

Modern Professional Practice and its Future

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The Promise of Professionalism in the 21st Century

Justine Rogers

University of New South Wales, Law
j.rogers@unsw.edu.au

Dimity Kingsford-Smith

University of New South Wales, Law
d.kingsfordsmith@unsw.edu.au

Thomas Clarke

University of Technology, Sydney
thomas.clarke@uts.edu.au

John Chellew

University of New South Wales, Law
j.chellew@unsw.edu.au

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I. Introduction and Context

This paper explores the question of 'What is the promise of professionalism in the 21st Century?' In doing so, it investigates the extent to which it might be concluded that professionalising an occupation will raise standards of conduct so that the client and the public interest will be better served. This inquiry is undertaken in a context where, particularly in relation to the financial sector, calls for the need to professionalise are becoming more common, and where government, regulators, the press, the academy and indeed professionals have previously failed to prevent conduct detrimental to the client and the public interest (eg, in the case of the GFC).

In this analysis, we recognise that professionalism is an elusive and changeable phenomenon that retains multiple stakeholders. We also recognise that professions have been beset by, and have had to adapt to huge social changes and challenges. Specifically, we explore the promise of professionalism by comparing the status profession¹ of law, which we argue as demonstrating how professionalism may be achieved, to banking and finance. We surmise that if the characteristics of profession can improve conduct in banking and finance, they will be useful in other occupations.

II. What are the Central Ideas and Mechanisms of Professionalism?

In this section, we distil the vast academic scholarship on conceptions of professionalism into five central ideas. First, is the elusiveness of defining professionalism. There is a gap between conceptions and practices of professions that has, in part, been perpetuated by the self-representations of professions.² The literature demonstrates that professionalism responds to wider political, economic and social changes.³ Even established status professions have undergone identity crises⁴ in the face of challenges to their political legitimacy, cohesive identity, regulatory and work monopolies and privileges over the past 40 years. Thus, professions and their power and forms are now no longer as well defined.

Second, is the characteristic of professional autonomy, and the interaction with the state and the public interest. Ideally, professions are forms of social organisations that enable non-pecuniary, altruistic ideas, interests and relationships between people based on trust between the professional and client, peer professionals, professional and association and profession and the state. Above all, professions are expected by the state on behalf of society to promise equality and a commitment to the public interest above their own self-interest. In exchange, the state grants a profession a regulatory autonomy over its entry and standards and a monopoly over its work jurisdiction.

Third, is the characteristic of shared knowledge and training. Professional knowledge is generated through extensive and ongoing education set by the professional body. Professional entry usually requires a university degree and significant practical training, while ongoing professional membership is granted conditionally upon the undertaking of continuing education. Knowledge has thus been described as the 'core generating trait' of professions that grants and justifies their special status.⁵ Like medicine, law, engineering and accounting, now banking and finance argues that it should be considered a profession.

¹ By 'status' profession or group we mean an occupational category 'that exist[s] by virtue of social values or evaluation' (McDonald *The Sociology of the Professions* (Sage) at 43), whose members have collective identity and common function and are recognised by members of society as such.

² Rogers, Justine. "Representing the Bar: how the barristers' profession sells itself to prospective members." *Legal Studies* 32.2 (2012): 202-225; Pue, W. Wesley, and David Sugarman, eds. *Lawyers and vampires: Cultural histories of legal professions*. Bloomsbury Publishing, 2003.

³ Gerard Hanlon, 'A Profession in Transition? – Lawyers, The Market and Significant Others' (1997) 60 *Modern Law Review* 798; Pue and Sugarman, above n 2.

⁴ Rogers, above n 2.

⁵ Terence Halliday, *Beyond Monopoly* (University of Chicago, 1987) 29.

Fourth, is the characteristic of shared professional ethics and purpose. Professions have been described as 'a group pursuing a learned art as a common calling in the spirit of public service'.⁶ This notion of service extends beyond the confines of private interest and gain, and necessarily entails the existence of a body of professional ethics to identify and regulate the demands of that service. This is typically expressed at the institutional level through a code of conduct adopted and enforced by a professional association.

