Monopoly Power in Defense of the Status Quo: A Critique of the ABA's Role in the Regulation of the American Legal Profession

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I. INTRODUCTION

Since its founding in 1878,[1] the American Bar Association (ABA) has served the legal profession in two principal ways: by limiting membership in the profession, and by protecting its prerogatives. It has done so by: advocating a system of licensing backed by unauthorized practice rules; by supporting and then regulating law schools and thereby diminishing the apprenticeship-clerkship route to admission; by regulating the delivery of professional services through detailed professional codes; by lobbying the state and federal legislatures for favorable legislation; by providing a continuous public relations campaign to put the bar in a favorable light; and by supporting the growth of state bar associations that press for these prerogatives at the state and local level. The result is an outsized and comfortable profession that is costly, and inefficient. By seizing the initiative in the creation of a trade association, which simply declared itself the official voice of the bar over all aspects of the profession (although less than one-third of the 1.2 million lawyers in the United States[2] are ABA members), and then convincing state bar authorities to accept its judgments, the ABA accomplished its goal of self-regulation through the use of monopoly power. Not until the 1970s did the ABA experience any real challenge to its dominance. The Watergate scandal harmed the bar's reputation when President Nixon's prestigious lawyers committed crimes that subverted governmental authority. Furthermore, the Supreme Court found a number of the ABA's regulations of lawyer professionalism to be illegal.

II. SUPREME COURT INTERVENTION

In the 1970s, the Court demonstrated a new willingness to examine the legal profession by applying antitrust principles and the First Amendment to a series of state bar rules that were patterned on ABA models. In *Goldfarb v. Virginia State Bar*,[3] the United States Supreme Court ruled that the Virginia State Bar attorney fee schedule, which dictated minimum fees to be charged for a wide variety of legal services, was an antitrust violation,[4] because it was "enforced

1. *See generally* Whitney North Seymour, *The First Century of the American Bar Association*, 64 A.B.A. J. 1038 (1978).

2. Gerard J. Clark, *American Lawyers in the Year 2000: An Introduction*, 33 SUFFOLK U. L. REV. 293, 312 (2000) (describing American legal profession).

3. 421 U.S. 773 (1975).

4. *Id.* at 781-82; *see also* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 509 (1988) (finding national electrical code subject to antitrust scrutiny); Nat'l Soc'y of Prof'l Engineers v. United States, 435 U.S. 679, 696 (1978) (finding that trade association for engineering profession is similarly subject to antitrust regulation).

through the prospective professional discipline from the State Bar . . . . [T]he motivation to conform was reinforced by the assurance that other lawyers would not compete by underbidding."[5] While the Court recognized that states have a "compelling interest" in the regulation of professions "to protect the public health, safety, and other valid interests," and "to establish standards for licensing practitioners and regulating the practice of professions," the practice of law was not a sanctuary insulated from the Sherman Act.[6] By using the state legislature, "lawyers would be able to adopt anticompetitive practices with impunity."[7] The Court found no "support for the proposition that Congress intended any such sweeping exclusion."[8]

The Court has also used the First Amendment to invalidate a variety of rules concerning the distribution of legal services.[9] In *NAACP v. Button*,[10] the Court held that the First Amendment prohibited the Virginia Bar Association from attempting to outlaw the NAACP's program of selecting and paying lawyers to bring school desegregation cases.[11] In *Brotherhood of Railroad Trainmen v. Virginia State Bar*,[12] the Court decided that the states could not treat as unlawful solicitation and unauthorized practice a program under which the union-sponsored lawyers advised injured member workers and their families to obtain legal assistance before settling claims and recommending specific lawyers who handled their claims of members.[13] In 1967, in *United Mine Workers v. Illinois State Bar Ass'n*,[14] the Court held that a union plan, under which a private practice lawyer, salaried by the union, handled worker compensation claims for union members and their families, was constitutionally protected.[15] Finally, in 1971, in *United Transportation Union v. State Bar of Michigan*,[16] the Court reaffirmed the constitutional invulnerability of the tradesmen union's regional counsel plan.[17]

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5. *See Goldfarb*, 421 U.S. at 781-82.

6. *Id.* at 792.

7. *Id.* at 787.

8. *Id.*; *see also* Thomas D. Morgan, *The Impact of Antitrust Law on the Legal Profession*, 67 FORDHAM L. REV. 415, 433 (1998). The principal obstacle to an antitrust challenge would be the state action defense. Parker v. Brown, 317 U.S. 341, 368 (1943) (holding that program to restrict raisin supply immune from Sherman Act scrutiny even though anticompetitive). The Supreme Court held in *Parker* that the Sherman Act was not meant to proscribe state legislative judgments that regulation was superior to competition. *See* STEPHEN F. ROSS, PRINCIPLES OF ANTI-TRUST LAW 497 (1993) (analyzing history, principles, and purposes of Sherman Act). Since unauthorized practice is often a criminal violation, enforceable by an instrumentality of the state's highest court, it is assumedly beyond antitrust.

9. CHARLES WOLFRAM, MODERN LEGAL ETHICS 899 (1986).

10. 371 U.S. 415 (1963).

11. *Id.* at 343-44.

12. 377 U.S. 1 (1964).

13. *Id.* at 8.

14. 389 U.S. 217 (1967).

15. *Id.* at 221-22.

16. 401 U.S. 576 (1971).

17. *Id.* at 580-86.

In *Bates v. State Bar of Arizona*,[18] the Court extended First Amendment protection to newspaper advertisements offering to provide various services for specified fees, including uncontested divorce, adoption, non-business bankruptcy, and change of name.[19] The Arizona Supreme Court censured the lawyers for conduct in violation of its code of professional responsibility. The United States Supreme Court reversed noting that, "[t]he listener's interest [in commercial speech] is substantial," and "often may be far keener than his concern for urgent political dialogue."[20] Further, the commercial speech served important societal interests by informing the public of the availability, the nature, and the price of products and services.[21] The court rejected the state's claims that advertising had an adverse effect on professionalism, was inherently misleading, or had an adverse effect on the administration of justice.[22] In subsequent cases, the Court invalidated prohibitions on targeted advertising,[23] direct mail advertising,[24] bona fide advertising of one's field of specialization,[25] and lawyer participation in collective activity undertaken to obtain meaningful access to the courts.[26] In each of these instances, the official ABA position opposed these rulings.

III. ABA APPROVAL OF LAW SCHOOLS

A. History

In 1893, the ABA created the Section on Legal Education and Admission to the Bar,[27] which immediately undertook a campaign to expand law school attendance and to diminish the arguably superior apprenticeship-clerkship route to admissions.[28] The apparent justification for this new and superior method was its intellectual rigor. The case method and the Socratic method created by Dean Langdell at Harvard became the model.[29] The new law schools eschewed the trade-school model in favor of training by academic specialists who touted the history and the policy implications of the rule of law.[30] This intellectual

18. 433 U.S. 350 (1977).
19. *Id.* at 382-83.
20. *Id.* at 364.
21. *Id.*
22. *Bates*, 433 U.S. at 383-84.
23. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 655-56 (1985).
24. Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 466 (1988).
25. Peel v. Att'y Registration & Disciplinary Comm'n, 496 U.S. 91, 91 (1990).
26. *In re* Primus, 436 U.S. 412 (1978).
27. *See* Seymour, *supra* note 1, at 1040.
28. It has been alleged that it was an attempt by the elite of the profession to bar access to the newer immigrant groups at the end of the nineteenth century. JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 5-6 (1976).
29. *See* ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 53 (1983) (describing Harvard Law School's development of legal education).
30. *See* WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF

approach to a practical profession has been criticized ever since by the likes of Jerome Frank.[31] Indeed, the ABA itself joined the critique of its own creation in the MacCrate Report that criticized legal education for being too narrowly focused on knowledge and recommended a more expansive educational experience including skills[32] and values.[33] More recently, the Carnegie Foundation came to a very similar conclusion.[34]

In 1921, the American Bar Association promulgated its first Standards for Legal Education and began to publish a list of ABA-approved post-graduate law schools that met the ABA standards. ABA approval has since been adopted by state bar admission bodies as a standard for purposes of eligibility for admission to the bar.[35]

B. Accreditation Standards

The process of accreditation of new law schools involves extensive written submissions, as well as at least two site visits by teams chosen by the Section.[36] Schools that are already approved are visited once every seven years. The standards and rules of procedure for the approval of law schools are voluminous and detailed.[37] They govern every aspect of the law school's educational program. This has led to a uniformity of legal education nationwide.[38] Indeed the cost of private law school and annual cost increases are strikingly uniform.[39]

For instance Standard 402 requires strict adherence to the regulations concerning student-faculty ratios:

> (1) A ratio of 20:1 or less presumptively indicates that a law school complies

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LAW 4-5 (2007).

31. JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 226-28 (1963).

32. *See generally* Larry E. Ribstein, *Practicing Theory: Legal Education for the Twenty-First Century*, 96 IOWA L. REV. 1649 (describing how shifting legal profession will force changes in legal education).

33. *See generally* LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (Robert MacCrate ed., 1992) [hereinafter MacCrate Report].

34. *See* SULLIVAN ET AL., *supra* note 30, at 92-93 (endorsing return to apprenticing).

35. *See* Mass. Sch. of Law v. Am. Bar Ass'n, 846 F. Supp. 374 (E.D. Pa. 1994) (holding district court did not have personal jurisdiction over non-resident where law school sued non-resident accredited organizations). *See generally* Gerard J. Clark, *A Challenge to Law School Accreditation:* Massachusetts School of Law v. The A.B.A., 24 ADVOC. 62 (1994) (discussing requirements to take bar exam).

36. Matthew D. Staver & Anita L. Staver, *Lifting the Veil: An Exposé on the American Bar Association's Arbitrary and Capricious Accreditation Process*, 49 WAYNE L. REV. 1, 71 (2003) (critiquing use of site teams).

37. *See* Am. Bar Ass'n, 2012-2013 Standards and Rules of Procedure for Approval of Law Schools (2012) [hereinafter Approval of Law Schools], http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2012_2013_aba_standards_and_rules.authcheckdam.pdf.

38. *See* SULLIVAN ET AL., *supra* note 30, at 187.

39. *See* David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 17, 2011, http://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html (scathing critique focusing on New York Law School).

> with the Standards. However, the educational effects shall be examined to determine whether the size and duties of the full-time faculty meet the Standards.
>
> (2) A ratio of 30:1 or more presumptively indicates that a law school does not comply with the Standards.[40]

Interpretation 402-1 adds further detail:

> (A) Additional teaching resources and the proportional weight assigned to each category include:
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> (i) teachers on tenure track or its equivalent who have administrative duties beyond those normally performed by full-time faculty members: 0.5;
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> (ii) clinicians and legal writing instructors not on tenure track or its equivalent who teach a full load: 0.7; and
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> (iii) adjuncts, emeriti faculty who teach, non-tenure track administrators who teach, librarians who teach, and teachers from other units of the university: 02.[41]

Section 503 requires that a law school not using the LSAT should establish that its test is an acceptable test.[42] "Interpretation 503-1 makes it clear that the burden is on the law school to demonstrate the validity and reliability of any test or assessment methodology, other than the LSAT . . . ."[43] Concerning the law school admission process, the Office of the Consultant to the Section on Legal Education and Admission of the Bar has issued the following memo: "The [Accreditation] Committee urges any school that is considering implementing a special admission program not requiring the use of the LSAT . . . to give notice to the Consultant's Office, and to be prepared to address all the issues identified and provide the documentation and evidence outlined above."[44]

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40. *See* Approval of Law Schools, *supra* note 37, at 31.

41. *See id.* at 30 (interpreting Standard 402-1).

42. *Id.* at 36-37.

43. *Consultant's Memo No. 1—Revision 1*, ABA SEC. OF LEGAL EDUC. & ADMISSION TO THE BAR (Aug. 2009), http://apps.americanbar.org/legaled/accreditation/503.pdf.

44. *Id.* The issues to be addressed include:

> (a) For the most recent entering class, the number of students who applied for admission under the Program, the number of those students admitted, and the number who matriculated.
> (b) For the various student populations referred to in paragraph (a), the distribution, mean, median, and standard deviation of the following: SAT score; ACT score; UGPA; and LSAT scores for those applicants under the Program who took the LSAT and reported LSAT scores.
> (c) A report on the reliability of the assessment method used in connection with the Program.
> (d) A report on the performance (including means, medians, and standard deviations) . . . .

