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Cohen for the Practice of Law in the Twenty-
First Century*

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In Defense of the Business of Law

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IN DEFENSE OF THE BUSINESS OF LAW

*Judith A. McMorrow**

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I'm not accusing lawyers of having the morals of the market place.¹

INTRODUCTION

In 1916, Julius Henry Cohen produced a readable and thoughtful book with the provocative title of *The Law: Business or Profession?*²

* Professor of Law, Boston College Law School. I am very grateful to the organizers and presenters at the Law or Business symposium and the Boston College Brownbag Series participants for providing valuable feedback on this essay. Particular thanks go to Paul Tremblay, Michael Cassidy and Denis Brion for sharing their insights on this topic and to Sean Wall (BC Law 2014) for his excellent research assistance. Finally, grateful thanks to the Boston College Law School Fund for its generous support.

1. Post from Legal Ethics Discussion List (Mar. 22, 2012) (email on file with author).

2. JULIUS HENRY COHEN, THE LAW: BUSINESS OR PROFESSION? (1916).

He describes a legal profession and society in flux, confronted with some very familiar challenges, including the pressures of the market, the increased specialization of lawyers, and changing social conditions such as a large influx of immigrants.³ The facts he marshals could be reweven to tell many different stories.⁴

Cohen chose to frame a dichotomy that has continued for over 100 years: is law a business or a profession? In his 1916 work, Cohen gives some credit to businesses that strive to enhance the professionalism and ethics of their business enterprises,⁵ but it becomes clear that business is the lower standard of the marketplace, less constrained—or unconstrained—by other social or professional concerns.⁶

For the purposes of this Article, I will use the word “professionalism” to capture these additional social and professional concerns, the particular obligations that lawyers owe to their clients and society: fiduciary obligations to clients, adherence to core values such as confidentiality and maintaining confidences, and an understanding of the lawyer’s role to both support and improve our system of justice and to use best efforts to address unmet legal needs. Unfortunately, the rhetorical device of framing the question as “profession versus business,” thereby characterizing the two as inherently inconsistent concepts, seriously impairs our ability to address some of the central challenges to lawyers fulfilling these important values and indeed contributes to these failings. This framing of profession versus business disparages the business aspects of legal services that are essential to implementing our professional obligations.

I will focus on three current professionalism challenges in the U.S. legal profession: (i) the problem of neglect, poor client communication, and poor management of client funds; (ii) the need to improve the ethical infrastructures in practice settings to enhance both routine practice and ethical decision-making when lawyers confront ethical challenges; and (iii) the challenge of providing legal

3. *Id.*

4. One could use Cohen’s facts to discuss the cultural construction of the lawyer’s role through an international and comparative analysis or professionalism as closing ranks. *Id.* at 44–80.

5. *Id.* at 173–200 (discussing advertising).

6. *Id.* at 73 (discussing business aspects of the legal profession in Russia as “a sort of indicia of what our own Bar could do if it were to be lowered to ‘business’ standards”).

services to the poor and working class. For each, it turns out that improving adherence to core values requires not just training lawyers to internalize a model of professionalism,⁷ and a continuing commitment to self-regulation in some form, but also *implementing improved business practices*. In other words, a significant part of our failures as a profession are business failures. These failures occur at the individual, firm, and market levels, and at each level we need to consider the business structures that enhance or impair improved practices.

Business—good business—is not the enemy of lawyers but an important tool to implement our service profession.⁸ We need to have a sharper and richer discussion of the business perspective of professional practice, without apologies, if we want to improve the professional practice of U.S. lawyers.⁹ In addition, a stronger interdisciplinary conversation with the field of business ethics would help break down the stereotype of business as an amoral, or immoral, enterprise. We must envision business as both a partner and a tool to achieve our larger social goals.¹⁰

I. PROBLEM ONE: THE DISCIPLINARY PERSPECTIVE—NEGLECT, POOR CLIENT COMMUNICATION AND IMPROPER MANAGEMENT OF CLIENT FUNDS

The legal profession embraces the idea of competent representation, the opening requirement set out in ABA Model Rule

7. This phrase “internalize a model of professionalism” should be read broadly to refer to individual constructs of how to make right decisions. Lawyers might also embrace a model of virtue ethics. See generally R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor’s Ethical Duty to “Seek Justice,”* 82 NOTRE DAME L. REV. 635 (2006).

8. Some commentators see a risk of the increasing characterization of law as a service profession. See Laurel S. Terry, *The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as “Service Providers,”* 2008 PROF. LAW. 189.

9. In her analysis of Australian regulation of lawyers, Prof. Christine Parker observes, “traditional legal ethics artificially assumes that since the practice of law is a profession, it cannot also be a business. Both these assumptions make for a short-sighted and potentially dangerously ineffective regulatory regime and ethical culture for legal practice.” Christine Parker, *Law Firms Incorporated: How Incorporation Could and Should Make Firms More Ethically Responsible*, 23 U. QUEENSLAND L.J. 347, 348 (2004).

10. See, e.g., Russell G. Pearce & Brendan Michael Wilson, *Business Ethics, in ECONOMICS OF PHILANTHROPY, RECIPROCITY AND SOCIAL ENTERPRISE* (forthcoming) (on file with author).

of Professional Conduct 1.1.¹¹ Implementing competent representation requires diligence and communication.¹² Yet the largest category of the disciplinary actions nationwide, roughly thirty percent, deals with issues of competence, diligence and failure to communicate with the client.¹³ The next most common basis for disciplinary action is mismanagement of client property or funds, which account for roughly twelve percent.¹⁴ Some of the mishandling of client funds comes from venality and outright theft. But quite a bit comes from poor business practices, such as commingling client and office funds.¹⁵

It does not take much analysis to identify that more than a third of the disciplinary actions against lawyers involve some aspect of business failure.¹⁶ Of course these are deeply intertwined with other issues, such as substance abuse, depression, and adult attention deficit disorder.¹⁷ Whatever the causes, the inability of some lawyers to implement a fundamental and sound business principle of service and competence is the most common problem for clients.¹⁸

To deal with this professionalism failure, the organized bar has taken a multi-tiered approach. All states now have lawyer assistance

11. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2010) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

12. MODEL RULES OF PROF'L CONDUCT R. 1.3 (2010) (diligence); *id.* at R. 1.4 (2010) (competence).

13. See Patricia W. Hatamyar & Kevin M. Simmons, *Are Women More Ethical Lawyers? An Empirical Study*, 31 FLA. ST. U. L. REV. 785, 811 (2004) (in a nationwide study of disciplinary actions in 2000, the two most common categories were "competence or diligence," which was the basis for 1154 or 17% of complaints nationwide, and "communications with client," which was the basis for 933 complaints, or 14% of all disciplinary actions).

