

## It's Not Funny: Creating a Professional Culture of Pro Bono Commitment

*Doug Colbert\**

Bashing lawyers and telling “lawyer jokes” remains a popular sport these days. From radio talk show hosts to the latest wannabe comics, everyone has their favorite slight directed against the profession.

Many have heard some variation of the tiresome quib that asks, “How do we know when a lawyer is lying?” Answer: “When his lips are moving.” Or the clever one about the heart surgeon, who gave his patient the choice of obtaining a new heart from two people who had recently died: a twenty-five year old marathon runner or a sixty year old lawyer. “The sixty year old lawyer,” said the patient without hesitation. “But why would you choose that one over the young marathon runner?” asked the doctor. “That is easy. I want the one that has never been used.”

Audiences smile or laugh at lawyer jokes, no matter the circumstances. Usually, the joke-teller begins with the standard, “Have you heard the story . . .” and then continues, “. . . about the family member shopping for a close relative’s tombstone? When asked what words she wanted inscribed, the bereaved daughter said, “Here lies an honest man and a lawyer.” The owner apologized for not being able to honor her request. “Sorry,” he said, “In this State, it is against the law to bury two people in the same grave.”

Greed, of course, is a familiar theme. Like the joke told about the personal injury lawyer, who moved to appeal her client’s case on grounds of newly discovered evidence. “What is the nature of the evidence?” asked the judge. The lawyer replied, “I discovered that my client still has \$500 left.”

My favorite zinger came when I invited some friends for dinner. One of the early guests noticed I was still working at preparing for my class the next day. She asked me what course I was teaching. “Legal ethics,” I said. Without missing a beat, she replied, “now, that is an oxymoron.”

Lawyers as lying, heartless, dishonest and unethical people who care only about money—are these really the same lawyers practicing law whom we know? Frankly, these are offensive examples of slanderous humor. These “jokes” are untrue for most lawyers, particularly for those whose work product and ethic I know best. Many lawyers stand tall and strong when fighting the uphill battle to protect the human rights and dignity of the least powerful in our society. These unsung heroes give voice to tenants, workers, consumers and immigrants, as well as the disabled, the health impaired, the unemployed, the small business owner, the environmentally conscious and the accused defendant. They meet the ideals of the profession and are committed to equal access to justice.

The public, though, is rarely aware of the everyday battles that take place in and outside of court. Most people are not informed or educated about the bigger stories surrounding legendary attorneys like Charlie Huston, Thurgood Marshall and the NAACP legal team, whose legal successes led to the dismantling of racial apartheid.<sup>1</sup> Nor do most know about the courage of attorneys like Sam Liebowitz, who defended the nine Scottsboro defendants during the lynch-mob atmosphere and racial terror that pervaded the courtroom in the 1930s.<sup>2</sup> Too little attention is given to the courageous human rights lawyers who traveled to the heart of segregation country to defend ordinary people seeking to exercise freedom and citizenship rights against the force of local law enforcement and vigilante white mobs in the south and in the north.<sup>3</sup> Attorneys like Arthur Kinoy, Morty Stavis, Bill Kunstler, Haywood Burns, Ann Fagan Ginger and Doris Brin,

have answered the call from local attorneys and confronted biased local court systems.<sup>4</sup> It is difficult to describe the dangers and personal risk these lawyers faced, not to mention their clear underdog status. If you have been marveling at the many upsets in this year's tournament, consider the public's reaction when attorney Thurgood Marshall overcame the overwhelming odds against the undefeated and number one ranked attorney, John Davis, his opposing counsel and a founding partner at one of Wall Street's most powerful firms.<sup>5</sup>

Presented here is the picture of a different type of lawyer than the public's distorted image of the self-centered and uncaring one. The modern lawyer is a member of a profession, a public citizen, and someone mindful of his or her "special responsibility for the quality of justice."<sup>6</sup> Eloquent words, don't you agree?

