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HOW LAW FIRMS CAN DO GOOD WHILE DOING WELL (AND THE ANSWER IS NOT PRO BONO)[1]

*Russell Pearce**

I was speaking with a transactional lawyer whom I hadn't seen in many years. He spoke with passion about his work. He was making good money. He was working on important deals. He took pride that when he worked on a deal, all the parties understood what the deal was about, and the deals were basically fair. Then he started to apologize. He started to apologize for not doing good in his career as a lawyer. In law school, he had done some public interest work, and he never followed up on it; then, as a lawyer, he didn't do a lot of pro bono.

So why did this lawyer feel the need to apologize? His work was important, and he did it in an honorable way, but he subscribed to a basic tenet of professionalism, the business/profession dichotomy.[2] Business people work primarily for self-interest. Professionals—lawyers—work primarily for the public good.[3] Applied to the legal profession, that divides

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1. For an outstanding examination of this topic with regard to the work of plaintiffs' lawyers in mass tort cases, see Howard M. Erichson, *Doing Good, Doing Well*, 57 VAND. L. REV. 2087 (2004).

2. *See* Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1238-42 (1995) [hereinafter Pearce, *Professionalism Paradigm*]. For a more extensive discussion of the dichotomy's foundation in professionalism rhetoric, see Russell G. Pearce et al., *Revitalizing the Lawyer-Poet: What Lawyers Can Learn From Rock and Roll*, 14 WIDENER L.J. 907, at nn. 4-18 and accompanying text (2005) [hereinafter Pearce et al., *Revitalizing the Lawyer-Poet*].

3. Pearce, *Professionalism Paradigm, supra* note 2, at 1239. In Roscoe Pound's classic formulation, a profession describes:

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

ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953). *See* AMERICAN BAR ASS'N COMM'N ON PROFESSIONALISM, ". . . IN THE SPIRIT OF PUBLIC SERVICE": A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 10 (1986) (noting that "the spirit of Dean Pound's definition withstands the test of time").

us into saints and sinners.[4] If, like my acquaintance, you chose your path in the law because you wanted to make a lot of money, you are like a business person and thus a sinner. If you decided to be a public-interest lawyer, then you are a saint.

It was not always this way. When Louis Brandeis wrote about the lawyer's role, he was a business lawyer who was both a fan and a critic of other business lawyers.[5] In matters of public concern, he viewed what we would today call the large-firm lawyer as "the people's lawyer," charged with leadership and identifying and promoting the public good.[6] In representing her clients, the work of the business lawyer was noble; she required the skills and moral judgment of a statesman.[7] In the early 1960s, Erwin Smigel found that this view continued to dominate the way large firm lawyers understood their role. His extensive interviews of large firm lawyers in New York revealed that they viewed themselves first and foremost as guardians of the law.[8]

This all changed later in the 1960s. After that time, studies of large firm lawyers found that they had discarded the governing class ideal for the hired gun approach that had previously been a minority view.[9] Murray Schwartz and David Luban have identified the two key elements of the ideology that is dominant today: (1) extreme partisanship for your client and (2) moral non-accountability, meaning that as long as you are an extreme partisan, you have no moral obligations other than to pursue your client's ends.[10]

Why this change? The conventional wisdom is that large law firm

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4. *See* Russell G. Pearce & Amelia J. Uelmen, *Religious Lawyering in a Liberal Democracy: A Challenge and an Invitation*, 55 CASE W. RES. L. REV. 127, 130 (2004) [hereinafter Pearce & Uelman, *Religious Lawyering*] (drawing upon the distinctions made by Joseph Allegretti in his book, JOSEPH ALLEGRETTI, THE LAWYER'S CALLING: CHRISTIAN FAITH AND LEGAL PRACTICE (1996)).

5. LOUIS BRANDEIS, BUSINESS: A PROFESSION 331-33, 335 (Hale, Cushman & Flint 1993) (1996). *See* Russell G. Pearce, *Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U. CHI. L. SCH. ROUNDTABLE 381, 401-02 (2001) (citing Brandeis's comments on lawyers) [hereinafter Pearce, *Governing Class*].

