ARTICLE: Effects of Reputation on the Legal Profession

Winter, 2008

Reporter: 65 Wash & Lee L. Rev. 173

Length: 15877 words

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LexisNexis Summary

... Abstract This Article considers how the reputation of lawyers and signaling between lawyers and clients affects the impact of legal ethics rules. ... A lawyer's desire to maintain a reputation for client-centered behavior may, for example, encourage the lawyer to downplay third-party and societal interests recognized in some professional rules, thus undermining these rules. ... Likewise, lawyers who appear before the same judges and regulators may depend upon their reputations for honesty or fair dealing in order to obtain good results. ... In contrast, if the evidence demonstrates that particular kinds of clients do not understand what qualifications of lawyers are important, that would suggest a need to at least require lawyers to discuss their qualifications and possible alternative representation at the retainer stage. ... If some clients have access to reputations that provide the information but other clients do not, the bar may need to consider creating counter-incentives to developing particular types of reputations-either by increasing rule enforcement against certain categories of lawyers or by reformulating rules that allow such reputations to develop. ... To the extent the bar is able to educate clients about the significance of client-centered behavior and facilitate clients' ability to identify lawyers' reputations for this behavior, code drafters reasonably might consider deregulation or justify limited enforcement of the rules.

Highlight

Abstract

This Article considers how the reputation of lawyers and signaling between lawyers and clients affects the impact of legal ethics rules. Academics who have written about the relationships between lawyers and clients have not adequately considered the influence of reputational signaling on who clients hire and on lawyers' implementation of discretion. These empirical issues are key to a proper analysis of many professional rules and to the approach bar associations should take to matching lawyers and clients.

The Article will focus primarily on lawyers' reputations as a proxy for what clients want, or need, to know about their representatives. Part I offers a taxonomy of the ways in which lawyers' reputations are important. Part II discusses what we do, and do not, know about lawyers' reputations in today's real world. Part III identifies a series of questions about reputation that academics and the bar should consider more seriously than they have in the past.

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Text

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I. Introduction

Before entering academia and teaching Professional Responsibility, I practiced law as a criminal defense attorney representing indigent individuals and as a public interest litigator suing officials of government and other organizational entities. A faculty colleague who also teaches Professional Responsibility represented exclusively corporate clients through large, established law firms. Although we are good friends, we rarely see eye to eye on what legal ethics should require and how effective the legal ethics codes can be.

Lying at the core of many of our disagreements is the role that the reputation of lawyers and signaling between lawyers and clients have in determining the impact of the professional rules. In part, the divergence in our views has to do with our backgrounds. When writing about legal ethics, I typically am focusing on the relationship between individual unsophisticated clients who know little about lawyers, defer to them significantly, and depend on lawyer self-regulation and professional discipline to ensure appropriate representation. [1] My colleague envisions sophisticated corporate clients, who know what they want and actively shop for counsel, and corporate lawyers willing to provide the desired service in order to obtain large legal fees. [2]

The clients I am thinking of, at best, select their lawyers based on vague word of mouth from a limited number of peers who tell them the lawyers have done a good job in the past. When the potential clients visit a **[*175]** lawyer for the first time, they are unlikely to leave the lawyer's office unrepresented, because the consumers do not have, or do not feel that they have, alternatives and do not fully comprehend the differences among lawyers and in how lawyers act. Once these clients retain counsel, they do not expect to exert significant control over her. [3]

My colleague's clients and lawyers live in a different world. His clients obtain references, study past results the lawyers have obtained, interview prospective counsel, and let them know what they want to achieve (and how). [4] The lawyers, in return, let the clients know how much they want the representation by adjusting their fees (or not) and signaling to the clients how they will behave if certain eventualities arise. These clients will know the lawyers' reputations for aggressiveness, cutting corners, and willingness to oppose client demands.

The caricatures of clients and lawyers that my colleague and I conjure up, while stemming from our experiences, are not necessarily representative of the way all, or most, clients and lawyers act. To be honest, we do not know for a fact how much of a role reputation and signaling between lawyers and clients play in ordinary attorney relationships outside our paradigms. The empirical issues are key to a proper analysis of many professional rules.

