The Attack(s) on Lawyers in the US

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Overview of Lectures

I. The “Internal” Attack

II. The “External” Attack

III. The Attack from Market Forces

IV. Recent Developments and Evaluation of the Attacks

Introductory Points

- Not a unified attack from single source
- Arose at different times
- Not an effort to destroy legal profession in US
- But do represent efforts to fundamentally change values and power of US legal profession

The Development of the Internal Attack

When did the attack begin?

The Development of the Internal Attack

August 9, 1974

The Development of the Internal Attack

Richard Nixon resigns the Presidency.

The Development of the Internal Attack

- Nixon resigned after the Judiciary Committee of the House of Representatives had voted three Articles of Impeachment and Nixon was told by Republican Senators that his chances of avoiding conviction in the Senate were remote.

The Development of the Internal Attack

- Article 1 accused Nixon of having "prevented, obstructed, and impeded the administration of justice."
  - Criminal conduct

The Development of the Internal Attack

- Nixon was not criminally prosecuted because his successor, Gerald Ford, pardoned Nixon.
- However, numerous other lawyers in the Nixon administration were prosecuted criminally.

The Development of the Internal Attack

- John Dean, White House Counsel, plead guilty to charges of obstruction of justice on October 19, 1973. Dean received a sentence of 1-4 years, but only served a few months because of his cooperation with prosecutors.

The Development of the Internal Attack

- John Mitchell became the first US Attorney General ever convicted of criminal conduct and imprisoned.
- On February 21, 1975, Mitchell was found guilty of conspiracy, obstruction of justice, and perjury. He received a sentence of 2 ½ to 8 years in prison.

The Development of the Internal Attack

- John Ehrlichman, counsel to the President, was convicted of conspiracy, obstruction of justice, perjury and other charges in 1975.
- Ehrlichman served 18 months in prison.

The Development of the Internal Attack

- G. Gordon Liddy, was chief of operations for the secret White House Special Investigation Unit (the "Plumbers") established to investigate leaks of sensitive information, including the Watergate break-in.
- Liddy was convicted of conspiracy, burglary and illegal wiretapping, and received a 20-year sentence. He served 4 ½ years before his sentence was commuted by President Jimmy Carter.

The Development of the Internal Attack

- Watergate is one of the most significant political scandals in American history.
- Because of the number of lawyers involved, it is also a major embarrassment and scandal for the legal profession.

The Development of the Internal Attack

How did the organized legal profession respond to this major scandal of ethical misconduct by the highest ranking lawyers in the country?

The Development of the Internal Attack

Weakly!

The Development of the Internal Attack

- The major response by the profession was the ABA's adoption of a requirement that all law schools provide instruction in professional responsibility and legal ethics as a condition of accreditation.

The Development of the Internal Attack

- ABA Standard for Approval of Law Schools, 302(a)(iii) was amended in 1974 to provide that all accredited law schools must

  "require for all student candidates for a professional degree instruction in the duties and responsibilities of the legal profession".

The Development of the Internal Attack

- In addition, partly as a result of Watergate, but for other reasons as well, the ABA formed a Commission, the Kutak Commission, to study revision of the Code of Professional Responsibility, which then governed lawyer conduct.

The Development of the Internal Attack

- And yet, these relatively modest actions in response to a major scandal, have produced a significant development --→

The Development of the Internal Attack

- The creation of a group largely composed of academics with some practicing lawyers who devote the majority of their time to a study of the legal profession and who have been largely critical of the institutions and values of the profession.

The Development of the Internal Attack

How did this occur?

The Development of the Internal Attack

- Prior to the ABA's professional responsibility requirement, professional responsibility was not a serious subject of academic inquiry or interest in the US.
- Schools that had PR courses, generally staffed them with adjunct rather than full time faculty.

The Development of the Internal Attack

- Relatively few books and articles on the legal profession were published.
- A Westlaw search for 1970 under "professional responsibility" and "legal ethics" produced 5 entries.

The Development of the Internal Attack

- With PR now a required component of the curriculum, full-time academics began to take the subject more seriously.

