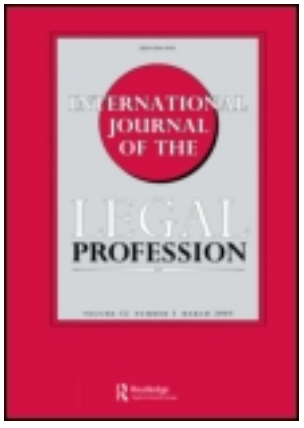

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Editorial

Lawyer regulation strategies – a personal view from the USA

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We must be honest about creating new regulatory strategies for governing lawyers and judges. This editorial does not go into detail on specific regulatory reforms but outlines and introduces some potentially key approaches. Among the most important is removing the exclusive control of the regulatory system from lawyers and judges[1]. No regulatory system that is controlled solely by those it purports to regulate will ever take important action against itself. Not only must the exclusive control over regulation be removed from lawyers and judges but the doctrines of lawyer liability and the secrecy within which lawyers operate in which clients never really know what has been done need to be changed by law.

In addition, a variety of strategies can be created that are aimed at more sophisticated and focused methods for regulating the specific and quite diverse forms of law practice that operate according to radically different competitive dynamics based on scale, finance, type of client and other critical factors. In its final part this editorial offers a listing of the positive and negative factors that should be taken into account in crafting effective strategies.

Voluntary codes of practice are illusory in any area of activity and this certainly includes the regulation of lawyers. Such agreements do not even rise to the level of 'paper tigers' and put no fear in the hearts of the lawyers against whom they are purportedly directed. This is because there are essentially no real obligations, mandates or consequences for failing to comply except in the most limited circumstances and even those require detection of the prohibited activity. Such codes are public relations and propaganda ploys. They aim at making it seem as if the actors are 'good guys' committed to values and behaviours considered positive by enlightened society. In fact these pseudo-regulatory schemes are masks behind which the ongoing conduct of business-as-usual is hidden. The disciplinary and liability rules governing law practice are little more than cheap and easy proclamations of what are in fact embarrassingly mediocre commitments to voluntary or unenforceable codes of practice or that appear to offer the promise

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of possible actions against one's neglectful lawyer but do so through complex and expensive systems of civil liability that few wronged clients can afford to pursue.

If we want effective regulation of lawyers in the interest of individual clients and the society lawyers are privileged to serve we first have to accept that 'one size' does not fit all. There is no single method for regulating multifaceted forms of law practice. We have to begin asking what strategies and methods of regulation of the different forms of law practice can work most effectively to ensure for a particular form or specialized niche that we either provide the quality of service we promise clients or that we are sanctioned for our shortcomings.

Lawyers engaged in the private practice of law are conducting business. In the economic arena if a substantial return can be had without significant negative consequences the decision will nearly always be made to seek the benefit. In the business of law practice there is very little oversight and almost no transparency. This creates a cost-benefit situation in which there are few costs to cutting corners, doing less than diligent work on cases, charging excessively or 'churning' a case to maximize billings. There is scant risk of detection and substantial benefit from behavior that allows the maximization of business earnings. This undercuts the potential for overarching voluntary codes of ethics to be much more than makeweights.

Of course there are situations of the most grievous or protracted violations in which a lawyer is sanctioned or even disbarred but that generally requires actions that could easily see an ordinary citizen charged with a crime. If a lawyer is caught stealing client funds, not by churning or overbilling for work not done at all or done poorly, but by embezzlement then that can lead to serious problems. If a lawyer 'commingles' personal and client funds that can, if detected, result in suspension from the practice of law. A lawyer who robs a bank or shoots a spouse can expect professional sanctions. If a lawyer makes obscene gestures aimed at a judge he can probably expect some kind of sanction. The same holds for falsification of evidence, forging signatures on court documents, suborning perjury or serious public misbehavior due to drug or alcohol problems. But, if a lawyer provides incompetent services to a client, fails to prepare a case with diligence or to evaluate its potential properly, fails to communicate with clients about crucial matters in a timely fashion, blurs the line on loyalty or conflicts of interest, overcharges in fees, charges for things not actually done or fails to interview and investigate a case there is much less chance of consequences or professional sanctions.

