

TEACHING PROFESSIONAL RESPONSIBILITY AND ETHICS

RONALD D. ROTUNDA*

I. MY FIRST THREE MEMORIES OF LEGAL ETHICS

It is unusual what the mind remembers. My first recollection of wanting to become a lawyer was in grade school, when the teacher told each of us to write a paper on what we wanted to be. I was probably in eighth grade. I decided that I wanted to be a lawyer. I do not know why I made that choice. I did not know any lawyers. My parents never had the opportunity to attend college; my mother never even attended high school. My father emphasized education, but it was up to me to decide on a career.

In order to collect information on lawyers for my grade school paper, I wrote the state bar in Illinois, where I lived. The bar sent me its code of professional responsibility. I remember one thing: that one of the rules of professional responsibility stated that it was unethical to charge less than a certain amount of money per hour. I do not remember the exact amount, for it was many years ago. Let us say it was fifty dollars per hour. I do remember that, whatever the hourly amount was, it was more than what my father earned in a good day.

Think about that. It would be unethical for a lawyer to charge less per hour than my father earned in a full day. He is retired now, but at the time, he was a skilled, self-employed, blue collar worker (a sign painter). He often worked ten hours a day. Yet, it would be unethical for a lawyer to charge less per hour than he would earn in a good day.

What struck me at the time was that the legal profession said *it was unethical to charge too little*. Of course, we all like to earn more, but other occupations did not say that it was a sin to earn too little.

While lawyers (or any skilled professionals) are not surprised that they typically earn more than blue collar workers, it was many years before my father appreciated the size of that difference. That is a second memory that sticks in my mind. The summer after my first year of law school, I had a job in the law department of the First National Bank of Chicago. As my father was

* University Professor and Professor of Law, George Mason University School of Law. I gratefully acknowledge the generous support of the Law & Economics Center of George Mason University School of Law.

driving me to the train station, he said that it was good working for a bank—indoor work and no heavy lifting. But, he warned, the salaries are not that high; he was thinking of bank tellers. I told him my salary and his mouth dropped—I was earning substantially more money than he was. I was twenty-three years old and he was fifty-three, and I was making more. Now, I saved all my money to pay for tuition and school expenses, so my high salary was a good thing for him. It all went in the same pot. Still, his mouth dropped.

There is a third memory that I still recall after all these years, and it relates to this second memory because it deals with the competitive advantage that lawyers have because of the ethics rules.¹ This competitive advantage serves to lift incomes. During law school, I never took a class in Professional Responsibility or Legal Ethics. There was no requirement to take such a course, and, like most students, I never did. But when I was working for the First National Bank that summer, a legal ethics issue involving “unauthorized practice” arose. As most lawyers know, it is “unauthorized practice” and a crime in most states for a nonlawyer to practice law.² The unauthorized practice issue surfaced because of a typical problem for many couples at the time. When the husband or wife died, the surviving spouse sometimes found that he or she could not get access to the joint bank account because of possible state estate taxes due. The spouse simply filed a form with the state indicating that there would be no taxes owed because the estate was so small.

The problem was that many bank customers were not educated enough to navigate the form. The bank, as a courtesy, would send these people to lawyers in its trust department who would tell them how to fill out the form. Some lawyers not working at the bank complained of the competition, arguing that the bank was engaged in the unauthorized practice of law.³ And so the bank, which charged no money for this activity, stopped offering the free service rather than fight the charge.

Those memories have stuck with me for years. Legal ethics told us that it was *unethical* to charge too low a fee; that it was *unethical* for banks to compete with lawyers—even when the bank used lawyers duly admitted to the bar to perform competently a service, at no charge, for its customers, who did not complain. And, finally, given the restrictions on competition with lawyers, it should not be surprising that lawyers can make a lot of money. I recalled those memories again when I started teaching in law school and the dean asked me to offer a course on legal ethics.

1. See generally Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977) (arguing that ethics rules for lawyers are self-serving and should be reformed to protect the public and the client).