These are not my words, nor my subjective definition of a lawyer dedicated to social justice for the underserved and disadvantaged communities. These are the words found in the American Bar Association's ethical code since 1983. They are included in the very first sentence of the Preamble to the ABA's Model Rules of Professional Conduct,<sup>7</sup> which most states have adopted as their ethical standard for lawyers' behavior.<sup>8</sup> The Preamble's consensus statement reminds lawyers that they have a "special responsibility" to enhance every person's access to a lawyer and to improve the quality of justice that litigants receive when they enter the legal system.<sup>9</sup> Model Rule 6.1 declares that, "[e]very lawyer has a professional responsibility to provide legal services to those unable to pay."<sup>10</sup> The ABA's Preamble recognizes that "deficiencies"<sup>11</sup> in people's lack of access to counsel exist in most states where four out of five lower income people, and more than half of the middle class, cannot afford a private lawyer in the civil arena.<sup>12</sup> Similarly, in states' criminal justice systems, most poor and working people accused of crime are typically denied counsel during the early stages of a criminal prosecution.<sup>13</sup>

Ironically, we are speaking here about the leadership taken by the American Bar Association, which until the 1960s had limited membership to white and male attorneys, who were almost exclusively Anglo-Saxon and from a “better” social class.<sup>14</sup> During the past four decades, the ABA has been one of the champions of the legal profession’s move toward enhancing justice and ensuring access to counsel for the many people who currently represent themselves in civil and criminal courts across this nation.

And so I pose the following questions to those who enjoy the privilege of teaching and preparing this generation of law students to enter the academy: How often do you bring the Preamble’s language to your classroom? How much time do you devote toward informing students that being a lawyer and fulfilling the attorney’s ethical obligations requires acting as “a public citizen”<sup>15</sup> committed to justice and conducting pro bono work? How many in the academy remind their students that we are not merely a law business, but a profession that is charged with “having [a] special responsibility for the quality of justice?”<sup>16</sup> We all know many colleagues who make tremendous pro bono and public service contributions as scholars, teachers and participants in public service. However, the question remains: Are we doing all we can to instill the profession’s ethical obligation of public service to our students, to members of the bar, and to faculty colleagues?

The Dean, you say, talks about public service at the first-year orientation and again at your school’s graduation. Faculty colleagues teach mandatory professional ethics courses. Other faculty members promote and supervise pro bono projects. But what happens during students’ three and four-year law school experience? What takes place after the Dean’s orientation and before her graduation speech, during which she expresses pride in the school’s commitment to service and tells students not to forget the needy and disadvantaged? When was

the last time your faculty engaged in discussion about what we are teaching in our classes to reinforce the lawyer's role as a public citizen dedicated to justice and public service? I say this with enormous respect to many law professors who are doing good work and making substantial pro bono contributions.

While offering my genuine praise, though, I must take issue with those who believe I am not preaching to the choir. To the contrary, I am convinced we can do more to teach the Preamble and Rule 6.1, and to inspire our students by describing the work remaining to complete the bar's commitment to public service. Indeed, we can lead by example.

That is why the Society of American Law Teachers (SALT) has embarked on an Access to Justice Project that seeks to reform the legal curricula and encourage colleagues to introduce the concept of the lawyer as public citizen in their classes and within the law school institution. We who teach and study law have this grand opportunity to complete the century-old circle of the legal profession's ethical code and to see the day when lawyers, as a group, accept their professional duty to serve communities in need of legal assistance. Many law professors already have observed signs of this taking place among the law students and lawyers, who volunteered and traveled to the Gulf Coast after Hurricane Katrina and who engage in volunteer legal work in the local community. I am persuaded that a significant portion of the current law school generation is ready to embrace their ethical duty of public service, but they need active faculty intervention. Students want to hear from professors and know what they must do to be an ethical lawyer. With access to this information, a sizeable portion of this next generation will succeed in performing at least fifty hours of legal services to people who cannot afford legal counsel, and will encourage many other experienced lawyers to do the same.

