

## Legal Ethics Falls Apart

JOHN LEUBSDORF†

In recent decades, the law governing lawyers has begun to fragment. Nowadays, a lawyer's duties often cannot be found in a single body of rules, such as the ABA Model Rules of Professional Conduct, but are likely to vary with the lawyer's specialty, the tribunal or agency before which the lawyer practices, the state or states in which the lawyer is acting, and other factors. The sources of those duties may well include not just the traditional duo of courts and bar associations but also state and federal legislators, administrators, and others. Ironically, this centrifugal movement has coincided with the promulgation of the Restatement of the Law Governing Lawyers (2001), a work grounded on the assumption that lawyers are subject to a single, integrated body of law, albeit also a work that has drawn attention to the fact that much of that law is not to be found in lawyer codes such as the Model Rules.<sup>1</sup>

Although the products of this fragmentation are varied and sometimes inconsistent, five trends do stand out.<sup>2</sup> First, the innovations have tended on the whole to restrain the freedom of lawyers to pursue their clients' interests at the expense of others. No doubt they reflect the view—common outside the profession and among academics—that lawyers

---

† Professor of Law, Rutgers Law School-Newark. Thanks to Bill Simon for his superb comments as well as to participants at workshops at Columbia, Harvard, and New York University.

1. See, e.g., 1 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS ch. 2 (2000) (restating agency law of client-lawyer relationship); *id.* ch. 4 (restating tort law of lawyer civil liability); *id.* ch. 5 (restating evidence law of attorney-client privilege and civil procedure law of work product protection); *id.* vol. 2, ch. 8, (restating lawyer codes and precedents on conflicts of interest) (2000). The author of this Article was an Associate Reporter of the RESTATEMENT but does not speak in that capacity here.

2. For a similar analysis, see Ted Schneyer, *An Interpretation of Recent Developments in the Regulation of Law Practice*, 30 OKLA. CITY U. L. REV. 559 (2005).

are too adversarial.<sup>3</sup> Often, the interests to be protected are those of the government itself, and the innovation can be seen as restricting the independence of the bar. Sometimes they are those of opposing parties or the public. In either case, the lawyer increasingly becomes not just an advocate and advisor but a gatekeeper as well, so that not just the details of legal representation but its rationale and function are changing. And even when the new regulations appear to leave intact the substance of previous rules balancing the interests of clients and those of nonclients, they often impose more stringent penalties that will sway lawyers to pay more attention to the latter.

Second, the innovations tend to enact requirements that are relatively particularized in their content and in their addressees compared to the generalities addressed to all lawyers that prevail in the lawyer codes.<sup>4</sup> As the functions of lawyers have multiplied, as their numbers have increased, and as faith in their high mindedness has declined, lawmakers have turned to narrower and more specific provisions. These provisions in turn foster specialization by making it harder for lawyers to venture into new fields of practice.

Third, despite being narrow, the new requirements have often included nonlawyers as well as lawyers within their scope. The regulators may not even mention lawyers specifically, and may not have considered how lawyers might differ from others doing the same sort of thing. Likewise, they may not have addressed existing regulation by the bench and bar—though in other instances, it has been the real or perceived inadequacy of that regulation that opened the way for new interventions. That lawyers, like everyone else, are forbidden to break their contracts or

---

3. See MARC GALANTER, *LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE* 64-96 (2005). For challenges to the adversary ethic from academics, see DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 50-103 (1988), and WILLIAM SIMON, *THE PRACTICE OF JUSTICE* 62-68 (1998).

4. By “lawyer codes” I mean the ABA’s *CANONS OF ETHICS* (1908), *MODEL CODE OF PROF’L RESPONSIBILITY* (1969), and *MODEL RULES OF PROFESSIONAL CONDUCT* (1983). Each of these has been amended by the ABA after its original promulgation, and has been adopted at different times by state supreme courts, often with changes. Variants of the Model Rules are now in effect in almost all states.

engage in fraud is nothing new; but they are now subject to a web of additional and particularized requirements. Ultimately, we might often find it more convenient to think of some practitioners as tax or bankruptcy professionals or the like rather than as lawyers.

Fourth, more and more regulators have sought to regulate the bar. If once the American Bar Association's codes dominated the field, now courts have become increasingly unwilling to defer to them,<sup>5</sup> and legislators and administrators have become increasingly unwilling to defer to either bar associations or courts.<sup>6</sup> We are witnessing the decline of the ideal of professional self-regulation at the same time that the ideal has been almost entirely demolished in England.<sup>7</sup>

Fifth, the new regulators—whether legislative, administrative, or judicial—tend to be federal ones. Although state supreme courts continue to promulgate professional rules and state legislatures occasionally seek to regulate lawyers, the more important and striking initiatives during recent decades have come from the federal government. In this respect, innovation has been centripetal rather than centrifugal. Considering the growth of multijurisdictional practice<sup>8</sup> and the tendency toward federalization of many bodies of law, one can expect this trend to continue. We seem to be moving from a system of rules that are uniform for all lawyers but vary from state to state to one of nationwide rules that vary by specialty.

The fragmentation of the law of the legal profession has begun to bring about a number of more general consequences. It complicates the lives of lawyers, and increases the need for them to obtain advice about their own

---

5. *State Ethics Rules*, [2006] *Laws. Man. on Prof'l Conduct (ABA/BNA)* No. 287, at 01:11-94 (describing differences between state rules and Model Rules).

6. *E.g.*, Susan P. Koniak, *When the Hurlyburly's Done: The Bar's Struggle with the SEC*, 103 *COLUM. L. REV.* 1236, 1248-56 (2003).

7. *See generally* RICHARD L. ABEL, *ENGLISH LAWYERS BETWEEN MARKET AND STATE: THE POLITICS OF PROFESSIONALISM* (2003); *Legal Services Act, 2007*, c. 29 (Eng.), [http://www.opsi.gov.uk/acts/acts2007/ukpga\\_20070029\\_en\\_1](http://www.opsi.gov.uk/acts/acts2007/ukpga_20070029_en_1); DAVID CLEMENTI, *REVIEW OF THE REGULATORY FRAMEWORK FOR LEGAL SERVICES IN ENGLAND AND WALES* (2004), <http://www.legal-services-review.org.uk/content/report/index.htm>.

8. *See infra* Part V.C.

obligations, as well as the need for law firms to provide internal mechanisms to promote compliance.<sup>9</sup> It means that, more than in the past, changes in the law governing lawyers will result from a political process involving trade offs among various interested groups inside and outside the profession, worked out in a variety of judicial, administrative, and legislative bodies, and often including competition among those bodies.

A further consequence of all these trends is hence to accelerate the trend for professional responsibility to be seen less as a field of personal morals or professional customs and more as one of hard law,<sup>10</sup> often rather technical law. The traditional approach embodied in the lawyer codes bridged or obscured that distinction. The term "legal ethics" could be read as a moral one or as referring to social standards embodying the customs of the profession. The norms recognized by the lawyer codes could be seen as crystallizations of moral obligations such as honesty and fidelity as they apply to agents in an adversary system, or as standards protecting the legal rights of clients and nonclients and the proper operation of the laws.<sup>11</sup> And lawyers could easily persuade themselves that if they followed the professional rules they were acting ethically in every sense. But to the extent that the rules come to be seen just as law, imposed by many lawmakers who are lobbied by many interested groups, and varying from specialty to specialty, thoughtful lawyers will be pressed to recognize their own personal responsibility for choosing how to act within the legal world those rules create. Indeed, there will be room within the profession for differing views about how lawyers should act, which will in turn promote further fragmentation.

---

9. *E.g.*, N.Y. CODE OF PROF'L RESPONSIBILITY DR 5-105(E) (2008) (dictating that firms must keep records and institute systems for preventing conflicts of interest); Elizabeth Chambliss & David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms*, 44 ARIZ. L. REV. 559 (2002) (detailing the steps law firms are taking to control compliance with professional regulations).

10. *E.g.*, Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1241-42 (1991); Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics—II The Modern Era*, 15 GEO. J. LEGAL ETHICS 205, 206-08 (2002).

11. For utilitarians, the difference between these views might be small.

This Article will portray the diversification of legal rules governing lawyers. My goal is descriptive and analytical rather than prescriptive. The full breadth of the changes described here is not widely known among scholars because they involve a variety of complex, specialized areas of law, and because much professional responsibility scholarship has focused on the lawyer codes and often on rules applicable to litigation. I will try to describe the effect of each of the changes on professional rules, and the forces that led to it. After that, the Article will consider trends within the legal profession and among its clients that foster the proliferation of standards for lawyers. Finally, I will discuss the impact of the expansion of multistate and multinational practice on the trends explored here.

### I. STATE COURT REGULATION AND ITS CHALLENGERS

During the nineteenth and most of the twentieth centuries, the great bulk of the rules governing lawyers in England and the United States were promulgated by the bench. The bench in turn tended to defer to the customs and values of the profession. Judges were former practicing lawyers, and often continued to be active in professional activities. They might take a broader view of the public interest than their practicing colleagues, but their starting point was usually the outlook and customs they had known as practitioners. Between them, the bench and the profession developed rules and principals applicable to all practitioners. Gradually, previous reliance on the common background and shared values of most practitioners was replaced by the system of self-regulation by bench and bar that is now yielding in turn to diverse governmental regulation supplemented by market forces.

This was the pattern in England, with the obvious qualification that barristers and solicitors were subject to differing regimes. Early legislation recognized the power of the courts to discipline misbehaving barristers and solicitors (or their precursors), and the courts also recognized causes of action against misbehaving solicitors.<sup>12</sup>

---

12. *See* *Deceits by Pleaders*, 1275, 3 Edw., c. 29 (Eng.); C.W. BROOKS, *PETTYFOGGERS AND VIPERS OF THE COMMONWEALTH: THE 'LOWER BRANCH' OF THE LEGAL PROFESSION IN EARLY MODERN ENGLAND 19-20*, 137-45 (1986); WILFRID R.

Barristers later set up their own disciplinary systems in the Circuit messes and the Inns of Court, the latter involving the participation of judges among the Benchers of the Inns.<sup>13</sup> For solicitors, the path to self regulation was longer and harder, probably because of their lower status.<sup>14</sup> The Law Society's precursor was founded only in 1739, and the Society acquired disciplinary power only in the early twentieth century.<sup>15</sup> By the end of the twentieth century, both solicitors and barristers had promulgated codes of conduct<sup>16</sup>; previously, practitioners had to rely on precedent, treatises<sup>17</sup> and professional customs. Meanwhile, during the last twenty years, government ministers and legislators have roared onto the English scene, reforming legal services has become a significant political issue, and the role of the

---

PREST, *THE RISE OF THE BARRISTERS: A SOCIAL HISTORY OF THE ENGLISH BAR 1590-1640*, at 292-94 (1986); Jonathan Rose, *The Legal Profession in Medieval England: A History of Regulation*, 48 SYRACUSE L. REV. 1, 41 (1998). For a masterly comparative study, see MICHAEL BURRAGE, *REVOLUTION AND THE MAKING OF THE CONTEMPORARY LEGAL PROFESSION: ENGLAND, FRANCE, AND THE UNITED STATES* (2006).

13. See BURRAGE, *supra* note 12, at 501-02 (explaining how Bar Council began reducing rules to writing in late nineteenth century); DANIEL DUMAN, *THE ENGLISH AND COLONIAL BARS IN THE NINETEENTH CENTURY* 56-71 (1983) (explaining attempts to reform disciplinary system); DAVID LEMMINGS, *PROFESSORS OF THE LAW: BARRISTERS AND ENGLISH LEGAL CULTURE IN THE EIGHTEENTH CENTURY* 302-04 (2000) (examining discipline by circuit messes); WILFRID R. PREST, *THE INNS OF COURT UNDER ELIZABETH I AND THE EARLY STUARTS* 91-114 (1972) (illustrating that benchers enforced good behavior within the Inns, not professional conduct).

