

Constitutional Mythology in the United States: The Arguments Against Public Relations Licensing Refuted

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There can be little doubt that public relations practitioners have a significant influence on public opinion in the United States. Public relations practitioners represent candidates and influence the outcome of elections. They represent businesses and influence the economy. They represent civic causes and influence public opinion on everything from health to religion. There is, perhaps, no other group which so openly influences the opinions and actions of the people in the United States that is not subject to any public interest regulation or licensing.

The Requirements of Professionalism

Any group with the influence and social significance wielded by public relations practitioners should be held to professional standards. Further, most practitioners and educators in public relations in the United States claim they practice or teach a “profession.” Many scholars and advocates for public relations compare its practitioners to attorneys and physicians. The markers of professionalism often cited by those who want public relations to be perceived as a profession include 1) a body of knowledge, 2) an enforceable code of professional behavior, and 3) a license. (Olasky, 1985 and Gabaldon, 1998).

Body of knowledge

The Public Relations Society of America maintains a directory of the “body of knowledge” in public relations in the form of scores of books on the practice (PRSA, 2002) and in Europe EUPRERA has an ongoing project to develop a European public relations body of knowledge (Euprera, 2002). This literature is often cited at professional meetings and conferences as evidence that there is a body of knowledge in public relations sufficient to justify its recognition as a profession. Many public relations textbooks and model curricula also cite this

“body of knowledge” as evidence that public relations meets at least one of the criteria for a profession.

Code of professional behavior

In October of 2000 PRSA adopted a new code of ethics to replace the older PRSA Code of Professional Conduct. According to the PRSA Board of Directors, the new Code of Ethics is intended to “... inspire ethical behavior and performance” (PRSA Member Code, 2000, p. 1. There have been challenges to the potential effectiveness of the PRSA code (Parkinson, 2001) but, at least, there are ongoing efforts to develop a professional code of ethics for public relations practitioners in the United States.

Professional license

Even if one assumes there is a body of knowledge and a code of professional behavior, there is still one element of professionalism glaringly absent. There simply is no such thing as a public relations license in the United States.

The single most significant requirement for professional status is some system of public recognition or licensing. The practitioners in public relations cannot simply define themselves as a profession. Before public relations can be a legitimate profession legislatures or other regulatory bodies must recognize, define and license its professionals just as they do by admitting attorneys to the bar or by licensing physicians, dentists and members of other professions.

The public relations society of America has adopted the acronym APR (accredited in public relations) to designate those in the field of public relations who have a minimum level of experience and who have passed a basic test. However, this designation is not a true license. There is absolutely no requirement for anyone to be APR in order to practice public relations. PRSA does not even require its members to hold the designation. Further, there is no government oversight or enforcement of the use of the designation.

A true license, with some form of regulated endorsement and enforcement is essential to recognition of public relations as a profession and it is also an important element of public perception. Edward Bernays, for example, recognized the need for a professional license. He suggested that the practice of public relations would never be recognized as a legitimate social or business function without a license to recognize those who are competent and to eliminate those who are not (Newsom, Scott & Turk, 1989 p. 246). In effect a public relations license is important for the public relations image of the public relations industry. Just as clients and patients expect to retain licensed attorneys and physicians, people would be more likely to retain and respect the opinions of a licensed public relations practitioner. One need look no further than the public outcry for increased government regulation and oversight of the financial

industry to see that in the United States our publics see government regulation and control as important indicia of trustworthiness and competence.

Elsewhere in the world, public relations practitioners and governments have seen the advantage of licensing the profession. For example in Brazil practitioners are licensed (Moura, 2000). There are also licensing systems for public relations practitioners in Switzerland, the Netherlands and the United Kingdom (Willems, 2002). Such licensing insures professional competence and helps to support confidence in members of the profession. That confidence is particularly important to the public relations practitioner who must market services to clients based upon those clients' perception of his or her competence.

