

## TOWARD A COMMUNITY OF PROFESSIONALISM

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### I. INTRODUCTION

Many judges and lawyers in the United States believe there has been a serious decline of professionalism in the conduct of litigation. And the professionalism they have in mind does not reflect academic debates on that subject, but rather the everyday concerns and frustrations of judges and practitioners. There are constant complaints that lawyer advocates engage in too much posturing and invective, too little cooperation and courtesy, too many unnecessary proceedings, and too much exaggeration or outright misstatement of fact and law.

To conduct litigation “professionally” in this sense means to abide by the rules and ideals of the adversarial system, some of which are identified later in this article. The best analogy, therefore, is the concept of sportsmanship. Like professionalism in competitive advocacy, sportsmanship demands not merely compliance with official rules but also adherence to ideals about grace in athletic competition—even when it involves violent physical clashes. Rules and ideals about the conduct of warfare also come to mind as an analogy to professionalism in this sense, but the analogy is too belligerent for present purposes.

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Nor is “civility” an adequate synonym, in the familiar usage equating civility “with decorum, with temperateness of speech, with politeness and a high-minded determination not to descend from principles to personalities.”<sup>1</sup> While civility of that kind is a critical element of the professionalism that judges and lawyers find lacking, the two terms are not interchangeable. Most significantly, the concept of professionalism includes rules and ideals about the content of advocacy, not merely its manner. Thus, for example, no matter how gracious advocates may be in their speech or writing, they would still violate the dictates of professionalism by misstating or failing to disclose important precedents.

It is extremely difficult, of course, to measure the actual level of professionalism in advocacy today, let alone compare it to some earlier time. Nevertheless, there is undeniable evidence of a widespread *perception* of decline in this kind of professionalism. The American Bar Association’s Center for Professional Responsibility keeps a tally of professionalism and civility codes in American jurisdictions.<sup>2</sup> As of this writing there were no fewer than 136 of such codes on the ABA’s web site.<sup>3</sup> Even more remarkably, the overwhelming majority of those codes were adopted in the last ten years.<sup>4</sup> The numbers and timing evidence an acute national concern about this kind of professionalism.

Unfortunately, the ABA’s web site fails to report whether these new codes are making a difference. Experience suggests not. If anything, they appear more effective at generating sanctions litigation than raising professionalism.<sup>5</sup> Nevertheless,

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1. Anthony T. Kronman, *Civility*, 26 *Cumb. L. Rev.* 727, 727 (1996) (featured remarks in the Ray Rushton Distinguished Lecturer Series). Dean Kronman’s subject, however, was civility in the sense of citizens’ involvement in public affairs. *Id.*

2. American Bar Assn., *Center for Professional Responsibility, Professionalism Codes* <<http://www.abanet.org/cpr/profcodes.html>> (last updated June 2001).

3. *See id.*

4. *See id.*

5. *See e.g. Klein ex rel. Klein v. Seenauth*, 687 N.Y.S.2d 889, 896 (Civ. Ct. City of N.Y. Queens County 1999)(although civility codes are “not intended as rules to be enforced by sanction or disciplinary action, “ court “nevertheless” found standard discouraging lawyers from misleading other litigants to be “applicable”); *Thomson v. Thomson*, 1994 WL 597221 at \*5 (Conn. Super. Ct. Oct. 25, 1994) (in granting defense counsel’s motion for sanctions for plaintiff’s failure to answer deposition question, court noted plaintiff’s claim that defense counsel engaged in “dramatics and hysteria,” referring

codes and sanctions have been the main response of our legal system to this serious problem.

This article proposes a new strategy. While its inspiration is the English barrister tradition, consider first a prominent American sociologist. Amitai Etzioni began a recent book by citing a code of sexual civility adopted by Antioch College in 1992.<sup>6</sup> The code represented “a lengthy, detailed, written list of instructions that students, faculty, and staff [were] expected to follow when they proposition[ed] each other.”<sup>7</sup> But Etzioni wrote that the main value of this “near-desperate attempt to restore rules of conduct”<sup>8</sup> was not its likelihood of success, which he regarded as slight despite the threat of sanctions up to expulsion.<sup>9</sup> Rather, he saw the code as evidence of a social problem more profound than sexual misconduct—the lack of such basic shared values as mutual respect. As Etzioni put it, the promulgation of the Antioch code “point[ed] to the need for an approach to the regeneration of moral values and commitments that is markedly different from enforced codes.”<sup>10</sup>

Etzioni’s prescription is to strengthen people’s identification with a community (defined as “a web of affect-laden relationships”<sup>11</sup>) that shares and reinforces the desired values.<sup>12</sup> “The sociological fact is that values do not fly on their own wings . . . .”<sup>13</sup> Individual motivation is not sufficient. Values require the support of a community’s “moral voice,” by which Etzioni means the communication of peer approval or disapproval to the individual members. If the community’s moral voice “is feeble or absent, if the community disregards the extent to which its members live up to or ignore shared core

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counsel to civility and courtesy provisions in Connecticut’s *Principles of Professionalism*).

6. Amitai Etzioni, *The New Golden Rule: Community and Morality in a Democratic Society* xiii (Basic Books 1996).

7. *Id.* The Antioch code covered conduct at “every step and move of courtship,” mandating “explicit and unambiguous consent” to every sexual advance. *Id.*

8. *Id.*

9. *Id.* at xiv.

10. *Id.*

11. *Id.* at 127.

12. *Id.*

13. *Id.* at 119.

values, the community's silence becomes a major reason values are disregarded."<sup>14</sup>

The English barrister tradition is proof of Etzioni's thesis and, at the same time, an intriguing model for increasing legal professionalism in America. Historically, the barristers as a group have maintained a stellar reputation for professionalism in an adversarial legal system similar to our own. One American lawyer recently voiced tremendous admiration after practicing as a barrister for seven years in London: "You never have to watch your back in England. . . . No one stoops to foul blows or misleading tactics. They think of themselves as above that."<sup>15</sup>

Evidence suggests that the key to the barristers' professionalism is their sense of community—a strong identification with one another and the judges before whom they practice. Several years before Etzioni published his book about values and peer pressure, the four English Inns of Court had this to say about the barristers' community:

The fact that most practising barristers work in a number of small, closely knit communities such as the Inns of Court is perhaps the most effective discipline of all. The fear of obtaining the label of "sharp" within this collegiate community is a powerful deterrent to those who might otherwise be tempted to stray from the high standards of conduct and integrity which are the rule, and of far greater efficacy than any threats of possible disciplinary sanctions. Through this association the Inns are able to develop a truly professional spirit . . . .<sup>16</sup>

A word of caution, however, is in order. There are profound differences between the English and American legal systems and societies in general.<sup>17</sup> One difference, for example, is the much stronger current of individualism and

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14. *Id.* at 125-126.

