OCCUPATION CODE 541110: LAWYERS, SELF-REGULATION, AND THE IDEA OF A PROFESSION

Jonathan Macey*

INTRODUCTION

In Arizona, lawyers earn on average $45.70 an hour.¹ This is comfortably above poverty wages, but it puts lawyers in sixteenth place on a list of the top twenty highest paying occupations in Arizona.² Lawyers are ahead of pharmacists and optometrists, but behind chiropractors, podiatrists and, of course, all matter of medical doctors. Being a lawyer is not what it used to be. The profession is more competitive, the services performed for clients are more commoditized, and the work involved is less rewarding.

This Article first makes the simple point that demographic factors, including, but not limited to, the decline in lawyers’ wages relative to other professions, the growth in the percentage of lawyers in the population since 1970, and the concomitant increase in competition among lawyers have conspired to bring about a marked decline in the social status of lawyers and in the self-esteem of lawyers.³ These factors, in turn, provide at least a partial explanation for the apparent and much lamented decline in civility and general “professionalism” among lawyers.⁴ Consistent with this observation, we have seen the adoption of several aspirational “civility codes” which suggest that the “legal profession deems itself to be in crisis.”⁵

* Sam Harris Professor of Corporate Law, Corporate Finance, and Securities Law, Yale Law School. I am grateful to Roberta Romano for her extremely valuable comments and to Robin M. Preussel, Yale Law School Class of 2006, for her exemplary research assistance.


2. See id.

3. See infra app. C, which presents data on the relative incomes of lawyers and chiropractors in a sampling of U.S. metropolitan areas.

4. See James A. George, The "Rambo" Problem: Is Mandatory CLE the Way Back to Atticus?, 62 La. L. Rev. 467, 472 (2002); Thomas P. Sukowicz & Thomas P. McGarry, Feathers May Fly for Using Foul Language, Chi. Law., Dec. 2002, at 14 (observing that “[f]or many years now, there has been a perception that incivility, rudeness and the use of offensive tactics among lawyers are on the rise”).


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Another important factor leading to the observed declines in civility and professionalism is the increasingly national character of law practice. The expansion of the market for legal services from being local to being national in scope contributes to the decline in civility and professionalism in at least three ways. First, by reducing the amount of "repeat dealing" that occurs among opposing counsel, national practice reduces the costs to attorneys of bad behavior because few, if any, social sanctions, such as stigma or ostracism, emerge to constrain behavior. Second, as law practice has become more national, lawyers find themselves able to operate in a variety of important contexts in which they interact with other lawyers, such as depositions and settlement negotiations, without even the possibility of supervision, much less sanction, by courts or other competent bodies. Third, as the legal profession has expanded, it has become more heterogeneous, which in turn has led to less empathy and camaraderie among lawyers.

One might, of course, legitimately ask the question, "so what?" Any perceived decline in civility or "professionalism" is not only notoriously hard to measure; it also may be only one of the mere pecuniary externalities associated with the welcome increase in competition among lawyers. After all, if an externality imposes a cost on a third party, but does not interfere with any legal or moral right that the third party is thought to enjoy, perhaps it should not be considered a problem. Certainly, for example, there is no "right" to be free from the effects of competition.


In the Seventh Circuit's urban courtrooms, trial lawyers no longer appear frequently against the same opponent or before the same judge, thereby reducing opportunities for building mutual respect and learning the ethics of a time-honored profession from seasoned hands. Today's metropolitan lawyer may deal with a particular opponent lawyer, law firm, or judge only once in his or her career. Thus, the incentive to retain cordial relationships often dies because the relationship will not likely become an ongoing one.


7. See generally Aspen, supra note 6, at 515-17.


9. For a discussion of externalities, including the difference between true externalities and mere pecuniary externalities, particularly in the context of takeovers, see David D. Haddock et al., Property Rights in Assets and Resistance to Tender Offers, 73 Va. L. Rev. 701 (1987).
Other sorts of externalities, such as the lack of civility among lawyers, while unpleasant, simply may be an unavoidable, but manageable, price that society must pay to reap the benefits of a more competitive environment among lawyers.

In other words, the costs of increased competition may be borne by lawyers, while the benefits are enjoyed by clients, in the form of lower fees and better service. This point becomes increasingly strong when one considers the fact that at least some of the "blame" for any decline in civility and professionalism must be attributable to the increasing gender, race, and cultural diversity in the legal profession.\textsuperscript{10} The decline in civility is, in other words, attributable at least in part to the demise of the "old boys network" in which informal sanctions, such as ostracism and stigmatization, have lost much, if not all, of their bite. As the legal profession has become less of a cozy local club in various locales, so too has the incentive to get along with one's professional colleagues diminished.

All of this matters, not because romantic recollections of the glories of the practice of law in a bygone era are worth preserving, but because the practice of law is still self-regulated. It is worth considering, in light of all of the changes that have occurred in the economics of the practice of law, whether such self-regulation is still in the public interest, if indeed it ever was.

This Article argues against self-regulation of the legal profession. As a general matter, self-regulation is desirable only where the firms or individuals subject to such regulation internalize the costs and benefits associated with generating such regulation.\textsuperscript{11} As the prestige of the legal profession has eroded, so too have the costs of being sanctioned by professional bodies. Censure by a bar association does not carry much of a social stigma when the bar itself is not viewed with respect. Rational lawyers will not spend resources to protect the reputation of their profession if there is little left to protect.

The first part of this Article explains why, in recent years, life as a lawyer has become highly competitive. In particular, the barriers to entering the profession posed by the bar examination and other restrictions—such as the requirement that lawyers graduate from college and law school—have been competed away.

Part II explores the various ways in which the new competitive environment manifests itself and outlines the costs and benefits of the increased competition among lawyers.

\textsuperscript{10} For a report on increased diversity in the legal profession, see, e.g., N.Y. County Lawyers' Association, Report of the Task Force to Increase Diversity in the Legal Profession 9 (2002), http://www.nycla.org/publications/taskforce.html [hereinafter Report to Increase Diversity].

