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COMMENTARY

Professionalism Means Putting Your Profession First

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Ask a lawyer what "professionalism" means and you are likely to hear that professionalism means *putting your client first* or *acting as an officer of the court*. Only rarely will a lawyer say that professionalism means *putting justice first*. Never, I think, will a lawyer even suggest that professionalism means *putting your profession first*. Yet that is the thesis of this paper: *Professionalism means putting your profession first*. While one paper is unlikely to enter this thesis into the common wisdom of lawyers, perhaps it will be enough to get it a fair hearing. That, anyway, is what I hope to achieve for this conception of professionalism. This conception, though never explicitly stated, much less defended, seems to me fundamental to professionalism as we know it.

This paper has three parts. Section I makes certain distinctions necessary to prevent misunderstanding my thesis. Sections II and III develop the thesis into a conception of professionalism. Sections IV and V use that conception to help with that most difficult of undertakings, justifying professional discipline to someone convicted of professional misconduct which harmed neither her client nor an identifiable third-party.

Nowhere in this paper do I expressly deal with objections to my thesis. I do not, in part, because I have done that elsewhere.[1] But, in part too, I do not because space forbids me to do too much at once and what I do seems to me more important than demolishing a few objections. Showing that my conception of professionalism sheds light where other conceptions do not, seems to me, the best way to demonstrate that my thesis deserves a hearing.

I. THE PROFESSION IN "PROFESSIONALISM"

Pprofessionalism means putting your profession first, but only on a certain understanding of profession. We sometimes use "profession" to mean *the members of a certain occupational group*. According to this usage, lawyers are the legal profession and a lawyer would put her profession first by putting

1. See especially, Davis, *The Use of Professions,* BUSINESS ECONOMICS 5-10 (1987), and *The Moral Authority of Professional Codes,* in NOMOS XXXIX: AUTHORITY REVISITED 302-37 (Pennock & Chapman, eds.) (1987).

the interests of lawyers ahead of everyone else's. Needless to say, that is not how I understand "profession".

In a more common usage, "profession" means an occupational group *organized* to use the characteristic skill of its members for the *public good*.[2] "Profession" in this sense distinguishes an occupational organization with a certain purpose (public service) from similar organizations with somewhat different purposes (for example, protecting members from exploitation, making a profit, or recreation). This second sense of "profession," though closely related to what I intend, is still not it. The profession to be put first is not an occupational group, however organized.

For me, the profession that a professional should be put first is the standard of skill and conduct he *professes* by being a member of a profession (in my second sense). For example, the lawyer's profession is what he invites the public to expect of him when he declares himself to be a lawyer. To declare yourself to be a member of a certain profession (in my second sense) is to hold yourself out as one who satisfies all the requirements members of that profession are supposed to satisfy. To declare yourself a lawyer is to profess more than knowledge or experience of legal work. It is, in effect, to claim that you have the education lawyers are supposed to have, passed the tests lawyers are supposed to pass, that you have made the commitments lawyers are supposed to make. Among those commitments is the commitment to act in accordance with a code of ethics, such as, *The Model Rules of Professional Conduct*, *The Model Code of Professional Responsibility*, or some similar code (depending on where the lawyer practices).

For a lawyer, then, professionalism can only mean putting the client first when that is part of what lawyers are supposed to do. If, however, the profession's code of ethics requires something else, for example, revealing a damaging precedent, professionalism means making the client take a back seat to helping the judge discover the law. The concept of professionalism does not, as such, give the client (or anyone else) priority in a lawyer's work. The concept of professionalism leaves such matters to the profession's standards of practice. If the client receives no priority in the standards, professionalism will not require it.

What I have said so far may suggest that the content of professionalism is arbitrary. Whatever a profession puts into its standard of training, skill and conduct is what professionalism requires. There is no "natural profession" of lawyering or anything else. Professionalism means do as you profess,

2. Note that this conception of profession, while consistent with that the ABA's Commission On Professionalism recently endorsed, *omits* some predicates the Commission, and tradition. include (for example, intellectual training). ABA, . . . IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR REKINDLING OF LAWYER PROFESSIONALISM 10 (1986). Nothing in what follows depend on these omissions. They should, I think, be regarded as convenient simplifications.

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whatever you profess. That, in fact, is not quite what I mean. As I understand professionalism, its content, while largely arbitrary, is *not* altogether so. Those constituting a profession have wide latitude, but they cannot make just anything professionalism.

