**"The Next Century of Lawyer Ethics: Does the Present System Make Any Sense?" ©**

**By**

**Thomas M. Fitzpatrick**
**tom@tal-fitzlaw.com**

Thomas M. Fitzpatrick is a graduate of the University of Montana (1973) and the University of Chicago Law School (1976). He is a former partner in the firm of Karr, Tuttle, Campbell (1978-1989) and Stafford Frey Cooper (1989-1999); managing partner (1991-1994). From 1999 through 2004, he served as Assistant Chief of the Snohomish County Prosecuting Attorney's Office, Civil Division, heading the Litigation and Employment unit. He was named a "Super Lawyer" by the publication Washington Law and Politics in 2004. In 2005, the elected Snohomish County Executive, selected him as Executive Director of Snohomish County with oversight responsibility for planning and development, economic development, environmental policy, the airport, risk management, and several other county offices. In 2006, he returned to private practice, joining former Washington Supreme Court Justice Phil Talmadge with whom he previously practiced, at the Talmadge/Fitzpatrick firm. His practice has an emphasis in professional responsibility, municipal law, land use, water and the environment, and litigation. Mr. Fitzpatrick has extensive bar association experience including service on the Board of Governors of the American Bar Association (1998-2001) and the ABA House of Delegates (1989-present). Mr. Fitzpatrick served two terms on the ABA Standing Committee on Professional Discipline, and one term as a member of the ABA Standing Committee on Ethics (2001-2004). He served on the committee which wrote the Model Rules of Judicial Discipline, and the Joint Commission which rewrote the Model Code of Judicial Conduct adopted by the ABA in 2007. He currently serves on the ABA Lawyer Professional Liability Committee.

**A Century of Lawyer Ethics**
**Seattle: August 27, 1908**

The owner of a fishing boat in Ballard goes to see his lawyer who practices in a couple of rooms over the bank at Dock Street and Ballard Avenue. He wants his lawyer to help him with the legal documents about the financing he needs to be a commercial fisherman. His lawyer is pretty typical of lawyers generally, practicing as a solo or in a very small firm, and handling general business and personal matters.

Down at the office space above King Street Station, the six lawyers in the Seattle office of the legal department of the Northern Pacific Railroad meet early in the morning to discuss the personal injury suits against the railroad and some property acquisitions. These lawyers are fairly unique, practicing in a larger group and handling more sophisticated transactions. All the male lawyers, there are no women lawyers, are dressed in their best suits because the NP's General Counsel from "back east" is in town and will be at the morning meeting.

After the morning meeting where the general counsel meets the "boys" in Seattle, he goes back to the meeting of the American Bar Association (the "ABA") that is meeting in Seattle for a change. For most of its history, the ABA met at Saratoga Springs, New York, where the "elite lawyers" who belong to the ABA dine, drink, gamble, and partake in the various spas. The ABA was selective in choosing its members in those days. Less than 3% of lawyers belonged, with a representative of each state being the governing board.[1]

The Seattle meeting was significant, however, not only because it was on the West Coast. At the meeting, the ABA adopted the Canons of Ethics, the first ethical code for the legal profession that would purport to be authoritative and national in scope. The Canons were not the first code of legal ethics. By 1907, eleven states had come up with some sort of ethical code.[2] Although a national ethics code was finally drafted, it would be decades before any systematic system of discipline for violating ethical standards would come into existence. But the start made by the ABA on August 27, 1908, profoundly shaped the practice of law and the role of lawyers in American society.

**Seattle and Snohomish County: August 27, 2008**

In downtown Everett, an inmate at the Snohomish County Jail meets with a public defender who is there for the arraignment calendar in the jail. The criminal defendant is being prosecuted by a deputy from the Snohomish County Prosecuting Attorney's Office, the County's largest law firm with over eighty lawyers handling criminal, civil, and family support matters.