15. Jeanna Steele, *Mastering the Queen's English: How to Make the Grade as a Barrister in London*, 20 Cal. Law. 22, 22 (Aug. 2000) (quoting American lawyer William Locke).

16. Response of The Inns of Court to *The Work and Organisation of the Legal Profession* (April 28, 1989), at ¶ 24 (copy on file with author and with *Journal of Appellate Practice and Process*).

17. See Maimon Schwarzschild, *Class, National Character, and the Bar Reforms in Britain: Will There Always be an England?* 9 Conn. J. Intl. L. 185 (1994) (providing an excellent comparative analysis of the English and American legal systems).

acquisitiveness that runs on this side of the Atlantic—traits that resist any moral voice urging restraint for the greater good of the legal system and the public at large. Although the strategy I propose includes some force, not just sermonizing, it will not produce a sudden blossoming of professionalism. Change is never easy.

But that is no excuse to sit on our hands, continue to bemoan the decline in professionalism, and continue to pretend that more and more codes and sanctions will make a difference. They will not. A more effective strategy is available, and we should pursue it for whatever progress we can achieve. Professionalism is far too important to accept its decline as inevitable.

## II. A MODEST PROPOSAL FOR EMULATING THE BARRISTERS

In *The Taming of the Shrew*, a suitor invites his competitors to “do as adversaries do in law, [s]trive mightily, but eat and drink as friends.”<sup>18</sup> Shakespeare’s words first appeared in 1594, four years after membership in the Inns of Court became a prerequisite for advocacy rights in the higher courts of England.<sup>19</sup> And to this day, English barristers continue to “eat and drink as friends” in or around the Inns even while competing vigorously in court and the marketplace. They form a classic community in Etzioni’s sense of that word.<sup>20</sup> Indeed, their community embraces most of the higher-ranking English judges, who started out as barristers themselves<sup>21</sup> and continue to be engaged in the life of the Inns.

To be sure, the history of the barristers includes discrimination<sup>22</sup> and some other phenomena—those wigs, for

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18. William Shakespeare, *The Taming of the Shrew* act 1, sc. 2, ll. 276-277.

19. See Wilfrid R. Prest, *The Rise of the Barristers: A Social History of the English Bar 1590-1640* at 5 (Clarendon Press 1986).

20. Etzioni, *supra* n. 6, at 127.

21. Prest, *supra* n. 19, at 9; see also *infra* nn. 42-44 and accompanying text (discussing appointment of solicitors to barrister positions).

22. See Schwarzschild, *supra* n. 17 at 194. Schwarzschild’s article provided the following historical account:

The first Jew was called to the Bar in the 1840s and the first woman in 1920, but until quite recently women and those not of “old English stock” were rarities at the Bar. Most barristers of Black or Asian descent still practice in effectively

example—obviously unsuitable for emulation in the American legal system. Nor can Americans hope to emulate, or wish to emulate, the factor of social class that helps explain the cohesiveness and ideals of the English barristers.<sup>23</sup> Nevertheless, their reputation for professionalism demands that we consider their tradition for potential emulation in an American way. It is noteworthy, for example, that professionalism for them is a matter of custom, not written codes of conduct. No such code even existed for barristers until 1980.<sup>24</sup>

One attempt to emulate the barrister tradition is the American Inns of Court movement, which encourages groups of judges, lawyers, and third-year law students to hold monthly meetings oriented toward education and mentoring.<sup>25</sup> Professionalism is a central theme of the movement, inspired by former Chief Justice Warren Burger following an Anglo-American exchange program in 1977. “Chief Justice Burger thought that many of the positive values of the English Inns, such as integrity, civility, and collegiality, integral concepts of the English Inns, could be transported to America.”<sup>26</sup> Although

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segregated chambers that are mostly or entirely “minority,” and the Bar Council has only in the past few years been embarrassed into urging all sets of chambers to take on barristers on a non-discriminatory basis.

*Id.* at 194 (footnotes omitted).

23. See Schwarzschild, *supra* n. 17, at 188-92.

24. Anthony Thornton, *Responsibility and Ethics of the English Bar*, in *Legal Ethics and Professional Responsibility* 53, 55 (Ross Cranston, ed., Clarendon Press 1995).

25. American Inns of Court <<http://www.innsocourt.org/>> (accessed Oct. 21, 2001). The web site of the national office explains the organization’s mission:

The mission of the American Inns of Court is to foster excellence in professionalism, ethics, civility, and legal skills for judges, lawyers, academicians, and students of law in order to perfect the quality, availability, and efficiency of justice in the United States.

*Id.* The American Inns of Court seek to accomplish, among others, the following goals:

To facilitate the exchange of ideas, experiences, and ongoing education among members of American Inns of Court, thereby maintaining an institutional forum where judges, lawyers, academicians, and students of law, working together, may pursue the highest goals of the legal profession[, and]

To shape a culture of excellence in American jurisprudence by promoting a national commitment to civility, ethics, advocacy skills, and professionalism in the practice of law, by communicating these ideals to the nation and the world, and by transmitting these values from one generation to the next.

*Id.* Each Inn meets approximately once a month both to “break bread” and to hold programs and discussions on matters of ethics, skills and professionalism.

26. Hugh Maddox, *An Old Tradition with a New Mission: The American Inns of Court*, 54 Ala. Law. 381, 381 (Nov. 1993).

the grass-roots quality of the resulting movement is a welcome force for professionalism, more can and should be done. The moral voice of each Inn is restricted to a small number of individuals.

Another idea floated by Chief Justice Burger, likewise inspired by the barrister tradition, was to establish a specialized trial bar.<sup>27</sup> However, the enormous size and decentralization of the American trial court system make it impossible to develop any true analogue to the barrister tradition even on a statewide level.<sup>28</sup>

This article proposes a smaller-scale analogue that can be duplicated at will throughout the country. The essential first step is to create a community capable of generating effective peer pressure for professionalism. This step requires an identifiable group of lawyers, lawyers who know that they and discernable others belong to that group. The best way to accomplish that goal and, at the same time, provide a strong center of gravity for the new community, is to establish minimal qualifications to practice in a particular court (or group of courts) in a local jurisdiction. Any and all lawyers who qualify to practice before a particular court—not just an elite or favored group of insiders—will form the community or “bar” of that court. This qualification procedure should minimize complaints of improper exclusiveness.

For reasons discussed later in greater detail, experimentation of this kind should begin with the appellate courts. Their prestige, relatively small number, and the relatively small number of practitioners before them make them especially advantageous for this purpose. In addition, while professionalism can definitely stand improvement in appellate practice, it is inherently less bellicose than trial court practice. Therefore, the community-building model proposed by this article is more likely to succeed at the appellate level, and early

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27. Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?* 42 *Fordham L. Rev.* 227, 227 (1973).

