



ST. MARY'S  
UNIVERSITY

Digital Commons at St. Mary's University

---

Faculty Articles

School of Law Faculty Scholarship

---

2016

## Sorting: Legal Specialization and the Privatization of the American Legal Profession

Michael S. Ariens

*St. Mary's University School of Law*, [mariens@stmarytx.edu](mailto:mariens@stmarytx.edu)

Follow this and additional works at: <https://commons.stmarytx.edu/facarticles>



Part of the [Supreme Court of the United States Commons](#)

---

### Recommended Citation

Michael S. Ariens, *Sorting: Legal Specialization and the Privatization of the American Legal Profession*, 29 *Geo. J. Legal Ethics* 579 (2016).

This Article is brought to you for free and open access by the School of Law Faculty Scholarship at Digital Commons at St. Mary's University. It has been accepted for inclusion in Faculty Articles by an authorized administrator of Digital Commons at St. Mary's University. For more information, please contact [sfowler@stmarytx.edu](mailto:sfowler@stmarytx.edu), [egoode@stmarytx.edu](mailto:egoode@stmarytx.edu).

# Sorting: Legal Specialization and the Privatization of the American Legal Profession

MICHAEL S. ARIENS\*

## ABSTRACT

*Beginning in the 1950s, legal specialization was promoted to the majority of the American legal profession, small firm and solo practice lawyers, by the elite of the bar as the future of legal professionalism. Legal specialization was a form of sorting lawyers, and sorting was contrary to the traditional understanding of an undivided legal profession. Over the course of the next thirty years, this effort succeeded. This new understanding of legal professionalism emphasized the idea of competence based on a deep but particularized knowledge of law. This resulted in a slipping away of the beliefs that law was a public profession and it was the duty of the public-minded lawyer to remain independent of all clients. The shift from the traditional idea of lawyer professionalism distanced American lawyers from one another and from the broader communities in which they practiced law. It also tied lawyers more closely to their clients, which helped lead to a private, market model of American lawyering.*

## TABLE OF CONTENTS

INTRODUCTION. . . . .	580
I. THE ABA AND LEGAL SPECIALIZATION. . . . .	581
A. RECOGNIZING LEGAL SPECIALISTS . . . . .	583
B. ABA ETHICS CODES AND SPECIALIZATION. . . . .	585
II. THE “INDEPENDENT LAWYER” AND THE “LAWYER AS HIRED GUN” . . . . .	587
A. CAUSES, THE OFFICER OF THE COURT, AND THE “LAWYER FOR HIRE” . . . . .	589
B. AFTER WATERGATE . . . . .	591

---

\* Professor, St. Mary’s University School of Law. Thanks to my colleagues Vicki Mather and Geary Reamey for their comments, and to my research assistants, Dorian Ojemen, Mitchell Gonzales, and Sumner Macdaniel. I am responsible for all remaining errors. © 2016, Michael S. Ariens.

C. KUTAK COMMISSION . . . . .	592
III. THE PRIVATIZATION OF THE AMERICAN LEGAL PROFESSION . . .	594
CONCLUSION . . . . .	597

## INTRODUCTION

He did not specialize, nor did he pick and choose clients. He rarely declined service to worthy ones because of inability to pay. Once enlisted for a client, he took his obligation seriously. He insisted on complete control of the litigation—he was no mere hired hand . . . . The law to him was like a religion, and its practice was more than a means of support; it was a mission.<sup>1</sup>

In a brief 1950 essay for the *ABA Journal*, Supreme Court Justice Robert H. Jackson wrote of the virtues of the small town lawyer, “counsellor to railroads and to Negroes, to bankers and to poor whites, who always gave to each the best there was in him.”<sup>2</sup> Jackson argued that these lawyers were consummate professionals, even as they were fading from the American legal profession.<sup>3</sup>

Jackson emphasizes three traditional aspects of lawyer professionalism. First, a lawyer “did not specialize,” but simply knew “the law.” The county seat lawyer did not “pick and choose clients,” but served businesses (“railroads” and “bankers”) and individuals (“Negroes” and “poor whites”) alike.<sup>4</sup> Second, the lawyer remained independent of the client, for “he was no mere hired hand.”<sup>5</sup> Third, if the law was “like a religion” and its practice a “mission,” the lawyer was a missionary who served the community, and did not act merely as an agent for a client.<sup>6</sup>

This article argues that legal specialization was promoted to lawyers representing individual clients, often solo practitioners, as part of an effort by the elite of the bar to redefine the meaning of professionalism.<sup>7</sup> Legal specialization was a

1. Robert H. Jackson, *The County-Seat Lawyer*, 36 A.B.A. J. 439, 497 (1950).

2. *Id.*

3. *See id.* (“More and more those who in court and classroom and legislative body restate our legal principles are men who have not experienced the country life of which our law was so largely the expression.”).

4. *Id.*

5. *Id.* Jackson reemphasized this point, noting the lawyer “thought of himself as a leader and lawgiver, not as a mouthpiece.” *Id.*

6. *Id.*; *see also* Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 251 (1978) (listing “essential ingredients” of the ordinary religion of the law school classroom, one of which emphasizes the “skilled craftsman of the discrete controversy”).

7. *See* JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* 127 (Nw. Univ. Press & Am. Bar Found. rev. ed. 1994) (1982) (“[W]e have advanced the thesis that much of the differentiation within the legal profession is secondary to one fundamental distinction—the distinction between lawyers who represent large organizations (corporations, labor unions, or government) and those who represent individuals.”).

form of sorting lawyers. Sorting was contrary to the traditional understanding of an undivided legal profession. The shift toward legal specialization after 1945 challenged that understanding.<sup>8</sup> By the early 1980s, this sorting process succeeded, bringing with it a new understanding of what it meant to be a lawyer. This revised approach to professionalism focused less on the independence and mission of lawyers, and more on their technical competence.<sup>9</sup> Despite earlier predictions promoting legal specialization, the move away from the traditional idea of lawyer professionalism disaggregated American lawyers. This disaggregation of lawyers, in turn, helped lead to a privatization or market model of American lawyering.

This redefinition of professionalism altered each of Justice Jackson's three criteria. First, lawyers accepted the idea that knowledge of "the law" was impossible. Second, specialization limited the nature of the lawyer's claim of independence from the client. Third, specialization changed the public mission of the private practice of law.

This article first examines the American Bar Association's (ABA) understanding of the relationship between legal knowledge and legal specialization. It next explains why the model emphasizing the independence of lawyers from clients was slowly displaced by the "hired gun" model of client representation beginning in 1970. Finally, it suggests how the confluence of both material and ideological concerns in the American legal profession in the 1970s privatized the public mission of private practice lawyers.

## I. THE ABA AND LEGAL SPECIALIZATION

"I don't think there are any good solo lawyers; there is too much to know and he has so little time to learn it."<sup>10</sup>

In an important and controversial study of American legal education published in 1921, Carnegie Foundation education researcher Alfred Z. Reed argued for reform of legal education because American lawyers did not constitute "a united

---

8. See generally Michael Ariens, *Know the Law: A History of Legal Specialization*, 45 S.C. L. REV. 1003, 1042-56 (1994).

9. See TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT-AN EDUCATIONAL CONTINUUM 42 (1992) ("[I]t has become increasingly clear that every lawyer is obliged as a practical matter to limit the subjects on which he or she will keep abreast and develop particular competence."); see also *id.* at 46 ("More and more lawyers are focusing on one or several practice specialties which they announce and publicize, further departing from the traditional general practitioner model.").

10. ERWIN O. SMIGEL, *THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN?* 173 (1964) (quoting an unnamed lawyer). More than half of all lawyers then in private practice were solo practitioners. See AM. BAR FOUND., *THE AMERICAN LAWYER: 1964 LAWYER STATISTICAL REPORT* 32 (1965) (reporting that 56 percent (113,127/200,586) of private practice lawyers were solo practitioners in 1963).

bar but a heterogeneous body.”<sup>11</sup> The ABA had obtained a pre-publication copy of Reed’s study,<sup>12</sup> and its Special Committee on Legal Education preempted Reed’s argument in its Report to the ABA.<sup>13</sup> The Report, known as the Root Report after its Chairman, Elihu Root,<sup>14</sup> concluded:

If an admiralty lawyer’s work were fundamentally different in kind from a probate lawyer’s work, a different training would be required for each and a consequent classification of the bar would follow as a matter of course. In our opinion, however, there is no such difference between kinds of legal work.<sup>15</sup>

This idea represented the profession’s view of legal specialization for the next thirty years. As Reed himself noted, the claim of a “heterogeneous” bar “is the one feature . . . that has been almost contemptuously dismissed. The indivisibility of the legal profession is as much a fetish of the existing generation of lawyers as it was forty years ago.”<sup>16</sup> This “fetish” presumed that every lawyer understood every aspect of law. Even admiralty lawyers, who along with patent lawyers were traditionally acknowledged within the legal profession as legal specialists, were claimed to perform work no different “in kind” than a probate lawyer.

