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A BETTER BARGAIN IN FILENE'S BASEMENT: A RESPONSE TO PROFESSOR ABEL

PETER C. BUCK*

In *Practicing Immigration Law in Filene's Basement*,¹ Professor Richard Abel directs his formidable skills in mining and interpreting data toward the significant and related problems of lawyer neglect and incompetence. He chooses the "extreme case"² of Joe Muto, a hapless immigration lawyer in New York City, to illustrate the severity of the legal profession's problems in this regard. Using Muto as an example, he proposes empirical work to identify the behavioral variables that characterize neglectful or incompetent lawyers and offers some tentative ideas on potential remedies.

Professor Abel's visit to one of the law's bargain basements yields a thought-provoking and troubling look into a practice gone completely wrong. His detailed picture of life on the front lines of New York City's Immigration Court practice highlights a problem that deserves a careful response from the legal profession. More importantly, the data he has assembled and his suggestions of possible cures guide our attention to the much more widespread problems of lawyer neglect and incompetence. This Response seeks to address both the specific and the general issues, though the concerns will frequently overlap. Before going on, though, it is necessary to deal initially with two preliminary matters.

First, Joe Muto may present too extreme a case to serve as the best illustration of the problems that concern Professor Abel. For thirty-five pages, we learn of troubling fact after troubling fact culled from the more than 1,200 transcript pages from Muto's hearing before the Departmental Disciplinary Committee of the New York Supreme Court Appellate Division.³ Muto is a terrible lawyer, a Joe

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1. Richard L. Abel, *Practicing Immigration Law in Filene's Basement*, 84 N.C. L. REV. 1449 (2006).

2. *Id.* at 1488.

3. *Id.* at 1452 n.18.

Btfsplk⁴ of the bar. Again and again, and despite his loud and pained protests, we see him make little or no effort to organize and control his practice, completely ignore the best interests of his clients (with whom he generally is unable to communicate), and show an almost pathological inability to provide competent representation. Muto, though, presents issues that very likely are unique to him. At least a part of his problems may be “characterological,”⁵ and thus a function of singular personal circumstances. As the referee in Muto’s disciplinary hearing found, “some deeper psychological cause”⁶ may be the best explanation of this sorry picture. One wonders, in the face of this nearly interminable list of malfeasances, whether there is anything that can be done.

Second, the community in which lawyer Muto practiced presents unique issues that may limit the usefulness of the market-based and regulatory remedies that Professor Abel suggests as tentative solutions to the general problem of lawyer neglect. The bar at 26 Federal Plaza serves an “unusually vulnerable”⁷ clientele, who more than any other group of clients are completely dependent on intermediaries. Muto’s clients primarily were Chinese immigrants, either here illegally or seeking asylum, unable to speak English, generally poor and deep in debt to unscrupulous middlemen, and facing the threat of deportation.⁸ For most such clients,⁹ the inability to pay anything like a reasonable fee makes a market-based solution

4. Joe Btfsplk was one of the central characters of the Lil’ Abner comic strip, drawn by Al Capp and syndicated from 1934 through 1977 throughout the United States. Lil’ Abner, About Lil’ Abner (2005), <http://www.lil-abner.com/abnerbio.html>. His was the forlorn character who jinxed all around him and whose every move was shadowed by a dark cloud immediately over his head. Lil’ Abner, Other Characters (2005), <http://www.lil-abner.com/other.html>. The pronunciation of his last name is said to resemble a Bronx cheer. Btfsplk (Aug. 28, 2005), <http://en.wikipedia.org/wiki/Btfsplk>.

5. Abel, *supra* note 1, at 1489.

6. *Id.* at 1474.

7. *Id.* at 1488. The intermediaries who frequently charge exorbitant fees in return for help to Chinese people who seek to immigrate are often referred to as “snakeheads.” *Id.* at 106. For a description of an allegedly very abusive “snakehead,” see Julia Preston, *Ringleader Gets 35-Year Term in Smuggling of Immigrants*, N.Y. TIMES, Mar. 17, 2006, at B1 (reporting that a “snakehead” was sentenced to thirty-five years in prison for “running one of New York City’s most lucrative immigrant smuggling rings”).