28. *Id.* Justice Burger prefaced his proposals with the comment that “[o]ur wide expanses of territory, our heterogeneous and turbulent diversity, and our more than fifty jurisdictions with 150 accredited law schools would make it impossible to transplant the English system here, and I do not suggest it by any means.” *Id.*

success would facilitate the spread of the model, no doubt with modifications, to the trial courts.

Once an identifiable community of lawyers is created as described above, the second step is to enlist human nature. Each court or jurisdiction should develop regular bench/bar social opportunities, such as informal lunches, as well as more formal programs designed to promote professionalism within the newly identified community. Naturally, the specifics will depend heavily on the customs and traditions of each venue, as some suitable programs may already exist. However, the key to success is to maximize opportunities for the moral voice of the community to speak—to let peer pressure develop and express itself in the many ways it can. The more we encourage our own advocates to “eat and drink as friends,” as Shakespeare put it, the better chance there is for the moral voice of the community to speak effectively to its members.

A. *The Case for Emulation: The Social Glue of the Inns*

Shakespeare’s contemporary, Ben Jonson, described the Inns of Court of his day as “the noblest nurseries of humanity, and liberty, in the kingdom.”<sup>29</sup> Legal apprentices, later to become known as barristers,<sup>30</sup> resided at the Inns and “studied law and many other things—history, music and dancing, for example.”<sup>31</sup> Although the curriculum eventually narrowed to legal subjects, the social function of the Inns remained a prominent feature. Their great halls “were not only the scenes of that business of eating and drinking, the ‘dinners’ to which so much attention was devoted, and by which the students ‘eat their

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29. Prest, *supra* n. 19, at 283 (citation omitted).

30. As one chronicler of the Inns of Court explains, the very word “barrister” originates from the physical arrangement of the meeting hall:

[T]he dais of the governing body, or Benchers, corresponding to the High Table of an Oxford College, was separated by a bar from the profane crowd of the Hall. . . . The *Utter-* or *Outer Barristers* ranked next to the Benchers. They were the advanced students . . . called from the body of the Hall to the first place outside the bar for the purpose of taking part in the *moots* or public debates on points of law.

Cecil Headlam, *The Inns of Court* 11 (Adam and Charles Black, 1909).

31. Theodore F.T. Plucknett, *A Concise History of the Common Law* 225 (5th ed., Little, Brown & Co. 1956).

way to the Bench,' but also the centres of the social life and educational system of these Guilds."<sup>32</sup>

That collegial quality continues to the present day, and has been credited by a blue-ribbon Royal Commission as an important factor in maintaining professionalism among the barristers:

[T]he Inns continue to provide the collegiate element by maintaining common rooms and libraries, providing meals in hall, awarding scholarships and bursaries and organising moots [mock hearings], talks and other activities in hall and at weekend meetings. The collegiate element also plays a part in maintaining professional standards and quality. Personal association within the profession, at least that part of it based in London, is close and is fostered by the proximity of professional chambers one to another, the opportunity of meeting in hall and the contacts between members of the practising profession and students during and after dinner and at moots. Although the collegiate element was said by some witnesses to have disadvantages, we think that it is of continuing value.<sup>33</sup>

As noted previously, the collegiality nurtured by the Inns is "a powerful deterrent" against deviations from the barristers' high standards of professionalism.<sup>34</sup> Continuity itself contributes to the social glue of the Inns. Barristers have been living, training, and practicing in these same quadrangles since the fourteenth century, when they became available upon the demise of the Knights Templar.<sup>35</sup> Pride of history is encouraged by the very beauty of the buildings and gardens. And inside, the halls are adorned with portraits of the great barristers and judges of each Inn's heritage. Thus, barristers are confronted every day with physical reminders of the long and proud history of their tradition.

Another important element of the society of the Inns is its verticality. Both judges and senior barristers (called Queen's Counsel or "silks"<sup>36</sup>) are fully engaged in the life of the Inns

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32. Headlam, *supra* n. 30, at 11.

33. Royal Commission on Legal Services, *Final Report* vol. 1, ¶ 32.62 (Oct. 1979).

34. *Inns of Court Response*, *supra* n. 16, at ¶ 24.

35. *See* Headlam, *supra* n. 30, at 34-37.

36. Their court robes are made of silk, rather than the simpler cloth worn by the junior barristers.

with the main group of barristers.<sup>37</sup> The ranks of the silks are augmented annually from a small number of barristers<sup>38</sup> who are elevated by the Crown, through the offices of the Lord Chancellor, to the rank of Queen's or King's Counsel ("QC" or "KC") as the case may be. The year 2000 crop of new silks numbered 78 out of the 500 barristers who applied for the appointments.<sup>39</sup> Unlike their historical predecessors—the "serjeants" of Shakespeare's time who maintained a separate Inn<sup>40</sup>—silks continue to participate fully in the social and educational life of their home Inn. Rank has its privileges, of course, and silks take their meals at an elevated bench at the front of the dining hall. (Thus, "master benchers.") But whether on or off the bench, the presence of silks in the daily life of the Inns provides modeling, mentoring, and exposition for new admittees ("pupils") and rank-and-file barristers ("juniors") in the ways of their centuries-old profession.

Even more potent influence of that kind derives from the presence of judges in the life of the Inns. From the fourteenth century<sup>41</sup> until the end of the twentieth century,<sup>42</sup> English judges had to be appointed from the ranks of barristers (or their predecessors, the serjeants).<sup>43</sup> Experienced solicitor-advocates are now eligible for appointment as well, although experience thus far suggests that the appointment pool will remain small. In any event, judges hailing from a particular Inn continue to eat there (at the same raised bench with the silks) and participate in its social and educational activities. Indeed, the presiding "treasurer" of each of the four Inns is traditionally a judge,

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37. The American Inns of Court movement deliberately copies that pattern. See American Inns of Court <<http://www.innsofcourt.org/>> (accessed Oct. 21, 2001).

38. Solicitors first qualified for such appointments in 1996. Of the thirty-three who have applied since then, four were successful. Editor's Gazette, *Queen's Counsel 2000*, Counsel 44 (June 2000). *Counsel* is the bi-monthly journal of the General Council of the Bar, the umbrella organization of the barristers.

39. *Id.* The journal reported that 68 of the successful applicants for QC were men (out of 453 applicants) and 10 women (out of 53 applicants). Nelson Mandela and four other dignitaries were named honorary QC's.

40. For a brief history of the serjeants, who wore a white cloth cap called a "coif," see Plucknett, *supra* n. 31, at 220-24. The serjeants had a separate Inn in London, which was sold in 1877 upon the formal dissolution of their order. *Id.* at 224.