This claim was promoted in the Root Report to bolster efforts to raise the admissions and educational standards of law schools, and to make law schools, which taught the fundamental principles embodied in law, the only pathway to entry to the bar.<sup>17</sup> Some lawyers might spend most of their time defending those accused of crimes,<sup>18</sup> and others might defend United Fruit Company’s monopoly on bananas,<sup>19</sup> but each was assumed capable of doing the other’s work. This was

---

11. ALFRED ZANTZINGER REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW: HISTORICAL DEVELOPMENT AND PRINCIPAL CONTEMPORARY PROBLEMS OF LEGAL EDUCATION IN THE UNITED STATES WITH SOME ACCOUNT OF CONDITIONS IN ENGLAND AND CANADA 410 (1921). Reed’s book was controversial in elite circles of the American legal profession, in part because of his challenge to the “theory of a unified bar,” ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 114 (1983), but also due to his acceptance of night law schools as necessary to avoid the practice of law from “becoming a class monopoly,” JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 110 (1976).

12. SUSAN K. BOYD, SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS’N, THE ABA’S FIRST SECTION: ASSURING A QUALIFIED BAR 26 (1993) [hereinafter BOYD, FIRST SECTION].

13. See *Report of the Special Committee to the Section of Legal Education and Admissions to the Bar of the American Bar Association*, 46 A.B.A. ANN. REP. 679 (1921) [hereinafter *Report of the Special Committee*].

14. On Root, see generally PHILIP C. JESSUP, ELIHU ROOT (1938); Jonathan Zasloff, *Root, Elihu*, in THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 467, 467–68 (Roger K. Newman ed., 2009). Root was the epitome of the modern corporation lawyer.

15. *Report of the Special Committee*, *supra* note 13, at 681.

16. BOYD, FIRST SECTION, *supra* note 12, at 26 (internal citation omitted).

17. *Report of the Special Committee*, *supra* note 13, at 687; BOYD, FIRST SECTION, *supra* note 12, at 24. The Report also recommended eliminating the diploma privilege, requiring all those who graduated law school to take and pass a bar exam. See *Report of the Special Committee*, *supra* note 13, at 688.

18. See Newman Levy, *Lawyers and Morals*, HARPER’S MAG., Feb. 1927, at 288.

19. See JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS 65–110 (U.C. Press 2002) (1976) (discussing work of Boston lawyers Bradley Webster Palmer and Moorfield Storey in representing United Fruit).

nonsense. The elite of the bar served railroads, oil and steel companies and other gargantuan enterprises, in litigation and more often in transactional work.<sup>20</sup> An elite lawyer crafting a loan agreement for a railroad knew nothing about prosecuting personal injury claims, and the neighborhood lawyers representing injured workers had never drafted a railroad mortgage. This was the heterogeneous legal world that Alfred Reed had described in clear-eyed fashion. Yet, as the Root Committee declared, elite lawyers were unwilling to acknowledge that transformational changes largely dating from the Gilded Age economy<sup>21</sup> had segregated their work from that of most American lawyers. The constant and traditional view was expressed in a *Yale Law Journal* article on the duties and limits of representing the guilty criminal defendant: “The lawyer should be the best type of man; and honesty and honor should ever be his guide.”<sup>22</sup>

#### A. RECOGNIZING LEGAL SPECIALISTS

In 1951, the ABA began a halting effort to recognize the existence of traditional legal specialists. It amended Canon 27 of its 1908 Canons of Ethics by allowing patent and admiralty lawyers to indicate on letterhead their specialties.<sup>23</sup> An *ABA Journal* article that same year discussed specialization among private practice lawyers. There, the author favorably quoted Justice Jackson’s view that the specialist lacked full judgment:

No person who rightly appreciates the advantages of the division of labor will deny an important place in an advisory and consultive way to the specialist, but his seat is not the seat of judgment. That calls for a breadth of view and understanding that may not be so deep as the specialist’s, but must be broader.<sup>24</sup>

Despite Justice Jackson’s criticism and the ABA article’s finding that 60 percent of lawyers denied any claim to serving as a “legal specialist,”<sup>25</sup> ABA President Robert G. Storey<sup>26</sup> announced in 1953 the creation of a special committee to advise the ABA’s Board of Governors on the need for standards of

20. See James G. Rogers, *Types of the American Lawyer, Past and Present*, 15 A.B.A. J. 531, 534 (1929) (noting the model of the modern lawyer is a “business lawyer” and toward which ambitious young men agree is “the standard of greatest achievement”).

21. See generally H. W. BRANDS, *AMERICAN COLOSSUS: THE TRIUMPH OF CAPITALISM, 1865–1900* (2010).

22. Louis J. Rosenberg, *The Status of an Attorney Defending a Guilty Client*, 10 YALE L.J. 24, 27 (1900).

23. *Proceedings of the House of Delegates*, 76 A.B.A. ANN. REP. 107, 134–24 (1951).

24. Robert H. Jackson, Address to Beaver County Bar Association, Beaver Falls, Pennsylvania, (Mar. 30, 1935), quoted in Eugene C. Gerhart, *Organization for the Practice of Law: How Lawyers Conduct Their Practice*, 37 A.B.A. J. 729, 731 (1951). Gerhart later wrote *AMERICA’S ADVOCATE: ROBERT H. JACKSON* (1958).

25. Gerhart, *Organization*, 37 A.B.A. J. at 731.

26. On Storey, see *The New President of the Association: Robert Gerald Storey*, 38 A.B.A. J. 831 (1952). Storey was a Dallas corporate lawyer and name partner.

competence as a legal specialist.<sup>27</sup> Storey argued “[t]he legal profession has not kept pace with the rapidly changing events and demands of our time.”<sup>28</sup>

The efforts of the special committee failed after widespread disagreement within the ABA about the value of institutional recognition of legal specialists.<sup>29</sup> The primary reason for its rejection was the fear that recognizing legal specialists would mean the general practitioner was no longer a professional, but a “tradesman.”<sup>30</sup> The majority of lawyers who remained general practitioners, including nearly all who represented individual clients, believed they were professionals, not mere businessmen.<sup>31</sup> The elite of the bar believed that, because there was “too much to know and so little time to learn” all law,<sup>32</sup> a professional accepted and understood the limits of his knowledge, and thus, competence.

The ABA created two additional special committees on legal specialization, one each at the beginning and end of the 1960s.<sup>33</sup> Both failed to obtain institutional approval for recognition of legal specialists, and largely for the same reasons as the failed effort in the 1950s: the majority of lawyers in solo practice were not ready to abandon the ideal of the undivided legal profession.<sup>34</sup> Probably due to antitrust concerns,<sup>35</sup> the ABA has not proposed any specialization plan since 1969.<sup>36</sup>

---

27. Robert G. Storey, *The President's Page*, 39 A.B.A. J. 91, 91 (1953).

28. *Id.*

29. See Ariens, *Know the Law*, *supra* note 8, at 1042–54.

30. See *Statement of Committee on Unauthorized Practice of Law on Specialization and Specialized Legal Education*, UNAUTHORIZED PRAC. NEWS Dec. 1954, at 4, 5 (likening specialist “Societies” to “trade associations or craft unions” rather than “true professional societies”).

31. *Id.*

32. See SMIGEL, *supra* note 10, at 174.

33. See *Report of the Board of Governors*, 87 A.B.A. ANN. REP. 44, 54 (1961); *Proceedings of the 1969 Midyear Meeting of the House of Delegates*, 94 A.B.A. ANN. REP. 115, 129–32 (1969).

34. *Report of the Special Committee on Recognition and Regulation of Specialization in Law Practice*, 88 A.B.A. ANN. REP. 672, 672 (1963).

