints would be heard in a different forum), and would not share the anti-plaintiff bias exhibited in the present system.

The ABA Professionalism Commission also complains that RICO—the Racketeer Influenced and Corrupt Organizations Act⁹⁶—has been interpreted improperly. Thus, the legislative efforts have been “misdirected” by the courts.⁹⁷ RICO provides for treble damages for certain types of activities such as mail fraud and securities fraud. Antitrust laws have provided for treble damages for years. Why should those who practice fraud be put in a better position than those who are antitrust violators—i.e., “catch me, and I’ll pay only what I owe”? Congress wanted to discourage fraud, and granting plaintiffs treble damages and attorneys’ fees does exactly that.

I do not understand why the Commission singled out RICO, and what RICO has to do with professionalism. I realize that some commentators have argued that RICO should be interpreted narrowly, reaching only organized crime.⁹⁸ Yet the courts have

93. See, e.g., *Hector v. INS*, 782 F.2d 1028 (3d Cir. 1986), *rev'd per curiam*, 107 S. Ct. 379 (1986) (third circuit decision reversed in light of “plain language” of statute, the plain meaning of which is “compelling”); *Henderson v. United States*, 784 F.2d 942, 943-46 (9th Cir. 1986) (federal government liable in tort when trespassing adults scale electrical tower to steal cable and are accidentally electrocuted).

94. ABA, MODEL CODE OF JUDICIAL CONDUCT, CANON 3B(3)(1978).

95. See Thode, *The Code of Judicial Conduct—The First Five Years in the Courts*, 1977 UTAH L. REV. 395, 401 (rare for lawyer or judge to file disciplinary complaint).

96. 18 U.S.C. §§ 1961-1968 (1982 and Supp. III 1985).

97. ABA COMMISSION REPORT, *supra* note 5, at 33.

98. See, e.g., *id.* at 71, n.104.

disagreed, and rejected artificial limitations on the statute,⁹⁹ fulfilling the intent of Congress according to other commentators,¹⁰⁰ and Congress has refused to change the law.

I suppose that if we have too many lawsuits, we can cut down on litigation by repealing laws like RICO, making it more difficult for defrauded plaintiffs to be made whole. Certain defendants would no doubt welcome that result, but I doubt that it would promote professionalism.

I certainly agree with the Commission that we should do what we can to cut delay in the courts, so that cases can proceed to trial on the merits as quickly as possible. Yet we must be realistic. When we have cases involving a great deal of money and complex law, we should not be surprised that a just result takes time. That is inherent in the system.

With that caveat, there are still some reforms that will help, at least at the margin. Judges, of course, should promptly decide motions. And the judicial system should institute built-in mechanisms to discourage judges from accepting delay. Consider, for example, the reduction in delay of criminal cases when the Southern District of New York changed from a central calendar system to an individual calendar system. Under the central calendar system all criminal pretrial motions made in a given week were decided by one judge on a rotating basis. If a judge who was on motion call that week continued a motion, he would not have to decide it; it would merely be sent to the next judge who would, in turn, either decide it or continue it and thereby pass it to another judge. A judge was, in effect, rewarded for delay because the more he or she granted postponements, the less was the judge's work load. Under the individual calendar system, criminal cases are assigned almost immediately to a given judge for *all* purposes. No longer did a jurist benefit from granting a requested continuance; he kept the case until it was finally disposed. Under the individual calendar system, unnecessary delay was significantly reduced, and the number of guilty pleas increased.¹⁰¹ Nothing seems to en-

99. See, e.g., *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 105 S. Ct. 3275 (1985).

100. See, e.g., Blakey, *RICO: A Vital Weapon in the Battle Against Corporate Fraud*, Chi. Daily L. Bull., Jan. 10, 1986, at 4, col. 5; Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237 (1982); Blakey & Gettings, *RICO: Evening Up the Odds*, 16 TRIAL 58 (Oct. 1980).