41. Plucknett, *supra* n. 31, at 223.

42. Courts and Legal Services Act of 1990, ch. 41, § 71 (1999) (Eng.).

43. *Id.*

though occasionally a silk will assume that position, as was recently the case at the Inner Temple.

The inclusion of judges in the society of the Inns calls to mind another custom tending to bind this bench/bar community. Judges and barristers, both male and female, appear in court in strikingly similar “robes,” a term that encompasses the traditional black gown and the wigs of eighteenth century styling.<sup>44</sup> Although judges and barristers alike have occasionally called for the abandonment of the wigs,<sup>45</sup> they are stoutly defended as a way to maintain respect for the judicial process and mindfulness of its historical contribution to English liberty. As the barristers’ journal, *Counsel*, editorialized in 1992, “[S]upposing that wigs do contain a powerful reminder of the 18th century, is that at this hour such a bad thing? There were advocates then of single-minded passion and fearless integrity, and courts breaking new ground in fair trial procedures.”<sup>46</sup>

That reasoning evokes the concept of a “community of memory” as described in *Habits of the Heart*, another leading work of American sociology:

Communities . . . have a history—in an important sense they are constituted by their past—and for this reason we can speak of a real community as a ‘community of memory,’ one that does not forget its past. In order not to forget that past, a community is involved in retelling its story, its constitutive narrative, and in so doing, it offers examples of the men and women who have embodied and exemplified the meaning of the community.<sup>47</sup>

The traditional court dress and other customs of the barrister tradition advance those very purposes.

Finally, the social glue of the Inns is strengthened by the small size and geographical concentration of “the bar,” which in

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44. Although judges’ and barristers’ wigs vary in appearance, it was difficult for this observer to tell the difference at first glance. It was easy, however, to spot the occasional solicitor appearing as an advocate. He or she wore a black gown but no wig. Reformers attack that difference, calling for the abolition of the wigs or their expansion to all advocates.

45. E.g. Francis Mathews, *Big Wigs and Periwigs*, *Counsel* 28 (March 1990).

46. Editorial, *Wigs and Gowns Should Be Retained*, *Counsel* 3 (June/July 1992).

47. Robert N. Bellah, Richard Madsen, William M. Sullivan, Ann Swidler, & Steven M. Tipton, *Habits of the Heart: Individualism and Commitment in American Life* 153 (Harper & Row 1986).

England means the barristers alone, not the much larger group of solicitors. Professor Maimon Schwarzschild, a barrister currently teaching law at the University of San Diego, wrote in 1994 that “[t]he English Bar is a small profession, whose traditions and organization are such that many barristers know each other personally. There are only about 6,600 practicing barristers.”<sup>48</sup> While the number of barristers in private practice reached 9,932 as of October 1, 1999,<sup>49</sup> that is still an extremely small number.<sup>50</sup> In addition, “[m]ore than half of them practice in London, where almost all work in sets of ‘chambers’ in or near the Inns of Court.”<sup>51</sup> In short, while the Inns are no longer the exclusive venue for chambers, they remain the centripetal social force of the barrister community.

### B. *The Content of the Tradition*

Some say the barrister community is just a guild, more interested in the maintenance of its economic privileges than in any high ideals of professionalism. Indeed, the Thatcher government declared war in 1989 on the barristers’ four-century monopoly on advocacy (“audience”) in the appellate courts and higher trial courts.<sup>52</sup> The war ultimately prevailed on paper, at least, when the Blair government’s Access to Justice Act of 1999 gave solicitors and other groups with no formal legal training, such as law firm executives, the same potential rights of audience as barristers. “Access to justice” was a slogan of Blair’s policy toward the legal profession and the legal aid system. According to one respected English expert, however, “[t]he truth is that the Government’s reforms spring not from a

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48. Schwarzschild, *supra* n. 17, at 193 (footnote omitted).

49. Interview with Mark Stobbs, Head of the Professional Standards and Legal Services Department of the General Council of the Bar in London (July 12, 2000). In addition to the barristers in private practice, another 2,525 were employed in government or private industry where they have an attenuated relationship with the majority of their professional colleagues. *Id.*

50. The State of California alone had 135,384 lawyers in active practice as of July 1, 2000. *Numbers of the Bar*, 2000 Cal. B.J. 3.

51. Schwarzschild, *supra* n. 17, at 193.

52. The best summaries of the 1989 donnybrook on this issue are given by Schwarzschild, *supra* n. 17, and Michael Zander, *The Thatcher Government’s Onslaught on the Lawyers: Who Won?* 24 Intl. Law. 753 (1990). The upshot was the Courts and Legal Services Act of 1990, a somewhat moderated version of Thatcher’s original proposals.

desire to improve access to justice but from the Treasury's need to control the budget."<sup>53</sup>

The English will judge for themselves the barristers' true motives and the ultimate fate of their profession. A different issue faces Americans: how to raise legal professionalism closer to barrister levels. Therefore, we are well advised to study what the barristers say they do and why they say they do it, leaving ultimate value judgments to the English. The barristers' unique record of professionalism compels us to consider their tradition on its own terms.

What is it, then, that the social glue of the Inns is designed to maintain and perpetuate? First is a set of ideals about advocacy that are virtually identical to American ideals. Second is the principle that advocacy in the higher courts, at least, demands lawyers specially trained in the skills and ethics of that calling. Third is the conviction that such advocates' duties of professionalism to the client and court alike must be insulated as much as possible from countervailing economic pressures.

### 1. *The Ideals of Advocacy*

Little need be said about the ideals themselves because they are virtually identical to American ideals about advocacy. The first "Fundamental Principle" in *The Code of Conduct of the Bar of England and Wales* is that barristers

must not: (a) engage in conduct . . . which is: (i) dishonest or otherwise discreditable to a barrister; (ii) prejudicial to the administration of justice; [or] (iii) likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute. . . .<sup>54</sup>

Similarly, the Preamble to the ABA's Model Rules of Professional Conduct states that a lawyer is not only "a representative of clients" but also "an officer of the legal system and a public citizen having special responsibility for the quality

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53. Michael Zander, *The State of Justice* 24 (Sweet & Maxwell 2000).