14. See RICHARD L. ABEL, *THE LEGAL PROFESSION IN ENGLAND AND WALES* 248-56 (1988); ROBERT ROBSON, *THE ATTORNEY IN EIGHTEENTH-CENTURY ENGLAND* 1-5 (1959). Statutes did regulate fee procedures and admission to practice among other matters, entrusting implementation to the courts. *E.g.*, An Act for the Better Regulation of Attornies and Solicitors, 1729, 3 Geo. II, c. 23 (Eng.); An Acte to Reforme the Multitudes and Misdemeanors of Attorneys and Sollicitors at Lawe, 1605, 3 Jac., c. 7 (Eng.).

15. See BURRAGE, *supra* note 12, at 509-12.

16. See CODE OF CONDUCT OF THE BAR OF ENGLAND AND WALES (1981); A GUIDE TO THE PROFESSIONAL CONDUCT OF SOLICITORS (1974) (deriving from THOMAS LUND, *A GUIDE TO THE PROFESSIONAL CONDUCT AND ETIQUETTE OF SOLICITORS* (1960)).

17. See ARTHUR CORDERY, *THE LAW RELATING TO SOLICITORS OF THE SUPREME COURT OF JUDICATURE* (1878) and subsequent editions.

profession and the courts in regulating lawyers has declined.<sup>18</sup>

In the United States, state supreme courts were likewise the prime regulators, typically acting in interplay with the bar.<sup>19</sup> For a long time, access to the profession and professional conduct were only lightly regulated. Yet by the end of the nineteenth century there was an extensive common law of lawyering,<sup>20</sup> and professional literature on the ethics of lawyering had begun to emerge.<sup>21</sup> An organized bar only began to develop late in that century,<sup>22</sup> and the Canons of Ethics that the American Bar Association approved in 1908 were not binding in most jurisdictions. Moreover, the development of university law schools hindered the organized bar from controlling its own recruitment and training through the apprenticeship systems common in other nations.<sup>23</sup> Not until the ABA's

---

18. See sources cited *supra* note 7.

19. On the bench-bar alliance, see RONEN SHAMIR, MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL 104 (1995), Stephen Botein, "What We Shall Meet Afterwards in Heaven": Judgeship as a Symbol for Modern American Lawyers, in PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 49, 54-69 (Gerald L. Geison ed. 1983), and Fred Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. (forthcoming 2009).

20. See generally EDWARD P. WEEKS, A TREATISE ON ATTORNEYS AND COUNSELLORS AT LAW (Fred B. Rothman & Co. 1997) (1878) (presenting the law governing attorneys as officers of the court and as representatives of clients); Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics—I. Origins*, 8 U. CHI. L. SCH. ROUNDTABLE 469, 483 (2001).

21. See 1 DAVID HOFFMAN, A COURSE OF LEGAL STUDY 752-75 (2d ed. 1836); GEORGE SHARSWOOD, PROFESSIONAL ETHICS: A COMPENDIUM OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW (1854); M.H. Hoeflich, *Legal Ethics in the Nineteenth Century: The "Other Tradition,"* 47 U. KAN. L. REV. 793, 795-97 (1999).

22. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 495-98 (3d ed. 2005); HERMAN KOGAN, THE FIRST CENTURY: THE CHICAGO BAR ASSOCIATION 1874-1974, at 15-77 (1974); GEORGE MARTIN, CAUSES AND CONFLICTS: THE CENTENNIAL HISTORY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 1870-1970, at 40-49 (Fordham Univ. Press 1997) (1970). In some states, courts assisted the state bar association by requiring all lawyers in the state to join it. See DAYTON DAVID MCKEAN, THE INTEGRATED BAR 49 (1963) (describing court-mandated compulsory bar membership); Theodore J. Schneyer, *The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case*, 1983 AM. B. FOUND. RES. J. 1 (criticizing the unified bar movement).

23. See BURRAGE, *supra* note 12, at 284-89, 300-05, 586.

Model Code of Professional Responsibility was issued in 1969 did most state supreme courts turn the bar's rules into law by adopting them as rules of court.<sup>24</sup> And many of those rules were themselves based on state court decisions.<sup>25</sup> By promulgating professional rules, and by seeking to invigorate their traditionally feeble disciplinary systems, these courts confirmed their primacy, while the participation of the organized bar in these processes reinforced its own authority.<sup>26</sup>

Although the dominant role of the state courts was sometimes threatened by state legislatures, starting in the late nineteenth century courts developed the doctrine of "inherent power" to fend off many such intrusions. Under that doctrine, the state supreme court not only regulated the practice of law but also excluded legislative regulation.<sup>27</sup> Courts continue to invoke their power to strike down even innocuous or beneficial statutes.<sup>28</sup> Nevertheless, some statutes affecting the practice of law have survived, either because courts in some states do not recognize the inherent powers doctrine in its full strength or because the statutes were enacted and accepted before that doctrine arose. For example, legislatures have sometimes succeeded in

---

24. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 53-58 (1986); Hazard, *supra* note 10; Wolfram, *supra* note 20, at 484.

25. Compare CANONS OF PROF'L ETHICS Canon 12 (1908) (listing factors relevant to reasonableness of attorney fee), with *Morehead's Trustee v. Anderson*, 100 S.W. 340, 342 (Ky. Ct. App. 1907) (argument of counsel), *Randall v. Packard*, 36 N.E. 823, 824 (N.Y. 1894), and *Eakin v. Peeples Hotel, Co.*, 54 S.W. 87, 87 (Tenn. Ch. App. 1899) (similar list).

26. See generally MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT (1989); COMM'N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, AM. BAR ASS'N, LAWYER REGULATION FOR A NEW CENTURY (1992); HOUSE OF DELEGATES, AM. BAR ASS'N, STANDARDS FOR IMPOSING LAWYER SANCTIONS (1986).

27. Thomas M. Alpert, *The Inherent Power of the Courts to Regulate the Practice of Law: An Historical Analysis*, 32 BUFF. L. REV. 525, 538-39 (1983).

28. *E.g.*, *Prof'l Adjusters, Inc. v. Tandon*, 433 N.E.2d 779 (Ind. 1982) (finding that legislature may not create profession of "public adjusters" to negotiate with insurers); *In re N.H. Bar Ass'n*, 855 A.2d 450 (N.H. 2004) (holding legislature cannot require lawyer referendum on ending unified bar); *McKeown-Brand v. Trump Castle Hotel & Casino*, 626 A.2d 425 (N.J. 1993) (finding state constitution bars statute requiring that lawyers asserting baseless claims or defenses pay attorney fees); *State ex rel. Fiedler v. Wis. Senate*, 454 N.W.2d 770 (Wis. 1990) (ruling that legislature cannot require three hours of continuing legal education for lawyers appointed guardians ad litem).

preventing or limiting the professional monopoly by allowing nonlawyers to represent even litigants without restriction<sup>29</sup> or more recently by allowing certain kinds of nonlitigative practice by nonlawyers.<sup>30</sup> Sometimes competitors have overcome the profession in pitched battles, as when Arizona real estate brokers secured an amendment to the state constitution to override a decision denying them the right to draft sales contracts.<sup>31</sup>

The principles of lawyering recognized by the state courts were for the most part uniform for all lawyers. The distinction between barristers and solicitors soon faded away in the United States,<sup>32</sup> and was not replaced by any other recognized split. There were a few exceptions, aside from the obvious one that some rules varied from state to state.<sup>33</sup> For example, the Model Code laid down special provisions for prosecutors and other government lawyers, lawyers who were also government officials, and former judges, presumably based on the special characteristics of those functions.<sup>34</sup> In addition, some formally general rules

---

29. See WOLFRAM, *MODERN LEGAL ETHICS*, *supra* note 24, at 824-25.

30. *E.g.*, Fla. Bar v. Moses, 380 So. 2d 412, 418 (Fla. 1980) (holding that legislature may authorize lay representation before administrative agency); State Bar of Mich. v. Galloway, 335 N.W.2d 475, 480 (Mich. Ct. App. 1983) (similar); *In re Burson*, 909 S.W.2d 768, 777 (Tenn. 1995) (finding legislature may authorize nonlawyer tax agents); COMM'N ON NONLAWYER PRACTICE, A.B.A., *NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS* 32-50 (1995).

31. See State Bar v. Ariz. Land Title & Trust Co., 366 P.2d 1, 14 (Ariz. 1961), *superseded by statute*, ARIZ. CONST. of 1956, art. XXVI, § 1 (1962). More recently, an exasperated Arizona legislature simply repealed the statute criminalizing unauthorized practice of law. Jonathan Rose, *Unauthorized Practice of Law in Arizona: A Legal and Political Problem That Won't Go Away*, 34 ARIZ. ST. L.J. 585, 585 (2002).

32. *E.g.*, Stinson v. Hildrup, 23 F. Cas. 107, 107 (N.D. Ill. 1878) (No. 13,459) (finding signature as "solicitor" satisfies rule requiring signature by "counsel"); Foster v. Jack, 4 Watts 334 (Pa. 1835) (stating rule that barristers, unlike solicitors, may not sue for fees inapplicable in Pennsylvania).

33. For differing approaches to living expense loans to clients, see Restatement (Third) of The Law Governing Lawyers § 36 Reporter's Note, cmt. C (1998); WOLFRAM, *supra* note 24, at 508-09. For referral fees, see Thomas J. Hall & Joel C. Levy, *Intra-Attorney Fee-Sharing Arrangements*, 11 VAL. U. L. REV. 1 (1976).

34. See MODEL CODE OF PROF'L RESPONSIBILITY DR 7-103, 8-101, 9-101 (1969). The Model Rules added more such provisions, reflecting the trend that is the subject of this article. *E.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.13 (2008)

pressed harder on low status lawyers than on the elite.<sup>35</sup> Nevertheless, until recent decades it was broadly true that all the lawyers in each state were subject to the same rules.

Uniformity does not equal perfection: the first half of the twentieth century was not a golden age of lawyer regulation. Professional rules were riddled by gaps and skewed by professional self interest.<sup>36</sup> Enforcement was feeble at best.<sup>37</sup> Indeed, not the least consequence of the proliferation of regulators to be described here has been the awakening shock they administered to professional rulemakers and disciplinary systems.

State supreme court domination began to erode in the late 1960s and 1970s as the federal government began to influence lawyer rules, and as the size of the bar dramatically increased.<sup>38</sup> The Supreme Court relied on the First Amendment to strike down state barriers to group legal services,<sup>39</sup> solicitation of public interest cases,<sup>40</sup> and lawyer advertising.<sup>41</sup> It held unconstitutional certain

---

(lawyers representing organizations); *id.* at 2.3 (lawyer providing opinion letter or the like for use by third persons); *id.* at 2.4 (lawyers serving as third-party neutrals), 5.1 (law firm partners or supervisors); *id.* at 6.3 (board members of legal services organizations).

35. See JEROME E. CARLIN, *LAWYERS' ETHICS* 120 (1966); Philip Schuchman, *Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code*, 37 GEO. WASH. L. REV. 244, 246 (1968). For more details on status within the bar, see JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* (1982), and JOHN P. HEINZ ET AL., *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR* (2005).

36. *E.g.*, Robert W. Gordon, *The American Legal Profession, 1870-2000*, in 3 *THE CAMBRIDGE HISTORY OF LAW IN AMERICA* 73 (Michael Grossberg & Christopher Tomlins eds. 2008); Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977); Schuchman, *supra* note 35.