This Article will focus primarily on one aspect of the equation: lawyers' reputations as a proxy for what clients want, or need, to know about their representatives. Part I offers a taxonomy of the ways in which lawyers' reputations are important. Part II discusses what we do, and do not, know about lawyers' reputations in today's real world. Part III identifies a series of questions about reputation that academics and the bar might do well to consider more seriously than they have in the past.

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[1] The influence on legal ethics regulation of the paradigm of the unsophisticated, indigent criminal defendant is discussed in Fred C. Zacharias, The Civil Criminal Distinction in Professional Responsibility, 7 J. Contemp. Legal Issues 165, 167- 78 (1996).

[2] See Fred C. Zacharias, The Images of Lawyers, 20 Geo J. Legal Ethics 73, 84-85 (2007) (discussing the paradigm of the lawyer as businessman).

[3] To avoid confusion, this Article will refer to lawyers as female and other actors as male.

[4] Some of these clients are so sophisticated that they may use their investigations of and initial interviews with counsel as a tactic to create conflicts of interests when the clients' adversaries and competitors attempt to consult the same counsel in the future. See, e.g., B.F. Goodrich Co. v. Formosa Plastics Corp., 638 F. Supp. 1050, 1051-52 (S.D. Tex. 1986) (involving a corporation that had interviewed a list of "outside prominent trial lawyers who had experience in patent cases" and then moved to disqualify a lawyer not selected from representing its adversary); cf. Model Rules of Prof'l Conduct R. 1.7 cmt. 22 (2006) (recognizing some prospective waivers of conflicts of interest designed to limit the effectiveness of intentional efforts to create conflicts); Note, Prospective Waiver of the Right to Disqualify Counsel for Conflicts of Interest, 79 Mich. L. Rev. 1074, 1075 (1981) (discussing the use of prospective conflict waivers as a potential antidote to tactical efforts to disqualify counsel).

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II. The Significance of Lawyers' Reputations

Most obviously, lawyers' reputations are important for clients planning to hire an attorney. In the absence of mechanisms that publicly grade attorneys, [5] clients' means of selecting lawyers are limited to reviewing the lawyers' objective qualifications (e.g., their educational background), interviewing candidates, contacting references, and word of mouth. The level of client sophistication ordinarily determines how a client selects counsel. A client who is uninformed about which qualifications are important and how to assess the qualifications cannot make good use of most of the options. When there are costs associated with interviewing and evaluating more than one attorney, that also may constrain a client's ability to perform a meaningful personal evaluation. [6]

Because of the importance of lawyers' reputations in the minds of prospective clients, lawyers' desires to maintain specific types of reputation have significant impact on the implementation of professional rules and other legal constraints on lawyer behavior. To the extent reputation is dependent on the way lawyers behave, or are likely to behave in particular contexts, that affects the manner in which lawyers comply with the constraints. Consider permissive professional rules that allow lawyers to take action against their clients' interests under some circumstances-for example, to disclose confidential information or report information to a governmental agency. A firm with a reputation for always exercising discretion so as to maximize the clients' interests (as opposed to third party or societal interests) obtains an advantage in attracting clients who are willing to pay for that behavior and are in a position to obtain accurate information about reputation. [7]

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Reputation plays a unique role in clarifying a lawyer's proclivities. A lawyer or firm might not, for example, be willing to put into writing its willingness to surrender discretion accorded in the rules [8] because doing so might be sanctionable [9] or might put the firm in disfavor with governmental agencies administering the rules. [10] For similar reasons, counsel is unlikely to express the willingness directly to the client, particularly a client with whom counsel has not previously dealt. Reputation is a method for signaling to prospective clients the lawyer's or law firm's flexibility without risk. Maintaining that reputation can be important to the lawyer's or firm's bottom line.

Lawyers' reputations may affect the impact of mandatory professional rules as well. Suppose, for example, lawyers

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[5] See Fred C. Zacharias, The Pre-employment Ethical Role of Lawyers, 49 Wm. & Mary L. Rev. 569, 631-34 (2007) (discussing the possibility of developing formal mechanisms for grading lawyers).