35. The ABA was twice charged with violating antitrust laws by the Department of Justice in the mid-1970s. See *Justice Department and Other Views on Prepaid Legal Services Plans Get an Airing Before the Tunney Subcommittee*, 60 A.B.A. J. 791, 792–93 (1974) (noting 1974 allegations of antitrust violations in Code of Professional Responsibility); Lawrence E. Walsh, *The Annual Report of the President of the American Bar Association*, 62 A.B.A. J. 1119, 1120 (1976) (reporting filing by Department of Justice of second complaint). In addition, the Supreme Court held in 1975 the minimum fee schedule of the Virginia State Bar violated antitrust law. See *Goldfarb v. Va. St. Bar*, 421 U.S. 773 (1975).

36. After the successful creation of specialization certification plans in several states, the ABA in 1979 created a Model Plan of Specialization. See *Proceedings of the 1979 Annual Meeting of the House of Delegates*, 104 A.B.A. ANN. REP. 821, 846–47 (1979). An amended plan was adopted by the ABA in 1993. See *House of Delegates Proceedings*, 118(1) A.B.A. ANN. REP. 1, 29 (1993); see also *Report of the Standing Committee on Specialization*, 118(1) A.B.A. ANN. REP. 181 (1993).

## B. ABA ETHICS CODES AND SPECIALIZATION

The ABA created a committee in 1964 to draft a code of ethics to replace the *1908 Canons of Ethics*.<sup>37</sup> The final draft was published on July 1, 1969, and at its annual meeting in August, the House of Delegates approved the Code of Professional Responsibility as written.<sup>38</sup> The Code was quickly embraced by the states. Within three years, forty-three states and the District of Columbia enacted the Code as law, usually with few or no changes. Another four state bar associations made the Code applicable to their members, though it was not adopted as the law of the state.<sup>39</sup>

The Code was popular in part because it assumed the traditional view that all lawyers knew all law. Disciplinary Rule 2-105(A) stated, “A lawyer shall not hold himself out publicly as a specialist or as limiting his practice.”<sup>40</sup> A lawyer was permitted to send an announcement to other lawyers of availability in certain matters, but “the announcement shall not contain a representation of special competence or experience.”<sup>41</sup>

This ideal that all lawyers knew all law became increasingly unstable during the 1960s. Those drafting the Code were aware of the ABA’s drive to recognize and regulate specialists. Further, several studies of lawyers were published as the Code was prepared, each of which noted the advance of specialization.<sup>42</sup> For example, the book *Lawyers and Their Work* included a deeply researched chapter assessing the impact of specialization on the manner in which American lawyers practiced law,<sup>43</sup> and the *ABA Journal* represented to its lawyer-readers the arrival of legal specialization as a “fact and not a theory.”<sup>44</sup>

After the 1973–74 Watergate affair, the Code was criticized for failing to keep up with changes in society and the profession.<sup>45</sup> When ABA President William B. Spann, Jr. announced a new look at rules of ethics in 1977, he justified his call in

---

37. See generally Michael Ariens, *American Legal Ethics in an Age of Anxiety*, 40 ST. MARY’S L.J. 343, 433–44 (2008) (discussing origins of Code).

38. See *Proceedings of the 1969 Annual Meeting of the House of Delegates*, 94 A.B.A. ANN. REP. 378, 392 (1969).

39. See A.B.A., *Report of the Special Committee to Secure Adoption of the Code of Professional Responsibility*, 97 A.B.A. ANN. REP. 740, 740–41 (1972).

40. MODEL CODE OF PROF’L RESPONSIBILITY DR. 2-105(A) (1969), Code of Prof. Resp., reprinted in A.B.A. *Report of the Special Committee on Evaluation of Ethical Standards*, 94 A.B.A. ANN. REP. 729, 744 (1969).

41. MODEL CODE OF PROF’L RESPONSIBILITY DR 2-105(A)(3).

42. See SMIGEL, *supra* note 10, at 149–54; JEROME E. CARLIN, *LAWYERS’ ETHICS: A SURVEY OF THE NEW YORK CITY BAR 25–26* (1966); QUINTIN JOHNSTONE & DAN HOPSON, JR., *LAWYERS AND THEIR WORK: AN ANALYSIS OF THE LEGAL PROFESSION IN THE UNITED STATES AND ENGLAND 131–59* (1967); see also John P. Bracken, *Specialization in the Law: A Fact and Not a Theory*, 53 A.B.A. J. 325 (1967).

43. JOHNSTONE & HOPSON, JR., *supra* note 42, at 131–59.

44. Bracken, *supra* note 42.

45. See John F. Sutton, Jr., *How Vulnerable Is the Code of Professional Responsibility?*, 57 N.C. L. REV. 497, 497 (1979) (noting Code was weakened due to “reluctance of lawyers to depart from old, familiar standards”). Sutton was the Code Reporter; see also Ariens, *Age of Anxiety*, *supra* note 37, at 444–48 (noting attacks on Code as dated, self-interested, unlawful, and unconstitutional).



large part due to the involvement of lawyers in Watergate.<sup>46</sup> He did so in light of the consensus of the elite bar that lawyers involved in Watergate had engaged in “incredibly amoral as well as illegal acts.”<sup>47</sup> The ABA created the Kutak Commission to assess “all facets of legal ethics.”<sup>48</sup> In January 1980, the Kutak Commission published a Discussion Draft of *The Model Rules of Professional Conduct*. It framed a lawyer’s claim as a specialist in positive terms, stating, “A lawyer whose practice is limited to specified areas of practice may communicate that fact.”<sup>49</sup> Model Rule 7.4 was simplified in the Proposed Final Draft,<sup>50</sup> and the Kutak Commission noted strong evidence of lawyer specialization in its commentary to the Model Rule. It cited the earlier work of ABA Special Committees on specialization, *ABA Journal* articles, and “recent surveys” in concluding “most lawyers limit their practice.”<sup>51</sup> Model Rule 7.4 was drafted in a way that both acknowledged the “established fact” of specialization and avoided countenancing any claims by lawyers that specialization “implied a degree of special competence.”<sup>52</sup> The ABA adopted Model Rule 7.4 substantially as written in the Proposed Final Draft.<sup>53</sup>

The underlying message of Model Rule 7.4 was that all lawyers no longer knew all law.<sup>54</sup> Unlike the effort to recognize legal specialties in the mid-1950s, this declaration no longer represented a threat to the professional status of

---

46. William B. Spann, Jr., *The Legal Profession Needs a New Code of Ethics*, B. LEADER, NOV.–DEC. 1977, at 2–3.

47. Lyman M. Tondel, Jr., *Watergate: The Public Lawyer and The Bar as seen from the Perspective of the ABA Ethics Committee*, 30 BUS. LAW. 295, 295 (1975).

48. Spann, *supra* note 46, at 3.

49. MODEL RULES OF PROF’L CONDUCT R. 9.4 (Discussion Draft 1980).

50. MODEL RULES OF PROF’L CONDUCT R. 7.4 (Proposed Final Draft 1981) (“A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.”).

51. *Id.* at 199 (*Comment: Legal Background*).

52. *Id.*

53. *Report of the Commission on Evaluation of the Rules of Professional Conduct*, 127(1) A.B.A. ANN. REP. 153, 264–67 (2002) (amending Rule 7.4 to require any certifying organization conferring specialist status be approved by ABA or “appropriate state authority”); see Am. Bar Ass’n, *Proceedings of the 1983 Annual Meeting of the House of Delegates Proceedings*, 108 A.B.A. ANN. REP. 763, 775–76 (1983) (noting discussion of Rule 7.4). The Philadelphia Bar Association proposed an amendment deleting language in the comments restricting a lawyer’s ability to state the lawyer’s practice was “limited to” or “concentrated in” particular areas of law. The amendment failed, 107 votes to 197 votes. See *id.* at 776. Rule 7.4 has been twice amended, in 1992 and 2002. See Am. Bar Ass’n, *Report of the Standing Committee on Specialization and Presented Jointly with the Standing Committee on Ethics and Professional Responsibility*, 117(2) A.B.A. ANN. REP. 493 (1992) (amending Rule 7.4 in light of *Peel v. Att’y Registration and Disciplinary Comm’n*, 496 U.S. 91 (1990)); Am. Bar Ass’n, *Report of the Commission on Evaluation of the Rules of Professional Conduct*, 127(1) A.B.A. ANN. REP. 153, 264–67 (2002) (amending Rule 7.4 to require any certifying organization conferring specialist status be approved by ABA or “appropriate state authority”).

