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## Standards, Change, Politics, and the Millennium

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# Standards, Change, Politics, and the Millennium

*Erica Moeser\**

I am deeply honored to have been chosen to deliver this year's edition of the Baker & McKenzie Lecture to such a distinguished group of listeners. It has been humbling to devise remarks that are worthy of such an important occasion—the rededication of a very fine legal educational institution—and worthy of a lecture series named for such a prestigious law firm.

When Erma Bombeck died earlier this week, she was praised for having the wisdom to write about what she knew. I suppose that goes for public speaking, too. While I may be no match for the challenge, I will do my best to explore topics that relate to the occasion of this rededication, to legal ethics, and to the legal profession at this particular juncture.

By the time we attain the millennium, I imagine that most of us will be ready to stuff the word “millennium” into a time capsule and give it 995 years to recover from chronic overuse. However, the approaching millennium does permit us the occasion to pause before we cross the threshold into another ten centuries, much as the centennial of a university provides an appropriate point for reflection on its past accomplishments and for setting goals for the next hundred years.

And so, I pause with you to consider several matters this afternoon.

Ethics. Imagine the possibilities for what one can say about ethics for lawyers—or for anyone—at the end of this century. Are ethics out of vogue, or returning to vogue? How many of our perceptions about the fall and rise of ethics are valid, and how many are simply the past viewed through layers of memory—like Doris Day shot through gauze in her later movies? I don't know.

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Erica Moeser delivered an address as the keynote speaker at the 10th annual Baker-McKenzie Lecture, a legal ethics symposium, on April 25, 1996, at Loyola University Chicago School of Law.

How much did Vietnam and Watergate undermine our confidence in authority, and did ethics go south because of those events? I don't know that, either, but I also don't remember lawyer jokes from the pre-Vietnam days and the pre-Watergate days . . . do any of you? And while I remember with amusement a sign in the French Quarter when the ABA met in New Orleans in 1994 that read, "[i]f they can take 5,000 lawyers to New Orleans, why can't they take them all?"; and while I chuckled when I recently heard a Chicago disk jockey mention on the air that his subject of discussion would be the 99% of lawyers who give the other 1% a bad name, I recognize the disenchantment, the cynical edge, and what some might call the truth that underlies the wit. The truth of these statements fuels the response of the listener. The quips are funny because, at least in part, they resonate. We bear collective responsibility for our tarnished profession, and we are its hope for rescue and repair.

For me, the subject of legal ethics breaks into a number of sub-categories. One of these sub-categories is the set of internal rules that lawyers learn, understand, and abide by irrespective of any body of written rules governing conduct. I am unsure whether the profession still communicates these values to new lawyers, and I believe that the practice of law, when ordered differently a generation ago, probably did this better than it is done now.

The reasons for this are varied. I think that rules and rule-following, even as to internal rules, fell out of fashion in the late 1960s. In addition, the method of passing along professional expectations has not evolved to acknowledge, let alone keep pace with, the vast numbers of new lawyers who lack any meaningful mentoring when they leave law schools. National statistics make clear that the profession no longer absorbs the same percentage of new initiates into nurturing settings, leaving many to invent the profession as solo practitioners. And those initiates who are absorbed into larger law firms, we are told through the MacCrate Report<sup>1</sup> and the conclaves it has spawned, are not brought along with the same degree of patience and care as they once were—patience and care that have been widely replaced by keener eyes on the bottom line.

Law schools themselves have drifted away from the profession. (That is one reason that I am so delighted about Baker & McKenzie's sponsorship of this event.) There is an oft-described perception of a growing gap between the academy and the profession that has impeded

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1. AMERICAN BAR ASSOCIATION, TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (Robert MacCrate ed., 1992) (the "MacCrate Report").

the inculcation of professional values in students. In many law schools, faculties have moved away from taking on this responsibility. This may arise out of conviction about its unimportance—their own internalization may never have occurred, *or* because there is a view that those who practice are not engaged in so honorable a profession after all, *or* because the profession itself no longer justly qualifies for respect. And as law schools look to practitioners to teach professional responsibility as adjuncts (a positive development, to be sure, because it interjects a reality), perhaps this also accounts for an unexplored “flip side” that communicates that “real” faculty members bear no responsibility in this area. Instead of integrating practitioners into the academic mix, perhaps we have unwittingly carved thought and teaching about ethics out of the mission of the traditional faculty.

Having said that, there are perhaps other related items that we could stir into our considerations. First is the fact that only relatively recently has professional responsibility been required of all law students at all law schools. The “good old days,” if they were in fact good old days, managed to occur without universal exposure to ethics or even exposure to the Model Code, the body of rules in place at the time.

In terms of who delivers what exposure, another related issue about the inculcation of values has to do with the emergence of clinical and externship experiences in law schools through which practice skills and values are communicated to students. The clinical or externship model certainly lends itself, it seems to me, to becoming an ideal delivery system for teaching legal ethics, both in its black letter form and in its living form when law students come to grips with what underlies those black letters. We might ask if this is being done. We might ask if it is being done well. We might ask, if we are at all inclined to press the point, if this is being done in a way that prepares students for appropriate behaviors as lawyers. In some instances, it is not, and that demands reflection by the legal education community.