The claim of professionalism is primarily a moral claim. To be a professional is to have obligations one would not otherwise. These are not mere legal obligations (though they may be that too). They are obligations one is in honor, in conscience, and in decency, bound to respect. The claim of professionalism would not be worth the praise commonly given it if it were no more than what a lawyer must do to keep her meal-ticket and her freedom. Since the claim of professionalism is primarily moral, morality must limit the content of professionalism. Professionalism can never require anything immoral. For example, the "professionalism" of a torturer must always remain in scare quotes. However skillful, scrupulous, and organized, torturers can no more form a profession (without scare quotes) than counterfeit money can be money.

The claim of professionalism is not simply a moral claim. To be professional is to profess membership in a certain profession. To be a profession, an occupational group must be organized (in large part at least) for the purpose of serving others. This is a conceptual truth, neither more nor less. A business may in fact do as much good as any profession. But, so long as its primary purpose is benefitting its owners rather than benefitting others, it is a business, not a profession. In the same way, a trade union remains a trade union while its primary purpose is improving the conditions under which its members work. Though professions do not necessarily do more good than other occupational organizations, they are distinguished from the others by the purpose for which they are organized. Morality does not require occupations to organize, much less to organize for any particular purpose. So, by definition, professionalism includes a commitment to benefitting others beyond what ordinary morality requires.

Perhaps I should add that the organization's purpose must not be a mere "paper purpose," one the acts of the organization regularly belie. To be a real profession rather than a counterfeit one, an occupational group must really be organized in a way likely to achieve its stated purpose. Because the members of any large organization will ordinarily be rational, experienced, and serious, such an organization can be counted upon to act more or less as its purpose requires. And because relatively few people are hypocrites, the purpose of such an organization may be readily be read from its statements as from its acts.

We should, however, not read the acts of a human organization too closely. Humans are fallible. Even an organization of the educated may now and then adopt a practice at odds with its purpose, or leave a once-defensible

practice in place long after its defense has collapsed. More common, though, are practices in place because of disagreement among people of good will. Suppose, for example, that everyone in a certain profession agrees that a certain practice should be changed, but no alternative so far proposed seems clearly superior to more than a minority. Unsatisfactory as the practice might be, it would survive. But that survival would not be evidence against the organization's professional status. Indeed, we can easily imagine its survival to be part of the evidence *for* the organization's being a profession. For example, suppose that the debate over alternatives is largely in terms of how this or that alternative would serve the public interest better than any other.

So, an organization's status as a profession should not be made to depend on a perfect fit between its purpose of public service and what it in fact does. An organization will be a profession if, on the whole, it seems reasonably well designed to benefit others in the way professions are supposed to. That is to say, if its standards of admission appear reasonably well designed to assure the public of competent service, its code of ethics forbids many abuses that might otherwise occur, and its enforcement procedures seem equal to the task of maintaining substantial compliance with its professed standards and so on.

II. PROFESSION: PUBLIC SERVICE *AND* SELF-INTEREST

Lawyers (and other professionals) are often mocked for suggesting that their motives are better than those of ordinary people. [3] Yet, on my analysis, there is a clear sense in which their motives are better. The (moral) obligations of any decent person are among her motives. Ordinary people, however decent, do not have any specific obligation of public service (for example, an obligation to provide free to the poor who need it the service they make their living selling). Lawyers have that obligation (because, and only because, it is part of what they profess). The obligation of public service is not only a morally good motive but a morally better one than simply making a living. Hence, all else equal, lawyers have better motives than ordinary people do.

Having better motives because one has special obligations does not, however, make one a better person. A lawyer who satisfies all her obligations, including her professional ones, is (all else equal) no better than a nonprofessional who satisfied all his. Both have done exactly what morality requires. The lawyer may, however, be morally worse than the nonprofessional, even if she does everything required of a nonprofessional. She can fail to live up to her professional obligations, something an ordinary person cannot fail to do. I have heard lawyers complain bitterly that lawyers are blamed for doing

3. *See, e.g.,* Moore, *Professionalism Reconsidered*, 1987 AM. B. FOUND. RES. J. 773-89. The reader should pay special atttention to pages 776 and 779-80 of the article.

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what passes without comment in a business person. My response is: "If you want to be held to no higher standard than business people are, renounce the law and go into business".