The Development of the Internal Attack

- The ABA's project to revise the Model Rules reinforced this interest.
  - Geoffrey Hazard, a well-known and well-respected scholar, was appointed as Chief Report for the project, giving credibility to the field.
  - As the project developed, controversy over subjects such as confidentiality showed that there was substantial subject matter for academics to evaluate, criticize, and seek to improve.

The Development of the Internal Attack

- Today, professional responsibility is a serious field of academic inquiry to which a large number of scholars devote all or a substantial part of their time.
- A Westlaw search for 2005 under the same headings produced 4219 entries.

The Development of the Internal Attack

- Institutional structures show the arrival of the field:
  - One of the ABA's most prestigious conferences is the Annual Conference on Professional Responsibility, begun in 1975.
  - Other conferences abound.
  - Numerous law schools have developed centers and chairs in professional responsibility.
  - APRL (The Association of Professional Responsibility Lawyers) is a national association of academics and lawyers who devote substantial time to the field.

The Development of the Internal Attack

- Scholars in the professional responsibility field have largely been critical of the rules and practices of the legal profession.
- One of the principal areas in which scholars have focused their attack is the duty of confidentiality.

The Assault on Confidentiality

- Under the Code of Professional Responsibility, the standard that governed in the early 1970s, a lawyer could reveal confidential information only in four situations:

The Assault on Confidentiality

(1) Client consent after full disclosure

(2) When permitted under Disciplinary Rules or required by law or court order.

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

The Assault on Confidentiality

- Under this rule a lawyer was ethically prohibited from revealing confidential information
  - To prevent serious harm to others, unless the client was committing a crime
  - To rectify serious financial fraud by a client

Spaulding v. Zimmerman Facts (1)

- Accident between 2 vehicles in 1956
- Death of two passengers, one in each car
- David Spaulding (20), passenger in one car, seriously injured
- Spaulding father, as his natural guardian, brought suit against two drivers

Spaulding v. Zimmerman Facts (2)

- 3 medical experts for plaintiff examined Spaulding, but did not discover that he suffered from a life-threatening aneurysm of the aorta

Spaulding v. Zimmerman
Facts (3)

- Doctor retained by defense, Dr. Hannah, discovered the aneurysm and reported it to defense lawyer about a week before the case was scheduled to go to trial.

Spaulding v. Zimmerman
Facts (4)

- "Of course an aneurysm or dilatation of the aorta in a boy of this age is a serious matter as far as his life. This aneurysm may dilate further and it might rupture with further dilatation and this would cause his death."

Spaulding v. Zimmerman
Facts (5)

- Lawyer for defendant did not tell his client, the insurance company, or Spaulding's lawyer about his condition
- Dr. Hannah did not tell anyone other than lawyer for defendant.
- Lawyer for Spaulding never asked for a copy of the report, although he was entitled to receive a copy on request.

Spaulding v. Zimmerman Facts (6)

- Parties negotiated and agreed to settlement of $6500.
- Because Spaulding was a minor (at that time 21), Spaulding's lawyer filed a petition with the court to approve the settlement.
- Petition included reports of 3 doctors. Defense lawyer did not mention Dr. Hannah's report.
- Court approved.

Spaulding v. Zimmerman
Facts (7)

- About 18 months later Spaulding was required to take a physical by Army Reserve.
- Dr. Cain, his physician, and one of three doctors who examined him in connection with lawsuit, discovered the aneurysm.
- Spaulding underwent surgery to repair the aneurysm. He suffered a permanent speech loss, probably as a result of the procedure.

Spaulding v. Zimmerman Decision (1)

- Spaulding then filed a petition to have the settlement vacated and the judgment reopened.
- The trial court granted the motion, and the Minnesota Supreme Court affirmed.

Spaulding v. Zimmerman Decision (2)

- The court decided that defense counsel had not acted improperly:
- "no canon of ethics or legal obligation" required defense counsel to inform plaintiff or his counsel of Spaulding's injuries.