37. See SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, AM. BAR ASS'N, *PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT* 24 (1970); Wolfram, *supra* note 20, at 483-84.

38. See Gordon, *supra* note 36, at 79, 113.

39. *United Mineworkers, Dist. 12 v. Ill. Bar Ass'n*, 389 U.S. 217, 222 (1967).

40. *In re Primus*, 436 U.S. 412, 439 (1978); *NAACP v. Button*, 371 U.S. 415, 428 (1963).

41. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977).

restrictions on admission to state bars.<sup>42</sup> It invoked the antitrust laws to limit the powers of bar associations to impose minimum fees and other anticompetitive practices,<sup>43</sup> an enterprise in which the Justice Department and Federal Trade Commission joined.<sup>44</sup> It applied Title VII's prohibition of employment discrimination to law firm partnership decisions,<sup>45</sup> which in the long run could not help but affect the conditions in which law firm lawyers practice.<sup>46</sup> Others likewise began to apply employment legislation to law firms and house counsel, rejecting the claim that lawyers are different.<sup>47</sup> And federal courts began to take a more prominent role than state courts in shaping the common law of lawyering, for example when they formulated rules disqualifying lawyers suing former clients in matters substantially related to the former representation,<sup>48</sup> rules that were later codified by the American Bar Association.<sup>49</sup>

---

42. See Supreme Court of N.H. v. Piper, 470 U.S. 274, 288 (1985) (voiding residency requirement); *In re Griffiths*, 413 U.S. 717, 718 (1973) (barring exclusion of noncitizens); Baird v. State Bar, of Ariz. 401 U.S. 1, 8 (1971) (limiting questions about Communist Party membership).

43. See FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 432 (1990) (striking down a boycott of appointed counsel work to obtain higher fees); Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 357 (1982) (holding maximum-fee agreement for members of medical care foundation as unlawful); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 696-97 (1978) (stating rule barring competitive bidding); Goldfarb v. Va. State Bar, 421 U.S. 773, 791-93 (1975) (describing lawyer minimum fee scales).

44. See WOLFRAM, *supra* note 24, at 40-41, 826-27, 911-15.

45. Hishon v. King & Spalding, 467 U.S. 69 (1984).

46. See David B. Wilkins, *Partner, Shmartner!* EEOC v. Sidley Austin Brown & Wood, 120 HARV. L. REV. 1264, 1272 (2007) (predicting that firms will seek to avoid discrimination claims by using more objective performance standards focusing on revenue generation).

47. See Camden Reg'l Legal Servs., Inc., 231 N.L.R.B. 224 (1977) (legal assistance office); Foley, Hoag & Eliot, 229 N.L.R.B. 456 (1977) (asserting jurisdiction over law firm employees); Parker v. M & T Chems., Inc., 566 A.2d 215, 222 (N.J. Super. Ct. App. Div. 1989) (state whistleblower statute).

48. T.C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265 (S.D.N.Y. 1953).

49. See MODEL RULES OF PROF'L CONDUCT R. 1.9(a) (2008).

During the same period, Congress preempted state regulation of employee group legal services plans<sup>50</sup> and instituted the Legal Services Corporation,<sup>51</sup> the activities of whose lawyers it promptly began to supervise.<sup>52</sup> Federal legislators did not have to fear the inherent powers doctrine, which has not been considered by the federal courts to bar legislation.<sup>53</sup> However, even some state legislatures became increasingly active. California legislation of the late 1970s imposed nonlawyer members on the State Bar's Board of Governors, limited medical malpractice contingent fees, and required lawyers to submit to fee arbitration.<sup>54</sup> State legislatures also followed Congress by imposing on former government lawyers rules more stringent than those of the bar.<sup>55</sup> And perhaps an academic may be forgiven for viewing the proliferation of professional responsibility scholarship that resulted from making that subject compulsory as the arrival of another regulatory force, albeit one with only persuasive power and often

---

50. 29 U.S.C. §§ 1002(1)(A), 1144 (2000 & Supp. 2007) (parts of the Employee Retirement Income Security Act of 1974 (ERISA)); *see infra* Part IV.A.

51. Legal Services Corporation Act of 1974, 42 U.S.C. § 2996 (2000 & Supp. 2007). The Corporation grew out of a federal program instituted in 1966. *See generally* EARL JOHNSON, JR., JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM (1974).

52. *See infra* Part II.C.

53. *See* *Walters v. Nat'l Assoc. of Radiation Survivors*, 473 U.S. 305 (1985) (upholding legislation that in effect forbade paid representation before Veterans Administration); *Sperry v. Fla. ex rel. Fla. Bar*, 373 U.S. 379 (1963) (holding that federal law that allows nonlawyers to practice before the Patent Office preempts state law that prohibits the unauthorized practice of law). *But see* *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) (holding that First Amendment invalidates statute barring legal services lawyers subsidized by government from raising certain contentions for clients); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866) (voiding statute that in effect disbarred former supporters of Confederacy).

54. CAL. BUS. & PROF. CODE §§ 6013.5, 6146, 6200-6206 (West 2003 & Supp. 2008). California does not read the inherent powers doctrine to bar all legislative bar regulation. *E.g.*, *O'Brien v. Jones*, 999 P.2d 95, 97 (Cal. 2000).

55. *Compare* Pub. L. No. 87-849, 76 Stat. 1119, 1123-24 (1962) (codified at 18 U.S.C. § 207 (2006)), and Note, *Caught in the Revolving Door: A State Lawyer's Guide to Post-Employment Restrictions*, 15 REV. LITIG. 525 (1996), with MODEL RULES OF PROF'L CONDUCT R. 1.11 (2008).

divided against itself.<sup>56</sup> The way was open for a new era in which many regulators strove to regulate segments of the bar or professional practices.

During the last twenty-five years, more governmental regulators have appeared on the scene while old competitors of the courts have expanded their activities. New enactments, often limited by field of practice, have implemented a grab bag of policies centering around the government's own interests, the protection of nonclients from lawyers believed to be too adversarial, and sometimes the protection of clients from self-interested lawyers. My description here will focus on the impact and goals of these enactments, not their desirability or undesirability.<sup>57</sup> In emphasizing how regulators changed the previous rules, I do not mean to suggest that the changes were for the worse. On the contrary, I think that a number of them were improvements, and that the resistance of the bar and bench to making desirable changes often helps explain the intervention of new regulators.<sup>58</sup>

## II. PROTECTING THE GOVERNMENT BY REGULATING LAWYERS

Protection of the government's own interests is a striking feature of recent governmental interventions. That had scarcely been a goal of regulation by the bar and bench, though the ethics codes do contain some provisions that in practice bear primarily on the criminal defense bar.<sup>59</sup> Where

---

56. See Ronald M. Pipkin, *Law School Instruction in Professional Responsibility: A Curricular Paradox*, 1979 AM. B. FOUND. RES. J. 247, 248 (describing August 1974 revision of ABA law school standards to require professional responsibility instruction). For a survey of reform proposals from this period, most of them academic, see John Leubsdorf, *Three Models of Professional Reform*, 67 CORNELL L. REV. 1021 (1982).

57. See David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992) (discussing the competing interests advanced by the various alternate models of enforcement).

58. For a similar argument, see Susan P. Koniak, *When Courts Refuse to Frame the Law and Others Frame It to Their Will*, 66 S. CAL. L. REV. 1075 (1993).

59. MODEL RULES OF PROF'L CONDUCT R. 1.5(d)(2) (2007) (forbidding contingent fees for criminal defense); *id.* at 3.3(a)(3) (forbidding introducing evidence the lawyer knows to be false). The latter provision is phrased generally, but has usually been discussed in connection with perjury by criminal

the bar's main focus has usually been on the lawyer-client relationship and the adversary system, new regulations often make lawyers gatekeepers charged to protect public and governmental interests.

When the government regulates lawyers representing its adversaries, it may regulate too strictly, and may undermine the bar's role of protecting private rights.<sup>60</sup> On the other hand, governmental regulation may protect the public interest when the legal profession has been more attentive to its own. Both government and the profession claim to pursue the good of society, not their own interests as narrowly defined, and this claim is often sincere and, in the case of government, subject to enforcement by the electorate.

In this and following sections, I will often use the American Bar Association's *Model Rules of Professional Conduct* as a benchmark in order to note changes introduced by other regulators. This use unavoidably oversimplifies: no one would say that the *Model Rules* state timeless verities. They developed out of previous formulations,<sup>61</sup> have repeatedly been amended since their first promulgation in 1983,<sup>62</sup> and have been adopted only with modifications by many state supreme courts.<sup>63</sup> The ABA's *Model Rules* emerge from a process in which many groups participate, and sometimes governmental agencies such as the FTC have successfully pressured the ABA to change them.<sup>64</sup> Lastly, courts often regulate lawyers in ways

---

defendants. *E.g.*, *Nix v. Whiteside*, 475 U.S. 157, 166-69 (1986); *People v. DePallo*, 754 N.E.2d 751 (N.Y. 2001).

60. See JOHN LEUBSDORF, *MAN IN HIS ORIGINAL DIGNITY: LEGAL ETHICS IN FRANCE* 1-11, 65-73, 83-84 (2001) (describing French lawyers' emphasis of this role, and its comparative neglect in the United States).

61. See sources cited *supra* note 24.

62. See, *e.g.*, Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 *GEO. J. LEGAL ETHICS* 441 (2003).

63. *State Ethics Rules*, [2006] *Laws. Man. on Prof'l Conduct (ABA/BNA)* No. 287, at 01:11-94. The Rules of Professional Conduct of the State Bar of California are still based, not on the Model Rules, but on the ABA MODEL CODE OF PROF'L CONDUCT, albeit with many changes.

64. WOLFRAM, *supra* note 24.

other than enforcing the *Model Rules*.<sup>65</sup> Despite these qualifications, one can often say with confidence that law created by legislatures and others has altered the law of lawyering from what it would have been had it been left to the bench and bar.

A. *The Savings & Loan Crisis and Banking Lawyers*

When many savings and loan associations became insolvent during the 1980s, the federal government was left holding the bag because it had insured their depositors. It sought to hold civilly liable bank personnel involved in the insolvencies, and uncovered numerous instances of fraud, failure to follow regulatory requirements, and other misconduct.<sup>66</sup>

Lawyers and law firms were among the targets. Because the Federal Deposit Insurance Corporation took over the insolvent institutions, it and the Resolution Trust Corporation set up to deal with the crisis were able to assert the rights of those institutions as clients to obtain from their law firms documents relating to former representations.<sup>67</sup> When the documents revealed misconduct, the agencies asserted the malpractice and other claims of the defunct financial institutions,<sup>68</sup> recovering many millions of dollars through verdicts or settlements.<sup>69</sup>

---

65. *E.g.*, PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES (4th ed. 1999); John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 RUTGERS L. REV. 101, 103 (1995); *see supra* notes 39-49 and accompanying text.

66. KATHLEEN DAY, S & L HELL: THE PEOPLE AND THE POLITICS BEHIND THE \$1 TRILLION SAVINGS AND LOAN SCANDAL (1993); MARTIN MAYER, THE GREATEST-EVER BANK ROBBERY: THE COLLAPSE OF THE SAVINGS AND LOAN INDUSTRY (1990).

67. *E.g.*, Resolution Trust Corp. v. H-, P.C., 128 F.R.D. 647 (N.D. Tex. 1989) (defendant is unnamed).