One of the problems throughout the process is the invisibility of lawyer activity. Clients, and others, simply do not know what is happening. Nor do most clients have any idea about what constitutes high quality or even competent legal service. Without actual knowledge about what has or has not been done and lacking a qualitative frame of reference for what they have a right to expect, clients are at the mercy of their lawyers. This state of helplessness is compounded because even when another lawyer is aware of the deficient performance of another lawyer the 'guild' nature of the legal profession and the 'there but for fortune go you or go I' psychology of one lawyer to another means there is a self-protective *omerta-like* code of silence that insulates lawyers against reporting and detection.

This same code of silence influences even well-meaning lawyers and judges who wish the rules were applied differently. But wishfulness cannot be allowed to be an

excuse for an institution as powerful as the legal profession. Lawyers and judges run the system and have been allowed to craft the rules by which they are regulated in both the disciplinary and civil liability spheres. They have set extremely low level and toothless rules because in effect they are judging themselves. The problem is clearly that if any group is allowed to create the rules by which they are governed, and to operate the machinery of discipline, and issue the sanctions for behaviour that has been found to violate even the low level rules then the rules will tend to be as weak and ephemeral as they can get away with. They know that the system ultimately could be applied against them.

We should dispense with the existing formal ethical codes, remove the exclusive control over lawyers from the bench and bar, replace most of the current system with a statutory/regulatory process including consumer protection laws with teeth, create an effective SEC-type entity for regulating large law firms, and convert the mandatory ethics courses in law schools to ones dealing with efficient law practice that delivers effective service to clients. Whether we should develop clear breach of warranty regulations, honest requirements of a dispute's cost estimates and evaluation of probability and worth of return to the clients is a question to be examined closely. But the current system is simply a fraud on clients and society that needs to be discarded.

We need values or the economics of practice and 'the System' overwhelm us

We are neither heroes nor existential giants.[2] Regardless of the 'face' we show to the world, we are conformists who seek security, status and reward.[3] One of the causes of our conversion to what Gardner called 'specialist-links in larger systems' is that we have increasingly lost the countervailing force of values of a kind sufficient to mitigate the effects of avarice.[4] Martin Buber describes our situation as one where the drifting and powerless individual has lost the ability to understand or master the world with the result that we are engaged in a 'flight from responsible personal existence.'[5] Buber warned of the fear and emptiness a belief in one's impotence creates. He also suggests there is a profound danger in separating individual power from principle, arguing that when we do so the result is that we are capable of acting in ways he described as evil.

From the perspective of theoretical ethics most people are not ground breakers or adventurers.[6] For every hero there are 100,000 'yes men'. We want to settle into a secure niche and have a decent life.[7] Principle can get in the way of security for those who 'rock the boat'. Consider, for example, one episode in which an entire insurance industry shut off dealings with a firm that had provided quality representation for two decades because of perceived disloyalty. The 'disloyalty' was that a lawyer provided written testimony to a Congressional subcommittee considering reform of the insurance industry.[8] His analysis contained recommendations the industry considered *disloyal* and the lawyer's firm was cut off from its clients after two decades of strong and competent advocacy. Working within such a system means that we must follow the institutional rules that determine whether we are able to survive and prosper according to the dictates of money and power rather than abstract principle.

As individual actors within such powerful collective systems we understandably tend to be moral cowards who deny the existence of problems and rationalize away any uncomfortable dilemmas until it is too late.[9] Bacon reminds us of the responsibility of the counselor. He remarked that if we do not see our oath as a sacred trust, but instead consider our own interests first—whether they be personal, systemic, or financial—then "that is the case of bad officers, treasurers, ambassadors, generals, and other false and corrupt servants; which set a [personal] bias upon their bowl [in which their share is measured], of their own petty ends and envies, to the overthrow of their master's great and important affairs."[10] It is also Francis Bacon who captured the effects of wealth on our moral identity, arguing: "I cannot call riches better than the baggage of virtue. The Roman word is better, impedimenta. For as the baggage is to an army, so is riches to virtue. It cannot be spared nor left behind, but it hindereth the march. . ."[11]

Bacon's point as to the responsibility of the good counselor highlights our dilemma of betrayed trust. It was difficult enough to deal with the stress and role-differentiated morality of the lawyer/advocate when it was a requirement of loyalty and service to clients and the lawyer was nonetheless duty-bound to honour that obligation regardless of personal values and preferences except in the most extreme cases of moral conflict.[12] But at least the special duty of a lawyer as advocate and counselor invested in the service of the client's interest was a principled choice even though it often carried with it conflict between personal and professional morality. Even this justification has disappeared.