In downtown Everett, a developer meets with a land use lawyer at one of Snohomish County's other large law firms concerning whether there is a basis now under the Growth Management Act to seek the expansion of the City of Snohomish's UGA so the development can proceed. The developer also wants to know what type of development regulations will need to be satisfied and what impact fees paid if the development proceeds.

In Lynnwood a couple meets with a small group of professionals, including a lawyer, to discuss a "collaborative" approach to divorce and ending the couple's marriage of seventeen years.

A lawyer in Monroe is filling out all the paperwork required to obtain a dissolution for a client, and explains to the client that because of the animosity between the parties, the client should expect a highly contentious divorce even though the couple has few assets.

In downtown Seattle, senior executives from Microsoft are meeting with an array of attorneys from K & L Gates to discuss antitrust exposure in the European Union and various Asian countries for new Microsoft products. The meeting involves lawyers from the firm's offices around the world who participate by videoconference.

In another high rise office building in downtown Seattle, members of a fifty plus lawyer firm are taking depositions in a class action lawsuit over asbestos insulation in homes. As a federal court class action, the lawyers will probably be paid out of any class recovery. It is unclear if the amount to be recovered will be significant to any members of the class or not.

Around the Seattle area, many lawyers are trying to catch up after being out of their offices to attend the 2008 ABA Annual Meeting in New York City. At the Annual Meeting, the ABA Center for Professional Responsibility co-sponsored a symposium celebrating a century of lawyer ethics since the adoption of the Canons in Seattle in 1908.

## The Regulatory Framework for the Legal Profession

What flowed from the adoption of the Canons in 1908 was the beginning of a regulatory framework for the legal profession. Prior to that time, lawyers were "regulated" basically by informal means. The bar was small and the lawyers all knew one another. As a result, informal compliance by group pressure served as the regulatory approach for the bar. James Willard Hurst, an historian of the legal profession explains: "[U]nder these conditions there grew a substantial corporate sense of the local bar …There was not only professional fellowship, but also a sense of what was done what was not done. If there was little formal discipline, there was nonetheless pressure to conform to group standards."[3]

However, by the turn of the Twentieth Century, the bar had begun to grow and diversify. Although this was not true for women and minorities, at least more male lawyers were coming from different backgrounds than their professional predecessors. More practitioners worked in cities where informal controls did not work that well.[4]

As the Progressive Era began to take shape, reform minded leaders began to advocate that there should be a comprehensive set of ethical principles to guide lawyers, and bar associations, that really did not come into their own until the second half of the nineteenth century, should enforce these codes. Thus, the concept that ethical norms had to be developed by the profession itself was born. This is generally known as internal regulation, as distinct from external regulation which emanates outside the profession or is conducted by others.

Cynics might suggest that by coming up with such a model, the legal profession basically institutionalized professional self-regulation at the expense of external regulation that would have been more demanding of the profession. As Mr. Schneyer notes, at the time of the adoption of the Canons, there was effectively no external regulation of the legal profession, unless a lawyer was criminally convicted. The regulatory effort was really to fill a vacuum.[5]

What has emerged from this century old process of internal regulation is a system of legal professional self-regulation, certainly in the perception of the public, with regulatory power over the legal profession exercised by the judicial branch of state government. The amount of bar involvement varies depending on the jurisdiction. In a majority of jurisdictions, the admission and disciplinary function is vested in a mandatory bar association known as a unified bar. In other jurisdictions, these functions are conducted by a separate agency that reports to the highest court. But no matter what the jurisdiction, there is no doubt that in every jurisdiction lawyers are actively involved in articulating to the highest court what the ethical standards should be. Lawyers participate throughout the discipline system as prosecutors or adjudicators, as well as being respondents or their counsel. Thus the internal regulation of the legal profession is largely self-regulation.[6]

In addition to this internal regulation, a growing framework of external regulation, commented upon in more detail below, does exist. This includes in Washington lawyers being subject to the Consumer Protection Act for the "entrepreneurial" aspects of law practice. *Short v. Demopolis*, 103 Wn.2d 398, 804 P.2d 621 (1991).