2. See RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY §§ 5.5-3–5.5-6 (4th ed. 2006).

3. See *id.* at § 5.5-7.

II. POST-WATERGATE MORALITY

As I started teaching, the American Bar Association (ABA) was about to require a course in legal ethics as part of its response to our post-Watergate morality.⁴ There had been a moving and painful moment during the televised Senate Watergate Committee hearings during the testimony of John Dean, the former Counsel to President Nixon. Dean disclosed that he had earlier made a list of the people that he thought could be involved in a conspiracy to obstruct justice.⁵ Next to many of the names was an asterisk.⁶ One of the Senators questioning him asked what the asterisks represented.⁷ John Dean indicated that they were the lawyers:

JOHN DEAN: "I put a little asterisk beside each lawyer . . . how in God's name could so many lawyers get involved in something like this?"⁸

The law school dean thought that I must know something about legal ethics because I had just finished my work with the Senate Watergate Committee. Fortunately, when the dean turned to me, I was able to turn to Tom Morgan, another professor, also on the University of Illinois faculty at the time. Without him, there never would have come into existence *Problems and Materials on Professional Responsibility*.⁹

Besides the complex rules against unauthorized practice, the law of ethics was easy to summarize in 1974 when I began teaching the subject: don't charge too little, and don't lie, cheat, steal, or advertise. That soon changed.

The old epigram that one should be careful for what one wishes because it may become true, applies to rules that mandated teaching the ABA Model Rules of Professional Conduct. When law professors analyzed the legal rules, they often did not like what they saw. A primary instrument of change in the

4. See Roger C. Cramton & Susan P. Koniak, *Rule, Story, and Commitment in the Teaching of Legal Ethics*, 38 WM. & MARY L. REV. 145, 148 (1996). The ABA Standards for Approval of Law Schools was "first adopted in August, 1973, in the midst of the Watergate disclosures." *Id.* It provided:

The law school shall: . . . require of all candidates for the first professional degree, instruction in the duties and responsibilities of the legal profession. Such required instruction need not be limited to any pedagogical method as long as the history, goals, structure and responsibilities of the legal profession and its members, including the ABA Model Rules of Professional Conduct, are all covered.

ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS, Standard 302(a)(iv) (1995). This professional responsibility requirement is the only substantive teaching requirement imposed by the ABA. Cramton & Koniak, *supra*, at 148.

5. *Presidential Campaign Activities of 1972: Hearing on S. Res. 60 Before the S. Comm. on Presidential Campaign Activities*, 93d Cong. 1053 (1973) (statement of John Dean).

6. *Id.* at 1054.

7. *Id.*

8. *Id.*

9. THOMAS D. MORGAN & RONALD D. ROTUNDA, *PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY* (1976). This book is now in its ninth edition.

law governing lawyers' ethics has been lawsuits, supported by scholarly research and commentary. Later, the American Law Institute's Restatement (Third) of the Law Governing Lawyers, published in 2000, continued the efforts to reform.¹⁰

The ethics rules have changed over the years, often because the courts have prodded, cajoled, and forced the organized bar to change. The year I started teaching legal ethics, the Supreme Court ruled that bar ethics rules that establish minimum fee schedules violate antitrust laws.¹¹ Later, the Court held that state rules prohibiting legal advertising violated the free speech rights of the First and Fourteenth Amendments.¹² But many courts—in the name of legal ethics—still protect the lawyer's monopoly over legal services, even when the people who perform the work are lawyers admitted to the bar (albeit the bar of a different state) and there is no claim that the work is incompetent.¹³

Oddly enough, while the content of the ABA Model Rules of Professional Conduct have changed substantially over the years, the basic format and outline of our ethics book has not, although it is now in its ninth edition.¹⁴ The original book, like its subsequent editions, focused on the ABA ethics rules and sought to teach the students what the ethics rules are, because the ethics lawyer must know those rules as well as the tax lawyer knows the Internal Revenue Code. But, because the law changes, and because what the law ought to be affects what it will be, the ethics lawyer must know why the rules exist in the present form, their policy or economic justifications, and why they may be likely to change.

Our ethics book created problems that brought out issues that one could analyze effectively only by applying these ethics rules.¹⁵ Those problems and the basic organization of the book have remained very similar over the years, even though the answers to many of the questions have changed because the rules have changed.

10. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000). Although this Restatement is titled "Third," there was never a Restatement (First) or Restatement (Second) on this topic. *See also* THOMAS D. MORGAN, ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, *LAWYER LAW: COMPARING THE ABA MODEL RULES OF PROFESSIONAL CONDUCT WITH THE ALI RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* (2005).

11. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

12. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977).

13. *See, e.g.*, *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998) (holding that a New York law firm violated a California statute, which restricted the practice of law to persons who are members of the state bar, by representing a California client with attorneys who were not members of the California bar).

14. *Compare* MORGAN & ROTUNDA, *supra* note 9, *with* THOMAS D. MORGAN & RONALD D. ROTUNDA, *PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY* (9th ed. 2006).

15. Our book was the first one to focus on the problem method of teaching ethics. Now, most of the other ethics books in this crowded field also use the problem method, which has proved to be a very effective method of teaching this subject.

Another thing that has changed over the years is that we have gone from a dearth of case law to an overabundance. There is now a lot of case law disciplining lawyers, disqualifying them, or holding them liable in tort for violations of ethics rules that, in the first edition, were mere hypotheticals. Sadly, life imitates art, and at this point, we have many examples of lawyers paying the price for ethical violations that the past punished less harshly or not at all. What were simply musings of law professors have become real-life threats, giving students an incentive to take the course seriously.

III. POST-ENRON MORALITY

In response to the Enron bankruptcy and the involvement of the legal and accounting professionals, Congress enacted the Sarbanes-Oxley Act.¹⁶ Among other things, Sarbanes-Oxley imposed new duties on lawyers.¹⁷ Since its enactment, the federal government has filed quite a number of charges against lawyers who allegedly knew about or participated in corporate fraud.¹⁸ In this post-Enron world, the federal government has indicted an “astonishing number of lawyers” in corporate fraud cases.¹⁹ The “sheer number of in-house counsel

16. See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 307, 116 Stat. 745-84 (2002); 15 U.S.C. § 7245 (2002). Congress required the Securities and Exchange Commission (SEC) to: issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule—

(1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and

(2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.

Id.; see also Richard W. Painter, *Convergence and Competition in Rules Governing Lawyers and Auditors*, 29 J. CORP. L. 397 (2004) (examining the problems lawyers and auditors confront when they evaluate and respond to risk, and examining ways that the gatekeeper function addresses these problems).

17. ROTUNDA & DZIENKOWSKI, *supra* note 2, at §§ 1.6-12(b); 1.6-12 (e)(4); 1.13-1(c); 1.13-2(c).

18. Richard M. Strassberg, David B. Pitofsky & Samantha L. Schreiber, *Lawyers on Trial: Government Views Attorneys as ‘First Line of Defense’ Against Corporate Malfeasance*, N.Y. L.J., Jul. 18, 2005, at 9.

19. ROTUNDA & DZIENKOWSKI, *supra* note 2, at §§ 1.6-12(b); 1.6-12 (e)(4); 1.13-1(c); 1.13-2(c); Strassberg, Pitofsky & Schreiber, *supra* note 18; see also LUCIAN T. PERA & BRIAN S. FAUGHNAN, ASS’N OF CORP. COUNSEL, PARADISE TARNISHED: TODAY’S SOURCES OF LIABILITY EXPOSURE FOR CORPORATE COUNSEL 2 (2005), available at <http://www.acca.com/public/article/ethics/liability.pdf>; John S. Dzienkowski & Robert J. Peroni, *The Decline in Lawyer Independence: Lawyer Equity Investments in Clients*, 81 TEX. L. REV. 405, 489 n.435 (2003).

prosecutions in the last few years is unheard of in a segment of the profession that historically has never been at the front of the prosecutors' radar."²⁰

