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The Usefulness of "Good Moral Character"*

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Although morality provides a guide for all rational persons, it is more likely to be followed by those who have a good moral character. Indeed, this is little more than a tautology, as we assess the moral character of persons by the degree to which they follow the guide provided by morality. To bring up children so they will act morally and to bring them up to have a good moral character are, generally speaking, simply two ways of saying the same thing.

Bernard Gert¹

In both legal education and professional culture, we regularly use the concept "good moral character," but in contemporary practice it often seems a fuzzy and troubling notion. Is it a relic of our Victorian past that should be abandoned? In this century, legitimization of occupational groups as professions and licensing of individuals to be members of a particular profession has changed from a primary emphasis on "character" to almost exclusive concern with "expertise," "technique" and "efficiency."² Is "good moral character" used differently today than it was when character rather than expertise was central to professional culture?

Lawyers regularly use one version or another of the concept of "good moral character" in at least four different situations: first, when certifying that a person is eligible for professional licensing; second, when recommending an applicant for employment or any other position in the professional world; third, when revoking a professional's license for having acted unethically; and fourth, as a demanding aspirational concept which both students and practicing professionals should strive to cultivate for themselves. This analysis is made by a law teacher who has had to use the concept of "good moral character" in each of these contexts and who has never felt quite comfortable in doing so. Law professors are probably more involved with using "good moral character" in the first, second, and fourth of these contexts than are any other class of lawyer. Yet the legal profession as a whole may rely on how professors define and measure character. We

* Copyright Banks McDowell 1992. Earlier drafts of this paper were presented to the First National Conference of the Association for Practical and Professional Ethics held at Indiana University/Purdue University at Indianapolis in March, 1992 and at the 4th Annual National Conference on Ethics at California State University Long Beach in February, 1993. The questions from the audience showed me how troubling these problems were not just for lawyers, but for all professionals, and also helped refine my analysis.

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1. BERNARD GERT, MORALITY: A NEW JUSTIFICATION OF THE MORAL RULES 179 (1988).
2. See ANDREW ABBOTT, THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR 184-95 (1988). Of course, the concept of character used in the nineteenth century tended to be defined by class and social characteristics rather than purely matters of virtue.

all need a clearer understanding of how we actually perform or evade our responsibilities in these four contexts and how we ought to be responding.

I. "GOOD MORAL CHARACTER" AS A CONCEPT

I originally felt that "good moral character" was a fuzzy concept without clear meaning, but on reflection concluded the problems in applying it are not primarily with its content. The concept has much the same core meaning today it had for our grandparents.³ This correspondence between good moral character in the last century and in our own time could, of course, arise because the concept is merely a historical and formal holdover from that time.⁴ Social changes, such as urbanization, increased competitive pressures, and different expectations about moral conduct seem to have weakened not only the emphasis on moral character, but the support and reinforcement for the character requirement as well. For many observers, "good moral character" no longer seems to be descriptively appropriate for large segments of our population, including many lawyers. Nor does it seem as aspirationally achievable.⁵ Although its frequency among people may be lower, its content has not changed appreciably.

The concern here is not with good moral character in general, but rather with the good moral character of the professional *qua* professional. For lawyers, "good moral character" is tolerably well defined.⁶ Its content can be gleaned from the professional codes of ethics. "Good moral character" signifies the professional possesses and practices certain virtues or traits,⁷ such as truthfulness,⁸ dedication to high levels of competence,⁹ loyalty to clients¹⁰ and the profession,¹¹ trust-

3. "The most plausible view of a good character is that it contains all of the virtues, both moral and personal. If one aspires to a character of this sort, then he must act morally, for clearly he cannot have the moral virtues unless he acts morally." GERT, *supra* note 1, at 230. Gert makes a powerful argument that moral virtues and character are universal, that is, applicable over time and across cultures.

4. For a historical survey indicating that character qualifications for the legal profession go back two millennia and were of at least formal importance in both England and the United States since the eighteenth century, see Deborah Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 494-503 (1985).