Indeed, one function of professions seems to assure that professionals need not be better than ordinary people even though they have better motives. Fulfilling one's (moral) obligations is, as we have seen, morally the same, whatever one's obligations. Only if professional obligations were, all things considered, a heavier burden than the obligations of ordinary people would fulfilling one's obligations as a professional make one morally better. But, in fact, professions generally enable their members to do *at no cost to themselves* what an ordinary person could do only with significant sacrifice. Consider, for example, the grocer who gives food to the poor. He must either take his gift out of his profits and live less well than his competitors or figure the gift into the price of his goods and put himself at a competitive disadvantage. He bears the cost of his public service and, therefore, deserves praise for it. But a lawyer who does a certain amount of *pro bono* work when other lawyers do the same, can help the poor without any sacrifice. Her public service will be a normal cost of legal business. Whatever little praise a lawyer deserves for it will be what we dole out to those who simply live up to their obligations.

Lawyers can, I think, claim to be better than ordinary people only insofar as they enter their line of work with motives which are better than those with which those ordinary people theirs, or fulfill their obligations better than ordinary people fulfill theirs. The lawyer who enters the law only to make money, satisfy ambition, or have a good time is morally no better (and no worse) than someone who goes into business for the same reason. Each simply accepts certain obligations to obtain certain benefits.

People entering the law primarily from a motive of service to others are probably as rare as saints. The law does not require saints. Indeed, it should not. Those who want only saints to serve them will generally have to do without. This fact, so plain that it is often overlooked, puts substantial limits on the context of professionalism. For example, the codes allow lawyers to breach a confidence in order to collect a fee. Such a provision cannot be justified directly by the profession's concern for justice, the client, or public service. Its justification is necessity. A legal profession dependent on fees would be impossible or, at least, far less profitable, if lawyers either had to collect their fees in advance or risk being barred by lawyer-client confidentiality from going into court to force payment. The better organized the profession, the less often self-interest and public service are at odds.

While those organized into a profession may, *as individuals*, be no better (and no worse) than those not so organized, they will, *as an organization*, generally be not only different, but better—for two reasons. First, they will be better because, as an organization, they will have a commitment to public

service that unions, businesses, trade associations, and other organizations of self-interest do not. Second, they will be better because, as an organization, they will have the power to do good which the unorganized cannot. Those not organized for public service must do what public services they do in an unorganized way, much as a crowd might respond to a purse snatching among them. Some may stare, some may freeze, some may start to help. A few may actually be able to do some good, for example, comfort the victim or call the police—but even this will happen almost by chance. A profession, in contrast, responds in an organized way, much as a well-trained squad of soldiers might, each soldier knowing what he is supposed to do and being able to act with reasonable assurance that others will do what they are supposed to do. Thus, if a thief sneaks up to steal from the squad, the sergeant will issue orders, each subordinate will respond accordingly, and the thief will be overwhelmed in a few seconds.[4]

III. PROFESSION, COOPERATION, AND FAIRNESS

The good that a professional organization does is done by coordinating the conduct of its members. Stating matters this way naturally suggests that we think of a profession as a cooperative undertaking. In exchange for putting himself under an obligation to do as those in his profession are doing, each member of the profession receives the benefits of being identified as a member of that profession. The benefits are not extrinsic to the exchange. For example, the trust people place in someone they identify as a lawyer is itself a function of what they suppose lawyers to be. What they suppose lawyers to be is, in turn, in large part at least, a function of what the profession itself requires of its members. If, for example, one could become a lawyer without proving any knowledge of the law, being identified as a lawyer might be worth far less than it is today.

Thinking of the relation among members of a profession in this way may suggest that the professional obligations ultimately rest on a *contract* among members of the profession. This suggestion, though natural, is nonetheless dangerous, especially for any profession, like law, that makes would-be members take an oath of admission. Some professions (for example, teaching) do not have an oath of admission and yet their members are held to their profession's standards as much as lawyers are held to theirs. Any adequate conception of profession ought to cover all the professions, not just those with special oaths.

The "contract" between members of a profession is probably better conceived as a "quasi-contract" or "contract implied in law" rather than as an actual contract. The obligation depends not on any oath actually taken

4. For a fuller defense of this claim, see the works cited *supra* note 1.

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(though that alone would create an obligation) but upon that principle of morality, *fairness*, requiring each person voluntarily receiving the benefits of a morally permissible practice to do her prescribed part of maintaining the practice. Though promises, oaths, and even "contracts implied in fact" can also serve as a foundation of professional obligation, the common foundation of such obligation is the principle of fairness. Since that principle generates moral obligations, professional obligations are necessarily moral obligations.[5]

I have now explained how professional obligations can be moral obligations even though the content of professionalism is largely arbitrary. I have not had to base the morality of professional obligation on such substantive moral principles as "Do no harm" or "Be loyal to your friends." I am therefore not obliged to divide professional ethics into "real ethics" and "mere etiquette." Any standard of practice having a reasonable relation to the profession's purpose will be part of its professional ethics.