Rather than being strong individuals who control our own lives and destinies, we are embedded in the webs of powerful systems that either dictate our principles or punish us for acting in ways that conflict with the systems' rules of operation. Such compromise is not without cost.[13] The effects of operating in a culture of power and ambiguity are manifested in lawyers' emotional states, their values, and in how they deal with the world.[14] One report on such issues went so far as to conclude that lawyers were the most emotionally depressed group among those researchers studied.[15] It suggested that the poor emotional health of many lawyers "might be the result of operating in moral ambiguity. They might be representing positions they may not like or believe in."[16]

While this ambiguity has always been a part of the lawyer's function as advocate for others and inevitably carried a moral cost in itself, the substitution of the lawyer's self-interest and the dictates of the business models of law practice have eliminated any valid claim to moral justification. The result is that lawyers may manipulate, deceive, maneuver and plot, not to advance our clients' interests but our own. Quite often this is done at the expense of our clients who, as in any other business, we convert into commodities, company assets and the means to our financial ends while subordinating the client interests.

The power of the institution over the principled individual has grown even more as the legal profession has come on hard times in employment and potential client revenues. There has been a rapid increase in downsizing by many of the large American law firms. This has seen fired associates, released non-equity partners, and even the withdrawal of offers to new law graduates.[17] Lawyers are 'running scared' and this gives their employers even more power over them as individuals. These new economic conditions are hitting

hard in large firm law practices, but the situation is even bleaker for many lawyers engaged in solo practices, in shared expense arrangements aimed at spreading costs among an otherwise non-affiliated group of lawyers, and in small law firms.

For such lawyers the costs of living and practice are essentially inseparable. The total debt burden and operating costs involved in practicing law and paying for already incurred personal, educational and professional expenses is a continual burden that must be met—whether viewed as capital expenditures or day-to-day costs. Substantial expenses and debt burdens are associated with pre-existing expenses incurred in the process of gaining a law degree, the capital and operating costs of setting up a practice, and the expenses and earnings expectations of lawyers and their families. Many of the solo practitioners are new or relatively new to the legal profession and are forced to compete with more experienced and established lawyers for a limited client base of clients capable and willing to pay fees for legal services. In this world of 'dog-eat-dog' law practice abstract legal ethics are overwhelmed by the dictates of Darwinian survival.

Again we are faced with the conflict between the ideal of the principled and ethical individual and the person who is a functionary within a larger and more powerful institutional collective. This represents one of the most fundamental and growing dilemmas of modern society. An individual's sense that he has lost control over the quality, direction or meaning of his or her life as a person leads to an 'existential vacuum'.[18] Viktor Frankl observed: "there are various masks and guises under which the existential vacuum appears. Sometimes the frustrated will to meaning is vicariously compensated for by a will to power, including the most primitive form of the will to power, the will to money."[19] Power and money have become greatly out of balance with the quest to become a complete and fully-developed person even to the point where that long-standing ideal becomes meaningless.[20] As we lose any real appreciation of the ideal of the principled and ethical individual lawyers become increasingly empty people who lack any grounding principles of a positive nature, at the extreme becoming soulless *golem*.[21]

In such a state there are no sufficiently strong moral principles capable of mitigating our natural instinctive drives for security, power and self-interest.[22] Oddly, the ideas of individualism and personal development that are at the root of much of Western philosophy are seen not only as a kind of personal freedom and liberation but as a heavy burden of developmental responsibility that many are unable or unwilling to accept and pursue.[23]

When caught between the philosophy of personal freedom and responsibility to pursue the highest levels of self-evolution of which we are capable in contrast with the security of being part of a powerful group from which we extract status, rewards and power in exchange for allegiance, most of us choose allegiance. We opt for security, status and power while rationalizing the choices as 'goods' because at some level we know such choices are at odds with the lessons we have been taught about our individual responsibility.[24]

The desire to 'have our cake and eat it' is a powerful motivator that supports a system in which we profess belief in our highest individual qualities even while selling out to the institutions and value systems that contradict those values and

aspirations.[25] But we engage in a form of denial that reinterprets reality into a model that allows us to think we are on the right path.[26] The problem is that the ego defenses we create to cope with our hypocrisy often have cracks that allow the true nature of our hypocrisy to seep into our awareness with various levels of intensity.