5. The tension between the ethical expectations captured in the concept of "good moral character" and the competing pressures for financial and social success was the subject of my book, BANKS McDOWELL, *ETHICAL CONDUCT AND THE PROFESSIONAL'S DILEMMA: CHOOSING BETWEEN SERVICE AND SUCCESS* (1991).

6. My first attempt to understand its content appears in McDOWELL, *supra* note 5, at 17-18, 31-32.

7. "Character traits are dispositions to respond in a standard way to situations that all rational persons are likely to confront." GERT, *supra* note 1, at 183.

8. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7.102(5) (1980) [hereafter MODEL CODE]; MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1 (1983) [hereafter "MODEL RULES"].

9. MODEL CODE, Canon 6; MODEL RULES, Rule 1.1.

10. MODEL CODE, DR 5.101(A); MODEL RULES, Rule 1.7 and *com.* [1].

11. MODEL CODE, Canon 1.

worthiness,¹² courage in carrying out professional responsibilities,¹³ a desire to serve the public instead of mere striving for private gain,¹⁴ and the disposition to make decent, rational decisions in actual contexts of difficult judgment.¹⁵

The concept of "good moral character" will take on different connotations depending on the context in which it is employed and the purposes for which it is used. There are two possible ambiguities connected with the concept which arise from questionable uses. One is that character may carry class connotations which are culturally defined. In the past, the character a professional should display was often defined by the class characteristics of the more successful leaders and went beyond the ethical virtues to notions of civility, demeanor, political attitudes, and behavioral style.¹⁶

The second difficulty is caused by the application of the concept of "good moral character" to a series of problematic moral issues over which there is currently ideological or political disagreement. Examples are questions of normality in sexual conduct, the degree to which drug use is immoral, the permissible extent of dissembling in relations with others, the acceptable range of eccentric personal conduct or opinions, etc. Good moral character has become a weapon in those conflicts. For example, one person may argue that a strict code of personal conduct as defined by religious or moral beliefs signifies good moral character, while another, not sharing that value position, might argue that a tolerance of human differences is a greater hallmark of good moral character.

For purposes of this analysis, the concept should be stripped of any connotations of class characteristics or of particular value attitudes about controversial contexts. Rather, I want to consider only those virtues and dispositions we would use to describe a moral person whatever his social position or set of moral and political values is. I believe there is a high degree of social consensus at this level.¹⁷

12. MODEL CODE, Canon 4.

13. MODEL CODE, Canon 7.

14. MODEL RULES, Rule 6.1.

15. Is content of "good moral character" different for professionals than for ordinary persons? The list of virtues are those we normally expect to find in any person we would describe as being of good moral character, not just professionals. For professionals, there is only a heightened sense of confidentiality and of loyalty to particular individuals, primarily clients, colleagues, or students, although neither of these duties are substantially more demanding than what has traditionally been expected of family members and close friends. Thus the difference between general good moral character and professional good moral character is primarily a matter of stress or emphasis rather than of different virtues.

16. For a discussion of how the profession defined appropriate professional character in this way during the early part of this century, see JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976).

17. For a powerful argument that there is such a consensus on moral issues, see GERT, *supra* note 1. He focuses more on the core moral rules, whereas my interest is on the accepted virtues.

II. THE PROBLEM OF ASCRIPTION

If we consider "good moral character" to be a descriptive concept with socially understood and agreed elements, the problem is how do we determine whether it is present in an individual and in what degree? Such a judgment must be based on close observation over time. In the modern professional world which, at least in urban areas, tends to be divorced from other aspects of life, such as social, familial, or recreational spheres, the contacts between the observer and the person being described may be too limited in time and restricted in scope to give much basis for such judgments. This is particularly true for teachers in professional schools whose relationship with the bulk of their students is formal and in group situations.

Many wonder whether people possessing good moral character are less common today than in the nineteenth century when it was a more important factor in professional qualification and in social judgments of individuals. We live in a cynical age and do not expect to find good moral character. If one does not expect virtuous conduct, less of it will be perceived and, as a consequence, others will not feel as strong an obligation to display it. The constraints arising from living in small communities and having high ethical expectations about ourselves and others are no longer as prevalent.