101. Rotunda, *Law, Lawyers, and Managers*, in THE ETHICS OF CORPORATE CONDUCT 144 (C. Walton 1977). A recent study of the administrative office of the United States Courts showed that in the Eastern District of Virginia, where judges forced themselves to decide cases quickly, the time between the filing of the litigants' papers and the start of the civil trial is only five months. The national median is fourteen months. In

courage guilty pleas or civil settlements so much as the knowledge that a trial date is set and will not be changed.

More institutional reforms are needed to assure that cases are tried on the merits with the least delay. Roscoe Pound's complaint over eighty years ago, that "our exaggerated contentious" civil procedure "disfigures our judicial administration,"¹⁰² portended the movement toward notice pleading. This movement from technical to simplified pleading in the federal rules was intended to reduce delay.¹⁰³ Unfortunately, the battle is not yet won. Various judges—led by the Third Circuit—are reviving fact pleading in areas such as securities fraud, civil rights, and conspiracy.¹⁰⁴ For example, a Third Circuit court has dismissed a civil rights complaint signed by the Attorney General of the United States alleging that members of the Philadelphia police systematically violated the civil rights of minorities by physical abuse. The trial court concluded that the suit could be vexatious for the police to defend;¹⁰⁵ while the appellate court did not find the claim frivolous, it nevertheless concluded that the complaint did not provide "fair notice."¹⁰⁶ The commentators and most judges agree that this effort to reduce litigation by procedural rulings that prevent plaintiffs from having their day in court is misguided.¹⁰⁷

some federal districts it is two years. Barrett, "Rocket Docket": *Federal Courts in Virginia Dispense Speedy Justice*, Wall St. J., Dec. 3, 1987, at 33, col. 4-6 (Midwest ed.).

102. See Pound, *The Causes of Popular Dissatisfaction With the Administration of Justice*, 29 A.B.A. Rep. 395, 404-06 (1906).

103. J. FLEMING & G. HAZARD, *Civil Procedure*. Sec. 1.6 at 17 (3d ed. 1985) ("The hardships, delays, and injustices finally led to reform.") See also *Thomson v. Allstate Ins. Co.*, 476 F.2d 746, 749 (5th Cir. 1973); Clark, *Special Pleading in the "Big Case."* 21 F.R.D. 45, 46 (1957). Cf. ABA COMMISSION REPORT, *supra* note 5, at 24.

104. See the thoughtful study by Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 449 (1986). See also *id.* at 435 (fact pleading "seems to be enjoying a revival in a number of areas . . .").

105. *United States v. Philadelphia*, 482 F. Supp. 1274, 1278 (E.D. Pa. 1979).

106. 644 F.2d 187, 205-06 & n.8 (3d Cir. 1980). See also *Sims v. Faestal*, 638 F. Supp. 1281 (E.D. Pa. 1986) (securities fraud suit against law firm of McDermott, Will & Emery and others for knowingly failing to disclose material facts in offering memorandum dismissed on technical pleading grounds). *Contra Shores v. Sklar*, 647 F.2d 462, 469 (5th Cir. 1981) (en banc) (similar charges against another lawyer held to state a cause of action).

107. See, e.g., *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Felton v. Walston & Co.*, 508 F.2d 577, 581 (2d Cir. 1974); *Thompson v. Allstate Insurance Co.*, 476 F.2d 746, 749 (5th Cir. 1973).

See also 2A J. MOORE & J. LUCAS, *MOORE'S FEDERAL PRACTICE* ¶ 9.03, at 9.28 (2d ed. 1985); 5 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 1298, at 406 (1969). Clark, *The Handmaid of Justice*, 23 WASH. U.L.Q. 297, 318-19 (1938); Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986).

In spite of the fact that Rule 12(b)(6), Federal Rules of Civil Procedure motions rarely

Our own State of Illinois can learn from other procedural reforms that serve to move litigation along promptly without being biased against either plaintiff or defendant. For example, judges rather than lawyers can conduct the *voir dire* of the jurors. Federal courts have been doing this for years without loss of any basic civil rights. The whole process of jury selection can be streamlined, thus saving the time of litigants and jurors.¹⁰⁸ Remember that the purpose of *voir dire* and jury selection is to assure that the jurors are impartial; there is no public interest served by allowing parties to use the opportunity to plead one's case to the jury or to select jurors who are likely to favor one side or the other. Illinois might also seek to simplify its other procedural rules: for example, it is the only state in the Union to distinguish between two types of depositions, creating unnecessary complexity.¹⁰⁹