6. *See* Pearce, *Governing Class*, *supra* note 5, at 401. Brandeis saw the role of the "people's lawyer" to weigh fairly the interests of the individual clients and the common good. *See* BRANDEIS, *supra* note 5, at 337.

7. *See* Brandeis, *supra* note 5, at 335.

8. *See* ERWIN O. SMIGEL, THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN? (1964); *see also* Pearce, *Governing Class*, *supra* note 5, at 381, 405-07.

9. *See id.* at 407-10.

10. *See* Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 671-73 (1978); DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 10 (1988).

lawyers have gotten greedy since the 1960s.[11] No matter how often this mantra is repeated, it is not persuasive. Let's face it: from the creation of what we know as the corporate law firm in the late 19th century, making money has been its *raison d'etre*—making money for big-business clients and for their lawyers.[12]

So what really happened? Society shifted in the 1960s. Most of the American elite, including lawyers, embraced the idea that people were fundamentally self-interested and not concerned with the public good.[13] If this were true, the only role that made sense for lawyers was that of an amoral hired gun.[14]

Two changes in the profession facilitated this shift. The first was the creation of public-interest law as an area of practice in the 1960s.[15] The concept, as well as the label, of "public interest" law helped shift responsibility for the public good away from large firm lawyers to this small segment of the bar.[16] The second was the new ethical duty of pro bono.[17] Helping the poor had always been one of the general obligations of lawyers as the governing class, but the notion of a separate and distinct ethical duty dates only to the 1960s.[18] Pro bono completed what public-interest law began. Within the practice of the large firm lawyer, it helped move the public good from the center to the margins of the large firm lawyer's work.[19] Today, business lawyers like my friend are operating with two contradictory ideologies: the hired gun conception which requires lawyers to serve as amoral advocates;[20] and a professionalism model which

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11. For an elaboration of this and other rationales for the collapse of professionalism, see Pearce, *Governing Class*, *supra* note 5, at 411-12.

12. *See id.* at n.307 and accompanying text.

13. *See id.* at 415-17; Pearce et al., *Revitalizing the Lawyer-Poet*, *supra* note 2, at nn. 22-24 and accompanying text.

14. *See* Pearce & Uelmen, *Religious Lawyering*, *supra* note 4, at 148-49.

15. *See* Pearce, *Governing Class*, *supra* note 5, at 417-19. Although a few self-conscious public interest law firms, such as the NAACP and the ACLU, existed long earlier, the establishment of a public interest bar of significant size dates from the 1960s. *Id.*

16. *Id.*

17. *See id.* at 419-20.

18. *See id.* at 419-20; *see also* Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 6-20 (2004); Erichson, *supra* note 1, at 2108-11, 2115-16; Judith L. Maute, *Changing Conceptions of Lawyers' Pro Bono Responsibilities: From Chance Noblesse Oblige to Stated Expectations*, 77 TUL. L. REV. 91 (2002); Note, *The New Public Interest Lawyers*, 79 YALE L.J. 1069 (1970); Pearce et al., *Revitalizing the Lawyer-Poet*, *supra* note 2, at 912 n.28.

19. Pearce, *Governing Class*, *supra* note 5, at 420 ("[P]ro bono permitted lawyers to compartmentalize their public service obligations and avoid the governing class tension of mediating between client interests and the public good.").

20. *See* note 10 *supra.*

condemns lawyers for failing to pursue the public good.[21]

How have lawyers responded? Large numbers of lawyers believe they are self-interested and all about money.[22] Large numbers of lawyers also feel very bad about themselves. It is no surprise that the rates of substance abuse and anxiety-related mental illness are far higher for lawyers than for other occupations,[23] or that according to most surveys job satisfaction is far lower.[24]

How did the organized bar respond? In 1984, Chief Justice Burger declared that law had become a business and that professionalism was in crisis.[25] In response, the bar declared war: a war of professionalism rhetoric, professionalism commissions, professionalism codes, mandatory ethics and professionalism continuing legal education courses, and pro bono, pro bono, pro bono.[26]

What is the result of the bar's twenty-year professionalism campaign? Not much.[27] Why? If most lawyers think they are in law to make money, you just can't convince them that they are really working for the public good.[28] If you make that argument, they are going to think you are either a hypocrite, a cynic, or a fool.[29]

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21. *See* Pearce & Uelmen, *Religious Lawyering*, *supra* note 4, at 146-47.