Standard 304 requires:

> (a) A law school shall have an academic year of not fewer than 130 days on which classes are regularly scheduled in the law school, extending into not fewer than eight calendar months. The law school shall provide adequate time for reading periods, examinations, and breaks, but such time does not count toward the 130-day academic year requirement.
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> (b) A law school shall require, as a condition for graduation, successful completion of a course of study in residence of not fewer than 58,000 minutes of instruction time, except as otherwise provided. At least 45,000 of these minutes shall be by attendance in regularly scheduled class sessions at the law school.
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> (c) A law school shall require that the course of study . . . be completed no earlier than 24 months and no later than 84 months after a student has commenced law study at the law school or a law school from which the school has accepted transfer credit.[45]

Section (f) mandates that "[a] student may not be employed more than 20 hours per week."[46] Standard 606 requires a school law library to have a collection of annotated state codes, the national reporter system, specialized periodicals and computer-assisted research services among many other requirements placed upon the library in Standards 601 through 606.[47]

C. Legal Difficulties

In June 1995, the United States Department of Justice filed a civil antitrust suit against the ABA, alleging violations of antitrust laws in the accreditation program.[48] The complaint cited as evidence of illegal collusion the fact that the

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> (e) A report on any other evidence or studies regarding the validity of the assessment method used in connection with the Program and the comparability of that assessment method with the assessment method used under the Law School's regular admission program.
> (f) A description of the regular admission program of the Law School then in effect and the assessment method used under it.
> (g) A description of the person or persons who performed the psychometric and other analyses reported to the Committee in connection with paragraphs (a)-(e), above.

Id. at 158-59.

45. APPROVAL OF LAW SCHOOLS, *supra* note 37, at 22.

46. *Id.*

47. *Id.* at 43-46.

48. *See generally* Complaint for Equitable Relief for Violation of 15 U.S.C. § 1, Sherman Antitrust Act, United States v. Am. Bar Ass'n, 934 F. Supp. 435 (D.D.C. June 27, 1995) (No. 95-1211), *available at* http://www.justice.gov/atr/cases/f0200/0254.htm. Excerpts from the DOJ complaint follow:

> 9. Legal educators, including current and former law school faculty, administrators, and librarians, control and dominate the law school accreditation standard-setting and enforcement

process.

10. The House has delegated authority to administer law school accreditation to the ABA's Section of Legal Education and Admissions to the Bar ("Section"). . . .

11. Approximately 90% of the Section's members are legal educators. The faculties of approximately 145 of the 177 ABA-approved schools hold membership through the Section's Faculty Group Membership Program. Under this Program, a law school pays ABA and Section dues for its faculty.

. . . .

15. *Law School Salaries* The ABA has required that an accredited law school pay its faculty, administrators, librarians, and other professional staff compensation comparable to the compensation paid to other professional staff at other ABA-approved law schools. . . .

16. The faculty salary Standard indicated only that compensation is relevant in evaluating a law school's ability to attract and retain competent faculty. In practice, however, the ABA has relied on salary data nearly exclusively to determine compliance. The ABA's salary Standards and their application have unreasonably restricted competition in the law school labor market and have had the effect of ratcheting up law school salaries.

17. *Proprietary Law Schools* The ABA has required that an accredited law school must be organized as a non-profit educational institution. The ABA has never accredited a proprietary law school.

18. The Standard erects an unnecessary entry barrier against proprietary law schools, and prevents these schools, some of which provide their professional staff with lower salaries and fewer amenities, from providing competition to professional law school staffs at ABA-approved schools.

19. *Students and Graduates of Non-ABA-Approved Schools* The ABA prohibits ABA-approved law schools from enrolling graduates of a law school accredited by a State, but not by the ABA, in an LL.M. or other post-J.D. program. . . .

20. The ABA also prohibits an ABA-approved law school from offering transfer credits for any course successfully completed at a law school accredited by a State, but not by the ABA. . . .

21. *Student to Faculty Ratios* A student to faculty ratio of 20:1 is required for a law school to be presumptively in compliance with ABA Standards and Interpretations. A law school with a ratio that exceeds 30:1 is presumptively non-compliant. In computing the faculty component of the ratio, the ABA counts only "full-time faculty," which it defines as those faculty members who are employed full-time on tenure track and who do not have any outside office, business or administrative activities. The ABA excludes from the computation of faculty: (i) administrators who teach; (ii) *emeritus* or senior faculty who teach; (iii) some visiting professors who teach; (iv) joint-appointed faculty who teach; (v) adjunct professors; and (vi) clinical and other instructors holding short-term appointments who teach. Although the stated rationale for the student to faculty ratio is to ensure smaller classes and more student-faculty contact, the ABA does not consider actual student-faculty contact or actual class size in enforcing the Standard. Law schools widely recognized for their outstanding quality are now on report for alleged high student to faculty ratios.

22. *Teaching Loads* The ABA sets the maximum number of classroom hours that a law school can require its faculty to teach at eight hours per week, or if a course is duplicated, ten hours. The ABA defines an "hour" as 50 minutes.

23. *Compensated Leaves of Absence* The ABA Standard related to faculty leaves of absence has provided that a law school should afford its faculty reasonable opportunities for leaves of absence and for scholarly research. In practice, the ABA has required that law schools provide their faculty with paid leaves of absence.

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25. *Facilities* The ABA requires an adequate physical plant. Since the adoption of the new Standards in 1973, nearly all ABA-approved law schools have built new facilities or made substantial renovations to existing facilities. Despite this, over 60 ABA-approved schools were on report for "inadequate facilities" in 1994, including schools of recognized high quality.

27. Student to faculty ratios, teaching load requirements, sabbatical and other faculty leave policies, bar preparation requirements, adequate physical facilities, and adequate resources are relevant factors to consider in assessing the quality of a law school's educational program.

rule-making and the inspections were dominated by the existing member schools; that they regulated faculty salaries; that they discriminate against proprietary law schools; and that they impose student-faculty ratios and teaching loads. The civil suit was concluded by a final Consent Decree that was approved in June 1996 expiring in 2006.[49]

The ABA has been recognized by the then Commissioner of Education since 1952 as the approved accreditation agent for the nation's law schools. Later, when student loan guarantees were enacted, the ABA became the accrediting agency for federally guaranteed student loans. That status has been placed in doubt by questions of compliance with the standards of the National Advisory Committee on Institutional Quality and Integrity. At a June 11, 2011 meeting,

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> However, these factors at times have been applied inappropriately to enhance compensation and working conditions for professional staff.

Id.

49. *See* United States v. Am. Bar Ass'n, 934 F. Supp. 435, 436-38 (D.D.C. 1996) (providing final judgment). Excerpts from the consent decree follow:

> The ABA is enjoined and restrained from:
> (A) adopting or enforcing any Standard, Interpretation or Rule, or taking any action that has the purpose or effect of imposing requirements as to the base salary, stipends, fringe benefits, or other compensation paid law school deans, associate deans, assistant deans, faculty, library directors, librarians, or other law school employees, or in any way conditioning the accreditation of any law school on the compensation paid law school deans, associate deans, assistant deans, faculty, library directors, librarians, or other law school employees;
> (B) collecting from or disseminating to any law school data concerning compensation paid or to be paid to deans, administrators, faculty, librarians, or other employees;
> (C) using law school compensation data in connection with the accreditation or review of any law school; and
> (D) adopting or enforcing any Standard, Interpretation or Rule, or taking any action that has the purpose or effect of prohibiting a law school from:
> (1) enrolling a member of the bar or graduate of a state-accredited law school in an LL.M. program or other post-J.D. program;
> (2) offering transfer credits for any course successfully completed at a state-accredited law school, except that the ABA may require that two-thirds of the credits required for graduation must be successfully completed at an ABA-approved law school; or
> (3) being an institution organized as a for-profit entity.
> . . . .
> The ABA shall:
> (A) establish a Special Commission to Review the Substance and Process of the ABA's Accreditation of American Law Schools to determine whether the Standards, Interpretations, and Rules, and their enforcement governing the following subjects should be revised:
> (1) faculty teaching-hours;
> (2) leaves of absence, compensated or otherwise, for faculty and other staff;
> (3) the calculation of the faculty component of student-faculty ratios;
> (4) physical facilities;
> (5) the allocation of resources to a law school by the law school or its parent university; and
> (6) the treatment of bar preparation courses.

Id.

the Committee found the ABA "to be out of compliance with 17 regulations, including the need to consider student-loan default rates in assessing programs; to solicit and consider public comments; and to set a standard for job placement by its member institutions."[50] In August 2010, the role of the ABA House of Delegates in accreditation matters was eliminated in order to comply with new Department of Education concerns about a lack of independence.

The effect of this comprehensive, detailed regime of regulation has been the homogenization of American legal education. The 199 ABA-approved law schools are strikingly similar, in terms of the casebooks used in most classes, teaching methodologies, required courses, electives, and qualifications for faculty appointment. Indeed, the classroom architecture tends toward uniformity. Further, there is very little price competition in the tuitions of the nation's private law schools. Alternative models like the California proprietary schools and the Massachusetts School of Law have had difficulty surviving without that valued ABA accreditation which allows graduates to take the bar in any of the fifty states.[51] Indeed, the recent rejection of Duncan Law School in Tennessee has been challenged in a federal antitrust action filed in December 2011.[52]

IV. A SHORT HISTORY OF ABA PROFESSIONAL REGULATION

A. The First Ninety Years

In 1908, prompted by stinging criticism of the bar by President Roosevelt,[53] the Canons of Professional Ethics (CPE) were promulgated and the ABA advocated that the states adopt the ABA model to police the profession and to spread the principles of professionalism.[54] By 1930, the centrality of the

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50. Eric Kelderman, *American Bar Association Takes Heat From Advisory Panel on Accreditation*, CHRON. OF HIGHER EDUC., June 9, 2011, http://chronicle.com/article/American-Bar-Association-Takes/127869/ (describing federal scrutiny of ABA).

51. *See* Clark, *supra* note 35.

52. David Segal, *New Law School Sues Bar Association*, N.Y. TIMES, Dec. 22, 2011, http://www.nytimes.com/2011/12/23/business/duncan-law-school-sues-american-bar-association.html (discussing Duncan Law School's suit against ABA).

53. *See* AUERBACH, *supra* note 28, at 5-6. In an address given at Harvard University in the spring of 1905, Roosevelt sharply rebuked corporate lawyers for aiding their clients in evading regulatory legislation. *See id.*

54. THOMAS D. MORGAN & RONALD D. ROTUNDA, 2011 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY (2011). Those Canons were originally thirty-three in number and often aspirational in nature. For example, Canon 32 stated that:

> No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. . . .

profession in America's public life was established.[55]

As the commercial and corporate practice expanded in the mid-twentieth century, the CPE began to appear inappropriate and out-moded. ABA President Lewis Powell led the calls for a replacement which culminated in the Model Code of Professional Responsibility (CPR) in 1969, under the leadership of Edward L. Wright.[56] Difficulties with the Supreme Court, and the public relations disaster of Watergate prompted the ABA to advocate a review of the recently enacted rules of professional responsibility from the perspective of reform in the mid-1970s.[57] In the Watergate scandal,[58] White House Counsel John Dean's testimony before the Senate Committee that more than nine lawyers were involved in the obstructions of justice in the Watergate cover-up shocked the Senate Committee and the public, and created one of the most serious crises in public confidence in the rule of law in American history.[59]

Id. at 664.

55. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (13th ed., Knopf 1980) (1835) (labeling legal profession as aristocracy in 1835).

56. *See* Seymour, *supra* note 1, at 1049.

57. *See* Arnold Rochvarg, *Enron, Watergate and the Regulation of the Legal Profession*, 43 WASHBURN L.J. 61, 67 (2003) (Watergate generated calls for professional reform).

58. Theodore Schneyer, *Professionalism as Politics: The Making of a Modern Legal Ethics Code, in* LAWYERS' IDEALS / LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 95, 104 (Robert L. Nelson et al. eds., 1992).

59. The Watergate scandal began with the arrest of five men for breaking and entering into the Democratic National Committee headquarters at the Watergate complex on June 17, 1972. *See* Alfred E. Lewis, *5 Held in Plot to Bug Democrats' Office Here*, WASH. POST, June 18, 1972, http://www.washingtonpost.com/wp-dyn/content/article/2002/05/31/AR2005111001227_pf.html. For a detailed description of historical events, see *The Watergate Story: Timeline*, WASH. POST, http://www.washingtonpost.com/wp-srv/politics/special/watergate/timeline.html (last visited Sept. 15, 2012).