As a digression, one of the interesting issues that bar examiners have encountered relates to assessing the character and fitness of bar applicants who, as students, have demonstrated a lack of character in a law school practice setting. The professional transgressions that clinical teachers and extern-placement supervisors observe are very relevant to what lawyers are expected to do and to what bar examiners should rely upon to make judgments. We need to work to assure that the development of methods for communicating germane information is encouraged.

The student perspective on all of this is an essential. I have sought that perspective from the students I have taught. In their eyes, the profession itself has stumbled with its selection of the word “professionalism” to describe the essence of the holy grail of service to a profession and of the integrity that most would agree is an essential component of that service.

Fairly or unfairly, some students and practitioners perceive “professionalism” as a code word for the phrase “lost elitism,” or for the long-lost law practice of memory—Doris Day through gauze again—before it was invaded by women and persons of color. “Professionalism” is, for some, a term that may send the wrong message to tomorrow’s lawyers, even though the exploration of the underlying quest—for that holy grail of service and integrity—is entirely valid.

As many of you know, the Law School Admission Council (LSAC) embarked on a study of the class that entered law school in Fall, 1991, and graduated in Spring, 1994. The LSAC study followed over 20,000 students through law school, through the bar exam, and into practice. It is a benchmark study that will be far too costly to replicate any time soon. The aspirations and expectations of those students figure into that study, both as they entered law school and as they adjusted based on what they learned. A series of monographs has begun to appear in print. One aspect that bears watching will be the attitudes of these students and how they are observed to evolve.

Anyone who reads the papers knows that the practice of law today appears to encourage a take-no-prisoners approach and a defensive practice approach even as segments of the profession talk about alternative dispute resolution and reducing the cost of litigation. Is there room left for the “word-is-my-bond, acknowledge one’s own errors” value system that most of us associate with what we think the profession used to embody? Is anyone horrified that we may be relegated to looking to malpractice carriers for the Pole Star of professional propriety? Is it chic to think about propriety at all?

And the rules that govern lawyers ethics . . . what meaning do they have? How are they growing, and how may they be affecting the profession? In my view, there is nothing about the current body of state disciplinary rules to which the current level of disappointment with the profession can be attributed. The rules are serviceable, and they offer important guidance. They represent acceptable standards, but we as a society seem to be struggling with standards. It seems ever so much easier to attack standards with zeal than to defend them, and that is a theme that is playing out in many contexts.

Then there are those lawyers who qualify as the rank and file. Unfortunately, I think that many lawyers are unaware of even the most basic rules. Can law schools and the profession combine to communicate the rules and the values that underlie them? Every year lawyers pay their bar dues out of their trust accounts, and I see no prospect for change. What can we reasonably expect—a grasp of the underpinnings, a reach for the moral center, or simply a brush with the fundamentals, as in “the money in the trust account is not your money”?

One unsettling phenomenon about the rules and, for that matter, standards, and institutions such as the judiciary, is that at the end of this century they have provided a fertile ground for politics. However worthy some political objectives are (mine, of course), rules of ethics are an unsuitable battleground. I would prefer to see the rules grow very narrowly to address what members of the profession must and must not do. That is an ambitious enough of a role as the practice becomes so much more complex.

As for the rules themselves, perhaps the problem is less likely the rules than lawyers’ responses to them. Here, unfortunately, I recognize many of the behaviors that I observed when I taught sixth grade almost three decades ago.

I refer to a lack of personal accountability, that personal internal ethic that operates whether or not there are rules in place. Just as my sixth graders retreated almost instinctively to the refuge of, “I didn’t do it; she made me do it; he did it, too,” we see the same defenses in lawyers confronted with wrongdoing and breaches of ethics.

The importance of ethics in the practice is supported by what we generally observe about the efficacy of the written rules of professional responsibility. We know that lawyer disciplinary machinery is not satisfactory, and that it can be condemned, justly, in most jurisdictions as ineffective. The ineffectiveness springs from several sources. The first and last—that alpha and omega—is resources. It is rare that lawyer disciplinary agencies are sufficiently funded to be able to avoid the prioritization that results in jettisoned complaints. This undermines public confidence.

State agencies often cannot carry the burden of the clear and convincing standard in many meritorious claims because of scanty resources or because a particular case does not set up neatly. And of course, for a complaint to arise in the first place, there must be some recognition that wrongdoing may have occurred—a tough call for a non-lawyer—and the courage to go forward, something that even lawyers and judges are reluctant to do.

If one looks at the disciplinary consequences of breaching rules, one is struck by how much emphasis is placed on the failures to communicate or failures to meet deadlines, things that aggrieved clients are more able to confidently discern. The consequences confirm that rules and their enforcement are not enough, even if vigorously pursued, and that, ultimately, the profession's answers must come through affecting the conduct that is presented in the first place.

How we can get lawyers of this generation to buy into the value system that is required to build public confidence, now eroded, is a major challenge, but one that we appropriately contemplate as we approach the millennium.