Part III constructs a framework for evaluating the desirability of self-regulation and argues that, whatever value self-regulation may have had historically, the legal profession and clients would benefit from abandoning it for a private contracting model that treats clients as investors to whom lawyers owe standard fiduciary duties of care, loyalty, good faith, and disclosure. These obligations would exist as default rules around which the parties could contract. In particular, this part argues that clients should be responsible for their lawyers’ misconduct because clients are their lawyers’ principals both in fact and in theory. This would immediately eliminate the growing problem of lawyer misbehavior.

Finally, this Article concludes that abandoning lawyer self-regulation would significantly reduce the unfortunate consequences of the increasingly competitive environment in which lawyers work.

I. THE PRACTICE OF LAW TODAY

Law has long been an adversarial endeavor. There was a time, however, when the adversarial aspects of lawyering were tightly cabined within a clear set of professional norms. Adversarial lawyering was carried on in the manner of academic debating in which gentlemanly conduct was an important professional attribute, valued by judges and clients alike. This is no longer the case.

Today, litigation is likened not to a scholarly debate but to all-out war. Antiquated notions, for example, the notions of professional courtesy and civility, are considered at best character flaws and at worst signs of incompetence or sloth. There are three reasons for the observed decline in civility and professionalism. First, a collective action problem, akin to a prisoners’ dilemma, exists among lawyers that makes it difficult for individual lawyers to survive by pursuing a strategy of professionalism and civility. Second, professional groups have not interceded to solve this collective action problem by policing lawyer civility. Third, courts have shown little or no proclivity, or ability, to intercede.

A. The Prisoners’ Dilemma Among Lawyers

Lawyers face a collective action problem in the form of a prisoners’ dilemma when they attempt to establish their disclosure policies. The


13. In the original version of the prisoners’ dilemma, the police have arrested two suspects on suspicion of armed robbery and have separated them into different rooms for the purpose of interrogating them. Each prisoner must choose whether to confess and implicate the other suspect or remain silent. If neither prisoner confesses, police and prosecutors can obtain a conviction only for the crime of carrying a concealed weapon. If one prisoner confesses, the government can obtain convictions on both the weapons charge and on the more serious charge of armed robbery. A prisoner can obtain a drastic reduction in sentence by confessing, but if one prisoner refuses to confess and his partner in crime confesses, the
prisoners' dilemma is probably the best known game theoretic construct in the social sciences.\textsuperscript{14} The prisoners' dilemma models the collective action problem of two groups who must solve an identical problem without cooperating with each other or coordinating their actions. This model shows that when groups are unable to cooperate, each group pursues its own self-interest, resulting in decisions that are suboptimal from the perspective of both groups together.

Applying this model to the context of professionalism among lawyers, imagine that there are two lawyers, Enlawyer and Outlawyer. Both lawyers must choose between pursuing a policy of exhibiting "good," i.e., highly professional, cooperative behavior, or engaging in bad, i.e., highly unprofessional, noncooperative behavior. Though it would be better for both lawyers to behave professionally, each lawyer can benefit herself individually by behaving unprofessionally, without any risk. The benefit to the uncivil lawyer is especially good if her opponent adopts a good behavior policy. The worst outcome for either lawyer would be to adopt a good behavior policy while her opponent adopted a bad behavior policy. This is so because, in a world of rivalrous competition for legal services, each lawyer can act uncivilly in ways that lead the client to think that he is getting the benefit of more aggressive legal representation. Thus, the only way that a lawyer can effectively compete for clients is by engaging in aggressive conduct herself.

A simple example illustrates the point. Imagine that our two lawyers, Enlawyer and Outlawyer, are identical in every way except that they represent clients on opposite sides of a lawsuit. Both lawyers have a choice about whether to act professionally and civilly towards the other. If both attorneys act professionally and civilly, neither lawyer will suffer relative to the other during the suit. The problem is that the market, as measured by client demand for a lawyer's services, will punish any lawyer that acts civilly as long as other lawyers the client could hire would act uncivilly.

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Prisoners' Dilemma: & Prisoner 1 confesses: & Prisoner 1 does not confess: \\
\hline
Prisoner 2 confesses: & Prisoner 1: 10 years & Prisoner 1: 25 years \\
& Prisoner 2: 10 years & Prisoner 2: 3 years \\
\hline
Prisoner 2 does not confess: & Prisoner 1: 3 years & Prisoner 1: 1 year \\
& Prisoner 2: 25 years & Prisoner 2: 1 year \\
\hline
\end{tabular}
\caption{Prisoners' Dilemma}
\end{table}

In other words, no matter what the other prisoner does, a suspect can improve his own position by confessing and implicating the other suspect. However, the best result would be obtained if both remained silent.

\textsuperscript{14} Barry Nalebuff, \textit{Prisoners' Dilemma}, in 3 The New Palgrave Dictionary of Law and Economics 89-94 (Peter Newman ed., 1998). The following chart shows how many years in jail each suspect confronted with a prisoners' dilemma would receive under the four possible scenarios:
Thus, both Enlawyer and Outlawyer have incentives to refrain from acting professionally. In a competitive environment for legal services, individual lawyers—or law firms—will obtain the best possible outcomes for themselves by pursuing unprofessional, highly aggressive strategies while rival lawyers and firms behave more professionally. However, each law firm will suffer the worst possible outcome—the loss of its clients—if its lawyers act benignly while its rivals pursue scorched-earth lawyering tactics.

This prisoners' dilemma is even more pronounced when one moves the example from the theoretical world of two lawyers to the real world of hundreds of thousands of practicing lawyers. In this world, individual lawyers face strong incentives to "cheat" by acting unprofessionally to gain a reputation with clients and to score points against litigation or negotiation rivals. If only a small number of lawyers defect from professional norms, they will benefit as long as the general market expectation for lawyers is one of professional conduct. But if there are a large number of these "defectors," then adhering to a policy of professional conduct is no longer a viable survival strategy.

Unfortunately, if all lawyers act uncivilly, sooner or later clients and other market participants will come to realize that such tactics are ineffective and highly costly. So, as noted above, over the long term, the best decision for all lawyers is to act professionally.

Thus, the prisoners' dilemma in the context of lawyers' professionalism is easy to summarize: From the standpoint of lawyers, the best of all possible scenarios would exist if all lawyers could forge binding agreements to act professionally. This would be the best way for lawyers to optimize the available pool of legal talent and to keep the cost of legal services low and the quality of such services high. However, each firm can benefit at the expense of its rivals by cheating a little bit on its promise to act professionally. So, cheating on one's professional obligations is the dominant strategy because cheating is both (a) the only way to maximize one's appeal to clients by developing a reputation for aggressive, scorched-earth lawyering, and (b) the only way to avoid the worst outcome by pursuing a strict policy of professionalism while most other lawyers cheat.