Consider a few recent examples. In 2004, Stephen Woghin, the former general counsel of Computer Associates, pled guilty to obstruction of justice in connection with coaching company employees to provide false testimony to investigators.²¹ Two years earlier, the SEC charged that Franklin C. Brown, the former vice chairman and chief legal officer of Rite Aid Corp., and others "were responsible for one of the most egregious accounting frauds in recent history."²² "At age seventy-six and after being fitted with a pacemaker, Brown was sentenced to ten years in prison," after being convicted of ten felony counts, including lying to federal regulators.²³

Compare that punishment with what the court meted out to Michael Milken, the junk-bond king. In 1989, just fifteen years earlier, Rudy Giuliani, then U.S. Attorney for the Southern District of New York, prosecuted Milken for ninety-eight counts of racketeering and insider trading.²⁴ Milken, who is not a lawyer, pled guilty to six counts of various securities and reporting

20. PERA & FAUGHNAN, *supra* note 19, at 2–3.

21. Press Release, U.S. Dep't of Justice, Former Computer Associates Executives Indicted on Securities Fraud, Obstruction Charges (Sept. 22, 2004), *available at* http://www.usdoj.gov/opa/pr/2004/September/04_crm_642.htm.

[Computer Associates] retained a law firm to represent it in connection with the government investigations. Shortly after being retained, the company's law firm met with Kumar, Richards, Woghin and other CA executives in order to inquire into their knowledge of the practices that were the subject of the government investigations. During these meetings, the defendants and others allegedly failed to disclose, falsely denied and concealed the existence of the 35-day month practice. [The indictment explained that the goal of the "35-day month" was to permit CA to report that it met or exceeded its projected quarterly revenue and earnings when, in fact, it had not.] Kumar, Richards, Woghin and others allegedly presented to the law firm an assortment of false justifications to explain away evidence of the 35-day month practice. The indictment alleges that Kumar, Richards and Woghin *knew, and in fact intended, that the company's law firm would present these false justifications to the U.S. Attorney's Office, the SEC and the FBI* in an attempt to persuade the government that the 35-day month practice never existed. The indictment further alleges that *Kumar frequently instructed Woghin to meet with CA employees prior to their being interviewed by the government or the company's lawyers to coach them on how to answer questions without disclosing the 35-day month practice.* *Id.* (emphasis added).

22. SEC Litigation Release No. 17577, U.S. Sec. & Exch. Comm'n, Rite Aid's Former Management Team Charged with Securities Fraud by SEC (June 21, 2002), *available at* <http://ftp.sec.gov/litigation/litreleases/lr17577.htm>.

23. Joseph Savage & Christine Sgarlata Chung, *Trends in Corporate Fraud Enforcement: A Calm During the Storm?*, BUS. CRIMES BULL. (Law Journal Newsletters), Oct. 2005, at 1–2, *available at* www.goodwinprocter.com/getfile.aspx?filepath=/Files/publications/savage_chung_10_05.pdf.

24. Editorial, *Junk Sentence for Milken*, NAT'L REV., Dec. 17, 1990, at 17.

violations.²⁵ Judge Kimba Wood recommended a ten-year prison sentence and said that Milken should serve at least thirty-six to forty months.²⁶ In fact, he served only about twenty-two²⁷ months and remained a wealthy man with a net worth of at least \$700 million, even after paying \$900 million in fines and settlements (including civil law suits).²⁸

The SEC has not been sitting on the sidelines. One study concluded that the SEC, during the first eight months of 2005, has barred or suspended at least eighteen lawyers from practicing before the SEC.²⁹ By comparison, it disbarred or suspended three lawyers in 2004, five in 2003, and only one each in 2002 and 2001.³⁰

In addition to criminal and SEC enforcement, there is the risk of tort liability and disqualification. One does not need an economics degree to conclude that lawyers pay more attention to legal ethics when the results affect their pocket books. One accomplished lawyer told me that, about twenty years ago, when he began working for a well-known malpractice insurer, the head lawyer told him to read, first, the ABA Model Rules, cover-to-cover. He was surprised: What does this have to do with insuring law firms? After a short time on the job, he learned that a major risk with blue chip law firms is not that they are likely to miss a statute of limitations. Rather, it is that large law firms will be involved in a conflict of interest or violation of another ethics rule that leads to tort liability.