Despite the obvious advantages of licensing, there is massive resistance to regulation of public relations practice in the United States. A survey of members of the Public Relations Society of America indicated, "there is an almost universal disdain for licensing..." (Wilcox, Ault & Agee, 1995, p. 135) and Grunig said he believes "most practitioners.. don't believe licensing will work" (1984, p 75). Much of this resistance comes from the profession itself but the most often cited reason for not licensing public relations practitioners is the myth that such licensing would be prohibited by the U.S. Constitution. The fantasy that the First Amendment would prohibit licensing has been repeated by nearly every significant author who has addressed the concept of licensure. (see for example: Baskin & Arnof, 1983, pg 96; Cutlip, Center & Broom, 1994, p. 143; Wilcox, Ault & Agee 1995, p. 136; Grunig & Hunt 1984, p. 75; Crable & Vibbert, 1986, p. 119).

The purpose of this paper is to explore and to refute the four major arguments against licensing. These arguments are based on: 1) protectionism, 2), fear of malpractice liability, 3) difficulty of producing a legal definition of public relations and 4) the belief that licensing would violate the First Amendment.

The Protectionist Argument

One disadvantage of a license seen by many in public relations is the fact that licensing standards would identify those whose training, education, experience, competence or ethics are inadequate. In a profession with no current standards those who resist licensing are quite likely to do so because they fear they could not demonstrate adequate competence to secure a license. In fact this resistance may account, in part, for the unquestioning adherence to the myth that there are legal barriers to licensing. Despite the fact that some current practitioners may not meet a reasonable licensing standard their loss does not warrant serious resistance to licensing. The very professionalism that a license would identify demands that those unable to meet appropriate standards be eliminated from the practice of public relations. If we fail to adopt professional licensing standards we will continue to permit those without proper education or

skills to practice public relations. Failing to eliminate those incompetents who claim to practice public relations only exacerbates the perception that public relations has no standards and is not a profession.

Licensure and Malpractice Law Suits

The second major argument against licensing is the belief that a professional license might subject those working in public relations to suits for professional malpractice. As long as public relations is perceived more as an art than a profession its practitioners are relatively immune from the rampant litigation that has become a characteristic of life in the United States. For nearly a century those in professions have been held to a significantly higher standard of performance than those who are seen only as artists. (See for example: Fidelity Trust v. American Surety, 1909 and Simon, 1984). In effect if public relations practitioners claim to be members of a profession their clients have a legal right to expect work that meets professional standards. This legal expectation could subject practitioners to more litigation from clients. In an article in the University of Arkansas at Little Rock Law Review *Robert Dreschel* explored this paradox for journalists (2000). In his article, Dreschel presents an argument against professional journalism that is equally applicable to public relations practitioners. Having a professional license, he speculates, would raise the legally expected competence for journalists and might subject them to malpractice lawsuits for actions, which are now seen as simply variations in the skill or attention of artists. An identical argument could be made that a public relations license would make it easier for clients to sue public relations practitioners for professional failings. Like the earlier argument about eliminating some practitioners, this one simply deserves no serious consideration. If public relations in the United States is to be taken seriously as a profession it must have systems for eliminating and/or penalizing those who fail to perform adequately. Despite the view that U.S. society may litigate too much lawsuits are well recognized as a technique for identifying those who should be held liable for malpractice. If the practitioners of public relations resist holding themselves responsible for meeting a professional standard of performance they cannot legitimately claim professional status.

Licensure and a Legal Definition of PR

Some authors have argued that developing criteria for a public relations license is not possible because the practice of public relations cannot be legally defined. (See, for example, Cutlip, Center & Broom, 1994 p. 143). This argument is easily refuted. One need only read the federal statutes that already regulate representation of foreign entities. These foreign agent acts require registration of those engaged in "publicity" and "public relations." Therein "public relations counsel" is defined as:

Any person who engaged directly or indirectly in informing, advising or in any way representing a principal in any public relations matter pertaining to political or public interest, policies or relations of such principal. (22 USCS Sec 611 (g))

A "publicity agent" is defined as:

Any person who engages directly or indirectly in the publication or dissemination of oral, visual, graphic, written, or pictorial information or matter of any kind, including publication by means of advertising, books, periodicals, newspapers, lectures, broadcasts, motion pictures, or otherwise. (22 USCS Sec 612 (h)).