14. *Id.*

15. See, e.g., *In re Nowak*, No. 496,2010, 2010 WL 3699843, at *7 (Del. Sept. 22, 2010) ("Respondent's conduct can be characterized as a 'sustained and systematic failure to exercise even a modicum of diligence with respect to his recordkeeping.'"); see also *id.* at *9 (no evidence of dishonest or selfish motive).

16. *Id.*

17. See generally Rachel Tarko Hudson, *Pick Your Poison: Abuse of Legal Versus Illegal Substances as Mitigation in Attorney Disciplinary Cases*, 22 GEO. J. LEGAL ETHICS 911, 911 (2009) ("[S]ome jurisdictions estimate that anywhere from twenty-seven to seventy percent of attorney disciplinary cases involve some form of substance abuse."); Kelly Cahill Timmons, *Disability-Related Misconduct and the Legal Profession: The Role of the Americans With Disabilities Act*, 69 U. PITT. L. REV. 609 (2008).

18. See Leslie Griffin, *A Client's Theory of Professionalism*, 52 EMORY L.J. 1087 (2003).

programs to address alcohol and drug abuse, which is a significant source of client neglect.¹⁹ The alcohol and drug initiatives have grown to include a range of lawyer wellness issues, such as efforts to assist lawyers confronted with compassion fatigue, compulsive behaviors, depression, stress, and suicide.²⁰ As programs expand they increasingly provide services relating to cognitive impairments, aging, financial, marital, and career issues.²¹

Professor Fred Zacharias courageously articulated the inherent tension of providing confidential assistance to lawyers suffering from drug and alcohol problems and the goals of client protection.²² The clients are typically not the focus of the initial assistance.²³ Benefits hopefully flow to future clients.²⁴

At the same time we have seen a growth of lawyer assistance programs, we have also seen an increasing focus on law practice management. In 1974, the ABA created the Law Practice Management Section to assist lawyers in the business of law, recognizing that good business models are needed to “make the legal services delivery team more effective, competent, ethical, and responsive to the needs of clients and the public.”²⁵ Their Solo and Small Firm Resource Center is aimed at the practice setting with a disproportionately large number of complaints to the bar.²⁶

19. See generally *Commission on Lawyer Assistance Programs*, A.B.A., http://www.americanbar.org/groups/lawyer_assistance.html (last visited Dec. 17, 2012).

20. Along with “alcohol abuse & dependency” and “drug abuse & dependency,” these are topics that the ABA Commission on LAP focuses upon. See *id.*

21. AM. BAR ASS’N, 2010 COMPREHENSIVE SURVEY OF LAWYER ASSISTANCE PROGRAMS (2011), available at http://www.americanbar.org/content/dam/aba/migrated/legalservices/colap/downloads/20110311_aba_2010_colap_comprehensive_survey.authcheckdam.pdf.

22. Fred C. Zacharias, *A Word of Caution for Lawyer Assistance Programming*, 18 GEO. J. LEGAL ETHICS 237, 243–46 (2004).

23. *Id.* at 241–43.

24. *Id.* at 244 n.27.

25. *Law Practice Management Section: About Us*, A.B.A., http://www.americanbar.org/groups/law_practice_management/about_us.html (last visited Dec. 17, 2012).

26. See Mark Hansen, *Picking on the Little Guy: Perception Lingers that Discipline Falls Hardest on Solos, Small Firms*, 89 A.B.A. J. 30, 32–34 (2003) (discussing studies that indicate that solo and small firm attorneys are disciplined more frequently than attorneys at large firms); Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1, 6–8 (2007) (secrecy in lawyer discipline impairs ability to assess whether there is bias against solo and small firm practitioners); see also Deborah L. Rhode, *Comparative Perspectives on Lawyer Regulation: An Agenda for Reform in the United States and Canada*, 80 FORDHAM

Literature from the practicing bar addresses this topic, and even the academics are getting into the discussion.²⁷ Consulting practices also advise firms on improving business practices.²⁸

These initiatives have hit the law schools. Many law schools provide information on lawyer assistance programs before students even enter the legal profession.²⁹ The increasing attention to skills training in U.S. law schools should include, in the words of the 1991 MacCrate Report, “organization and management of legal work.”³⁰ Good texts have emerged to introduce students to the business of lawyering and have supported the growth of law practice management courses.³¹ By 2007, 61 law schools offered some course in law practice management (at least according to the law school’s websites).³² In 2010, 107 individuals listed themselves as law office management teachers, including legal ethics leaders such as Thomas Shaffer, David Wilkins, Steven Hobbs, Gary Munneke, Clark Cunningham, and Debra Moss Curtis.³³ The growth of law practice management gives students who will move quickly into their own solo or small firm practice the tools to act in a professional manner.³⁴

L. REV. 2761, 2775 (2012) (“[In the Canadian disciplinary system] disciplinary sanctions tend to disproportionately target lawyers in solo practice or small partnerships.”).

27. See Debra Moss Curtis, *Teaching Law Office Management: Why Law Students Need to Know the Business of Being Lawyers*, 71 ALB. L. REV. 201 (2008); Gary A. Munneke, *Managing a Law Practice: What You Need to Learn in Law School*, 30 PACE L. REV. 1207, 1214–16 (2010) (canvassing practice management scholarship).

28. See, e.g., ALTMAN WEIL, INC., <http://www.altmanweil.com> (last visited Nov. 6, 2012); HBR CONSULTING, <http://hbrconsulting.com> (last visited Nov. 6, 2012); HURON CONSULTING GRP., <http://www.huronconsultinggroup.com/service.aspx?serviceId=635> (last visited Nov. 6, 2012).

29. AM. BAR ASS’N, *supra* note 21, at 39 (forty-two law assistance programs (87.5%) presented to students).

30. AM. BAR ASS’N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 199 (1992).

31. See, e.g., GARY A. MUNNEKE, INTRODUCTION TO LAW PRACTICE: MATERIALS AND CASES (3d ed. 2007); THOMAS MCKNIGHT STEELE, MATERIALS AND CASES ON LAW PRACTICE MANAGEMENT: A LEARNING TOOL FOR LAW STUDENTS (2004).