> The president repeatedly professed ignorance of [the Committee for the Re-Election of the President] CRP and White House involvement in Watergate. However, his claims were eventually challenged when specific aspects of his own conduct were revealed in criminal trials of his associates, in investigations by the Senate Watergate committee (chaired by Senator Sam Ervin), in staff studies by the House Judiciary Committee, and in tapes of White House conversations.

Watergate Affair, ENCYCLOPEDIA.COM, http://www.encyclopedia.com/topic/Watergate_affair.aspx (last visited March 20, 2012) [hereinafter Encyclopedia, *Watergate*]. John Dean, White House Counsel, testified that no less than nine lawyers were involved in obstructions of justice, asking himself "how in God's name could so many lawyers get involved in something like this." *Book 3 of President's Campaign Activities of 1972, Watergate and Related Activities, Phase I: Watergate Investigation*, MARY FERRELL FOUND., http://www.maryferrell.org/mffweb/archive/viewer/showDoc.do?mode=searchResult&absPageId=1472853.

> In statements before the Senate Watergate committee, Dean revealed that the president had promised clemency to Hunt and had said that it would be "no problem" to raise the "million dollars or more" necessary to keep Hunt and other defendants silent. In an address on 30 April 1973 the president accepted "responsibility" for the Watergate events but denied any advance knowledge of them or involvement in their cover-up. A steady procession of White House aides and Justice Department officials resigned and were indicted, convicted (including [Attorney General John] Mitchell, Dean, Haldeman, and John D. Ehrlichman), and imprisoned.
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> Nixon himself [also a lawyer] was named an unindicted coconspirator by the federal grand jury

B. The Kutak Commission

The Kutak Commission, appointed in 1977,[60] had a mandate to develop rules that would prevent future Watergates. The Commission, with its prestigious membership,[61] concluded that one cause of Watergate was that lawyers had too weak a commitment to the law in the face of client need. The response was to locate the duty to advance the public good ahead of the duty to meet client demands in a wide array of circumstances. The Kutak Commission vetted its first discussion draft, a radical document indeed, which required reporting of client wrongdoing, dictated that negotiators seek only fair agreements, and required lawyers to participate in the expansion of access to the legal system.[62] The reaction from the ABA House of Delegates to the Commission's first draft was so overwhelmingly negative[63] that the Commission seemed to back-pedal for the next five years in which draft upon re-draft were rejected by the House of Delegates[64] until finally in San Francisco under a no-amendment resolution, the House of Delegates passed the Model Rules of Professional Conduct (Model Rules or Rules), a mere shadow of their former self.[65] In the battle between radical reformers and radical reactionaries, the Model Rules emerged in the middle of the road not far different from its predecessor.

C. The Post-Kutak Years

Since the approval of the Model Rules, the ABA House of Delegates has continued to successfully resist change. While there have indeed been over thirty changes to the Model Rules since 1983, most have been minor[66] and directed at detail often found in the Rule's Comments. The Ethics 2000 Commission labored for four years under an "if it ain't broke, don't fix it" approach[67] and produced multiple drafts of their proposed reforms over three

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in the Watergate investigation . . . .

Encyclopedia, *Watergate*, *supra*.

60. ABA CTR. FOR PROF'L RESPONSIBILITY, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005, at viii (2006).

61. *See* Schneyer, *supra* note 58, at 107-08. Included among the members were Judge Marvin Frankel, Robert Meserve, Richard Sinkfled, Jane Lake Frank, and Thomas Erlich.

62. MODEL RULES OF PROF'L CONDUCT (Discussion Draft 1980).

63. *See* Schneyer, *supra* note 58, at 97.

64. *See generally Proposed Ethics Rules: A Try for Balance*, 66 A.B.A. J. 270 (1980) (discussing ABA House of Delegates' response and rejection of multiple drafts).

65. *See* Schneyer, *supra* note 58, at 139-143.

66. In 1990, the House of Delegates enacted a new Rule and Comment allowing the sale of a law practice. In 1991, the House of Delegates approved a new Rule 5.7, a later Comment concerning the provision of ancillary services. In 2000, it approved a new Rule 7.6 concerning political contributions to obtain government legal engagements or appointments by judges. Other amendments codified Supreme Court cases applying the First Amendment to lawyer publicity. *See generally* MORGAN & ROTUNDA, *supra* note 54.

67. Nancy J. Moore, *Lawyer Ethics Code Drafting in the Twenty-First Century*, 30 HOFSTRA L. REV. 923, 928 (2001) ("The guiding motto of the Commission was one of minimalism.").

years before a good number of small fixes were finally accepted by the House of Delegates.[68] The Enron scandal prompted begrudging changes in the confidentiality Rule and the organizational client Rule. The Commission on Multi-Jurisdictional Practice studied the problem of limitation of lawyer practice to the states of their admissions for four years and made numerous attempts at expansion with very little success. The Commission on Multidisciplinary Practice likewise studied the limitations on law firm ownership for four years but ultimately came up with no approved changes. The ABA House of Delegates continues to act as an overseer which resists change and reform. The successful lawyers who largely make up the House of Delegates of the ABA seem to like it that way. Indeed the ABA has announced the creation of yet another Commission, the ABA Commission on Ethics 20/20, which according to the ABA "will perform a thorough review of the ABA Model Rules of Professional Conduct and the U.S. system of lawyer regulation in the context of advances in technology and global legal practice developments."[69]

V. THE VALUE JUDGMENTS UNDERLYING A PROFESSIONAL CODE FOR LAWYERS

A. Professionalism

The changes in terminology used by the ABA in the titles of their principles of professionalism is instructive. The 1908 code was called the Canons of

68. *See generally* Ethics 2000 Comm., *Model Rules of Prof'l Conduct as Adopted by the ABA House of Delegates*, AMERICAN BAR ASS'N, Feb. 2002, http://americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/c2k_redline.html. At the ABA's annual meeting in August 2002, the House of Delegates enacted most of the proposals contained in the November 2000 report of the Ethics 2000 Commission on the Evaluation of the Rules of Professional Conduct. While the changes were extensive—touching on most rules and most comments—they did not enact major substantive change. Some of the more significant changes state that the communication obligation contained in Rule 1.4 was expanded, and the obligation in Rule 1.5 that lawyer's fees be reasonable was changed to a prohibition against unreasonable fees. Although the commission recommended expanding the exceptions to confidentiality to cover crimes and frauds, the House of Delegates rejected this recommendation. The Comments to Rules 1.7, 1.8, 1.9, 1.10, 1.11, and 1.12—all concerning conflict of interest—were substantially rewritten. The one substantive change that would have liberalized the rules surrounding lateral movement of lawyers from one firm to another was rejected by the House of Delegates (but then enacted in 2009). A new Rule 1.18 covering duties to prospective clients was enacted, and Rule 2.2 defining the lawyer's role as an intermediary was abolished. A new Rule 2.4 covering the role of a lawyer serving as a third party neutral was enacted, and a new Rule 6.5 involving court-annexed, limited, legal-service programs was enacted. *See generally* MORGAN & ROTUNDA, *supra* note 54.

69. In a December 28, 2011 memo summarizing the findings concerning new developments of the Commission to date, the co-chairs stated: "In general, we have found that the principles underlying our current Model Rules are applicable to these new developments. As a result, many of our recommendations involve clarifications and expansions of existing Rules and policies rather than an overhaul. In sum, our goal has been to apply the core values of the profession to 21st century challenges." *See Ethics 20/20: The Future of the Model Rules of Professional Conduct*, YOURABA (April 2012), http://www.americanbar.org/content/newsletter/publications/youraba/201204article01a.html.

Professional Ethics. The term canons has an ecclesiastical origin and invokes universal principles. Likewise, ethics are rules of behavior which can logically be reduced from first principles. The 1969 principles were entitled the Code of Professional Responsibility. A code is a body of laws that are interrelated and systematically govern an area. The term "responsibility" invokes the idea that the lawyer's principal obligation will be to the client. The 1983 principles are simply entitled the Rules of Professional Conduct. Gone are the ideas of ethics or responsibility. Gone is the idea of first principles or an interrelated code. These are merely "obligation[s] and prohibition[s] . . . for invoking the disciplinary process."[70] They regulate the lawyer's conduct, a strange and narrow term for the breadth of tasks that lawyers perform. Over time, the scope of the principles has narrowed. While the Preamble to the Model Rules is a hodge-podge result of drafting by a contentious committee, the shorter preamble of the Model Code is what the ABA wants the public to believe: law keeps us free and democratic; lawyers are the guardians of the law; professional responsibility ensures lawyer integrity.

The one unifying term in all three versions is "professional." In 1986, the ABA Commission on Professionalism[71] adopted Roscoe Pound's definition of a profession: "[A] group pursuing a learned art as a common calling in the spirit of public service."[72] The ABA's preference for this definition is understandable. It presents a highly complimentary picture of the professional.

It may also strike a modern skeptical reader as naïve. A calling implies one who has chosen some special work. But is law in particular, or are the professions in general, more special than the jobs performed by other members of society? Indeed what is a profession anyway? Pound also suggested that the calling be common. Is there a strand of unity which ties lawyers together? Heinz and Lauman suggest that there is almost no confluence between the two hemispheres of the bar.[73] What is common between the lawyer employed by the IRS to audit tax returns and the solo practitioner in a small rural town? I suspect that the sense that the whole bar is common is dead forever, if it ever lived at all. In its place, we have smaller associations that are directed at the specialties like the Association of Trial Lawyers of America, the Patent Law Association and the Federal Bar Association.

Pound called a profession a "learned art." The learned part gets more

70. MODEL RULES OF PROF'L CONDUCT Preamble (2011).

71. ABA COMMISSION ON PROFESSIONALISM, ". . . . IN THE SPIRIT OF PUBLIC SERVICE:" A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM (1986), *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/professionalism/Stanley_Commission_Report.authcheckdam.pdf.

72. ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES, at xxvii (1953).

73. *See generally* HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR (2005) (sociological study of the bar in Chicago, suggesting that the bar is composed of two separate hemispheres, one serving individual clients and the other serving institutional clients). Indeed, the internal dynamics of the large law firm have become more atomistic and competitive. *See* Marc Galanter & William Henderson, *The Elastic Tournament: The Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1873 (2008).

difficult every day. The sheer volume of the law seems to continue to expand exponentially. So to be learned today requires more effort than when Pound spoke in 1953. It also encourages specialization. The ABA, however, has avoided a mandate for continuing legal education, although many states have adopted it. Art perhaps signals its indeterminacy.

What about the spirit of public service? Law is, by its nature, public. Certainly many lawyers serve their communities as elected or appointed officials. The codes have always asserted an obligation to do pro bono work, but this has generated an uneven response from the bar.[74] The ABA's MacCrate Report and the preamble to the Model Rules of Professional Conduct assert a responsibility of lawyers to enhance the capacity of law and legal institutions to do justice, but it is not clear how to do this.

B. The Ethical Triangle

The ethical rules governing the practice of law involve the balancing of the public interest, the client interest, and the lawyer's own interest. The public interest is advanced by law and the proper functioning of the courts and other institutions of the law. As such, lawyers should facilitate the speedy, just, and efficient enforcement of the law in tribunals that are comprehensible and user friendly. The bar's exclusive role as officer of the institutions of justice and as the sole advisor and interpreter of the law places unique responsibilities on lawyers to act as custodians of the public interest. Lawyers that interfere with the proper functioning of the law or its institutions for their own advantage or that of their clients abuse their unique privileges.[75] Lawyers should support measures to make the law more accessible to the public.[76] They should also take responsibility to train and mentor new lawyers.[77]

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74. MODEL RULES OF PROF'L CONDUCT R. 6.1 (2011).