These laws have been in place without constitutional or other significant legal challenge since 1938 and they were modified and updated as recently as 2002 without constitutional challenge. While we may or may not agree with the accuracy of the definitions, these laws provide incontrovertible evidence that the practice of public relations can be legally defined and that such a definition can be used to impose legal regulations on the practice.

Licensure and the First Amendment

Although it may often simply camouflage other reasons to resist licensing, many public relations practitioners and educators seem to firmly believe that the First Amendment to the Constitution of the United States poses a serious barrier to licensing public relations professionals. That belief is simply wrong. The First Amendment says: "Congress shall make no law abridging the freedom of speech, or of the press..."

The prohibition against laws abridging free speech and press is extended to the state legislatures through the Fourteenth Amendment. Many people, particularly those who teach communications law, erroneously believe this creates an obligation for the government to protect communication or that it completely prohibits all restriction, regulation or licensing of communication. It is this mythological "right" that is often used to squelch any move to propose a license for public relations practitioners in the United States. Obviously the prohibitions against regulation of speech and press are not absolute, they are balanced against other governmental, societal or public interests. "Liberty of speech, and of the press, is not an absolute right ..." (Near, p. 708, quoting Stromberg, 1931). Existing laws that have been held constitutional in the United States restrict virtually every component of public relations practice. The courts have ruled repeatedly that reasonable regulations of the media, including newspapers, are constitutional and both state and national laws actually require

licensing of other professions that involve speech and/or the press. Most significantly laws restricting only the right to be paid for communication have been upheld.

Thus far this paper has explored and refuted the protectionist argument that public relations cannot be licensed in the United States because it would eliminate many in the profession. Likewise it has explained that fear of malpractice suits should be no barrier to licensing and that there is no difficulty in establishing a legal definition of public relations practice. The remainder of the paper will address the arguments against licensure that are based on misunderstandings of the First Amendment to the U.S. Constitution. It will explore one possible explanation for the strength of the myth that licensing is unconstitutional. It will then provide examples of existing restrictions on most elements of public relations practice. It will conclude with an explanation of how simply licensing the right to be paid for practicing public relations would meet all the needs of a professional license for PR and also avoid any possible constitutional challenge.

Why the myth that licensing is unconstitutional

Fervent beliefs in non-existent legal rights permeate the culture of the United States. These fantasies are often created or supported by self-serving politicians, advocacy groups and simple public misperception. Perhaps no fantasy is more powerful among journalists and public relations practitioners than the belief in “rights” of free speech and free press.

Even a simple analysis of the wording of First Amendment to the U.S. Constitution makes it obvious there is no “right” of free communication; rather there is only a “freedom” to speak and write. If there were a right of free communication the Constitution would say that Congress has an obligation to protect speech and press. Instead the Constitutional Amendment only says that congress cannot make a law that interferes with speech or press. This language has been interpreted by the Supreme Court of the United States to create only a freedom or liberty from government interference, not a right that must be protected. Further, conflicts between the First Amendment and other provisions of the Constitution and existing interpretation make it clear that even the liberty of communication can be reasonably restricted to time, place and manner of communication (*City of Los Angeles*, 2002, p. 1733). Why then do many journalists and public relations practitioners in the U.S. seem to believe the Constitution would prohibit licensing their professions?

One possible reason for the prevalent misunderstanding of the First Amendment’s provisions is the biased legal information prevalent in U.S. media. Most Americans receive their legal information from the media, not from lawyers. In turn, it appears most reporters in the U.S. media received what legal training they have from their journalism or mass communications teachers. In

short, an academic rather than an attorney's perception of law dominates U.S. culture outside the legal community. Two perspectives of media academicians may account for the power and prevalence of the mythology of a "right to communicate."