I have also not had to suppose any contract between the profession and society. This is important. Not all professions have the privileges the legal profession has. Engineering, for example, can be practiced in most states without a license (though a license may be required to approve certain documents under certain circumstances). Financial analysts are entirely unlicensed (though they have a system of private certification). Though such professions seem to lack a "contract with society" such as law has, they seem in other respects as much professions as law does. One strength of my approach to professionalism, I think, is that it escapes the view that professional obligations depend primarily on the profession's contract with society. "Negotiation with society" may indeed explain this or that provision of a code of ethics (for example, current language on advertising). What such "negotiations" cannot explain is the moral standing of professional obligations as such. For some professions at least, the obligations seem to exist without such negotiation.

I have also had no reason to stress the lawyer-client relationship. This too seems to me to be a good thing. Much of what a lawyer is required to do is outside any particular lawyer-client relationship (for example, his obligation to report the misconduct of other lawyers). And some of what he is required to do, though internal to a particular lawyer-client relationship, is not necessarily in the client's interests. (Consider, for example, the obligation not to delay simply for the sake of delay, however much delay may benefit the cli-

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5. The principle of fairness has been under a cloud since the seemingly devastating criticism it received in R. NOZICK, ANARCHY, STATE, AND UTOPIA 90-95 (1974). This need not concern us for two reasons. First, the examples on which the criticism relies do not support it. *See* Davis, *Nozick's Argument for the Legitimacy of the Welfare State*, 97 ETHICS 576-94 (1987). Second, the focus of criticism has been not the "voluntary" version of the principle but its "nonvoluntary" counterpart. *See, e.g.*, A. SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATION 118-36 (1986); Arneson, *The Principles of Fairnees and Free-Rider Problems,* 92 ETHICS 616-33 (1982).

ent). My approach invites lawyers to think of their professional standards as primarily of their collective making, the outcome of negotiation *within* the profession, not as a necessary by-product of just one of the relationships into which lawyers as such enter.[6]

IV. IN RE EAGLE: THE FACTS

The discussion has so far been quite abstract. It is time to get down to cases. The case to which I shall now apply the foregoing analysis I owe to Monroe Freedman. Freedman has, of course, made a career of putting cases that force a rethinking of what it is to be a lawyer. The case I shall discuss is no exception.[7]

Freedman asks us to imagine Laura Eagle, a sole practitioner in a large city. One evening an acquaintance of hers, a social worker, mentioned over cocktails the horrible conditions he had seen that day on a visit to a private nursing home—filth, poor food, neglect. One patient actually had maggots growing in her flesh. The patients are poor, elderly, bedridden, and rarely visited by anyone. The staff seems indifferent. State inspectors have probably been bribed.

The social worker doubted anything could be done and ended his story with a sigh. Eagle thought otherwise and immediately offered him $100 to return to the nursing home, to explain to some of the patients about the possibility of suing on their behalf, and to sign up one or more of them on a contingent fee. Eagle stressed that the social worker was not to mislead or pressure the patients in any way but simply to make sure they were as fully informed as possible about what could be done.

Eagle soon became attorney for the patients, and, after much maneuvering and a dramatic trial, obtained both a substantial judgment against the nursing home and an order protecting the patients from further neglect. Her share in the judgment was the normal one-third.

The case caused a stir in the newspapers. They reported Eagle's substantial fee with considerable irony. They also reported the solicitation without comment. Soon thereafter the local bar association began disciplinary proceedings. At her hearing, Eagle admitted that the fee was a significant motive for taking the case. Indeed, she emphasized that she could not have afforded to do such a difficult and time-consuming case *pro bono*. She preferred representing the patients. But, she admitted that she would have been

6. This, I think, is the main advantage my approach has over that Charles Fried takes in *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation,* 85 YALE LAW JOURNAL 1060-89 (1976).

7. Freedman presented this case for our panel at the American Bar Association Conference On Professionalism, Denver, Colorado, June 25, 1987. Need I say that he is not responsible for the use I shall make of it?

willing to represent the nursing home operator instead. "You can call me a hired gun if you like," she said, "but I believe in the English barrister practice of taking the next client in line."

Eagle's case is relatively easy to decide. Suppose the *Model Rules* are in effect in her locale. Rule 7.3 does not allow a lawyer to "solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in-person, or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain . . ." Eagle did indeed solicit professional employment from persons she did not know and she admitted that her own pecuniary gain was a significant motive. This clear violation of the *Model Rules* is compounded by another. Rule 7.2(c) does not allow a lawyer to "give anything of value to a person for recommending the lawyer's services . . ." Eagle had given the social worker $100 to do just that.