54. *The Code of Conduct of the Bar of England and Wales* ¶ 301 (7th ed. 2000), available at <[http://www.barcouncil.org.uk/document.asp?languageid=1&documentid\\_ddl=81&documentid=83&original\\_documentid=81](http://www.barcouncil.org.uk/document.asp?languageid=1&documentid_ddl=81&documentid=83&original_documentid=81)> (accessed Nov. 13, 2001).

of justice.”<sup>55</sup> The Preamble goes on to state, among other things, that lawyers should “seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession.”<sup>56</sup>

The second fundamental principle in the barristers’ code is equally familiar to American lawyers:

A barrister has an overriding duty to the Court to act with independence in the interests of justice: he must assist the Court in the administration of justice and must not deceive or knowingly or recklessly mislead the Court.<sup>57</sup>

In addition, the barrister “must ensure that the Court is informed of all relevant decisions and legislative provisions of which he is aware whether the effect is favourable or unfavourable towards the contention for which he argues. . . .”<sup>58</sup> Similarly, the ABA’s Model Rules prohibit making any “false statement of material fact or law to a tribunal” and also require disclosing “legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.”<sup>59</sup>

The barrister is also enjoined not to “permit his absolute independence, integrity, and freedom from external pressures to be compromised” or “compromise his professional standards in order to please his client, the Court, or a third party.”<sup>60</sup> Similarly, the ABA’s Model Rules provide that, “[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice.”<sup>61</sup>

As a final example, the barristers’ code provides that the barrister

must in all his professional activities be courteous and act promptly, conscientiously, diligently, and with reasonable competence and take all reasonable and practicable steps to

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55. ABA Model R. Prof. Conduct Preamble ¶ 1 (2001).

56. *Id.* at ¶ 5.

57. *Code of Conduct*, *supra* n. 54, ¶ 302.

58. *Id.* ¶ 708(c), available at <<http://www.barcouncil.org.uk/document.asp?languageid=1&documentid=87>> (accessed Nov. 13, 2001).

59. ABA Model R. Prof. Conduct 3.3(a).

60. *Code of Conduct*, *supra* n. 54, ¶ 307 (a), (c) (punctuation added).

61. ABA Model R. Prof. Conduct 2.1.

avoid unnecessary expense or waste of the Court's time and to ensure that professional engagements are fulfilled.<sup>62</sup>

Similarly, the Preamble to the ABA's Model Rules states that

[i]n all professional functions a lawyer should be competent, prompt and diligent . . . should use the law's procedures only for legitimate purposes and not to harass or intimidate others . . . [and] should demonstrate respect for the legal system and for those who serve it.<sup>63</sup>

## 2. *Advocacy Requires Specially Trained Lawyers*

Ideals need support. The second prong of the barrister tradition is the proposition that advocacy in higher courts is a privilege and responsibility that requires specialized training in relevant skills and ethical principles. Simply stated, this type of work is not for any lawyer willing and hired to do it.

Before presenting the barristers' rationale for that principle, I hasten to acknowledge that some Americans might perceive it as elitist to restrict the right to practice in certain courts, even if the qualifications adopted were easily satisfied. Others might protest that such a policy would infringe on lawyers' freedom of action and clients' freedom of choice. And it would, of course, though for important reasons.<sup>64</sup>

Nevertheless, free-market proponents might be reassured to know that even the Thatcher/Blair anti-monopoly campaign against the barristers respected their premise that higher court advocacy is a privilege and responsibility, not a right. Under the new legislation, solicitors and others wishing to advocate in the higher courts must receive specialized training and certification by an approved professional body functionally equivalent to the General Council of the Bar.<sup>65</sup> Such bodies must also maintain and enforce a code of conduct for advocacy similar to the

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62. *Code of Conduct*, *supra* n. 54, ¶ 701(a).

63. ABA Model R. Prof. Conduct Preamble ¶¶ 3-4.

64. Increasing professionalism will not be an easy task, as it means changing a culture.

65. *See* Courts and Legal Services Act of 1990, ch. 41, §§ 27-28 (1999) (Eng.); *see also* Access to Justice Act of 1999, ch. 22, §§ 36-41 (1999) (Eng.).

barristers' modern code.<sup>66</sup> It is doubtful, though, that any of those requirements will produce a barrister level of professionalism without a similar community to support it.

The most compelling defense of a specialized advocacy bar came in response to Thatcher's Green Paper<sup>67</sup> proposals of January 1989. Every appellate court judge and higher trial court judge in the land joined in a fifty-four-page warning that the proposals severely threatened the high quality of English justice. Among other things, *The Judges' Response* made an impassioned plea against the creation of an open market for higher court advocacy:

In deciding whether to impose or remove restrictions on rights of audience, the judges have had regard solely to what is required in the public interest for the efficient and effective administration of justice and not to the interests of the lawyers concerned. There is a recognised public interest in limiting the categories of person whom the courts are prepared to hear as advocates, in order to ensure that the advocates appearing in a particular court have the requisite standard of skill and a high standard of probity.<sup>68</sup>

The judges further argued:

The present system of advocacy in the higher courts has served the country well and still does so. Judges and juries can only work with the materials presented to them by the advocates. The quality of their advocacy is a major feature in the quality of justice administered by the courts in all cases, whether they are criminal cases, or disputes between Government and citizens, or disputes between citizen and citizen. There is a real risk that the Green Paper proposals will, in the long term, significantly damage the present quality of advocacy and, with it, the quality of justice in this country.<sup>69</sup>

The barristers made the same point in their own response to the Thatcher proposals. One vivid argument was that

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66. See Courts and Legal Services Act of 1990, ch. 41, §§ 28-29 (1999) (Eng.); see also Access to Justice Act of 1999, ch. 22, § 42 (1999) (Eng.).

67. A legislative proposal circulated for comment is known as a "green paper." The post-comment version submitted to Parliament for enactment is known as a "white paper."

68. Royal Courts of Justice, *The Green Paper: The Judges' Response* ¶ 16 (May 1989).

69. *Id.* ¶ 76.

[t]he “monopoly” of the Bar is no more a monopoly than, for example, the restriction of anaesthetics and surgery to those who have by their innate talents, their training, and their hard work and experience made themselves acceptable practitioners in the skilled arts of anaesthetics and surgery.<sup>70</sup>

While barristers’ arguments can always be dismissed as a guild’s self-defense, *The Judges’ Response* stands on a different footing. Although it could not overcome the political forces of the day, *The Judges’ Response* remains a classic argument for higher court advocacy as a specialized calling. Indeed, it speaks to Americans unfamiliar with the barrister tradition in much the same way the judges sought to explain that tradition to the English public and Parliament in 1989.

### 3. *The “Cab-Rank” Obligation Goes Along with the Privilege of Advocacy*

There is a corollary to the barristers’ principle of restricting advocacy rights to specially trained lawyers. In light of that restriction, the so-called “cab-rank” rule requires barristers to accept assignments without discrimination.<sup>71</sup> Much like physicians, barristers are required to accept any case that their experience and schedule permit as long as the proposed fee is a reasonable one. As stated in *The Judges’ Response*,

this obligation is perhaps of most importance with regard to the choice of defending counsel in serious criminal cases.... It secures, in the public interest, the opportunity for a defendant to obtain the advocate of his choice, however unpopular the defendant may be.<sup>72</sup>

Because the Green Paper proposed to create an open market for higher court advocacy, *The Judges’ Response* pointed out that only barristers were subject to the cab-rank rule, not other legal professionals.<sup>73</sup> Ultimately, though, the legislation

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70. General Council of the Bar, *Quality of Justice: The Bar’s Response* ¶ 12.4 (Butterworth’s 1987).