Ethics are undoubtedly intertwined with image, and the answer is not to put the image-polishers to work to craft a solution. We are not baby formula, and we are not cigarettes. The changes that are necessary are very serious, deeply internal, and anything but cosmetic.

Some would say that cameras in the courtroom have undermined our confidence in the justice system, and that the cameras have revealed how faulty or unfair our justice system can be, or, simply stated, how lawyers can manipulate the justice system to defeat justice itself. I do not believe that cameras are the problem. Public access to the justice system is a positive, and I would not unplug a single camera. If anything, I would increase their use so that the true everyday doings of courtrooms would be more fully revealed; the public's occasional exposure to only high-profile cases contributes to the development of incorrect stereotypes.

I have another word or two about the profession that stems from an involvement that I share with your dean, Nina Appel, in the American Bar Association (ABA). Dean Appel, as many of you know, chaired the Section of Legal Education and Admissions to the Bar (Section) three years ago in halcyon days during which we celebrated the Section's centennial.

Through a series of happenstances, Dean Appel has now done a hat trick as the Section's Last Retiring Chairperson, something that will doubtlessly earn her a special asterisk in the Section's annals. Her two successors did not remain on to serve in that capacity, so she served not merely her own "retiring" year, but also that of Bob Stein, now the Executive Director of the ABA, and Judge Joseph Bellacosa. I now chair the same Section, the ABA's oldest, and if the good dean plays her cards right, she will be released from service this August.

The ABA and our Section have undergone a difficult period relating to an investigation by the Department of Justice into the accreditation process. I will not dwell on that here, except to remark that the

dissension in the ranks of law schools about accreditation echoes some of what I have said today in other contexts.

I refer to the notion of standards—standards that express the minimums that result in an acceptable education; an education on which the highest court of a state may justifiably rely in determining which underlying educational credentials are sufficient for individuals to be permitted to sit for a two-day bar examination. The bar examination, after all, is a relatively modest requirement. (I say that not to trivialize its importance as a qualifying rite but to underscore that what one learns in a law school over three years and what one demonstrates over the course of six semesters of evaluations is more telling than what one can determine about the law student as bar applicant over two days, however well-crafted the test instruments.)

It should come as no surprise that critics of the accreditation process have often taken aim at the standards, stating that when a particular school has a shortcoming—and here we have the usual assortment—that there must be something wrong with the standard; it cannot, after all, be the school; or, if so, someone else is doing the same thing (“he did it, too” redux). In any event, it is not “you’re right—we should do better—it was my fault—I am accountable.” In the context of the difficulties that the accreditation process as undertaken by the ABA has fallen into during the past two or three years, we have read more than once that the problem is not a school’s shortcomings but a problem with the standards. This is unlikely to change. There is no shortage of zeal in the attack on the standards, either, which perplexes the more moderate among us as we seem to learn that “nice guys finish last” again and again.

Back to ethics. I have one more troubling thought to share about ethics and law schools these days. As any of you who have prowled the racks of law school guides and publications will know, *U.S. News and World Report* has become a gospel of sorts touting law school rankings. Setting aside the matter of the validity of the math and science that goes into ranking law schools, I would like to focus on one murderous fact that should make us all pause as we cast for the future of ethics in our law schools: the widespread misreporting of data by law schools to *U.S. News* to inflate the numbers by which it judges law schools. Placement data and LSAT scores of the entering class have become “the scene of the crime.” The matter has become so grave that for two years in a row, the publication has included a sidebar about the discrepancies, which it has apparently confirmed by consulting leaked confidential documents.

This year's *U.S. News and World Report's* law school rankings issue notes that the numbers of misreportings are down, but that gives inadequate comfort to those of us who look to our law schools to set the standard for integrity in reporting, even—or should I say especially—when the numbers are harmful. If there was ever a time when law schools should reject the “means to an end” notion, this is it. If the best we can get from our law schools is a *low* number of schools churning out faked data, we have a long way to go to earn the public's trust in the profession.

In closing, I hope that I have strayed into enough areas to provide food for thought about where we are as a profession, and that you will bring your own thinking to taking both the profession's ethical “temperature”—and your own. How can this profession turn the tide? How can we un-selfconsciously reintroduce ethics and values into the discussion without appearing to moralize (and, therefore, have ourselves dismissed as moralizers)?

One of the things that I have learned through my experiences with legal education by participating in the ABA's Section of Legal Education and its accreditation efforts is how important the mission identified by a school can be to shaping the educational effort that flows from it. I have gained knowledge and enormous respect for what a religiously-affiliated school can do to communicate values to a student body. In a way, schools such as Loyola, with their solid religious underpinnings and traditions, have a freedom to insist on an exploration of what is moral, and an inclusion of values components, that may be more difficult for schools not so rooted to achieve. That morality and those values are going to be even more important in an increasingly diverse society with the problems that lie ahead for it during the next century and the next millennium.

I thank you for allowing me to share my thoughts with you. I hope that we have made some forward progress in our thinking about lawyers, ethics, law schools, and what lies ahead for Loyola and for the profession.