75. Two examples of such abuse include Rules 3.1 and 3.2 of the Model Rules. Rule 3.2 requires reasonable efforts "to expedite litigation consistent with the interests of the client." MODEL RULES OF PROF'L CONDUCT R. 3.2 (2011). The obvious implication of the final clause is that exercising delay tactics is acceptable when the client interest demands it. This sacrifices the public interest to client advantage. The civil calendars of most state courts are lengthy and they move at a snail's pace in part because lawyers play the delay game. Typically, institutional defendants like insurance companies would rather pay later than sooner. The Rule is nothing less than an embarrassment to an organization of those who call themselves "officers of the court." Rule 3.1 prohibits the assertion of frivolous claims and defenses, however, Comment 1 softens the Rule, by reminding us that the "proper scope of advocacy" must take account of the "law's ambiguities" and "potential for change." MODEL RULES OF PROF'L CONDUCT R. 3.1 & R. 3.1 cmt. 1 (2011). The 1983 version of Comment 2 made clear that the Rule prohibited "action taken primarily for the purpose of harassing or maliciously injuring a person." The 2002 amendments deleted that language because the "client's purpose is not relevant. . . . " *See* NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION 305 (5th ed. 2012). Similarly, while Rule 4.4 prohibits the use of means that "embarrass, delay or burden a third person," Comment 1 reminds the lawyer that those obligations are subordinate to the "[r]esponsibility to a client." MODEL RULES OF PROF'L CONDUCT R. 4.4 & R. 4.4 cmt. 1 (2011).

76. MacCrate Report, *supra* note 33, at 216.

77. *Id.*

The client interest is derived from the lawyer's fiduciary duties to the consumers of the lawyer's expertise for which those clients pay the lawyer's salary and expenses. The ethical question is: what is the appropriate level of commitment owed by the lawyer to the client? The requirement contained in Canon Seven of the 1969 CPR that a lawyer must represent his client zealously favored a high level of commitment. The code stated that "[a] lawyer shall not intentionally . . . fail to seek the lawful objectives of his client, through reasonably available means permitted by law," nor shall he "prejudice his client."[78] One gets a flavor of the breadth of the Rule from its stated exceptions, which allow at the discretion of the lawyer: courtesy, punctuality, and accession to reasonable requests of adversary counsel "which do not prejudice" client rights.[79] While this high level of commitment is clearly found in the criminal law paradigm as dictated by the Fourth, Fifth, and Sixth Amendments, its extension into civil cases and other roles that lawyers might play needs independent justification.[80] Under the Code, zealous advocacy guided an attorney's negotiation tactics, communications with adversary counsel, preparation of clients for trial, questioning in discovery, choice of language in papers filed with the court, and use of the codes of criminal and civil procedure.

Zealous advocacy[81] served the lawyer's own interests because it freed the attorney of responsibility for the moral consequences of the results of his advocacy. As such, critics feared that the mandate caused disputes to become confrontational legal free-for-alls where the opposing parties are bitter enemies and advocates gain client advantage through litigation tactics. Parties could become pawns in the hands of more or less skillful attorney players.[82] Much like the doctor who over-prescribes procedures out of self-interest, zealous advocates tended to be pessimistic counselors whose warnings of the possible legal complications could intimidate all but the most fearless of clients. In advising clients, these advocates tended to draw the worst case scenario arising out of the imputation of suspicions against the opponent's motives and activities. This could stiffen the client's resolve to fight rather than to settle upon reasonable terms and, as a result, the court became the servant of the zealous advocate in gaining tactical advantage.[83]

Zealous advocacy also favored the rich and the unscrupulous. Obviously, in

78. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-101 (1980).

79. *Id.*

80. *See generally* U.S. CONST. amend. IV, V, VI.

81. William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 107 (1978) (neutral partisanship akin to confidence game).

82. Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1043 (1975) (district court judge claims factual presentations in trials frequently confused him).

83. *See generally* Gerard J. Clark, *Fear and Loathing in New Orleans: The Sorry Fate of the Kutak Commission's Rules*, 17 SUFFOLK U. L. REV. 79 (1983) (detailing tactics of zealous advocate).

a system where, procedural advantage leads to substantive advantage, money can often buy the best result. Yet the zealous advocate, enjoying the freedom of a role-differentiated morality,[84] was discouraged from judging his client's position and became hardened to the results of his tactics. These were the rules targeted by the Kutak reformers.

The Model Rule 1.3,[85] which replaced CPR DR 7-101, required only diligence and promptness. However, Comment 1 mandates "whatever lawful and ethical measures [that] are required to vindicate a client's cause . . . ."[86] It further requires "zeal in advocacy."[87] Like the Model Code, it does "not require" offensive tactics and does not "preclude" treating litigants and lawyers with "courtesy and respect."[88]

The lawyer's own interest can manifest itself in two distinctive ways: *first*, the lawyer makes a living from the practice and has an interest in maximizing income.[89] As such, lawyers will seek to limit their responsibilities to the client.[90] Self-interest will also seek to limit exposure to professional

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84. ALAN GOLDMAN, THE MORAL FOUNDATION OF PROFESSIONAL ETHICS 135-37 (1980).

85. MODEL RULES OF PROF'L CONDUCT R. 1.3 (2011).

86. *Id.* at R. 1.3 cmt. 1.

87. *Id.*

88. *Id.* (added by the Ethics 2000 Commission).

89. Rule 1.16(b) allows a lawyer to withdraw from the representation of a client if:

> (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
> . . . .
> (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
> (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
> (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client;
> (7) other good cause for withdraw role exists.

MODEL RULES OF PROF'L CONDUCT R. 1.16 (2011). The normal attorney-client relationship involves a signed retainer. The retainer is clearly a contract stating the terms of the engagement, placing obligations on the lawyer and the client. Certainly, the Model Rules of Professional Conduct cannot change those contractual obligations. Rule 1.16 seems to imply that the lawyer can walk away from the contractual obligation whenever he pleases when there is a disagreement, or when the representation becomes difficult. *Id.* Clearly, the result is a rule that sanctions the abandonment of the client in the middle of the representation. Rule 1.6(b)(5) exempts the lawyer from his duty of confidentiality to:

> establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

MODEL RULES OF PROF'L CONDUCT R. 1.6 (2011). This very broad exception allows the lawyer to manipulate the client by empowering the lawyer to disclose the client's confidential information whenever a dispute arises between the lawyer and the client.

malpractice claims, disciplinary proceedings, and consumer protection laws.[91] *Second*, lawyers will seek to minimize the intrusion of competitors.

The proper balance among the three interests of lawyer, client, and public is a political question. Periodically an issue like Watergate or Enron arises and the public calls for reform, which usually calls for the profession to put the public interest ahead of client interest or self interest. Courts[92] or legislatures[93] may impose such rules, but the history of the ABA's professional regulation is to resist these calls for reform in favor of lawyer and client autonomy, and to maintain the regime of self-regulation and the status quo.

C. The Process of Reform

While in theory a state legislature could enact reform measures,[94] the ABA has succeeded in playing the role as the keeper of rules governing the American bar. Amendments are usually a painfully slow two-step process. *First*, the ABA, often through its House of Delegates, decides that a policy or a code is in need of amendment, revision, or review. It sanctions the creation of a commission to study the question and to report back to the House of Delegates periodically. The commission is populated by members named by the president and is granted a budget to pay for meetings, travel, and accommodations of the commission members. The commission names a reporter, usually an academic with expertise in the field under inquiry. The commission meets periodically to direct the work of the reporter and to review discussion drafts. Myriad other bar groups representing, for instance, trial lawyers, in-house counsel, or government lawyers may make proposals or comments. When the commission finalizes the draft, the commission presents it to the House of Delegates for enactment, amendment, or rejection.[95] The members of the House of Delegates

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Rule 1.5(a) states that: "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses." MODEL RULES OF PROF'L CONDUCT R. 1.5 (2011). Obviously lawyers should accept the obligation to keep fees reasonable. The double negative in the rule is an unsubtle manipulation of the language to place the burden of proof on the client to establish unreasonableness.

90. *See generally* Andrew B. Ayers, *The Lawyer's Perspective: The Gap Between Individual Decisions and Collective Consequences in Legal Ethics*, 36 J. LEGAL PROF. 77 (2011).

91. *See generally* Thomas Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977).

92. Andrew Perlman, *The Parallel Law of Lawyering in Civil Litigation*, 79 FORDHAM L. REV. 1965, 1966 (2011) (interpreting rules of civil procedure independently from the Model Rules).

93. *See supra* Part IV (discussing legislative imposition of rules and regulation).

94. *See generally* CAL. BUS. & PROF. CODE § 6146 (2012) (outlining limitations on periodic payment). In some states, the legislature actively intervenes into the prerogatives of the legal profession. For example, California limits the amount attorneys in a medical malpractice case can collect pursuant to a contingent fee arrangement to 40% of the first $50,000, 33.3% of the next $50,000, 25% of the next $500,000, and 15% of any amount that exceeds $600,000. *Id.* This limit applies regardless of whether the recovery is by settlement, arbitration, or judgment. *Id.* However, there also exists a strain of state constitutional law that suggests that all lawyer regulation belongs exclusively to the judiciary. *See* WOLFRAM, *supra* note 9, at 27.

95. As of May 2011, the House of Delegates consisted of a hodge-podge of 560 members: 52 State Delegates, 231 State Bar Association Delegates, 74 Local Bar Association Delegates, 18 Delegates-at-Large,

are lawyers who are both successful enough and also have sufficient time in their schedules to travel to a major city twice a year to sit and listen to lengthy debates about the technicalities of professional regulation, while eating convention food at a large hotel. One might suggest that radical change from such a process would be rare.[96] Further, all members recognize that what they are enacting is merely a model rule which may or may not be supported in the fifty individual states.

Second, at the state level, there is, of course, wide variation. Typically the power to promulgate ethical rules for the state profession resides with the highest court of the state. The state bar association may propose that a recently enacted model amendment from the ABA be promulgated by the state's highest court. The court may appoint a commission to review the ABA proposed amendment. Again, the commission may appoint a reporter to study the question for a period of time with drafts and meetings. The local commission may accept the ABA model in full or amend it. The commission's final report is presented to the highest court of the state which may schedule hearings allowing for public comment on the proposed rule. The final decision about promulgation sits with the state's highest court. Typically the position of the statewide bar association is given substantial weight by the state's highest court.[97] Again, the process at the state level, much like the ABA process at the national level, would seem to dictate change to occur at a very slow pace. Further, one would expect change that would be injurious to the economic interest of the lawyers who join the state bar association to be rare.

VI. THE ABA'S INSTITUTIONAL LIMITATIONS ON THE PRACTICE OF LAW

The ABA has steadfastly resisted any lay interference in the delivery of legal services either by playing a role in law firm management or by investing in an enterprise that delivers legal services. Further, while the delivery of legal services is rapidly globalizing with large firms having offices in major cities throughout the country and the world, the individual lawyer continues to be tethered to his or her locus of admission and licensure and is prohibited by unauthorized practice Rules from most forms of interstate practice.

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75 Present and Former Officers and Board members, 73 Section, Division, and Conference Delegates, 2 Ex Officio Members, 28 Affiliated Organization Delegates, 1 Virgin Islands Bar Association Delegate, 1 American Samoa Delegate, 1 Guam Delegate, and 1 Commonwealth of the Northern Mariana Islands Delegate, and 3 Members-at-Large. *See House of Delegates: General Information*, ABA, http://www.americanbar.org/groups/leadership/delegates.html (last visited Sept. 15, 2012).

96. *See* Schneyer, *supra* note 58, at 104.

97. *See generally* Lynn A. Baker, *The Politics of Legal Ethics: Case Study of a Rule Change*, 53 ARIZ. L. REV. 425 (2011) (providing case study of amendment of Texas referral fee rule).

A. Rule 5.4, Multi-Disciplinary Practice

Rule 5.4 states that "(a) a lawyer or law firm shall not share legal fees with a nonlawyer . . ."[98] and "(b) a lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law."[99] Further:

> (d) a lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for profit if:
>
> (1) a nonlawyer owns any interest therein . . . ; or
>
> (2) a nonlawyer is a corporate director or officer thereof or occupies a position of similar responsibility . . . .[100]

This subtle Rule is largely responsible for the business forms of the organizations that deliver legal services. Until about forty years ago, law firms were almost uniformly partnerships with all equity holders being lawyers. More recently and mostly for tax driven considerations, limited liability corporations and partnerships, and also professional corporations have emerged; but Rule 5.4's prohibition on lay ownership or interference has remained.