32. Curtis, *supra* note 27, at 206.

33. See ASS’N OF AM. LAW SCHOOLS, AALS DIRECTORY OF LAW TEACHERS 2010-2011, at 1731–32 (2010).

34. See David Barnhizer, *Redesigning the American Law School*, 2010 MICH. ST. L. REV. 249, 283 (2010) (“[I]t is reasonable to conclude that the majority of the more recent graduates have gone into solo practices for which they are ill-prepared, formed associated relationships with others similarly situated to spread operating costs, or

Given the anticipated increase in recent graduates hanging up their own shingles, such programs will become increasingly important.³⁵

In addition to lawyer assistance programs and law practice management emphasis, the bars have implemented programs that directly or indirectly assist the lawyer in improving their business practices.³⁶ Some bars have initiated early intervention programs to take client complaints and divert them to focus on problem solving and prevention, rather than discipline.³⁷ This provides a remedy for the current client and assists the lawyer in improving business practices to prevent future failures. As part of professionalism initiatives, other states have embraced the transition to practice and mentoring programs to assist lawyers in improved business practices.³⁸

Despite all these efforts, issues of neglect, communication, and poor financial accounting continue to be common problems. From discussions with other professional responsibility professors, and a review of legal ethics textbooks, it appears that those who teach legal ethics spend little time on these issues in a traditional professional responsibility course because these are obvious and clear obligations.³⁹ This is what Julius Cohen recognized as the disconnect

become vulnerable junior associates in small firms that themselves are operating on the margin.”).

35. James Leipold, *The Employment Profile for the Law School Class of 2011 May Represent the “Bottom,”* in NAT’L ASS’N FOR LAW PLACEMENT (2012) (noting that percentage of new graduates working as solo practitioners has risen from 3.3% for the Class of 2008 to 6% for the Class of 2011; percentage of new graduates working at firms of 50 or fewer lawyers, including solo practitioners, has reached 59%); see also R. Michael Cassidy, *Beyond Practical Skills: Nine Steps for Improving Legal Education Now*, 53 B.C. L. REV. 1515, 1515–16 (2012).

36. See *infra* notes 37–38.

37. See Levin, *supra* note 26, at 3–6 (noting that as of 2007, twenty jurisdictions had diversion programs and that it is unclear whether they work); Lori Nelson, *The Diversion Process in Disciplinary Cases: Utah Rule 14-533*, 20 UTAH B.J. 9 (2007).

38. See, e.g., Melody Finnemore, *Meeting Requirements, Meeting Expectations: New Lawyers and Mentors Reflect on Year One of the Mentoring Experience*, 72 OR. ST. B. BULL. 26, 27 (2012) (discussing mandatory year long mentorship for new Oregon attorneys, and noting that “Oregon’s program is loosely modeled after similar programs in Georgia and Utah”); *Transition Into Law Practice Program (TILPP)*, ST. B. GA., <http://www.gabar.org/membership/tilpp/index.cfm> (last visited June 19, 2012).

39. See, e.g., STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* 896–98 (9th ed. 2012) (according to the index, the 800-plus page text spending seven pages on the ethical duty of competence; discussing effective assistance of counsel including some issues of competence, such as procedural defaults, in a handful of pages); LISA G. LERMAN & PHILIP G. SCHRAG, *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* 296–313 (3d ed. 2012) (900-plus page text spending seventeen pages on issues of competence and diligence).

between the ideals of the profession and the conduct of its members—that is, the gap between theory and practice.⁴⁰ While Cohen accurately asserts that inadequate moral training might explain some of the gap,⁴¹ moral training does not appear to be the issue in this category of problems. These problems occur because at the implementation stage lawyers have trouble with the fundamental business aspects of our service profession. This leads to questions of how the systems and structures in which the lawyer functions might reduce this category of problems.

II. PROBLEM TWO: ETHICAL INFRASTRUCTURE AND IMPROVING BUSINESS SYSTEMS

Over the last twenty years we have seen increased attention to the need for improving the ethical infrastructure within legal settings.⁴² The attention toward ethical infrastructure looks to improve systems that will reduce errors, increase compliance with ethical obligations, improve ethical decision-making, and enhance access to justice for low- and middle-income clients. The legal profession has made some progress in this area, which only sharpens our understanding that there is still a long way to go to have practice settings that facilitate the core values of competence, ethical decision-making, and access to justice.

A. Regulatory System Incentives to Create Ethical Infrastructure

The regulatory system imposes some responsibilities on supervisors and managers. Under ABA Model Rule of Professional Conduct 5.1, a partner, and those with comparable managerial authority in a law firm, “shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the

40. COHEN, *supra* note 2, at 100.

41. *Id.* (“If we have the pedagogue’s bias, we shall be tempted to believe that lack of educational training will explain some of these sharp curves [in the gap between ideals and conduct]. And if we are ethicists in philosophy we shall doubtless find confirming evidence that absence or presence of moral training accounts for some of the declivities.”).

42. *See, e.g.*, Ted Schneyer, *A Tale of Four Systems: Reflections on How Law Influences the “Ethical Infrastructure” of Law Firms*, 39 S. TEX. L. REV. 245 (1998); Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 10 (1991); *see also* Elizabeth Chambliss & David B. Wilkins, *Promoting Effective Ethical Infrastructure in Large Law Firms: A Call for Research and Reporting*, 30 HOFSTRA L. REV. 691 (2002); *infra* footnotes 82-84 and accompanying text.

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firm conform to the Rules of Professional Conduct,”⁴³ and “[a] lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.”⁴⁴ This includes a duty to take “reasonable remedial measures” if the supervisory lawyer learns of the conduct “at a time when its consequences can be avoided or mitigated.”⁴⁵ Rule 5.3(a) imposes a parallel duty of both creating systems and supervision over non-lawyer assistants.⁴⁶ This supervisory obligation extends to assuring there are internal policies and procedures to improve adherence to the Rules of Professional Conduct.⁴⁷

If the regulatory process had the resources and the political support to address root causes of incompetence and neglect, and create systems to improve decision-making when lawyers are confronted with ethical issues, one can imagine that a vigorous use of Rule 5.1 could make a difference. Sanctions under Rules 5.1 and 5.3, however, are less common than other rules violations, but these rules are occasionally the source of discipline for poor infrastructure.⁴⁸ For example, the Alabama Supreme Court sanctioned two named partners in a firm for, among other acts, failing to create the management conditions that would allow associates to provide competent service:

43. MODEL RULES OF PROF'L CONDUCT R. 5.1(a) (2010).

44. *Id.* R. 5.1(b).

45. *Id.* R. 5.1(c)(2).

46. *Id.* R. 5.3(a).