Illinois also should look carefully at the rules of evidence and procedure with an eye toward eliminating those that add to expense without adding to justice. For example, Illinois, unlike most other states, requires parties to prove the information contained in hospital records by calling all the nurses and doctors involved.¹¹⁰ The business records exception to the hearsay rule does not apply here. The process can be expensive and the benefits to the system of justice are quite unclear.¹¹¹ To engage in specific reform and

succeed, defense attorneys find them effective to slow down the litigation process. Cf. A. MILLER, THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY 7-8 (Fed. Jud. Ctr. 1984) (Rule 12(b)(6) motions very rarely succeed). Requiring specificity in pleadings inherently favors defendants, as one expert in civil procedure has noted. Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CALIF. L. REV. 806, 815 (1981).

108. See Graham & Pope, *One Day, One Trial or a One Week Term of Jury Service: The Misleading Marketing of Modern Jury Management Systems*, 45 MO. L. REV. 255 (1980). Illinois has recently established a Study Committee on Voir Dire. Professor James P. Carey of Loyola University of Chicago is the Reporter.

See also Rickleff, *Sentenced to the Jury Room*, Wall St. J., June 5, 1987, at 18, col. 4-6 (Midwest ed.).

109. I am indebted to various members of the Illinois State Bar Association Committee on Professionalism, in particular, Peter Lousberg, Esq., for suggesting possible avenues of law reform.

110. See *Wright v. Upson*, 202 Ill. 120, 135 N.E.209 (1922). While it "is difficult to believe that *Wright* continues to represent the state of admissibility of hospital records in Illinois, the case continues to be applied by lower courts." E. CLEARY & M. GRAHAM, HANDBOOK OF ILLINOIS EVIDENCE § 803.11, at 444 (1979). See, e.g., *Wilson v. Clark*, 80 Ill. App. 3d 194, 399 N.E.2d 651 (1980). Cf. *Estate of Buddeke*, 49 Ill. App. 3d 431, 364 N.E.2d 446 (1977).

111. See, e.g., MCCORMICK ON EVIDENCE § 312 (E. Cleary 1972). This conclusion—that the business records exception to the hearsay rule should not apply here—is especially true in light of the Illinois Supreme Court's adoption of Federal Evidence Rule

streamlining of our rules of evidence and procedure may not be dramatic or exciting, but the cumulative efforts of the reform results should be satisfying.

IV. LEGAL EDUCATION DURING AND AFTER LAW SCHOOL

I do not want to give the impression that I do not agree with any of the proposals of the ABA Commission. On the contrary, much of what it recommends deserves to be implemented. Thus, I would like to turn to some of the Commission Recommendations dealing with legal education, both during law school and while in practice.

Law schools, as the Commission recommends, should continue to teach ethics courses as well as weave ethics issues into other courses.¹¹² Law schools seem to be doing a good job now in training for the practice of law. The Commission does not specifically

703. See *Wilson v. Clark*, 84 Ill.2d 186, 417 N.E.2d 1322 (1981). See also *Melecovsky v. McCarthy Bros. Co.*, 115 Ill. 2d 209, 503 N.E.2d 355 (1986).

112. ABA COMMISSION REPORT, *supra* note 5, at 16-17. The Commission also recommends that the ABA prepare videotapes on ethical problems or vignettes. *Id.* at 17 & n*. If the ethical problems of the profession are even half as serious as the Commission contends, having students watch video vignettes may not make much of a dent in the problem; I have less faith than the Commission in the power of television. In any event, the ABA prepared such videotapes and accompanying discussion guides a decade ago. See ABA, *DILEMMAS IN LEGAL ETHICS (PARTS 1-6)* (ABA 1977). One might assume that the Commission did not know of these videotapes, or found them inadequate; the Commission members, however, were informed of the existence of this series, but the Commission never viewed any of the videotapes.