8. See Abel, *supra* note 1, at 1453–54.

9. This is not true for all immigration clients. Ann Hsiung, who appears to be a competent immigration law practitioner, charged and received \$3,500 to \$5,000 for asylum representations and provided service that reflected the price paid. *Id.* at 1463–64. In contrast, the evidence shows that Muto found a large market for his bargain-basement approach. He generally charged only \$150 for similar representations, *id.* at 1453, and thus chronically accepted case loads far beyond his capacity, as many as 500 at a time. *Id.* at 1464.

to the problems examined here a virtual impossibility. Likewise, the status of illegal alien that burdened most of Muto's clients renders it unlikely that they would benefit from a regulatory solution, either through the courts or in a disciplinary forum.¹⁰ The immigrant plight thus cries out for a government solution, probably in the form of salaried lawyers similar to those on public defender staffs but possibly through some combination of pro bono and contracted services. While this solution seems obvious, the "community" of illegal aliens may find little political support to help it resolve the problem of poor legal representation.¹¹ In the specific context in which Joe Muto

10. It is true, as Professor Abel notes, that the availability in immigration cases of resort to claims of ineffective assistance of counsel may in some situations increase the likelihood that immigration clients would seek redress in court. See *In re Lozada*, 19 I. & N. Dec. 637, 637 (1988), available at 1988 BIA LEXIS 19. Indeed, some of Muto's clients apparently moved to reopen their cases by arguing that he had failed to represent them properly. See Abel, *supra* note 1, at 1454. Yet the availability of ineffective-assistance claims seems to have had little impact in Muto's case, and the factors noted in the text make it unlikely that such claims will lead immigration clients to seek other remedies against the offending lawyers.

11. Professor Abel has documented the erosion of governmental support for legal aid in criminal law and other contexts in the United Kingdom. RICHARD L. ABEL, *ENGLISH LAWYERS BETWEEN MARKET AND STATE: THE POLITICS OF PROFESSIONALISM* 240–353 (2003). In the United States, federal funding for the Legal Services Corporation, which provides legal services for civil matters involving low-income people, peaked in inflation-adjusted dollars in 1981; current funding represents less than half the 1981 level. LEGAL SERVICES CORP., *DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* 18 n.22 (2005), available at http://www.lsc.gov/press/documents/LSC%20Justice%20Gap_FINAL_1001.pdf. In the area of indigent criminal defense, the authors of a report in March 2000 of the National Symposium on Indigent Defense, convened by the United States Department of Justice, summarized a bleak situation:

Overall . . . indigent defense in the United States today is in a chronic state of crisis. Standards are frequently not implemented, contracts are often awarded to the lowest bidder without regard to the scope or quality of services, organizational structures are weak, workloads are high, and funding has not kept pace with other components of the criminal justice system. The effects can be severe, including legal representation of such low quality to amount to no representation at all . . .

OFF. OF JUST. PROGRAMS, U.S. DEP'T OF JUST. *IMPROVING CRIMINAL JUSTICE SYSTEMS THROUGH EXPANDED STRATEGIES AND INNOVATIVE COLLABORATIONS: REPORT OF THE NATIONAL SYMPOSIUM ON INDIGENT DEFENSE*, at ix (2000), available at <http://www.ojp.usdoj.gov/indigentdefense/icjs.pdf>. Much of the opposition to Legal Aid is grounded in the perception that Legal Aid lawyers often use their clients to further their own social agendas, as opposed to working in individual cases to help poor citizens. See, e.g., *Illegal Immigration Amnesty Bills Would Be a Boon for Taxpayer-Funded Legal Services Lawyers*, LEGAL SERVICES MONITOR, Jan. 1, 2005, at 1, <http://www.nlpc.org/view.asp?action=viewArticle&aid=745> (stating that Legal Services Corp. has a history of filing Legal Aid lawsuits to "advance liberal political causes"). See generally DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988) (addressing, in chapters 13 through 16, how public interest lawyers practice politics and not just the law. Luban

worked, then, we confront a problem that may have little likelihood of being resolved.