However, the hallmark of professional regulation for the legal profession remains a unitary ethics code and an enforcement system staffed by lawyers, usually with organized bar involvement, reporting to the highest court of a state, the members of which are generally subject to public election. As we look forward to the next century of legal ethics, a legitimate question is whether this approach is appropriate for the future. In other words, does the present system make sense?

## The RPCs Are Premised on a Fallacy

Above in this paper, there are a series of vignettes about lawyers and clients in Seattle and Snohomish County in 2008. The lawyers in those vignettes, and their clients, do not have much in common, although each vignette depicts a client-lawyer relationship.

Every client-lawyer relationship involves some core principles. The two basic ones are the duties of confidentiality and loyalty. A client will not be candid with a lawyer if the client believes what she tells the lawyer will be used against her. Nor will the client be candid if the client believes the lawyer is looking out for someone else other than the client, such as another client, a former client, a third party, or the lawyer's personal interest. Accordingly, the RPCs institutionalize these core principles necessary for the legal profession to function in the confidentiality (RPC 1.6) and conflict of interest provisions of the Rules (RPCs 1.7, 1.8, 1.9). Obviously for the legal system to function appropriately, lawyers cannot be engaged in criminal or fraudulent activities. Fees also have to have some correlation to work and value. No one

would seriously dispute that these types of obligations can be expected and required of all lawyers.

The problem with the RPCs is, however, that the Rules do not differentiate between the types of client-lawyer relationships, and only sparingly deal with various roles the modern day lawyer plays. For instance, RPC 2.1 deals with the lawyer as an advisor, RPC 2.3 as an evaluator, RPCs 1.12 and 2.4 as a third-party neutral, and RPC 3.8 as a criminal prosecutor.

The overall approach of the RPCs is to make few distinctions among lawyer roles and basically no distinctions among client situations. This results in what the former chair of the ABA Ethics Committee Steven Krane describes as "the fallacy of the monolithic client-lawyer relationship."[7] Basically the RPCs are structured on a fundamental belief that every client-lawyer relationship can be addressed by the unitary statements of ethical principles contained in the RPCs. As Mr. Krane notes, this "one size fits all" approach to legal regulation, is a fallacy and cannot continue to be a basis for regulation in the future.

If the ethical framework must be more nuanced to reflect the reality of modern legal practice, what are the significant factors to be considered? Essentially there are two: the type of client and the role the lawyer in the representation. Whether the client is sophisticated, unsophisticated, or somewhere in-between should be considered.[8] The importance of differentiating among the sophistication level of clients should not be limited to just disciplinary considerations. Courts in reviewing whether attorney fees should be reduced or disgorged for "unethical activity," should look at the sophistication of the client as a factor to be considered. *See Cotton v. Kronenberg,* 111 Wn. App. 258, 44 P.3d 878 (2003) and cases cited in it for the proposition that fee agreements that violate the RPCs are unenforceable or that the court can reduce and change the fee. Does it make sense to cut the attorney fees due because of some provision in a fee agreement that was truly and fairly negotiated with a sophisticated client who knew exactly what she was doing. The time has come to move beyond simply labeling conduct based upon a unitary code, always presuming the client gets the benefit of the doubt in every situation, and to begin to look at the reality that not all clients are the same.