Spaulding v. Zimmerman Decision (3)

- The court did decide, however, to reopen the settlement because it has supervisory power over settlements involving minors.

The Assault on Confidentiality

- Scholars have overwhelmingly been critical of cases like *Spaulding v. Zimmerman* and its strict view of confidentiality.

The Assault on Confidentiality

- See, e.g., Roger C. Cramton & Lori P. Knowles, Professional Secrecy and Its Exceptions: *Spaulding v. Zimmerman* Revisited, 83 Minn. L. Rev. 63, 63-64 (1998).
- See generally Crystal, Professional Responsibility, Problems of Practice and the Profession 96-99 (3rd ed. 2004).

The Assault on Confidentiality in Business Transactions

- The academic attack on strict confidentiality goes beyond physical harm like that involved in *Spaulding v. Zimmerman* to include prevention of financial harm.

The Assault on Confidentiality in Business Transactions

- Beginning in the 1970s, every decade has produced at least one major corporate scandal in which lawyers were directly involved.
- The most recent of these involves the Enron Corporation, 235 F.Supp.2d 549 (S.D. Tex. 2002).

The Assault on Confidentiality in Business Transactions

- Academic commentators have criticized the involvement of lawyers in these transactions and have called for limitations on the duty of confidentiality when a business engages in fraud.

The Assault on Confidentiality in Business Transactions

- Susan P. Koniak, When the Hurlyburly's Done: The Bar's Struggle with the SEC, 103 Colum. L. Rev. 1236 (2003) (reviewing the history of lawyer involvement in major corporate scandals and the tension between the bar's ethics rules and the SEC's enforcement of the securities laws).

The Assault on Confidentiality in Business Transactions

- See Daniel R. Fischel, Lawyers and Confidentiality, 65 U. Chi. L. Rev. 1 (1998) (confidentiality rules benefit lawyers but are of dubious value to clients and society as a whole).

Ethics 2000

- In 1997 the president of the ABA appointed a Commission to study and make recommendations regarding revisions of the Model Rules of Professional Conduct.
- Known as "Ethics 2000 Commission."
- In 2002 the ABA adopted revised Model Rules based on the work of the Commission.

Revised Model Rule 1.6(b)

Revised Model Rule 1.6(b) provides lawyers with discretion to reveal confidential information in a number of situations, including:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

Revised Model Rule 1.6(b)

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

Revised Model Rule 1.6(b)

- Under the revised rule a lawyer has discretion to reveal confidential information in a situation like *Spaulding v. Zimmerman*.
- Under the revised rule a lawyer has discretion to reveal confidential information to prevent or to rectify financial frauds, like Enron.

Conclusions Regarding the Attack on Confidentiality

- It would be an overstatement to claim that the community of academics brought about this change.
- In fact, the profession had resisted calls by academics for change for years.
- Negative publicity about the profession resulting from Enron and other scandals was a major cause.
- But the existence of an academic community that had developed the rationale and details for change was an important contributing factor.

The Attack on Delivery of Legal Services

- Low- and moderate-income individuals in the US have a vast unmet need for legal services.
- Seventy-five percent of the legal needs of low-income individuals are unmet.
- Almost two-thirds of moderate-income Americans with legal problems are not receiving professional assistance.

Crystal, Professional Responsibility at 445.

The Attack on Delivery of Legal Services

- Legal services programs have woefully inadequate resources to meet the needs of low- income individuals.
- Forty-five million Americans qualify for civil legal aid.

The Attack on Delivery of Legal Services

- They are served by 4,000 legal aid lawyers and perhaps 2,000 other lawyers who provide representation to indigents.
- Thus, approximately one lawyer is available to provide services for every 9,000 qualifying individuals.

The Attack on Delivery of Legal Services

- In criminal cases, the US Supreme Court has recognized a constitutional right to counsel.
  - *Gideon v. Wainwright*, 372 U.S. 335 (1963) (felonies)
  - *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (misdemeanors in which defendant is subject to imprisonment)

The Attack on Delivery of Legal Services

- However, numerous studies have shown serious lack of funding in the criminal justice system. See Crystal, Professional Responsibility at page 215 n. 449. As a result
  - Public defenders have extremely heavy case loads
  - Appointed counsel receive grossly inadequate fees
  - Funds for investigation and experts are small

The Attack on Delivery of Legal Services

- The Supreme Court has refused to recognize a constitutional right to appointed counsel in civil cases. *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981) (no constitutional right to appointed counsel in proceeding for termination of parental rights).