In other words, ethical lawyers face a prisoners' dilemma. Less professional rivals can benefit themselves at the expense of the professional, ethical attorneys by making the professional lawyers look like less vigorous advocates. If this happens enough, however, preexisting norms of professionalism will collapse under the competitive pressures that are ubiquitous in the market for lawyers.

Given the contours of this ethical dilemma, rules of professional conduct are valuable because such rules solve the prisoners' dilemma facing lawyers. If the sanctions for unprofessionalism are high enough, then lawyers and law firms no longer would have any incentive to cheat by acting unprofessionally.
B. Professional Groups

The above discussion raises the issue of why professional groups, particularly bar associations, have not acted to ameliorate the ethical collective action problems that practicing lawyers face. If the bar actually is the predominant self-regulatory organization for lawyers, it should promulgate regulations that are in the rational self-interest of the group as a whole.\(^1\) However, several constraints limit the ability of the bar to control lawyers.

First, it is difficult to articulate professional norms that precisely define unprofessional conduct while permitting vigorous advocacy within the bounds of professional propriety. It is one thing to agree that professional misconduct needs to be sanctioned. It is quite another to devise a workable system that can implement a system of sanctions on a day-to-day basis.

Second, since lawyers have strong incentives to avoid sanctions, individual members of the bar have little incentive to lobby the bar to impose strict sanctions on other lawyers. Moreover, lawyers benefit from self-governance, and thus are loath to take actions that would make the existence of unprofessional conduct salient to any administrative authority, as focusing on incivility could lead to criticism of the very status quo regulatory structure from which lawyers benefit. Thus, it is not surprising that lawyers are reluctant to sanction each other or to impose particularly stiff penalties in those rare instances where lawyers are sanctioned.\(^6\) And it is not surprising that high profile examples of lawyer misconduct that do not relate to a lawyer’s professional obligations, like stealing from the Girl Scouts or permitting marijuana to be grown on one’s property, often elicit more serious sanctions than professional misconduct, like stealing clients’ money.\(^7\)

The third problem is that the self-regulatory structure is extremely narrow in scope. The bar can only regulate lawyers, but lawyers face increasing competition from nonlawyers. As the U.S. Department of Labor’s Bureau of Labor Statistics has observed, growth in demand for lawyers will be mitigated by the fact that clients “increasingly are using large accounting firms and paralegals to perform some of the same functions... [as] lawyers.”\(^8\) Increasingly, professional tasks traditionally performed by lawyers, such as dispute resolution, mediation, document handling, real estate transactions, and tax advocacy are being handled by nonlawyers. When lawyers face increased competition for clients, the incentive to abandon professionalism grows as now the lawyer must

\(^{16}\) Deborah L. Rhode, In the Interests of Justice: Reforming the Legal Profession 158-65 (2000).
\(^{17}\) Id.
demonstrate even more aggressive advocacy in order to retain her client and earn her fee. Since these external sources of competition are entities beyond the reach of the bar and its power to impose sanctions for unprofessional conduct, the incentive to abandon professionalism will further increase, compounding the problem.

C. The Courts

Courts have not been any better than bar groups at imposing sanctions on unethical or unprofessional lawyers. Courts are extremely reluctant to protect lawyers from the unprofessional behavior of their adversaries. Courts also generally decline to sanction lawyers who bring frivolous suits for strategic purposes or simply to harass an adversary while generating fees for themselves.19 As the United States Court of Appeals for the Second Circuit remarked,

[W]e are cognizant of the unique dilemma that sanctions present. On the one hand, a court should discipline those who harass their opponents and waste judicial resources by abusing the legal process. On the other hand, in our adversarial system, we expect a litigant and his or her attorney to pursue a claim zealously within the boundaries of the law and ethical rules. Given these interests, determining whether a case or conduct falls beyond the pale is perhaps one of the most difficult and unenviable tasks for a court.20

The court acknowledges that zealous advocacy may sometimes justifiably lead to what may look like uncivil behavior, while at the same time recognizing that there must be an ethical line that may not be crossed without reprimand. The court is frustrated as to where to draw such a line, considering the countervailing forces present in the American legal system.

The Second Circuit also noted in another case that the language and conduct of attorneys must be considered in the context of what is currently acceptable in public discourse, which is also difficult to identify.21 It seems as though courts, or at least the Second Circuit, while recognizing that there are ethical limits to what can be considered zealous advocacy, are still searching for some sort of balancing test (i.e., zealous advocacy versus uncivil behavior as an ethical violation) or standard (i.e., what is currently acceptable in public discourse) by which to more concretely identify and sanction incivility among lawyers. So, just how much bad behavior courts are willing to tolerate is yet to be determined with any precision.

1. Discovery Abuse

Perhaps the most important arena in which one observes unprofessional conduct is discovery, where insulting and obstructive tactics during depositions appear to have become the professional norm. Depositions are critical to the factual development of a case and in identifying the theory of liability or the defense that should be adopted. However, "[v]irtually all litigators know that depositions are the forum where lawyer incivility is often the rule, rather than the exception." Although courts have little control over this important stage of litigation unless alerted to such abuse by one of the parties, most have failed even so much as to comment on tactics of which they are keenly aware. The Delaware Supreme Court is a notable example, as discussed below.

Certainly the most well-known example of unprofessional and abusive conduct in the corporate context during discovery is the statements, threats, and insults made by Joseph Jamail, a highly successful Texas plaintiffs’ lawyer, as he defended the deposition of a Paramount Communications Inc. director in Paramount’s high-profile case against the QVC Network. Although the case was in Delaware state court, Mr. Jamail was not a member of the Delaware bar nor admitted to practice in Delaware pro hac vice. Instead, Mr. Jamail personally represented the director, who was a witness in a deposition that took place in Texas, as an accommodation to the director.