One problem of sorting people into two categories—those of good moral character and those who are not—is that most people range across the dividing line. Many, if not most, people are usually of good moral character, but not always; are frequently honest, but once in a while untrustworthy; are often loyal, but sometimes unfaithful; will be generally competent, but occasionally careless; and so on. They range along a continuum, usually acting above minimum standards, but at times falling below. Those who assess moral character are asked to make a global judgment, applying a complex set of criteria to reach a black and white, either-or decision.¹⁸

18. An instructive example of the ascription problems involved in "good moral character" is *Repuille v. United States*, 165 F.2d 152, (2d Cir. 1947). Mr. Repuille, a Canadian citizen, applied for naturalization as an American citizen. The Nationality Act required the applicant to have been a person of good moral character for five years preceding the filing of his petition. Mr. Repuille during that period had intentionally performed euthanasia on his child, who had suffered from birth to thirteen years of age with incredible physical and mental impediments, totally incapacitating him from any meaningful life at all. Repuille's motive was that the child's care was exhausting the parents and damaging the other children in the family. He was indicted for manslaughter in the second degree, the jury convicted him with a recommendation for "the most clemency" and the judge sentenced him to five to ten years imprisonment, but placed him immediately on probation. Apart from this incident, Mr. Repuille was an exemplary person displaying the highest moral character. Two able judges, Learned Hand and Jerome Frank, agonized over the decision, reached different results about whether he was a person of good moral character as intended by Congress, and disagreed about relevant standards and acceptable evidence.

Even if one can accurately describe another's character at the moment of reference, the concept is not used descriptively, but as a basis for prediction. Our concern is how the person is likely to act in the future in situations where we may not have observed her or in which she has had no occasion to act previously, and where future pressures could be different from those existing for her or anyone else today. Predictions about how someone will act in the future in undefined situations may be fairly reliable for someone we know well,¹⁹ but would be questionable, at best, for anyone we do not know intimately.

We do make such judgments daily, sorting people with whom we deal into those we trust and those we do not. If we are unsure whether to trust them, or know them much too well to trust them, we have a way of dealing—an analogue to the notion of "defensive driving" in an automobile. Act so that the other person, if irresponsible, is least likely to be able to hurt you. A client dealing with a professional cannot use that approach. One must trust a professional's competence and judgment and must divulge confidential information that might be abused by a dishonest professional. A high level of trust is necessary in professional relationships. A good moral character is essential to create and maintain such a trustworthy relationship. The certification of good moral character by the profession as a part of licensing is intended to satisfy this need.

My concern is not so much with the content of good moral character, which I do not believe is very problematic, but how it is used. Simone de Beauvoir reminds us that there is no "absolute meaning to the epithet *useful*, which, in truth, has no more meaning if taken by itself than the words *high*, *low*, *right* and *left*. It simply designates a relationship and requires a complement: useful *for* this or that."²⁰ In order to decide what meaning "good moral character" has in contemporary professional practice, we must look at its application or function in the various contexts in which professionals are likely to use it, in other words, what is it used for and useful for. It would be difficult to say whether the discomfort many of us have with "good moral character" comes more from the difficulties in ascription or from the questionable uses to which the concept has often been put. Any legitimate use of the concept must address both concerns.

19. For a powerful argument that such predictions are almost always unreliable, see Rhode, *supra* note 4, at 555-62. My position is that whether that is true or not, few persons making such recommendations are in the position to have the kind of detailed knowledge about the applicant to make the prediction reliable.

20. SIMONE DE BEAUVOIR, *THE ETHICS OF AMBIGUITY* 49 (1967).

III. "GOOD MORAL CHARACTER" AS A THRESHOLD QUALIFICATION FOR LICENSING

"Good moral character" is a standard requirement for admission to a profession and often to professional school. Licensing asserts facts about professionals to the general public, such as, that they are competent in expertise of the profession, and that they are the kind of person a client can trust. We go to great lengths in professional education and testing to ensure minimum adequate levels of expertise as a prerequisite to licensing. We do little to ensure or develop the requisite moral character. We seem to feel it is either there or not, and our certification through licensing is an attempt to attest to its presence.