[6] The costs may not only entail the expenditure of money and time investigating prospective counsel, but also the psychological and emotional cost to some individuals of discussing personal information with lawyers and reliving the negative experience that is the foundation of the visit. Scholars have routinely assumed that many prospective individual clients quickly become dependent on the first lawyer they meet and have difficulty treating the initial discussions concerning representation as an arms' length transaction. See Douglas E. Rosenthal, Lawyer and Client: Who's in Charge 129 (1974) (studying New York personal injury claimants suggesting that "[g]enerally speaking, clients choose the first lawyer they know who comes to mind, the first lawyer recommended to them, or the first lawyer they meet"); John V. Tunney & Jane Lakes Frank, Federal Roles in Lawyer Reform, 27 Stan. L. Rev. 333, 338 (1975) ("Once in a law office door, the average citizen is a captive audience.").

[7] See Fred C. Zacharias, Coercing Clients: Can Lawyer Gatekeeping Rules Work?, 47 B.C. L. Rev. 455, 466-69 (2006) (discussing corporate lawyers' economic incentives in implementing reporting and disclosure rules).

[8] See Bruce A. Green & Fred C. Zacharias, Permissive Rules of Professional Conduct, 91 Minn. L. Rev. 265, 280 (2006) (discussing whether lawyers have an option to guarantee nondisclosure).

[9] A disciplinary authority might take the position that the attorney has the obligation to exercise discretion in every possible disclosure situation. It might also conclude that this discretion must be exercised in light of the competing policy considerations underlying the confidentiality rule and the exception. Recognizing this possibility, the drafters of the recent California future crime exception included language that foreclosed discipline against an attorney for invoking or declining to invoke the exception. See Cal. Rules of Prof'l Conduct R. 3-100(E) (2007) (providing that a lawyer "who does not reveal information permitted [under the exception] does not violate the rule"); id. at discussion (stating that lawyer is "not subject to discipline for revealing confidential information as permitted under this rule").

[10] The SEC, for example, administers regulations governing lawyers pursuant to the Sarbanes-Oxley Act. Pub. L. No. 107-204, § 307 (2002).

compete for business among corporate clients potentially affected by obligatory "reporting up" requirements. [11] The rules and enforcement of the rules, however, are not the only incentives that influence lawyers, [12] and a range of alternate ways to remedy putative corporate misbehavior may be available. [13] A lawyer's reputation for implementing the reporting-up rule, employing internal review **[*178]** mechanisms instead of reporting to outside authorities, or routinely protecting the lawyer's own interests in compliance (e.g., by writing internal opinions that shift the burden of compliance but effectively require the client to take action) can lead clients to select her from among lawyers with different approaches to the rules. [14] In situations in which clients uniformly, or mostly, prefer lawyers who will disobey the letter or spirit of mandatory rules, the availability of reputational signaling undermines the character of the rules.

There are, of course, different kinds of reputations. One important form, for purposes of the legal ethics codes, is a lawyer's or firm's reputation for responding to criticism, discipline, or sanction. As a practical matter, the resources of disciplinary agencies are relatively meager, with the result that the agencies tend to avoid imposing sanctions that will embroil the regulators in lengthy and costly litigation. Historically, disciplinary agencies have shied from implementing rules against prosecutors' offices [15] and legal advertisers, [16] in part because those rules are legally controversial and tend to prompt a vigorous defense. [17] Discipline is imposed disproportionately on solo practitioners and small firms, again in part because these defendants are least likely to devote substantial resources to fighting sanctions. [18] For the same **[*179]** reasons, a lawyer's or firm's reputation for litigiousness in its own interests may promote hesitant enforcement of the rules. This, in turn, may limit the effect of the rules in precisely the contexts in which they are intended to have their greatest impact.

Just as there are various kinds of reputation, a single reputation can have multiple effects. A lawyer's desire to maintain a reputation for client-centered behavior may, for example, encourage the lawyer to downplay third-party and societal interests recognized in some professional rules, thus undermining these rules. But the desire to maintain the reputation for client-centeredness may also reinforce rules that forbid the lawyer to place her own interests ahead of

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[11] See, e.g., Implementation of Standards of Professional Conduct for Attorneys, 17 C.F.R. § 205.3(b) (2007) (requiring corporate attorneys to report up the ladder in certain circumstances); Model Rules of Prof'l Conduct R. 1.13(b) (2006) ("[U]nless the lawyer [who knows of potential misconduct] reasonably believes that it is not necessary in the best interest of the organization to do so the lawyer shall refer the matter to higher authority in the organization."); Zacharias, supra note 7, at 481-84 (discussing obligatory reporting-up requirements).

