

INTRODUCTION: SYMPOSIUM ON LAWYERS' SPECIAL RESPONSIBILITIES AS PUBLIC CITIZENS IN A RAPIDLY CHANGING WORLD

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The following presentations represent the Professional Responsibility Section Program at the Association of American Law Schools Annual Meeting on January 7, 2011. The members of the program planning committee were Sande Buhai, of Loyola Law School in Los Angeles; Margaret Raymond, of University of Iowa College of Law; Jack Sahl, of University of Akron, C. Blake McDowell Law Center; and myself, Susan D. Carle. All members of the planning committee put their stamp on the program in important ways.

The program topic was intended to create a focus on how lawyers' special responsibilities for the quality of justice in our society are undergoing new challenges in the face of many new influences on the legal profession. We recognized that recent world events have led to enormous new pressures on, and potential transformations in, conventional understandings of lawyers' professional responsibilities. The worldwide economic crisis and its causal link to financial practices in which some lawyers were complicit, coupled with lawyers' roles in a host of recent corporate scandals, have shifted attention back to lawyers' professional responsibilities to safeguard the public purposes of regulatory law. The challenge of combating terrorism while preserving treasured lawyering traditions that protect individual civil liberties against state encroachment has raised difficult new dilemmas. Persisting economic and social inequalities continue to pose a host of questions about lawyers' special responsibilities, if any, to work for social justice.

At the same time, globalization has led to increased linkages among lawyers as well as increasing competitive pressures and new experiments in

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legal services arrangements. All of these new issues confronting lawyers in a rapidly changing world raise important questions about how we should teach new generations of lawyers to assume their places in the legal profession as special citizens with potentially unique duties as guardians of justice.

These were the general questions we set out to address. More realistically, we at least hoped to reach a subset of such questions through this program. We initially scheduled, as one of our speakers, a military JAG lawyer involved in the representation of detainees in Guantanamo Bay, Cuba, but she unfortunately had to withdraw at the last minute, leading the presentations below to skew more towards civil representation than we had originally planned. But losing one planned aspect of the program left more room for the remaining presenters to go into depth on their topics, so our loss in one respect led to gains in others.

Planning the program turned out to be a very organic process, and the presentations have come together in interesting and telling ways. The common themes that unite them were not necessarily similarities we were striving to achieve, making it all the more striking that the presentations exhibit certain shared qualities which, as I will argue below, demonstrate something important about how scholarship in the professional responsibility field is developing. Before discussing the similarities that span the presenters' diverse topics, I will offer a few words about each of the presenters and the theses they so admirably develop in the short space allotted for each of their presentations.

William H. Simon is the Arthur Levitt Professor of Law and the Everett B. Birch Professor in Professional Responsibility at Columbia Law School, as well as the William W. and Gertrude H. Saunders Professor of Law at Stanford Law School. Professor Simon hardly needs any introduction to anyone who follows professional responsibility scholarship. He is a prolific scholar in professional responsibility as well as social policy and welfare rights law. I value him as one of the scholars that most influenced my thinking when I first started studying the field of legal ethics. He has taken on old jeremiads and challenged others in the field in a broad range of ways. Although it might not always be comfortable to hear what Professor Simon has to say, it is always very worthwhile, and I am extremely appreciative that he was willing to prepare his interesting new paper for this program.

Professor Simon's paper compares recent developments in ethics regulation across the securities and tax areas. He is interested in the contrast between the responses of the bars in these two areas of practice to what he calls the "gatekeeper" idea—in other words, the idea that lawyers should attend to the public interest in their representation of their clients.

Simon sees interesting differences in the two bars' reactions to new regulations in both practice areas that enhance lawyers' gatekeeping responsibilities. In the securities area, the main new regulatory development involves the Securities and Exchange Commission's promulgation of new regulations under the Sarbanes-Oxley Act. Simon shows that the securities bar has resisted these developments. It has done so through a variety of means ranging from displaying ambivalence to mounting outright opposition to the imposition of new responsibilities, even when these responsibilities have been modest and not very different from what existing doctrine already provides.