Should there be a serious attempt on entry to professional school to determine whether the requisite moral character is already present in the beginner?²¹ Professional schools on rare occasions deny admission to applicants where there is serious question about their moral character, such as that evidenced by conviction of a serious crime involving moral turpitude.²² At the outset of professional education, "good moral character" is almost always a purely formal requirement. Schools are reluctant to make a serious effort to condition entrance on character requirements for a variety of justifiable reasons: first, the difficulty of obtaining sufficient reliable evidence; secondly, the possibility that character might change or be improved in the course of professional education; and finally, a profession's expertise may be studied and mastered by those who have no intention of ever practicing.²³

21. The Delaware Bar Association is trying to place this obligation formally on the law school to deny admission to students who lack good moral character. Predictably the law schools and their formal associations are resisting such a requirement. See Sandra Goldsmith, *A Filing Proposal*, 20 *STUDENT LAWYER* 3 (1992).

22. See Rhode, *supra* note 4, at 518-29.

23. The Delaware Bar Association recently suggested that law schools should be responsible for assessing "good moral character" as a condition for admission. See Goldsmith, *supra* note 21. They identified three problem areas, the conviction of a crime, substance abuse, and the unwillingness of some young lawyers to function under the pressures of private practice. While all three might be problems associated with character, they raise different difficulties in determining the presence of the problem and the appropriate reaction to it. Many regard substance abuse as a medical, not a moral problem, and one that can be responsive to treatment in many cases. If we expect employers to help employees suffering from substance abuse, why is that an unreasonable expectation for professional schools and for the profession. Of course, if therapy is not sought or is ineffective, then that addiction, even if not immoral, is a ground for denying or revoking a professional license. The conviction of a crime should probably not be an automatic disqualification, if we determine the person has repented, changed the personal or social conditions that led to the crime, and is unlikely to repeat any action which would be professionally unethical. The unwillingness or inability of young lawyers to function under the high pressures of private practice seems more a matter of personal choice of lifestyle than of moral deficiency. One answer might be that the schools should not deny admission based on such factors, but must report such facts to the appropriate bar committee for their evaluation of its relevance to practice the profession ethically. Some professors and schools are reluctant to do that except in very clear-cut cases, perhaps because they distrust bar committees as capable of exercising sound unbiased judgment.

When students have finished their formal professional training and are ready to be admitted to the status of lawyer, it is not as easy to treat character requirements as merely formal. On graduation, the deans, on behalf of professional schools, are often required to certify that graduates have the requisite good moral character. Furthermore, individual faculty members and members of the profession have an ethical duty to inform licensing authorities if they know of any information indicating that the applicant is not of good moral character.²⁴

In this context, the concept is used as a minimum set of character or ethical qualifications. This minimally²⁵ ethical character must be maintained throughout the professional career, if the person does not want to risk losing his or her license. "Good moral character" in this sense is primarily negative, signifying that nothing drastically unethical is known about the candidate, or more minimally that the applicant has never been convicted of a crime. In effect, we use a weak concept of moral character and a strong presumption in favor of its presence. One reason we feel discomfort about participating in this licensing practice is that our working presumption in this cynical age runs the other way. In cases of doubt, we assume the other cannot be trusted.

In this usage, there are serious constraints on employing the concept in any form more than a weak negative. Beyond hard evidence of immorality, the judgments are subjective and often hard to justify in ways that would satisfy third persons. There is, absent a clearly grounded privilege, the potential legal liability of slander or libel.²⁶ Even if that is not a worry, decent people are reluctant to make public statements about character based on subjective and fallible judgments when such statements have a major impact on an applicant's future career. Denying persons the right to practice a profession for which they have prepared themselves is a major penalty or forfeiture. Our reluctance to participate in foreclosing that opportunity is reinforced

24. See MODEL RULES:

Maintaining the Integrity of the Profession

RULE 8.1 Bar Admission and Disciplinary Matters

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admission or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

1d. Rule 8.1.

25. "Minimally" here does not mean that the requirements in the code are trivial or unimportant, but that they refer to borderline situations and set standard across-the-board requirements, instead of ethical standards which are aspirational and everyone ought to strive to meet.