Fifth, are the characteristics of status, power and identity. Aside from the consideration of the public, professionalism is also a logic that is self-serving. It has been argued that professions use concerted strategies to dominate markets in areas of social concern to advance the interests of their members.⁷ This has been termed the 'professional project' – the systematic attempt to translate scarce cultural technical resources into a secure and institutionalised system of social and financial rewards.⁸ Thus, for example, professional ethics are seen by some as rules of behaviour designed to support a profession's internal hierarchies, trust and cohesion.⁹

III. What are the Main Challenges to Established Ideas and Mechanisms of Professionalism?

In this section, we examine the contemporary challenges facing professionalism and their consequences. Writers generally perceive the traditional ideals of autonomy, collegiality and ethical fidelity as having been 'contaminated' by entrepreneurship, managerialism¹⁰ and consumerism. We consider that the sites of power of professionalism, and its meaning and its beneficiaries have shifted in the face of such challenges.

First, we consider competition, consumerism and the new relations of professions with the state. In recent times, professional monopolies and arrangements have been attacked and dismantled as being self-serving, anti-competitive and inefficient.¹¹ Increasing political attention has revised the regulative bargain between professions and the state, with extensive regulation that has 'sought to weaken professional monopolies, dismantle restrictive arrangements and challenge entrenched privileges'.¹² Professional associations are thus no longer trusted with the dual role of representation and regulation. Alongside this is the consumerist view that professions must deliver on their promise,¹³ and that the client has thus far been under-served. The trust of all professions is being increasingly eroded which, alongside these competition and consumerist ideologies, has also been fuelled by the emergence of globalisation and new technologies.¹⁴

Second, we consider client demands, profit motive and managerialism. In contrast to the traditional professional ethos that focuses on individual practice and responsibility to the client, the rise of the

⁶ Roscoe Pound, *The Lawyer from Antiquity to Modern Times* (West Publishing, 1953) 5, cited by James Allsop, 'Professionalism and Commercialism: Conflict or Harmony in Modern Legal Practice?' (2010) 84 *Australian Law Journal* 765.

⁷ M Larson, *The Rise of the Professions: A Sociological Analysis* (University of California Press, 1977).

⁸ Ibid.

⁹ Richard Abel, *The Legal Profession in England and Wales* (Blackwell Publishers, 1988).

¹⁰ John Flood and Avis Whyte, 'Straight There, No Detours: Direct Access to Barristers' (2009) 16 *International Journal of the Legal Profession* 131.

¹¹ In relation to law see for example HMSO *The Work and Organisation of the Legal Profession* (1989) prepared for the Thatcher Government. In Australia see Hilmer etc.

¹² Daniel Muzio and Stephen Ackroyd, 'On the Consequences of Defensive Professionalism: Recent Changes in the Legal Labour Process' (2005) 32 *Journal of Law and Society* 615, 622.

¹³ R and D Susskind, *The Future of the Professions: How Technology will Transform the Work of Human Experts* (OUP 2015) 33.

¹⁴ Daniel Muzio and John Flood, 'Entrepreneurship, Managerialism and Professionalism in Action: The Case of the Legal Profession in England and Wales' in Markus Reihlen and Andreas Werr (eds), *Handbook of Research on Entrepreneurship in Professional Services* (Edward Elgar Publishing, 2012) 369.

'bully client' (eg, the large multinational client) has led some to question whether the traditional supposition of a power imbalance in favour of the professional is still applicable.¹⁵ Commercial challenges including the assumption that high remuneration will more efficiently motivate client service thus justifying a for-profit practice focus have also been prominent. Another major change is how the workplace has now become a site for professional identity formation and re-formation. Legal professionals, for example, are now socialised into new managerial priorities including client service, commercial awareness, teamwork, flattened hierarchies, lean staffing and efficiency.¹⁶ Professional organisations are thus becoming their own training sites outside of the purview of professional bodies, introducing competing values and further contributing to the fragmentation of professional identity and associational regulation.

Third, we consider the rise of the professional firm and changes in the sites of professional work. Most professional activity is now undertaken in large organisational settings including publicly run services or large, private sector firms.¹⁷ Accordingly, we need to understand more about how professional organisations interact with professional occupations. A related challenge is that of globalisation whereby small, local communities of professionals with ethical knowledge to serve their clients have been replaced by anonymous, hugely incentivised individuals operating in large international practices. This has created tensions in professional regulation,¹⁸ compounding the effects of remuneration and profit-seeking management in large organisations.