The Attack on Delivery of Legal Services

- Deborah Rhode of Stanford Law School is the leading scholar who has challenged the institutional structures of the legal profession, particularly its failure to respond to the clearly documented unmet need for delivery of legal services. See Access to Justice (Oxford 2004).

The Attack on Delivery of Legal Services

- For many years the organized bar was indifferent or hostile to programs designed to improve the delivery of legal services.
- The bar opposed relaxation on restrictions on the unauthorized practice of law.
- The bar opposed plans for group legal services.
- The bar virtually ignored serious underfunding of the criminal justice system.

The Attack on Delivery of Legal Services

- In recent years, the bar has become more responsive.
- The ABA has adopted standards for delivery of both criminal defense and civil legal services. Revised standards were adopted this year.
  - Case loads
  - Independence

The Attack on Delivery of Legal Services

- This year the bar passed the following resolution
- **RESOLVED,** That the American Bar Association urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.

The Attack on Overzealousness

- The traditional view of the lawyer's role in the US is that lawyer's are
  - Neutral partisans
- Some critics charge that this view of the lawyer's role makes them nothing but "hired guns."

The Attack on Overzealousness

What is neutral partisanship?

The Attack on Overzealousness

- The principle of professionalism -- lawyers must take any action that will advance the client's interest so long as the action does not clearly violate a rule of ethics or other law.
- The principle of nonaccountability -- lawyers are not morally accountable for any actions that they take on behalf of clients in their professional role.

An example of overzealousness

Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130,
657 F.2d 890 (7th Cir. 1981)

An example of overzealousness

- civil rights class action
- brought by five named plaintiffs seeking to represent African Americans and Latinos
- alleging employment discrimination in their attempts to gain entry to the plumbing trade

An example of overzealousness

Excerpts from deposition
of one of the named plaintiffs

The Attack on Overzealousness

- *Q* Is any ancestor of yours Caucasian?
- *A* I rather not answer.
- *Q* I think it is a proper question. I believe you should answer the question, Mr. Eggleston.
- *Mr. Miner:* If you know. If you have first-hand knowledge.
- *By the Witness: A* I can only go by what my grandmother tells me, you know. I don't know if it is true or not.

The Attack on Overzealousness

– *By Mr. Barron: Q* What did your grandmother tell you, sir?
– *A* Well, she said our—she said yes.
– *Q* That some of your ancestors were Caucasian?
– *A* Yes.
– *Q* And is this your mother's mother or your father's
– mother who told you that?
– *A* My father's mother.
– *Q* Is she still living?
– *A* Yes.
– *Q* What is her name?
– *A* Berta Eggleston. Berta or Bertie.
– *Q* Would you tell us what she said to you about your
– ancestors?

The Attack on Overzealousness

– *Mr. Miner:* Listen. I am going to cut this off right now, and I will just instruct him not to answer any further questions. If you want to raise some doubt as to whether or not Mr. Eggleston is a black man, Howard, you are free to do so; but you have established that both his mother and father are members of the Negro race, and whether some hundred years ago he had some white blood introduced into his system is, I think, irrelevant, and I will instruct him not to answer any more questions.

The Attack on Overzealousness

- *By Mr. Barron: Q* Would you answer the question, please, Mr. Eggleston?
- *Mr. Miner:* I have instructed him not to answer. You can tell him that you are not going to answer the questions when I instruct you not to.
- *By the Witness: A* I rather not answer.
- *By Mr. Barron: Q* What is your grandfather's name, Mr. Eggleston?
- *A* Josef Eggleston.
- *Q* Do you know your great grandfather, Mr. Eggleston, on your father's side?