The Commission also expressed concerns that the Multistate Professional Responsibility Examination ("MPRE"), prepared by the National Conference of Bar Examiners ("NCBE"), "may *unduly* test only the lowest acceptable standards through technical responses to multiple choice questions." ABA COMMISSION REPORT, *supra* note 5, at 17 (emphasis added). Leaving aside the ambiguous work "unduly," the fact remains that the MPRE does in fact test ethical aspiration as well as conduct beyond the pale. Objective questions can certainly test whether a lawyer *should* or *must*, or *may* do something. Moreover, I do not regard questions testing the parameters of the attorney-client privilege, or the rules governing commingling of client trust funds, or conflict of interest restrictions as "technical." One knowledgeable commentator on bar examinations has noted that it is a "false assumption" that objective examinations only test "the ability to memorize facts or find a question hidden within a convoluted passage." Josephson, *Becoming a Lawyer: An Outsider's View*, 53 THE BAR EXAMINER 4, 10 (May 1984).

The Commission urges the NCBE to prepare essay questions to test ethics issues. ABA COMMISSION REPORT, *supra* note 5, at 18. My own experience as an educator is that law students who know anything about testing techniques often respond to essay questions on ethics by writing, in substance: "the conduct of *X* raises some ethical questions that I would avoid by withdrawing from the case." See also Morrissey, *The Origins and Objectives of the MPRE*, 50 THE BAR EXAMINER 24, 25 (Aug. 1981) ("Essay questions on ethics tend to invoke sanctimonious answers, which in no way indicate how candidates would respond to a similar situation when actually practicing law.").

I am not saying that good essay questions can't be drafted. I'd like to think that I have drafted some. I only point out that essay questions have their own pitfalls. One expert

reach this conclusion, but it acknowledges the evidence that demonstrates that older lawyers — not younger lawyers who have just finished law school, but older lawyers, those out ten years or more — draw a very disproportionate number of the malpractice suits.¹¹³

The Commission recognizes what too many people forget: legal education does not end on graduation day. The good lawyer is always learning. The law changes. The tools of the legal profession change. The only thing that is constant is the certainty of change. In order to increase the competence of those older lawyers who have not kept up with change, and to reduce the number of malpractice suits against such lawyers, the Commission recommends that lawyers should take continuing legal education courses.¹¹⁴ Lawyers often oppose making these courses mandatory, arguing that some lawyers may be physically present but mentally in a different world. The Commission's response is to recommend that continuing legal education should be mandatory *with an examination* on the materials taught!¹¹⁵ It will be interesting to see how the organized bar reacts to that suggestion.

Even if the bar is not yet willing to accept mandatory continuing legal education ("CLE") with periodic examinations on the courses taken, the bar should seriously consider mandatory continuing legal education in the area of legal ethics. Attorneys practicing bankruptcy law, for example, may have a market incentive to keep up in the law involving creditor rights, or to take CLE courses in that area. But they do not have the same incentive to learn about recent developments regarding client trust funds, conflict of interests, and attorney disqualification. Lawyers often are their own worst lawyers; they often do not appreciate the nuances of the "law of lawyering."¹¹⁶ If they did, they (and their clients) would benefit.

The Commission properly recognizes that even though lawyers

on bar testing and bar techniques has conceded that "[t]here are certain inherent and irreducible reliability problems engendered by essay testing." Josephson, *supra*, at 12.

We must remember that the purpose of the MPRE is not to separate the *A* students from the *B* students or *C* students. That is the purpose of examinations during the course of three years of law school. Nor is it the purpose of the MPRE to create yet another barrier to entry. And the MPRE does not guarantee that the future lawyers will in fact be ethical any more than an examination on antitrust will guarantee that those who will pass will never engage in price fixing. Rather, the purpose of the MPRE is to separate those who know their ethical responsibilities and aspirations from the ethically incompetent. An objective examination serves that limited goal quite satisfactorily.

113. ABA COMMISSION REPORT, *supra* note 5, at 24 n.*. See, e.g., Gates, *The Newest Data on Lawyers' Malpractice Claims*, 70 A.B.A. J. 78 (April 1984).