68. *E.g.*, O'Melveny & Meyers v. FDIC, 512 U.S. 79 (1994); FDIC v. Clark, 978 F.2d 1541 (10th Cir. 1992); FDIC v. Mmahat, 907 F.2d 546 (5th Cir. 1990). Disclosure: The author advised or testified for the government in two such cases, neither of which is mentioned here.

69. *E.g.*, DAY, *supra* note 66 at 373-95; Steve France, *Unhappy Pioneers: S&L Lawyers Discover a "New World" of Liability*, 7 GEO. J. LEGAL ETHICS 725 (1994); Henry J. Reske, *Firm Agrees to Record S&L Settlement*, 79 A.B.A. J., July 1993, at 16.

Although these suits were brought under existing law, they changed the ethical world of banking lawyers in two significant ways. First, they made concrete and specific obligations that had previously been vague. The principle that corporate lawyers represent the corporation rather than its management was not new.<sup>70</sup> But FDIC litigation made it plain that this implies a duty for corporate counsel to report the derelictions of executives up the corporate ladder, if necessary to the board of directors, and that this duty can be enforced by successor management, who can sue counsel and obtain counsel's own records for use as evidence.<sup>71</sup>

Second, the FDIC established that enforcement was a realistic possibility, at least in the case of financial institutions. Even today, it would be hard to find an instance in which a corporate lawyer was professionally disciplined for placing the interests of management ahead of those of the corporation.<sup>72</sup> Corporate lawyers are constantly tempted to regard as their clients the executives who retain them and work with them, and who can end their employment. The FDIC's litigation campaign showed that yielding to the temptation can be costly.

And then Congress stepped in to up the ante. The Financial Institution Reform, Recovery, and Enforcement Act of 1989 (FIRREA)<sup>73</sup> was a complex statute intended both to help clean up the savings and loan mess and to prevent future disasters. As one small part of this scheme, FIRREA subjects bank lawyers (as well as accountants and others) to regulation by classifying them as institution-affiliated parties if they either participate in the affairs of an insured institution or knowingly or recklessly participate in any violation of a law or regulation, any breach of fiduciary

---

70. MODEL RULES OF PROF'L CONDUCT R. 1.13(a) (2007); MODEL CODE OF PROF'L RESPONSIBILITY EC 5-18 (1969).

71. See, e.g., *supra* notes 67-68. Until amended in 2003, *Model Rule* 1.13(b) allowed but did not require going up the ladder; many states have not adopted the amendment. See LAWS. MAN. ON PROF'L CONDUCT (ABA/BNA) at 91:2401-05 (Mar. 22, 2006 update).

72. See ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 203-04 (6th ed. 2007) (collecting authorities on the relevant rule).

73. Pub. L. No. 101-73, 103 Stat. 183 (codified in scattered sections of 12 U.S.C.).

duty, or any unsafe or unsound practice likely to cause more than minimal financial loss.<sup>74</sup> The act empowers the Office of Thrift Supervision (OTS), the FDIC's successor, to issue cease and desist orders against such parties, remove them from participation in the affairs of insured institutions, and subject them to large daily fines, all subject to judicial review.<sup>75</sup>

In practice, the OTS's enforcement powers may affect the activities of bank lawyers more dramatically than the content of the standards they enforce. In two publicized and controversial proceedings, the OTS froze the assets of Kaye Scholer and Paul Weiss and obtained multimillion dollar settlements from those law firms as well as securing their agreement to provisions regulating their banking practices.<sup>76</sup> The bar's ensuing protests were somewhat ironic, granted that the OTS' claims were generally consistent with traditional bar standards and that lawyers have long been able to freeze clients' assets in their possession to coerce payment of fees.<sup>77</sup> In any event, neither the bar disciplinary authorities nor courts hearing legal malpractice cases have ever invoked the power to freeze lawyer assets at a preliminary stage of their proceedings. Neither do they impose daily fines or detailed orders regulating future practice.<sup>78</sup> The power to impose such

---

74. 12 U.S.C. § 1813(u)(3) (2006).

75. 12 U.S.C. § 1818(b)-(n) (2006).

76. For the Kaye Scholer matter, see *In re Fishbein*, 1992 FHLBB LEXIS 4 (Office of Thrift Supervision), Symposium, 35 S. TEX. L. REV. 639 (1994); Symposium, 66 S. CAL. L. REV. 977 (1993), and Symposium, 23 LAW & SOC. INQUIRY 237 (1998). For Paul Weiss, see *Developments in the Law—Lawyers' Responsibilities and Lawyers' Responses*, 107 HARV. L. REV. 1547, 1609-10 (1994)

77. See John Leubsdorf, *Against Lawyer Retaining Liens*, 72 FORDHAM L. REV. 849 (2004) (criticizing lawyer power to freeze client assets); William H. Simon, *The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology*, 23 LAW & SOC. INQUIRY 243 (1998) (criticizing bar protests).

78. Punitive damages can be awarded in legal malpractice suits. 3 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 20.16 (5th ed. 2000). Courts can fine lawyers who violate procedural rules. *E.g.*, *Midlock v. Apple Vacation West, Inc.*, 406 F.3d 453 (7th Cir. 2005). In lawyer discipline cases, courts can require restitution but not fines. Standards for Lawyer Discipline and Disability Proceedings, 6.12, 6.14 (1979), reprinted in PROFESSIONAL DISCIPLINE FOR LAWYERS AND JUDGES (1979).

measures thus constituted a major development in lawyer regulation. By vesting that power in the government, FIRREA played a major role in the replacement of traditional law firm partnerships by limited liability entities<sup>79</sup> and in the rise of risk management practices and attitudes within firms.<sup>80</sup>

Although the OTS's interlocutory enforcement powers have so far led to settlements precluding any court ruling on its legal theories, FIRREA and its accompanying regulations clearly modify former rules governing statements made by banking lawyers to regulators and auditors. Lawyers of course may not knowingly make false statements, though some room for "puffing" has often been allowed.<sup>81</sup> Regulations under FIRREA go further by forbidding bank lawyers communicating with regulators or auditors to make statements that are misleading or omit any material fact.<sup>82</sup> Thus, regardless of other theories the OTS advanced in the *Kaye, Scholer* matter,<sup>83</sup> this regulation imposes a new duty to tell the whole truth.<sup>84</sup> Indeed, OTS regulations directed against money laundering now impose on affiliated persons as well as the financial institutions with which they are affiliated, the obligation to report suspicious transactions.<sup>85</sup>

---

79. See discussion *infra* Part IV.C.

80. *E.g.*, ANTHONY E. DAVIS, RISK MANAGEMENT: SURVIVAL TOOLS FOR LAW FIRMS 11-12 (1995); Anthony V. Alfieri, *The Fall of Legal Ethics and the Rise of Risk Management*, 94 GEO. L.J. 1909, 1933-37 (2006).

81. See generally MODEL RULES OF PROF'L CONDUCT R. 3.3(a), 4.1 & cmt. 2, 8.4(c) (2008); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 98 (2000).

82. 12 C.F.R. § 563.180(b) (2008). Another regulation, 12 C.F.R. § 513.4(a)(3) (2008), requires those practicing before the agency to avoid "unethical or improper professional conduct," but this apparently incorporates rather than modifies existing standards. Whether violating either regulation can give rise to civil liability, and if so to whom, remains unresolved.

83. See Simon, *supra* note 77 (defending OTS's theories).

84. Professional rules do sometimes impose duties of disclosure. MODEL RULES OF PROF'L CONDUCT R. 4.1(b) (2008) (stating that lawyer must disclose when necessary to avoid assisting client's crime or fraud, unless forbidden by confidentiality rule); N.J. RULES OF PROF'L CONDUCT R. 1.6(b) (2008) (requiring disclosure necessary to prevent client's unlawful act likely to cause death, bodily harm, substantial financial injury, or fraud on tribunal).

85. 12 C.F.R. § 563.180(d) (2008). Similar requirements apply to other financial institutions. See, *e.g.*, 12 C.F.R. §§ 21.11, 208.62, 353.3, 748.1 (2008).

In a broader sense, one might contend that FIRREA modifies the conflict of interest rules for bank lawyers. It grants the OTS the power, in appropriate circumstances, to remove lawyers from a representation or from the practice of representing financial institutions for breach of their fiduciary duties,<sup>86</sup> to make them pay restitution or indemnify an institution for losses their misconduct caused,<sup>87</sup> and to invoke the interlocutory measures deployed against Kaye Scholer. If one thinks of OTS as a party adverse to regulated financial institutions, such powers over the institution's lawyer would be inconsistent with usual conflicts standards,<sup>88</sup> though of course since FIRREA lawyers and clients have no choice but to accept the situation. The same is true if one thinks of OTS as a potential successor in interest to the financial institution because it insures the institution's customers and will be entitled to take over its management if necessary. However, until that takeover occurs OTS and the institution nevertheless remain separate parties with differing interests. Only if one thinks of OTS as a neutral third party, like a tribunal, would practice under FIRREA be more in line with usual conflicts norms. There is nothing new about an administrative agency having disciplinary power over lawyers practicing before it.<sup>89</sup> What is new about FIRREA is that the rules it imposes diverge from those otherwise applicable to lawyers, that the OTS has unprecedented power to enforce those rules, and that the regulator can and does assert monetary claims on its own behalf against the regulated lawyers and their clients.

One of the most striking things about the changes that the FDIC litigation campaign and the passage of FIRREA brought to banking lawyers is that they do not seem to have originated from any specific concern with the rules applicable to those lawyers or to the enforcement procedures for those rules.<sup>90</sup> The FDIC campaign was

---

86. 12 U.S.C. § 1818(e)(1)(A)(iii) (2006).

87. 12 U.S.C. §§ 1818(b)(1), (b)(6)(A), (c)-(d) (2006).

88. *E.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2008) (discussing conflict between client interest and lawyer's personal interest).

89. *See, e.g.*, *Goldsmith v. U.S. Bd. of Tax Appeals*, 270 U.S. 117 (1926).

90. *See generally* 135 CONG. REC. S3993-4013, S4238-76, H2553-80, H2602-701 (1989) (recording Congressional consideration of FIRREA).

directed not just at lawyers but at bank officers and directors and accountants. Its goal was to recover money to pay some small part of the obligations of insolvent financial institutions, and perhaps to counter the suspicion that the government itself shared the responsibility for the Savings and Loan debacle. FIRREA likewise was a get tough measure that affected, not just financial institutions and their lawyers, but also their directors, officers, employees, controlling stockholders, consultants, appraisers, and accountants.<sup>91</sup> Unlike the bar and bench, Congress did not think that lawyers were special.

### B. *Tax Shelters and the Tax Bar*

Like banking lawyers, and for similar reasons, the many lawyers who practice tax law<sup>92</sup> have recently become subject to a web of federal regulation.<sup>93</sup> Just as the Savings and Loan crisis precipitated regulation of lawyers and others, the rise of tax shelters—and most recently the commercial marketing of corporate tax shelters—accelerated the regulation of the accountants and the lawyers (some of them in law firms, and some in accounting firms) who invented and sold shelters.<sup>94</sup> The government had its own interest in stepping in. Despite decades of countermeasures, tax shelters are now estimated to cost the treasury ten billion dollars yearly, and the 2004 legislation addressing them was projected to yield \$26.56 billion during

---

91. 12 U.S.C. § 1813(u) (2006).

92. See JOHN P. HEINZ ET AL., *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR* 42 (2005) (observing that more than five percent of total legal effort in Chicago is devoted to tax law; at least ten percent of the bar does tax work).

93. See generally BERNARD WOLFMAN ET AL., *STANDARDS OF TAX PRACTICE: PROFESSIONAL RESPONSIBILITY AND ETHICS* (6th ed. 2004 & 2006 Supp.).