54. See George K. Steil, *If You Are Looking for a Bedtime Story for a Tiered Bar . . . Wake Up!*, B. LEADER, MAY–JUNE 1979, at 24, 25 (“[W]e are going to have to recognize that *de facto* specialization or concentration in practice is a reality in today’s complex society . . . [I]t is time that we honestly tell [our clients] that we do not know it all.”) [hereinafter Steil, *Wake Up!*].

lawyers. Lawyer specialization increased throughout the 1960s and 1970s.<sup>55</sup> Between 1977 and 1982, when the Kutak Commission worked on the *Model Rules*, the number of lawyers who considered themselves generalists dropped from 54 percent to 43 percent.<sup>56</sup> A 1975 study of lawyers in Chicago, Illinois found an even higher acceptance of specialization, with 70 percent considering themselves specialists.<sup>57</sup>

Legal specialization was a brute fact by 1980. The American legal profession accommodated this brute fact by altering its understanding of the meaning of professional. The American lawyer was no longer on a quest for legal knowledge, but in search of competence. A lawyer who limited her practice implicitly indicated her competence within those fields of practice (and correlatively, an absence of competence outside of those areas). Some lawyers took the additional step of obtaining state bar certification as a specialist, which allowed them to claim a “special competence” in such fields.<sup>58</sup> This rationalized the practice of law, but in so doing, the position of lawyer as mediator between the state and the citizen, and between the local community and its residents, was largely lost.<sup>59</sup> That loss created a landscape that allowed a lessening of the public duties of the lawyer in favor of the private duty of loyalty to client. The shift to the ideal of competence was a double-edged sword, which became clear only after the ideal was accepted within the profession.

## II. THE “INDEPENDENT LAWYER” AND THE “LAWYER AS HIRED GUN”

“We should face the fact that the quality of ‘hired gun’ is close to the heart and substance of the litigating lawyer’s role.”<sup>60</sup>

In the January 1970 issue of the *Yale Law Journal*, John Griffiths noted the negative implication of calling a criminal defense lawyer a “hired gun.”<sup>61</sup> The footnote accompanying his assertion began, “I cannot find an instance of this

55. See generally Bracken, *supra* note 42; RICHARD L. ABEL, *AMERICAN LAWYERS* 122, 202 (1992) (noting increasing pace of legal specialization from the 1960s to the late 1970s) [hereinafter ABEL, *AMERICAN LAWYERS*].

56. Am. Bar Ass’n, *Law Poll: Specialization, Relicensing, and Reciprocity*, 68 A.B.A. J. 800, 800 (1982).

57. HEINZ & LAUMANN, *supra* note 7, at 33–34.

58. The Comment to the Proposed Final Draft of Model Rule 7.4 discusses the difference between a claim of competence and “special competence.” See MODEL RULES OF PROF’L CONDUCT R. 7.4 cmt. 199 (Proposed Final Draft 1981); see also *id.* (noting that in absence of specialization certification program, “a claim of specialization is an unverifiable representation of quality that may be so inherently misleading as to warrant prohibition”).

59. Harlan Fiske Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 6 (1934) (noting that increased specialization led to less time to reflect “upon other than immediate professional undertakings” and made the lawyer less able to serve as “interpreter of his community”).

60. Marvin Frankel, *The Search for the Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1055 (1975).

61. John Griffiths, *Ideology in Criminal Procedure, or a Third “Model” of the Criminal Process*, 79 YALE L.J. 359, 369 (1970).

common aspersion in print.”<sup>62</sup> Three years later, Chief Justice Warren Burger wrote in dissent in *In re Griffiths*:

The concept of a lawyer as an officer of the court and hence part of the official mechanism of justice in the sense of other court officers, including the judge, albeit with different duties, is not unique in our system but it is a significant feature of the lawyer’s role in the common law. This concept has sustained some erosion over the years at the hands of cynics who view the lawyer much as the “hired gun” of the Old West. In less flamboyant terms the lawyer in his relation to the client came to be called a “mouthpiece” in the gangland parlance of the 1930’s. Under this bleak view of the profession the lawyer, once engaged, does his client’s bidding, lawful or not, ethical or not.<sup>63</sup>

Griffiths and Burger were opposites. Griffiths was a Yale law professor and self-styled “old-fashioned socialist of the [Eugene V.] Debs variety.”<sup>64</sup> Burger was a Midwestern conservative appointed to unravel the decisions of the Warren Court.<sup>65</sup> Yet they joined together in disparaging the idea of a lawyer as a “hired gun.” Both implied some wrongheaded segment of the American legal profession adopted this model of lawyer behavior.

The “lawyer as hired gun” metaphor rose as the ideal of the lawyer as independent of her client fell. This shift was in significant part due to a several-fold sorting within the legal profession that accelerated between 1970 and 1984. First, the attack on amoral lawyering by “movement” lawyers generated a reaction defending the “lawyer for hire.”<sup>66</sup> Second, private practice lawyers were increasingly sorted in the “two-hemisphere” model of law practice, serving either large organizations or individuals.<sup>67</sup> Relatedly, more lawyers served single clients as either government lawyers or in-house corporate

---

62. *Id.* at 369 n.42. My research confirms Griffiths’ research. The phrase “[h]ired gun,” as applied to lawyers, was used twice in 1969 in the *Harvard Law Record*, a student newspaper, but no law reviews. See Lawrence Gartner, *Novel Portrays Lawyer as a Hired Gunman*, HARV. L. REC., Mar. 13, 1969, at 13 (reviewing Albert Lebowitz, *THE MAN WHO WOULD’N’T SAY NO* (1969)); *Lawyers as ‘Hired Guns,’* HARV. L. REC., Nov. 14, 1969, at 8.

63. *In re Griffiths*, 413 U.S. 717, 732 (1973) (Burger, C.J., dissenting). The decision was released on June 25, 1973, in the midst of revelations about Watergate. Applicant Fre Le Poole Griffiths was then married to John Griffiths.

64. See LAURA KALMAN, *YALE LAW SCHOOL AND THE SIXTIES: REVOLT AND REVERBERATIONS* 253 (2005) (quoting Griffiths).

65. See VINCENT BLASI, *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN’T* (1983). On Burger, see *Burger; Warren Earl*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 122 (Kermit L. Hall ed., 2d ed., 2005); Kenneth F. Ripple, *Burger; Warren E.*, in *YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW* 83 (Roger K. Newman ed., 2009); John J. Patrick, *Burger; Warren Earl*, in *THE OXFORD COMPANION TO AMERICAN LAW* 74 (Kermit L. Hall ed., 2002).

66. Michael Ariens, *The Agony of Modern Legal Ethics, 1970-1985*, 5 ST. MARY’S J. ON LEGAL MALPRACTICE & ETHICS, 134, 161–71 (2014) (discussing movement lawyers, including William Kunstler, lawyers who supported the civil rights, student and anti-War movements of the 1960s and early 1970s).

67. HEINZ & LAUMANN, *supra* note 7, at 127.

counsel.<sup>68</sup> This sorting tied lawyers more closely to the narrower world of their clients, contrary to the idea that specialization provided the lawyer more power vis-à-vis clients. Third, the percentage of solo practitioners continued to decline.<sup>69</sup> Fourth, private practice lawyers within each hemisphere increasingly sorted themselves by particular practice area.<sup>70</sup>

#### A. CAUSES, THE OFFICER OF THE COURT, AND THE “LAWYER FOR HIRE”

By 1970, William Kunstler may have been the most (in)famous lawyer in the United States.<sup>71</sup> Kunstler embraced what was called radical lawyering,<sup>72</sup> which challenged the ideal of the independent lawyer, one who represented a client without embracing the client’s values. Kunstler’s work for the Black Panthers and other “rebels” and “revolutionaries”<sup>73</sup> in the late 1960s led to his widely-publicized defense of the Chicago Seven<sup>74</sup> at the end of the decade. Shortly after the verdict in the Chicago Seven trial, Kunstler was the subject of a very sympathetic profile in the Sunday *New York Times Magazine*, in which he declared, “I am not a lawyer for hire. I only defend those I love.”<sup>75</sup> The response of the legal establishment is exemplified in an *ABA Journal* editorial. It condemned Kunstler and praised the “lawyer for hire” ideal, the lawyer who “is available to the bad and the ugly, the scorned and the outcast.”<sup>76</sup> Lawyers serving “any person with a legitimate cause” improved “the profession’s service to society,”<sup>77</sup> and acting as “a ‘lawyer for hire’ is a badge of honor.”<sup>78</sup> This duty, to represent those on the margins of society, even those whose views were repugnant to the lawyer, served the profession’s highest ideals. Such action made

---

68. See THE 1971 LAWYER STATISTICAL REPORT 10–12 (1974) (noting drop in percentage of lawyers in private practice from 89.2 percent in 1948 to 72.7 percent in 1970 and concomitant rise in government and private industry lawyers).