During the deposition, rather than permit his client to answer questions, Mr. Jamail attempted to block opposing counsel’s questions, by attacking the opposing lawyer with obscenities and personal insults. For example, when the witness was asked a question, the examining attorney was told by Mr. Jamail that he was going to “shut... down [the deposition] if [he did not] go on to [the] next question.”

Mr. Jamail then proceeded to call the attorney who was attempting to take the deposition an “asshole” and warned, “You can ask some questions, but get off of that. I’m tired of you. You could gag a maggot off a meat wagon.” During a colloquy among the lawyers, Mr. Jamail told his opponent to “shut up,” and asserted that the deposition was going to end in

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24. *Id.* at 33.

25. *Id.* at 54.
one hour, "period." He attacked his adversary's skills, suggesting that the examining lawyer was incompetent because he had "no concept" of what he was doing. Ultimately Mr. Jamail ordered the examining attorney not to question the witness further: "Don't even talk with this witness."

Upon learning of Mr. Jamail's behavior, the Delaware Supreme Court observed that such behavior was "outrageous and unacceptable." Acting with "gravity and revulsion," the court found that Mr. Jamail had "abused the privilege of representing a witness in a Delaware proceeding" by "improperly direct[ing] the witness not to answer certain questions," being "extraordinarily rude, uncivil, and vulgar," and "obstruct[ing] the ability of the questioner to elicit testimony to assist the Court in this matter."

However, since Mr. Jamail was not a member of the Delaware bar and had not been admitted to practice in this proceeding pro hac vice, the Delaware court could not sanction Mr. Jamail. Mr. Jamail was beyond the jurisdiction of the Delaware bar and judiciary and therefore not subject to Delaware's disciplinary rules or rules of conduct.

Lacking a remedy, the Delaware Supreme Court was reduced to imploring Mr. Jamail to appear voluntarily before the court to explain his conduct and to show cause as to why his conduct should not bar him from any future appearance in a Delaware proceeding. Mr. Jamail did not positively respond to this invitation to voluntarily receive sanctions. The press reported Mr. Jamail as saying, "I'd rather [have] a nose on my ass than go to Delaware for any reason," since, he believed, the Delaware Supreme Court had animosity for "exceptional lawyers" like himself.

As egregiously unprofessional as Joe Jamail's behavior was, the story does not end with the unsatisfying result that he avoided sanctions and fired off the last insulting words at the Delaware judiciary. Two additional facts also must be noted. First, it is worth observing that the Delaware judiciary recently was ranked first in the nation by the U.S. Chamber of Commerce ranking for the fourth year in a row, scoring first in nine out of ten categories, including timeliness, judges' competence, and judges' impartiality. These results, from a poll of more than 1400 senior corporate

26. Id.
27. Id.
28. Id.
29. Id. at 55.
30. Id. at 56 n.38
31. Id. at 53.
32. Id. at 53-55.
33. Id. at 55.
34. Id. at 56.
attorneys, cast doubt on the validity of Mr. Jamail’s deprecating remarks about Delaware and its courts.36

Second, and even more disturbingly, soon after this case Mr. Jamail was honored by his alma mater, the University of Texas Law School, with an alumni award and a giant statue of himself, which was unveiled at the school on November 13, 2003, to honor Mr. Jamail’s career as a “great trial lawyer.”37 As if this were not enough, a second statue of Mr. Jamail was erected a year later, making Mr. Jamail the only person on campus with two statues.38 This honor is in addition to the many university sites named in Mr. Jamail’s honor: the school’s swim center, football field, law school pavilion (which contains the first statue of him), and the law school’s legal research center. The newest statue of Mr. Jamail will be placed in a corner of the football stadium near a new statue of the former national champion football coach and University of Texas legend Darrell Royal.39

The Jamail incident should not be interpreted as an unusual or isolated example of attorney misbehavior. Perhaps the most interesting thing about the Jamail case was how easily Mr. Jamail avoided any sort of legal or professional sanction. This is consistent with the light sanctions that typically are imposed even on the most egregious attorney misconduct.

2. Name-Calling, Threats, and Frivolous Lawsuits

Another manifestation of unprofessional conduct is the use of inappropriate accusations, threats, and name-calling to intimidate litigants, witnesses, or opposing counsel. And of course, unprofessional conduct manifests itself in the pursuit of bad-faith litigation and the assertion of baseless claims.40

For example, the U.S. District Court for the Southern District of New York once required a New York litigator to pay $50,000 in sanctions for his conduct, where the lawyer sent a pre-suit letter that threatened the prospective defendant (who was also an attorney) with the “‘legal equivalent of a proctology exam.’”41 The sanctioned lawyer’s conduct also included: (a) writing a letter to opposing counsel threatening to “tarnish” his reputation, (b) making a sham settlement offer with an unreasonable deadline and then immediately filing suit, and (c) publicly accusing the

39. Id.
40. See, e.g., Easley v. Kirmsee, 382 F.3d 693 (7th Cir. 2004).
defendant of fraud without any concrete evidence to support the claim. Further, the sanctioned lawyer also threatened to interfere with opposing counsel's other clients by conducting an investigation to identify those clients, contacting the firm's former clients, and seeking permission to send a letter to all the firm's clients to inquire as to "experiences, good or bad," with the firm's billing practices. The lawyer also served overly broad subpoenas, including a subpoena for all of the firm's banking records and even one seeking records from the golf course where the defendant played golf. He also threatened to add a RICO claim to the complaint, to sue the defendant individually and seek discovery of the defendant's personal finances, and to send a letter to the court accusing opposing counsel of criminal conduct if the defendant did not capitulate to his client's demands. Finally, the lawyer claimed he would make good on his threat to "tarnish" the defendant's reputation by contacting a reporter to write a story about the litigation and that he would engage in unfair tactics at trial, including cross-examining the defendant in an unfair manner. The lawyer also repeatedly attacked the defendant in an offensive and demeaning fashion, such as calling the defendant "a lawyer who... has acted in a manner that shames all of us in the profession," "a disgrace to the legal profession," and an example of "why lawyers are sometimes referred to as snakes."56

Responding to complaints about this conduct, the attorney asserted that his tactics simply reflected proper zealous and aggressive representation. Unleashing the shop-worn palliative that "[a]lthough a lawyer must represent his client zealously, he must do so within the bounds of the law," the trial court held that the lawyer's unprofessional conduct had gone beyond the pale. Observing that the lawyer treated his opponent in an offensive and demeaning manner and engaged in a course of conduct intended to coerce a settlement through improper threats and harassment, the trial court imposed sanctions on the offensive attorney.