In the 1990s, spurred on by a kind of full-service professional service entity found in the European Union, the American bar became interested in combining legal services with accounting, investment banking, insurance, and a wide variety of other disciplines.[101] Liberalizing Rule 5.4 would permit nonlawyer professionals to work with lawyers without being relegated to the role of an employee. For instance, a liberalized rule would permit economists

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98. MODEL RULES OF PROF'L CONDUCT R. 5.4 (2011).

99. *Id.*

100. *Id.* District of Columbia Rule of Professional Conduct 5.4(b) allows a nonlawyer to become a partner or shareholder of a law firm if the nonlawyer assists in "providing legal services" to the firm's clients. The comment to D.C. Rule 5.4 makes clear that it does not allow passive investment by nonlawyers:

> Paragraph (b) does not permit an individual or entity to acquire all or any part of the ownership of a law partnership or other form of law practice organization for investment or other purposes. It thus does not permit a corporation, an investment banking firm, an investor, or any other person or entity to entitle itself to all or any portion of the income or profits of a law firm or other similar organization. Since such an investor would not be an individual performing professional services within the law firm or other organization, the requirements of paragraph (b) would not be met.

D.C. RULES OF PROFESSIONAL CONDUCT R. 5.4 cmt. 8.

101. *See* Daniel R. Fischel, *Multidisciplinary Practice*, 55 BUS. LAW. 951, 955-59 (2000) (examining economic effect of multidisciplinary practice and specific issues for consideration such as attorney's pursuit for higher profit, effect on public interests, and quality of services rendered); *see also* Lawrence J. Fox, *Dan's World: A Free Enterprise Dream; An Ethics Nightmare*, 55 BUS. LAW. 1533, 1540-55 (2000) (discussing issues that arise with multidisciplinary practice such as client loyalty, pro bono aid, self-regulation, and success of such practice).

to work in a firm with antitrust or public utility practitioners, psychologists or psychiatric social workers to work with family law practitioners, nonlawyer lobbyists to work with lawyers who perform legislative services, certified public accountants to work in conjunction with tax lawyers, and professional managers to serve as office managers, executive directors, or similar positions.[102] Finally, it would allow for the injection of entrepreneurship into the practice.[103] Some of the group legal service providers,[104] legal insurance companies,[105] and web-based providers[106] have pushed against Rule 5.4 in pursuit of alternative delivery mechanisms to deliver services to the much-neglected middle class clientele.

The ABA created the Multidisciplinary Practice Commission in 1998. The Commission embraced the idea and produced a detailed report[107] and a new Model Rule.[108] The ABA House of Delegates definitively rejected the Commission's proposal as "inconsistent with the core values of the profession"

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102. On May 18, 2011, the Jacoby & Meyers personal injury law firm filed class actions in federal district court in New York, where the firm is based, and in New Jersey and Connecticut, where it has offices. Each complaint challenges the jurisdiction's Rule 5.4(d)(1), which forbids lawyers to practice in a for-profit law firm if a nonlawyer owns any interest in the firm. All three complaints assert that the rule exceeds the judiciary's rule-making power, violates the state separation of powers doctrine, is void for vagueness, and violates the Dormant Commerce Clause, the Due Process and Equal Protection Clauses, the Takings Clause, and freedom of speech and association. The defendants in each suit are the justices that adopt professional conduct rules in that state. *See* Joan C. Rogers, *Trio of Federal Suits Challenges Ethics Rule That Stops Private Equity Investment Firms*, 27 LAW. MANUAL PROF. CONDUCT NEWSL. 382 (June 8, 2011).

103. *See* Edward S. Adams & John H. Matheson, *Law Firms on the Big Board?: A Proposal for Nonlawyer Investment in Law Firms*, 86 CALIF. L. REV. 1, 23-24 (1998).

104. *See* HYATT LEGAL PLANS, http://www.legalplans.com/ (last visited Sept. 15, 2012).

105. *See* LEGAL SHIELD, http://www.legalshield.com/corp/ (last visited Sept. 15, 2012).

106. *See* LAWGURU, http://www.lawguru.com/ (last visited Sept. 15, 2012); LEGALZOOM, http://www.legalzoom.com/ (last visited Sept. 15, 2012).

107. *See* ABA COMM. ON MULTIDISCIPLINARY PRACTICE, RECOMMENDATION AND REPORT TO THE HOUSE OF DELEGATES (1999), *available at* http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdpfinalreport.html.

> 3. A lawyer should be permitted to deliver legal services through a multidisciplinary practice (MDP), defined as a partnership, professional corporation, or other association or entity that includes lawyers and nonlawyers and has as one, but not all, of its purposes the delivery of legal services to a client(s) other than the MDP itself or that holds itself out to the public as providing nonlegal, as well as legal, services. It includes an arrangement by which a law firm joins with one or more other professional firms to provide services, including legal services, and where there is a direct or indirect sharing of profits as part of the arrangement.
>
> . . . .
>
> 13. Allowing fee-sharing and ownership interest in an MDP does not change the rules of professional conduct prohibiting fee-sharing and partnership in any other respect, including the current provisions limiting the holding of equity investments in any entity or organization providing legal services.

Id.

108. *Id.*

in July 2000[109] after several economic objections.[110] Small firms clearly feared the competition.[111] Others predicted that multinationals like Sears, Roebuck and Co., Montgomery Ward & Co., Inc., H&R Block, Inc., and the Big Six accounting firms would become the dominant players. The Ethics 20/20 Commission will have another look at the question.[112]

Rule 5.7 similarly discourages partnerships with outsiders in the provision of law-related services.[113] Modern law firms may desire to provide their clientele with a wide variety of nonlegal services including investment services, construction management, environmental remediation, and public relations. Rule 5.7 discourages such combinations by placing restrictions on the nonlawyer providers.

B. Rule 5.5, Multi-Jurisdictional Practice

The 1983 Rules, as written, are direct descendants of the ABA campaign against unauthorized practice. While primarily directed at nonlawyers who poached on business that lawyers sought to dominate,[114] the resulting unauthorized practice statutes and Rules also had the effect of making each state an island for the purpose of the practice of law. This result becomes more anachronistic each year, and the Commission on Multi-Jurisdictional Practice

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109.

> 7. The sharing of legal fees with nonlawyers and the ownership and control of the practice of law by nonlawyers are inconsistent with the core values of the legal profession.
>
> 8. The law governing lawyers, which prohibits lawyers from sharing legal fees with nonlawyers and from directly or indirectly transferring to nonlawyers ownership or control over entities practicing law, should not be revised.

Florencio Ramirez, *The Debate Continues*, 18 GPSOLO MAG. 23 (2001).

110. *See generally* Gianluca Morello, *Big Six Accounting Firms Shop Worldwide for Law Firms: Why Multi-Discipline Practices Should Be Permitted in the United States*, 21 FORDHAM INT'L L.J. 190 (1997) (advocating increased ethics guidelines for multidisciplinary practices).

111. Gary T. Johnson submitted written testimony at a hearing on the issue in October 1999:

> Global multidisciplinary partnerships are consolidating services across professional boundaries. In addition, on the Main Streets of America, various services firms are doing work that lawyers used to do exclusively. Meanwhile, law firms of all kinds face new financial challenges in order to serve clients efficiently and to survive economically, such as the need to invest in expensive technology. Given these modern economic conditions, how do we equip the American bar to remain the source of uncompromising, independent advice?

Written Testimony of Gary T. Johnson, General Practice, Solo and Small Firm Section of the American Bar Association, ABA COMMISSION ON MULTIDISCIPLINARY PRAC., Oct. 8, 1999, http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/johnson.html.

112. Paul D. Paton, *Multidisciplinary Practice Redux: Globilization, Core Values, and Reviving the MDP Debate in America*, 78 FORDHAM L. REV. 2193 (2010).

113. MODEL RULES OF PROF'L CONDUCT R. 5.7 (2011).

114. For example, tax and real estate.

was created to correct the anachronism.[115] The Commission's Mission Statement talks about the need to address the problems confronting counsel, transactional lawyers, litigators, arbitrators, and law firms maintaining offices and practices in multiple state and federal jurisdictions.[116]

Rule 5.5 (as amended by Ethics 2000) states that: "(a) a lawyer shall not practice in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction or assist another in doing so." [117] Section (c) allows such practice "on a temporary basis" when "in association with a lawyer who is admitted to practice in the jurisdiction and who actively participates in the matter."[118] It also allows practice in an alternative dispute resolution matter, and in matters "reasonably related" to a lawyer's practice in a jurisdiction in which he is admitted.[119] Section (d) allows a lawyer admitted in another U.S. jurisdiction: "(1) to act as house counsel to an employer and (2) to provide services authorized by "federal or other law."[120] Section (a) states an absolute prohibition and Sections (c) and (d) provide very meager exceptions.[121]

Thus, the Model Rules tether the lawyer to the state of admission for a lifetime, or until he or she can take the time to study for a bar exam in a new state. There is no right to *pro hac vice* admission, and admission on motion after a specified number of years of practice is by no means uniformly available across the country and is usually discretionary on motion with the state's highest court where it is available.[122]

Indeed, the leading case creates an absurd rule in a very uncertain opinion. In *Birbrower v. Superior Court*,[123] the California Supreme Court denied a New York law firm's claim for one million dollars in legal fees against its client, ESQ Business Services, Inc., a software developing and marketing company, for representation provided to the client in a dispute with a supplier.[124] Birbrower lawyers handled most of the work on the case from its New York office and were not licensed to practice law in California.[125] The court declared the arrangement void, unenforceable, and illegal as a violation of a California unauthorized practice statute.[126] The background of the relationship was that

115. *See generally* Daniel R. Fischel, *Multidisciplinary Practice*, 55 BUS. LAW. 951 (2000) (discussing full-service entities in Europe).

116. *Mission Statement*, ABA COMMISSION ON MULTIJURISDICTIONAL PRAC., http://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission_on_multijurisditional_practice/mjp_mission_statement.html (last visited Sept. 15, 2012).

117. MODEL RULES OF PROF'L CONDUCT R. 5.5 (2011).

118. *Id.* § (c)(1).

119. *Id.* § (c)(2).

120. *Id.* § (d).

121. MODEL RULES OF PROF'L CONDUCT R. 5.5 (2011).

122. *Id.*

123. 949 P.2d 1 (Cal. 1998).

124. *Id.* at 2-3.

125. *Id.* at 4.

126. *Id.* at 13.

ESQ originated in New York.[127] As its California business expanded, the principal and his brother retained Birbrower to form a second corporation in California.[128] Although the California Supreme Court dismissed Birbrower's claim for legal fees because the retainer agreement was illegal,[129] a *quantum meruit* claim survived and was remanded.[130]

The court defined the practice of law as "'the doing and performing services in a court of justice,'" but added "legal advice and legal instrument and contract preparation, whether or not these subjects were rendered in the course of litigation."[131] Thus, representation during the negotiation and settlement was held to constitute the practice of law.[132] Strangely, however, the court ruled that any work for ESQ-CA, performed by the Birbrower lawyers while they were physically present in New York (and assumedly en route to California), was severable from the illegal California-based work.[133] Thus, the case was remanded for trial on the question of quantity of work performed in which locus.[134] The court further muddied the locus of the work-performed standard by stating, "[o]ur definition does not necessarily depend on or require the unlicensed lawyer's physical presence in the state"[135] and that "[a]dvising a California client on California law in connection with a California legal dispute by telephone, fax, computer or other modern technological means" might constitute unauthorized practice as well.[136]

The ABA Commission on Multi-Jurisdictional Practice issued a progressive and sensible 2001 Interim Report, which would have allowed some limited representation across state lines:

> (b) A lawyer admitted in another United States jurisdiction, but not in this jurisdiction, does not engage in the unauthorized practice of law when the lawyer represents a client on a temporary basis in this jurisdiction if the

127. *See Birbrower*, 949 P.2d at 4.

128. *Id.* at 3-4.

129. Birbrower v. Superior Court, 949 P.2d 1, 13 (Cal. 1998).

130. *Id.* at 2-3 (relying upon California statute making unauthorized practice misdemeanor); *see also* CAL. BUS. & PROF. CODE § 6125 (1994) (providing that "[n]o person shall practice law in California unless the person is an active member of the State Bar").

131. *Birbrower*, 949 P.2d at 5 (citing People v. Merchants Protective Corp., 209 P. 363, 365 (Cal. 1922)).

132. *Id.*

133. *Id.* at 13.