69. See *id.* (recording decline in percentage of solos among all lawyers from 61.2 percent in 1948 to 36.6 percent in 1970).

70. See ABEL, AMERICAN LAWYERS, *supra* note 55, at 122 (noting increasing pace of legal specialization from the 1960s to the late 1970s).

71. See generally DAVID LANGUM, WILLIAM M. KUNSTLER: THE MOST HATED LAWYER IN AMERICA (1999). Kunstler was first profiled nationally in the July 25, 1969 issue of *Life* magazine, the cover article of which discussed the landing of American astronauts on the moon on July 20. See “*The Blackest White Man I Know*,” *LIFE*, July 25, 1969, at 50.

72. William M. Kunstler, *Open Resistance: In Defense of the Movement*, in LAW AGAINST THE PEOPLE: ESSAYS TO DEMYSTIFY LAW, ORDER AND THE COURTS 267 (Robert Lefcourt ed., 1971).

73. See WILLIAM M. KUNSTLER & SHEILA ISENBERG, MY LIFE AS A RADICAL LAWYER 165 (1994) (discussing work representing Black Panthers, “rebels” and “revolutionaries”).

74. See generally JOHN SCHULTZ, THE CHICAGO CONSPIRACY TRIAL (rev. ed., 1993); see also Michal R. Belknap, *Chicago Conspiracy Case*, in OXFORD COMPANION TO AMERICAN LAW 92 (Kermit L. Hall ed., 2002).

75. Victor Navasky, *Right On! With Lawyer William Kunstler*, N.Y. TIMES MAG., Apr. 19, 1970, at 31, 92.

76. See Richard Bentley *et al.*, *Editorial, A Lawyer for Hire*, 56 A.B.A. J. 552, 552 (1970). This approach was rejected by the anonymous Harvard Law student who wrote the editorial, *Lawyers as ‘Hired Guns,’ supra* note 62, at 8.

77. Bentley *et al.*, *supra* note 76, at 552.

78. *Id.*

claims to the rule of law more than lip service.<sup>79</sup> The “lawyer for hire” could and did represent Communists at the peak of the Cold War even as he found their political views repulsive.<sup>80</sup> Thus, the editorial labeled Kunstler’s approach “antiprofessional,”<sup>81</sup> contrary to a core tenet of the American legal profession.

The legal establishment concluded Kunstler’s view was antiprofessional because he acknowledged no distinction between lawyer and client. The lawyer’s independence from the client’s fees and values marked the detached, disinterested professional, one who could provide sage advice and advocacy in large part because she represented abstract legal principles, not just clients. Movement lawyers, those who used their legal training to aid participants in the civil rights, anti-Vietnam War, and student movements, dismissed this view.<sup>82</sup> Movement lawyers believed that a lawyer who took a client’s money and distanced himself from his client’s values was a not a professional, but a “prostitute.”<sup>83</sup> A movement lawyer distinguished oneself from lawyers representing establishment interests by fostering one’s ideals through legal practice. In this way, movement lawyers claimed to follow more faithfully than establishment lawyers those legal figures whom the establishment venerated: “I found those wonderful people like Cardozo and Holmes were few and far between. Instead, the lawyer was an economic prostitute doing anything his client wanted him to.”<sup>84</sup>

It was easy to see why movement lawyers concluded the “hired gun” was unprofessional. But those praising the “lawyer for hire” ideal did not praise the “hired gun.” The “hired gun” was disparaged because he failed to meet his obligations as an officer of the court. As Chief Justice Burger concluded in *Griffiths*, “[w]hatever the erosion of the officer-of-the-court role, the overwhelming proportion of the legal profession rejects . . . the denigrated role of the advocate and counselor that renders him a lackey to the client.”<sup>85</sup>

If both movement and establishment figures rejected the concept of the “hired gun,” how did it become commonplace?

---

79. See EDWARD BENNETT WILLIAMS, *ONE MAN’S FREEDOM* 6–7, 9 (1962) (discussing importance of rule of law).

80. See *id.* at 324 (“Soviet lawyers were generally astounded that I, as an American lawyer, could voluntarily stand beside a Soviet citizen as an advocate in an American courtroom and not be ruined socially, financially and professionally.”).

81. *Id.*

82. See generally WITH JUSTICE FOR SOME: AN INDICTMENT OF THE LAW BY YOUNG ADVOCATES (Bruce Wasserstein & Mark J. Green eds., 1970); RADICAL LAWYERS: THEIR ROLE IN THE MOVEMENT AND IN THE COURTS (Jonathan Black ed., 1971); LAW AGAINST THE PEOPLE: ESSAYS TO DEMYSTIFY LAW, ORDER AND THE COURTS 81 (Robert Lefcourt ed., 1971).

83. See Florynce Kennedy, *The Whorehouse Theory of Law*, in LAW AGAINST THE PEOPLE: ESSAYS TO DEMYSTIFY LAW, ORDER AND THE COURTS 81, 81 (Robert Lefcourt ed., 1971).

84. *Ghetto Law*, NEWSWEEK, Jan. 19, 1970, at 55.

85. *In re Griffiths*, 413 U.S. 717, 732 (1973).

## B. AFTER WATERGATE

A 1974 article in *New York* magazine attacked one of President Richard Nixon's lawyers by calling him a "hired gun."<sup>86</sup> By this time, the "hired gun" metaphor had begun to supplant an earlier metaphor disparaging a certain type of lawyer, the lawyer as "mouthpiece."<sup>87</sup> "Hired gun" remained an aspersion, but this was soon to change.

Elite lawyers concluded the Watergate affair was a "lawyers' scandal."<sup>88</sup> The initial response of establishment lawyers was a shared sense of shame.<sup>89</sup> A secondary response was to defend the legal profession by noting that other lawyers uncovered the scandal generated by lawyers.<sup>90</sup> Others rejected any link between Watergate lawyers and the legal profession.<sup>91</sup>

ABA leaders were particularly forceful in linking the Watergate scandal to unethical lawyer behavior.<sup>92</sup> Lawyers enmeshed in the Watergate scandal had behaved unethically by pursuing their client's interests to the exclusion of any public interest. ABA President William B. Spann, Jr., justified the ABA's creation of a new ethics committee in 1977 to assuage public concerns about the venal behavior of lawyers brought into sharp relief by the involvement of lawyers in Watergate.<sup>93</sup> His short essay suggested a role for lawyers that considered more clearly the lawyer's duty to society as well as to one's client.<sup>94</sup>

---

86. Richard Reeves, *The Trouble with Lawyers: The Case of James St. Clair*, N.Y., July 29, 1974, at 27 (calling Nixon's lawyer James St. Clair, "an attorney, an advocate, a hired gun . . . a frightening man, ethical without being moral, lawyer").

87. See Joseph B. Warner, *The Responsibilities of the Lawyer*, 19 A.B.A. ANN. REP. 319, 324 (1896) ("[N]ow, in fact, the lawyer, under present arrangements, is far from being merely an official intermediary, whose function is simply to expound principles of law, or to act as a mouthpiece for those who cannot speak for themselves."); Robert H. Jackson, *The Lawyer: Leader or Mouthpiece?*, 18 J. AM. JUD. SOC'Y 70 (1934-35).

88. See Richard B. Allen, et al., *Editorial, Watergate—A Lawyers' Scandal?*, 60 A.B.A. J. 1257 (1974) (quoting past ABA President Chesterfield Smith's observation); James D. Fellers, *President's Page*, 61 A.B.A. J. 529, 529 (1975) ("Early in its development, Watergate was characterized as a lawyer's scandal."); *N.O.B.C. Reports on Results of Watergate-Related Charges Against Twenty-nine Lawyers*, 62 A.B.A. J. 1337, 1337 (1976) (noting seven lawyers were disbarred, and another eleven were publicly disciplined, of twenty-nine involved in Watergate).

89. See Robert W. Meserve, *President's Page*, 59 A.B.A. J. 681, 681 (1973) ("It is a painful fact that many whose names have been brought into the scandal are lawyers."); Donald T. Weckstein, *Watergate and the Law Schools*, 12 SAN DIEGO L. REV. 261, 261 (1975) (noting after John Dean's testimony, "the national scandal which we call Watergate became a particularly embarrassing tragedy for the legal profession").