Enough, though, of clearing these bits of underbrush. Professor Abel set out to shed some light on a big problem in the legal profession and, notwithstanding these limitations of his illustration, the details of Joe Muto's story serve his purpose well. Unlike Captain Renault, we at the bar can hardly protest that we are "shocked" that Muto's kind of lawyering could actually be going on.¹² Resignation to defeat because of the *sui generis* characteristics of Muto personally and the New York City immigration practice will not help us find solutions to a problem that Professor Abel shows us is pervasive in most professions,¹³ and quite possibly worst of all for lawyers.¹⁴ Table 1 included within the Article confirms what we know anecdotally: clients believe lawyers all too often pay little or no attention to their cases and, even when they do, lack the competence to deliver the services that people expect.¹⁵ The problem is widespread and it seems to be worse for solo practitioners and lawyers in very small firms,¹⁶ although this may be as much the result of the relative powerlessness of the client populations involved than of the practices' organizational structure.

Professor Abel argues convincingly that we need to do a lot more study if we are to make any headway in reducing lawyer neglect and incompetence.¹⁷ But he does offer some provisional remedies for examination,¹⁸ and a closer look at his tentative solutions repays the effort. There are four, to each of which I have taken the liberty of applying a short-hand label:

- (1) the "traditional professional" approach: placing limits on solo practitioners, effectively requiring apprenticeship, and

argues that "practicing politics on behalf of have-nots is a legitimate and worthy form of practicing law, even when legal aid lawyers engaging in it are publicly funded."). Recently, law school clinics have received similar criticism. Heather MacDonald, Editorial, *Clinical, Cynical*, WALL ST. J., Jan. 11, 2006, at A14. The Legal Services Corporation is authorized to provide certain discrete services to immigrants, including in applications for asylum. See Alien Status and Eligibility, 45 C.F.R. § 1626.5 (2005).

12. See CASABLANCA (Warner Bros. 1942), http://www.casalinx.com/case_crew_rains.htm (last visited Apr. 20, 2006) (Captain of Police Louis Renault, played by Claude Rains).

13. Abel, *supra* note 1, at 1449–50.

14. *Id.* at 1449–51.

15. See *id.* at 1495–96 tbl.1 & 1498 tbl.2.

16. See *id.* at 1489–90.

17. *Id.* at 1494.

18. *Id.* at 1490–93.

requiring specialized training and certification;¹⁹

(2) the “pure market” approach: allowing the market for legal services to correct its own imperfections;²⁰

(3) the “enhanced market” approach: making the market more effective by opening the field to law students, required pro bono legal services, and representation by non-lawyers;²¹ and

(4) the “regulatory” approach: beefing up lawyer disciplinary measures or finding ways to allow malpractice claims and malpractice insurance markets to create greater disincentives.²²

Each of these remedies holds promise for the general problem of neglect in legal practice. As the Article points out, however, there are problems with each, especially in the context of 26 Federal Plaza.²³ Practice restrictions, as proposed in the “traditional professional” approach, will meet fierce resistance from the many solo private practitioners in the United States, as will the addition of specialization requirements. And Professor Abel would share their reservations, albeit for a very different reason: he has long distrusted lawyers’ invocation of professionalism as a means of helping clients, seeing in most such appeals an economically-motivated grab for self-protection.²⁴ Although this author would protest that pride in the profession and concern for client welfare, driven perhaps by reputational concerns, furnish less objectionable grounds for some

19. *Id.* at 1491.

20. *Id.* at 1491–92.

21. *Id.* at 1492–93.

22. *Id.* at 1493–94.

23. *Id.* at 1494.