IV. What are the Main Responses to Professionalism's Changes and Challenges?

In this section, we consider the main strategies being adopted to deal with these challenges. First, is re-regulation. In the Australian legal context, a major response of professional bodies has been to create a single legal services market overseen by a national regulatory body. This is an example of adaptation by the bodies to consolidate authority and independence in an increasingly regulated environment. Australia has also adopted a separate, meta-regulatory regime of professional and occupational regulation supervised by the Professional Standards Council that, if admitted, provides association members limited liability. In particular, under this regime, associations must adopt compulsory risk management strategies and professional indemnity insurance in order to obtain admission.

Second, is the emphasis on personal professional responsibility and competence. For example, in the NSW legal profession, professional ethics and conduct rules have been explicitly formalised in the Legal Professional Uniform Law¹⁹ instead of being intrinsically assumed. Moreover, the literature underscores that codes of conduct are no longer sufficient *per se* to support professional integrity as most ethics breaches are due to a lack of motivation or skill to do the right thing rather than a mere

¹⁵ Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 2013) 332; James Spigelman, 'Are Lawyers Lemons? Competition Principles and Professional Regulation' (2003) 77 *Australian Law Journal* 44.

¹⁶ Campbell, Iain, and Sara Charlesworth. "Salaried lawyers and billable hours: a new perspective from the sociology of work." *International Journal of the Legal Profession* 19.1 (2012): 89-122.

¹⁷ Daniel Muzio and Ian Kirkpatrick, 'Introduction: Professions and Organizations – A Conceptual Framework' (2011) 59 *Current Sociology* 389, 390.

¹⁸ Carole Silver, 'Regulatory Mismatch in the International Market for Legal Services' (2002–3) 23 *Northwestern Journal of International Law and Business* 487, cited in John Flood, 'The Re-Landscaping of the Legal Profession: Large Law Firms and Professional Re-Regulation' (2011) 59 *Current Sociology* 507.

¹⁹ Law Society of New South Wales, *A New Framework for Practising Law in NSW* <<http://www.lawsociety.com.au/ForSolicitors/professionalstandards/Ruleslegislation/nationalreform/>>. The wider context of these new rules is efforts to create a national, uniform, legal services market and a super-regulator to work with local regulators to oversee the conduct and practice of lawyers and firms that offer legal services. See also background paper by Corrs Chambers Westgarth, *Professionalism in the 21st Century* (14 July 2015) on file with authors.

lack of knowledge of codes. This emphasises the need for ongoing training in responding to ethics issues while faced with differing situational pressures. In response to rubrics of customer-orientation, the 'ethical' duty to the client now also includes the requirement to be competent, diligent and efficient,²⁰ reflecting a new emphasis on training and competence.

Third, is the intensification of professional 'identity work'. In response to conditions of fragmentation, mobility and remoteness from traditional supervision (eg, the courts), the legal profession has, for example, amped-up its 'identity work' to, for example, remind lawyers that they are 'officers of the court', that their license is granted by the court, and that they play a functional role in providing for a just, fair and efficient method of understanding the rules of society and resolving disputes.²¹ The profession has also realised the pressing need to revitalise and rearticulate its service ideals, to find new ways and motivations for new lawyers to take custodianship of them, and to take serious collective responsibilities for defects in the legal system so that social commitments are more realised than rhetorical.²²

Fourth, is the shift to 'entity' regulation. In the legal context, the diversity of law practices and workplaces is now recognised in conduct and practice rules, for example, in the new uniform law that explicitly applies not just to individuals, but all law practices regardless of business structure.²³ However, professional associations of all status professions are yet to fully come to terms with the central influence of the organisation on the socialisation and ethical conduct of their members. As the profession continues to grow and fragment, and as the elite become more global and multi-disciplinary, the organisations' role and co-operation in this area will become more important.

V. The 'Promise' of Professionalism

Finally, in this section, we return to consider what the promise of professionalism continues to offer as the professional logic is reinvented by regulation, work in large organisations, managerialism, incentives of remuneration and globalisation and the fragmentation of professional identity. In doing so, we compare the features and readiness of banking and financial advising for professionalization to law.

First, we consider the characteristic of expert knowledge and practical advice. A key difficulty in professionalising banking and finance is that much of the sector buys and sells financial contracts and does not give personal advice. Thus, the sector *deals* with customers and does not usually provide clients expert judgment in a fiduciary relationship (a notable exception being the area of retail financial advising). Moreover, in contrast to law, education, qualification and training standards for banking are fragmented, with no universal entry pathway or qualification that makes one into a 'banker'.²⁴ Indeed, some doubt whether this is even possible.²⁵ This is seen by some as strong evidence that the sector is not professionalised, and is in fact not ready to become a profession.²⁶

²⁰ *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* r 4.1.3.