90. *The Profession Takes on Mr. Nixon*, 2 STUD. LAW. 17 (1973); Allen, *supra* note 88, at 1257.

91. Stuart E. Hertzberg, *Watergate: Has the Image of the Lawyer Been Diminished?*, 79 COM. L.J. 73, 73 (1974) ("These so-called White House 'lawyers' were not functioning as members of the bar or as officers of the court."). Still others rejected shaming the legal profession. Leroy Jeffers, *A Word of Pride*, 36 TEX. B. J. 763, 763 (1973) ("[Lawyers] must sharply reject the frequent glib and shallow assertion that Watergate tarnishes the Bar and brings it into disrepute.").

92. Allen, *supra* note 88; Fellers, *supra* note 88; Meserve, *supra* note 89; Tondel, *supra* note 47.

93. Spann, *supra* note 46, at 2-3.

94. See also L. Ray Patterson, *Wanted: A New Code of Professional Responsibility*, 63 A.B.A. J. 639, 639-40 (1977) (noting a lawyer is "more than an advocate serving the interests of a client").

Spann's approach dovetailed with that of Harvard Law School Professor Archibald Cox,<sup>95</sup> the Watergate prosecutor fired by President Richard Nixon in the notorious Saturday Night Massacre.<sup>96</sup> Cox spoke at the Annual Meeting of the ABA in August 1974, just days after Nixon's resignation.<sup>97</sup> In his talk he noted that because helping the client achieve her goals did "not *always* serve the general public or build confidence in the law," the legal profession needed to engage in a "more sustained and wider study of where the balance should be struck between the conflicting duties of 'hired gun' and 'servant of the law.'"<sup>98</sup> Cox lauded the improved skill of lawyers, but concluded that "one must agree that under modern circumstances loyalty is often more easily given to the client's interests than to the people's interests or the law."<sup>99</sup>

### C. KUTAK COMMISSION

When Spann created the Kutak Commission, the definition of proper lawyer behavior was contested: "Two models of professional behavior are presented to law students: the 'hired gun' and the 'social engineer.'"<sup>100</sup> One goal of the Kutak Commission was to tilt that balance away from the "hired gun" model.

The Kutak Commission's January 1980 *Discussion Draft* offered several provisions making the lawyer a public as well as a private agent. It included two sets of exceptions to the rule protecting client confidences, both of which attacked the "hired gun" model,<sup>101</sup> and a mandatory *pro bono* requirement.<sup>102</sup> It also avoided using the words "zeal" or "zealous" to signal the adversary system

---

95. On Cox, see Ken Gormley, ARCHIBALD COX: CONSCIENCE OF A NATION (1997); Ken Gormley, *Cox, Archibald*, in YALE BIOGRAPHICAL DICTIONARY, at 132.

96. See GORMLEY, ARCHIBALD COX, *supra* note 95, at 359–72.

97. Nixon resigned on August 9, 1974. The ABA's Annual Meeting began three days later. See *Informational Report of the Section of Individual Rights and Responsibilities*, 99 A.B.A. ANN. REP. 1053, 1054 (1974); Archibald Cox, *The Loss of Mystical Qualities Makes It Harder to Revere the Law*, 3 STUD. LAW. 8 (excerpting speech) [hereinafter Cox, *Mystical Qualities*].

98. Cox, *Mystical Qualities*, *supra* note 97, at 10.

99. *Id.*; see also Archibald Cox, *The Lawyer's Independent Calling*, 67 KY. L.J. 5, 12 (1978–79) ("Does he see himself as a 'hired gun' or as the follower of an independent public calling? Does he see himself as only a technician—a 'professional' he might say—who puts his knowledge of law and legal skills to whatever use his client dictates? Or does he see . . . himself as also serving larger interests?").

100. See Cramton, *Ordinary Religion*, *supra* note 6, at 251. Cramton noted that, because "law is an instrument for achieving social goals and nothing else," the lawyer's "primary task is that of the craftsman or skilled technician who can work out the means by which the client or the society can achieve its goals." *Id.* at 250. This emphasis on particular legal skills applied to both the "hired gun" and "social engineer" models. The lawyer as social engineer was coined by civil rights lawyer Charles Hamilton: "A lawyer's either a social engineer or a parasite on society." See GENNA RAE MCNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* 84 (1983). A more process-based definition is found in Roscoe Pound, *The Lawyer as a Social Engineer*, 3 J. PUB. L. 292, 292 (1954) ("By social engineer I mean, on the analogy of the industrial engineer, one whose calling it is to make a social process or activity achieve its purpose with a minimum of friction and waste.").

101. See MODEL RULES OF PROF'L CONDUCT R. 1.7(b) and (c) (Discussion Draft 1980).

102. MODEL RULES OF PROF'L CONDUCT R. 8.1 ("A lawyer shall render unpaid public interest legal service.").

did not allow lawyers to devote their entire interests to their clients.<sup>103</sup>

The result was a torrent of criticism, and a return to the drafting table. The Kutak Commission's May 1981 *Proposed Final Draft* abandoned these reform efforts. Both the call for mandatory *pro bono* and any extensive restrictions on protecting client confidences were withdrawn.<sup>104</sup> Robert Kutak also acknowledged "heated comments" criticizing perceived alterations to the adversary system.<sup>105</sup> The Kutak Commission defended itself by noting it attempted to balance the lawyer's duty as "a representative of the client but also an officer of the court."<sup>106</sup>

Critics argued that the proposed *Model Rules* weakened the lawyer's foundational duty of loyalty to the client. By the late 1970s, the "hired gun" metaphor expressed that jurisprudential ideal. It was no longer an aspersion. The well-known lawyer and legal lecturer Irving Younger justified the metaphor "because the question whether the client or the cause deserves a hearing is too profound for men to answer."<sup>107</sup>

Those who accepted the "hired gun" metaphor implicitly rejected both the "social engineer" and "officer of the court" models.<sup>108</sup> This accounted for the strong criticisms of the proposed Model Rules. As one interested observer wrote, "The prevailing notion among lawyers seems to be that the lawyer's duty of loyalty to the client is the first, the foremost, and, on occasion, the only duty of the lawyer."<sup>109</sup>

---

103. See AM. BAR ASS'N, COMMISSION ON EVALUATION OF PROFESSIONAL STANDARDS JOURNALS, ABA 19-20 (Research Triangle Park, N.C., Feb. 23-24, 1979) (on file with author) ("'Zealous,' it seems, has curiously come to mean 'overzealous.' Strong sentiment was found around the table for dropping 'zeal' altogether as a descriptive term with ethical consequences. It carries with it simply too much baggage.').

104. *Chairman's Introduction*, MODEL RULES OF PROF'L CONDUCT ii (Proposed Final Draft 1981).

105. *Id.* at ii-iii. The ABA Standing Committee on Legal Aid and Indigent Defendants criticized the Discussion Draft for this failure: "Taken as a whole, the Model Rules, and most particularly the provisions covering Confidential Communications . . . reflect a retreat from the traditional view of a lawyer's role as confidant and zealous representative of the client." See 3 COMPILATION OF COMMENTS ON THE MODEL RULES OF PROFESSIONAL CONDUCT § O-40 at 27 (Geoffrey C. Hazard, Jr., ed. 1980).

106. See *Chairman's Introduction*, *supra* note 104, at iii.

107. Irving Younger, *Professional Responsibility*, 43 BROOK. L. REV. 863, 865 n.12 (1977). Younger had become well known by this time for his audio/video lectures on evidence for the National Institute for Trial Advocacy. On Younger, see Stephen Gillers, *Younger, Irving*, in THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 609 (Roger K. Newman ed., 2009).

108. This debate continued throughout the 1980s, as some scholars promoted an ethics of virtue against the hired gun model. See Michael Ariens, *Lost and Found: David Hoffman and the History of American Legal Ethics*, 67 ARK. L. REV. 571, 617-23 (2014).

109. L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L.J. 909, 918 (1980). When he wrote this, Patterson was the Dean of the Emory University Law School and had served as the first Reporter to the Kutak Commission. See AM. BAR ASS'N, COMMISSION ON EVALUATION OF PROFESSIONAL STANDARDS JOURNALS I (Sept. 29-Oct. 1, 1977, Aspen, Colorado) (noting presence of members and Reporter) (on file with author).