Interestingly, however, on appeal the Second Circuit reversed the district court's holding, and declined to impose sanctions. The court found that to impose sanctions under the authority of 28 U.S.C. § 1927 or under the court's supervisory powers, the "trial court must find clear evidence that (1) the offending party's claims were entirely meritless and (2) the party acted for improper purposes."59 The court was not particularly bothered by the letter discussing opposing counsel's impending "proctology exam," opining that, while the letter was a bit harsh, and the proctologic reference

42. Id. at 417.
43. Id.
44. Id.
45. Id.
46. Id.
47. Id.
48. Id. at 417-18.
49. Id. at 443.
"repugnant," such behavior is merely "reflective of a general decline in the decorum level of even polite public discourse," and, therefore, was not egregious enough to merit sanctions. Moreover, the circuit court even held that the subject attorney's personal characterizations of the defendant as, among other things, "slimy" and a disgrace to the legal profession were mere "colorful tropes" that should not be the subject of much concern.

3. Male Attorney Animus Toward Female Attorneys

Not surprisingly, given the lack of sanctions for old-fashioned unethical and unprofessional conduct, other sorts of misbehavior, such as gender bias and threats of physical violence, appear to be on the increase. In one case, an attorney deposing a witness told the witness that he would like "to be locked in a room with [her] naked with a sharp knife," and that he needed "a big bag" to put her in "without the mouth cut out." The South Carolina Supreme Court publicly reprimanded this attorney for his conduct. Although in this case the court made public its displeasure with the attorney's conduct, there were no sanctions imposed.

In another case involving egregiously unprofessional treatment of women, Nachbaur v. American Transit Insurance Co., a New York attorney was sanctioned for making disparaging remarks in a letter to the court where he stated that opposing counsel's abilities "indicate[] that she fits more as a clown in a circus than an attorney in a court of law." That the attorney was bold enough to refer to his opponent in such a manner in a letter to the court is surely indicative of unprofessional conduct, if not bias of a male attorney towards a female attorney.

In still another case involving abuse of women, an attorney was suspended from practice for filing a motion containing vulgar language and false allegations about bribery, and calling his former employer, a woman, a fraud, a thief, and a liar, and alleging that she did not pay her bills. To top it off, during the course of a deposition, the attorney accused the woman of giving him a venereal disease. This is yet another example of a male attorney attacking a female attorney and making debasing comments alluding to her gender and sexuality.

The list of abused female attorneys appears to be quite long. In a deposition in New York, a female attorney was referred to as a "little lady,

51. Id.
52. Id. at 82.
54. In re Golden, 496 S.E.2d at 619.
55. 752 N.Y.S.2d 605 (Sup. Ct. 2002).
a "little girl," and a "little mouse," and instructed to "pipe down," "be quiet," and to "go away" during the course of her representation of a fourth-party defendant.\textsuperscript{58}

Thus, it is not surprising that Supreme Court Justice Sandra Day O'Connor has been in the forefront of advocating for greater civility in the practice of law, observing that

the justice system cannot function effectively when the professionals charged with administering it cannot even be polite to one another. Stress and frustration drive down productivity and make the process more time-consuming and expensive. Many of the best people get driven away from the field. The profession and the system itself lose esteem in the public's eyes. . . . In my view, incivility disserves the client because it wastes time and energy—time that is billed to the client at hundreds of dollars an hour, and energy that is better spent working on the case than working over the opponent.\textsuperscript{59}

While Justice O'Connor was undoubtedly correct in her observation about the relationship between the efficient administration of justice and civility, unfortunately there is no evidence that judges are actually taking concrete action to restore civility to the practice of law.\textsuperscript{60}

\section*{II. The Costs and Benefits of Competition}

A major cost of the increased competition within the legal profession is the decline in civility and professionalism among lawyers. It is not surprising that the practice of law is less civil in the United States than in Great Britain.\textsuperscript{61} After all, the United States has three times as many lawyers per capita as Great Britain.\textsuperscript{62} The existence of more lawyers per

\begin{itemize}
\item \textsuperscript{58} Cary, supra note 22, at 568 (discussing Principe v. Assay Partners, 586 N.Y.S.2d 182, 184 (Sup. Ct. 1992)).
\item \textsuperscript{59} Randy J. Holland, President's Message, www.innsofcourt.org/contentviewer (last visited Oct. 22, 2005).
\item \textsuperscript{60} See, e.g., Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 52 n.24 (Del. 1994) (quoting Justice Sandra Day O'Connor, Address Delivered to an American Bar Association Group on "Civil Justice Improvements" (Dec. 14, 1993)). Justice O'Connor (as a judge, attorney, and a woman) was speaking to an American Bar Association group on "Civil Justice Improvement," which included both judges and attorneys, and thus she was implying that it was an important issue that required action by members of both the bar and the bench.
\item \textsuperscript{61} See Whelan, supra note 8, at 715-17.
\end{itemize}
capita is correlated with lower earnings per lawyer, and greater competition for the relatively smaller pool of client fees available.

In addition, the surfeit of lawyers imposes costs on society because lawyers faced with more competition without a similar increase in the number of clients are more likely to lobby for new laws and regulations that will increase the demand for lawyers' services.63

At the same time, however, the surplus of lawyers has benefits as well as costs. Competition increases not only the rancor among lawyers; it also improves the general quality of legal services. Clients have a vast array of choices when they are in the market for legal representation. The growing heterogeneity of the legal profession also should be viewed as a positive aspect of the growth of the legal profession, as it represents reduced barriers to entry for traditionally underrepresented groups as well as increasing client choice, competition, and, therefore, the quality of legal services.

The dramatic changes in the nature of law practice have both good and bad implications for lawyers, clients, and for society as a whole. Lawyers face more competition and less collegiality, while they have to work harder to repay the capital investment reflected in the decision to attend law school. On the other hand, the profession is richer for its diversity, and never before has the law played such an important role in society and in popular culture.64

Clients must put up with the costs associated with ever-increasing amounts of regulation (especially prevalent among businesses in regulated industries, but also affecting individuals in areas such as governmental tax regulation and licensing), which provide benefits for lawyers by increasing the demands for their services, but impose costs on everybody else. Moreover, like lawyers, clients must, at least to some extent, cope with the costs associated with the decline in civility in the legal profession. However, the intense competition among lawyers keeps prices down and quality high for consumers of legal services.