The second factor, the role of the lawyer in the representation, must also be considered. Mr. Krane divides the role of lawyers into five general categories based upon the level of "aggressiveness." The categories are: (1) adversarial advocacy; (2) negotiation; (3) counseling and evaluation; (4) mediation and non-adversarial dispute resolution; and (5) collaborative process.[9] These general categories reflect the various roles lawyers play and demonstrate why ethical duties should be more nuanced based upon the role of the lawyer. For instance, disclosure of client information clearly should be more permissible in the collaborative role than in the adversarial role. Mr. Krane then constructs a "hub-and-spoke" approach as to how ethical regulation should be constructed.[10] It is premature to decide whether that approach or another is the best way to proceed. At this point, we need to discuss what is the best way to regulate the legal profession. Regardless of where you come out in that debate, we should all be able to agree that if we are going to have an ethical code that requires adherence on the pain of professional discipline, then that code should make sense. A unitary approach that does not attempt to look at the nature of clients and the permutations of legal practice no longer makes sense. Steven Krane summarizes it best: "It is time for us to take the first step: rejection of the fallacy of the

monolithic client-lawyer relationship. Once are minds are free of this self-imposed restraint, there is not limit to what we can achieve."[11]

**Washington Needs to Recognize the Realities of Specialization and Technology**

The shortcomings of a unitary approach to its ethics code is best exemplified in Washington in regard to its approach to specialization. The legal profession becomes more specialized every day. As a result, various specialties such as bankruptcy or immigration practice are moving toward specialized codes covering the conduct of practitioners in that area. Increasingly clients seek recognized specialists to handle specific legal needs. Yet the Washington RPCs prohibit a practitioner from stating or even implying that the practitioner is a specialist or expert in any field of law, except as to some narrow exceptions. RPC 7.4. However, specialization is recognized as basis for a competency standard under the Rules. See comment 1 to RPC 1.1. If lawyers cannot honestly provide information to the public about how the profession is organized, and their qualifications under pain of disciplinary enforcement, lawyers are left to wonder if the ethics rules about communicating information about legal services have any basis in reality.

The Rules containing the prohibitions about communications concerning legal services are contained in RPCs 7.2 through 7.5. They utterly fail to recognize the realities of modern communications. We can all agree to the basic standard that the communications should not be false as codified in RPC 7.1. However, the Rules were designed for in person, snail mail, or telephone contact between lawyers and potential clients of decades ago. In an era of social networking sites, internet information recognizing no boundaries, and text messaging, do the ethics rules of decades ago even make any sense? As the rules become more divorced from reality, an ever more skeptical bar begins to question the importance of adherence to them.

**The Growth of External Regulation**

While the ethical standards of internal regulation come into question, external forces of regulation of the profession grow each year. Civil litigation asserting professional liability continues to grow. Malpractice liability is external regulation imposed by courts and juries. As a result of increasing liability pressures, carriers impose more stringent regulation on their insureds under the rubric of risk management to avoid claims.

Specialty groups and bar associations have begun to draft guidelines for their practitioners, some provisions of which may supplement or even conflict with the RPCs. *See*, for example, *The Bounds of Advocacy* from the American Academy of Matrimonial Lawyers.[12]

The move toward more external regulation of the legal profession is most pronounced in other English based legal systems. Both Australia and Canada have seen greater scrutiny of the profession from outside groups. Nowhere has moved as far as England and Wales, however. The English bar now has an ombudsman to oversee the handling of legal complaints by the respective professional bodies.[13] The 2007 Legal Services Act established the Office of Legal Complaints, that is a single independent body to investigate all consumer complaints against

legal service providers. If they choose to do so, grievants can now proceed directly to the ombudsman, avoiding the Law Society and Bar Council all together.

The UK is presently in the process of dismantling prohibitions against outside investment in entities that provide legal services, following Australia's example. Such prohibitions remain a hallmark of American ethical regulation. The *Economist* reports the English Legal Services Board is to have everything in place by 2011 to allow non-lawyers to invest in and own law firms. Australia already has a law firm publically listed and trading on the stock market, Slater & Gordon. *Economist,* "Legal Advice," August 23, 2008, p. 55.