This resulting tension between conforming to the norms and expectations of the collective with which we most closely identify and from which we derive status and benefits imposes costs. One is a sense of lingering ennui produced by the tacit awareness of our cooptation. At some level we are aware of the fact of our cowardice and our corruption. This results in an inner emptiness, Frankl's 'existential vacuum' that not only produces a sense of fear and inadequacy but drives us to seek meaning from some source or to flee to a haven that provides a sort of surrogate security.

That means lawyers who work in a variety of practice settings succumb to the amoral and self-interested value systems of the institutions they serve. In two classic works, *The Technological Society* and *Propaganda*, Jacques Ellul presents compelling arguments and analyses of the conditions of modern society. In *The Technological Society*, for example, he describes the enormous power of what he calls technique, with this concept representing the emergence of powerful and controlling structures of social organization that shape us into functional tools to serve the ends of the institution.[27]

Those powerful institutions, the embodiment of particular substantive forms of *technique*, create and impose the real norms and rules of operation according to which we function. They contradict the set of false professional ethics according to which we pretend to operate and that are in any event not implemented effectively as a regulatory system.[28] The hypocrisy extends even to the point that false claims to higher principles and values can often be a part of the strategy by which a corrupt institution seeks to conceal its true nature. While such systems are inhabited by us, they nonetheless set up a sort of identity and 'mob' or group mentality of their own and dictate collective terms of operation for those within them.

There is a sort of 'bottom line' that can be advanced in our understanding of the falsity of the system of lawyers' ethics. What can be said about a system of ethics that sets little more than a duty of competence at the heart of its system? If the ABA had never voted as a matter of ethics that lawyers had duties such as competence, reasonable diligence, and communication with their clients about critical matters would it then be considered professional and ethical for lawyers to be incompetent, lack diligence, or under no duty to communicate with their clients about matters of consequence? By imposing such 'ethical duties' all the profession has done is restate the lowest conceivable common denominator of responsibility to clients. It does this as if the lowest denominator establishes admirable professional standards that would otherwise not exist as conditions of the contract between lawyers and clients.

Incentives and disincentives for effective regulatory systems

In summary, effective regulatory systems depend on identifying the appropriate incentives and disincentives to encourage desired actions and inhibit other forms of behavior. The likelihood of individuals, obviously including lawyers, behaving in

accord with principled norms depends on the incentives and disincentives to which they are subject. Such incentives and disincentives include:

- The prospect of significant financial gain over the long or short term.
- The potential for financial loss if one does not take certain action or refrain. from action that has negative consequences.
- Competing demands on the person's time.
- Employer expectations, morality and culture.
- Degree of employer power over individual.
- The power and expectations of the system being dealt with such as judicial or administrative displeasure that can produce informal and formal effects.
- The probability of a client being able to detect and report the questionable behaviour and take effective action against the lawyer.
- The probability of a non-client reporting alleged questionable behavior by the lawyer.
- The probability of an authority reviewing, investigating and pursuing claims.
- The probability of the relevant authority being able to uncover damning evidence against the lawyer and deciding to sanction professional actor for behavior.
- The probability of sanctions being severe or costly enough to inhibit or deter the lawyer and/or other lawyers from similar actions.
- The probability of the lawyer being sued civilly for questionable professional behavior.
- The probability of recovery against the lawyer in a civil suit.

Lack of real sanctions

Awareness of the best incentives and disincentives is not enough to construct an effective system. Supposedly 'legal' requirements are of limited consequence to the extent they lack the systems and standards essential to making them work. It has been a central part of this editorial to accept that the private practice of law is a business. This is an important element in understanding what kinds of regulatory strategies have potential for effectiveness. One can begin with the idea that businesses will never honor voluntary codes of practice that impose no real duties at any level of enforceable clarity, contain no adequately staffed and resourced monitoring and investigation systems, and lack effective sanctions and enforcement mechanisms even when violations are detected.

Law is a facilitator of desired behaviour and an inhibitor of behaviour we want to reduce or eliminate. Effective law is inevitably reliant on some degree of public force, sanction or source of influence. Voluntary codes simply are not law. Effective laws and institutions purportedly responsible for implementation are a necessary but insufficient condition of a system that works.