94. For descriptions of the dubious practices involved, see MINORITY STAFF OF PERM. SUBCOMM. ON INVESTIGATIONS, 108TH CONG., *U.S. TAX SHELTER INDUSTRY: THE ROLE OF ACCOUNTANTS, LAWYERS, AND FINANCIAL PROFESSIONALS* (Comm. Print 2003); Joseph Bankman, *The New Market in Corporate Tax Shelters*, 83 *TAX NOTES* 1775 (1999); Janet Novack & Laura Saunders, *The Hustling of X Rated Shelters*, *FORBES*, Dec. 14, 1998, at 198.

the following ten years.<sup>95</sup> Cracking down on lawyers and accountants also has the fortunate effect of diverting attention from the government's failure to fund the Internal Revenue Service adequately or to close corporate tax loopholes.

For lawyers, tax practice like banking practice offers temptations to adopt the adversarial approach accepted in litigation.<sup>96</sup> Because the IRS has severely limited resources and must rely on information in the hands of taxpayers, the tax system depends on a high level of compliance by taxpayers and their lawyers.<sup>97</sup> But just this dependence offers a constant temptation to rely on the improbability that underpayments will be detected and sanctioned.<sup>98</sup> Even when providing formal opinions on which clients and nonclients will rely, where it is clear that a lawyer should speak as a neutral rather than a partisan,<sup>99</sup> tax lawyers (and not just tax lawyers) can easily yield to the pressure to follow their usual role of promoting a client's interests by all means not clearly unlawful. The pressure is even greater when relying on a lawyer's opinion may shield a client from sanctions otherwise applicable.<sup>100</sup> And state lawyer disciplinary systems have never devoted much attention to tax lawyers.

---

95. U.S. DEPT OF JUSTICE, CONGRESSIONAL SUBMISSION: FY 2008 PERFORMANCE BUDGET: TAX DIVISION 9-10, 17-18 (2007), [http://www.usdoj.gov/jmd/2008justification/pdf/13\\_tax.pdf](http://www.usdoj.gov/jmd/2008justification/pdf/13_tax.pdf).

96. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 85-352 (1985), reprinted in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 (2000) ("In many cases a lawyer must realistically anticipate that the filing of the tax return may be the first step in a process that may result in an adversary relationship between the client and the IRS.").

97. See, e.g., David M. Schizer, *Enlisting the Tax Bar*, 59 TAX L. REV. 331 (2006).

98. See, e.g., Alex Raskolnikov, *Crime and Punishment in Taxation: Deceit, Deterrence, and the Self-Adjusting Penalty*, 106 COLUM. L. REV. 569 (2006).

99. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 95 cmt. C (2000).

100. 26 C.F.R. §§ 1.6662-4(g)(4)(i)(B), 1.6664-4(c) (2008) (taxpayer reliance on certain lawyer opinion letters reduces penalties). See generally William H. Simon, *The Market for Bad Legal Advice: Academic Professional Responsibility Consulting as an Example*, 60 STAN. L. REV. 1555 (2008).

Like the Savings and Loan scandal, the corporate tax shelter business has given rise in recent years to a systematic and well publicized government litigation campaign against professionals. Among law firms, Jenkens and Gilchrist paid a \$76 million penalty and went out of business while Sidley Austin paid \$39.4 million<sup>101</sup>; and accounting firms did no better.<sup>102</sup> Although prosecutors ultimately did not indict the firms themselves, some of their employees were less lucky.<sup>103</sup> These sanctions sent a message, even if it was only to pay more attention to the principle that lawyers may not knowingly assist fraudulent and criminal conduct. The Deferred Prosecution Agreement that KPMG accepted to avoid indictment shows the potential for professional regulation in the government's campaign, in this instance regulation of an accounting firm with seven hundred lawyer employees in the United States.<sup>104</sup> The agreement bound KPMG to abandon certain kinds of tax practice, to charge only hourly fees (with exceptions), to meet certain standards for opinions, to waive attorney-client privilege and work product protection, and to accept oversight by an outside monitor with access to all its files.<sup>105</sup> Applied to a law firm, such requirements would

---

101. John Herzfeld, *Malpractice: Jenkins & Gilchrist Escapes Prosecution But Pays Heavy Price for Tax Shelter Fraud*, 23 LAW MANUAL ON PROF'L CONDUCT 178 Apr. 4, 2007); James P. Miller, *Law Firm to Pay \$39 Million*, CHI. TRIB., May 24, 2007, at Bus. 1. Sidley Austin also paid an undisclosed share of the \$178 million needed to settle a class action brought by tax shelter investors against it and KPMG. *Simon v. KPMG LLP*, No. 05-CV-3189, 2006 U.S. Dist. LEXIS 35943 (D.N.J. 2006).

102. See, e.g., Lynnley Browning, *Four Men, But Not Ernst & Young, Are Charged in Tax Shelter Case*, N.Y. TIMES, May 31, 2007, at C3 (reporting that Ernst & Young paid fifteen million dollar penalty; KPMG paid \$456 million under deferred prosecution agreement).

103. See *id.*; Miller, *supra* note 101.

104. See N.Y.S.B.A. SPECIAL COMM'N ON THE LAW GOVERNING FIRM STRUCTURE AND OPERATIONS, PRESERVING THE CORE VALUES OF THE AMERICAN LEGAL PROFESSION: THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS, ch. 7(2) (2000), <http://www.law.cornell.edu/ethics/mdp.htm>.

105. Press Release, U.S. Dep't of Justice, KPMG Deferred Prosecution Agreement (Aug. 26, 2005), <http://www.usdoj.gov/usao/NYS/pressreleases/August05/kpmgdpagmt.pdf>. On deferred prosecution agreements, see Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 321-26 (2007).

dramatically change the ordinary rules.<sup>106</sup> And of course reporting to the U.S. Attorney's office is not a familiar mode of lawyer regulation.

Well before the government's litigative onslaught on law firms and accounting firms that marketed corporate tax shelters, the struggle against tax shelters and other evasive techniques fostered increasing governmental regulation of tax lawyers and other practitioners. The Treasury has long been empowered to admit, disbar and discipline those practicing before it.<sup>107</sup> After the war on abusive tax shelters began in the 1970s with legislation penalizing their promoters and investors, the Treasury proposed rules regulating lawyers' tax shelter opinions.<sup>108</sup> The American Bar Association, in turn lobbied by the tax bar, resisted. The regulations ultimately promulgated did not significantly change lawyers' duties, though they did press lawyers to be more thorough and to state, when possible, an opinion as to whether the tax benefits were more likely than not to be realized.<sup>109</sup>

In 1989, Congress shifted the focus to tax return preparation, enacting penalties for preparers of returns that took positions with no realistic possibility of prevailing, unless the return made full disclosure.<sup>110</sup> The ABA resisted making this "realistic possibility" standard much more

---

106. MODEL RULES OF PROF'L CONDUCT R. 1.5(c) (2008) (contingent fees); *id.* at 1.6 (confidentiality); *id.* at 5.6 (restrictions on right to practice) (2008).

107. See *Pope v. United States*, 599 F.2d 1383 (5th Cir. 1979); Kurtis A. Kemper, Annotation, *Disciplinary Action Under 31 USCS § 1026 Authorizing Secretary of the Treasury to Suspend and Disbar Any Person Representing Claimants from Further Practice Before the Treasury Department*, 50 A.L.R. FED. 817 (1980). See generally Act of July 7, 1884, ch. 334, 23 Stat. 236, 258-59 (1884).

108. See generally Joseph J. Portuondo, *Abusive Tax Shelters, Legal Malpractice, and Revised Formal Ethics Opinion 346: Does Revised 346 Enable Third Party Investors to Recover from Tax Attorneys Who Violate Its Standards?*, 61 NOTRE DAME L. REV. 220, 222-25 (1986).

109. Regulations Governing the Practice of Attorneys, Certified Public Accountants, Enrolled Agents, and Enrolled Actuaries Before the Internal Revenue Service, 49 Fed. Reg. 6719 (Feb. 23, 1984) (to be codified at 31 C.F.R. pt. 10). For the history of these regulations, see Note, *Redefining the Attorney's Role in Abusive Tax Shelters*, 37 STAN. L. REV. 889 (1985).

110. Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 7732(a), 103 Stat. 2106, 2402 (1989) (amending I.R.C. § 6694(a)).

specific,<sup>111</sup> but this time the IRS adopted a requirement that there be approximately a one third probability that the taxpayer's position would be upheld if challenged.<sup>112</sup> Whether this requirement restricts a lawyer's right to assist acts of unclear legality,<sup>113</sup> or rather prohibits clients from certain acts that their lawyers may therefore not assist, depends on how one interprets the obligations of a taxpayer under the Internal Revenue Code. Those obligations are subject to dispute.<sup>114</sup>

By 2004, Congress was prepared to target professionals still more directly, thanks to the notorious activities of large law and accounting firms in promoting corporate tax shelters.<sup>115</sup> The American Jobs Creation Act of 2004<sup>116</sup> required advisers to report specified types of transactions,<sup>117</sup> provided that taxpayers could not use certain legal opinions to reduce penalties,<sup>118</sup> restricted the application of the tax preparer's privilege,<sup>119</sup> and provided for disciplinary penalties against individuals and firms.<sup>120</sup> The IRS has

---

111. K.H. Sharp, *A Smile, a Frown, and a Few New Wrinkles: The Changing Face of Practice Before the IRS*, 70 N.D. L. REV. 965 (1994); see ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 85-352 (1985).

112. 59 Fed. Reg. 31,523, 31,527 (June 20, 1994) (codified at 31 C.F.R. § 10.34).

113. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (prohibiting assistance in conduct a lawyer knows is criminal or fraudulent).

114. Compare Kenneth L. Harris, *Resolving Questionable Positions on a Client's Federal Tax Return: An Analysis of the Revised Section 6694(a) Standard*, 47 TAX NOTES 971 (1990), with James P. Holden, *Constraining Aggressive Return Advice: A Commentary*, 9 VA. TAX REV. 771 (1990), and Camilla E. Watson, *Tax Lawyers, Ethical Obligations, and the Duty to the System*, 47 KAN. L. REV. 847 (1999).

115. For those activities, see authorities cited *supra* note 94.

116. Pub. L. No. 108-357, 118 Stat. 1418 (2004).

117. 26 U.S.C. §§ 6111, 6112, 6707 (2006). Even before Congress enacted this statute, the courts upheld IRS's power to obtain information about tax shelter clients. *United States v. BDO Seidman*, 337 F.3d 802 (7th Cir. 2003) (concerning an accounting firm, but including dictum about lawyers). For this legislation's impact on confidentiality, see *infra* Part II.C.2.d.

118. I.R.C. § 6664(d)(3) (2006).

119. I.R.C. § 7527(b).

120. 31 U.S.C. § 330(b).

issued regulations elaborating these provisions,<sup>121</sup> and has proposed others that are still under consideration.<sup>122</sup> As Tanina Rostain has reported, the tax bar, on the whole, supported these innovations, which maintain its gatekeeping role and professional esteem but may reduce its income.<sup>123</sup> And the IRS's Office of Professional Responsibility now disbars and suspends as many tax practitioners each year as California does lawyers.<sup>124</sup>

Although perhaps only a tax lawyer could fully understand the current provisions, it is easier to note the main ways in which they have changed the usual standards applicable to the many lawyers practicing tax law. First, IRS rules now provide that a lawyer advising or preparing tax returns, providing a tax shelter opinion, or giving written tax advice may not take into account the possibility that a tax return will not be audited, that an issue will not be raised on audit, or that an issue will be settled.<sup>125</sup> It may still be true that "People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves,"<sup>126</sup> but apparently their tax lawyers may not tell them. If so construed, the IRS rules would modify previous rules, practice and theory, which does not squarely and generally prohibit advising clients about the likely consequences of

---

121. 69 Fed. Reg. 75,839 (Dec. 20, 2004) (codified at 31 C.F.R. §§ 10.33, 10.35-38, 10.52).