26. See WILLIAM L. PROSSER, *LAW OF TORTS* 790 (1971).

by professional courtesy, which attempts to promote an atmosphere of cooperation rather than adversarial competition among professionals.

Even though we may feel uncomfortable about this process, we cannot avoid participation because it is compelled by the profession.²⁷ We qualify our warranties by such language as "to the best of our knowledge" and strive to keep our eyes and ears nearly shut in order to avoid having such knowledge. This is a process that is distinguished, if not outright dishonest. The general public is asked to take our certification as a statement they can rely on. If we are rarely wrong when we make such a certification, any misjudgments can be explained as good faith error. If misjudgments happen regularly and in significant numbers, that raises serious ethical questions about us. Do we take the task seriously or do we act deceptively? Could it be that we are merely participating in a ritual which is not intended to be taken seriously and is not relied on by any sophisticated observer? Even so, do we not owe a duty to the unsophisticated members of the public?

A. "Good Moral Character" as a Condition for Employment

A second context where we use "good moral character" is when recommending students or fellow professionals for employment. Most prospective employers want more than an evaluation of technical competence and, even if not requested, recommenders usually believe the employers want an assessment of applicant's moral character. Although one might expect "good moral character" here to be the same as required for licensing, it would then be redundant. Professional membership is already supposed to signal that character. There are two possible explanations. It could mean, of course, that prospective employers do not trust professional certification of moral character, so they want reassurance. Alternatively, potential employers might be using a more demanding concept of "good moral character" than the minimal requirements for licensing.

Part of the difficulty with assessing moral character is determining what the potential employer wants or expects. Unless there is an agreed-on set of concerns when we recommend an applicant for employment as a person of "good moral character" there may be much miscommunication and misunderstanding. Does the employer want to know how the applicant would relate to and act towards clients and

towards other members of the public? This is what we formally think of as the primary objective of good moral character for the lawyer.

Instead might the employer be concerned whether the employee will be internally ethical in her relationship with fellow employees and the firm?²⁸ Stated crassly, will she steal from petty cash or fiddle her expense accounts?

If we are cynical about the inquiry, might we suspect the employer wants to be assured that the prospective employee is sufficiently intelligent and cautious in questionable activity that she will not be caught and cause disrepute for the firm? We often have the feeling that appearing to be virtuous is an even more demanding standard than virtue itself. There was no question about the virtue of Caesar's wife. She had to be virtuous, but that was not enough. She must not act in any way that would create the impression she might be immoral. In our day, two millennia later, we may have downgraded or even abandoned the primacy of virtue. The popular view seems to be that there is no particular need to be virtuous, as long as you appear to be. Getting caught is the real impropriety.

Another possibility is that, in the event the employee is caught in unethical activity, the employer is building a record to protect herself by showing that she made an inquiry and got reassurances. The letters attesting to good moral character in the file are the evidence of that effort.

I suspect there is little agreement, or even conscious thought, by either employer or recommender about which of these many purposes the letter of recommendation might be supposed to fulfill, so the use of the concept in this context may be the most ambiguous.

B. "Good Moral Character" and the Decertification Problem

The difficulties of subjective judgment disappear when there is a proceeding for terminating a practitioner's license. Here we are judging actions after the fact and these can be established and evaluated in a legal process. Unethical conduct which harms other people, most particularly clients, although it could be fellow professionals, third parties, or the public in general, should not be tolerated. If the profession does not police such unethical activities, the public will ultimately demand substantial and effective governmental regulation. Professions concerned with maintaining a broad area of professional autonomy have little choice but to eliminate those professionals who have been discovered to act unethically. Violations of ethical codes and

27. When I presented this paper at the Conference at California State University at Long Beach, one member of the audience asked a pointed question. Why, if I feel this way, do I continue to participate in the practice? The only answer I could give is that I would maintain my ethical purity at the expense of my students who often require my letters of certification and recommendation. The only satisfactory solution is to reform the system.

28. This use was suggested to me by Carl Monk as a possible, if not probable, concern of prospective employers.

legal requirements by professionals do raise character questions, but those are not at the forefront of a decertification inquiry. The lack of moral character may be inferred from improper actions, but that inference is not essential in order to decide whether the professional has forfeited his or her right to a license.