Law is therefore vital, but it must be 'real' law, not an empty toothless expression of noble intentions. Grand words are not enough and can be counter-productive when they create the illusion that effective action is being taken. The system breaks down if conditions essential to the implementation of real law do not exist.

Regulatory sabotage

There are also ways by which the creation or implementation of a regulatory strategy is sabotaged. This can occur in a law's creation or its application. One common form of sabotage is that a gap is built into the formulation of legal standards in ways that use law to create the *appearance* of law without creating 'real' law. This approach runs throughout the system by which lawyers are supposedly regulated. Of course this undermining of the efficacy of a regulatory strategy through sabotage is applicable to law generally and it is unsurprising that we find it embodied in the ethics codes. Lobbyists working on behalf of special interests are highly skilled at incorporating language in statutes and regulations that create standards that are ambiguous or unworkable while erecting burdens of proof that prove prohibitively expensive or practically insurmountable. This can be done in ways that virtually guarantee a regulatory system will be ineffective in relation to its ability to achieve its claimed purposes.

A common device to achieve this outcome is that the language is made to appear powerful and eloquent on the surface while containing qualifications on key elements that dilute the actual effects of the law. This is also done by imposing exceedingly high (or expensive) standards of proof on parties seeking to enforce the law through private actions, requiring complex processes that take long periods of time, and incorporating assumptions of validity regarding decision-making.

Similarly, on the levels where laws are implemented and enforced, it is common practice to sabotage the efficacy of a law by underfunding one or more of the essential functions necessary to effective implementation. The law can, for example, impose significant duties on the entities being regulated but construct a system in which the staffing and other financial resources required for implementation are grossly inadequate. Failure to support the core costs of implementation results in inadequate staffing of the essential components required to make the system work. This occurs on the level of investigation, monitoring, training, inspection and enforcement. The regulatory system relating to the discipline and civil liability of lawyers is of this character.

Political influence involving self-interest is commonly used to sabotage the implementation of law. The 'Iron Triangle' between governmental officials and legislators, regulators, and those who are regulated operates to sabotage implementation. This occurs through direct intervention in specific situations, political contributions, future employment expectations by regulatory staff who hope to move to lucrative positions in the regulated activity, and by appointment of industry personnel to the regulatory positions, thus ensuring favourable treatment.[29]

What else makes regulation of lawyers fail?

Some of the other reasons law fails to work represent a combination of sloppiness, sabotage and systemic ignorance. The reasons set out below are applicable to all legal and regulatory schemes but in this context consider the extent to which they apply to the regulation of lawyers and to the degree to which lawyers are likely to

behave in certain ways—not as a matter of principle but due to clear cost-benefit analysis and a determination of the risks and probabilities of detection and sanction for specific behaviours. Whether in their original conception or their implementation laws fail for reasons that include:

(1) The law is too broad and ambiguous and tries to do too much.
(2) The law is created to benefit special interests, or contains provisions for special interests that inhibit its effective implementation.
(3) The law lacks implementation systems, monitoring or investigation capability or those capabilities are insufficient.
(4) The law contains no sanctions for failure to comply or the sanctions are so inadequate that 'bad actors' are willing to risk the potential penalty because the sanctions are so low, the probability of detection or prosecution is low, or the benefit for violation is high relative to the sanctions.
(5) Interference by special interests in the creation or implementation of the law.
(6) Lack of public institutional capacity needed to implement the law.
(7) Lack of private institutional capacity needed to understand or act according to the legal requirements.
(8) Complexity of the systems being targeted.
(9) The economics, externalities and internalities in which the business activity finds itself.
(10) The subtlety and difficulty of detection or proof of causation of any harm.
(11) Tolerance of significant 'avoidance behaviour' and 'free riding' by those purportedly regulated.

What might make regulation succeed?

If the factors listed above contribute to failure of a regulatory regime, what makes laws work? I suggest the following offer some of the most important reasons.