The Attack on Overzealousness

- *Mr. Miner:* Listen, Howard. This is getting bizarre. I am going to instruct him not to answer any more questions about anything beyond his grandparents just so that we might finish this in less than the time it took us to get through Mr. Plummer's deposition.
- *Mr. Barron:* We are not through with Mr. Plummer's deposition, Mr. Miner.

The Attack on Overzealousness

- David Luban of Georgetown and William Simon of Columbia, along with a number of other scholars, have criticized the rules of the legal profession for sometimes requiring lawyers to engage in morally improper conduct and for failing to promote justice.

Academic Critics

- David Luban, Lawyers and Justice (1988) develops a philosophy of lawyering founded on moral principles.
- Lawyers are morally accountable for the actions that they take on behalf of their clients and must be prepared to defend the morality of what they do.

Academic Critics

- Practical consequences of a philosophy of morality:
  - decline representation in more cases than under a philosophy based on neutral partisanship, turning down cases in which the lawyers concluded that the representation was morally indefensible

Academic Critics

– withdraw from representation more frequently, for example in cases in which clients demanded that lawyers pursue goals or tactics that the lawyers found to be morally unsound

Academic Critics

– broader view of their obligations as counselors, at a minimum raising moral issues with their clients and often trying to convince their clients to take what the lawyer considered to be the morally correct action.

Academic Critics

– when lawyers have professional discretion about how to act or in which the rules were unclear, take the action that the lawyer believed to be indicated by principles of morality, even if this action was not necessarily in the client's interest.

Academic Critics

- William H. Simon, The Practice of Justice (1998) develops a philosophy of lawyering based on a commitment to justice.
  - "[T]he lawyer should take such actions as, considering the relevant circumstances of the particular case, seem likely to promote justice." Page 9.

Academic Critics

- Justice as used by Simon is not an abstract concept but equated with “legal merit.”
- Calls on lawyers to assess the “internal merit” of their clients’ claims.

Academic Critics

"Responsibility to justice is not incompatible with deference to the general pronouncements or enactments of authoritative institutions such as legislatures and courts. On the contrary, justice often, perhaps usually, requires such deference." Page 138.

Academic Critics

When procedural defects exist, however, the lawyer's obligation to do justice requires the lawyer to assume responsibility for promoting the substantively just outcome:

Academic Critics

"[T]he more reliable the relevant procedures and institutions, the less direct responsibility the lawyer need assume for the substantive justice of the resolution; the less reliable the procedures and institutions, the more direct responsibility she needs to assume for substantive justice." Simon at page 140.

Academic Critics

- For example, if a government agency has insufficient resources to carry out a statutory mandate to protect the public, a lawyer representing a defendant would have an obligation not to impede the government investigative efforts and thereby subvert the statutory goal.

Results of Academic Criticism

- Results of the academic critique of overzealouness:
  - Not a fundamental revision of lawyers' ethics
  - Changes in particular rules
  - Examples
- Rule 2.1 --- greater discretion in counseling to include moral considerations

Results of Academic Criticism

- 1.16(b)(4) expansion of grounds for discretionary withdrawal to include situations in which client's action is repugnant or lawyer has fundamental disagreement
- 3.4 fairness to opposing party and counsel
- 4.4 respect for rights of others
- 4.4(b) and comments on inadvertently produced material

Nonacademic developments to temper overzealousness

- Professionalism movement emphasizing professional courtesy to judges and others
- Legal changes to temper overzealousness in discovery
- Both fostered by judiciary, which has interest in controlling overzealousness

Conclusions about the Internal Attack

- Post Watergate rise of group of academics devoted to study and critique of legal profession.
- Critiques have focused on
  - Strict confidentiality
  - Inadequate delivery of legal services
  - Overzealousness

Conclusions about the Internal Attack

- Other critiques – billing practices, status of women and minorities

- Results of internal attack have been mixed
  - Confidentiality – substantial change
  - Delivery of legal services – professional support but little change in funding
  - Overzealouness. Modest changes in rules of ethics. Supported by changes fostered by judges and rule makers.