[12] See generally David McGowan, Why Not Try the Carrot? A Modest Proposal to Grant Immunity to Lawyers Who Disclose Client Financial Misconduct, 92 Cal. L. Rev. 1825 (2004) (discussing, from a game-theoretic perspective, lawyers' incentives in complying or not complying with corporate disclosure obligations).

[13] See Zacharias, supra note 7, at 464-66 (discussing options of different kinds of lawyers responding to corporate misconduct).

[14] See Richard W. Painter, Toward a Market for Lawyer Disclosure Services: In Search of Optimal Whistleblowing Rules, 63 Geo. Wash. L. Rev. 221, 253 (1995) (noting that "clients can short circuit whistleblowing rules, and thus remove disincentives to engage in misconduct, by hiring lawyers who will not disclose").

[15] See Fred C. Zacharias, The Professional Discipline of Prosecutors, 79 N.C. L. Rev. 721, 760 (2001) (discussing possible reasons for the infrequency of discipline of prosecutors).

[16] See Fred C. Zacharias, What Lawyers Do When Nobody's Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules, 87 Iowa L. Rev. 971, 974-1002 (2002) (discussing reasons for underenforcement of legal advertising rules).

[17] The Department of Justice, for example, recently announced a policy that it will defend its lawyers in disciplinary proceedings whenever the lawyers have made a "good faith effort to understand their ethical requirements." DOJ Issues Rule Detailing Mission, Functions of Professional Responsibility Advisory Office, 22 A.B.A./B.N.A. Law. Manual on Prof'l Conduct 21 (Jan. 11, 2006) (reporting the Department of Justice's adoption of a new rule that requires federal prosecutors to obey state laws and rules that govern ethical conduct in the state where the prosecutor practices).

[18] See, e.g., California Bar Report Finds Lack of Bias Against Small Practices in Discipline Matters, 17 A.B.A./B.N.A. Law. Manual on Prof'l Conduct 43-35 (July 18, 2001) (reporting that "[a]lthough only 23 percent of California lawyers are in solo practice, 54 percent of inquiries about attorneys involved solo practitioners, 68.47 percent of investigations opened were for solo practitioners, and 78.37 percent of the completed disciplinary cases involved those practitioners"); Leslie C. Levin, Preliminary Reflections on the Professional Development of Solo and Small Law Firm Practitioners, 70 Fordham L. Rev. 847, 847-48 (2001) ("Lawyers who practice in [solo and small firm] settings tend to receive . . . substantially more discipline than their big firm colleagues."); id. at 848 n.3 (citing multiple authorities on the proposition).

a client's, such as conflict of interest and fair dealing requirements. [19] Thus, when a lawyer operates in a field in which a reputation for client-centered behavior is imperative to her ability to attract clients, the need for professional rules against self-dealing (and even negligence) is diminished because the market will enforce similar standards. [20]

Various targets other than potential clients rely upon reputations. Reputation is a mechanism for signaling to third parties the kind of approach a lawyer is likely to take to her role, which itself may affect the resolution of particular matters. The difference between an ultra-aggressive lawyer and a lawyer who acts with detachment and objectivity may be significant for the adversary or agency with whom the lawyer has regular dealings. [21] For example, the IRS, SEC, prosecutors, and even judges may respond differently **[*180]** to positions taken by attorneys with reputations for exercising means or making arguments that are reasonable than to positions taken by lawyers known to stretch the law. [22] Likewise, adversaries will respond differently to settlement offers and statements made in negotiations, depending on their opponents' reputations for candor and taking reasonable positions. [23] Rules that authorize varying approaches to making arguments, [24] settlement discussions, [25] and engaging in borderline deceit or misrepresentation [26] thus will be implemented differently by lawyers seeking to attract different kinds of clients. [27]