For example, Baltimore's Venable, Baetjer & Howard settled, for \$27 million, a lawsuit involving conflicts of interests.³¹ New York's Milberg Weiss Bershad Hynes & Lerach settled, for \$50 million, a malicious prosecution case brought against a lawyer.³² The law firm, after losing a jury verdict for \$45 million for malicious prosecution, settled by wiring a check for

25. *Id.*

26. JAMES B. STEWART, *DEN OF THIEVES* 448 (1991).

27. See Daniel J. Kornstein, *Review of Lawyer: A Life Of Counsel And Controversy*, N.Y. L.J., Sept. 18, 1998, at 2; *Milken Released To Halfway House*, CHI. DAILY L. BULL., Jan. 4, 1993, at 1; *Today's News: Update*, N.Y. L.J., Mar. 5, 1991, at 1; Jayne O'Donnell & Richard Willing, *Prison Time Gets Harder For White-Collar Crooks*, USA TODAY, May 12, 2003, at 1A.

28. See Emily Lambert & Monte Burke, *Dishonor Roll*, FORBES, Mar. 29, 2004, at 46; Margaret A. Jacobs, *Threats, Tension Electrify Trade Center Trial*, WALL ST. J., Sept. 30, 1993, at B1.

29. Savage & Chung, *supra* note 23, at 2.

30. *Id.*

31. Kirk Victor, *Venable Agrees to \$27M Accord*, NAT'L L.J., May 25, 1987, at 3. A precursor of some of these conflicts problems may be found in Ronald D. Rotunda, *Law, Lawyers, and Managers*, in *THE ETHICS OF CORPORATE CONDUCT* 127 (Clarence C. Walton ed. 1977).

32. Richard B. Schmitt, *Milberg Weiss Agrees to Pay \$50 Million to Settle Lexecon Case*, WALL ST. J., Apr. 14, 1999, at B17.

\$50 million before the jury could deliberate on punitive damages.³³ A few years later, a Los Angeles federal grand jury indicted the law firm for perjury, bribery, obstruction of justice, and fraud.³⁴ The court in *In re Futuronics Corp.* denied a law firm over one million dollars in fees under the Bankruptcy Code because of a prohibited fee-splitting arrangement and failure to comply with disclosure provisions for joint representation.³⁵ This list will never be complete.

Disbarment, suspension, reprimand, or other forms of legal discipline are not the real fears of lawyers, for they pale in comparison to the more realistic risk of tort liability and disqualification.

IV. WHY JAPAN WANTS MORE LAWYERS

The recent years have seen more competition in the practice of law, as courts and the state bars have revised ethical rules that restricted the free market.³⁶ That has benefited clients, but it has not caused lawyers to cry poverty. The average lawyer today earns about \$100,000 per year.³⁷ That high income level is not a sign of an overcrowded or underpaid profession: if there

33. *Id.*; Karen Donovan, *Milberg Weiss' \$50M Mistake*, NAT'L L.J., Apr. 26, 1999, at A1.

34. Julie Creswell, *U.S. Indictment for Big Law Firm in Class Actions*, N.Y. TIMES, May 19, 2006, at A1.

35. *Futuronics Corp. v. Arutt, Nachamie & Benjamin (In re Futuronics Corp.)*, 655 F.2d 463, 468–71 (2d Cir. 1981); *see also* *Halbert v. Yousif*, 225 B.R. 336, 343 (E.D. Mich. 1998).

Upon review of the record, this Court concludes that the Bankruptcy Court correctly determined that Halbert violated several other fiduciary obligations that had been imposed upon him by bankruptcy law. Based on these acts of misconduct, the Bankruptcy Court assessed the totality of Halbert's violations and concluded that "[t]he only proper response" to those deficiencies was to deny his fee applications.

Id. The court then concluded that the decision to deny the attorney all fees for services that he provided in a Chapter 11 case of debtor-corporation was not an abuse of discretion; however, the lawyer's disinterestedness and disclosure violations in a Chapter 11 case of debtor-corporation did not permit any denial of compensation for services that the lawyer performed in separate Chapter 11 cases of corporate principals. *Id.* at 360.