114. ABA COMMISSION REPORT at *supra* note 5, at 24.

115. *Id.*

116. See Rotunda, *Ethical Problems in Federal Agency Hiring of Private Attorneys*, 1

are educated about, and sensitized to, ethical issues that may develop in their law practice, they nevertheless may not have the distance to resolve the problems properly. The lawyers involved may be too close to the issue to be objective. Thus the Commission urges law firms to establish ethics committees.¹¹⁷ I know of various firms that already have done that. Such ethics committees should provide a more neutral, detached source of advice for the supervising partner or the associates being supervised.

Let me conclude by briefly considering two more areas where the Commission has suggested reform.¹¹⁸ The first involves judges; the second, the problem of admission and discipline.

V. JUDGES

The Commission strongly endorsed the merit selection of judges.¹¹⁹ The Deans of every law school in this state also have supported merit selection for years. About forty states already have some form of merit selection; Illinois, which does not, is in the distinct minority.¹²⁰

As the ABA Commission acknowledges, the "elective system has given us some very good judges . . ." ¹²¹ Yet we do not value a chain by its strongest links but by its weakest. The present elective system has given us some weak links. The recent Greylord investigation, which has unfairly tarred the many honest and capable judges in Illinois, has served to focus our attention on the issue.

The investigation of the ABA Commission led it to conclude that judges who are appointed will be less reluctant to punish lawyers misconduct than judges who need to face retention elections periodically, and who need campaign donations. And, the Commission added, the political gauntlet discourages "many of the best potential candidates" from applying.¹²²

To these reasons, let me add another. The average citizen—indeed, the average lawyer—often does not know enough about the

GEO. J. OF LEGAL ETHICS 85, 96-102, 122-23 (1987). See also G. HAZARD, ETHICS IN THE PRACTICE OF LAW 43-44 (1976).

117. ABA COMMISSION REPORT, *supra* note 5, at 23.

118. The Commission also recommends that, in order to reduce legal costs, paralegals be licensed to perform certain relatively simple tasks now being performed by lawyers. ABA COMMISSION REPORT, *supra* note 5, at 52. The proposal has merit. The bar traditionally has been very protective of its legal monopoly, and its reaction to this proposal will be interesting.

119. ABA COMMISSION REPORT, *supra* note 5, at 43.

120. See, e.g., *Push for Merit Selection*, BAR LEADER 4 (Mar.-Apr. 1987).

121. ABA COMMISSION REPORT, *supra*, note 5, at 44.

122. *Id.*

individual candidates to make an informed choice. The truth of this statement was dramatically illustrated by the recent situation in Illinois, where the Chicago Bar Association rated as "qualified" a judicial candidate who won election to the Cook County Circuit Court Bench; this lawyer already had been identified as having paid bribes in traffic court. He later pled guilty to bribery charges, was prohibited from taking his judicial seat, and was then disbarred from the practice of law.¹²³

This example is not isolated. Justin Stanley, the Chairperson of the Professionalism Commission, and a distinguished Chicago attorney who formerly served as ABA President, conceded that at the recent Chicago elections there were few judicial candidates "that I knew and I have been practicing here a long time, and I found talking to friends that most of them haven't any idea what to do under those circumstances."¹²⁴ If Justin Stanley does not feel competent to vote knowledgeably for judicial candidates, how will the average lay voter fare? Popular judges are more likely to be elected or retained, but popular judges are not necessarily the better ones. Sir Francis Bacon's advice offered many years ago still contains truth: "A popular judge is a deformed thing, and plaudits are fitter for players than for magistrates."¹²⁵

The Illinois Supreme Court recently promulgated a new Code of Judicial Conduct.¹²⁶ It is patterned after the ABA Model Code,¹²⁷ and goes a long way toward improving and clarifying the ethics

123. *Push for Merit Selection Gains Momentum*, BAR LEADER 4 (Mar.-Apr. 1987). Other states without merit selection have had similar problems:

In Philadelphia, two judges were indicted for extortion as part of a federal grand jury investigation of bribes from a union to judges and other government officials.

In the wake of allegations about improper campaign contributions to justices of the Texas Supreme Court, a court committee was formed to push for merit selection.

A hotly contested race in the North Carolina Supreme Court rekindled professional and public interest in merit selection.