Similarly, for society as a whole, the changes in the legal profession over the past few decades have benefits and disadvantages. On the plus side of the equation, the increased diversity of the legal profession has brought with it a concomitant increase in attention to rights, particularly minority rights, and, ultimately, to justice.65 Lawyers deserve a great deal of the credit for this state of affairs. The legal profession also deserves credit for much of the rest of the social change that has characterized the United States in the post-War era. As J. P. Nettl observed, unlike the situation in Europe and Asia, "in the United States, the law and its practitioners have

perhaps been the most important single factor making for political and social change and have time and again proved to be the normal instrument for bringing it about."66

On the negative side, as the table below indicates, increased numbers of lawyers correlates with significantly more litigation, and litigation is an extremely costly way to resolve disputes. Worse, lawyers tend to ignore the social costs of new laws when evaluating the merits of proposed regulations.67 This problem is particularly serious, as lawyers have assumed a dominant role in lawmaking.68

There also is evidence that the number of lawyers and competition among them inversely influences the quality of the legal system. Delaware, for example, is the state that is ranked highest for the quality of its legal system. It may not be a coincidence that Delaware also has fewer lawyers per capita than the United States average.69

III. SELF-REGULATION OF THE LEGAL PROFESSION: AN IDEA WHOSE TIME HAS GONE

In light of the observable increases both in the amount of competition and conflict among lawyers, it is time to ask whether the legal profession is best governed by self-regulation. The test of whether self-regulation should be used is simple: Does the legal profession internalize the costs—as well as the benefits—generated by self-regulation?70

As a purely descriptive matter, a core requirement of any system of regulation is the ability to control the firms and individuals subject to the regulation. This, in turn, depends on the extent to which the regulatory entity enjoys monopoly power over the industries, firms, and people it regulates. Self-regulation, like other forms of regulation, becomes less effectual as the costs of avoiding regulatory sanctions decline. For example, the Securities and Exchange Commission’s (“SEC’s”) power over insider trading declines as traders are able to avoid the SEC’s reach by moving their transactions offshore.71

In the context of a private, self-regulatory organization, this point becomes even clearer. Take, for example, the power of the New York

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68. See Ribstein, supra note 63, at 327-38.
70. For an application of this theory of self-regulation in the context of the regulation of for-profit stock exchanges, see Macey & O’Hara, supra note 11.
Stock Exchange ("NYSE") to enforce its rules over listed firms. The NYSE's ability to serve as an effective self-regulatory organization depends on its ability to sanction listed firms that break its rules. In turn, the ability of the NYSE to sanction listed firms depends on the market power of the exchange. Historically, an exchange such as the NYSE was a very effective self-regulatory organization because it could enforce its rules—and thereby enable listing firms to make credible commitments to obey them—by threatening to delist firms that disobeyed their rules.\(^7\)

Over time, however, as technology and rival markets developed, the threat of delisting subsided. Firms that were delisted would simply move to rival trading venues with similar liquidity characteristics, and more congenial rules.\(^7\)

The paradigmatic illustration of this phenomenon is the one-share, one-vote listing requirement. During the 1980s, the senior management of several firms listed on the NYSE were concerned about the possibility of a hostile takeover. Because of this, management wanted to defend itself by recapitalizing the firm with additional classes of voting stock, to be held by management, which would have significantly greater voting rights than the shares held by other shareholders. The problem with this recapitalization strategy was that it violated an unambiguous NYSE rule that all shares of common stock of listed companies could have only one vote.\(^7\)

Significantly, several venerable listed firms—notably General Motors Corporation and Dow Jones, Inc.—that wanted to engage in these so-called “dual-class recapitalizations” elected to proceed with their plans and risk delisting.\(^7\) If they were delisted, their shares could have migrated to a rival trading venue, such as the American Stock Exchange or the NASDAQ, both of which permitted dual-class recapitalizations.\(^7\) The result was that the NYSE was forced to relax its listing requirements, and to petition the SEC to impose a uniform voting rights standard for all publicly traded firms.\(^7\)

\(^7\) The New York Stock Exchange ("NYSE") still claims to have this power, although it is rarely, if ever, used. See NYSE, How Regulation Works, Enforcement, http://www.nyse.com/regulation/howregworks/1022221394131.html (last visited Oct. 22, 2005).


\(^7\) See Karmel, supra note 75, at 343-47.

\(^7\) See id.

\(^7\) See id. at 346. In Business Roundtable v. SEC, the U.S. Court of Appeals for the District of Columbia Circuit ultimately held that the Securities and Exchange Commission ("SEC") did not have the authority to adopt a uniform voting rights standard. 905 F.2d 406 (D.C. Cir. 1990). However, by the time the court decided this case, the NASDAQ, the American Stock Exchange ("AMEX"), and the NYSE had adopted the SEC's proposed rule
The situation of the bar is not much different than that of the NYSE. As the monopoly power of the bar has declined, so too has its capacity and its incentives to regulate itself. Indeed, in some ways, the self-regulatory structure of the legal profession represents the worst aspects of self-regulation. Legal self-regulation displays the typical self-interested behavior of a cartel without any of the concomitant benefits that come from organizing a "single collectivity" for the purposes of "promulgat[ing] and enforc[ing] (beneficial) norms [such as norms] of good practice." This Article will refer to this behavior as "cartelization."

The admissions requirements to enter the profession (a college degree, three years of law school, and a multiday bar exam); the restrictions on nonlawyers practicing even the most rudimentary aspects of law; the mandatory rules of confidentiality for lawyers, but not accountants and other competitors (nonlawyer consultants and advisers); and restrictions on marketing all benefit individual lawyers at the expense of clients and the profession as a whole. The best explanatory paradigm for the behavior of the organized bar is that it perpetuates its own existence by attracting support from individual lawyers whose interests, as participants in an ethical prisoners' dilemma, sharply diverge from the overall best interests of the legal profession. The theory that the bar exists to promote the provision of high-quality legal services is inconsistent with the bar's unresponsiveness to the current trend of declining civility and professionalism among lawyers.