24. Professor Abel has described lawyers’ efforts to control the “production of producers” by creating, through law school admission standards, bar examination and licensing requirements, various controls over how many and who become lawyers. *See, e.g.,* RICHARD L. ABEL, *AMERICAN LAWYERS* 96–119 (1989) (describing how American lawyers have protected their profession from competition since its inception and have erected barriers to entry); ABEL, *supra* note 11, at 159–201 (describing how the British law profession has controlled who becomes a lawyer, and competition from inside and outside the profession). He has also reviewed the profession’s efforts to limit “production . . . by producers,” thus controlling competition through various direct means such as restrictions on the unauthorized practice of law and lay competitors (e.g., in conveyancing of real property), limitations on multidisciplinary firms, and specialization requirements. *See, e.g.,* ABEL, *supra*, at 158–65 (examining strategy of demand creation by which American lawyers have controlled “the production of producers and by producers of legal services” (alteration in original)); ABEL, *supra* note 11, at 202–39 (describing how English lawyers controlled competition within the practice of law).

such proposals, he is far from alone in this view. Regulators, among others, have shared the professor's suspicion in recent years.²⁵ For example, the Australian Professional Standards Board for Patent and Trade Marks Attorneys recommended the creation of a two-tiered registration process for lawyers seeking to practice in these complex areas.²⁶ The proposal would have effectively required a two-year apprenticeship with an experienced patent or trade mark attorney.²⁷ In presenting the recommendation, the chairman of the Standards Board had only the interests of his clients at heart:

[T]here were strong concerns expressed by a number of interest areas that at the time of registration, and for several years thereafter, there is a shortfall in the practical knowledge required by attorneys to practise without supervision. This was expressed not just by experienced practitioners, but also by persons who have recently qualified as well as students. In other words there was a strong, though not unanimous, view that at the time of registration persons are now better educated in the law and some aspects of practice that relies on legal theory, but they are less skilled in the practical application of the law for the benefit of their clients. Thus there is a greater risk to those persons, and their clients, were they to practise following registration in a sole practice or in an unsupervised environment.²⁸

The responsible government agency demurred: "The introduction of a two stage registration system for both professions would: not be in line with the Government's general policy of reducing restrictions in professions"²⁹

At least in Professor Abel's illustration, then, increased

25. *E.g.*, *Goldfarb v. Virginia*, 421 U.S. 773, 785, 793 (1975) (holding bar-imposed minimum fee schedules constitute price-fixing in violation of antitrust laws).

26. PROF'L STANDARDS BOARD FOR PATENT AND TRADE MARKS ATTORNEYS, REVIEW OF THE REGULATORY REGIME FOR PATENT AND TRADE MARKS ATTORNEYS (2004), available at <http://www.psb.gov.au/pdfs/Professional%Standards%20Report%20Text.pdf>.

27. *Id.*

28. Letter from Raoul Mortley AO, Chair, to The Honorable Warren Entsch MP, Parliamentary Secretary to the Minister for Industry Tourism and Resources (May 12, 2004), in REVIEW OF THE REGULATORY REGIME FOR PATENT AND TRADE MARKS ATTORNEYS, *supra* note 26.

29. GOVERNMENT RESPONSE TO THE PROFESSIONAL STANDARDS BOARD FOR PATENT AND TRADE MARKS ATTORNEYS' (PSB) REVIEW OF THE REGULATORY REGIME FOR PATENT AND TRADE MARKS ATTORNEYS 1, available at <http://www.psb.gov.au/pdfs/Govt%20Response%20to%20PSB%20Review%20of%20Regulatory%20Regime.pdf> (last visited Apr. 20, 2006).

specialization requirements to improve legal expertise do not seem to be the answer. Muto's complete absence of organization skills and an unwillingness, likely grounded in his economic self-interest, to limit his caseload play a much more important role in any event. Muto graduated from an accredited law school and apparently passed the bar examination in New York,³⁰ and his problems only occasionally stemmed from lack of substantive knowledge.³¹

Likewise, allowing the "pure market" to work its magic does not seem a good answer for the Chinese immigrants whom Joe Muto represented. Their situation places in sharp relief the *raison d'être* of professions, the great asymmetries in information that make it difficult if not impossible for consumers of services to differentiate as to quality.³² These clients generally could speak no English,³³ much less make any sort of determination before the fact regarding the competence or dedication of the lawyers who might be available to help them. Moreover, their desperate lack of funds means that they would choose price, especially Muto's unrealistic \$150 fixed fees,³⁴ over quality in virtually every situation. Thus, while, there is no doubt that harnessing of market incentives can at least improve the cost-effectiveness of delivery of certain types of services,³⁵ and such mechanisms may hold significant promise for improving the quality of services at least in some types of practice, traditional market remedies may not provide effective solutions for "personal plight"³⁶ clients such as immigrants, tenants resisting eviction, parents engaged in child custody disputes, and bankrupt individuals and small businesses.