36. Thomas D. Morgan, *Economic Reality Facing 21st Century Lawyers*, 69 WASH. L. REV. 625, 626 (1994).

37. THOMAS D. MORGAN & RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY 3 n.3 (7th ed. 2000). The Bureau of Labor Statistics reported in 2000 that the median earnings of all lawyers was \$88,280; 25% earned more than \$130,000 and 25% earned less than \$60,700. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, 2000 NATIONAL OCCUPATIONAL EMPLOYMENT AND WAGE ESTIMATES (2001), available at <http://www.bls.gov/oes/2000/oes231011.htm> (last visited May 20, 2007). The salaries of the largest law firms exceeds this median. A survey of the 100 largest U.S. law firms found the median profits per partner at those firms in 1997 was \$587,000. John E. Morris, *Too Good to Be True?*, AM. LAW., Jul.-Aug. 1998, at 5. "In 1999, 17 of the 20 top-grossing firms in the Washington, DC, metropolitan area had profits per partner of at least \$500,000." Ronald D. Rotunda, *A Few Modest Proposals to Reform the Law Governing Federal Judicial Salaries*, 12 PROF. LAW. 1 (Fall 2000).

was an oversupply of lawyers, we would expect that their salaries would be lower than \$100,000 per year.

These high salaries do what we would expect high salaries to do: they draw talented people into the profession. There are more than one million lawyers in the United States today³⁸—“about three times as many lawyers per capita as any other comparable society.”³⁹

Over twenty years ago, Harvard President Derek Bok, a lawyer, complained about that. He moaned about a “massive diversion of exceptional talent into [law and other] pursuits that often add little to the growth of the economy, the pursuit of culture, or the enhancement of the human spirit.”⁴⁰ He continued:

I cannot press this point too strongly. . . . [T]he supply of exceptional people is limited. Yet far too many of these rare individuals are becoming lawyers at a time when the country cries out for more talented business executives, more enlightened public servants, more inventive engineers, more able high school principals and teachers. . . . A nation's values and problems are mirrored in the ways in which it uses its ablest people. In Japan, a country only half our size, 30 percent more engineers graduate each year than in all the United States. But Japan boasts a total of less than 15,000 lawyers, while American universities graduate 35,000 *every year*. It would be hard to claim that these differences have no practical consequences. As the Japanese put it, “Engineers make the pie grow larger; lawyers only decide how to carve it up.”⁴¹

Yet, the Japanese economy over the last several decades has not grown nearly as much as the U.S. economy.⁴² And Japan is now trying to *increase* the number of its lawyers!⁴³ That is right: the Japanese reject Derek Bok's

38. Ichiko Fuyuno, *Japan Grooms New Lawyers: Slew of Law Schools Open Up, as Deregulation Spurs Litigation*, WALL ST. J., Apr. 13, 2004, at A18. In 1900, that number was only about 100,000. Thomas D. Morgan, *Practicing Law in the Interests of Justice in the Twenty-First Century*, 70 FORDHAM L. REV. 1793, 1794 (2002).

39. Frank B. Cross, *The First Thing We Do, Let's Kill All the Economists: An Empirical Evaluation of the Effect of Lawyers on the United States Economy and Political System*, 70 TEX. L. REV. 645, 646 (1992); Richard H. Sander & E. Douglass Williams, *Why Are There So Many Lawyers? Perspectives on a Turbulent Market*, 14 LAW & SOC. INQUIRY 431, 432–33 (1989).

40. Derek C. Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570, 573 (1983).

41. *Id.* at 573–74.

42. See, e.g., Jonathan Fuerbringer, *Market Place: All Is Right with the World (Well, Not So Bad, at Least), and U.S. Treasuries Are in the Doldrums*, N.Y. TIMES, Jan. 12, 1999, at C15 (noting no evidence of a Japanese economic turn-around while the United States showed no signs of slowing down).

43. Fuyuno, *supra* note 38. Japanese universities opened 68 new law schools. *Id.* “The schools—the first U.S.-style law schools in Japan—started classes [in April 2004] with 5,600 students enrolled. They are part of the Japanese government's ambitious plan to boost the number of lawyers to 50,000 by 2018, from 23,000 [in 2004].” *Id.*

complaint. They want more lawyers, not fewer. What does Japan know that Derek Bok did not?