The first of these perspectives is a focus on speculation about what law should be or might be in the future rather than a focus on what law is. The prevalence of this perspective can be seen in both traditional law journals and those that focus on mass communications law. Law journals are dominated by comments or analyses that use detailed comparisons of dicta, dissenting opinions and concurring opinions to attempt to predict court trends or future decisions. This same system of analyzing concurring and dissenting opinions and dicta is also used to defend positions that are not consistent with current court rulings --- in effect to describe what often disgruntled media commentators believe the law should be.

Judges hearing actual cases reject any arguments based on dicta, dissenting opinion or concurring opinion and instead focus exclusively on the mandatory authority of superior courts [see END NOTE]. The examples and arguments presented in this paper will focus exclusively on the actual decisions of courts with authority to interpret the U.S. Constitution. They, therefore, are a statement of what the law is, not what some believe it may be in the future or what differently motivated groups believe it should be.

The second of these academic perspectives is the obvious and understandable pro media bias in most journals and texts in mass communications law. One such text specifically says that "licensing schemes" are prior restraint (Zalezney, 2001, p 44-45). This same author goes on to offer broadcast regulation as an example of legal licensing of communication but he, like most of the experts to whom reporters in the U.S. are exposed, give the distinct impression that licensing is an evil from which their profession is protected by the Constitution.

The academic use of analytical systems that focus on speculation rather than accurate statements of existing law, coupled with an understandable bias against any restrictions on communication, could certainly explain the strength of the myth that the First Amendment prohibits licensing. However, the myth is powerful enough that simply pointing out its error will not suffice. It will be necessary to offer examples of constitutionally permissible legal restrictions and licensing of communication and then to show how a public relations license would endure any constitutional challenge.

Constitutional Restrictions on Commercial Communication

Historically, speech that served an economic interest of the speaker received no First Amendment protection at all. (See for example: Virginia Pharmacy Board v. Virginia Citizens Consumer Council, 1976 p. 762, Ohralik v. Ohio

State Bar Assn, 1978, pp 455-456). However, in the 1980 case of Central Hudson Gas & Electric Corp. V. Public Services Commission of New York the U.S. Supreme Court ruled that commercial speech has some protection. The protections identified in Central Hudson depend on the following test:

If the speech concerns lawful activity and is not misleading, and if there is a substantial government interest in regulating the speech then a restriction on that communication may be permitted if it is not more restrictive than necessary to meet the government's interest. (Central Hudson, 1980, p. 566)

Based on applications of this test it is apparent that even truthful and lawful speech can be regulated if the regulation advances a substantial government interest and is no more restrictive than necessary. There is an important or even substantial government interest in protecting the public from charlatans and incompetents in virtually every other profession. There should be no problem finding an important government interest in protecting citizens and commerce from the incompetent or dishonest public relations practitioner. Further, a simple license that recognizes education, training and/or experience does not place an unreasonable burden on the First Amendment. Such a license should, therefore, easily meet the Central Hudson test.

There are, of course, other examples of government restrictions on communication. Perhaps the simplest and most obvious examples of existing restrictions on components of public relations practice are the restrictions on media use and access.

Constitutional Restrictions on Media of Communication

Outright licensing is imposed on broadcast media in the United States (47 USCA 15 & 301). Other media that are regulated include all misleading or deceptive advertising and many advertisements that encourage socially undesirable attitudes or actions (15 USCS 45; also, see for example: RAV v. City of St. Paul, 1992; Morales v. Trans World Airlines, 1992; California Dental Association v. FTC, 1999). Perhaps less obvious are the growing restrictions on electronic media. Thirty-three states have or are evaluating laws directed at controlling unsolicited commercial e-mails (SPAM) and the United States is also considering anti-SPAM legislation that would require a license or permit to use most Internet media. (Fogo, 2000, p. 916). Most of these laws have survived constitutional challenge and the only government interest used to justify any restriction on free communication is the government's interest in protecting the "cyber-economy." Other media that suffer constitutional limitations include highway billboards that have been constitutionally restricted since 1965 simply in the name of highway beautification (Albert, 2000, p. 465

& Ftn. 1). Of course, political advertising and issue advertising, which are perhaps more closely associated with public relations are constitutionally restricted through finance limitations and restrictions on communications near polling places (Jowers, 2000).