(1) Consistency/fit with the values and concerns of the people who must comply with the law and the people who are responsible for regulation and enforcement.
(2) Realistic obligations being imposed on the people who must take action for the outcome to be positive, including business, government and consumers.
(3) Asking people to do things they are willing to do and are capable of doing.
(4) Achieving clear, simple, positive outcomes.
(5) Effective monitoring, investigation and enforcement systems that make it likely undesired behaviour or failure to act as intended by the law will lead to detection and meaningful sanctions of a kind sufficient to deter undesirable behaviour by most actors.
(6) Sanctions sufficient to inhibit targeted behaviour, fear of consequences by those who would otherwise not obey the law.
(7) Sense of fairness concerning duties and allocation of benefits.
(8) Incentives for compliance by private and public actors.

(9) Applicable to others similarly situated.
(10) Do not unnecessarily impact on economic activity.
(11) Contain 'pass through' opportunities by which added costs can be recouped.

What is necessary for effective implementation?

Implementation requires effective systems to carry out the law's mandates and ensure compliance with its requirements. The elements that determine whether a system for regulating lawyers is capable of being implemented effectively include factors such as:

- The probability that unethical and unprofessional behaviour is detected and reported to appropriate regulatory actors.
- The likelihood that clients and others affected by the behaviour are made aware of what has occurred.
- The costs and standards by which harmed parties can pursue private remedies for the lawyers' failures.
- Adequate funding for all relevant regulatory and enforcement components.
- Sufficient staffing to carry out all relevant responsibilities.
- Quality and clarity of institutional mandates.
- Adequate expertise at all relevant levels.
- Cooperative institutional behaviour among regulatory components.
- The extent of political interference.
- Corruption interfering at key points in the system.
- Adequacy of sanctions and enforcement.
- Comprehensive understanding of the systems to be regulated.
- Clear agreement on the goals to be facilitated by the regulation.
- Honesty about the existing system and how it functions in ways that protect institutional jurisdictions and 'turf'.
- Honesty of decision-makers about the allocation of private and public power and how it will impact upon efforts to achieve desired results.
- Political will on the level required to fund, regulate, monitor and enforce the activities necessary to make the regulated system work responsibly.

With all of this in place we will have a better chance at organizing proper regulation of lawyers.

Notes

[1] For analysis of the asserted decline in the integrity of the legal profession, *see*, Richard Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services* (Oxford, 2008); Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (1993); Sol M. Linowitz and Martin Mayer, *The Betrayed Profession: Lawyering at the End of the Twentieth Century* (1994); Carl T. Bogus, The Death of an Honorable Profession, 71 *Ind. L.J.* 911 (1996); *But see*, Marc Galanter, Lawyers in the Mist: The Golden Age of Legal Nostalgia, 100 *Dickinson L. Rev.* 549 (1996) for the idea that we tend to overstate the historical virtues of lawyers. This represents a depressing decline from the special status ascribed to lawyers in America by Tocqueville in his 19th Century classic analysis *Democracy in America*. In that work he contrasts Europe and America.

> In America there are no nobles or literary men, and the people are apt to mistrust the wealthy; lawyers consequently form the highest political class and the most cultivated portion of society. . ..If I were asked where I place the American aristocracy, I should reply without hesitation that it is not among the rich, who are united by no common tie, but that it occupies the judicial bench and the bar. Alexis de Tocqueville, *Democracy in America*, Book 1, ch. 10, at 42 (Alfred A. Knopf ed. 1945).

[2] "Even our most fully-human beings are not exempted from the basic human predicament, of being simultaneously merely-creaturely and godlike, strong and weak, limited and unlimited. . ., fearful and courageous, . . .yearning for perfection and yet afraid of it, being a worm and also a hero." Maslow, *Toward a Psychology of Being* at 174.

[3] "Everyone today has his own professional jargon, modes of thought, and peculiar perception of the world. . .. The man of today is no longer able to understand his neighbor because his profession is his whole life, and the technical specialization of this life has bound him to live in a closed universe." Jacques Ellul, *The Technological Society* 132 (Alfred A. Knopf 1969).

[4] Friedman reminds us: "The legal system is a structure. It has shape and form. It lasts. It is visible. It sets up fields of force. It affects ways of thinking." Lawrence M. Friedman, *American Law* (New York and London, W. W. Norton, 1984) at 257. As a structure that generates the environment and forces within which lawyers and judges operate it shapes our perceptions, values and behaviors. We oppose such an overarching system at our peril.

[5] Martin Buber, *The Knowledge of Man* at 108, Maurice Friedman, editor, Friedman and Ronald Gregor Smith, trans. (1965).