The Japanese apparently have concluded, correctly in my view, that the demand for lawyers is a function of the rate of increase in the gross national product.⁴⁴ As the amount of economic activity increases, the number of lawyers needed to facilitate that economic activity increases proportionately. Lawyers go hand-in-hand with prosperity. Derek Bok was wrong. We have more lawyers because we have more prosperity.

As Japan has been deregulating and opening up its markets,⁴⁵ its economy is now expanding, and its companies face more conflicts and more disputes, from employee complaints to intellectual-property disputes.⁴⁶ As Japan becomes more prosperous, it needs more lawyers, who implement the business transactions that lead to prosperity.

Just producing more lawyers will not make us richer, any more than buying more Picassos will make us richer. But, as we become richer, we need more lawyers (and we develop a taste for acquiring Picassos). Lawyers neither cause prosperity nor stand in the way. Instead, they are more like grease that reduces friction in the economic machine. Lawyers implement economic activity even if they do not originate it. That is why the long-term demand for lawyers is roughly in proportion to the long-term increase in the Gross Domestic Product.⁴⁷ We are growing faster than Europe, so we demand more lawyers than Europe.⁴⁸

Clients use lawyers to implement financings, plan for contingencies, draft contracts, advise on how to handle disputes, and seek redress in the courts, in agency actions, or in arbitration. Clients also use lawyers for rent-seeking activity when they lobby agencies or the legislature. This economic activity

44. See, e.g., Morgan, *supra* note 36, at 627–29. The high level of regulation in this country does not explain our need for lawyers because Europe has even more regulation, but the number of lawyers it has is less, not more. See B. Peter Pashigian, *The Market for Lawyers: The Determinants of the Demand for and the Supply of Lawyers*, 20 J.L. & ECON. 53, 53–55 (1977). It is common to blame the explosion in massive tort suits, and surely it is true that these lawsuits have made some lawyers rich, but the number of tort cases does not correspond to increases in the profession, and most lawyers do not practice tort law anyway.

45. Sebastian Moffett, *New Blueprint: Koizumi's Success Charts the Path to Japan's Future*, WALL ST. J., Aug. 28, 2006, at A1.

46. Fuyuno, *supra* note 38.

47. Morgan, *supra* note 38, at 1794; Morgan, *supra* note 36, at 627–630; B. Peter Pashigian, *The Number and Earnings of Lawyers: Some Recent Findings*, 1978 AM. B. FOUND. RES. J. 51, 81 (1978).

48. Compare DIRECTORATE-GENERAL FOR ECONOMIC AND FINANCIAL AFFAIRS, EUROPEAN COMMISSION, EUROPEAN ECONOMY 18 (Spring 2006), http://ec.europa.eu/economy_finance/publications/european_economy/2006/ee2006en.pdf (forecasting U.S. growth in Gross Domestic Product (GDP) for 2006 at 3.2%), with *id.* at 32 (forecasting E.U. growth in GDP for 2006 at 2.3%).

drives demand for lawyers' services. Our increasing trade and the increase in the number of our transactions⁴⁹ means that we need more lawyers to implement more business deals. The "demand for lawyers increases as more people get jobs, start businesses, accumulate assets, and have disputes that require a lawyer's attention."⁵⁰ As we get richer, we want better things, such as a cleaner environment, a safer workplace, and a more just society. For that, we need lawyers. Lawyers in this country, much more so than in European or South American countries, are at the center of business. When these other countries become the deal-makers, they—like Japan—will want more lawyers.

As these countries create more lawyers, the enforcement of the laws that regulate these lawyers will increase, just as we have seen an increase, in our post-Enron world, in the enforcement of the legal ethics rules in the United States. The problems may not change that much, but the answers to the questions will change as the governing rules change. And, as the world becomes smaller and our global economy becomes integrated, the teaching of legal ethics will go international.

49. Morgan, *supra* note 36, at 630.

50. *Id.* at 628.

