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Repository Citation

Ralph Nader and Wesley Smith, *Lawyers' Roles as New Attorneys*, 80 Marq. L. Rev. 695 (1997).
Available at: <http://scholarship.law.marquette.edu/mulr/vol80/iss3/2>

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LAWYERS' ROLES AS NEW ATTORNEYS

RALPH NADER* AND WESLEY J. SMITH**

Ansel Chaplin, a Harvard law graduate and corporate lawyer with thirty years of practice under his belt, told us that many of his colleagues are big firm "spin control artists" who put the best face on the "outrageous or close-to-outrageous behavior" of their clients. As a consequence, clients view their legal representatives not so much as professionals, but as "hired guns" creating a system that promotes a kind of fundamental moral dishonesty.

These are not very encouraging words to read while you are a law student spending three years of your life in rigorous preparation for a license to practice law. But they are words that need to be taken to heart. The legal profession has devolved into a mercantile business where the ethical obligation to "zealously represent clients" has become the be all and end all of legal representation, resulting in the surrender of professional independence, sadly commented upon by Mr. Chaplin.

The general public is also aware that something has gone terribly wrong with the legal profession. The ubiquitous lawyer jokes we continually hear are merely one sign that the legal profession has slipped into disrepute among the general public. And for good cause. People sense that the legal system does not serve the common good, but has come instead to be utilized and administered primarily for the benefit of the richest and most powerful members of society. Is it any wonder, then, that respect for the rule of law has plummeted?

There is a powerful antidote to this despair and cynicism; the revitalization of the role of "lawyers" as a check and balance to the activities engaged in by "attorneys."

Many believe that the terms "attorney" and "lawyer" are synony-

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mous. They are not. The word "attorney" designates the private role of legal representative vis-a-vis the client. The word "lawyer" represents a vitally different duty required of the legal professional: the public role of "officer of the court" whose duties extend beyond the client to serving the justice system and the broader public interest.

The varying role of attorney and lawyer are both essential to effective and ethical legal representation. Without the attorney function, no duties of loyalty would be owed to the client. As a consequence, each legal professional would be tempted to become judge and jury of each case. However, without the lawyer function, legal representation would devolve into an anything-goes, whatever-it-takes-to-win form of legal Darwinism where justice would be superseded by the raw power of wealth, status, and connections, and where graft and ruthlessness would essentially prevail.

In today's legal profession, the "attorneys" have eclipsed the "lawyers," especially in the area of large firm and corporate practice where the values of the marketplace too often supersede the concept of equal justice under the law. This development has created a legal system in which "might" fundamentally makes "right," where individuals seeking justice from the most powerful private and public institutions are often crushed under unremitting "scorched earth" litigation tactics of attorneys who are paid hundreds of dollars an hour to obfuscate, obstruct, delay, and otherwise transform the pursuit of civil justice into a protracted, expensive, and inefficient war of attrition.

One need only look at the business pages of newspapers and the legal weeklies or read the news section of the Wall Street Journal to see what is going on. Regularly, stories appear of attorneys from the largest and most prominent law firms accused on discovery abuse, spoliation (destruction of evidence), misleading courts, and other unethical practices. Unfortunately, these reports are not the proverbial bad apples. Such forms of practice have become standard operating procedures as law firms vie to gain the favor of business interests and reap the fee largess that such activities garner. But the sense of emptiness felt by increasing numbers of corporate attorneys nearing retirement results, we found in researching our book, *No Contest*,¹ from their decades of missing out as "lawyers" to preserve and extend the legal pillars of our democracy. Instead, too many of these attorneys became lobbyists to

1. RALPH NADER & WESLEY J. SMITH, *NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA* (1996).

either enrich their corporate clients through such programs as corporate welfare or to aggressively restrict the access to justice and other legal rights of aggrieved persons trying to hold their clients responsible. Both the tort "deform" legislation drives and the vast pervasiveness of one-sided sign-on-the-dotted line contracts that dominate the market place, all the way to compulsory arbitration clauses, undermine our system of justice.

This all extracts a terrible toll: on society, against individuals caught up in an increasingly cruel and unresponsive civil justice system, and to the emotional health and well being of the attorneys themselves.

Society is injured by a lowering of the respect for the rule of law. People who feel that they do not have reasonable access to justice lose faith in the justice system. They refuse to serve on juries. They swallow injustice rather than use the legal system for its intended purpose. (There are few mental agonies more acute than believing one has been deprived of justice without an effective remedy.) In some extreme cases, they decide to take the law into their hands and act violently or otherwise unlawfully.

The personal toll on attorneys is also excruciating. Many come to hate practicing law but cannot leave it because they are hooked by the money. Imagine working for years to obtain the laudable goal of receiving a legal license only to wake up every day with your insides churning because you hate what you do for a living. Is it any wonder that attorneys have high incidence of alcoholism, drug abuse, marital discord, and other emotional problems?

The time has come to change course and revitalize the essential role of lawyering in all areas of legal representation. This can and should begin in law school where law students have an especially vital role to play. Students can resurrect practices undertaken by their predecessors in the Sixties and Seventies who sent questionnaires to recruiting law firms about their professional practices. These questions could include issues of the nature and scope of *pro bono* representation, activities to empower systems of justice, ethical guidelines followed by the firms, etc. Such consciousness raising can have an impact—as it did back then—especially considering that the law student activists of yesteryear are now the managing partners of recruiting firms.

At the same time, law professors and administrators reinforce these activities by paying heightened attention to the importance of legal ethics in legal practice, pressuring firms which recruit on campus, and seeking the assistance of experienced alumni in the transformation of legal practice away from the attorney-dominant form to one balanced and

benefitted by a greater exertion by legal professionals of their role as lawyers.

If students, faculty, administrators and experienced lawyers join together in a concerted effort, balance can be restored to the practice of law, and it can become, in the galvanizing words of attorney and former diplomat Sol Linowitz, a "profession that is once again independent, willing to sacrifice money for pride, eager to reassert its role as the guarantor of rights."