If you agree, you will be joining a distinguished group of colleagues who took bold steps at the turn of the twentieth century to change the status quo of a bar, which previously had been known for only serving the powerful and those who could afford their services. Consider future Justice Louis Brandeis's address to the Harvard Ethical Society in 1905 and his attempt to urge lawyers not to remain adjuncts of the great corporations. "We hear much of the 'corporation lawyer,' and far too little of the 'people's lawyer.'" <sup>17</sup> Shortly thereafter, President Theodore Roosevelt echoed Brandeis' words at Harvard's graduation commencement, when he urged "the great profession of the law" to cease providing the legal strategies "to override government regulation."<sup>18</sup> Instead, the President implored the soon-to-be lawyers to "actively frown on corporations seeking even greater accumulation of wealth at public expense,"<sup>19</sup> and to use their legal skills on behalf of the public interest.

Of course, it took many decades before the ABA would transform its public image of being a business and trade that cared primarily about money and "personal aggrandizement."<sup>20</sup> At first, the leadership used the President's admonishment as an excuse to invoke ethical guidelines against the new immigrant lawyers who were educating workers about their legal right to sue an employer for injuries they sustained from dangerous working conditions.<sup>21</sup> The ABA leadership referred derisively to these plaintiff lawyers as "the shyster, the barratrously inclined, the ambulance chaser and the member of the Bar with a system of runners."<sup>22</sup> Sixty years later, in 1969, when the ABA revised the first Canons of Ethics and created the Model Code of Professional Responsibility,<sup>23</sup> it was clear that the Supreme Court's ruling in *Brown v. Board of Education*<sup>24</sup> and the role of the civil rights lawyer had a dramatic impact upon lawyers' capacity to acknowledge their ethical obligation to treat the individual with dignity and to follow a non-discriminatory policy. This shift was reflected in the revised Preamble.<sup>25</sup> The Model

Code's new language also reflected Supreme Court rulings in the 1960s that recognized, for the first time, an accused person's constitutional right to counsel in a felony cases, as well as other due process rights of lower income people.<sup>26</sup> In 1965, ABA President Louis Powell, the previous defender of the segregated public school system in Prince County, Virginia, led support for a Legal Services Corporation that would provide legal representation to hundreds of thousands poor people in their civil matters.<sup>27</sup>

Following the 1969 Model Code, the next generation of lawyers—the ones who went to law school in the 1970s and chose to work as full-time Legal Aid and Legal Services lawyers—helped to introduce the current language of the Model Rules of Professional Conduct.<sup>28</sup> They, along with other veterans, engaged in a vigorous battle over whether lawyers must devote time to pro bono work, which nearly succeeded in requiring public service for every member of the bar.<sup>29</sup>

Today's public citizen lawyer faces an ever-present crisis in people's access to justice. Our legal system fails to guarantee access to a lawyer's representation when people's fundamental human rights are at stake.<sup>30</sup> Imagine the enormous difference it would make if this generation of law students were to embrace its duty to serve when entering the profession. If lawyers shed their public image of being selfish and instead dedicated one week each year to providing legal counsel to the underserved, it would transform the bar's public image and fundamentally change the quality of justice that ordinary people receive. Instead of hearing new lawyer jokes, people would become aware of the many untold stories about lawyers stepping forward to ensure individuals gained access to justice in criminal and civil matters. Consider for a moment how much this next generation would accomplish if they led the movement of

attorneys committed toward contributing fifty hours of service each year. The total amount of free legal assistance would be staggering.<sup>31</sup>

Law professors have an important job ahead. We must prepare law students to meet their ethical responsibilities and inspire each to fulfill their obligation as public citizens when they join the bar. We can set the example through our teaching within the classroom, and outside the classroom, too, by volunteering to meet the unmet legal needs of the community where we live, work, or practice. The crisis that people currently face in gaining access to counsel and the bar's professional responsibility requires that we begin right away.

---

\* [Biography/ Acknowledgements]

<sup>1</sup> See generally RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (Vintage Books 1977) (1976).

<sup>2</sup> See Clayborne Carson, *THE EYES ON THE PRIZE CIVIL RIGHTS READER: DOCUMENTS, SPEECHES AND FIRST HAND ACCOUNTS FROM THE BLACK FREEDOM STRUGGLE 1954 – 1990* 23-24 (Clayborne Carson et al. eds., Penguin Books 1991).