Id.

124. *Professionals, Pragmatists or Predators?*, 75 ILL. B.J. 482 (R. Rotunda ed. 1987) (quoting J. Stanley, chair, ABA Commission on Professionalism). Jerold Solovy, Chair of a Special Commission on the Administration of Justice in Cook County—a Commission formed to study court improvements after Greylord—stated: "The political process can't be relied upon to choose capable judges." *Push for Merit Selection Gains Momentum*, BAR LEADER 4 (Mar.-Apr. 1987).

125. W. H. AUDEN & L. KRONENBERGER, *THE VIKING BOOK OF APHORISMS* 208 (1966).

126. See 17 BENCH & BAR 1-4 (I.S.B.A., No. 7, Jan. 1987).

127. ABA MODEL CODE OF JUDICIAL CONDUCT, *reprinted in* T. MORGAN & R. ROTUNDA, 1987 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 337 (Foundation Press 1987).

guidelines for judges. While it attempts to regulate more strictly the political campaign process,¹²⁸ the fact remains that as long as Illinois judges are elected, you cannot take the politics out of politics. The time is ripe to consider some form of appointive process.¹²⁹

I will make only one further comment on the new Illinois judicial code. Illinois Canon 2 adopts the black letter of ABA Model Canon 2, and the two paragraphs of the Illinois Commentary are virtually identical to the first two paragraphs of the ABA Commentary. Without explanation, however, Illinois ignores the third paragraph of the ABA Commentary. That paragraph states explicitly, "It is inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin. Membership of a judge in an organization that practices invidious discrimination may give rise to perceptions by minorities, women, and others, that the judge's impartiality is impaired. . . ."¹³⁰ Illinois offers no explanation for the deletion of this paragraph, which may lead one to conclude that the Illinois Supreme Court meant to approve of membership in organizations which practice invidious discrimination. It is unusual for the judiciary (particularly an elected one) to embrace membership in these organizations; certainly such membership can hardly promote judicial professionalism.

128. CODE OF PROFESSIONAL RESPONSIBILITY Rule 7, ILL. REV. STAT. ch. 110A, CANON 7 (1985).

Note also that the new Illinois Judicial Code does *not* mandate judges to report lawyer misconduct. At first blush, Illinois Canon 3B(3) appears to be a bit stronger than the ABA version. The ABA Code provides that a judge "should" initiate disciplinary charges against a judge or lawyer if the judge becomes aware of unprofessional conduct. Illinois Canon B(3) substitutes the verb "shall." These changes are very good. What the right hand giveth, however, the left hand may taketh away, for the Illinois commentary *suggests* that a judge's finding of contempt against an attorney may be sufficient to fulfill the judge's obligations. The problem with that suggestion is that a lawyer may be held in contempt by several different judges; unless the judges report the contempt to the ARDC, no central body will even know that a particular lawyer is frequently in trouble. Even the judges who place that lawyer in contempt may not know of the contempt findings by other judges. No one likes to whistle blow, but that may be the cost of a profession which purports to be self-regulating. *Cf. In re Laurie*, 84 Ill. Courts Commission 5 (May 15, 1985).

129. For example, the law could provide for appointment by the Governor to a ten year term, with a presumption of reappointment.

130. Added Aug. 7, 1984, by the ABA House of Delegates, meeting in Chicago, *reprinted in* T. MORGAN & R. ROTUNDA, 1987 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 337 & n.1 (Foundation Press 1987).

VI. ADMISSION TO THE BAR AND LEGAL DISCIPLINE

I would like to conclude with a discussion of several case histories that illustrate the problems in admission to the Bar and legal discipline. They are all, unfortunately, very true.

First, admission to the bar. Every year our Dean, like the deans of all law schools, writes a report to the Illinois Bar Admission Authorities. In the standard form, the Dean is asked whether he *would* or *would not* recommend the graduate "for a position of trust and confidence."¹³¹ The form also asks whether our records show information adversely reflecting on the candidate's honesty, integrity, general conduct, reputation, and character.