Freedman concludes by imagining that the local grievance committee would recommend that Eagle be disciplined and that the state's supreme court would so order.[8] This outcome is troubling. Eagle is, in many ways, a good lawyer. She gave legal help to some who, though needing it desperately, might not have gotten it but for her. She won their case, leaving her clients far better off than she found them. And she did it without sacrificing the financial well-being upon which depends her ability to do such good work again. Yet, she *is* guilty of unprofessional conduct under the *Model Rules* (as she would be under any predecessor). While she achieved the sort of good the legal profession aims at, she did so by means the profession has renounced.

Eagle's case is, in other words, one involving the question whether a good end can justify an otherwise forbidden means. But it is not a classic case of that. In a classic case, the means in question is immoral in itself. It is an act like killing innocent children or torturing a prisoner. In Eagle's case, the means is not immoral in itself. Soliciting legal business "in the state of nature" (that is, absent a professional organization or legal prohibition) would be no more morally wrong that soliciting ordinary business is in most countries. Eagle's soliciting is morally wrong, *if* it is, only because it violates a professional rule. Professional rules are themselves a proper subject of moral evaluation. If the rule against a solicitation were itself immoral, violating it

8. Freedman actually had Eagle being *disbarred* for her misconduct. I cannot defend treating her so harshly. Disbarment is the most severe penalty the profession can impose on a lawyer. Disbarment should therefore be reserved for the most serious misconduct (as well as lawyers who demonstate absolute inability or disinclination to do as they profess). Eagle seems to be a first offender. Her misconduct, though serious, is certainly much less serious than it would have been had she also falsified evedence, taken an exhorbitant fee, or the like. So, I can only defend disciplining her if the resulting penalty is near the lower end of the scale, say, censure or a thirty-day suspension. (I have also changed the facts in many minor ways to sharpen the problem.)

would not be morally wrong; disciplining Eagle for violating such a rule would be. But the rule against solicitation is not itself immoral. The rule merely requires lawyers not to do certain acts that, while morally good, are not morally required. What is troubling is that the rule discourages Eagle from doing just the sort of good her profession supposedly wants to do. Can discipline be justified in such a case?

I believe it can. I shall consider myself successful if, drawing on the concept of professionalism developed above, I can provide a justification that any rational lawyer, Eagle included, should accept. To make the test as fair and dramatic as possible, I shall imagine myself to be addressing my justification to Eagle directly, as if I were the chair of her grievance committee and she a lawyer whom I regarded as a good colleague gone astray. I leave it to you to judge how successful I am.

V. WHAT EAGLE WOULD HAVE HEARD FROM ME

Ms. Eagle, you have violated two provisions of the *Model Rules*. You solicited clients, using an intermediary, and you paid the intermediary. Your only defense is that you are (and I am quoting) "a hired gun" and "believe in the English practice of taking the next client in line." That, of course, is no defense. The same code of ethics that requires the English barrister to take the next client also does not allow him to stir up litigation (as you have done). You seem to expect the benefits of the English system without its burdens. You seem in addition, and inconsistently, to think yourself an individual as free as any car dealer to get business where you can. In short, you seem to misunderstand your profession. I hope what I shall say now helps you to understand it better.

Let me begin, Ms. Eagle, by pointing out that you have entered into something like a contract with other lawyers. You took an oath to obey the laws of this state, including the *Model Rules* under which you now stand convicted. Had you refused to take that oath, you would not have been admitted to the practice of law. You would not have become a lawyer able to do the good you did for those whom you solicited. Since you passed the ethics section of the bar exam, you must have taken the oath knowing what the *Model Rules* would require of you. You also underwent an investigation for character and fitness. If you had felt you could not abide by the *Model Rules* as they stood, you might have said so. You would then have given us a fair opportunity to refuse you admission. You did not. Why?

Perhaps you took the oath in good faith, changing your mind about obeying the *Model Rules* only after you found it hard to make a living practicing law as the *Rules* require. That happens. But, by itself, such a change of mind cannot change your obligations. You have, after all, continued to claim the benefits of the contract you made. You have continued to claim to

be a lawyer. Do you expect to have the benefits of being a lawyer without the obligations?

But, you may say, it is no ordinary contract we are talking about. The bargaining power of the parties was very unequal. The profession could easily do without you, but you could not easily do without it. You were presented with a standardized agreement and, in effect, told to take it or leave it.