134. *See id. Quantum meruit* is an equitable claim where the defense of unclean hands is available, such as when the court has labeled the lawyer's representation a crime. *See* Vista Designs, Inc. v. Melvin K. Silverman, P.C., 774 So.2d 884, 888 (Fla. Dist. Ct. App. 2001) (disallowing payment of earned fee and rejecting claim for *quantum meruit*, on behalf of registered patent lawyer whose advice strayed from strict confines of patent law).

135. Birbrower v. Superior Court, 949 P.2d 1, 5 (Cal. 1998).

136. *See id.* (holding physical presence only one factor in determining violation of § 6.25); *see also* Estate of Condon v. McHenry, 76 Cal. Rptr. 2d 922, 928 (Cal. Ct. App. 1998) (following *Birbrower* locus theory and finding Colorado attorneys gave advice on California law while physically located in Colorado when communications between firm and its client took place entirely within Colorado).

> lawyer's services do not create an unreasonable risk to the interests of the lawyer's client, the public, or the courts.[137]

The Interim report was rejected.

These strict limitations on practice in the United States are obviously at odds with the reality of the practice in the twenty-first century. Most practice is done on behalf of organizations, many of which operate across state and even national lines. Much of the law which they practice is federal. Large law firms—with hundreds of lawyers and multiple offices in many countries—communicate daily with clients all across the country and the world, and travel frequently to meetings in places where they are not admitted. Indeed, the goal of treating a license to practice law like a driver's license, namely good in any state,[138] appears to be a long time coming.[139]

VII. LIMITING OTHER PROFESSIONAL ROLES

As the demand for legal services continues to tilt in favor of the organizational client over the individual, and transactional work grows over litigation, the role of lawyer as advocate declines. Brandeis used his famous phrase "counsel for the situation" during the examination of his corporate practice by the Senate Judiciary Committee prior to his appointment to the United States Supreme Court.[140] In the inquiry before the Committee, many reputable lawyers testified to the variety of roles lawyers played in situations involving, for instance, counsel to partnerships and corporations, trustee for family properties, counsel and board member for charitable organizations, intermediary between businesses and their creditors, intermediary between a corporate chief executive and his board of directors, and representation of spouses in a divorce.[141] Indeed a modern lawyer may play many roles including: officer of the court, friend, investigator, manager, business person,

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137. *See* ABA COMMISSION ON MULTIDISCIPLINARY PRAC., INTERIM REPORT 7 (Nov. 2001), *available at* http://www.americanbar.org/content/dam/aba/migrated/mjp_final_interim_report_2.authcheckdam.pdf.

138. John McGuckin, *The In-House Case for the Multijurisdictional Practice of Law in the United States*, AM. CORP. COUNS. ASS'N, Feb. 16, 2001, http://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission_on_multijurisditional_practice/mjp_comm_acca3.html.

139. *See* Gerard J. Clark, *The Two Faces of Multijurisdictional Practice*, 29 N. KY. L. REV. 251, 267-68 (2002) (suggesting that state bar limitations on out-of-state lawyers violate Commerce Clause and Privileges and Immunities Clause). Alternatively, Congress should enact a statute which states that a license to practice from any state shall suffice for the handling of any matter affecting interstate commerce.

140. Brandeis had represented the Lennox family for a number of years. Their business seemed to be failing. A family member consulted Brandeis and he recommended a conveyance of company assets into a trust for the benefit of creditors. Brandeis subsequently represented one of the petitioning creditors in the Lennox bankruptcy matter. *See generally* John P. Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683 (1965).

141. GEOFFREY C. HAZARD JR., ETHICS IN THE PRACTICE OF LAW 61 (1978); John S. Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, 1992 U. ILL. L. REV. 741, 771-72 (1992).

political operative, spin doctor, moral evaluator, public citizen, fiduciary, educator, judge and policy maker, advisor, bargainer, facilitator, negotiator, evaluator, scrivener, problem solver, and others.

The ABA has been steadfast in its refusal to recognize this diversity of lawyer roles in favor of zealous advocacy. The zealous advocate stands by the client through thick and thin, he does not question the client's motives, he shields the client's secrets with confidentiality, and the criminal law paradigm is dominant. In addition, there can be financial incentives in never having to abandon the well-heeled miscreant. However, the public demand for alternative services has its own financial rewards.

A. Intermediary

The 1983 version of the Model Rules included Rule 2.2,[142] a lawyer as intermediary, which was intended to provide standards for a lawyer representing multiple clients "when the clients shared a common goal and enjoyed a largely harmonious relationship, yet also had competing interests in the matter."[143] The intermediary was to seek to establish a relationship between clients on an amicable and mutually advantageous basis. Examples include assisting a business in which two or more entrepreneurs seek to work out the financial reorganization of an enterprise; helping a married couple who wish to end their marriage without acrimony; arranging trade-offs in property distribution in a settlement of a contested estate.[144] The lawyer works to develop "the parties' mutual interests."[145]

Rule 2.2 was eliminated in 2002.[146] Apparently the word intermediary implied too much lawyer participation in the settlement process, engaging with the parties as a problem solver, and coaxing settlement. As such, it strayed too far from the adversary ethic, which would consider such peacemaking to violate the Rules against conflict of interest.

B. Evaluator

Rule 2.3 concerns evaluation for use by third parties.[147] As such, the lawyer draws on his or her expertise and experience to state an opinion for the use of third parties, like the independent auditor role performed by accounting firms. Familiar examples include title examination, the legality of securities registered

142. MODEL RULES OF PROF'L CONDUCT R. 2.2 (1983).

143. 1 GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW OF LAWYERING § 24.2 (2011); *see also* CRYSTAL, *supra* note 75, at 232-33.

144. MODEL RULES OF PROF'L CONDUCT R. 2.2 (1983).

145. *Id.*

146. *See Reporter's Explanation of Changes*, ABA ETHICS 2000 COMMISSION (2002), http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule22rem.html.

147. MODEL RULES OF PROF'L CONDUCT R. 2.3 (2002).

for sale under the securities law, or the value of a claim in litigation to be used by the purchaser of a business. One would expect that an ethical rule concerning evaluation would encourage expertise and independence. It may expand the principles of conflict of interest beyond the somewhat narrow definitions stated in Rule 1.7 along the lines of the ABA Code of Judicial Conduct or the ACA Accountancy Rules for auditors.[148] Instead Rule 2.3 is cautionary; it allows evaluation only if "the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client."[149] Comment 2 reminds the lawyer that the "general rules concerning loyalty to client and preservation of confidences apply . . . ."[150] A perfect example of the defects of Rule 2.3 was the Vinson and Elkins study of the legality of the Enron fraud where V&E was evaluating the legality of its own work.[151] Again the adversary ethic prevails.

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148. *Id.* at R. 1.7.

149. *Id.* at R. 2.3.

150. *Id.* at R. 2.3 cmt. 2.

151. For a more complete description of the Enron fraud, see *infra* note 163.

> In late 2001, Enron's fraudulent debt shield began to crack. On August 15, 2001, Sherron Watkins, an Enron vice-president of finance, wrote a letter to Kenneth Lay, Enron's Chief Executive Officer, expressing concern about Enron's accounting practices. In the letter she expressed nervousness that Enron "[would] implode in a wave of accounting scandals," if Lay didn't take measures to "undo" the misstatements the fraudulent entities had allowed Enron to make.
>
> On August 22, 2001 Watkins met with Lay to discuss her letter. At this meeting she claimed that Enron was an "accounting hoax" and she urged Lay to develop a "clean-up plan" to set the books right. She also recommended that the company commission a review by independent counsel and accountants and specifically cautioned against using Vinson & Elkins as they had created many of the [special purpose entities] SPEs that were the subject of investigation and were thus conflicted.
>
> In response to Watkins's concerns, Lay initiated an investigation, but ignored Watkins's warnings with respect to using Vinson & Elkins. He further limited Vinson & Elkins's investigational scope to mostly a "fact-finding mission" in which it was not to "second-guess" the accounting judgments of Andersen reflected in the Enron financial statements; "dig down" into the transactions in question; attempt to study the particular structure of the transactions; or analyze the adequacy of disclosure of the transactions by "rebuilding" the disclosure process. Even though Vinson & Elkins knew that the firm had performed substantive legal work on several of the transactions specifically questioned by Watkins, they accepted the assignment.
>
> Vinson & Elkins attorneys interviewed eight Enron executives, two Andersen partners, and Ms. Watkins during its review process. Based on these interviews, Vinson & Elkins concluded that none of the Enron interviewees believed that Enron had suffered from the SPE transactions or that the transactions were not in Enron's best interest, and that the Andersen interviewees were comfortable with the accounting treatment of the transactions. On October 15, 2001, Vinson & Elkins submitted a nine page preliminary report on its assignment. In the report directed to Enron's chief counsel James Derrick, Max Hendrick, a Vinson & Elkins senior partner, after outlining the scope of the investigation and procedures followed, explained that there was some concern of the "cosmetics of the Special Purpose Entities . . . which create a serious risk of adverse publicity and litigation." However, Hendrick concluded that despite those "cosmetics," "the facts disclosed do not . . . , in our judgment warrant a further widespread investigation by independent counsel or auditors."
>
> Shortly thereafter, it was clear that the other shoe was about to fall, and Enron executives did not want to be the ones to take the hit. Eventually, the price for Enron stock began to fall as the fraudulent transactions began to seep into the light. While selling their own shares secretly, Enron

C. Negotiator

One of the most common roles played by members of the bar is that of negotiator. This role received a full chapter in the discussion draft of the Kutak Commission Rules. It required that "a lawyer shall be fair in dealing with the participants." It prohibited lawyers from engaging "in the pretense of negotiating with no substantial purpose other than to delay or burden another party."[152] It prohibited agreements that would be "held to be unconscionable as a matter of law."[153] The subject caused such disagreement in the House of Delegates that a decision was made to omit any reference to negotiation from the Model Rules altogether. Thus, other than Rule 1.12 which prohibits conflicts of interest in mediators and third party neutrals, the Model Rules make no reference, other than in the Preamble, to negotiation.[154] The arena of negotiation appears to be left to the most aggressive. A leading commentator states that like a poker player, the negotiator hopes that his opponent will overestimate the value of his hand. And like the poker player, he must facilitate his opponent's inaccurate assessment. Successful negotiators have the capacity both to mislead and not be misled.[155] In the famous case of *Spaulding v. Zimmerman*,[156] a lawyer representing a defendant insurance company had his own medical expert examine the plaintiff. The expert discovered a life-threatening aortal aneurysm. This information was withheld from the plaintiff in settling the case. The Supreme Court of Minnesota set aside the settlement on the basis of a unilateral mistake of fact but gratuitously adds that the lawyers had no legal or ethical obligation to make the disclosure, even though the aneurysm was life-threatening.[157] Some commentators[158] attempt to cobble

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executives urged investors, including many employees who had invested their entire 401(k) portfolio in Enron stock, to hang on to theirs, and even buy more, promising a comeback. Rather than interpreting the drastic fall in stock price as a red flag, on the word of the Enron executives, employees bought more. That was in August of 2001. In November of 2001, Enron's European branch filed for bankruptcy, shortly after Enron had announced a third quarter $1.01 Billion chargeback to earnings. Its U.S. base filed for bankruptcy on December 2, of the same year. Thousands of Enron employees lost their pensions and children's savings for college and other investors, including the Regents of the University of California, one of the largest retirement plans in the world, lost millions.

Eric Smith, *Meeting Their Professional Obligations?—A Comparison of the Professional Obligations of Enron's Attorneys and Accountants*, 2010 ETHICS & CRITICAL THINKING J. 35, 44-46 (2010) (citations omitted).

152. MODEL RULES OF PROF'L CONDUCT R. 4.2 (Discussion Draft 1980); *see also* Clark, *supra* note 83; Lee A. Pizzimenti, *Prohibiting Lawyers from Assisting in Unconscionable Transactions: Using an Overt Tool*, 72 MARQ. L. REV. 151, 174 (1989).

153. *Id.* at R. 4.3.

154. MODEL RULES OF PROF'L CONDUCT Preamble (2002).

155. James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 5 AM. B. FOUND. RES. J. 926, 927-28 (1980).

156. 116 N.W.2d 704 (1962).