²¹ Allsop, above n 6.

²² Christine Parker, 'The "Moral Panic" Over Psychological Wellbeing in the Legal Profession: A Personal or Political Ethical Response' (2014) 37 *University of New South Wales Law Journal* 1103.

²³ *Legal Profession Uniform Law (NSW)* s33.

²⁴ Evidence of Simon Thompson, Chief Executive of the Chartered Banker Institute in House of Lords/House of Commons, *Changing Banking for Good: Report of the Parliamentary Commission on Banking Standards* (vol 2) (2013) 295, 295 text surrounding note 1025.

²⁵ *Ibid*, 296-7.

²⁶ eg, The House of Commons Inquiry into conduct in UK Banking after the GFC.

Second, we consider the possibility of an altruistic and ethical alternative to the norms of banking. As previously noted, professions promise an ethos of serving interests other than the professional's own whereas, by contrast, banking and finance retains a profit-seeking ethos. We argue that the ethical promise of professionals retains substantial advantages: it is conducive of client trust, improves the fairness and inclusiveness of the administration of justice and rule of law, and correlates with human psychological conditions required for motivation and satisfaction. However, in the case of banking and finance (aside from areas such as retail financial advising), we argue that there is restricted scope for the organic development of client relationships that provide the context for the ethical obligations of status professions. This can be attributed to: the incompatibility of sales driven sky-high remuneration with a duty to put the clients' interest first,²⁷ the lack of any discussion regarding how banking and finance may confer a public benefit,²⁸ and the inability to promote a sense of shared professional purpose and identity due to diffuse knowledge and training, a lack of professional association membership and peer relations characterised by intense competition.

Third, we consider the promise of professionalism for modern professional regulation. Despite our review demonstrating the failings of both professional control and public regulation, we argue that part of the promise may be the hybrid of professional logic and state-based regulation that has developed. Modern regulation is seen as being deficient in part because it is external and disconnected with the norms of the regulated group.²⁹ In practice, regulators depend on the internalisation of program purposes by the regulated population for compliance.³⁰ However, if purposes and norms do not sync or are contradictory, it may be difficult to direct regulated persons towards compliance. Accordingly, we believe that one of the promises of professionalism may be the combination of ethical norms of professionalism along with the power of the state as exercised via meta-regulatory regimes. In the case of banking and finance, which we argue as lacking a body of ethical norms and purpose, internal drivers are thus less developed than external drivers so that its problems are unlikely to be overcome by public regulation alone. For reasons like this, we conclude that professionalism may help, but whether banking can ever become a profession is a question for which there is no clear answer yet.

VI. Conclusion

We conclude that firms, sectors and professional actors will use different ideas, discourses, features and mechanisms of professionalism that we have outlined to suit their purposes.³¹ We see a more malleable form of professionalism developing,³² with the single most important challenge to professions perhaps being the shift to large organisations. We see regulation and re-regulation as being central to modern professionalism so that research into optimal regulatory structures and techniques will be important in sustaining the promise of professionalism. Finally, we believe that what has been said about banking and finance can be applied to other occupations. Thus, research that widens understanding of the core ideas of professionalism is to be warmly encouraged.

²⁷ House of Lords/House of Commons, above n 24, Chapter 8.

²⁸ Lord Adair Turner, *Between Debt and the Devil: Money Credit and Fixing Global Finance* (Google books, Oct 2015) *passim*; Paul Volker 'The Only Useful Thing the Banks Have Invented in the Last 20 years is the ATM' (*New York Post*, 13 December 2009) at <http://nypost.com/2009/12/13/the-only-thing-useful-banks-have-invented-in-20-years-is-the-atm/>.

²⁹ Roger Cotterrell, *The Sociology of Law: An Introduction* (Oxford University Press, 2nd ed, 1992) 180ff.

³⁰ John Braithwaite, *Regulatory Capitalism: How it Works and Ideas for Making It Work Better* (Edward Elgar, 2008) 9.

³¹ Francis, Andrew M. "Out of touch and out of time: lawyers, their leaders and collective mobility within the legal profession." *Legal Studies* 24.3 (2004): 322-348, 344.

³² *Ibid* 347-8.