In two recent cases our Dean at Illinois has *not* recommended two candidates. We had evidence of misrepresentation, forgery, and mental instability as well as other defects of character, all occurring during the applicants' law school careers. These charges are serious. The Dean attached to his nonrecommendation a narrative discussing the candidates' problems.¹³² To that narrative, the Dean attached extensive supporting documentation. Campus legal counsel also was involved.

What happened? Nothing. The Admission Authorities neither asked for, nor received, any new evidence. They conducted no investigation. The documentary evidence already submitted was apparently ignored. The Admission Authorities offered us no reason for their nonaction. They admitted both candidates to the Illinois Bar. One of these candidates—now a full-fledged member of the bar—has since been caught in another matter involving misrepresentation.

We investigated the admission process and were told that in Cook County, at two different steps in the admission process, one person can unilaterally decide to drop the investigation. The initial reviewer need not even be a lawyer. The ethics admission process in Illinois is not so much a hurdle as a vacuum—it sucks in almost all applicants, regardless of documentary evidence of mental instability and misrepresentation. Law students appreciate this fact. Several have told me that they have heard that if one seeks admis-

131. See STATE BOARD OF LAW EXAMINERS, STATE OF ILLINOIS, CERTIFICATE OF DEAN OF LAW SCHOOL.

132. The ABA Commission correctly criticizes law deans who "plea bargain"; in such cases, the dean fails to report the discipline to the bar authorities as the quid pro quo for the student's acceptance of sanctions. ABA COMMISSION REPORT, *supra* note 5, at 20, 65 n.67. The University of Illinois does not engage in this practice.

sion to the Illinois Bar, seek it in crowded Cook County where any ethics investigation is cursory or non-existent.

By way of comparison, we had another problem recently involving a misrepresentation by a law graduate who sought admission to the Pennsylvania Bar. Our Dean fully disclosed the law student's misrepresentation and then explained why, in his view, the nature of the misrepresentation was such that it should not bar admission. Armed with these facts, the Pennsylvania authorities conducted a thorough investigation. They ultimately concluded that they would agree with our Dean and admit the applicant. Their conclusion was a proper one; one of the reasons it was proper was that it was reached after investigation. Pennsylvania investigates; Illinois ignores.

When the Dean of the student's law school refuses to recommend someone for admission to the Bar, on grounds of mental instability and documentary evidence of misrepresentation, that alone should trigger some investigation. I am not talking about refusing admission because the applicant holds unpopular political views; I am talking about misrepresentation. The state has a responsibility to future clients and to the system of justice. Illinois can do more to protect the users of legal services. When Georgia instituted a policy of fingerprinting applicants, about one-hundred applicants withdrew their applications.¹³³ We can learn something from the Georgia experience.

One last story, this one concerning discipline. About a year ago, several partners of a law firm asked my advice. They had discovered that one of their partners had commingled client funds, had misappropriated client money, and was being sued in various cases filed throughout the state for malpractice because he had missed statutes of limitations.

The lawyer apparently was under a great deal of stress and perhaps had mental or emotional problems. The partners asked the wayward attorney to leave the firm, and he did. He also promptly set up practice elsewhere in Illinois. The partners came to me for legal advice; they wanted to know whether they had an obligation to report the lawyer to the Illinois Attorney Registration and Disciplinary Commission ("ARDC"). I advised them that they must;

133. Estes, *Bar Administration: One Man's View*, 53 THE BAR EXAMINER 19, 20 (Aug. 1984): "All applicants [to the Georgia bar] were notified of this requirement [for the submission of fingerprints] and upwards of one-hundred applications were abandoned." See also Custer, *Georgia's Board to Determine Fitness of Bar Applicants*, 51 THE BAR EXAMINER 17 (Aug. 1982).

that if they did not, it was unlikely that they would ever be disciplined because it is very rare that an attorney is disciplined for refusing to whistle-blow. But, I concluded, the attorneys really should whistle-blow. The wayward lawyer was still out there, still practicing law, potentially causing new harm. To whistle-blow was the moral thing to do, even though they would never be caught for failing to report.