122. 71 Fed. Reg. 6421 (Feb. 8, 2006).

123. Tanina Rostain, *Sheltering Lawyers: The Organized Tax Bar and the Tax Shelter Industry*, 23 YALE J. ON REG. 77 (2006).

124. Compare Written Testimony of Commissioner of Internal Revenue Service Mark Everson before Senate Finance Committee on Filing Your Taxes: An Ounce of Prevention is Worth a Pound of Cure, Apr. 12, 2007, at 25-26, available at <http://finance.senate.gov/hearing/testimony/2007test/041207testme.pdf> (eighty-seven suspensions or disbarments, 205 expedited suspensions), with THE STATE BAR OF CALIFORNIA, 2006 REPORT ON THE STATE BAR OF CALIFORNIA DISCIPLINE SYSTEM 15 (2007) (sixty-six disbarments, five summary disbarments, 250 suspensions).

125. 31 C.F.R. §§ 10.34(d)(1), 10.35(c)(3)(iii), 10.37 (2007).

126. Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897). Whether Holmes meant his predictive theory of the law to include such factors as the likelihood of detection is unclear.

their acts.<sup>127</sup> But the IRS rules do not ban oral communication, and perhaps allow a lawyer to describe the risk of detection on audit even in writing so long as the lawyer does not rely on that risk in formulating advice. On this view, the goal of the rules is not so much to hide the IRS' ineffectiveness from taxpayers as to prevent taxpayers from using opinions based on that ineffectiveness to reduce tax penalties.<sup>128</sup> The rules' innovation would then just be that they require lawyers to segregate advice about probable enforcement from other advice.

Second, since 1994, the Treasury has prohibited tax practitioners from charging contingent fees for preparing original tax returns or for providing advice in connection with positions taken in such returns.<sup>129</sup> It has recently extended the prohibition<sup>130</sup> and has also adopted a regulation that subjects any written tax opinion rendered under a contingent fee arrangement to the requirements for tax shelter opinions.<sup>131</sup> Presumably these rules reflect a fear that contingent fee lawyers and other tax professionals will go too far in promoting taxpayer interests in order to increase their own payment. That fear lay behind the traditional ban on contingent fees,<sup>132</sup> which still applies to

---

127. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (lawyer may not counsel or assist conduct known to be criminal or fraudulent, but may discuss the legal consequences of any proposed course of conduct with a client); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 94 cmt. F (2000) (similar); Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545 (1995) (advocating multifactor, contextual approach); Bruce A. Green, *Taking Cues: Inferring Legality From Others' Conduct*, 75 FORDHAM L. REV. 1429 (2006) (defending advice about enforcement practices).

128. See 31 C.F.R. § 10.34(b) (2007) (requiring advisers and preparers to inform clients of penalties likely to apply to positions advised, prepared or reported); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 85-352 (1985) (stating tax lawyer may advise taking a position if "there be some realistic possibility of success *if the matter is litigated*") (emphasis added).

129. 59 Fed. Reg. 31,523, 31,525, 31,527 (June 20, 1994).

130. 72 Fed. Reg. 54,540, 54,548 (Sept. 26, 2007) (codified at 31 C.F.R. § 10.27(b)).

131. 31 C.F.R. § 10.35(a), (b)(4), (b)(7) (2007). For the tax shelter opinion requirements, see *infra* text accompanying notes 135-36.

132. See generally WOLFRAM, *supra* note 24, at 526-27.

criminal and divorce representation<sup>133</sup> but has otherwise yielded in the United States to the belief that contingent fees can help promote access to the law, share risk, and usefully align the interests of lawyers and clients.<sup>134</sup> If there is a justification for barring those fees for tax return work (as I think there is), it is that the tax return system is easy to game and lacking in adversarial safeguards. Still, this is one more situation in which a government agency has been able to protect its own interests (including the broader goals it serves) by regulating lawyers who represent private clients before it.

Third, since 2004 the Internal Revenue Service has regulated in detail the content of “covered opinions.” This term designates a variety of opinions likely to concern improper tax shelters, whether because of the nature or purpose of the transactions they cover, their likely and undisclaimed use to avoid possible tax penalties, their use in marketing transactions to potential buyers, their inclusion of confidentiality provisions protecting the secrecy of tax strategies, or their payment by contingent fee.<sup>135</sup> Covered opinions must, in short, rely on a proper factual basis, apply the law to those facts, consider (with some exceptions) all significant tax issues, reach conclusions on those issues or explain why that is impossible, and in some instances disclose financial arrangements involving the opinion’s author. In certain circumstances they may only be provided if the author concludes that it is more likely than not that the taxpayer will prevail.<sup>136</sup> These provisions may well protect against misunderstanding those who request or rely on tax opinions, and in that respect resemble but

---

133. MODEL RULES OF PROF’L CONDUCT R. 1.5(c) (2008); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 35(1) cmts. f, g & Reporter’s Note (2000) (describing criticisms of the prohibition).

134. See sources cited *supra* notes 132-33. For legitimation of partially contingent fees abroad, see OSCAR G. CHASE ET AL., CIVIL LITIGATION IN COMPARATIVE CONTEXT 73 n.3, 85 (2007) (observing legitimation pending in Germany and Italy), RAYMOND MARTIN, DÉONTOLOGIE DE L’AVOCAT 184-89 (8th ed. 2004) (citing fees in France), ADRIAN A.S. ZUCKERMAN, CIVIL PROCEDURE 910-27 (2003) (citing fees in England), and Solicitors Act, R.S.O., ch. S.15 §28.1 (Can.) (amended 2002).

135. 31 C.F.R. § 10.35(a), (b)(2) (2007).

136. 31 C.F.R. § 10.35(c)-(e) (2007).

elaborate traditional principles.<sup>137</sup> On the other hand, requiring detailed opinions might force some clients to pay for services they do not want or need.<sup>138</sup> In any event, once again the government's goal has not been so much to protect clients or purchasers of tax shelters as to protect the fisc from attempts of underpaying taxpayers to avoid penalties by claiming reliance on opinion letters that lawyers drafted to gloss over factual or legal weaknesses.

### C. *Reining In the Criminal Defense and Legal Services Bars*

Confronting the government in court is at the core of the bar's concept of itself, even though most contemporary lawyers never or rarely do it. Here too Congress has been active, often in conjunction with the Department of Justice, sometimes under the banner of wars on crime or terrorism, and sometimes in response to asserted abusive lawyering. The results have impacted the professional obligations of criminal defense and legal services lawyers.

Because it ultimately did not prevail, the Justice Department's effort to exempt its own lawyers, in part, from the rules applying to other lawyers deserves only passing mention. The Thornburgh Memorandum of 1989<sup>139</sup> and its successor the Reno rules of 1994<sup>140</sup> sought to limit the application to federal lawyers of the rule forbidding a lawyer to have direct contact with a party represented by counsel except with counsel's permission.<sup>141</sup> Although there

---

137. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 95, cmt. c (2000) (third party recipients); SCOTT FITZGIBBON & DONALD W. GLAZER, FITZGIBBON AND GLAZER ON LEGAL OPINIONS, ch. 4 (1992) (establishing factual basis for opinions); WOLFRAM, *supra* note 24, at 709-10.

138. David T. Moldenhauer, *Circular 230 Opinion Standards, Legal Ethics, and First Amendment Limitations on the Regulation of Professional Speech by Lawyers*, 29 SEATTLE U. L. REV. 843 (2006).

139. Memorandum from Dick Thornburg, Att'y Gen., to All Justice Dep't Litigators, Communication with Persons Represented by Counsel (June 8, 1989), reprinted in *In re John Doe*, 801 F. Supp. 478, 489-93 (D.N.M. 1992).

140. Communications with Represented Persons, 59 Fed. Reg. 39,910 (Aug. 4 1994) (codified at 28 C.F.R. 77).

141. MODEL RULES OF PROF'L CONDUCT R. 4.2 (2008). For the rule's history and purposes, see John Leubsdorf, *Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interests*, 127 U. PA. L. REV. 683 (1979).

were genuine questions as to how that rule does or should apply to prosecutors,<sup>142</sup> the attempt to resolve those issues by the Attorney General's fiat aroused controversy and resistance.<sup>143</sup> Ultimately, Congress decreed that federal lawyers should be subject to the same rules as other lawyers in the states where they engaged in their duties.<sup>144</sup> Thus the Attorney General's regulatory initiative was snuffed out by a Congressional initiative, inserted in an appropriations bill by a Representative with a personal grudge,<sup>145</sup> and creating its own problems.<sup>146</sup> But other governmental interventions have been more effective.

1. *Forfeiting attorney fees.* During recent decades, Congress has given United States Attorneys the ability to prevent private defense counsel from being paid in many cases by expanding the scope of statutes providing for the forfeiture of defendants' assets. Such statutes have long existed,<sup>147</sup> and two 1970 statutes provided for forfeiture in

---

142. *Compare* United States v. Hammad, 858 F.2d 834 (2d Cir. 1988) (applying rule to investigatory activity but not authorizing its enforcement by excluding evidence), *with, e.g.*, United States v. Ryans, 903 F.2d 731 (10th Cir. 1990). *See generally* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-396 (1995); William J. Stuntz, *Lawyers, Deception, and Evidence Gathering*, 79 VA. L. REV. 1903 (1993).

143. *See, e.g.*, United States v. Lopez, 765 F. Supp. 1433 (N.D. Cal. 1991), *rev'd on other grounds*, 989 F.2d 1032 (9th Cir. 1993); *In re Howes*, 940 P.2d 159 (N.M. 1997). *See generally* Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies over the Anti-Contact and Subpoena Rules*, 53 U. PITT. L. REV. 291 (1992); Fred C. Zacharias, *Who Can Best Regulate the Ethics of Federal Prosecutors, or, Who Should Regulate the Regulators?: Response to Little*, 65 FORDHAM L. REV. 429 (1996).

144. Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, Pub. L. No. 105-277, § 801, 112 Stat. 2681-118 (1998) (enacting 28 U.S.C. § 530B).

145. Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 209 (2000).

146. *Id.*; *see* Paula J. Casey, *Regulating Federal Prosecutors: Why McDade Should Be Repealed*, 19 GA. ST. U. L. REV. 395 (2002); Note, *Federal Prosecutors, State Ethics Regulations, and the McDade Amendment*, 113 HARV. L. REV. 2080 (2000).

147. *See, e.g.*, *Dobbins's Distillery v. United States*, 96 U.S. 395 (1877) (forfeiture of property used in unlawful distilling); *United States v. 1960 Bags of Coffee*, 12 U.S. (8 Cranch) 398 (1814) (forfeiture of unlawfully imported property).

drug and criminal enterprise cases.<sup>148</sup> But it was the Comprehensive Forfeiture Act of 1984<sup>149</sup> that put U.S. Attorneys into the fee forfeiture business.<sup>150</sup> They have remained in it ever since, despite some modest legislative cutbacks<sup>151</sup> responding to extreme examples of forfeiture.<sup>152</sup> Some state prosecutors have joined the game, either by participating in federal forfeiture proceedings<sup>153</sup> or by using state forfeiture statutes.<sup>154</sup>

Several features of the federal legislation make it a formidable weapon against privately retained counsel. Congress broadly defined the assets subject to forfeiture, so that they include essentially all the assets with which a professional criminal could hire a lawyer.<sup>155</sup> The prosecutor need not wait until the defendant is convicted to obtain the property, but may seek preliminary injunctive relief freezing the assets claimed to be forfeited, including those that have already been paid to third parties.<sup>156</sup> Lawyers are

---

148. See Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 511, 84 Stat. 1242, 1276 (codified as amended at 21 U.S.C. § 801 (1994)); Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1963, 84 Stat. 922, 943 (enacting 19 U.S.C. § 1963).

149. Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, 98 Stat. 2192, enacting 18 U.S.C. § 981).

150. See, OFFICE OF THE INSPECTOR GENERAL, AUDIT DIVISION, DEPARTMENT OF JUSTICE, AUDIT REPORT NO. 07-15, ASSETS FORFEITURE FUND AND SEIZED ASSETS DEPOSIT FUND ANNUAL FINANCIAL STATEMENTS, FISCAL YEAR 2006, at 11 (2007) (reporting federal forfeiture income of more than one billion dollars); Eric Blumenson & Eva Nilsen, *Policy for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 44-56 (1998) (contending that forfeiture helps finance police departments).

151. See Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, § 983, 114 Stat. 202 (codified at 18 U.S.C. § 983).

152. *E.g.*, *Bennis v. Michigan*, 516 U.S. 442, 443 (1996) (deciding the state may deny innocent owner defense to spouse who was co-owner of car used criminally by other spouse).

153. 18 U.S.C. § 981(e)(2) (2006); 19 U.S.C. § 1616(a),(c) (2006); 21 U.S.C. § 881(e)(1)(A) (2006); Blumenson & Nilsen, *supra* note 150, at 50-54.

154. See generally STEVEN L. KESSLER, CIVIL AND CRIMINAL FORFEITURE chs. 8-13 (1993).

155. See 21 U.S.C. § 853(a), (b), (d), (p) (2006); see also *Russello v. United States*, 464 U.S. 16 (1983) (reading the pre-1984 definition to include proceeds of crime, not just property used in committing it).

156. 21 U.S.C. § 853(c), (e) (2006).

not immune; indeed, the court has no discretion to exempt assets on the ground that they are needed to secure counsel.<sup>157</sup> The lawyer will then be paid only if the assets are held not subject to forfeiture or the lawyer proves that when paid she was reasonably without cause to believe that the property was subject to forfeiture.<sup>158</sup> The Supreme Court has indicated that a lawyer's ability to demonstrate such ignorance "will, as a practical matter, never arise."<sup>159</sup>

The forfeiture statute, in short, makes it possible for U.S. Attorneys to de-fund private counsel in a large class of cases, a power some of them have recently sought to expand.<sup>160</sup> The Court nevertheless upheld attorney fee forfeiture against Constitutional challenges, on the ground that a defendant has no Constitutional right to pay a lawyer with unlawfully acquired assets.<sup>161</sup> That is a plausible argument, though the four dissenters also had a case.<sup>162</sup> The fact remains that, however constitutional they may be, forfeiture statutes regulate the bar by creating an obstacle to payment of private criminal defense counsel.

---

157. See *United States v. Monsanto*, 491 U.S. 600 (1989). Some states likewise forfeit attorney fees. See *People v. Superior Court*, 264 Cal. Rptr. 28 (Cal. Ct. App. 1989); *State v. \$9,199, U.S. Currency*, 791 P.2d 213 (Utah Ct. App. 1990). Others allow or require exceptions. See *State ex rel. Topeka Police Dep't v. \$895.00 U.S. Currency*, 133 P.3d 91 (Kan. 2006); *Commonwealth v. Hess*, 617 A.2d 307 (Pa. 1992); Model Asset Seizure and Forfeiture Act, KAN. STAT. ANN. § 60-4111 (2005).

158. 21 U.S.C. § 853(n) (2006).

159. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 633 (1989). The Court therefore concluded that defense counsel would not be inhibited in seeking information from their clients by the fear that knowing too much might threaten their fees. *But see United States v. Moffitt, Zwerling & Kemler, P.C.*, 83 F.3d 660, 666 (4th Cir. 1996) (stating lawyer and client were "engaging in some sort of wink and nod ritual whereby they agreed not to ask" or tell too much).

160. See *United States v. Stein*, 541 F.3d 130, 136 (2d Cir. 2008) (pressuring corporation not to pay for employees' counsel); *United States v. Wittig*, 333 F. Supp. 2d 1048, 1051 (D. Kan. 2004) (attempting to enjoin corporate employer from honoring contractual obligation to pay for employee's lawyer).

161. See *Caplin & Drysdale*, 491 U.S. at 617; Kathleen F. Brickey, *Forfeiture of Attorneys' Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel*, 72 VA. L. REV. 493 (1986) (accepting this argument).

162. See *Caplin & Drysdale*, 491 U.S. at 635 (Blackmun, J., dissenting).

Forfeiture statutes also give rise to a new conflict of interest for defense counsel. The prosecutor's ability to block defense counsel's fees, where it exists, pushes counsel to defer to the prosecutor's wishes, and thus alters the rules under which defense counsel operate. The prosecutor, after all, represents an opposing party; and the Justice Department considers that whether to seek attorney fee forfeiture is a matter of prosecutorial discretion, albeit one calling for uniform and fair application and for due regard to the possible impact on communications between lawyer and client.<sup>163</sup> Technically, the Justice Department does not pay defense counsel's fee, so the professional rule governing third party payment does not apply.<sup>164</sup> Yet functionally an arrangement in which a third party can prevent payment poses the same danger as one in which a third party provides payment, to wit, that the lawyer will yield to the third party's interests even when they conflict with those of the client.<sup>165</sup> The client's informed consent is required for third party payment,<sup>166</sup> but the client has no way to deny consent to attorney fee forfeiture except by renouncing private counsel and seeking appointed counsel (assuming he can show he has no assets not subject to forfeiture).<sup>167</sup> In effect, then, the new law of forfeiture subjects some criminal defendants to attorney conflicts of interest from which the law of lawyering has sought to guard clients.

Admittedly, there are other situations in which opposing parties have some ability to affect what a lawyer is paid, but some of them only show that fee forfeiture is not the only way in which new regulators have affected rules for lawyers. Under the legislation (now expired) providing for appointment of independent counsel to investigate and prosecute certain governmental misconduct, someone who was investigated but not indicted could recover attorney

---

163. See 2 UNITED STATES ATTORNEY'S MANUAL § 9-119.200 (1997); see also *id.* § 9-112.230 (stating that with approval from Assistant Attorney General, U.S. Attorney may exempt from forfeiture assets paid to attorneys and reasonably believed nonforfeitable).

164. MODEL RULES OF PROF'L CONDUCT R. 1.8(f) (2008).

165. *Id.* R. 1.8 cmt. 11.

166. *Id.* R. 1.8(f)(1).

167. See, e.g., *United States v. Salemme*, 985 F. Supp. 197, 201 (D. Mass. 1997) (discussing problems of making such a showing).

fees from the government<sup>168</sup>; but the Independent Counsel and Attorney General have frequently opposed fee requests.<sup>169</sup> On the civil side, the proliferation of statutes providing for attorney fee recovery has made such opposition common.<sup>170</sup> In cases to which provisions like these apply, just as in those in which forfeiture is possible, lawyers have an incentive to avoid actions that might cause opposing counsel and parties to dispute fee awards with passion, or judges to deny or limit them.<sup>171</sup> In effect, the government has instituted a conflict of interest that is almost unavoidable in certain kinds of cases, and which clients and lawyers must therefore accept. The legislative packages incorporating this conflict may in some instances be desirable, but it remains true that they change lawyers' professional rules.

So far as fee forfeiture is concerned, the new régime instituted by the 1984 statute not only gives prosecutors discretion to interfere with opposing counsel's fee arrangements but also institutes a fee arrangement previously banned: a contingent fee for defending a criminal case.<sup>172</sup> Once a court freezes the funds on which defense counsel depends for payment, counsel is likely to be paid

---

168. 28 U.S.C. § 593(f)(1) (2006).

169. *See, e.g., In re Madison Guaranty Sav. & Loan* (Beard Fee Application), 441 F.3d 5 (D.C. Cir. 2006); *In re Madison Guaranty Sav. & Loan* (Livingstone Fee Application), 373 F.3d 1373 (D.C. Cir. 2004); *see also* 28 U.S.C. § 593(f)(2) (requiring that Independent Counsel and Attorney General must evaluate fee applications).

170. *E.g.,* 28 U.S.C. § 2412(b)-(d) (2006) (originally enacted 1980); 42 U.S.C. § 1988 (2000 & Supp. V 2005) (originally enacted 1976). *See generally* MARY FRANCES DERFNER & ARTHUR D. WOLF, *COURT AWARDED ATTORNEY FEES* (2008). Of course, in many foreign legal systems, lawyers for prevailing parties depend for their fees on a court award against the losing party. *See, e.g.,* ZUCKERMAN, *supra* note 134, at ch. 26 (describing English costs rules). Even in the United States, fee recovery is nothing new, though its incidence has vastly increased since the 1960s. *See* John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 *LAW & CONTEMP. PROBS.* 9, 24-31 (1984).

171. *See, e.g.,* *Ramirez v. Sturdevant*, 26 Cal. Rptr. 2d 554, 562-63 (Cal. Ct. App. 1994) (requiring judicial scrutiny of fee award settlement negotiated simultaneously with damages settlement); *State v. Homeside Lending, Inc.*, 826 A.2d 997 (Vt. 2003) (allowing collateral attack on class action settlement benefiting lawyer and defendant at expense of class).

172. For the ban, *see, for example,* MODEL RULES OF PROF'L CONDUCT R. 1.5(d)(2) (2008); WOLFRAM, *supra* note 24, at 535-36.

only if the client is acquitted.<sup>173</sup> The official view, which is open to question, is that such contingent arrangements give defense counsel an undesirable incentive to defend a client by improper means.<sup>174</sup> Ironically, this rationale is just the opposite of the rationale for limiting prosecutorial influence over what defense counsel is paid. One might argue that these two features of fee forfeiture cancel each other out: counsel's fear of losing payment should his client be convicted will counteract his fear of defending so zealously as to provoke the prosecutor to attack the funds from which he will be paid. But things will not work out so neatly. The contingent fee incentive arises only once the prosecutor seeks forfeiture, while the incentive to avoid a prosecutorial forfeiture attempt operates before the attempt occurs. And once forfeiture is sought, the lawyer can preserve his fee not only by prevailing at trial but through a plea bargain that gives the prosecutor the conviction she wants but frees the funds needed to pay defense counsel. In short, fee forfeiture has influenced the law governing lawyers in at least two ways: giving the prosecution power over defense counsel's pay and instituting a sort of contingent fee.

When Congress expanded forfeiture, it did not focus on how this would affect the regulation of lawyers. Its main concern was with depriving participants in organized crime of any resulting assets.<sup>175</sup> Although some in Congress were aware that the Comprehensive Forfeiture Act of 1984<sup>176</sup> might be applied to funds used to pay lawyers, they did not discuss whether this was desirable, much less how it would

---

173. Counsel might also get paid by showing that some of the client's funds are not subject to forfeiture, or that counsel received payment without cause to believe the funds were forfeitable. 21 U.S.C. § 853(d), (n) (2006). Also, the government might obtain forfeiture even if the defendant is acquitted. See Susan R. Klein, *Civil In Rem Forfeiture and Double Jeopardy*, 82 IOWA L. REV. 183 (1996).