> For the typical man of today the flight from responsible personal existence has singularly polarized. Since he is not willing to answer for the genuineness of his existence, he flees either into the general collective which takes from him his responsibility or into the attitude of a self who has to account to no one but himself and finds the great general indulgence in the security of being identical with the Self of being.

[6] Viktor Frankl observes: "there are various masks and guises under which the existential vacuum appears. Sometimes the frustrated will to meaning is vicariously compensated for by a will to power, including the most primitive form of the will to power, the will to money." Viktor Frankl, *Man's Search for Meaning* at 170.

[7] Walter Lippmann remarks that men have become dissolved into "an anonymous mass" because they are "without an authentic world, without provenance or roots," without, that is to say, "belief and faith that they can live by." Walter Lippmann, *The Public Philosophy* 87 (Mentor 1956).

[8] *See* Ralph Nader & Wesley Smith, *No Contest: Corporate Lawyers and the Perversion of Justice in America* (1996) at 232-239.

[9] *See* Abraham Maslow, who reminds us that we avoid true knowledge of troubling situations for fear of what that knowledge would require us to do. Avoidance also allows us to hide behind our true state of cowardice or helplessness. It is a form of self-deception in which we all commonly engage. In speaking to humans' fear of knowledge, Maslow offers the following insight:

> In general this kind of fear is defensive, in the sense that it is a protection of our self-esteem, of our love and respect for ourselves. We tend to be afraid of any knowledge that could cause us to despise ourselves or to make us feel inferior, weak, worthless, evil, shameful. We protect ourselves and our ideal image of ourselves by repression and similar defenses, which are essentially techniques by which we avoid becoming conscious of unpleasant or dangerous truths

See, Abraham H. Maslow, *Toward a Psychology of Being*, Second Edition (New York, D. Van Nostrand, 1968) at 60.

[10] Francis Bacon, *Essays, Civil and Moral* 64 (Charles W. Eliot ed., 1909).

[11] Francis Bacon, Essays, *Civil and Moral* 92 (Charles W. Eliot ed., 1909). He adds: "Of great riches there is no real use, except it be in the distribution; the rest is but conceit." *id.*

[12] David Barnhizer, Princes of Darkness and Angels of Light: The Soul of the American Lawyer, 14 *Notre Dame J. Of Law, Ethics & Public Policy* 371 (2000).

[13] Martin Buber put the issue eloquently:

> Our age has experienced this paralysis and failure of the human soul successively in three realms. The first was the realm of technique. Machines which were invented to serve men in their work, impressed him into their service. They were no longer, like tools, an extension of man's arm, but man became their extension, an adjunct on their periphery, doing their bidding. [The second realm was the economic, and the third, the political]. Martin Buber, *Between Man and Man* at 158 (1965).

[14] See, At the Breaking Point: The Emerging Crisis in the Quality of Lawyers' Health and Lives—Its Impact on Law Firms and Client Services (American Bar Association, 1991), cited in Michael J. Kelly, *Lives of Lawyers: Journeys in the Organizations of Pratice* 5 (Univ.of Michigan, 1994).

[15] An analysis of the impact of law practice on lawyers is found in, Connie J.A. Beck, Bruce D. Sales, and G. Andrew H. Benjamin, Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns Among a Sample of Practicing Lawyers, 10 *J. Law and Health* 1 (1995-96). *See also*, Stephanie B. Goldberg, Lawyer Impairment: More common than you might think, Denver survey suggests, 76 *A.B.A.J.* 32 (February 1990).

> A 1989 survey of 34 managing partners of Denver-based law firms suggests that the problem of lawyer impairment—one that firms of all sizes are slow to acknowledge and even slower at doing something about—is far from unusual." "The causes of impairment were most often alcoholism and marital problems, and the areas of performance most often affected were billable hours (79 percent), the ability to withstand pressure (79 percent) and the quality of work (75 percent).

[16] *See*, Excerpts: The Betrayal of the Legal Profession, *National Law Journal* 36 (February 28, 1994) [discussing Sol Linowitz and Martin Mayer, The Betrayed Profession: Lawyering at the end of the Twentieth Century (1994).

[17] AmericanLawyer.com, The Layoff List: Employment shifts at The Am Law 200, Global 100, and Other Firms of Note, Incisive Media, March 27, 2009, http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202425647706.

[18] Martin Buber, *supra*, n.