Probably the restrictions that most convincingly show that public relations practitioners can be licensed is the consistent holding in opinions of the U.S. Appellate courts and the Supreme Court that the press itself could be taxed or regulated. Cases that have held the government may tax or regulate newspapers include: Citizen's Publishing Co. v. United States (1969) and Lorain Journal Co. v. United States (1951). Both of these cases included holdings that newspapers are subject to anti-trust regulations. Oklahoma Press Association v. United States (1946) held newspapers are subject to labor regulations, and Branzburg v. Hays (1972) held journalists can be subjected to subpoenas. Further, it should be noted that throughout the line of First Amendment interpretation by the Supreme Court taxation of newspapers has been upheld so long as that taxation is consistent with the treatment of other businesses and does not discriminate on the basis of the newspapers' content (see, for example: Grosjean v. American Press, 1936 & Minneapolis Star v. Minnesota Commissioner of Revenue, 1983).

Most authors in mass communications law base their analysis of restrictions on free speech either on dicta, dissenting or concurring opinions that explain the conditions under which the press cannot be licensed. For this reason many students of mass communications law and most journalists inaccurately believe the press cannot be licensed. A careful reading of the court's decisions in many often-cited cases involving press regulation demonstrates that it is constitutionally permissible to regulate, tax and even to license communication. Grosjean (1936) and Minneapolis Star (1983) both include statements by the United States Supreme Court that indicate taxation or other government impositions on the press are constitutional. In Grosjean Justice Sutherland, writing the court's opinion does hold the subject Louisiana tax unconstitutional but takes pains to point out that the tax is unconstitutional because it is in a form that operates to discriminate against newspapers of greater circulation. He specifically indicates that newspapers are not exempt from taxation (Grosjean p. 238). In the more recent Minneapolis Star decision, Justice O'Connor writing for the Court specifically recognized that the Grosjean decision was based on the fact that that the tax found to be unconstitutional was prohibited only because it was structured for the purpose of discriminating against newspapers with large circulation. (Minneapolis p. 579-80). She goes on to indicate that what is prohibited is differential taxation, not simply taxation of an industry like the press. (Minneapolis, p 585). While the subject Minnesota tax was ruled unconstitutional it should be remembered that the tax, like that in Grosjean, was imposed on newspapers with higher circulation. It was not the kind of content neutral, non-discriminatory tax the courts have held to be constitutional.

Further, use of public parks and meeting places can be prohibited without a license or government permit (Cronk v Chicago Park District, 2002). This reasonable time, place, manner regulation means that many of the special events organized by public relations practitioners are subject to reasonable permit or license requirements.

Specific Constitutional Limitations on PR Practice

Some may feel only a decision by the Supreme Court of the United States that specifically addresses a public relations practice would provide evidence that public relations can be restricted or regulated. Gentile v. State Bar of Nevada (1991) provides exactly that evidence. In Gentile the U.S. Supreme Court ruled that an order prohibiting litigation public relations by the Nevada Supreme Court was void for vagueness. However, the court therein specifically indicated that an order prohibiting litigation public relations could be upheld if it gave adequate and timely notice to the defendant of what conduct was prohibited. For practitioners in the area of litigation public relations this means their entire function could be defined and reasonably regulated. There would be no constitutional prohibition of this regulation of public relations practice. Another major restriction on public relations practice – the Foreign Agent registration requirement – has already been described.

In short, virtually every component of public relations has been licensed or otherwise regulated by the government without successful constitutional challenge. It is obvious, based on a comprehensive view of already existing reasonable regulations of mass communications that a system for licensing public relations practitioners could easily survive constitutional challenge.