True, of course; yet, standing alone, such circumstances are not enough to void the contract. You are claiming, in effect, that the contract between you and the profession was one of adhesion. A contract of adhesion is void only if its terms are demonstrably unfair to the weaker party (or, a point I shall come back to, against public policy). The terms you accepted were, on the contrary, perfectly fair.

When you graduated college, you had a wide range of careers open to you. Many of them, though potentially as lucrative as the law, would not have burdened you with obligations like those the *Model Rules* impose. You chose law. You studied hard, passed your exams, filled out long forms, and paid all the fees. You were then granted the right to practice law "with", as we said, "all the rights and obligations pertaining thereto." That was the very thing you had worked so hard to obtain. You could not have been unfairly surprised. Indeed, you should not have been surprised at all.

The *Model Rules* are, it is true, not written in stone. They can be changed without your express approval. You are, in that respect, subject to a contract some terms of which you could not have known when you took the oath. Still, even this incompleteness does not make the contract unfair. On the one hand, the rules under which you are now being disciplined were in effect when you took your oath. So, you had fair notice of *them*. On the other hand, your oath did not subject you to anyone's arbitrary power. Admission to the profession made you eligible to join the state bar association and serve on committees that have the power to recommend changes in the *Model Rules*. True, the bar does not have final power to make the *Rules*, though their advice is usually followed. But you were already a member of the electorate that chooses (either directly on indirectly) those who do have final power. You will not, I gather, claim that the constitution of this state is unfair to you. You are, then, in all these respects, neither better off nor worse off than any other member of the state bar. Surely, that is fair.

But, you ask, is it fair to deny you the opportunity to find clients wherever you can, by any lawful means you can? Is it fair to lawyers to deny them opportunities to do business open to other business people? These two questions are, of course, distinct. One is about fairness to you as a lawyer; the other, about fairness to lawyers generally. Let us take them one at a time, beginning with you in particular.

How can it be unfair to you in particular to deny lawyers the opportunity to find clients wherever they can? Are you claiming that lawyers in general should be forbidden to do as you have done but that you should not? I suppose not. But, if you do not claim that, how can you justifiably claim that we are treating you unfairly when we treat you the same as the rest of us? You are not anyone special. You are under no formal disadvantage with respect to us. All of us are equally denied the opportunity you have usurped. Nor are you under any obvious material disadvantage. If all lawyers were free to do as you have done, Ms. Eagle, you might well be trampled in the stampede for clients. What reason do you have to believe that you would do better in wide-open competition than you are doing now?

That, Ms. Eagle, brings us to the possibility that the rule against solicitation is unfair to lawyers generally. But how could it be unfair to *us*? What is at issue is, after all, *self-denial*, not the work of an alien power. Lawyers, in general, approve the rule against soliciting business. When we no longer want that rule it will, no doubt, be repealed. Indeed, the rule remains largely because lawyers have fought to keep it. Why have lawyers fought to keep it? I shall come back to that question. For now, it is enough to point out that the rule does not seem to put lawyers at a disadvantage compared to business people who are not subject to such restraint. Those who sell life insurance, aluminum siding or flowers by direct solicitation are not, on the whole, financially better off than lawyers. They simply bear an extra burden of competition with no obvious reward.

So, Ms. Eagle, must we conclude that the contract between you and us is fair to you in particular and to lawyers in general? Perhaps, though, that is beside the point. Perhaps the unfairness you are really concerned about is not unfairness to you or to other lawyers but to those potential clients whom the *Model Rules* seem to have inadvertently doomed to lie helpless in dirty beds, maggots eating their flesh. You would then be claiming that the rule under which you have been charged is legally void because it is against public policy or at least morally void because of the harm it allows. *That* claim must be treated with great respect. The legal profession is committed to the ideal that those needing a lawyer's help to seek justice within the law should have the help they need.

I must, however, admit to doubting that your chief concern *was* for the needy. Surely, if *they* had been your chief concern, you would at least have tried to find a lawyer to do *pro bono* what you could only do for pay. There are many lawyers who can afford the time you say you cannot. The *Model Rules* put them under an obligation (unenforceable, I admit) to devote some time to those who need a lawyer's help but cannot pay the usual fee. Perhaps, then, a few phone calls would have been all you need have done to find a lawyer to do for free what you did for pay. Did you make even one call?

You did not. You might also have shown your concern for the needy in other ways. You made a profit on their suffering. You might instead have taken as pay only enough to cover your costs, including time. The good you did seems much more the by-product of the profit you saw in the case than the other way around.