In the tax practice area, the Internal Revenue Service's (IRS) new regulations, known as Circular 230, have raised the requirements for the threshold level of merit a tax lawyer's legal position on behalf of a client must have. These regulations elevate this standard considerably above that required by Model Rule of Professional Responsibility 3.1, entitled "Meritorious Claims and Contentions." These new rules are far more drastic than those applying to securities lawyers, but in contrast to the securities bar, the tax bar has not exhibited the strong resistance that has characterized the securities bar's reaction. In fact, some prominent tax practitioners have even embraced and encouraged these developments.

Simon proposes three possible explanations for these observed differences. First, what he calls a "functional approach" might posit that the difference can be accounted for by the fact that tax enforcement depends on an understaffed state agency, the IRS, whereas securities law enforcement does not depend solely on agency enforcement but also benefits from the vigilance of investment bankers and an active plaintiffs' bar representing investors. Thus, Simon implies, tax lawyers sense the need to assume more of a gatekeeping role in order to preserve the proper functioning of the tax law system, whereas securities lawyers have faith in the adversarial system to expose legal wrongdoing.

Simon's second potential explanation looks to history and points out a longstanding tradition within the elite tax bar of embracing the gatekeeping role, but presumably, no such similar tradition within the securities bar. Finally, Simon offers as a third possible explanation, a political one, which points to a difference between the competitive situations of securities and tax lawyers. "Barriers to entry" for tax practice are fairly low, but are higher for securities law. Elite tax practitioners, thus, may have more cause to worry about a "race to the bottom" as aggressive upstarts take unprincipled legal positions in order to attract clients.

In sum, Simon's explanation rests on the idea that analyzing structural differences between different practice locations may help account for developments within the profession as well as different reactions among

different sectors of the bar to regulation of the profession. Simon's thesis is brilliant and provocative and will surely merit far more development and debate. His underlying theme is one I want to revisit after introducing and summarizing the other presenters' arguments.

The second presentation published here is that of Scott Cummings of UCLA School of Law, another person who stands out for how much he has taught legal ethics scholars about what is actually happening on the ground, especially in the field closest to my heart—namely, public interest or social change law, cause lawyering, representing the underrepresented, or whatever else you might want to call it. Scott has been the leading voice capturing, interpreting, and explaining this sector of the legal profession for many years now. He is currently a Professor of Law and faculty chair of the Epstein Program in Public Interest Law and Policy at UCLA Law School. His publications go on for many pages, as does the list of courses he teaches, and he has several new books in the works as well.

Professor Cummings's presentation empirically examines the provision of public interest law within the private for-profit sector. More specifically, Professor Cummings looks at two practice arrangements of this type. The first type involves the carrying out of *pro bono* work by law firms that, in the main area of their practice, generate income through fee-for-service arrangements with clients who can pay for their legal work. The second type involves private, public interest law firms that do some fee-for-service work in order to fund public interest work, which they see as a primary mission of their firm, and/or do public interest work for clients who do not pay but for which the firm hopes to receive court-ordered attorneys' fees.

Cummings's goal is to examine what kinds of legal services needs get taken care of through these two types of private-sector legal services delivery models. He starts by pointing out that, although generally the private sector is viewed warily as a potential substitute for "good-old-fashioned" non-profit public interest offices, this kind of thinking can block a more level-headed approach to determining how to target scarce public resources to take care of the most pressing uncovered needs.

Cummings's fascinating conclusions are tentative; he is most confident about what the empirical data shows with respect to *pro bono* legal services. Cummings finds that those with power in law firms dictate the *pro bono* agenda. These "persons with power" are, naturally enough, partners and associates. The key factors they consider involve, first, sensitivity to fee-paying clients' interests and reactions, and second, choosing work that helps with recruiting and professional development of the firms' lawyers. Here, I think of a former student of mine who once sought a Skadden fellowship to represent in-home domestic and childcare

workers in securing greater legal protections against their employers. She described the gradually dawning shock, and then horror, that came over the faces of the lawyers interviewing her as it dawned on them that what she was seeking to do was to represent the very workers in these lawyers' homes who were taking care of matters on the domestic front so they could put in their long, lucrative hours at the law firm. She did not, needless to say, get the fellowship; though, she has since gone on to a highly illustrious career in public interest law. In other words, law firm *pro bono* work certainly can fill some legal needs, but it will just as certainly leave important gaps where legal needs clash with the interests of the clients and lawyers associated with those firms.