71. See Robert W. Gordon, *The Independence of Lawyers*, 62 Boston U. L. Rev. 1, 22 n. 61 (describing the cab-rank rule as “one of several that English lawyers adopted to achieve independence from powerful client-patrons”).

72. *The Judges’ Response*, *supra* n. 68, at ¶ 62.

73. *Id.*

resulting from the Green Paper extended the cab-rank rule to any non-barrister certified for higher court advocacy work.<sup>74</sup>

#### 4. *The Imperative of Economic Independence*

The third main component of the barrister tradition is the least familiar to Americans, but the English are deadly serious about it. Mindful of the ubiquity and power of economic pressure in a capitalist society, the barrister tradition posits that professional detachment requires economic detachment. To back up that precept, the barrister tradition developed a unique set of rules designed to ensure the economic independence of anyone engaged in higher court advocacy. As the barristers wrote in 1989:

It is not suggested that the barrister in independent practice possesses some innate superior moral stance. . . . But the reality is that the circumstances under which the independent barrister receives and prepares his work, the manner in which he is paid for his work, his accountability for his work and the geographical circumstances in which barristers practice from Chambers, all combine together to ensure for the independent barrister freedom from external influence and pressure, and so far as any environment possibly can, the necessary independence and detachment of mind.<sup>75</sup>

Custom requires every barrister wishing to advocate in the higher courts to do so as a sole practitioner accepting assignments exclusively from a professional intermediary like a solicitor. Barristers may not be employed for such work; may not enter into partnership with other barristers or anyone else; and may not even enter into a direct contractual relationship with the ultimate or “lay” client. An intermediary or “professional client,” typically a solicitor, retains the barrister in the manner of a specialized consultant. Indeed, the intermediary alone is legally responsible for the barrister’s fee. The tradition frowns on economic ties of any nature as entanglements that can compromise the barrister’s paramount duty to the court.

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74. Zander, *supra* n. 53, at 780.

75. *Quality of Justice*, *supra* n. 70, at ¶ 13.47.

Because Thatcher's Green Paper attacked this element of the barrister tradition, too, *The Judges' Response* defended it vigorously:

The much-emphasized independence of the Bar is rooted in the manner in which barristers practice. As a self-employed, sole practitioner instructed normally by a solicitor or other professional on behalf of a client on a case by case basis, the barrister advocate is not only independent of Government control: he also has a degree of independence from the client lacking in an advocate who is the salaried employee of the client. Moreover, an advocate instructed directly by the client may fail to achieve the same degree of independence from the client. This detachment from the client affords valuable insulation from the pressures on the advocate flowing from the client's desire to win his case. It also assists the advocate to be more objective and realistic in giving advice and presenting a case than an adviser who is close to the client. Further, the sole practitioner has a personal responsibility for his work, which he cannot share with partners, and he succeeds or fails on his own individual merits.<sup>76</sup>

Similar praise for the independence of barristers came from the Benson Royal Commission a decade earlier. The best excerpt from its report is a quotation from an appellate judge from New Zealand. He told the Commission that a separate advocacy bar was "one of the great British achievements":

I think that the idea of an independent body of men and women, specialists and skilled in their type of legal service, and not mere paid agents for the clients but recognising that they owe some responsibility to the courts and having the confidence of the courts, and the standard of ethics and professional skill that tends to go with that, is an extremely valuable concept, and long may that continue.<sup>77</sup>

### III. THE NEED FOR EMULATION IN AMERICA

We return, then, to the matter of emulating the barrister tradition here. The need to do so is clear, with a widespread

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76. *Judges' Response*, *supra* n. 68, at ¶ 49.

77. Royal Commission on Legal Services, *supra* n. 33, at ¶ 17.44.

perception that legal professionalism is in decline. What is less clear is the reason for that decline, but a number of factors may be responsible. There is strong evidence, for example, that the decline in legal professionalism reflects a decline in comparable values in American society as a whole. *Bowling Alone*, an exhaustive empirical study by Robert D. Putnam,<sup>78</sup> documents a dramatic decline in “social capital” or social connectedness in America beginning in the 1960’s. Putnam demonstrates persuasively that one effect of that decline has been a correlative decline in trust, honesty, reciprocity, and civility.<sup>79</sup> In effect, *Bowling Alone* provides empirical confirmation of Etzioni’s thesis mentioned at the outset of this article, that it takes a functioning community for its civic values to be implemented.<sup>80</sup>

The decline in legal professionalism also reflects economic factors. American law practice is increasingly dominated by economic competition, not only between firms but within them. Aggressive and protracted litigation tactics will likely earn a bigger fee even after the “tax” of sanctions awards. Such tactics also appeal to aggressive clients. One law firm recently sent out plastic hand grenades as a promotional mailing, inviting prospective clients to “arm” themselves by hiring the firm. Someone made a sober calculation that belligerence sells.

Another factor in the decline of legal professionalism—a factor English barristers are likely to emphasize—is a decline in American lawyers’ positive identification with their professional community. In part, that may result from the sheer mathematical growth of the legal profession. One often hears tell of earlier times when lawyers knew each other better and therefore *treated* each other better. That image closely resembles the barristers’ sense of community. And while the image of earlier and better times might be enhanced by nostalgia, or might reflect the simple fact that there were fewer lawyers to get to know, I believe the stronger sense of community remains the key factor. If professionalism was indeed more common in those earlier times, it means that lawyers identified more strongly and

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78. Robert D. Putnam, *Bowling Alone* (Simon & Schuster 2000).

79. *Id.* Chap. 8 (“Reciprocity, Honesty, and Trust”).

80. The small community of lawyers in Charleston, South Carolina, evidently bears out this thesis as well. See Margaret Graham Kebo, *Law in the Low Country*, 87 ABA J. 40 (Sept. 2001).

positively with their professional community than they do today. It takes positive identification of that kind for the peer pressure or “moral voice” of the community to have an impact.

Professionalism today is also suffering from a vicious cycle. A decline of civility and related norms of conduct accelerates lawyers’ declining sense of community with one another. We frequently bemoan our negative image in the public eye. But many lawyers themselves have a negative image of the profession, and are therefore less likely to identify with it in a positive way. The profession as a community, therefore, exerts less psychological influence on lawyers’ behavior.

Whatever root causes may explain the decline of professionalism, however, it is evident that our codes and our sanctions have made no dent in the problem. It is time, therefore, to consider emulating the successful model of the English barrister tradition.