### III. THE PRIVATIZATION OF THE AMERICAN LEGAL PROFESSION

“[A profession is] a group . . . pursuing a learned art as a common calling in the spirit of public service—no less a public service because it may incidentally be a means of livelihood.”<sup>110</sup>

In his 1973 book on large New York City law firms, author Paul Hoffman concluded that lawyers in large law firms in New York City might become “less a lackey and more of an ‘expert,’ more detached, more independent, someone paid by the client but responsible to the general public.”<sup>111</sup> A decade later, Hoffman returned with a sequel, which contained a different message. Lawyers existed to serve their corporate clients:

The Canons of Ethics may be filled with pious pronouncements about an attorney’s duty to his clients, to the court, to the law of the land, and to the concept of justice, but the legal powerhouses on Wall Street and in midtown Manhattan exist, not to chase the elusive butterflies of abstract ideals, but to make money.<sup>112</sup>

Hoffman’s re-assessment suggested lawyers in large law firms now viewed their work in a solely instrumental fashion. This change was not limited to those lawyers. Private practice lawyers in all practice strata and firm size emphasized the competent and remunerative practice of law on behalf of their clients.

During the 1970s and early 1980s, a significant number of lawyers struggled economically. The supply of lawyers increased by 53 percent between 1970 and 1980.<sup>113</sup> Although in some cases tort and personal injury damages verdicts increased substantially,<sup>114</sup> lawyer income fell. In constant 1983 dollars, median lawyer income was 23 percent less in 1979 than in 1969, and the economic premium lawyers earned compared with the median worker fell from 1.85 to 1.35 times.<sup>115</sup> The downward economic drift disproportionately fell on solo practitioners, most of whom were sorted into the individual client hemisphere.<sup>116</sup> For such lawyers, the precariousness of their private economic situation made it difficult to

---

110. ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953).

111. PAUL HOFFMAN, *LIONS IN THE STREET* 227 (1973).

112. PAUL HOFFMAN, *LIONS OF THE EIGHTIES* 38 (1982).

113. ABEL, *AMERICAN LAWYERS*, *supra* note 55, at 280 (noting increase of lawyers from 355,242 in 1970 to 542,205 in 1980).

114. *See* MICHAEL G. SHANLEY & MARK A. PETERSON, *COMPARATIVE JUSTICE: CIVIL JURY VERDICTS IN SAN FRANCISCO AND COOK COUNTIES, 1959–1980*, at 13 (1983).

115. Richard H. Sanders & E. Douglass Williams, *Why Are There So Many Lawyers? Perspectives on a Turbulent Market*, 14 *LAW & SOC. INQ.* 431, 448–49 (1989) (noting both drop from \$47,638 in 1969 to \$36,716 in 1979 in constant 1983 dollars and decline in lawyer economic premium). This led some lawyers to pad their bills. *See* John F. Grady, *Trial Lawyers, Litigators and Clients’ Costs*, 4 *LITIG.* 5, 58 (1978) (“There is no way of saying what needs to be said except to say it: much pretrial work is done primarily for the purpose of generating fees.”).

116. Sanders & Williams, *supra* note 115, at 450 tbl. 11.

pledge fidelity to the ideal that law was a public profession and they were social engineers or officers of the court. Further, these economic strains were largely invisible at the time. The 1970s were boom times for law schools, as enrollment in juris doctor programs rose from 64,416 in 1969–70 to 117,297 in 1979–80.<sup>117</sup> And this economic threat to lawyers in the individual client hemisphere was not effectively communicated in the profession's national magazine, the *ABA Journal*.

During the 1970s, the *ABA Journal* published an annual economic forecast.<sup>118</sup> These forecasts were often much more optimistic than warranted by later events.<sup>119</sup> One result of a sputtering economy in the 1970s was a shift in power to client from lawyer. As one senior lawyer noted in 1977, “[c]lients grow more difficult to handle from year to year, and many law firms with relatively few high-powered clients are in a weak economic position to struggle with them when ethical disagreements arise.”<sup>120</sup> Hard times enhanced the incentive for lawyers to weigh the needs of their clients more heavily than competing ethical constraints or notions of public interest.<sup>121</sup>

Two ideological developments within the profession also provided a way for private practice lawyers to prioritize client needs over competing ethical or “mission”-based concerns. First, corporate lawyers, on whom the highest honors and prestige were conferred by fellow lawyers,<sup>122</sup> offered individual hemisphere lawyers professional honor if they embraced legal specialization.<sup>123</sup> In 1962, elite lawyer Harrison Tweed<sup>124</sup> noted that too many lawyers found it “largely beneath their dignity” to “serve the public” by aiding individuals (and unions) in accident, tax, and other matters.<sup>125</sup> Lawyer specialization in such areas would benefit the

---

117. See A.B.A., *Statistics*, [http://www.americanbar.org/groups/legal\\_education/resources/statistics.html](http://www.americanbar.org/groups/legal_education/resources/statistics.html) [<https://perma.cc/J2QW-CG5Y>] (last visited Mar. 23, 2016).

118. See, e.g., Reuben E. Slesinger, *1970: More Prosperity*, 56 A.B.A. J. 257 (1970).

119. See, e.g., Reuben E. Slesinger, *1971: Back on the Track*, 57 A.B.A. J. 248 (1971); Reuben E. Slesinger, *1974: Another Prosperous Year but with Uncertainties*, 60 A.B.A. J. 109 (1974); Reuben E. Slesinger, *1979: A Good Year but with Confusing Signals*, 65 A.B.A. J. 129 (1979).

120. See Theodore Voorhees, *Retirement and You: A Retiree Becomes a Conference Chairman*, 63 A.B.A. J. 1310, 1310 (1977); John P. Heinz & Edward O. Laumann, *The Legal Profession: Client Interests, Professional Roles, and Social Hierarchies*, 77 MICH. L. REV. 1111, 1121–22 (1978) (noting median number of clients of public utilities lawyers was 3, and 2 for “political” lawyers).

121. This is one reason for the rising fear of “discovery abuse” in the last half of the 1970s. See *Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 79 (1976) (Pound Conference); JOSEPH L. EBERSOLE & BARLOW BURKE, *DISCOVERY PROBLEMS IN CIVIL CASES* (Fed. Judicial Ctr. ed., 1980).

122. See HEINZ & LAUMANN, *supra* note 7, at 58–73.

123. This is adapted from HEINZ & LAUMANN, *supra* note 7, at 55–91.

124. On Tweed, see Robert MacCrate, *Tweed, Harrison*, in *YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW* 555, 555 (Roger K. Newman ed., 2009); Roger K. Newman, *Harrison Tweed*, in *DICTIONARY OF AMERICAN BIOGRAPHY: SUPPLEMENT EIGHT 1966–70*, at 662 (John A. Garraty & Mark C. Carnes eds., 1988).

125. Harrison Tweed, *The Changing Practice of Law: The Question of Specialization*, 48 A.B.A. J. 423, 423 (1962).

public as well as the pocketbooks of such lawyers.<sup>126</sup> These legal specialists would then be accorded the same honor and respect earlier given the generalists.<sup>127</sup>

Tweed focused on the congruence of specialization and public service.<sup>128</sup> But later empirical work cast doubt on this perceived congruence. Law professor John P. Heinz and sociologist Edward O. Laumann engaged in a large-scale study of the Chicago bar in the 1970s.<sup>129</sup> As a part of this study, they asked legal scholars to rate the public service contributions of lawyers in different fields of law. Legal scholars gave high-prestige lawyers, found almost exclusively in fields of corporate law, the lowest scores related to public service. Low-prestige lawyers, such as divorce lawyers, received some of the highest scores on public service from legal scholars.<sup>130</sup> Scholars also gave high-prestige lawyers the lowest scores on independence from client constraints.<sup>131</sup> Specialization in high-prestige fields of law practice was negatively associated with both public service and independence.

Second, in early 1965, the ABA, led by elite lawyers, including future Supreme Court Justice Lewis Powell,<sup>132</sup> reversed course and embraced the federal government's creation of a Legal Services Program (LSP).<sup>133</sup> By 1966, the LSP had distributed "[m]ore than 27.8 million dollars," "more than five times" the amount spent on legal aid in 1964.<sup>134</sup> The LSP budget tripled from \$20 million in 1966 to \$61 million in 1972.<sup>135</sup> Public defender offices more than doubled in a four-year span<sup>136</sup> after *Gideon v. Wainwright*,<sup>137</sup> and nearly doubled again by 1973.<sup>138</sup> Finally, by the mid-1970s, more than ninety liberal public interest law

---

126. *Id.* at 424 (noting partners earn significantly more than individual lawyers).