22. *See, e.g.*, Pearce, *Professionalism Paradigm*, *supra* note 2, at 1251.

23. *See, e.g.*, MARY ANN GLENDON, A NATION UNDER LAWYERS 87 (1994); G. Andrew Benjamin et al., *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers*, 13 INT'L J. L. & PSYCHIATRY 233, 240 (1990); Lawrence S. Krieger, *What We're Not Telling Law Students—and Lawyers—That They Really Need to Know*, 13 J. L. & HEALTH 1, 3-4 (1998-99); Pearce & Uelmen, *Religious Lawyering*, *supra* note 4, at 149-50; Patrick Schlitz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 874-76 (1999).

24. *See* GLENDON, *supra* note 23, at 85; Pearce & Uelmen, *Religious Lawyering*, *supra* note 4, at 149; Schiltz, *supra* note 23, at 881-92. *But see, e.g.*, John P. Heinz et al., *Lawyers and Their Discontents: Findings from a Survey of the Chicago Bar*, 74 IND. L.J. 735, 736 (1999). For more extensive discussion of the complexity of measuring job satisfaction, see Pearce et al., *Revitalizing the Lawyer-Poet*, *supra* note 2, at 914 n.37; Schiltz, *supra* note 23, at 884-89.

25. Warren E. Burger, *The State of Justice*, 70 A.B.A. J. 62, 63 (1984).

26. Pearce & Uelmen, *Revitalizing the Lawyer-Poet*, *supra* note 2, at 912 n.31; Deborah L. Rhode, *Law, Lawyers, and the Pursuit of Justice*, 70 FORDHAM L. REV. 1543, 1556 (2002).

27. *See* Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism,* 46 AM. U. L. REV. 1337, 1347 (1997); Eugene R. Gaetke, *Renewed Introspection and the Legal Profession*, 87 KY. L.J. 903, 909–10 (1999); Pearce & Uelmen, *Religious Lawyering*, *supra* note 2, at 148-49; Rhode*, Law, Lawyers, and the Pursuit of Justice*, *supra* note 26, at 1556.

28. *See, e.g.*, Pearce, *Professionalism Paradigm*, *supra* note 2, at 1251.

29. *Id.* at 1266. Tom Shaffer has noted the irony of bar leaders' claims that "lawyers who are 'paid well . . . from the profits of commercialism act in the spirit of public service,' but that business people 'who practice commercialism do not.'" *Id.* at 1260 (quoting

As for pro bono, like other forms of charity, it is a good deed. But unless you place it within the context of broad moral obligation, it serves to relegate the public good to the margins of legal practice.[30] What might make a difference? Instead of trying to separate making money and doing well, we should try to integrate the two. How would you go about that?

First, adopt a realistic conception of commitment to the public good.[31] Most of us are neither saints nor sinners. We are not morally superior by virtue of being lawyers. We are just like everyone else. We want to make money and we want to do good.[32] That means, just like everyone else, we are morally accountable for what we do.[33]

Applying this idea to practice does not require automatically taking sides between, say, Monroe Freedman, Larry Fox, or Abbe Smith's strong version of advocacy[34] and David Luban, Deborah Rhode or Bill Simon's more circumscribed conception.[35] But what it does mean is that all of us, whatever our views, have to justify our approach morally rather than simply assuming it as the bar too often does today.[36]

Second, moral responsibility does add one specific obligation: we must counsel our clients on the moral implications of their actions.[37] In doing so, we could teach clients moral accountability to the law and to society. Today's lawyers, in contrast, too often promote or reinforce the instrumental attitude of the Enrons and the AIGs, grounded exclusively in

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Thomas L. Shaffer, *Lawyer Professionalism as Moral Argument*, 26 GONZ. L. REV. 393, 403 (1990-91)).