30. Abel, *supra* note 1, at 1488.

31. Rationalizing problems in his early career in Syracuse, Muto admitted that he "didn't know how to do a matrimonial" matter, although he had gladly taken on such an assignment. *Id.* at 1471. Solo and small-firm practitioners report that they use various means to stay current in their areas of practice, including bar association written materials and continuing legal education conferences, online resources, and advice from colleagues. However, the cost and time commitment required to "stay up on the law" can place especially severe burdens on the small law office. Leslie C. Levin, *The Ethical World of Solo and Small Law Firm Practitioners*, 41 HOUS. L. REV. 309, 332–35 (2004).

32. *See* Abel, *supra* note 1, at 1451.

33. *See id.* at 1474.

34. *Id.* at 1453.

35. *See, e.g.,* Zachary J. Bossenbroek & Puneet Mohey, *Should Your Legal Department Join the India Outsourcing Craze?*, ACC DOCKET, Oct. 2004, at 46, 46–54 (describing how outsourcing document review to an Indian firm can save law firms sixty to seventy percent in wages); Jonathan D. Glater, *Even Law Firms Join the Trend to Outsourcing*, N.Y. TIMES, Jan. 13, 2006, at C7 (reporting on a growing trend of law firms hiring outside providers to conduct legal research).

36. JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* 71 n.11 (1982).

Professor Abel's third provisional remedy, an "enhanced market" approach, may hold more promise in the immigration context and perhaps in other personal plight circumstances as well. He considers several alternatives to promote greater client choice: opening up immigration proceedings to representation by law students and non-lawyers who work for nonprofit agencies; improving access to pro bono legal services; and even allowing the "travel agencies"³⁷ that caused so many problems in their roles as intermediaries and other for-profit organizations to take on the representations.³⁸ Reliance on non-lawyers, in particular those in for-profit roles, raises interesting questions under the Rules of Professional Conduct and other regimes that normally would govern the lawyer-client relationship. For example, would communications to and from such non-lawyer representatives be afforded the protection of the attorney-client privilege?³⁹ Professor Abel notes that opening the courts to such persons would require at least some of the same sorts of regulation that apply to lawyers.⁴⁰ Greater availability of pro bono services would, as noted above,⁴¹ appear the best solution for the unhappy clients at 26 Federal Plaza. Yet, as the Article makes clear, it is unlikely that pro bono services from any source can begin to meet the great need for legal representation of immigrants who cannot afford to pay.⁴²

Finally, there is "regulation." New York did in fact disbar Joe Muto,⁴³ but only after he had "practiced," apparently in the same haphazard fashion, for fifteen years. Lawyer disciplinary bodies find it difficult to act except on the basis of a repeated pattern of neglect,

37. Abel, *supra* note 1, at 1453.

38. *Id.* at 1491-92.

39. The privilege frequently is denied to non-lawyers, even when they are playing the role of an advocate that would seem to call forth the same policy concerns present when lawyers act in such a capacity. For example, in *Nemecek v. Board of Governors of the University of North Carolina*, the court held that communications with a "lay representative" of a professor in a hearing to resolve a university tenure dispute were not protected by the privilege because the representative, another professor, was not a lawyer. *Nemecek v. Bd. of Governors of the Univ. of N.C.*, No. 98CV00062, 2000 WL 33672978, at *1 (E.D. N.C. Sept. 27, 2000); see Janet J. Higley, Robert C. Jones, Jr. & Peter C. Buck, *Confidentiality of Communications by In-House Counsel for Financial Institutions*, 6 N.C. BANKING INST. 265, 281-82 (2002).