#### A. *Begin with Appellate Practitioners*

The challenge, of course, is to find effective ways to emulate that tradition. As Professor Schwarzschild has written, “Americans often compare their own legal folkways unfavorably to the English way of doing things. This is especially true whenever there is widespread dissatisfaction with lawyers and with the legal system in America. . . .”<sup>81</sup> The gist of Schwarzschild’s article, however, is that England and America are different in a great many ways, both legally and otherwise. At the outset, therefore, I recommend modesty and selectivity in our initial experimentation. Appellate practice is the most promising place to begin for three main reasons.

First, efforts at community building will be facilitated tremendously by the small number of appellate courts in each jurisdiction and the relatively small number of lawyers practicing in those courts. Take a large state like California, for example, with 135,384 lawyers in active practice. One of the state’s largest population centers, the San Francisco Bay Area north of San Jose, is served by a state Court of Appeal sitting in San Francisco. That same court also serves a number of smaller

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81. Schwarzschild, *supra* n. 17, at 185 (footnotes omitted).

counties to the north and east. But on a randomly chosen day in the year 2000 there were only 2,475 lawyers of record on all pending appeals, civil and criminal, in all five divisions of this court.<sup>82</sup> To put that number in context, it is roughly half the number of barristers in active practice in London.<sup>83</sup> If that London-based core is small enough to maintain the sense of community described in this article, a group of lawyers half that size might well be amenable to community-building efforts centered on the appellate court in which they practice.

The second reason to focus efforts on appellate practitioners is the great respect and influence enjoyed by the appellate courts. If a local appellate court launches a campaign to build a sense of community with and among its regular practitioners, the latter will be highly motivated to sign on. Among other reasons, such a campaign is likely to offer frequent opportunities to socialize with the local appellate judges. Moreover, the attractiveness of the community-building program should help gain support for any new rules about the qualifications and responsibilities of advocates before the court.

The third reason to focus on appellate practitioners is that they are the closest analogue in America to the English barristers. Compared to other participants in the litigation process, appellate practitioners are (1) most often considered to have specialized knowledge and skills; (2) most likely to practice solo or in very small firms; (3) most likely to receive assignments from intermediary professionals like trial lawyers, rather than their ultimate clients; and (4) likely to identify most strongly as officers of the court given the greater respect and influence enjoyed by the courts in which they practice. Accordingly, if the barrister tradition has any value at all as a predictor in this country, a concerted effort to promote detached professionalism is more likely to succeed with appellate practitioners than with other lawyers. We can then build on that success by expanding the model.

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82. Interview with Ron D. Burrow, Clerk of the California Court of Appeals, First Appellate District (Aug. 16, 2000).

83. *See supra* n. 49 (discussing number of barristers in practice).

### *B. A Three-Point Program for Professionalism*

This country has fifty state appellate jurisdictions, which would seem most promising for barrister-inspired experimentation because of their focus on local practitioners.<sup>84</sup> However, our far-flung state appellate jurisdictions have different personnel, resources, histories, and cultures. It would be foolish, therefore, to propose any uniform recipe to raise professionalism among appellate practitioners.

What I propose, rather, is that each jurisdiction pursue three main objectives in its own way: (1) Create an identifiable community by adopting minimum standards for the right to appear in the appellate courts of the jurisdiction; (2) initiate regular bench/bar lunches and other community-building programs with qualified practitioners; and (3) promote as much independence as possible in appellate advice and advocacy. The particulars should be developed in collaboration with local bar associations, with statewide organizations like the California Academy of Appellate Lawyers, and with national organizations like the ABA, the Council of Appellate Lawyers, and the American Academy of Appellate Lawyers.

#### *1. Adopt Minimum Qualifications for the Right to Appear in the Appellate Courts of the Jurisdiction*

Community building requires an identifiable group of practitioners, an “appellate bar” of a local appellate jurisdiction. The best way to accomplish that goal, and at the same time improve the quality of advocacy, is to phase in a rule that lawyers wishing to practice in the appellate courts of the jurisdiction must satisfy minimum qualifications of education and experience. If the United States Treasury Department can restrict attorneys’ right to practice before the Internal Revenue Service,<sup>85</sup> surely the appellate courts of our land can do the

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84. The federal removal statutes, 28 U.S.C. §§ 1441–1452, remain a safety valve against local prejudices.

85. Title 31, Part 10 of the Code of Federal Regulations extensively regulates the rights and obligations of attorneys, accountants, and others who wish to appear before the IRS. For example, an attorney may be “disbarred or suspended from practice before the Internal Revenue Service” for designated forms of disreputable practice or for “willfully violating any of the regulations contained in this part.” 31 C.F.R. §§ 10.51, 10.52(a) (2001).

same. Appellate decisions are no less important to the national interest than IRS decisions.

The new qualifications should be meaningful but not onerous. A few state bar organizations offer a specialty certification in appellate practice.<sup>86</sup> Experienced appellate lawyers may also gain admission to such honorary societies as the California or American Academy of Appellate Lawyers. But appellate courts should not be rubber-stamping the positive or negative membership decisions made by such organizations. The courts should establish the new qualification program as an exercise of their traditional control over attorneys' rights to appear before them. Nor is the aim to certify expertise in appellate practice, but rather a minimum degree of familiarity with it.

There are two main reasons for such a program. The first is to create an identifiable group of practitioners who would be amenable to community-building efforts. Without such an identifiable group, it would be impossible to establish a strong sense of community and generate the desired peer pressure for higher standards of professionalism. The appellate practitioners of the jurisdiction must become known to each other, as well as the courts. Anonymity encourages the tendency to act unprofessionally in much the same way it encourages the tendency to commit crimes.

The second reason to establish minimum standards of familiarity with the appellate process is that, regrettably, not all lawyers handling appeals are meeting those standards today. A California appellate court spoke out with characteristic frustration in 1995, issuing an "advisory note" to the lawyers:

Most of the time counsel in these writ proceedings will be more experienced at the trial than the appellate level. Although out of their traditional trial element, counsel must take note of the substantial evidence standard of appellate review. The Court of Appeal is not a second trier of fact and a writ petition is not a trial brief. . . . In future,

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86. See ABA, *Standing Committee on Specialization, Sources of Certification* <<http://www.abanet.org/specialization/source.html>> (accessed Oct. 3, 2001) (providing an online source for state and organization sponsored certification programs). States offering specialty certification in civil appellate practice are California, Florida, New Mexico, and Texas. *Id.*; see also Melissa M. Serfass, *Standards for Certification of Appellate Specialists*, 1 J. App. Prac. & Process 381 (1999).

counsel's failure to acknowledge the proper standard of review might, in and of itself, be considered a concession of lack of merit.<sup>87</sup>

The court then quoted the most familiar refrain in California appellate literature, a cry of frustration originally published in 1949:

With rhythmic regularity it is necessary for us to say that where the findings are attacked for insufficiency of the evidence, our power begins and ends with a determination as to whether there is any substantial evidence to support them. . . . No one seems to listen.<sup>88</sup>

Practitioners are much more likely to start listening to such basics in the new regime proposed by this article.