30. Pearce, *Governing Class*, *supra* note 5, at 420.

31. Pearce et al., *Professionalism Paradigm*, *supra* note 2, at 1270-71, 1274-75; Russell G. Pearce, *Law Day 2050: Post-Professionalism, Moral Leadership, and the Law-As-Business Paradigm*, 27 FLA. ST. U. L. REV. 9, 19-23 (1999).

32. *See, e.g.*, Pearce et al., *Revitalizing the Lawyer-Poet*, *supra* note 2, at nn.63-67 and accompanying text.

33. *Id.* at n.63 and accompanying text; Pearce, *Professionalism Paradigm*, *supra* note 2, at 1268-76; Russell G. Pearce, *Model Rule 1.0: Lawyers are Morally Accountable*, 70 FORDHAM L. REV. 1805 (2002) (hereinafter Pearce, *Model Rule 1.0*).

34. *See* MONROE FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYER'S ETHICS (3d ed. 2004); Lawrence J. Fox, *The Fallout From Enron: Media Frenzy and Misguided Notions of Public Relations Are No Reason to Abandon Our Commitment to Our Clients*, 2003 U. ILL. L. REV. 1243 (2003).

35. *See generally* LUBAN, *supra* note 10; DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION (2000) [hereinafter IN THE INTERESTS OF JUSTICE]; WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS (1998).

36. Pearce, *Model Rule 1.0*, *supra* note 33, at 1806-07; FREEDMAN & SMITH, *supra* note 34, at 60; RHODE, IN THE INTERESTS OF JUSTICE, *supra* note 35, at 8, 11, 38, 65.

37. RHODE, IN THE INTERESTS OF JUSTICE, *supra* note 35, at 66-67; Pearce, *Model Rule 1.0*, *supra* note 33.

material self-interest.[38] This proposal does not require a change in the rules. Rule 2.1 already permits moral counseling.[39] Nonetheless, most lawyers believe their role requires they take the amoral approach and ignore the permission to provide moral counsel.[40]

To change lawyer conduct, we need a clear statement from the courts and the bar that the lawyer's role properly understood requires lawyers to be morally accountable. A simple way to accomplish this objective is to promulgate a new, aspirational Model Rule providing that lawyers are morally accountable.[41] Until the American Bar Association adopts this new Model Rule, the large law firms have a wonderful opportunity for leadership. They can serve as a model for the rest of the legal profession by pledging publicly to accept moral accountability and to provide moral counseling to their clients. The large firms can also serve as the political force within the bar to promote the new rule of moral accountability.

A new Model Rule restoring moral accountability to lawyers will certainly not resolve all the problems of the legal profession. It is only a first step. Yet if we discard the business-profession dichotomy and embrace moral accountability, it will make a big difference for the transactional lawyer whom I mentioned at the beginning of my talk.[42] We will then recognize that business lawyers like him are the exemplars of doing good while doing well. Even more important, maybe he will recognize it too.

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38. *See* Nancy B. Rappaport, *Enron, Titanic and The Perfect Storm*, 71 FORDHAM L. REV. 1373 (2003); William H. Simon, "*From the Trenches and Towers": The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology*, 23 L. & SOC. INQUIRY 243 (1998); Eli Wald, *Lawyers and Corporate Scandals*, 7 LEGAL ETHICS 54 (2004).

39. MODEL RULES OF PROF'L CONDUCT R 2.1 (2002) ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.").

40. *See* notes 36 and 38 *supra*.

41. Pearce, *Model Rule 1.0*, *supra* note 33.

42. Pearce, *Professionalism Paradigm*, *supra* note 2, at 1267-76; Pearce et al., *Revitalizing the Lawyer-Poet*, *supra* note 2, at 146-52.