47. *Id.* R. 5.1 cmt. 2.

48. For example, in 2011 the Massachusetts Office of Bar Counsel had only 1 complaint dealing with inadequate supervision under Rule 5.1 or 5.3. See MASSACHUSETTS OFFICE OF THE BAR COUNSEL OF THE SUPREME JUDICIAL COURT, ANNUAL REPORT TO THE SUPREME JUDICIAL COURT: FISCAL YEAR 2011 7 (2011), available at <http://www.mass.gov/obcbbo/fy2011.pdf>. At least in Massachusetts, discipline under 5.1 or 5.3 is not for isolated errors that the lawyer could not have guarded against or prevented, but for situations where the failure to supervise “was persistent or the result of systemic inappropriate office procedures.” Constance V. Vecchione, *Thy Brother's Keeper: Disciplinary Liability for Failure to Supervise*, MASS.GOV (Feb. 1999), <http://www.mass.gov/obcbbo/supervis.htm>. In Illinois in 2011, fifty charges of misconduct for failure to supervise subordinates were docketed compared to 2378 charges of misconduct for neglect. Of the failure to supervise cases, only four resulted in disciplinary sanctions compared to fifty-seven for neglect. See ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS, 2011 ANNUAL REPORT OF THE DISCIPLINARY COMMISSION 17, 30 (2011), available at <http://www.iardc.org/annualreport2011.pdf>.

The associates employed by Davis & Goldberg were also subjected to policies that interfered with their adequate and professional representation of their clients. These policies included the imposition of time limits or restrictions on the amount of time that they could spend with clients and on cases; the imposition of a quota system that required associates to open a specified number of files in a certain time period; and the imposition of a policy requiring associates not to return the phone calls of existing clients, so that the attorneys could free more time to sign new clients.⁴⁹

Jurisdictions have used Rule 5.1 to sanction managing partners for imposing an unmanageable caseload, including “establishing and maintaining a business model in which such ethical violations were likely to occur.”⁵⁰ And the disciplinary process has been used to point out that it is not sufficient to have nice-sounding formal policies if ongoing culture or business practices undermine the formal policies.⁵¹

If firms have aggressive business strategies that require high caseloads, the obligation to supervise should be higher. The Supreme Court of Maryland said it well:

[I]n some cases, a law firm’s culture inherently engenders a need for specific supervision regarding how to balance the lawyer’s obligations to clients within the business model of the firm. This was the case at [the Kimmel & Silverman firm]. The firm culture at K & S strongly emphasized the number of filings, case turnaround, and revenue generated as the significant measures of associate success; not rare criteria, in and of themselves, but which, in an admittedly high-volume business model, carry added responsibilities for the supervision of associates.⁵²

And when a firm has notice of a lawyer’s prior error or serious emotional impairment, there would be a similar obligation of heightened supervision.⁵³ In other words, ethical infrastructure

49. Davis v. Ala. State Bar, 676 So. 2d 306, 308 (Ala. 1996).

50. *In re Phillips*, 226 Ariz. 112, 114 (Ariz. 2010).

51. *Id.* at 115 (“The words in the firm’s policy manual prohibiting such conduct were insufficient to insulate managers and supervisors from ethical responsibility when the actual ongoing practices were to the contrary.”); see also Elizabeth Chambliss, *The Nirvana Fallacy in Law Firm Regulation Debates*, 33 FORDHAM URB. L.J. 119, 144-45 (2005) (arguing that how lawyers in a firm act is more important than what firms say about how their lawyers ought to act); Milton Regan, *Moral Intuitions and Organizational Culture*, 51 ST. LOUIS U. L.J. 941, 942 (2007) (Enron had policies that “formally conveyed the importance of ethical behavior” but its business practices created “a poisonous culture that spawned disdain for legal and accounting rules, as well as for any broader conception of ethics.”).

52. Att’y Grievance Comm’n of Md. v. Kimmel, 955 A.2d 269, 288 (Md. 2008).

53. See Bd. of Overseers of the Bar v. Warren, 34 A.3d 1103, 1113 (Me. 2011).

includes policies, practices, monitoring, and paying attention to those around us.

While Rules 5.1 and 5.3 are an improvement over a regulatory approach that looks at lawyers as atomistic decision-makers, these rules are still a far cry from imposing sharper responsibility on managing lawyers to develop improved systems to reduce error and improve decision-making. There is so much more that could be done. Could the disciplinary process be the basis for developing best practices, such as audits when lawyers bill at an excessive rate (e.g., 3000 hours per year)?⁵⁴ Perhaps the regulatory system could provide stronger protection of whistleblowers, which would give added incentive for institutions to monitor in-house activities.⁵⁵ And while Rules 5.1 and 5.3 could continue to impose sanctions on the individual managing lawyer, a more stringent and perhaps more effective method would be to sanction the firm through a public censure or fine. Unfortunately, Ted Schneyer's call to discipline law firms has, as yet, been heard by only two states.⁵⁶ The proposal to include sanctions on the firm for subordinate misconduct was initially recommended but ultimately rejected in the Ethics 2000 revisions.⁵⁷ In public defender offices it would be unfair to sanction supervisory attorneys for inadequate funding that results in excessive caseloads.

54. See Ronald D. Rotunda, *Why Lawyers Are Different and Why We Are the Same: Creating Structural Incentives in Large Law Firms to Promote Ethical Behavior—In-House Ethics Counsel, Bill Padding, and In-House Ethics Training*, 44 AKRON L. REV. 679, 711–22 (2011).

55. See Thomas A. Kuczajda, *Self Regulation, Socialization, and the Role of Model Rule 5.1*, 12 GEO. J. LEGAL ETHICS 119, 119–20 (1998) (claiming that the duties imposed by 5.1 to self-regulate are vague and calling for explicit protection of whistleblowers); Alex B. Long, *Whistleblowing Attorneys and Ethical Infrastructures*, 68 MD. L. REV. 786, 802–05 (2009) (advocating protection of internal whistleblowers and criticizing the Rules for having no explicit duty on the part of the law firm to have an internal reporting system).

56. Bruce A. Green, *Foreword—The Legal Ethics Scholarship of Ted Schneyer: The Importance of Being Rigorous*, 53 ARIZ. L. REV. 365, 369 (2011).

57. Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441, 470–71 (2003); Lucian T. Pera, *Grading ABA Leadership on Legal Ethics Leadership: State Adoption of the Revised ABA Model Rules of Professional Conduct*, 30 OKLA. CITY U. L. REV. 637, 775–76 (2005) (“[The Ethics 2000 proposal to discipline law firms] met fierce opposition within the ABA, and Ethics 2000 ultimately withdrew this proposal, settling instead on language in Model Rules 5.1 and 5.3 that attempts to arm disciplinary counsel with tools to fix responsibility for a law firm’s failure to have appropriate systems in place to prevent violations of the rules on lawyers in firm management.”).

Some form of pressure on systems, however, is needed.⁵⁸ If we wish to get to the root causes (which are often business failures), we should target the conditions that breed ethical violations.

B. Improved Decision-Making

In addition to formal regulatory incentives, a good deal of thoughtful work has focused on improving ethical infrastructure in law firms with the goal of improved decision-making.⁵⁹ The development of in-house ethics counsel and training programs helps create an environment in which lawyers can more likely recognize ethical issues and engage in thoughtful and nuanced analysis. As Elizabeth Chambliss has noted, certain business practices and conditions such as compensation structures and mobility, which affect ethical decision-making, could be up-front-and-center in the discussion of best business practices.⁶⁰

Along with work on ethical infrastructures, a rich body of scholarship has emerged on the psychology of decision-making and the cognitive distortions that impair our decision-making.⁶¹ Bringing these interdisciplinary insights from sociology and business to legal practice creates conditions that are likely to improve decision-making. The idea that systems are important in ethical decision-making is increasingly integrated into other aspects of our justice system. The Federal Sentencing Guidelines pertaining to organizations focuses on the importance of effective compliance programs.⁶² This is one of many factors that has spurred the growth of the compliance aspects of business, and is a growth area for

58. See generally Norman Lefstein, *Excessive Public Defense Workloads: Are ABA Standards for Criminal Justice Adequate?*, 38 HASTINGS CONST. L.Q. 949 (2011).

59. See sources cited *supra* note 42; see also Chambliss, *supra* note 51.

60. Chambliss, *supra* note 51, at 149–50.

61. A footnote cannot do justice to the literature. See, e.g., Donald C. Langevoort, *Psychological Perspectives on the Fiduciary Business*, 91 B.U. L. REV. 995, 1002 (2011) (citing Jason Dana et al., *Exploiting Moral Wiggle Room: Experiments Demonstrating an Illusory Preference for Fairness*, 33 ECON. THEORY 67, 69 (2007) (discussing “moral wiggle-room” and “ethical fading”)); Carol A. Needham, *Listening to Cassandra: The Difficulty of Recognizing Risks and Taking Action*, 78 FORDHAM L. REV. 2329 (2010); Andrew M. Perlman, *Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology*, 36 HOFSTRA L. REV. 451, 470 (2007); Ann E. Tenbrunsel & David M. Messick, *Ethical Fading: The Role of Self-Deception in Unethical Behavior*, 17 SOC. JUST. RES. 223, 224 (2004); Paul R. Tremblay, *Moral Activism Manqué*, 44 S. TEX. L. REV. 127 (2002).

62. See generally U.S. SENTENCING GUIDELINES MANUAL, § 8 (2011).

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lawyers.⁶³ This compliance-business focus is well-accepted in the business world, with the legal profession lagging behind.⁶⁴

The U.S. attorney regulatory systems, like many others around the world, are keeping close watch on the initiative in New South Wales, Australia (NSW) to expand the regulatory focus.⁶⁵ In 2001, NSW allowed corporations to provide both legal and non-legal services, subject to some restrictions.⁶⁶ The regulatory system implemented a requirement that these firms adopt “appropriate management systems” that would assure compliance with professional ethical obligations.⁶⁷ This “management based regulation” requires that the firms engage in self-assessment on whether the firm has appropriate management systems for the following areas:

- Negligence
- Communication
- Delay
- Liens / File Transfers
- Cost Disclosure / Billing Practices / Termination of Retainer
- Conflict of Interests
- Records Management
- Undertakings
- Supervision of Practice and Staff
- Trust Account Regulations⁶⁸

The regulatory focus encourages firms to put in place the ethical infrastructure that supports competent and ethical practice.⁶⁹ Eschewing a checklist-type, process-oriented approach, the Office of

63. See H. Lowell Brown, *The Corporate Director's Compliance Oversight Responsibility in the Post Caremark Era*, 26 DEL. J. CORP. L. 1, 144 (2001) (“There is a growing body of guidance concerning the elements of an effective compliance program that the Federal Sentencing Guidelines have strongly influenced.”).

64. See, e.g., *id.*

65. See Christine Parker et al., *Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales*, 37 J.L. & SOC'Y 466 (2010).

66. See generally *Practice Structures*, L. SOC'Y NEW S. WALES, <http://www.lawsociety.com.au/ForSolicitors/practisinglawinnsw/practicestructures/index.htm> (last visited Dec. 17, 2012).

67. Parker et al., *supra* note 65, at 471.

68. *Id.* at 470.

69. *Id.* at 468.

Legal Services Commissioner adopted a “light touch ‘education towards compliance strategy.’”⁷⁰

Some of the areas for self-assessment target the common issues of competence and communication, which are clustered under “Problem No. 1” above. Negligence, communication, delay, clear information on costs, billing and termination, and trust management all will reduce common errors. Some of these categories are more likely to improve decision-making, which are clustered under “Problem No. 2” above. A sharper process for identifying conflicts, establishing policies and best practices on undertakings, among other variables, are likely to improve decision-making among well-intentioned practitioners.⁷¹

This focus on a management-based approach allows the firms to think creatively about how to achieve good management in the areas noted above.⁷² And there are indications that this approach is working to improve legal practice. An empirical study of the new regulatory focus on self-assessment of the firm’s own compliance found that this management focus led to a large and statistically significant drop in client complaints.⁷³ This management-based approach was “explicitly to act as a counter-balance to the fear of over-commercialization in the new ILPs.”⁷⁴

There are many caveats to broad scale use of the NSW approach. Our highly legalized U.S. system, with a heavy focus on process, may resist the deliberative self-assessment process. The authors of the NSW study, Christine Parker, Tahlia Gordon, and Steve Mark, readily note the voice of cynics.⁷⁵ But the underlying idea that creative management systems might improve ethics needs to be front-and-center in our conversation. We can no longer afford to embrace

70. *Id.* at 468, 470 (explaining the checklist process-oriented approach).

71. Susan Shapiro’s groundbreaking empirical analysis of conflicts demonstrates that good systems, good information and open communication within a firm allow conflicts to be seen and addressed, hopefully in a timely manner. *See* SUSAN SHAPIRO, *TANGLED LOYALTIES: CONFLICT OF INTEREST IN LEGAL PRACTICE* (2002).