127. *Id.*

128. ABA President Chesterfield Smith made the same argument a decade later. See Chesterfield Smith, *1973-74: Activity on Many Fronts for the Association*, 60 A.B.A. J. 1041, 1043 (1974).

129. HEINZ & LAUMANN, *supra* note 7.

130. *Id.* at 68-71.

131. *Id.* at 72.

132. STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 32-34 (2008).

133. *Proceedings of the 1965 Midyear Meeting of the House of Delegates Proceedings*, 90 A.B.A. ANN. REP. 95, 110-11 (1965); see also EARL JOHNSON, JR., *JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE AMERICAN LEGAL SERVICES PROGRAM* 49-64 (1978) [hereinafter JOHNSON, *JUSTICE AND REFORM*].

134. See *Report of the Standing Committee on Legal Aid and Indigent Defendants*, 91 ANN. REP. A.B.A. 523, 524 (1966).

135. See JOHNSON, *JUSTICE AND REFORM*, *supra* note 133, at 369 n.234 (listing LSP budgets for fiscal years 1966 through 1972).

136. See *Report of the Standing Committee on Legal Aid and Indigent Defendants*, 93 A.B.A. ANN. REP. 197, 199 (1968) ("During the last three years the growth of defender organizations has matched the phenomenal rise of civil legal aid. In April, 1964, there were only 136 defender organizations. Now there are 299. Funds spent on such organizations rose from \$4,900,000 to over \$12,000,000.").

137. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

138. LISA J. MCINTYRE, *THE PUBLIC DEFENDER: THE PRACTICE OF LAW IN THE SHADOWS OF REPUTE* 29 (1987) (noting total of 573 public defender organizations by 1973).

firms existed,<sup>139</sup> and the support structure for the rights revolution was entrenched.<sup>140</sup>

These events lessened the persuasiveness of public mission claims on the conscience of private practice lawyers. This was particularly the case for those serving the individual client hemisphere. Specialization was sold as essential to the public mission of lawyers, especially those serving individuals, but prestige was found in heightened competence rather than public service.<sup>141</sup> Further, the sorting of “public interest” work as undertaken by distinctive subsets of the lawyer population helped reframe the mission of private practice lawyers serving the individual hemisphere. Those lawyers collapsed the idea of public mission and private practice. The legal specialist serving the legal needs of individuals served a public mission by competently representing the paying client. The public mission was to achieve the client’s goals.

For both economic and ideological reasons, private practice lawyers turned to a “market” model of lawyer-client relations over the traditional “social trustee” or “public interest” model of professionalism.<sup>142</sup> Sorting was a rational and client-focused approach that fit the market model. The legal specialist met the new standards of professional behavior in ordinary private practice. Certification of legal specialists did not accelerate the commercialization of law practice. It merely demonstrated the opportunity, as sorting became commonplace, to capitalize on the phenomenon.

## CONCLUSION

“The King is dead, long live the King.”

Bar efforts to certify and regulate legal specialists have been moribund for over two decades.<sup>143</sup> The only state to create a certification plan for legal specialists in

---

139. ANN SOUTHWORTH, *LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION* 12 (2008); cf. BURTON A. WEISBROD, ET AL., *PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS* 50–51 (1978) (concluding that eighty-six public interest law firms existed by the end of 1975).

140. See CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* 67 (1998). Conservative public interest law firms were created soon thereafter as a counterweight. See also TELES, *supra* note 132, at 61.

141. See Cox, *Mystical Qualities*, *supra* note 97, at 10 (noting increased technical competence in past 40 years); Steil, *Wake Up!*, *supra* note 54, at 25 (linking increased competence to specialization); HEINZ & LAUMANN, *supra* note 7, at 131 (noting lawyers in 1975 describe themselves as specialists because it “connotes expertise and special skill”).

142. See *TIPS Notes*, 14 BRIEF 2, 2 (1984–85) (reporting speech by Roger Cramton and explaining his development of two models of the role of the lawyer, the “public interest” model in which lawyers “mediate among contending interest groups and thus . . . bind society together” and a market model, in which the lawyer acts as a “hired gun” and does what the client wants). The fall of “social trustee professionalism” in the 1960s and 1970s is developed in STEVEN BRINT, *IN AN AGE OF EXPERTS: THE CHANGING ROLE OF PROFESSIONALS IN POLITICS AND PUBLIC LIFE* 36–42 (1994).

143. Compare *State Status Report on Lawyer Specialty Certification* (November/December 1992), 7 COM. L. BULL. 13 (1992) with *Louisiana*, A.B.A., [http://www.americanbar.org/groups/professional\\_responsibility/](http://www.americanbar.org/groups/professional_responsibility/)

the past twenty years is Nevada.<sup>144</sup> In Texas, which created its Board of Legal Specialization in 1974, the number of annually certified specialists peaked in 1990 at 393.<sup>145</sup> Only 211 were certified in 2014,<sup>146</sup> even as the number of Texas lawyers nearly doubled.<sup>147</sup>

The ABA's Standing Committee on Specialization remains in existence, with little to do. When the Supreme Court held that a lawyer's truthful and non-misleading speech that he was certified as a specialist by an unofficial entity was constitutionally protected,<sup>148</sup> the commercial need for lawyers to communicate official signals of expertise vanished.

In the midst of the Great Recession, the Standing Committee's then-chair urged that lawyers should obtain a specialist certification.<sup>149</sup> The two reasons to do so, he argued, were "professional pride . . . and in some cases, being able to command higher fees."<sup>150</sup> His essay made no apparent impact. It may have failed to persuade lawyers because, while honor is conferred by others, pride is internal. It also may have failed because no evidence exists that certification is a springboard to "higher fees." And absent from his essay was any appeal to obtaining certification to find professional meaning.<sup>151</sup>

---

committees\_commissions/specialization/resources/resources\_for\_lawyers/find\_a\_certification\_program/louisiana.html (last updated November 11, 2015) [<https://perma.cc/GV82-VYLS>]. Tennessee is the only state to make a significant change in its regulatory system. It abandoned certification by the Tennessee Commission on Continuing Legal Education and Specialization in favor of acknowledging specialists certified by any ABA-approved organization. See *In re Petition for Adoption of Amended Tennessee Supreme Court Rule 21*, December 16, 2014 (on file with author).

144. See *Attorney Specialization*, State Bar of Nevada, <http://www.nvbar.org/node/86> [<https://perma.cc/4GJS-MKZ3>] (last visited Mar. 23, 2015) (creating plan in 2003).

145. This data is taken from a spreadsheet created by my research assistant, Dorian Ojemen, based on data from the Texas Board of Legal Specialization (on file with author). For more information about the Texas Board of Legal Specialization see generally *About TBLS*, TBLS, <http://www.tbls.org/About.aspx> [<https://perma.cc/JV28-P6LY>] (last visited May 17, 2016).

146. See *id.* The number of new specialists reached a low of 145 in 2007, when Texas recognized 81,601 licensed lawyers.

147. The number of Texas lawyers increased from 54,783 in 1990 to 96,912 in 2014. See Email from Cory Squires, Department of Research and Analysis of the State Bar of Texas, to Michael Ariens, Professor of Law, St. Mary's School of Law (Oct. 8, 2015) (email attachment listing number of Texas lawyers from 1939–2014) (on file with author).

148. *Peel v. Attorney Registration and Disciplinary Commission*, 496 U.S. 91, 110–11 (1990).

149. Timothy Bouch, *Lawyer Specialty Certification: Competency and Marketing*, B. LEADER, July–Aug. 2010, at 13.

150. *Id.*

151. The most recent quest for professional meaning has been ongoing since Chief Justice Burger's 1984 speech to the ABA, in which he asked, "Should lawyers not be healers? Healers, not warriors? Healers, not procurers? Healers, not hired guns?" Warren E. Burger, *The State of Justice*, A.B.A. J., at 62, 66 (Apr. 1984).

The multi-decade growth of large law firm profits per partner indicates the economic value of lawyer specialization.<sup>152</sup> It also indicates how a lofty goal of better client service for more persons has been transmuted. Instead of public service, specialization has maximized private interest.

Legal specialization certification is dead. Long live legal specialization.

---

152. See STEVEN J. HARPER, *THE LAWYER BUBBLE: A PROFESSION IN CRISIS* 100 (2013) (noting “the top 1% of attorneys doubled their share of America’s income—from 0.61 to 1.22%—between 1979 and 2005”).