Cummings's conclusions about private public interest law are equally interesting. His tentative data points to a greater concentration of such firms in "blue" states and in areas covered by fee-shifting statutes and public defense subsidies—in other words, in contexts in which prevailing ideology, law, and taxpayer-provided resources encourage certain kinds of legal representation as a matter of public policy. These are revealing conclusions, suggesting possible future experiments in how to engineer outcomes through the establishment of market-type incentives to produce services in badly needed areas of legal representation. For example, might one want to consider new fee-shifting or fee-provision statutes to cover the representation of persons about to lose their homes in mortgage foreclosure cases?

In short, here, as in Simon's presentation, Cummings's project involves a highly sophisticated effort to explain empirically observed phenomena relating to the relationship between different sectors of legal practice; Cummings further explores what these findings mean for the functioning of the American legal system's justice-seeking goals.

Similar themes dominate the third presenter's project, which concentrates on a very different sector of the legal profession—namely, the somewhat obscure legal services sector of high volume, settlement-oriented representation of lower-income clients with little familiarity with the legal profession. This is the subject of Nora Freeman Engstrom's uniquely creative and path-breaking project.

Professor Engstrom represents a more recent entrant into law teaching, having joined the faculty of Stanford Law School in 2009 after a career in practice as an associate at Wilmer Cutler Pickering Hale and as a research dean's scholar at Georgetown University Law Center. Professor Engstrom has already published a number of articles that raise highly interesting matters of professional responsibility to which scholars have thus far paid little attention, including such topics, previously considered rather mundane, as automobile accident lawyering, the workings of no-fault

insurance, low-value personal injury cases, and settlement mills.

As do Simon and Cummings, Engstrom challenges commonly accepted understandings about how professional responsibility rules currently do, or should, shape the nature of what is taking place in the “real world” of law practice. The common assumption Engstrom questions is that, although our justice system suffers from a large problem of two tiers of justice—i.e., “one for the haves and one for the have-nots”—in almost all practice areas, an exception exists in the personal injury realm due to the wide use of contingency fee arrangements along with loosened restrictions on lawyer advertising. Observers have believed that these factors produce better or more equal legal representation for clients in personal injury cases.

Engstrom’s fascinating study of the little-understood phenomenon of law firms that operate as settlement mills—in other words, by Engstrom’s definition, firms that generate extremely high rates of case settlements after very little contact with the clients and facts involved—suggests that our assumptions about the working of the legal system in personal injury cases may be quite wrong. Engstrom’s findings suggest that even with the incentives contingency fees offer, and even with the access to information about lawyers advertising provides, the most vulnerable and unsophisticated clients in our legal system may still be receiving quite problematic representation. They are still suffering from “a lack of information concerning rights and potential remedies and also a lack of knowledge about, and contact with, lawyers.”

Yet again, Engstrom’s project returns to questions about class status, among both lawyers and clients, as a causal factor in explaining what happens in the provision of justice in the American legal system. Her project both provocatively and convincingly reminds that we must remain vigilant in empirically assessing what is actually happening “out there.” Like Cummings’s similarly probing investigation, Engstrom’s project heightens our awareness of the need to look with fresh eyes at how best to improve the quality of justice in the United States.

The fourth and final presenter, Rob Vischer from the University of St. Thomas School of Law in Minneapolis, carries the distinction of having had his paper selected by the program committee through an anonymously judged call for papers last summer. Professor Vischer’s presentation takes us full circle from the domestic corporate and tax lawyers on which Professor Simon focuses; through the private sector, public interest lawyers in various practice arrangements on which Professor Cummings focuses and the private-sector, low status personal injury lawyers representing clients who know little about the legal system, whom Professor Engstrom is studying; back to the world of “big law”—this time thought about transnationally, on the broadest of geographical scales, but at the same time

quite minutely focused on the fragile “trust” elements of the lawyer-client relationship.