<sup>3</sup> *Id.* at 15-16.

<sup>4</sup> Doris Brin Walker was the only woman in her 1942 UC Berkeley Law School class and an early member of the National Lawyers Guild. Bob Egelko, *Doris Walker—Fought to Acquit Angela Davis*, S.F. CHRON. (Aug. 19, 2009), available at [http://articles.sfgate.com/2009-08-19/bay-area/17178005\\_1\\_national-lawyers-guild-ms-walker-afghanistan-and-iraq](http://articles.sfgate.com/2009-08-19/bay-area/17178005_1_national-lawyers-guild-ms-walker-afghanistan-and-iraq). As a practicing attorney, she dedicated her time to representing war protesters and individuals subpoenaed by the House Un-American Activities Committee as suspected Communists and, in 1972, she played a central role in the successful defense of left-wing professor Angela Davis. *Id.* Ann Fagan Ginger is a constitutional lawyer who has worked to promote civil liberties and the United Nations throughout her legal career. Interview by Grace Erin with Ann Fagan in Los Angeles, California (Feb. 9, 2006). While working for the National Lawyers Guild, she sued the FBI in order to gain access to their surveillance files on attorneys. *Id.* In more recent years, she has spoken out against the post 9/11 activities of the Bush administration. *Id.*; See ARTHUR KINOY, *RIGHTS ON TRIAL: THE ODYSSEY OF A PEOPLE'S LAWYER* 210-11 (1983) (describing the circumstances that motivated Arthur Kinoy, Bill Kunstler, Ben Smith and Morty Stavis to come together in order to found the Center for Constitutional Rights in 1966); Michael Ratner & Eleanor Stein, *W. Haywood Burns: To Be of Use*, 106 YALE L.J. 753 (1996) (commemorating Burns' legal contributions to the civil rights movement).

<sup>5</sup> Luther A. Huston, *High Court Bans School Segregation: 9-to-0 Decision Grants Times to Comply*, N.Y. TIMES, May 17, 1954 at A1.

<sup>6</sup> MODEL CODE OF PROF'L CONDUCT, pmble. ¶ 1 (2002).

<sup>7</sup> "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." *Id.*



---

<sup>8</sup> Currently, all states except California have adopted a full or amended version of the Model Rules of Professional Conduct. Of the remaining forty-nine states, all states except Louisiana, Maine, Nevada, New Hampshire, New Jersey and Oregon have adopted a preamble that includes language concerning a lawyer's responsibility to provide legal access to the poor (the equivalent to the Model Rules of Professional Responsibility Preamble, paragraph six). In addition, New York's Preamble follows the 1969 version of the Model Rules of Professional Responsibility and Georgia's preamble omits the word "public" from its language in paragraph six. See *Links to Other Legal Ethics and Professional Responsibility Pages*, AMERICAN BAR ASSOCIATION, <http://www.abanet.org/cpr/links.html> (last visited Aug. 2, 2010).

<sup>9</sup> "As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal system." MODEL CODE OF PROF'L CONDUCT, pmble. ¶ 6 (1983).

<sup>10</sup> *Id.* R. 6.1.

<sup>11</sup> "A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor cannot afford adequate legal assistance." *Id.* pmble. ¶ 6.

<sup>12</sup> Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1785 (2001) (stating that "four-fifths of the civil legal needs of the poor . . . remain unmet"). "While there is only one legal aid lawyer (including all sources of funding) per 6,415 low-income people in the country, . . . there is [approximately] one lawyer providing personal civil legal services . . . for every 429 people in the general population." LEGAL SERVICES CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL NEEDS OF LOW-INCOME AMERICANS 19 (2009), available at [http://www.lafla.org/pdf/justice\\_Gap09.pdf](http://www.lafla.org/pdf/justice_Gap09.pdf).