40. Abel, *supra* note 1, at 1492-93.

41. See *supra* note 11 and accompanying text.

42. Abel, *supra* note 1, at 1492; see *supra* note 11 and accompanying text. The legal profession's support for pro bono services in general can hardly be characterized as energetic. See DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 37-38 (2000).

43. Abel, *supra* note 1, at 1477.

thus, as here, permitting a “great deal of damage” to precede an appropriate corrective.⁴⁴ As Professor Abel notes, small-firm and solo practitioners frequently view the whole legal disciplinary structure generally as an illegitimate project created by lawyers in large firms and elite practices to enhance their own reputations and erect barriers to competition.⁴⁵ It would be unfortunate if the battle lines over lawyer discipline pit large firm lawyers against small firms and solo practitioners. The special pressures of representing individuals in personal plight circumstances, where solo and small-firm practices provide much of the lawyering, may account for many of the issues addressed by lawyer disciplinary regimes, as opposed to structural or organizational differences between small and large firms.⁴⁶

But aside from the divergence of perspectives on the regulatory solution, there can be little dispute that the legal profession, which historically has insisted that its unique knowledge and expertise⁴⁷ and the need to maintain the profession’s independence from government domination⁴⁸ justify self-regulation, has done a poor job of disciplining its own.⁴⁹ As in Muto’s case, other lawyers rarely initiate

44. *Id.* at 1493.

45. *Id.* at 1493–94.

46. Personal plight clients can be especially hard to deal with because of the very difficulties in which they find themselves. Although this is likely not the case with many immigration clients, *see supra* text accompanying note 10, personal plight clients in many circumstances may be more likely than corporate and business clients to seek disciplinary action against their lawyers, perhaps because their lack of financial resources leaves them without other avenues of redress. Moreover, these clients are more likely to have a very significant emotional investment in the matters in which they are represented and thus feel more acutely the pain of a bad outcome. Levin, *supra* note 31, at 314. In addition, clients in these circumstances are more apt to pressure their lawyers to engage in unethical actions. *Id.* at 337–40. Of course, as with Muto, the need to maintain a large volume of the often low-paying matters, as well as problems related to the management of a small office, such as keeping up with filing, can also have a significant effect. *See id.* at 340–46.

47. ABEL, *supra* note 11, at 354.

48. The Preamble to the American Bar Association Model Rules of Professional Conduct states:

To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession’s independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

MODEL RULES OF PROF’L CONDUCT pmb1. 11 (2005).

49. Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1169–70 (2003); Michael S. Frisch, *No Stone Left Unturned: The Failure of Attorney Self-*

disciplinary complaints against incompetent practitioners,⁵⁰ and judges, who may be best situated to observe such misconduct, also exhibit reluctance to pursue disciplinary action.⁵¹ Even where complaints are properly lodged, the current disciplinary system tends to move at a “snail-like pace”⁵² and often fails in holding lawyers accountable for their misdeeds.⁵³ Still, as Professor Abel has shown, clients do complain to disciplinary bodies.⁵⁴ Thus, in contexts where the recipients of legal services are not so vulnerable as the immigrants who depended on Joe Muto, improvements in lawyer regulation—such as more involvement by courts or independent tribunals⁵⁵—may provide at least a partial solution to the problems of lawyer neglect and incompetence.

And so, stepping back from the pixels of Joe Muto’s incompetence in search of a better vantage point, we see with Professor Abel that there is much more work to do. The problem is real and apparently widespread in some practice areas—and empirical research into the behavioral factors and the practice circumstances that give rise to such failures should be a priority for the legal profession. Professor Abel has put forth several provisional remedies,⁵⁶ but without a better understanding of the reasons for lawyer neglect that may come from such empirical research, we are unable to say which, if any, of these possible solutions will provide meaningful help.

Joe Muto’s own words may provide a clue to one area of additional research that might expand Professor Abel’s list of tentative solutions. Repeatedly and mystifyingly, this bad lawyer told us of the pride he took in his practice and in his status as a lawyer. His work “fulfill[ed] a life long ambition” and gave him a thrill when

Regulation in the District of Columbia, 18 GEO. J. LEGAL ETHICS 325, 325–26 (2005); see ABEL, *supra* note 24, at 142–50; ABEL, *supra* note 11, at 393–96; RHODE, *supra* note 42, at 158–65; William T. Gallagher, *Ideologies of Professionalism and the Politics of Self-Regulation in the California State Bar*, 22 PEPP. L. REV. 485, 489–90 (1995).