72. Parker et al., *supra* note 65, at 495 (“Even though the ten objectives that form the basis of the self-assessment are reasonably basic, our findings suggest that the OLSC’s self-assessment process may well be guiding, encouraging, and requiring many practitioners consciously and systematically to think through practice management issues, including ethics management, for the very first time.”).

73. *See id.* at 485–93.

74. *Id.* at 497.

75. *See id.* at 477–78.

the “law or business” dichotomy described by Julius Cohen in his provocative title.

C. Market and Competitive Forces That Encourage Ethical Infrastructure

We know that market forces, such as strong competition for clients and pressure to maintain high billable hours, can create conditions that push aside professional values.⁷⁶ But some market forces have pushed law firms and other practice settings to improve the ethical infrastructure of the practice.⁷⁷ An increased risk management focus has caused many firms to improve practices that reduce the firm’s exposure to malpractice or other sanctions.⁷⁸

A single emphasis on risk management is insufficient, however.⁷⁹ The focus on risk management puts the primary goal as protecting the institution in which the lawyer operates, not protection of clients.⁸⁰ This may result in less communication (hiding errors) from clients and over-emphasis of risk.⁸¹ As Professor William Simon notes, law firms and legal practice settings have not taken the next step to embrace the quality-control movements that have yielded improved practices in medicine, aviation safety, and other fields.⁸² A commitment to quality improvement requires lawyers to worry less

76. See, e.g., Susan Saab Fortney, *I Don’t Have Time to Be Ethical: Addressing the Effects of Billable Hour Pressure*, 39 IDAHO L. REV. 305 (2003); Alva Hugh Maddox, *Lawyers: The Aristocracy of Democracy or “Skunks, Snakes, and Sharks”?*, 29 CUMB. L. REV. 323, 332 (1999).

77. See Elizabeth Chambliss & David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms*, 44 ARIZ. L. REV. 559, 590 (2002) (describing help from malpractice insurers on loss prevention and ethics).

78. See George M. Cohen, *Legal Malpractice Insurance and Loss Prevention: A Comparative Analysis of Economic Institutions*, 4 CONN. INS. L.J. 305, 307 (1997) (“[L]egal malpractice insurers are increasingly serving as regulators of lawyer behavior”); John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 RUTGERS L. REV. 101, 102 (1995) (“The time has come to consider legal malpractice law as part of the system of lawyer regulation.”).

79. See Stephan Landsman, *The Risk of Risk Management*, 78 FORDHAM L. REV. 2315 (2010); see also Anthony V. Alfieri, *The Fall of Legal Ethics and the Rise of Risk Management*, 94 GEO. L.J. 1909 (2006).

80. Landsman, *supra* note 79, at 2316 (explaining that this focus of risk management is “bottom-line oriented”).

81. *Id.* at 2317–21 (discussing “overcautious, fear-mongering, adversarial model of risk management” in the medical context).

82. William H. Simon, *Where Is the “Quality Movement” in Law Practice?*, 2012 WIS. L. REV. 387, 387 (2012).

about legal exposure (risk management) and more about constant self-improvement. This is not an easy change for lawyers, many of whom spend their professional lives reducing legal risk for clients.

A quality-control focus inevitably leads us back to the structure in which the lawyer offers services. In the medical context, many errors “are due to systemic failures rather than the glaring and anomalous mistake of a single individual.”⁸³ Attention to these business aspects of ethics also helps reduce the ethical blind spots that inevitably occur in our decision-making.⁸⁴ Once again, however, a more respectful examination of the business insights into quality improvement open up additional avenues for improved professional practice.

III. PROBLEM THREE: THE INABILITY TO MATCH THE SURPLUS OF LAWYERS WITH UNMET LEGAL NEEDS

A third, and more profound, failure of the legal profession is the inability to provide affordable legal services to address the vast unmet legal needs in our society,⁸⁵ even at a time when we have a surplus of legal labor.⁸⁶ A significant part of this conundrum is a business failure. We have been unable to find a business model that can match the excess capacity with the unmet needs.

This challenge occurs in part because of our social understanding of law and legal services as a public good. We see the provision of courts and judges as a public good, to be funded from the common weal, and for some areas of representation such as indigent criminal

83. Landsman, *supra* note 79, at 2325.

84. See Paul R. Tremblay & Judith A. McMorrow, *Lawyers and New Institutionalism*, 25 ST. THOMAS L. REV. 568 (2012).

85. See generally George C. Harris & Derek F. Foran, *The Ethics of Middle-Class Access to Legal Services and What We Can Learn from the Medical Profession's Shift to a Corporate Paradigm*, 70 FORDHAM L. REV. 775, 789–90 (2001); Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 397 (2004). Both the ABA and many states have attempted to quantify the reasons for and extent of unmet legal needs. See AM. BAR ASS'N, LEGAL NEEDS AND CIVIL JUSTICE, A SURVEY OF AMERICANS (1994); COMM. ON CIVIL JUSTICE—SUP. CT. OF GA. EQUAL JUSTICE COMM'N, CIVIL LEGAL NEEDS OF LOW AND MODERATE INCOME HOUSEHOLDS IN GEORGIA (2009), available at http://www.georgiacourts.org/files/LegalNeeds_Report_2010%20FINAL%20with%20ADDENDUM.pdf; TASK FORCE ON CIVIL EQUAL JUSTICE FUNDING—WASH. STATE SUP. CT., THE WASHINGTON STATE CIVIL LEGAL NEEDS STUDY (2003), available at <http://www.courts.wa.gov/newsinfo/content/taskforce/civillegalneeds.pdf>.

86. See Leipold, *supra* note 35, at 1 (“[T]he entry-level job market [for lawyers] can only be described as brutal.”); see also AM. BAR ASS'N, LAWYER DEMOGRAPHICS 1 (2012), available at <http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/abalawyerdemographics2012.authcheckdam.pdf>.

defense.⁸⁷ We do not envision the vast remaining areas of legal services, including most civil legal services, as a public good that should be paid out of public funds. Instead, these legal services are left to the market forces.⁸⁸

I appreciate that a broad proposition that we need to develop a workable business model to match supply and demand is not of much help in the implementation phase. We have many areas of life where we can state the goal but fail in practice. We all know the key to losing weight: eat less and exercise more. Many of us have trouble bridging the gap between the goal and practice, but with weight loss we usually assume it is a personal failure or character flaw. A more accurate analogy to our legal services may be investment strategies. We all know how to make money in the stock market: buy low and sell high. We fail (or succeed) for multiple reasons, but the free enterprise system continues to experiment with business models that embrace a deeper understanding of the investment process and use that information to develop different investment strategies.