Licensing the Right to be Paid to Represent Others

Even if the First Amendment were somehow to be construed to prevent licensing or regulation of the practice of public relations the profession could still be legally licensed. Simply put even if there were an absolutist interpretation of the First Amendment and all communication were protected, it would still be constitutional to license the right to be paid for communicating on behalf of others.

There is no need to explain that physicians, attorneys, accountants, engineers and virtually every other profession is already licensed in some jurisdiction of the United States. Most states even license occupations most readers would not define as professional. Oklahoma, for example, requires licenses for plumbers, cosmetologists, dieticians, contractors and many other occupations, in addition to the traditional professions (18 Oklahoma Statute Sec. 803 (2002)).

In each of these occupations and in most professions, what is licensed is not the right to practice the skills of the trade but rather the right to be paid for

exercising those skills. The traditionally recognized and licensed profession that comes closest to public relations is law. Lawyers practice their profession in an arena that is communication driven and just like public relations practitioners they represent clients with their communication and advocacy skills. If licensing infringed their First Amendment rights, rest assured attorneys in the United States, of all people, would find a way to avoid licensure. Further, lawyers represent clients who pay for their services. If licensing infringed upon any commercial right guaranteed by the constitution they would avoid licensure. Yet, in every state attorneys must be licensed to practice law and lawyers submit to this requirement.

The fact that lawyers must be licensed becomes an extraordinarily powerful argument for the constitutionality of a public relations license when one notes that legal representation is a constitutionally guaranteed right. The right to legal representation is found in the Sixth Amendment as interpreted by the U.S. Supreme Court (see, for example: Powel v Alabama, 1932 p. 69). Neither public relations representation nor the public relations practitioner's individual right of speech could be reasonably inferred from any provision of the U.S. Constitution. Remember the First Amendment only prohibits Congress from abridging freedom of speech and press, it does not create any right which Congress must guarantee. By comparison the Constitution does guarantee a right of legal representation. Those who doubt that lawyers have greater constitutional protection than do public relations practitioners should simply note that cases interpreting the constitution require the state and national governments to provide public defenders but there is no legal requirement for a "public PR practitioner." Even Edward Bernays recognized this when he said: "Licensing can be accomplished with ease, without in any way infringing on the rights guaranteed by the First Amendment. Lawyers, for instance, are licensed and their freedom of speech is guaranteed by the United States Constitution." (quoted in Newsom, Scott & Turk, 1989, p. 246)

To understand how the right to be paid for representing others avoids any constitutional challenge one must first understand how lawyers are licensed. We have not been able to identify any jurisdiction anywhere in the United States where the act of practicing law pro se is prohibited by any licensing statute or bar association rule. It appears citizens are always permitted to represent themselves in a courtroom even without a license to practice law. Most Bar Associations and Attorney Regulatory Commissions only regulate the paid representation of a client. Further, many states permit interns, law clerks and paralegals to perform many of the actions permitted by an attorney except the right to collect fees and to identify themselves as "attorneys at law" (see for example: 705 ILCS 205 et seq, 2002 & Law Clerks, 1997). For lawyers, what is licensed is not the right to communicate as lawyers but rather it is the right to represent others and to be paid.

If, as is the case with lawyers, a public relations license were only required if a practitioner sought to represent others and to be paid for his or her services then the constitutional challenge would be nil.

Conclusion

The practice of public relations can and should be licensed. Public relations practitioners should stop using the Constitution as an excuse to shield incompetence and should welcome the challenge of developing a professional licensing body and an enforceable code of ethics with specific standards of behavior that can be used to separate the qualified practitioners from the charlatans. True public interest could not demand more of us and we must not demand less of ourselves.

End Note

1. To put the vehemence with which judges reject argument based on dissenting opinions and dicta in perspective. One of the authors was once told by a judge, in open court, that the only people who read dissenting and concurring opinions are the lawyers who lost the case and morons.

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