C. "Good Moral Character" as Aspirational Concept

In the fourth sense, "good moral character" is not descriptive or predictive, but has an aspirational quality. It represents the higher set of ethical expectations and character qualities which we use to identify exceptional members of the profession. Aspirational "good moral character" is used as a goal for ethical education through professional training and reinforcement and ought to be a personal goal for each professional.

What are the components of the concept as ideal, model or aspirational set? It includes aspirations toward the highest attainable levels of competency. Among its ethical virtues are extraordinary fidelity, total honesty, genuine compassion, and commitment to public service.

The fourth usage differs fundamentally from the first three. Those three uses are compelled by the institutional structure of professionalism and by our membership in the profession. We are obligated to participate whether we like to or not. Such usages state minimum ethical obligations, what Lon Fuller calls a "morality of duty,"²⁹ and failure to abide by them requires punishment. Aspirational "good moral character" has a different quality. Its content is not fixed, its goals more general, and it is hortatory. Satisfying its demands can take many forms. Lon Fuller, calling this a "morality of aspiration," defined it as an area of freedom, and said the appropriate social consequence of attaining high aspirational goals is reward for achievement, not penalty for failure.³⁰ These rewards may be material, but usually are intangibles like esteem, respect and honor. Do we in the professions today honor those who display high moral character, or merely those who are financially successful? Do we even identify such highly ethical people? If we do not know who among us practice this aspirational high moral character, how can we give them our respect and how can we hold them up to our students, employees, and colleagues as models to follow?

"Good moral character" is an extremely important, if not critical, aspect of professionalism and of good business practice. Its primary

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importance, however, is in this aspirational role. It is not enough to merely meet minimum standards of professional competence in our areas of expertise and to refrain from acting in ways that could lead to criminal prosecution or professional decertification. We must expect more of ourselves and each other.

The teaching and practice of aspirational "good moral character" could be justified on utilitarian grounds: It will help the practitioner avoid the pitfalls leading to decertification. When used this way, it becomes a synonym for circumspection. A variant of the weak claim that good moral character will minimize chances for decertification is a somewhat stronger utilitarian claim that the professions as entities are suffering from such bad images that we must do something to improve public perceptions or we face severe governmental regulation. This is an argument for circumspection of all professional members, not just individuals. If, as I have argued elsewhere,³¹ almost all professional judgments have an ethical dimension and often actions of questionable morality that lead to harmful effects could be rationalized or defended as good faith errors in judgment, then good moral character is an important factor in trying to constrain such errors of judgment. In the last analysis, however, I would place aspirational moral character on a higher ground of justification than mere utility. An altruistic commitment to serve the public good is an obligation that not only distinguishes professions from mere occupations, but it is an obligation we voluntarily and solemnly assume when we swear our oaths on being licensed.³² Such solemn undertakings should not be lightly ignored. Furthermore, our oath obligates us to comply not only with the letter, but the spirit, of these public assumptions of professional duty.

IV. AN IMPROPER USE

Now an important caveat. One questionable if not totally unacceptable use of "good moral character" is as a control mechanism, pushing professionals toward conformist and safe behavior. For many, "good moral character" appears closest to those traits practiced, or at least celebrated by the leaders of the profession, so that rebels, eccentrics, or those who differ in background are more likely to be perceived as deficient in the right kind of character. If such persons cannot be brought into line, they will be separated from the profession. What is extraordinarily difficult in application is to distinguish nonconformist but valuable actions from those that are unethi-