Meanwhile legal services become more intertwined in international trade negotiations. One commentator terms this treatment of legal services as a "new paradigm" that eventually will lead to the restructuring of the profession as an outgrowth of federalization and globalization.[15]

**Does Self-Regulation Really Benefit Anyone?**

Throughout the past century, the bar has emphasized that self-regulation creates an independent bar that serves as firewall to protect judicial independence. However, there is little empirical evidence to support such a broad contention. Certainly the trend toward greater external regulation suggests that other societies have not felt that judicial independence requires the extent of self-regulation given to the legal profession in the United States.

Throughout the past century, at times the bar has found that the discipline system provided little protection to the public and has not engendered public confidence. In 1970 the ABA's "Clark Report" found the state of exiting discipline systems "scandalous" and "practically nonexistent in many jurisdictions."[16] Almost twenty years later the ABA's McKay Commission found that many improvements had been made, but that the system was "fractionalized," and that many jurisdictions needed to increase funding, improve protection of consumer interests, and institute other programs ranging from law practice management assistance to substance abuse counseling.[17]

Washington adopted many of these recommendations. Compared to most disciplinary agencies in the United States, the WSBA provides more programs and resources than most. However, a legitimate question is whether the system of self-regulation of the bar, that creates a legal monopoly, benefits consumers. With each year the bar chronicling the vast amount of unmet legal needs, in the long run can we sustain a legal monopoly that prevents those needs from being met? Can we continue to require adherence to an ethical framework that does not match the reality of the legal marketplace for many lawyers?

More importantly, the bar in Washington should become more impatient with the administration of the lawyer discipline system by the WSBA and the seeming indifference to how the system affects lawyers by the Washington Supreme Court. Why does the WSBA take months resolving complaints, even frivolous ones? Why is the WSBA indifferent to the costs lawyer bear for having unresolved bar complaints, such as malpractice premium increases or coverage availability? Why does the WSBA refuse to adopt a procedure to deal with serial vexatious grievants? See Supreme Court Docket No. 81456-2. Why does the Office of

Disciplinary Counsel believe it is entitled to a double standard? Why if a serial frivolous grievant goes after bar counsel are they entitled to relief, but you are not? Compare Supreme Court Docket No. 81456-2 with Docket Nos. 811434-1 and 79626-2. Why do the ELCs provide for grievant rights, but do not provide for respondent rights? Why is the elected leadership of the WSBA so indifferent to what is happening to its members?

## Conclusion

The structure of the legal marketplace is changing. The regulatory structure and ethical code for lawyers no longer serve vast components of the profession or the public. Particularly troubling is the functioning of the WSBA disciplinary process. The time has come for Washington lawyers to begin to demand accountability from their bar leaders and candidates for judicial office and the general public. The time has come to rethink the future of regulation of the legal profession.

1. Ted Schneyer, "How Things Have Changed: Contrasting the Regulatory Environments of the Canons and the Model Rules, p. 14.

   www://abanet.org/cpr/centennial

   All the cited papers can be found on the ABA website, will be addressed above and published in a special edition of Professional Lawyer.

2. *Id.* at 9.

3. James Willard Hurst, The Growth of American Law: The Law Makers 28th (1950), quoted *id.* at 7.

4. *Id.*

5. *Id.* at 9.

6. Judith Maute, "Bar Associations, Self-Regulation, and Consumer Protection: Whither Thou Goest?" p. 5.

7. Steven C. Krane, "The Fallacy of The Monolithic Client-Lawyer Relationship: Leaving 1908 and Procustean Regulation Behind," p. 3.

8. *Id.* at 9-10.

9. *Id.* at 10.

10. *Id.* at 11-14.

11. *Id.* at 15.

12. Cited in Schneyer, supra at 29.

13. Maute, supra at 20.

14. *Id.* at 27.

15. Laurel S. Terry, "The Future of the Legal Profession: The Impact of Treating the Legal Profession or "Service Providers."

16. ABA Special Committee on Evaluation of Disciplinary Enforcement (Tom C. Clark, Chairman), Problems and Recommendations in Disciplinary Enforcement (Final Draft, June 1970) at 7, cited in Maute, supra at 7.