Addressing unmet legal needs is obviously a complex problem that requires multi-tiered strategies. Simplification of laws and streamlined procedures, expanded pro bono and better government support for legal services would all help.⁸⁹ If our focus is primarily to expand affordable access, loosening of restrictions on unauthorized practice has long been on the table as a very credible strategy.⁹⁰ But another credible path is to continue experimentation with different business models to allow lawyers to offer affordable and quality legal services to moderate-income individuals and still earn a living wage.

Each of these strategies is interconnected. One brilliant initiative was the development of the Interest on Lawyer Trust Accounts (IOLTA) program to support legal services to low-income clients

87. See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966). A whole article could be written on this topic. Because U.S. judges are overwhelmingly drawn from the ranks of the legal profession and continue to have residual regulation by that profession (e.g. they can be disbarred for misconduct as a judge), they are part of the legal profession even while serving as a judge.

88. See Harris & Foran, *supra* note 85, at 775 (“[R]ecent empirical surveys by bar associations tend to confirm that middle-class Americans often lack access to affordable legal services.”).

89. See Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531 (1994).

90. *Id.*; see also Deborah J. Cantrell, *The Obligation of Legal Aid Lawyers to Champion Practice by Nonlawyers*, 73 FORDHAM L. REV. 883, 884 (2004); Rhode, *supra* note 85, at 388.

through diverting interest in lawyer trust accounts.⁹¹ IOLTA programs exist in all states and in 2008 produced \$263.4 million in grants throughout the country, which supports a (barely) living wage for civil legal services lawyers.⁹² IOLTA has generally worked well to provide some support for legal services, but is much less effective during times of economic slowdown and low interest rates.⁹³

Individual pro bono work is another strategy that has both a professional and business basis. While Model Rule of Professional Conduct 6.1 sets an aspirational goal to render at least fifty hours of pro bono legal services,⁹⁴ New York is the first state to make fifty hours of pro bono work a mandatory condition to obtain a license to practice law.⁹⁵ Anticipating pushback, this obligation is imposed on new entrants only.⁹⁶ While we should not discount ethical reasons to pursue pro bono work, many large firms encourage pro bono to market their firms, recruit and train associates, change firm culture, and actually improve the bottom line.⁹⁷ Smaller firms and solo practitioners often provide reduced cost or free legal services on a more informal basis.⁹⁸ Possible regulatory incentives include allowing lawyers to use pro bono work as credit toward the mandatory continuing legal education requirement.⁹⁹ Outside the attorney regulation context, creative proposals include allowing a tax deduction or credit for pro bono services out of state.¹⁰⁰

91. Ray Worthy Campbell, *Rethinking Regulation and Innovation in the U.S. Legal Services Market* (Mar. 18, 2012) (unpublished manuscript), available at <http://ssrn.com/abstract=2018056>.

92. *See Commission on Interest on Lawyers' Trust Accounts: Overview*, AM. BAR ASS'N, http://www.americanbar.org/groups/interest_lawyers_trust_accounts/overview.html (last visited Dec. 17, 2012).

93. *See generally* Dru Stevenson, *Rethinking IOLTA*, 76 MO. L. REV. 455 (2010) (analyzing some "output side" unconsidered consequences of IOLTA programs).

94. MODEL RULES OF PROF'L CONDUCT R. 6.1 (2010).

95. N.Y. ST. BOARD L. EXAMINERS, <http://www.nybarexam.org/> (reporting new fifty hour pro bono requirement) (last visited Jan. 30, 2013).

96. *Id.*

97. *See* ESTHER F. LARDENT, MAKING THE BUSINESS CASE FOR PRO BONO (2000); Jolie L. Justus, *Using Business Strategies and Innovative Practices to Institutionalize Pro Bono in Private Law Firms*, 72 UMKC L. REV. 365 (2003); *see also* CORP. PRO BONO, <http://www.cpbo.org/> (last visited Dec. 17, 2012).

98. *See* Leslie C. Levin, *Pro Bono Publico in a Parallel Universe: The Meaning of Pro Bono in Solo and Small Law Firms*, 37 HOFSTRA L. REV. 699, 701 (2009).

99. *See* Elena Romerdahl, Note, *The Shame of the Legal Profession: Why Eighty Percent of Those in Need of Civil Legal Assistance Do Not Receive It and What We Should Do About It*, 22 GEO. J. LEGAL ETHICS 1115 (2009).

100. Stevenson, *supra* note 93, at 477-78.

A more obvious business need is to find more cost-effective service delivery models. More information and study has come from the disruption of the large firm market.¹⁰¹ The ABA has focused on cross border practice and technology changes in its most current Ethics 20/20 project.¹⁰² Trends in disaggregation of legal services and increased competition present both challenges and opportunities and compel adjustments in the strategies for delivering legal services.¹⁰³ Innovation is now the trend.

In our discussion of legal ethics and efforts to address unmet legal needs, a broad scale, unapologetic focus on the business of law is an important and honorable way to improve access to legal services. In health services a creative non-profit, Management Sciences for Health, has a mission to “help[] managers and leaders in developing countries to create stronger management systems that improve health services for the greatest health impact.”¹⁰⁴ Many recognize that we need similar creativity in the market for legal service, particularly in light of the increasing debt load and disrupted training path for entry-level attorneys.¹⁰⁵

CONCLUSION: THE LAW-BUSINESS DICHOTOMY REVISITED

We return to the false dichotomy between law as a business and law as a profession. As Tom Morgan notes, lawyers “are economic actors, specially trained, but driven by all the vices and virtues of a capitalist economic system.”¹⁰⁶ Russell Pearce noted well, however,

101. See, e.g., Bernard A. Burk & David McGowan, *Big But Brittle: Economic Perspectives on the Future of the Law Firm in the New Economy*, 2011 COLUM. BUS. L. REV. 1 (2011).

102. The ABA Commission on Ethics 20/20 was created in 2009 to review the ABA Model Rules of Professional Conduct and U.S. lawyer regulation, with a focus on “advances in technology and global legal practice developments.” *ABA Comm’n on Ethics 20/20*, AM. BAR ASS’N, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (last visited Oct. 18, 2012).

103. Burk & McGowan, *supra* note 101, at 93.

104. *Our Mission*, MGMT. SCI. FOR HEALTH, <http://www.msh.org/about-us/index.cfm> (last visited Oct. 14, 2012).