31. See McDowell, *supra* note 5, particularly Chs. 1 and 5.

32. See Stephen F. Barker, *What is a Professional*, 1 PROFESSIONAL ETHICS: A MULTIDISCIPLINARY JOURNAL 73 (1992).

29. Lon L. Fuller, *THE MORALITY OF LAW* 5-9 (1964).

30. *Id.*

cal and damaging. The use of "good moral character" to stifle innovation, difference, and criticism has led many to believe that the concept should not be employed. That argument is very persuasive, but abandoning use of the concept also means giving up a powerful inhibitor of unethical conduct. Whether the consequence of chilling innovation or of tolerating unethical conduct is the more weighty to swing the balance between abandoning or retaining the concept in professional evaluation is a difficult question of getting empirical information and of judgment. My impression is that its use as a mechanism to control difference is substantial and has had a strong chilling effect on non-conformity. I am equally convinced that unethical activity which involves a demonstrable lack of "good moral character" is much too widespread to be condoned. My preference would be to retain the concept as an ethical and aspirational guide. When penalizing or decertifying members it should be used with great caution, particularly when used against those who are manifesting non-popular values or engaging in activities of social criticism. We should use the concept strongly in its aspirational sense, but cautiously in the first three, where the consequence might be denying a qualified and responsible person the opportunity to serve as a professional.

V. CONCLUSION

In which of these contexts should we continue to use "good moral character"? In my view it cannot be reliably or responsibly used to predict the future moral conduct of a professional, and ought to be abandoned for this use.³³ "Good moral character" is not something the profession can warrant in any particular professional. This is not a judgment that "good moral character" is unimportant, because it is a vital aspect of the status of professional, i.e., a person who is concerned with the welfare of the client and who is loyal and trustworthy towards that client. The problem is the reliability of predictions based on such limited information. Abandoning the formal certification recognizes this reality by not making such a warranty. It surrenders the pretense that clients need not take some responsibility for determining the level of competence and the trustworthiness of the professional to whom they entrust their affairs. Any sophisticated consumer of legal services already understands that licensing is not an effective guarantee of either of these qualifications and that inquiries must be made. Should we mislead less sophisticated members of the public

about their personal responsibility in selecting adequate professional help?

The formal professional structure must vigorously weed out those who have acted unprofessionally and thereby damaged clients or others. That consequence, however, should be based on objective criteria and actual acts of wrongdoing, not subjective judgments and predictions.³⁴

We must find other, more effective, ways of inculcating in practitioners the good moral character that should be an essential ingredient of all professional activity. That is why we need to emphasize and model the importance of good moral character both in professional education and in the legal culture.³⁵ "Good moral character" also has a vital aspirational purpose in guiding professionals in making complex judgments across the whole range of professional activity and in continuing to pull professionals beyond minimum levels of competence and of decency. One danger for lawyers and for law professors is that their distaste for the use and abuse of "good moral character" in the contexts of certification and employment will lead them to deemphasize or ignore it in the totally different normative context of aspirational good character.

Professional expertise, technique, and skill, if considered all important in defining and training professionals, do not contain restraints on their use, either in terms of the goals toward which the expertise may be aimed or the methods that might be used in applying technical skill and knowledge. "Good moral character" should operate as a side constraint on the exercise of professional expertise.

Given the bad repete now suffered by the legal profession and many individual lawyers, there is a temptation to use "good moral character" as essentially a public relations gambit designed both to persuade the public that we are not mere business people and to try to compel professionals to be sufficiently circumspect so as not to call that claim into serious question. The last several decades have seen most professions suffer in public esteem because of highly publicized unethical activities by some members. The problem is more than one of appearance and, unless professional groups demand or persuade their members to demonstrate good moral character, the erosion in respect and autonomy granted to professionals will continue.

34. My conclusion that we should be much more vigorous in weeding out unethical lawyers than in trying to assess the good moral character of applicants for a license does not reflect the actual practices of the bar. See Rhode, *supra* note 4, at 546-50.

35. For my analysis of the ethical modeling responsibilities of law professors, see Banks McDowell, *The Ethical Obligations of Professional Teachers (Of Ethics)*, 1 PROFESSIONAL ETHICS: A MULTIDISCIPLINARY JOURNAL 53 (1992).

33. This is the conclusion reached by Deborah Rhode after an exhaustive consideration of the administrative problems, constitutional concerns, and undesirable consequences of the certification procedures. See Rhode, *supra* note 4, at 585.

It is hypocritical to use an ethical concept like “good moral character” for public relations. The claim that all licensed members of a profession have good moral character loses credibility if it is regularly falsified by examples of egregiously unprofessional conduct. If the vast majority of the members of the profession are of good moral character, there is no need to make the claim. If they are not, the claim is unpersuasive.