From a practical standpoint, the new requirements should be phased in to avoid prejudice to lawyers and clients with cases already pending in the appellate court. If educational requirements are adopted, for example, lawyers should be given several months in which to complete the necessary courses. Not much more time should be necessary, however, because courses on appellate practice and ethics will proliferate as soon as the jurisdiction announces its new program.

Experience requirements should likewise be phased in. Even appellate novices should be allowed to keep their pending cases when the new program begins. However, they should be required to associate or at least consult a more experienced appellate practitioner in the jurisdiction, and on a pro bono basis if there is an appropriate showing of economic need. The duty to provide a measure of pro bono service of that kind during the phase-in period seems like a reasonable condition for the right to practice in an appellate court. The jurisdiction might also consider some form of "cab-rank" rule requiring qualified appellate practitioners to accept cases on a nondiscriminatory basis.

## *2. Actively Promote a Sense of Community*

Once the qualified practitioners are identified, the jurisdiction should actively promote a sense of community

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87. *James B. v. Super. Ct.*, 41 Cal. Rptr. 2d 762, 767 (Cal. App. 1995).

88. *Overton v. Vita-Food Corp.*, 210 P.2d 757, 759 (Cal. Dist. App. 1949).

among them. The barrister tradition suggests that the watchwords of the new program should be frequent socializing and the initiation of customs and traditions that promote the desired values of professionalism.

The core of the socializing component should be informal bench/bar lunches on at least a monthly basis, if not more frequently. Following the barristers' lead, attendance at a minimum number of such lunches could be required. But we need not emulate the barristers' elegant dining halls for this purpose. A courthouse cafeteria or other modest venue would do perfectly well. It is critical to make the lunches easily accessible by all, both physically and economically. Taking meals together is of proven value in building a sense of community and the more meals the better. Ornate and expensive rooms at hotels or restaurants can be saved for other events.

While the regular lunches are designed mainly for socializing, there should be short speeches about professionalism by a judge or practitioner. Especially when the new program is getting off the ground, its goals should be explained and touted as often as possible. Newly qualified practitioners of the jurisdiction should be made to understand that their privilege of advocacy carries with it the responsibility to advocate both competently and ethically.

In that connection, a jurisdiction permitting sanctions motions may want to reconsider that policy. Qualified practitioners will be expected to act ethically and competently. Moreover, because one qualified practitioner's sanctions motions against another will tend to undermine the sense of community between them, as well as create more work for the court, the jurisdiction should consider suspending the use of sanctions motions when the new professionalism program begins. If a substitute for sanctions motions seemed necessary, I would recommend a policy whereby the court, strictly on its own motion, could suspend a practitioner's right of advocacy in that court for an appropriate period of time (after due notice and hearing). In effect, the infraction would be deemed serious enough to forfeit the practitioner's membership in the court's advocacy community for the designated period of time. Suffice it to say that the possibility of such a suspension, with its economic consequences as well as shame in the community of

advocates, would be a far stronger deterrent than a mere sanctions award.

In addition to the frequent lunches, the jurisdiction should develop regular programs and traditions that honor the past achievements of the court and notable instances of professionalism by past or present advocates. The details will emerge from the bench/bar collaboration leading up to the program. The key goals of such a program, however, are to promote the bonding of the new community and, at the same time, strengthen its commitment to professionalism.

While I do not advocate the use of wigs as one such tradition, hopefully some jurisdiction will be brave enough to experiment with advocates wearing black robes in the courtroom. The effect would be powerful. The robes would dramatically underscore the notion that advocates are there for the same reason judges are: to seek justice through the process of vigorous, helpful, honest, and courteous advocacy. In addition, the prospect of wearing robes at oral argument might well promote professionalism in the evaluation of prospective appeals and the drafting of briefs.

### *3. Promote Independence in Advice and Advocacy*

As a final component of the professionalism program, the jurisdiction should attempt to promote independence in rendering advice to the client and advocacy to the court. I do not believe America is ready for the barristers' rule requiring appellate or any other advocates to be sole practitioners, for example, or forbidding clients from engaging such advocates directly. What our appellate courts can and should do, however, is encourage several developments that have occurred in California over the last few decades, such as: the emergence of appellate specialty law firms like the author's; appellate departments within general law firms; and a rule of prudence that trial lawyers should at least consult someone with appellate experience, if not stand down as lead counsel, when a final judgment is entered at the trial-court level.

While appellate specialists in a general law firm are subject to a variety of pressures from trial counsel and the firm as a whole, institutional and even economic factors support the specialist's ability to render an independent evaluation of a

prospective appeal. Whether the case has ended favorably or unfavorably in the trial court, prudence dictates a dispassionate and informed appraisal of the new costs, new prospects, and new risks facing the client—and by extension the firm—in the upcoming appellate phase of the case. In fact, appellate settlements are becoming more frequent in California in part because of the assignment of new appellate counsel from inside or outside the firm of the trial lawyer. The appellate courts have this, too, to gain from advocating the more frequent involvement of new appellate counsel.

#### IV. CONCLUSION

While the professionalism of the English barristers is easy to admire, the tradition that supports it will be difficult to emulate here. But it can be done. The key is to build communities of professionalism in an American way. This will require strong judicial leadership and a creative collaboration with appropriate bar organizations. A sense of community cannot be imposed from on high. All we can do is create favorable conditions for that sense to develop.

Experimentation should begin in the most promising laboratories, the appellate courts and their regular practitioners. Any successful results will surely expand quickly from one jurisdiction to another and ultimately, we can hope, to the trial courts. Despite the centrifugal forces of American individualism and free enterprise, the prospect of a community of professionalism will strike a deep chord in the heart of our profession. While litigation will always remain a competitive and pressure-packed enterprise, the opportunity to identify with a community of professionalism will vastly improve lawyers' outlook on life.

Finally, we should not be discouraged by the fact that the barrister tradition took several centuries to develop. Although the English started earlier down this path, they had to start somewhere too. We should start now. The legal system is too important to let professionalism continue to slide. We must rise to the challenge articulated by Professor Putnam in *Bowling Alone*:

[W]e need to create new structures and policies (public and private) to facilitate renewed civic engagement. . . . [L]eaders and activists in every sphere of American life must seek innovative ways to respond to the eroding effectiveness of the civic institutions and practices that we inherited. . . . [O]ur challenge is to restore American community for the twenty-first century through both collective and individual initiative.<sup>89</sup>



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89. Putnam, *supra* n. 78, at 403.