Professor Vischer, like the other panelists, has a very distinguished record of publications that stretches for pages. He is also a very active blogger in the legal ethics area, as many may know. His new book just out from Cambridge University Press is entitled *Conscience and the Common Good: Reclaiming the Space Between Person and State*. Based on how beautifully written and conceived his panel paper is, I know I will buy this book, as undoubtedly will many others after reading his excellent presentation.

Vischer’s thesis follows the theme of this symposium, considering lawyers’ special responsibilities as public citizens by focusing on the special trust element of a lawyer’s relationship with a client. This element, Vischer points out, does not necessarily exist, or even ideally need to exist, with respect to technical service providers of many other kinds. But, Vischer queries, does the weakening of relational trust in the context of the attorney-client relationship “directly compromise[] the attorney’s capacity and inclination to introduce public values into the representation[?]”

Vischer points to the many ways in which changes in the nature of the provision of legal services in a rapidly globalizing environment may undermine the establishment of relational trust between lawyers and clients. At the same time, Vischer points out that stretching lawyer-client relationships beyond national boundaries and beyond the reach of cohesive regulatory frameworks almost paradoxically increases the need for client trust in lawyers.

Like the other presenters, Vischer recognizes that the problems he so coherently identifies have no easy solutions. He points to some important conclusions that arise from his examination of the threat to lawyer trust posed by the rapid changes the legal profession is undergoing, and emphasizes the need to continue to care about the legal profession’s distinctive trust-based role, which involves more than the mere “sum of its market-driven parts.”

Now to turn to a short general discussion of some of the themes or qualities that unite these otherwise highly diverse presentations. First, I find it telling to observe the extent to which each of these presentations is deeply rooted in rigorous empirical inquiry. Each of these professional responsibility scholars is passionately interested in the descriptive enterprise of figuring out what is actually going on in the legal profession today and why, and what the consequences are of their descriptive accounts. Unlike what might have been perfectly acceptable at some point in the past, none of these presenters is content to rely on assumptions,

impressions, anecdotes, or bromides. Instead, all engage with actual hard data collected by themselves or others.

Second, all of the presenters are highly theoretically sophisticated. Each brings together new, important data with terrific theory to produce conclusions and insights that say something important and new. Although we made a purposeful decision to keep these papers relatively clean of extensive footnoting, I recommend to interested readers the longer works of each scholar on which the presentations here are based. Many years of hard study underlie the insightful points these presenters so cogently nail.

Third and finally, a commonality that struck me, to my surprise, as I reviewed the work on which of these presentations are based, is the way in which each in some way tells a story that relates to the theme of class-stratification in the legal profession. From Simon's theories about how variations among different sectors of the American bar towards increased gatekeeping duties may be explained by structural considerations related to relative insularity from competitive pressures; to Cummings's tentative conclusions about how private-sector, market-based mechanisms may be relied on to meet some but not all public interest law needs; to Engstrom's gripping discoveries about how legal services are provided to the most vulnerable and least sophisticated clients; to Vischer's exploration of how the rise of globalized mega-law may threaten to deeply alter the distinctive attributes of lawyers' role in injecting public values into clients' decision-making processes, each of these presentations suggests that there are serious but vastly different issues at stake with respect to the changing nature of legal representation provided within disparate client sectors. The question of whether lawyers are adequately carrying out their special duties as public citizens professionally charged with safeguarding the workings of justice within their legal systems, and whether they can and will continue to do so, remains of great concern across these many client sectors, although in very different ways depending on the particular sector examined. The telling fact this program illuminates is that in all sectors, current trends raise disturbing issues about lawyers' continuing capacity to take responsibility for safeguarding the quality of justice, and thus, highlight pressing needs to develop and evaluate new creative solutions to these problems. These are problems we must charge our current students with addressing in their careers, and this program hopefully provides some fodder for thought as we plan our professional responsibility curricula for coming semesters.