Commentators' protests notwithstanding, it is highly unlikely that the current system of self-regulation will be replaced any time soon with a better alternative. Moreover, it remains unclear that a superior alternative even exists. Rather, the question is whether courts and legislatures should end the anticompetitive and ultimately ineffectual regulations that pass for self-regulation of the bar.


in other states to conduct business within that state, subject to restrictions necessary to protect "local needs." Given current restrictions on in-state practice by out-of-state lawyers, Simon's suggestion would dramatically increase the amount of competition among lawyers. Therefore, it seems that Simon's conclusions may solve at least part of the problem of cartelization by lowering barriers to entry, increasing competition, and improving lawyer quality while simultaneously expanding client choice among legal competitors. Without a monopolistic bar, self-regulation by the bar would be replaced with direct local regulation better tailored to the needs of local areas. Thus, this is one plausible alternative to the current self-regulatory system.

As the many shortcomings of the current self-regulatory system demonstrate, organizing an efficient regulatory system that generates respect for important societal values such as trust and respect for the rule of law will be difficult. Specifically, how do we design a legal system that will increase lawyers' respect for what they do and for one another?

In my view, radical deregulation is the best way to achieve these challenging goals. The embarrassing lack of professionalism and collegiality among lawyers is not the most incredible aspect of modern law practice. Instead, it is remarkable that law is less collegial than other professions. There are few reports of uncivilized behavior frequently observed among lawyers who work in other professions or occupations. In fact, there are few reports of such behavior even among lawyers outside the U.S.

Why is this the case? Indeed, one must wonder whether American lawyers' self-regulation has itself contributed to the decline in civic virtue

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80. Id. at 650.
81. In its introduction to polling data released in 1997, the Harris Poll wrote, Recent Harris Polls have found that public attitudes to lawyers and law firms, which were already low, continue to get worse. Lawyers have seen a dramatic decline in their "prestige" which has fallen faster than that of any other occupation, over the last twenty years. Fewer people have confidence in law firms than in any of the major institutions measured by Harris including the Congress, organized labor, or the federal government. It is not a pretty picture....

For the last thirty years Harris has been tracking the confidence people have in the leaders of various institutions. In the most recent survey, only 7 percent of the public said they had a great deal of confidence in the people running law firms. This places law firms at the bottom of the institutions on the list. The 7 percent figure is not only the lowest number recorded for law firms over thirty years, it is actually the lowest number recorded for any institution over thirty years. Asimow, supra note 64, at 1372 & n. 136 (quoting The Harris Poll #37, released on August 11, 1997).

One author adds to the insight above:

By 1999, the confidence of people in institutions had risen across the board. The number of people having confidence in law firms rose from 7 percent to 10 percent, but that was still by far the lowest percentage of any institution. Law firms remained well below such commonly despised institutions.

Id. at 1372.
82. See, e.g., Atiyah, supra note 62, at 1015-28.
within the profession in the U.S. It is plausible that the relentless focus on advancing the narrow private interests of the legal profession—both individual lawyers and law firms—has been a consequence as much as it has been a cause of the increasingly competitive conditions in the legal profession. Both the efforts at continued cartelization discussed above as well as the increased competition among lawyers have contributed to the decline in civility among lawyers. This situation seems unique to the profession in that it is characterized as self-regulating, increasingly competitive, and less frequently monitored by authorities in the field (like judges). These factors may combine to explain at least partially the decline in civility in the profession.

Finally, why is the legal profession characterized, simultaneously, both by high barriers to entry and by high internal competition within the industry? After all, the sole purpose for erecting high barriers to entry is to stymie competition. If such barriers to entry exist, we should not observe the vigorous competition among lawyers that clearly characterizes the modern practice of law, particularly corporate law. It appears, however, that we have the worst of all competitive environments: costly barriers to entering the legal profession coupled with vigorous competition among lawyers who have paid the high entry price. Thus, although barriers to entry are still costly, they are no longer so prohibitive as to keep entry sufficiently low as to assure a high rate of return on a costly investment since such a return is now constantly decreasing due to increased competition in the legal profession.

This situation creates stress and is likely responsible for the increasing friction among lawyers. Lawyers reasonably are frustrated and demoralized to have incurred very high costs to enter a profession only to find that they must work very hard, encounter stiff competition for clients, and still earn only a competitive rate of return. Further, the aggressive marketing and client pandering necessary in today’s legal world undermines lawyers’ collective self-esteem as well as the esteem in which lawyers are held by the public at large.83

The explanation for this seemingly puzzling combination of high barriers to entering the legal profession and stiff competition within the profession becomes clear by applying basic economic insights to our study of the market for lawyers. In the past, lawyers earned substantial incomes relative to the rest of the educated population. To maintain these high incomes, the existing cohort of lawyers erected barriers to entering the profession.84 Over time, people realized how lucrative law could be, and so they either entered the profession or decided to compete with lawyers as accountants,

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83. See supra note 82 and accompanying text.
consultants, or mediators. However, the investment to enter these professions became sufficiently high that the economic benefits of becoming a lawyer decreased—lawyers began to earn only normal, competitive rates of return once the costs of entering the legal profession were considered.

However, lawyers’ decreased profits did not lead to reduced barriers to entering the profession. This is because removing these barriers would result in even more lawyers, as it would be especially attractive to enter the profession at lower cost than previous entrants. This, in turn, would enable the new entrants to earn competitive rates of return while undercutting incumbents, since the new entrants would not have to charge high fees to recoup the costs of their initial investments to enter the profession.

Because of this problem, reform of the legal profession is not likely to come from within. Despite the fact that the high returns for entering the legal profession have been dissipated, existing lawyers still have incentives to keep extant barriers high. This, in turn, indicates that reform of the legal profession, if it is to come at all, must come from within. Unfortunately, lawyers currently have little incentive to reform the profession. Thus, we may be at a stalemate. As discussed above, lawyers have incentives to encourage bar associations to increase barriers to entry, in order to reduce competition. Competition encourages lawyers to act unprofessionally so that they will be seen as zealous and effective advocates by clients and retain their business. Additionally, since the bar associations are made up of lawyers seeking to protect their own interests, self-regulation often leads to little repercussion for such incivility, as the bar recognizes the needs of lawyers and law firms to compete for business. Since reforming the barriers to entry and deconstructing the self-regulatory regime are two important steps in restoring civility to the profession, the adherence to the status quo invites more incivility. However, stripping away these barriers to entry may end this vicious cycle—more competition and direct regulation by states will encourage professional conduct as lawyers will be made to answer for their conduct in the stricter regulatory regime and clients will have a variety of legal professionals to choose from, all of whom must meet universal standards of professionalism.