105. The implementation challenges are vast. Professor David Van Zandt from Northwestern projects a \$65,000 break-even point. See David Lat, *Changes in Legal Education: Some Thoughts from Dean David Van Zandt*, ABOVE THE LAW, (Feb. 3, 2010, 8:23 PM), <http://abovethelaw.com/2010/02/changes-in-legal-education-some-thoughts-from-dean-david-van-zandt>. Prof. Herwig Schlunk projects a range. See Herwig Schlunk, *Mamas 2011: Is a Law Degree a Good Investment Today?* (Vand. L. & Econ., Working Paper No. 11-42, 2011).

106. THOMAS D. MORGAN, VANISHING AMERICAN LAWYER 25 (2010).

that “[m]ost 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.”¹⁰⁷

The ability to make money needs to be accepted as more than a necessary evil in our discussion of professional conduct. The very earliest colonial efforts to control lawyers went right to this business aspect. Both the Massachusetts and Virginia colonies prohibited lawyers from receiving fees for representing others in court.¹⁰⁸ Until very recently, veterans were unlikely to have a lawyer in the early stages of the benefit application process because it was a crime to accept more than \$10 to represent a person in a Veterans Affairs claim.¹⁰⁹ If you want to limit lawyer involvement, you do not need to kill all the lawyers, just cut off their ability to make a living wage.

The core theme of this Article is that creative, unapologetic attention to the business of law will enhance ethics and professionalism. As Gary Munneke noted, “the skills associated with organizing legal work and managing a practice are central to competent lawyering. When lawyers practice proficiently and efficiently, then clients are well-served. When clients are well-served, the system of justice is enhanced.”¹¹⁰ Readers certainly understood this, at least on an intuitive level, before reading this essay. If we want to take a multi-tiered approach to improving professionalism, we must embrace the business of law.

That being said, obvious concerns arise. Julius Cohen reminds us of the limits of the business paradigm in our service business. It is Economics 101 that we have regulation to counteract some forms of market failures. We can argue about the scope and extent of market failures in the provision of legal services, and whether other market mechanisms such as malpractice, judicial sanctions and public shaming are sufficient to correct failures. But there is a powerful need for some form of external professional obligations.¹¹¹ Market

107. Russell Pearce, *How Law Firms Can Do Good While Doing Well (and the Answer is Not Pro Bono)*, 33 FORDHAM URB. L.J. 211, 215 (2005).

108. William T. Gallagher, *Ideologies of Professionalism and the Politics of Self-Regulation in the California State Bar*, 22 PEPP. L. REV. 485, 508 (1995); see also MORGAN, *supra* note 106, at 34.

109. Daniel R. Coquillette & Judith A. McMorrow, *Zacharias's Prophecy: The Federalization of Legal Ethics Through Legislative, Court, and Agency Regulation*, 48 SAN DIEGO L. REV. 123, 141 (2011).

110. Munneke, *supra* note 27, at 1243.

111. See, e.g., James Spigelman, *Are Lawyers Lemons? Competition Principles and Professional Regulation*, 77 AUSTL. L.J. 44 (2003).

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forces give less attention to the public, non-client based interests, which as we know is one primary justification for imposition of additional duties on lawyers. These additional duties, such as avoiding conflicts and maintaining confidences and obligations to the courts, provide the value that lawyers add.¹¹² Those are the duties that we impose to support the legal system and courts and that amorphous concept called “the rule of law.”¹¹³

At this point a reader might be quite frustrated, stating that the real question is defining the content of these additional duties, and how to assure that those who wish to use the title “lawyer” deliver the content.¹¹⁴ That question is one that the idea of the “professional” captures. But the concept of “business” is just as vast and elastic as the word “profession.”¹¹⁵ It has affirmative and negative manifestations. With the wave of a hand I can declare that we should focus on the positive aspects of a service business: core values, excellent service, good infrastructure, proper capitalization, clear business plan, efficiencies, cost controls, and employee development. In addition, we can make a powerful alignment with the field of business ethics, which challenges the concept that profit maximization is the dominant or only concern of business. As a field, the legal profession can also draw lessons from the expanding and creative field of corporate social responsibility.¹¹⁶ These are our natural

112. See Scott L. Cummings, *What Good Are Lawyers?*, in *THE PARADOX OF PROFESSIONALISM: LAWYERS AND THE POSSIBILITY OF JUSTICE* 1 (Scott L. Cummings ed., 2011).

113. In addition to a sharp understanding of the particular obligation of lawyers, including putting client needs above personal needs, a heavy emphasis on profit maximization results in significant stress on the daily lives of lawyers. Some business models require high billable hours, provide less job security and impose greater stratification, all of which contribute to some levels of dissatisfaction. See NANCY LEVIT & DOUGLAS O. LINDER, *THE HAPPY LAWYER: MAKING A GOOD LIFE IN THE LAW* 53–58 (2010). Lawyer satisfaction needs to be part of the discussion, just as employee development and satisfaction is an important dimension of business.

114. With all due respect to Professor Tom Morgan, I do not see professionalism as dead. Maybe the word is just too fuzzy to capture the core values, or has been co-opted and has too many meanings. See MORGAN, *supra* note 106, at 21 (“It should be acknowledged at the outset that the terms profession and professional are used almost promiscuously in our society, with little agreed-upon definition.”).

115. Neil Hamilton, *The Profession and Professionalism Are Dead?: A Review of Thomas Morgan, The Vanishing American Lawyer* (2010), 20 *PROF. LAW.* 14, 14–17 (2010).

116. See generally KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE RESPONSIBILITIES* (2006); Richard P. Nielsen, *Organization Theory and Ethics: Varieties and Dynamics of Constrained Optimization*, in *THE OXFORD HANDBOOK OF ORGANIZATION THEORY: META-*

intellectual allies in the effort to have an integrated approach to improving lawyer ethics and conduct.

Scott Cummings describes this as the dual status of lawyers “in the market, but above it.”¹¹⁷ This professional paradox, as he notes, is complex, and “we know that different lawyers, at different times, in different places” stand for a different balance between the profit goals and justice.¹¹⁸ I do not see the business aspects of legal services as bad or as the enemy. To provide legal services, lawyers must be good business people as well. Ask any board member of any non-profit legal services provider.

THEORETICAL PERSPECTIVES 476, 494 (Haridimos Tsoukas & Christian Knudsen eds., 2003).

117. Cummings, *supra* note 112, at 1.

118. *Id.* at 2.