I say that, Ms. Eagle, not to shame you but to suggest to problem for which I think profession is the best solution. A profession is an organization the purpose of which is to benefit the public by assuring that a certain way. A noble purpose, Ms. Eagle, but one to be accomplished, it is to be accomplished at all, only by such human beings as you and I. *How can people whose chief, but not sole, interest is their own welfare and that of people close to them, be organized so that they can make a living, provide legal help to those who need it, and benefit the public?* That is the problem.

We may, I think, dismiss as an unrealistic solution having all legal services performed by people drafted into lawyering the way we used to draft young men into soldiering. That leaves only one solution beside making law a profession, that is, allowing legal services to be provided in a free market the way cars are today.

A legal market may at first seem better than a legal profession. With a market, people would do legal work because they thought they were better off doing it than doing anything else. They would take particular clients because they thought they could do better serving them than serving others. A legal market would certainly give us enthusiastic legal help, just as it now gives us enthusiastic car dealers. But would it give us the kind of legal help we want?

The market is, after all, like the police, primarily a means of supervision. It works well for those items of commerce consumers have both the will and the means to control. But, for those items the virtues and faults of which are in large part concealed from all but the maker, or fall largely on third parties, the market is likely to be a poor supervisor. Deregulation of trucking seems, for example, to have forced more cost-cutting than is safe. Trucks now cause fatal accidents at a much higher rate than they did before deregulation. Yet, shippers, the actual consumers of trucking, neither have much incentive to prefer safe truckers nor are well-placed to identify them. The difference between what a good lawyer would do and what a shyster would do is often as invisible to the legal consumer as a trucker's cost-cutting is to a shipper. One weakness of a legal market is that it tends to discourage (what we might call) "invisible quality" (including in that term protection of third parties.)

That, I think, is reason enough to doubt whether a legal market is better than a legal profession. But there is another. The poor are likely to suffer. Of course, where the poor have a fee-generating case such as the one you brought, Ms. Eagle, they would have a good chance of finding legal help.

Indeed, their only problem would be distinguishing between the competent and the incompetent, the honest and the crooked. The sick, the old, the worn out, the ignorant, might not choose well from the crowd of profit-hungry would-be helpers likely to gather at their bedside. But, at least they would have help. Not so those other poor whose case can generate no fee or only a fee too small to cover the work. In a pure market, they would have to do without legal help, just as now they must do without cars.

We can, of course, try to correct that market failure by penal statute. But, doing so would introduce into the market the draft's weaknesses. The poor may, for example, end up with lawyers whose only concern is to avoid punishment while spending as little time as possible on an unprofitable case. Another way to correct that market failure would be buying legal help in a free market with money raised by tax or gift. But, doing so would still leave the problem of supervision. What incentive would such legal helpers have to do more than the minimum necessary to avoid losing business, paying too much for malpractice insurance, or the like?

So much for a legal market. Why is a legal profession better? Remember how our profession is organized. We admit into practice only people whose performance in law school and on the bar exam gives us good reason to believe they know what is expected of them. The character and fitness investigation should exclude all those who seem disinclined to respect their oath or to do their share in a fair practice. Those remaining are then bound by oath to practice as the *Model Rules* provide. If (as I believe) the oath requires nothing immoral and lawyers generally do as they have sworn, everyone admitted into practice will have a moral obligation to do as she has sworn.

The obligation will have a double foundation, the same two moral principles upon which the law of contract is generally supposed to rest. Though these principles are not without exceptions, the exceptions do not matter here. One principle is "Keep your promises." It applies because of the oath. The second principle is, "Do as required by any morally permissible cooperative practice in which you voluntarily participate." A practice is cooperative insofar as each participant's reason for acting as the defining convention requires is that he expects to benefit form so acting because the other participants will also act as the convention requires. The second principle applies to lawyering because the *Model Rules* make lawyering a practice in which each lawyer stands to benefit from practicing law as the *Model Rules* require in part at least because other lawyers can be relied on to do the same.

If that is what it is to organize law as a profession, then organizing law in that way makes conscience, rather than the market or law, the chief "supervisor" of legal work. Conscience, of course, is a cheaper method of guiding conduct than penal statute. Conscience is also able to keep watch where neither the police nor the market can.

But, Ms. Eagle, though we are entitled to expect more of lawyers than of ordinary business people (because lawyers swear to do more), we are not entitled to expect too much. Compliance with the *Model Rules* is much like compliance with any other convention. It is an obligation only so long as there is a practice. If the practice disintegrates, the obligation vanishes. Any voluntary practice will disintegrate unless most of the participants benefit from participating. For each lawyer, it is the compliance of *other* lawyers that makes acting as the *Model Rules* require both rational and morally obligatory. So, if the *Rules* set standards so high that sufficient compliance is unlikely, each lawyer may reasonably conclude that not enough other lawyers will act as required. He would then be justified in ignoring the *Rules* himself. (Think of constructive breach in contract law.) The profession should die of its own idealism.