<sup>13</sup> Douglas L. Colbert, *Thirty-Five Years After Gideon: The Illusory Right to Counsel at Bail Proceedings.*, 1998 U. ILL. L. REV. 1, 9-13 (1998) (stating that only eight states guarantee assigned counsel at indigent defendants' initial appearance). "Despite [a] national trend toward representing indigent defendants at the initial appearance, about half of the country's local jurisdictions persist in not providing counsel." Douglas L. Colbert, *Prosecution without Representation* 56 (July 12, 2010) (unpublished manuscript) (on file with author).

<sup>14</sup> JEROLD S. AUREBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 65 (1976).

<sup>15</sup> MODEL CODE OF PROF'L CONDUCT, pmble. ¶ 6 (2002).

<sup>16</sup> *Id.* pmble. ¶ 1.

<sup>17</sup> Louis D. Brandeis, Address Before the Harvard Ethical Society: The Opportunity in the Law (May 4, 1905), available at <http://www.law.louisville.edu/library/collections/brandeis/node/222>. Louis Brandeis added a further challenge to his colleagues: "The great opportunity of the American Bar is and will be to stand again as it did in the past, ready to protect . . . the interests of the people. *Id.*

<sup>18</sup> Theodore Roosevelt, Address at Harvard Commencement Exercises: The Harvard Spirit (June 28, 1905) in XIV Harvard Graduates' Magazine, No. 53, Sept. 1905, at 7-8.

<sup>19</sup> *Id.*

<sup>20</sup> ABA Comm. on Code of Prof'l Ethics, 29 ANNUAL REP. OF THE A.B.A. 600, 601 (1906).

<sup>21</sup> AUERBACH, *supra* note 14.

<sup>22</sup> 29 A.B.A. rep. 600, 600-01 (1906).

---

<sup>23</sup> MODEL CODE OF PROF'L RESPONSIBILITY (1969).

<sup>24</sup> 347 U.S. 483 (1954).

<sup>25</sup> “The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection . . . . Lawyers, as guardians of the law, play a vital role in the preservation of society.” MODEL CODE OF PROF'L RESPONSIBILITY, pmble. ¶ 1 - ¶ 2 (1969).

<sup>26</sup> See *Gideon v. Wainwright*, 372 U.S. 335 (1963) (establishing the right to counsel for defendants in all felony cases); see also *Boddie v. Connecticut*, 401 U.S. 371 (1971) (holding that due process prohibits a state from denying access to the court system to individuals seeking judicial dissolution of their marriage solely because of their inability to pay); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that due process requires that a person receive an evidentiary hearing before he is deprived of certain government benefits) .

<sup>27</sup> See Douglas L. Colbert, *Professional Responsibility in Crisis*, 51 HOW. L. J. 677, 701-03 (2008); Judith Maute, *Changing Conceptions of Lawyer's Pro Bono Responsibilities*, 77 TUL. L. REV. 91, 117-21 (2002).

<sup>28</sup> Colbert, *supra* note 27, at 704-07.

<sup>29</sup> Colbert, *supra* note 27, at 710-12.

<sup>30</sup> See Legal Services Corp, *supra* note 12; see also Russel Engler, *Shaping a Context-Based Civil Gideon from the Dynamics of Social Change*, 15 TEMP. POL. & CIV. RTS. L. REV. 697, 700 (2006) (identifying key categories of cases that frame an argument for a defendant's right to counsel in the civil context: divorce, termination of parental rights, eviction and immigration).

<sup>31</sup> According to the ABA, there are 1,180,386 practicing lawyers in America (as of Dec. 31, 2008). AMERICAN BAR ASSOCIATION, NATIONAL LAWYER POPULATION BY STATE (2009), [http://new.abanet.org/marketresearch/PublicDocuments/2009\\_NATL\\_LAWYER\\_by\\_State.pdf](http://new.abanet.org/marketresearch/PublicDocuments/2009_NATL_LAWYER_by_State.pdf). If each lawyer met his or her minimum pro bono responsibility of fifty hours each year, the profession would collectively provide 59,019,300 hours of free legal service. Even if only half met their responsibility, the profession would still provide almost 30,000,000 hours each year.