157. *Id.* at 709-10.

together an obligation to be truthful in negotiation arising out of Rule 4.1, which prohibits making "a false statement of material fact or law to a third person," but the ethical obligation is anything but clear.[159]

D. Advisor

The attorney-advisor Rule, codified in Rule 2.1, encourages lawyers not only to advise clients in legal matters, but also to counsel them in light of "moral, economic, social, and political factors."[160]

VIII. CONFIDENTIALITY: THE INFORMATION FLOW

The bar has always held the duty of confidentiality as central to the lawyer's role. Obviously, a lawyer cannot advise a client without accurate information about the client's situation. A client will be reluctant to disclose that information unless it is fully protected from discovery from adversary parties or from prosecutors. However, the downside to confidentiality is that it may disable the lawyer from averting harm to third parties by warning or disclosing to victims information that might allow them to avoid the harm. For instance, the duty to maintain confidentiality contributed to a wide-spread obstruction of justice by the lawyers working for President Nixon in the Watergate controversy. Had their commitment to the public been stronger than their commitment to their clients, the country would have been spared a great deal of difficulty. In resisting the expansion of exceptions to their duty of absolute confidentiality, the ABA insulates lawyers from the consequences of guilty knowledge and the obligation to blow the whistle on fee-paying clients' frauds or crimes.

A. Rule 1.6, Confidentiality

Rule 1.6, the fundamental rule of lawyer confidentiality, prohibits disclosure of "information relating to the representation of a client."[161] The final version of the Rule, approved in 1983, contains only the narrowest of exceptions allowing, but not requiring, disclosure of information "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." The Ethics 2000 recommendations to expand these exceptions were rejected by the House of

158. *See* Nathan M. Crystal, *The Lawyer's Duty to Disclose Material Facts in Contractor Settlement Negotiations*, 87 KY. L.J. 1055, 1058 (1998); Geoffrey C. Hazard Jr., *The Lawyer's Obligation to Be Trustworthy When Dealing with Opposing Parties*, 33 S.C. L. REV. 181 (1981) (describing substantial differences in the technical sophistication among lawyers).

159. MODEL RULES OF PROF'L CONDUCT R. 4.1 (2011).

160. *Id.* at R. 2.1.

161. *Id.* at R. 1.6.

Delegates in 2002.[162] It was only after the Enron scandal that the ABA amended the Rule in 2003.[163] The new Rule allows revelation of confidential information "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services."[164] The House of Delegates rejected this very same exception in 2002 after being recommended by the Ethics 2000 Commission. The stated exceptions are both narrow and extreme, but yet result only in a

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162. *Id.* at R. 1.6(b).

163. In 1985, Houston Natural Gas merged with InterNorth, a Nebraska energy company, creating Enron. Kenneth Lay was appointed CEO the following year. Under Lay's direction, Enron became the largest natural gas merchant in North America. Riding its success in the natural gas energy market, it expanded its operations to other commodities and services such as paper, steel, coal, and communications, tallying revenues of $111 billion in 2000. It employed around 21,000 people at the height of its operations and was named by Fortune magazine as "America's Most Innovative Company" for six consecutive years, from 1996 to 2001. In 2000, Fortune Magazine listed Enron among its "100 Best Companies to Work For." In the mid-1990s, Enron had established itself as the country's largest gas company with revenues exceeding $100 billion per year. As is often the case, success bred competition, and increased competition decreased Enron's market share in the gas-energy field. Consequently, Enron lost its ability to post the double-digit earnings growth and resulting share price increases its investors, employees, officers, and Board had come to expect. Enron needed new ideas and strategies for Enron to clear the high bar it had set for itself in previous years.

In response to increased competition, Enron developed an extremely complex and sophisticated strategy that exploited loopholes within the Financial Accounting Standards (FAS) and Generally Accepted Accounting Principles (GAAP), without technically violating them. At the crux of Enron's scheme was the creation of fraudulent business entities comprised of limited-liability companies and partnerships known as Special Purpose Entities (SPEs) that were used to artificially accelerate income, defer losses, book cash flow from operations on its statement of cash flows, or remove debt from its balance sheet. *See* Thomas G. Bost, *Corporate Lawyers After the Big Quake: The Conceptual Fault Line in the Professional Duty of Confidentiality*, 19 GEO. J. LEGAL ETHICS 1089, 1094 (2006). These entities were designed to comply with FAS that provided for independent third-party status to an SPE as long as the parent did not control it. *Id.* at 1095. Thus, an SPE (even though created, but not controlled by Enron) would not be viewed as an Enron subsidiary or affiliate whose financial statements required inclusion on Enron's consolidated financial statements, and transactions between Enron and the SPEs would essentially be transactions between unrelated parties. *Id.* By this accounting structure, Enron's financial statements reflected gains realized on assets sold to the SPEs, and cash flow from operations thereon just as it recognized gains on assets sold to any other separate entity. But, they did not reflect losses or liabilities incurred or assumed by the SPEs in the consolidated financial statements. *Id.* Through a labyrinth of transactions with these SPEs (over 1000 in number), Enron's managers were able to paint a picture of Enron's financial condition which had the effect of drastically diminishing investors' perceived risk by artificially inflating the company's earnings. None of this could have been accomplished without the sophisticated accounting by Arthur Andersen or the creation of these SPEs by the Houston based Vinson and Elkins. Of course, when the truth came to light and Enron went bankrupt, stockholders, employees, and creditors were the victims of one the largest corporate frauds in the nation's history. A small percentage of these damages were recovered though civil suits and bankruptcy against Enron, and civil actions against Arthur Andersen and Vinson and Elkins. *See* Skilling v. United States, 130 S. Ct. 2896 (2010) (reversing conviction charging theft of honest services pursuant to 18 U.S.C. 371); Arthur Andersen, LLP v. United States, 544 U.S. 696, 696, 708 (2005) (reversing guilty verdict for destruction of documents because jury instruction was insufficient concerning defendant's guilty knowledge). *See generally* Bost, *supra*; Marianne M. Jennings, *A Primer on Enron: Lessons from a Perfect Storm of Financial Reporting, Corporate Governance and Ethical Culture Failures*, 39 CAL. W. L. REV. 163 (2003); Smith, *supra* note 151, at 35.

164. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2011).

permission to reveal, not an obligation to do so. Like Rule 1.13, the discretion is left entirely to the lawyer with no guidance as to when it should be exercised. A more complete rule would require the lawyer to balance the harms of disclosure against the harms of nondisclosure. But that would require a difficult exercise of judgment on the part of the lawyer, which the ABA studiously avoided.[165]

B. Rule 1.13, Organizations as Clients

Rule 1.13 concerns the organizational client rule and contains its own set of confidentiality rules for clients. The question often concerns how organizational counsel should deal with culpable information gained from an employee of the organizational client. The history of Rule 1.13's disclosure provisions is well known. The first and subsequent drafts of Kutak allowed counsel to bring such information to a higher authority inside the organizational client (reporting up). If higher authority refused to address the problem, counsel was allowed to make a disclosure outside of the organization (reporting out). The reporting out provisions were struck by the House of Delegates. The Ethics 2000 Commission recommended reporting out again, and again the House of Delegates said no. Then the Enron scandal erupted, and it became clear that the Enron management had perpetrated a massive fraud on its stockholders, employees, and myriad others through sophisticated legal and accounting measures that hid billions of dollars of debt from the public. It was not long before the nation's sixth largest corporation went bankrupt, wiping out the holdings of its stockholders and employees. At the August 11, 2003 meeting, the House of Delegates was finally ready for reporting out.[166]

Rule 1.13(b) governs reporting up, and Rule 1.13(c) governs reporting out.[167] Subsection (b) concerns lawyers whose organizational clients engage in "a violation of law." In such circumstances, the Rule allows the lawyer to proceed to go to a higher authority as is "reasonably necessary in the best interests of the organization."[168] If the higher authority fails or refuses to act and "the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization," only then can the lawyer exercise his or her discretion to report out.[169] Thus, the current Rule sanctions reporting out in the narrowest terms.

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165. The states vary widely from the ABA model. Indeed the state of New Jersey imposes mandatory disclosure of any client intention to commit a fraud. N.J. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.6 (2012); *see also 1.6:100 Comparative Analysis of New Jersey Rule*, LEGAL INFO. INST., http://www.law.cornell.edu/ethics/nj/narr/NJ_NARR_1_06.HTM (last visited September 15, 2012).

166. *See American Bar Association Adopted by the House of Delegates*, August 11-12, 2003, http://www.americanbar.org/content/dam/aba/migrated/leadership/2003/journal/119b.authcheckdam.pdf.

167. MODEL RULES OF PROF'L CONDUCT R. 1.13 (2002).

168. *Id.*

169. *Id.*

Notice that the sole focus of both subsections is the protection of the best interests of the organization. It is here where some focus on employees, or stockholders or indeed customers or the public may be appropriate. Taking Enron as an example, consider the position of a lawyer working in the house counsel's office who is directed to incorporate some corporate entities in the Cayman Islands for the purpose of transferring debt owed by Enron. He does so and then learns of the assignment of billions of dollars of debt into these entities and that same debt is now excised from the books of Enron. He knows that the board of directors has approved the transaction. He also knows that the excision of the debt from corporate books and transfer to a shell corporate entity devoid of assets can be nothing but a fraud on investors and the public. Should he disclose outside of the organization? The Rule requires reasonable certainty that the debt transfer will cause "substantial injury to the organization." But the debt transfer seems to have helped the organization. The stock goes up and the organization's access to credit improves. The accounting department and the legal department seem to have gone along. The naked king is fully clothed. Even in a case as extreme as this, the Rule states only that "the lawyer may reveal" the incriminating information, although not directing to whom the disclosure should be made.[170] As written, the Rule is so narrow and so carefully drafted that only a rare, courageous, independent, and supremely confident in-house lawyer would consider reporting out by blowing the whistle to the SEC, which would in all probability cost him his job. Certainly this reality did not escape the drafters' recognition.[171]

C. Rule 4.2, Represented Parties

Rule 4.2 states:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.[172]

This deceptively simple Rule is unique in many ways. With respect to the individual client who has retained a lawyer, it insulates the client from communications and inquiries from opposing counsel that may be unwelcome or confusing to the client. The retention of the lawyer agent signals a notice to the world of lawyer investigators that subsequent inquiries should be made to

170. *Id.*

171. Indeed in the Sarbanes-Oxley Act of 2002, Congress sought to address problems like Enron but left the drafting of remedial regulations to the SEC, which, under intense industry pressure, issued a narrow mandate to report out. *See* CRYSTAL, *supra* note 75, at 537.

172. MODEL RULES OF PROF'L CONDUCT R. 4.2 (2011).

the agent and not the principal. The lawyer-agent can now control access to the principal's information in an almost proprietary fashion. The Rule has the salutary effect of protecting against inaccuracies, inequalities of advantage, and deception between the lawyer-questioner and the unsuspecting witness. Violations of Rule 4.2 bespeak some kind of tortious interference with an agency relationship. From a more skeptical perspective, the Rule protects, first, a lawyer's economic relationship with a client from improper competition or raiding, and, second, a lawyer's opinions from being second-guessed by consultation with a competitor.

It is with respect to the organizational client that the Rule does its real mischief. Comment 7 extends limitations on inquiry to all constituents "whose acts or omission[s] . . . may be imputed to the organization," which has the practical effect of prohibiting investigations into any organization that has counsel either retained or in-house without permission.[173]

The interpretation of Rule 4.2 and its applicability to federal prosecutors led to open warfare between the ABA and the Department of Justice during the 1990s. The precipitating event appears to have been the Second Circuit opinion in *United States v. Hammad*,[174] wherein the court was critical of the government's investigation tactics in an arson investigation because the government's use of an undercover informant involved contact with a defendant who had already retained counsel in a related Medicare fraud investigation. The decision sent shock waves through the Department of Justice.[175] Clearly, no lawyers had ever been allowed in grand jury inquiries and the government has always felt free to question witnesses, use undercover agents, tipsters, eavesdropping, and other tricks in ferreting out crime.[176] Relying upon the general authority to enforce federal statutes,[177] Attorney General Thornburgh authorized department lawyers "to contact or communicate with any individual in the course of an investigation or prosecution," unless specifically prohibited.[178] Thornburgh's successor, Janet Reno, extended and formalized these powers in the Code of Federal Regulations, allowing investigations of "on-going crimes or civil

173. *Id.* at cmt. 7.

174. 858 F.2d 834 (2d Cir. 1988).

175. *See generally* Jerry E. Norton, *Government Attorneys' Ethics in Transition*, 72 JUDICATURE 299 (1989).