I have stressed that the benefits of compliance must outweigh the costs. "Benefits" should, however, not be read too narrowly. The benefits need not be self-serving. For example, because lawyers are generally decent people, they would consider it a benefit to not have to choose between serving a client badly and going broke. If lawyers generally maintained high standards in their work, no lawyer would be at a competitive disadvantage for doing the same, even if much of the resulting good work is "invisible" to the client. High standards for legal work serve the lawyer by serving the client.

Lawyers also generally want to help the needy or oppressed now and then. So we have tried in various ways to get every lawyer to do a fair share of such good works. Our attempt to impose an enforceable obligation to do a certain amount of *pro bono* work each year was, as you know, not well received. Still, the basic strategy was right. If doing a certain amount of such work were made part of practicing law, no lawyer would be at a competitive disadvantage if he did help the needy now and then.

Since lawyers are only human, we must not expect them to sacrifice very much very often. The law would probably not long remain a profession if practicing as the *Model Rule* required impoverished almost anyone who tried it. Much in the *Model Rules* that may seem out of place given their noble purpose may be understood as part of what is necessary to make a living practice.

I admit, though, that some provisions may simply be mistaken. Lawyers are as capable of writing a bad rule as anyone else. But the burden of proof should fall on the one who claims a particular rule is bad. After all, the majority is, all else equal, more likely to be right than any minority is. Of course, should a minority carry that burden and show a particular rule to be immoral, I would refuse to enforce it. If, however, the minority could only show the rule to be less than perfectly suited to its purpose, I would still feel obliged to enforce it until a better one had been adopted or, at least until a

consensus had formed in favor of one alternative. Coordinating the conduct of 30,000 lawyers (as we must do in this state) is not easy. Confusion about the rules of practice would make coordination harder. Anyone serious about professional standards must resolve reasonable doubts about his conduct in view of the standards as they are.

Which brings us, Ms. Eagle, to the rule against solicitation. It makes sense, I think, in part because lawyers are free to solicit so long as they do not profit. Ordinarily, some lawyer or other can be expected, if asked, to help *pro bono* with a case like the one that brought you here. The rule against solicitation also makes sense, in part, because the alternative your misconduct suggests is likely to force lawyers to choose between participating in an unseemly scramble for business at the bedside of the sick and losing out in wide open competition. Who would benefit in the long run if lawyers were forced to make that choice? There may, I admit, be a way around this problem. But neither you nor anyone else has yet to suggest one that more than a small fraction of lawyers favor over the present rule. We are, then, committed to the present rule for now not because it is the best possible, but because it is not plainly a bad rule and it is the one upon which our profession has agreed.

So, Ms. Eagle, what can we conclude? You are not in any way distinguishable from those lawyers who, though perhaps as hard up, do not solicit as you have. If we made a practice of letting lawyers profit from doing as you have done, solicitation like yours might soon become common and the advantages of the rule against it would be lost. Preserving the practice from which you unfairly benefited seems to require taking the profit out of what you did. So, Ms. Eagle, are we not justified in imposing on you a penalty proportioned to the benefits you unfairly took?[9]

VI. CONCLUSION

With that rhetorical question, I yield up the chair of Eagle's grievance committee and become myself again. I have now sketched a theory of professionalism. I have also given an example of how it might be applied in practice. I have explained why Eagle should have put her profession, that is, the obligations she voluntarily accepted when she became a lawyer, ahead of making money by helping poor sick old people. Though that explanation included a defense of the present rule against solicitation, nothing of importance should be supposed to hang upon whether *that* rule is in fact defensible.

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9. If this last question seems to invoke a retributive notion of punishment, that is because it does. Though retributivism is not necessary for anything I have said up until now, it is, I think, necessary to justify a particular penalty. For a defense of this view, see Davis, *How to Make the Punishment Fit the Crime*, 93 ETHICS 726-52 (1983).

So long as it is defensible-on-the-facts-as-I-have-stated-them, Eagle's case will serve my purpose. The subject of this paper is professionalism, not solicitation; my purpose, to get a fair hearing for the claim that professionalism means putting your profession first.[10]

10. A version of the second half of this paper was presented at the ABA Conference on Professionalism. I should like to thank those present, but especially Monroe Freedman, for giving me much to think about. I should also like to thank my colleague, Vivian Weil, for helpful comments on an early draft of this paper.