[19] Frankl, *supra*, n. at 170.

[20] We prize financial security and status much more than freedom. Real freedom carries within it a personal responsibility and accountability that we strive to avoid. *See*, Peter Berger, in *Invitation to Sociology: A Humanistic Perspective* (Doubleday & Co., 1963). He observes: "...most of the time we ourselves desire just that which society expects of us. We want to obey the rules. We want the parts that society has assigned to us." (93).

[21] The *golem* is the mud and stick figure of legend that was created to protect Jews from the abuses of Hungarian society centuries ago. But ultimately it had to be destroyed because it lacked a soul and had no moral core to regulate its behavior. Most people may be more familiar with the concept of the *golem* than they realize. In J. R. R. Tolkien's book, *The Hobbit*, and the subsequent *Ring Trilogy*, the sad creature who chased Frodo to recover the 'Precious' ring of power continually muttered 'gollum' to the extent that Frodo began to refer to him in that way. The ring he called 'his precious' was one of power linked to the Dark Lord, and its use affected those who activated it to such a degree that it seduced them and stole their souls. The power and scale of institutional structures is part of the economic technique, which Jacques Ellul describes as shaping modern society. See Ellul, *Technological Society*, infra n. Ellul writes, "propaganda seeks to induce action, adherence, and participation—with as little thought as possible." J. Ellul, *Propaganda* 180 (1965).

[22] Maslow, *Toward a Psychology of Being*, *supra* n. at 10.

> There is a "total collapse of all sources of values outside the individual. Many European existentialists are largely reacting to Nietzsche's conclusion that God is dead, and perhaps to the fact that Marx also is dead. The Americans have learned that political democracy and economic prosperity don't in themselves solve any of the basic value problems. There's no place else to turn but inward, to the self, as the locus of values."

[23] Peter Drucker warns: "Education that does not strive for the "good man" is ignoble and cynical. Anyone as highly equipped with knowledge, with ability to learn, and with ability to do—and with income—as is the educated man of educated society, is equipped with so much power as

to be a menace, if not a monster, unless he have virtue." Peter Drucker, *Landmarks of Tomorrow* at 156.

[24] "This is one aspect of the basic human predicament, that we are simultaneously worms and gods." Abraham H. Maslow, *Toward a Psychology of Being*, *supra* n. at 61.

[25] The subordination of self to powerful interests marks our culture. Jacques Ellul has observed that in a society dominated by large institutions: "The intelligentsia will no longer be a model, a conscience, or an animating intellectual spirit . . ..They will be the servants, the most conformist imaginable, of the instruments of technique." Ellul, *The Technological Society*, *supra* n.

[26] This ability to deceive self was Abraham Maslow's point when he described how we rationalize what we do in order to protect our egos and avoid an awareness that would cause us to act through a crisis of conscience or to face our own hypocrisy. Maslow explained:

> We protect ourselves and our ideal image of ourselves by repression and similar defenses, which are essentially techniques by which we avoid becoming conscious of unpleasant or dangerous truths." Abraham Maslow, *Toward a Psychology of Being* 66. He adds: "We tend to be afraid of any knowledge that could cause us to despise ourselves or to make us feel inferior, weak, worthless, evil, shameful. *Id.*

[27] *See*, Jacques Ellul, *The Technological Society* and Ellul, *Propaganda*.

[28] Maslow, *Toward a Psychology of Being*, *supra* n. at 66:

> In any case, this close relation between knowing and doing can help us to interpret one cause of the fear of knowing as deeply a fear of doing, a fear of the consequences that flow from knowing, a fear of its dangerous responsibilities. Often it is better not to know, because if you *did* know, then you would *have* to act and stick your neck out.

[29] The idea of the Iron Triangle is defined as:

> The closed, mutually supportive relationships that often prevail in the United States between the government agencies, the special interest lobbying organizations, and the legislative committees or subcommittees with jurisdiction over a particular functional area of government policy. As long as they hang together, the members of these small groups of movers and shakers tend to dominate all policy-making in their respective specialized areas of concern, and they tend to present a united front against 'outsiders' who attempt to invade their turf and alter established policies that have been worked out by years of private negotiations among the 'insiders.' *A Glossary of Political Economy Terms*, http://www.auburn.edu/~johnspm/gloss/iron_triangles. Visited 12/19/05.