176. *See generally* William J. Stuntz, *Lawyers, Deception, and Evidence Gathering*, 79 VA. L. REV. 1903 (1993) (summarizing unsavory business of crime stopping).

177. 28 U.S.C. § 533 generally provides that the Attorney General may appoint officials to prosecute crimes and "to conduct such other investigations regarding official matters . . . as may be directed by the Attorney General." 28 U.S.C. § 533 (2006).

178. Roger C. Crampton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules*, 53 U. PITT. L. REV. 291, 320 (1992). *See generally* Richard Thornburgh, *Ethics and the Attorney General: The Attorney General Responds*, 74 JUDICATURE 290 (1991).

violations. . . ."[179] But the Justice Department position was not well received in the courts.[180] The relationship between the ABA and the Justice Department festered.[181] The resolution of the dispute came definitively in 1998 with the enactment of the Ethical Standards for Attorneys for the Government Act, which clearly mandates that Federal Government attorneys must comply with local ethical rules, which appears to stand the Supremacy Clause on its head.[182] Suffice it to say that the Comments to Rule 4.2 can lead to an interpretation that vests vast power in corporate counsel to insulate a client from outside investigation of their "constituents."[183] What could be called an obstruction becomes a power inside the company to declare a new corporate privilege through a no-contact letter that would not otherwise exist. Counsel by fiat can change an opposing fact-investigating lawyer into a violator of the professional rules. Disloyal employees, unions, and whistle-blowers act at their jeopardy. Indeed, the result is arguably at odds with Rule 3.4(f) which prohibits a lawyer from "request[ing] a person other than a client to refrain from voluntarily giving relevant information to another party . . . ."[184]

IX. ABA AS PUBLIC RELATIONS ORGAN FOR THE BAR

As a final function, the ABA plays the role of the protector of the reputation of the bar and lawyers. Official ABA positions unsurprisingly defend the economic interests of lawyers.[185] The ABA has resisted tort reform and the

179. THOMAS D. MORGAN & RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY: PROBLEMS & MATERIALS 328 (10th ed. 2008) (quoting 28 CFR § 77.6 (1998)).

180. *See* United States v. Lopez, 4 F.3d 1455 (9th Cir. 1993) (Justice Department contact with defendant, even at behest of defendant, is improper); *In re* Howes, 940 P.2d 159 (N.M. 1997) (disciplinary action against Justice Department attorney).

181. Other reasons for the deterioration in the relationship were the increasing use by the Justice Department and by U.S. Attorneys Offices across the nation of subpoenas directed at attorneys, and the seizure of attorneys' assets when they were the fruit of a criminal enterprise. *See* Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989) (neither attorney-client privilege nor Sixth Amendment prohibit government from subjecting assets intended for attorney's fees from forfeiture); United States v. Klubock, 832 F.2d 664 (1st Cir. 1987) (discussing supremacy of federal law); Kathleen F. Brickey, *Tainted Assets and the Right to Counsel–The Money Laundering Conundrum*, 66 WASH. U. L. Q. 47 (1988); Max D. Stern & David Hoffman, *Privileged Informers: The Attorney Subpoena Problem and a Proposal for Reform*, 136 U. PA. L. REV. 1783 (1988).

182. 28 U.S.C. § 530B (2006).

183. MODEL RULES OF PROF'L CONDUCT R. 4.2 (2011).

184. *Id.* at R. 3.4(f).

185. *See* Brief for the ABA as Amicus Curiae, White & Case LLP v. United States, 627 F.3d 1143 (2010) (No. 10-1147) (involving grand jury subpoenas directed at attorneys). The ABA argued that it has adopted policies against per se enforcement of subpoenas because of their potential to undermine the attorney-client relationship. Beyond information protected by the attorney-client privilege, a lawyer is obligated in the attorney-client relationship to maintain a client's confidences, except as directed by the client in the course of the representation. The per se approach overrides this element of confidence by compelling the lawyer served with a subpoena to act contrary to the interests of the client without an inquiry as to whether the government has other available means for obtaining the information. Thus, clients under grand jury investigation may hold back important information from their lawyers out of fear that their counsel will be compelled to produce to the

application of federal preemption to many areas of product liability.[186] When Watergate and Enron threatened the reputation of lawyers, the ABA announced public responses which promised the public that action would be taken if problems existed.

The safest, non-controversial, and most frequently repeated position of the ABA is to support the expansion of access to legal services, especially for the poor. This position is in keeping with Rule 6.1 that states: "Every lawyer has a professional responsibility to provide legal services to those unable to pay," and should "aspire to render at least 50 hours of pro bono, public legal services per year."[187]

The ABA has always been an active lobbyist.[188] The ABA President's message of September 2011 states three priorities for his tenure: reverse the trend of underfunding for the state courts, enhance the diversity of the profession, and preserve the rule of law through the ABA's large staff of lobbyists in Washington.[189]

X. CONCLUSION

For 130 years, the ABA has been highly successful in its mission to advance the interest and the reputation of lawyers. In doing so, it has maintained a conventional and traditional image of what a lawyer is: highly educated with three years of arduous and theoretical graduate education, as such his advice is unique, sophisticated, and expensive; a loyal agent who courageously advances client interest at the direction of the client, the legal arena in which he plies his trade is full of traps for the unwary; the rules of engagement are arcane and thus require diligent factual and legal preparation, and the professional

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government information that was disclosed to the lawyer through the attorney-client relationship.

186. *See* Bruesewitz v. Wyeth LLC, 131 S. Ct. 1068 (2011). The National Childhood Vaccine Injury Act "preempts all design-defect claims against vaccine manufacturers brought by plaintiffs [seeking] compensation for injury or death caused by vaccine side effects." *Id.* at 1082.

187. *See* MODEL RULES OF PROF'L CONDUCT R. 6.1 (2002).

188. *See* Rhonda McMillion, *The ABA Adjusts Its Lobbying Efforts to Suit a New Climate on Capitol Hill*, A.B.A. J. (Apr. 1, 2011), http://www.abajournal.com/magazine/article/the_aba_adjusts_its_lobbying_efforts_to_suit_a_new_climate_on_capitol_hill. The ABA Journal summarizes the current lobbying priorities as:

> The priorities include continuing support for the Legal Services Corp. and other efforts to provide legal services to low-income civilians and service members, improving the criminal justice and immigration systems, protecting the independence of the judiciary, and promoting the rule of law. The association also is continuing efforts to oppose federal regulation of lawyers and enactment of federal changes in the tort system.

Id.; *see also* VERDICT ON LAWYERS 3 (Ralph Nader & Mark Green eds., 1976); Theodore B. Olson, *The Politicization of Bar Associations: A Critical Appraisal* (1993), *in* THE FEDERALIST SOCIETY, THE ABA IN LAW AND SOCIAL POLICY: WHAT ROLE? (1994).

189. *William T. Robinson III, President's Message: Step Up, Pitch In, Make a Difference*, A.B.A. J. (Sept. 1, 2011), http://www.abajournal.com/magazine/article/step_up_pitch_in_make_a_difference.

expertise must not be sullied by lay interference or extrinsic considerations.

Whether that image is accurate or whether it advances the public interest is debatable. Twenty-first century practice is being driven by a multiplicity of new forces: commoditization of legal services,[190] the digitization of law and processes of the law, globalization,[191] and a relentless drive by the entrepreneur to find cheaper, simpler, and more efficient paths to increased profits. These forces are changing the legal landscape rapidly.[192] Law is available to all on governmental and commercial web-sites.[193] Interactive internet sites that purport to provide legal advice to the public proliferate.[194] Many elements of the current lawyer's workload can be accomplished better if it is disaggregated or unbundled;[195] other work can be done more quickly, more cheaply, and more efficiently through outsourcing to a host of new providers in the United States and elsewhere.[196]

Meanwhile, the bonds of partnership at law firms grow weaker.[197] Lawyer dissatisfaction grows, collegiality and professionalism suffer, and the needs for mentoring the young into the traditions of the profession go unaddressed. Law schools continue to raise tuition and student debt load increases.[198] Likewise,

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190. *See* KROLL INC., http://www.kroll.com/ (last visited Sept. 15, 2012) (providing risk management services).

191. *See* RICHARD SUSKIND, THE END OF LAWYERS? (2008).

192. *See generally* Stephen C. Bennett, *The Ethics of Legal Outsourcing*, 36 N. KY. L .REV. 479 (2009) (discussing problems associated with legal outsourcing); Renée T. Lawson, *Cloud Computing and IT Outsourcing—Unforeseen Hiccups for eDiscovery in the Wake Of* Quon v. Arch Wireless?, *in* ELECTRONIC DISCOVERY GUIDANCE 2010: WHAT CORPORATE AND OUTSIDE COUNSEL NEED TO KNOW (Practicing Law Institute, 2010); Alexandra Hanson, Comment, *Legal Process Outsourcing to India: So Hot Right Now!*, 62 SMU L. REV. 1889 (2009) (detailing trend of legal outsourcing to India); Michele C.S. Lange & Kristin M. Nimsger, *Working with an E-Discovery Service Provider*, SCITECH LAW (2010); Sharon Nelson & John Simek, *Outsourcing EDD Review Abroad*, 35 LAW PRAC. 28 (2009) (discussing outsourcing of electronic discovery); Kayleigh Roberts & Ashley Post, *Keeping Up with Evolving E-Discovery*, INSIDE COUNSEL (2011), http://www.krollontrack.com/publications/insidecounsel_trentroberts_0511.pdf (discussing trends associated with e-discovery).

193. The amount of law available on the Internet is voluminous. The United States Code, the Code of Federal Regulations, state statutes and the cases from the highest courts of the states, and most federal courts are all available. Indeed, a growing amount of municipal law is available as well. Only thirty years ago none of these laws were available to the public. They were the exclusive domain of lawyers. While litigation continues to be the almost exclusive domain of lawyers, the public can find answers to their legal questions from sources on the Internet. Further, corporate America seems to be more educated to the fact that litigation is not worth its cost. Alternative dispute resolution and risk management are serving to reduce litigation. Finally, the crime rate is down in most major cities and a movement to decriminalize drug use is slowly moving forward.

194. *See supra* note 106.

195. *See* Wesley v. Don Stein Buick, Inc., 987 F. Supp. 884, 886 (D. Kan. 1997) (finding lawyers authoring pleadings for pro se litigants unethical).

196. Integrion, Pangea3, KPMG, and Delloitte are but four of the leading outsourcing companies.

197. *See generally* MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM (1991); Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867 (2008).

198. *See generally* David Segal, *Is Law School a Losing Game?*, N.Y. TIMES, Jan 8, 2011, http://www.nytimes.com/2011/01/09/business/09law.html. Concerning the inability of the indebted law

the politicization of the judiciary undermines the public's faith in the courts and their judges.[199] As the rate of change increases, the dominant position of lawyers in American public life appears destined to diminish. The result will be more open, less costly, and more efficient delivery modalities,[200] and increased lay access to the law, which will in turn lead to a renewed willingness to examine traditional legal practices and replace those that are found wanting.[201] The ABA will likely resist, in favor of the status quo, which will likely lead to a decline in its influence.

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graduates to find work to pay off their loans, ABA President Bill Robinson said:

> It's inconceivable to me that someone with a college education, or a graduate-level education, would not know before deciding to go to law school that the economy has declined over the last several years and that the job market out there is not as opportune as it might have been five, six, seven, eight years ago.

Ameet Sachdev, *3 Chicago Law Schools Sued by Graduates*, CHI. TRIB., Jan. 2, 2012, http://articles.chicagotribune.com/2012-02-02/business/ct-biz-0202-law-schools-suit-20120202_1_law-schools-post-graduation-graduates.

199. The ABA has also promulgated a revised Model Code on Judicial Conduct (2007).

200. *See generally* CLIFFORD WINSTON, ROBERT W. CRANDALL & VIKRAM MAHESHRI, FIRST THING WE DO, LET'S DEREGULATE ALL THE LAWYERS (2011) ("[O]f the $170 billion spent on lawyers every year in America, some $64 billion is a premium produced by market distortions.").

201. Gillian K. Hadfield, *Legal Infrastructure and the New Economy*, 8 I/S: J. L. & POL'Y INFO. SOC'Y 1 (2012), *available at* http://moritzlaw.osu.edu/students/groups/is/files/2012/02/Hadfield.pdf.