50. Ann Hsiung, the immigration lawyer whose organized approach to practice contrasted so sharply with Muto’s, told the immigration judge: “I don’t want Mr. Muto or the other gentleman thinking that I personally filed against them . . . as much as I don’t agree with . . . their practice . . . it’s really not my business.” Abel, *supra* note 1, at 1463.

51. In Muto’s case, Judge Ferris may have been motivated as much by Muto’s “shocking” last-minute attempt to “get the case away” from her with a baseless change-of-venue motion, *id.* at 1467, and the havoc that he wrought with court schedules, *see id.* at 1486, as with the need to protect innocent clients.

52. Frisch, *supra* note 49, at 362.

53. Gallagher, *supra* note 49, at 490.

54. Abel, *supra* note 1, at 1495–96 tbl.1.

55. *See* Frisch, *supra* note 49, at 363.

56. *See supra* notes 18–22 and accompanying text.

“somebody would come in and say they saw my name on the board, on the sign in front of my office”⁵⁷ He boasted of finishing at the top of his law school class and achieving a “stellar” record as a prosecutor; overall, he claimed, he was doing an “excellent job” for his clients, working long hours; he proclaimed loudly and often that he provided good legal services at prices the people who needed them could afford.⁵⁸ While he seemed incapable of taking responsibility for his chronic sloppiness and the damage it caused, there seems no reason on this record to doubt that he anchored a great deal of his pride and self-esteem in his professional life. Gaining acceptance from the “legal community” carried at least some importance, even for Joe Muto.⁵⁹ In his case, unfortunately, professional pride and avoidance of the shame and embarrassment associated with exposure of his neglect failed to modify Muto’s disregard of his clients in any meaningful way. The reasons are not clear and may be rooted in the characterological issues that Professor Abel notes.⁶⁰

Notwithstanding their complete lack of warrant, though, Muto’s claims at least call attention to the possibility that pride of accomplishment and a need to avoid embarrassment in front of peers can motivate lawyer behavior. A closer examination of these cultural drivers, especially in the solo-practice and small-firm context, may reward our efforts. This author’s own most unscientific survey of small-firm lawyers suggests that lawyers such as Muto who practice in functioning “communities” of lawyers—lawyers who know and have frequent contact with each other—tend to respond to the practice norms that these communities create and by which they live.⁶¹ This very anecdotal evidence reinforces the findings of recent studies and suggests that further research into the building of effective legal communities, or networks, may prove fruitful in addressing the problems raised by Professor Abel.⁶²

57. Abel, *supra* note 1, at 1484.

58. *Id.* at 1479.

59. *See id.* at 1472.

60. *See id.* at 1489.

61. In preparing for the panel presentation that gave rise to this Response, this author interviewed two solo practitioners, one who had begun his career with a small but established litigation firm and another who had been in-house general counsel for a communications company; a young lawyer working in a small legal aid agency providing services to children in the criminal courts; and a more senior lawyer working in a space-sharing arrangement with several other lawyers. All responded that lawyers with whom they dealt frequently provided advice and aid, and helped establish standards of competence and ethical behavior that were enforced effectively through informal means.

62. Traditional market incentives, of course, may be at work in these legal communities or networks as well. Referrals from other solo and small-firm lawyers can

For example, Professor Leslie Levin recently surveyed forty-one practitioners in New York City⁶³ and found that “the ethical decision-making of solo and small firm lawyers is influenced by their communities of practice and especially their early practice communities” much more than by formal bar rules.⁶⁴ And a more comprehensive set of interviews with 163 divorce lawyers in Maine and New Hampshire⁶⁵ confirmed that participation in local “communities of practice” creates circumstances in which community norms positively affect lawyer behavior.⁶⁶ There is therefore growing evidence that “soft factors” such as norms, attitudes, beliefs, and values that tend to develop in small practice bars may meaningfully influence the quality and character of law practice.⁶⁷ This research may prove extremely interesting when considered in the case of Joe Muto. The question is why the community of immigration lawyers in which he practiced failed to develop effective norms of practice and ethical behavior that would have protected his clients from his chronic malfeasance?⁶⁸