I am reminded of an episode from *Don Quixote*: Don Quixote is with Sancho Panza, his squire. Quixote explains that he must now stay up all night and think about his love, Dulcinea, because Knights-Errant are supposed to do that. "But, M'Lord," says Sancho Panza, "I will be asleep and I won't know if you fail to stay up all night. And we are in the middle of the plains. No one else is here, so no one else will ever know." "I will know," says Quixote. I don't mean to suggest that, like Don Quixote, we should tilt at windmills. But what you do when you believe that no one will ever catch you is the real test of ethics.

The lawyers did the right thing. They reported the wayward attorney to the ARDC. They wrote a careful, objective narrative. They offered to provide documentary proof. The response of the ARDC? At first, the ARDC asked the reporting lawyers if the ARDC could undertake this matter as a complaint by the Administrator. The lawyers agreed. After that, the ARDC never contacted the complaining lawyer to seek documents or for any further information from them. When the lawyers phoned ARDC, the ARDC representative refused to answer any questions or give any indication of the progress or disposition of the matter. We eventually learned that the ARDC took *no* disciplinary action against the wayward lawyer.

Within two years, the wayward attorney moved to Arizona, and applied for admission to the bar there. The application asked him to list his prior employment record. He did. The Arizona authorities sent a routine letter to my clients. The form questionnaire asked the standard question: "Would you rehire the applicant?" The wayward attorney's former law partners truthfully answered: "No, for the reasons stated in our letter to the ARDC . . ." They did not attach the ARDC letter. Nonetheless, the Arizona authorities immediately began an investigation. They sent a lawyer to Illinois to depose my clients, who were the wayward attorney's former partners. The wayward attorney also sent his own lawyer. The deposition lasted all day.

Afterwards, the Arizona bar attorney told my clients that, at

Arizona's request, the Illinois ARDC had shown the Arizona bar attorneys its file on the wayward lawyer. Based on that file alone, said the Arizona discipline attorney, he could not understand why the ARDC closed the case. Shortly thereafter, the wayward attorney, at the suggestion of his own counsel, underwent a psychiatric evaluation. It concluded that he was not fit to practice law. The wayward lawyer withdrew his Arizona application, underwent counseling, and plans to resubmit the application when he has his problems truly behind him. I am hopeful that he will eventually be readmitted to the practice of law when he has reformed and is capable of handling client matters competently, ethically, and honestly.

The point of the story: Arizona investigated; Illinois did not. Perhaps the ARDC closed the case because the wayward lawyer was moving out of state. If so, the reason is outrageous. We should not impose on our sister states those lawyers who are unfit to practice. We would not like Arizona shipping us their incompetent, unethical, and alcoholic lawyers to practice here. Whatever the reason for the ARDC decision—lack of manpower, or lack of will—it should be corrected.

VII. CONCLUSION

The Report of the ABA Commission on Professionalism is a very important document because it focuses our attention on the ways of improving the legal profession. I do not endorse all of its proposals, but I applaud the effort it represents. Hopefully, some of its suggestions will be implemented. Yet if the Commission's Report does nothing other than promote further discussion on the ways to improve the practice of law, it will have served a very important role.

Carl Sandburg wrote years ago:

The knack of a mason outlasts a moon.
 The hands of a plasterer hold a room together,
 The land of a farmer wishes him back again.
 Singers of songs and dreamers of plays
 Build a house no wind blows over.
 The lawyers—tell me why a hearse horse snickers
 hauling a lawyer's bones.¹³⁴

But why should we pay attention to what horses think? I much prefer the view expressed by John W. Davis many years ago:

134. K. LEWELLYN, *THE BRAMBLE BUSH: OF OUR LAW AND ITS STUDY* 142 (1960) (quoting Carl Sandburg, *The Lawyers Know Too Much* (1951)).

True, we build no bridges. We raise no towers. We construct no engines. We paint no pictures—unless as amateurs for our own principal amusement. There is little of all that we do which the eye of man can see. But we smooth out difficulties; we relieve stress; we correct mistakes; we take up other men's burdens and by our effort we make possible the peaceful life of men in a peaceful state.¹³⁵

135. *Quoted in* THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 30 (1958), and in M. MAYER, THE LAWYERS 3 (1967).