**CONCLUSION**

Over time, the same forces that led to the cartelization of the legal profession have led to the decline of professionalism and decency within the profession. Unfortunately, the bar has transformed itself to serve the self-interested needs of its members. Its associational activities are directed


at reducing entry into the legal profession and devising rules that increase society's demand for the services of lawyers. As William Simon observed, there are plenty of voluntary bar associations, like the Bar Association of the City of New York, the American College of Trust and Estate Council, and the American Academy of Matrimonial Lawyers whose work advances the practice of law for the mutual benefit of clients and society as a whole. These voluntary associations should be encouraged. But the entry barriers into the profession should be stripped away, regardless of the negative short-term consequences on incumbent lawyers and law professors.

### Appendix A: Lawyers and Tort Costs in Six Countries

<table>
<thead>
<tr>
<th></th>
<th>Lawyers</th>
<th>Lawyers per 100,000 Population</th>
<th>Tort Costs as % of GNP</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States</td>
<td>780,000</td>
<td>312.0</td>
<td>2.4</td>
</tr>
<tr>
<td>West Germany</td>
<td>115,900</td>
<td>190.1</td>
<td>0.5</td>
</tr>
<tr>
<td>England and Wales</td>
<td>68,067</td>
<td>134.0</td>
<td>0.5</td>
</tr>
<tr>
<td>Italy</td>
<td>46,401</td>
<td>81.2</td>
<td>0.5</td>
</tr>
<tr>
<td>France</td>
<td>27,700</td>
<td>49.1</td>
<td>0.6</td>
</tr>
<tr>
<td>Holland</td>
<td>5124</td>
<td>35.2</td>
<td>—</td>
</tr>
</tbody>
</table>

APPENDIX B

In 2002, the median annual earnings of all lawyers was $90,290. The middle half of the occupation earned between $61,060 and $136,810. The lowest paid ten percent earned less than $44,490; at least ten percent earned more than $145,600. Median annual earnings in the industries employing the largest numbers of lawyers in 2002 are given in the following table:\textsuperscript{89}

<table>
<thead>
<tr>
<th>Industry</th>
<th>Median Annual Earnings</th>
</tr>
</thead>
<tbody>
<tr>
<td>Management of companies and enterprises</td>
<td>$131,970</td>
</tr>
<tr>
<td>Federal government</td>
<td>$98,790</td>
</tr>
<tr>
<td>Legal services</td>
<td>$93,970</td>
</tr>
<tr>
<td>Local government</td>
<td>$69,710</td>
</tr>
<tr>
<td>State government</td>
<td>$67,910</td>
</tr>
</tbody>
</table>

\textsuperscript{89} U.S. Dep't of Labor, supra note 18.
**APPENDIX C: SOME DATA ON LAWYERS AND CHIROPRACTORS**

<table>
<thead>
<tr>
<th>Location</th>
<th>Lawyer*</th>
<th>Chiropractor*</th>
<th>Lawyer**</th>
<th>Chiropractor**</th>
</tr>
</thead>
<tbody>
<tr>
<td>Atlanta, GA</td>
<td>$58,410.00</td>
<td>$25,200.00</td>
<td>$79,727.33</td>
<td>$42,607.00</td>
</tr>
<tr>
<td>Boston, MA</td>
<td>$75,149.00</td>
<td>$31,890.00</td>
<td>$70,215.00</td>
<td>$38,340.00</td>
</tr>
<tr>
<td>Buffalo, NY</td>
<td>$60,466.00</td>
<td>$34,190.00</td>
<td>$77,125.00</td>
<td>$43,525.00</td>
</tr>
<tr>
<td>Chicago, IL</td>
<td>$74,196.00</td>
<td>$35,850.00</td>
<td>$83,210.00</td>
<td>$48,670.00</td>
</tr>
<tr>
<td>Des Moines, IA</td>
<td>$67,117.00</td>
<td>$27,720.00</td>
<td>$78,220.00</td>
<td>$44,100.00</td>
</tr>
<tr>
<td>Las Vegas, NV</td>
<td>$70,851.00</td>
<td>$30,050.00</td>
<td>$80,320.00</td>
<td>$42,800.00</td>
</tr>
<tr>
<td>Miami, FL</td>
<td>$83,365.00</td>
<td>$34,380.00</td>
<td>$89,720.00</td>
<td>$48,950.00</td>
</tr>
<tr>
<td>Minneapolis-St. Paul</td>
<td>$71,125.00</td>
<td>$33,850.00</td>
<td>$78,565.00</td>
<td>$46,420.00</td>
</tr>
<tr>
<td>New York, NY</td>
<td>$99,400.00</td>
<td>$39,890.00</td>
<td>$95,280.00</td>
<td>$54,920.00</td>
</tr>
<tr>
<td>Philadelphia, PA</td>
<td>$54,120.00</td>
<td>$23,300.00</td>
<td>$58,750.00</td>
<td>$35,450.00</td>
</tr>
<tr>
<td>Phoenix, AZ</td>
<td>$72,835.00</td>
<td>$33,400.00</td>
<td>$84,984.00</td>
<td>$48,674.00</td>
</tr>
<tr>
<td>San Francisco, CA</td>
<td>$80,120.00</td>
<td>$38,000.00</td>
<td>$93,420.00</td>
<td>$52,800.00</td>
</tr>
</tbody>
</table>

* Preparations and examinations involving insurance, sales, contracts, business, etc. Graduate of an accredited law school with at least 3 years of experience. Provides legal advice to clients. Prepares documents for major clients. Responsible for overseeing and protecting company against legal risks. Requires a background in finance, business, and communication.

** Oversees the chiropractor program, and licensed as a chiropractor with at least 2 years of experience. Fulfills a variety of tasks, including supervision and planning. Requires a background in health care, business, and communication.