The beneficial impact of small ad hoc groups—sometimes we call them communities, sometimes networks, in other circumstances, teams—is becoming more apparent through research such as Professor Levin’s and others. It manifests itself in larger firms as well, where the close networks created in the form of temporary task forces, or project teams, create incentives for cooperation and hard

improve volume. JAY G. FOONBERG, *HOW TO START & BUILD A LAW PRACTICE* 210–12 (5th ed. 2004). Reputation and referrals from lawyers are significant factors in business development for lawyers in all practices. See, e.g., Stephen Daniels & Joanne Martin, “It’s Darwinism – Survival of the Fittest:” *How Markets and Reputations Shape the Ways in Which Plaintiffs’ Lawyers Obtain Clients*, 21 *LAW & POL’Y* 377, 385–88 (1999) (describing the important role that lawyer referrals play in building a legal practice); Herbert M. Kritzer & Jayanth K. Krishnan, *Lawyers Seeking Clients, Clients Seeking Lawyers: Sources of Contingency Fee Cases and Their Implications for Case Handling*, 21 *LAW & POL’Y* 347, 357–59 (1999) (same).

63. Levin, *supra* note 31, at 318.

64. *Id.*

65. LYNN MATHER ET AL., *DIVORCE LAWYERS AT WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE* 50 (2001).

66. *Id.* at 6.

67. See John M. Conley & Scott Baker, *Fall from Grace or Business as Usual? A Retrospective Look at Lawyers on Wall Street and Main Street*, 30 *LAW & SOC. INQUIRY*, 783, 798 (2005).

68. It may be that Muto, by establishing his fees so far below any reasonable level, separated himself completely from the effect of any market incentives. His low prices generated more than enough business without any lawyer referrals and notwithstanding his reputation among the lawyers and judges of the immigration bar. Alternatively, Muto’s unique characterological issues may effectively have immunized him from pressures and incentives that would have worked with most lawyers.

work and open channels for the provision of informal advice (not expressly accounted for in compensation decisions) to other lawyers within the firm.⁶⁹

It may be difficult to determine how such cultural factors work in communities of lawyers, and why they apparently did not work at all at 26 Federal Plaza. And it may turn out, as Professor Abel could respond, that all such talk of community norms and pride of close-knit networks of lawyers is only a smokescreen to embellish lawyers' reputations and make it more difficult for competitors to enter the fray. Still, there can be no doubt that "shame and honor" have driven behavior in communities since ancient times.⁷⁰ This has not always occurred in ways that we would find helpful, but learning more about the functioning and interconnection of these soft "cultural" factors, as well as market incentives within lawyer "communities,"⁷¹ may afford us greater insight into a set of problems that has shown itself to be very resistant to a solution. Professor Abel has amassed the data, and in the case of lawyer Muto, the discomfiting details, making it very hard for the legal profession to escape the need to improve our understanding of these problems and to seek ways to better safeguard those who rely on our diligence and competence.

69. EMMANUEL LAZEGA, *THE COLLEGIAL PHENOMENON: THE SOCIAL MECHANISMS OF COOPERATION AMONG PEERS IN A CORPORATE LAW PARTNERSHIP* 93–99 (2001); see also Richard L. Abel, *Varieties of Social Discipline: Collective Action in a Law Firm*, 31 J. L. & SOC'Y 610, 617 (2004) (commenting on Lazega's research).

70. See, e.g., JEROME NEYREY, *HONOR AND SHAME IN THE GOSPEL OF MATTHEW* 3–4 (1998) (examining "Matthew's Gospel in terms of honor and shame" and exploring how people have structured their lives around these values); BERNARD WILLIAMS, *SHAME AND NECESSITY* 219–23 (1993) (examining the emotional root of shame).

71. See *supra* notes 61–67 and accompanying text.