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[19] See Model Rules of Prof'l Conduct R. 1.7-1.8 (limiting lawyers' abilities to act in their own interests). The theory is that if sophisticated future clients will become aware of lawyer self-dealing, then engaging in it ordinarily will not be cost effective. But, in practice, the reputational concerns will not always dominate. If, for example, the client is unlikely, or unable, to gauge the lawyer's reputation for acting in a self-interested manner, the market will not serve as an effective deterrent. See Milton C. Regan, Professional Reputation: Looking for the Good Lawyer, 39 S. Tex. L. Rev. 549, 559 (1998) ("The desire for financial gain may outweigh concern for reputation, for instance, when the client is relatively unsophisticated and engages in only lenient oversight of outside counsel."). In addition, in individual cases the size of the booty resulting from self-interested action may outweigh the lawyer's desire to maintain her reputation.

[20] Cf. Regan, supra note 19, at 558 ("[D]evotion to the client . . . has the common function of constraining the operation of lawyer self-interest.").

[21] See Richard W. Painter, Lawyers' Rules, Auditors' Rules and the Psychology of Concealment, 84 Minn. L. Rev. 1399, 1402-03 (2000) (discussing the relationship between lawyers' reputation for disclosing information and regulators' likely response to the lawyers); Zacharias, supra note 7, at 483 ("Conversely, a law firm's overall marketability may depend on the reputation for independence that the firm establishes with regulators in the field in which the firm practices."); cf. Robert Bone, Modeling Frivolous Lawsuits, 145 U. Pa. L. Rev. 519, 572 (1997) (arguing that, by hiring a lawyer with a reputation for "always investigating and filing only meritorious suits, defendants can rely on that reputation to cure any informational asymmetry that blocks early settlement").

[22] See Richard W. Painter, Game Theoretic and Contractarian Paradigms in the Uneasy Relationship Between Regulators and Regulatory Lawyers, 65 Fordham L. Rev. 149, 170 (1996) (arguing that attorneys who have proven to regulators that they screen their clients' positions and take their obligations to monitor client misconduct seriously may receive enhanced deference from the FCC).

[23] See, e.g., Scott R. Peppet, Lawyers' Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism, 90 Iowa L. Rev. 475, 485 (2005) (analyzing a potential "reputational solution" to a bargaining problem, under which parties can signal their willingness to cooperate by hiring an attorney with a reputation for collaboration); Franz Xaver Perrez, The Efficiency of Cooperation: A Functional Analysis of Sovereignty, 15 Ariz. J. Int'l & Comp. Law 515, 563 (1998) (asserting that a reputation for integrity and trustworthiness strengthens a party's bargaining position over time); Robert B. Wilson, Strategic and Informational Barriers to Negotiation, in Barriers to Conflict Resolution 108, 111 (Kenneth J. Arrow et al. eds., 1995) (discussing costs and benefits of a negotiator's reputation for truthfulness); Douglas H. Yarn, Lawyer Ethics in ADR and the Recommendations of Ethics 2000 to Revise the Model Rules of Professional Conduct: Considerations for Adoption and State Application, 54 Ark. L. Rev. 207, 270 n.269 (2001) (arguing that a lawyer's reputation for truthfulness and fairness increases that lawyer's effectiveness as a negotiator in future negotiations).

[24] See, e.g., Model Rules of Prof'l Conduct R. 3.1 (forbidding arguments only when there is no "basis in law or fact . . . that is not frivolous" and allowing all claims when there is "a good faith argument for an extension, modification, or reversal of existing law").

[25] See, e.g., id. at R. 4.1 cmt. (stating that "under generally accepted conventions in negotiation" certain types of statements are "ordinarily not taken as statements of material fact").

[26] See, e.g., id. at R. 4.1 (excluding from regulation misrepresentations that do not involve statements of material fact, including "estimates of price or value" and "a party's intentions as to an acceptable settlement"); id. at R. 8.4 (forbidding all dishonesty and deceit by lawyers).

[27] See, e.g., Regan, supra note 19, at 558 (discussing lawyers' different constituencies and the different reputations each constituency demands).