174. For criticism of the rule, see RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 35 cmt. f(i) (2000).

175. See *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 629-31 (1989); *Russello v. United States*, 464 U.S. 16, 26-27 (1983). By contrast, one money laundering statute does except transactions needed to preserve Sixth Amendment rights. 18 U.S.C. § 1957(f)(1) (2006); *United States v. Ferguson*, 142 F. Supp. 2d 1350 (S.D. Fla. 2000).

176. Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, 98 Stat. 2192.

change professional rules.<sup>177</sup> The Supreme Court was aware of the impact on such rules, dismissing them in a footnote when it upheld attorney fee forfeiture against Constitutional challenges.<sup>178</sup> But when Congress later passed the Civil Asset Forfeiture Reform Act<sup>179</sup> it again did not explicitly advert to attorney fee forfeitures or their impact on lawyering. Considering that fee forfeitures are just an aspect of forfeitures in general, which are just an aspect of crime legislation, which is just one of many matters before Congress, that is not surprising. But we should also not be surprised if inadvertent regulation turns out to be imperfect.

2. *Limiting confidentiality.* Recent government initiatives have limited the confidentiality of communications between lawyers and clients. These initiatives date back to the Reagan era's proliferation of grand jury subpoenas to criminal defense lawyers.<sup>180</sup> They do not represent a coordinated campaign, but could better be described as piecemeal nibbles serving various governmental interests. Some of them affect lawyers in civil matters, but their main impact is on criminal defense counsel.

(a) As part of the War on Terror, Attorney General Ashcroft authorized monitoring of communications between prisoners and their lawyers. Monitoring requires a finding

---

177. For surveys of the legislative history, see *Caplin & Drysdale*, 491 U.S. at 635-43 (Blackmun, J., dissenting); *United States v. Monsanto*, 491 U.S. 600, 606-11 (1989); Brickey, *supra* note 161, at 497-502.

178. *Caplin & Drysdale*, 491 U.S. at 632 n.10.

179. Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202. Earlier versions of this statute did provide for the release of certain frozen funds needed to pay a defendant's lawyer. See Civil Asset Forfeiture Reform Act, H.R. 1965, 105th Cong. § 47 (1997); H.R. REP. NO. 105-358, pt. 1, at 19 (1997). For comparable state law provisions, see KESSLER, *supra* note 154. The federal provision disappeared on the way to enactment, along with others deemed insufficiently anticrime.

180. See Cramton & Udell, *supra* note 143; Max D. Stern & David Hoffman, *Privileged Informers: The Attorney Subpoena Problem and a Proposal for Reform*, 136 U. PA. L. REV. 1783, 1788-89 (1988). Safeguards against attorney subpoenas are found in MODEL RULES OF PROF'L CONDUCT R. 3.8(e) (2008), and U.S. DEP'T OF JUSTICE, U.S. ATTORNEY'S MANUAL § 9-13.410. However, few states had adopted Rule 3.8(e). See LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) at 55-1301-07.

of reasonable suspicion that the communications might be used to facilitate terrorism; the prisoner and lawyer must be given advance notice; privileged communications are to be discarded; and information from the monitoring may not be disclosed to prosecutors or others unless a judge approves or acts of violence or terrorism are imminent.<sup>181</sup> These safeguards, however, have not always been honored.<sup>182</sup> The notice requirement is a two edged sword, since it permits the argument that the defendant has waived the attorney client privilege for monitored conversations.<sup>183</sup>

(b) The Secretary of Defense has also become a regulator of lawyers. Although his rules governing defense counsel in military commission trials have recently lost some of their original stringency,<sup>184</sup> they still require civilian counsel to disclose “information relating to the representation of my client to the extent that I reasonably believe necessary to prevent the commission of a future criminal act that I believe is likely to result in death or substantial bodily harm, or significant impairment of national security.”<sup>185</sup> Most states do not require lawyers to disclose even confidential information identifying an imminent threat to human life, and none treats a danger to national security as a ground for disclosure.<sup>186</sup> An extra twist is that, while defense counsel may be obliged to

---

181. 28 C.F.R. § 501.3(d) (2008).

182. See *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007) (monitoring of lawyer communications with Guantanamo detainees), *vacated*, No. 07-1054 (2008), *reh'g granted*, Jan. 9, 2009; *Lonegan v. Hasty*, 436 F. Supp. 2d 419, 422 (E.D.N.Y. 2006) (monitoring lawyers' conferences with 9/11 detainees without disclosure); *United States v. Reid*, 214 F. Supp. 2d 84 (D. Mass. 2002) (defense lawyer forbidden from disclosing client communications except for defense and receipt of restrictions).

183. *E.g.*, *United States v. Hatcher*, 323 F.3d 666, 674 (8th Cir. 2003).

184. For the previous rules, see Kevin J. Barry, *Military Commissions: Trying American Justice*, ARMY LAW., Nov. 2003, at 1.

185. OFFICE OF MILITARY COMM'NS, OFFICE OF THE SEC'Y OF DEF., DEP'T OF DEF., REGULATIONS FOR TRIAL BY MILITARY COMMISSIONS 46-51 fig.9.2 (2007), available at [www.defenselink.mil/news/April2007/Reg\\_for\\_Trial\\_by\\_mcm.pdf](http://www.defenselink.mil/news/April2007/Reg_for_Trial_by_mcm.pdf); see also *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174, 190 (D.D.C. 2004) (requiring disclosure of information involving future events that threaten national security or involve imminent violence).

186. 2007 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 144-64 (Thomas D. Morgan & Ronald D. Rotunda eds. 2007).

disclose certain client confidences to the government, they also participate in certain hearings from which their clients are excluded,<sup>187</sup> and apparently may not tell their clients without approval about classified materials discussed at those hearings.<sup>188</sup>

(c) By inducing corporations to waive their attorney client privilege in order to avoid indictment, prosecutors found another way to restrict the confidentiality of communications between clients and lawyers. In this case, the government's goal is to punish and deter corporate crime, or at least to promote well publicized prosecutions of corporate employees, in response to Enron and other corporate scandals. The "Thompson Memorandum" of 2003 instructed federal prosecutors to consider a corporation's willingness to waive its privilege in deciding whether to indict it, on the theory that willingness eases the government's task and demonstrates the corporation's wish to reform itself.<sup>189</sup> The same theory supported Deferred Prosecution Agreements in which the Justice Department agreed not to prosecute corporations that agree to waive their privilege and cooperate in other ways.<sup>190</sup> Responding to widespread criticism, the more recent "McNulty Memorandum"<sup>191</sup> and "Filip Policy" moderated the Thompson

---

187. MANUAL FOR MILITARY COMMISSIONS, pt. III, R. 505(h), at 28-30 (2007 ed.) (stating the standard for in camera hearings on proper treatment of classified information), available at <http://www.defenselink.mil/news/commissionsmanual.html>.

188. OFFICE OF MILITARY COMMISSIONS, *supra* note 185, at 49-50. President Obama has now stayed all military commission proceedings pending review of the government's detention practices. Exec. Order No. 13,492, § 7, 74 Fed. Reg. 4897, 4899 (Jan. 27, 2009).

189. Memorandum from Larry D. Thompson, Deputy Att'y Gen., Dep't of Justice, to Heads of Dep't Components, U.S. Attorneys, Dep't of Justice, Principles of Fed. Prosecution of Bus. Org., pt. VI (Jan. 20, 2003), [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm). This memorandum restated a policy asserted during the Clinton administration. See Christopher A. Wray & Robert K. Hur, *Corporate Criminal Procedure in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1099-1100 (2006).

190. Marcia Coyle, *Deferred, Nonprosecution Deals Fall by 60%*, NAT'L L.J., Feb. 9, 2009, at 9; Griffin, *supra* note 105, at 321-23.

191. Memorandum from Paul J. McNulty, Deputy Att'y Gen., Dep't of Justice, to Heads of Dep't Components, U.S. Attorneys, Dep't of Justice, Principles of Fed. Prosecution of Bus. Org., pt. VII (Dec. 12, 2006),

Memorandum, though it remains to be seen whether they have put the genie back in its bottle.<sup>192</sup> Meanwhile, several other federal agencies have adopted similar policies.<sup>193</sup> The federal Sentencing Guidelines have long listed “disclosure of all pertinent information known by the organization” as a prerequisite for sentence reduction based on cooperation.<sup>194</sup>

These measures might be defended as a response to the Supreme Court’s holding in *Upjohn Co. v. United States*,<sup>195</sup> which recognized an attorney client privilege for corporations extending to statements made to corporate counsel by any employee as part of counsel’s investigation of wrongdoing in the corporation. In a sense, obtaining a corporate waiver cancels out that ruling by enabling prosecutors to get employee statements that *Upjohn* may have been too eager to protect.<sup>196</sup> In another sense, *Upjohn* and corporate waivers work together by encouraging corporations to pressure their employees to confess to corporate counsel and then turn them in for the benefit of the corporation and—in some instances—its higher-ups. The employees come out the worst, exposed to prosecution both for their own previous acts confessed to corporate counsel and now to obstruction of justice charges for misleading counsel with knowledge that counsel would then pass the misinformation on to the government.<sup>197</sup>

---

[http://www.usdoj.gov/dag/speeches/2006/mcnulty\\_memo.pdf](http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf); see LAWRENCE D. FINDER & RYAN D. MCCONNELL, ANNUAL CORPORATE PRE-TRIAL AGREEMENT UPDATE 2007, available at [http://papers.ssrn.com/abstract\\_1080263](http://papers.ssrn.com/abstract_1080263) (2008) (reporting decline in percentage of privilege waivers).

192. *Justice Department Announces Revisions to Policy on Corporate Privilege Waivers*, 24 *Laws. Man. on Prof. Conduct (ABA/BNA)* at 473 (2008); Steven M. Witzel & Brenda E. Cooke, *Cooperation, Privilege, and Internal Investigations*, NAT’L L.J., Mar. 9, 2009, at S2.

193. Wray & Hur, *supra* note 189, at 1108-33.

194. U.S. SENTENCING GUIDELINES MANUAL § 8C2.5, cmt. 12 (2007). A specific reference to privilege waiver was recently added, and then deleted. Wray & Hur, *supra* note 189, at 1117-19.

195. 449 U.S. 383 (1981).

196. *Id.* at 401.

197. See Samuel W. Buell, *Criminal Procedure Within the Firm*, 59 *STAN. L. REV.* 1613, 1657 (2007); Griffin, *supra* note 105, at 371-74. *United States v. Stein*, 541 F.3d 130, 136 (2d Cir. 2008), may have extinguished the further gambit of asking the corporation, as evidence of cooperation, not to pay for employees’ counsel.

Whatever the justification for the government's approach to prosecuting corporate crime,<sup>198</sup> it clearly restricts an employee's ability to speak to corporate counsel with practical assurance that what she says will remain private. As a result, counsel must consider issues of professional responsibility ranging from what warning to give an interviewed employee to whether counsel should now be considered subject to all the Constitutional and professional obligations of a government lawyer.<sup>199</sup> These impacts on lawyers and their clients confronting the federal government contrast strikingly with Congress' recent enactment of Federal Rule of Evidence 502, which among other effects encourages disclosures to the government by limiting the scope of the resulting waiver of privilege.<sup>200</sup>

(d) The Deficit Reduction Act of 1984 requires those engaged in a trade or business, including lawyers, to report to the Treasury the amount and payor of all cash payments of more than ten thousand dollars.<sup>201</sup> The lawyers unsuccessfully challenging it have typically been engaged in criminal defense,<sup>202</sup> presumably because their clients are

---

198. For discussions see, for example, Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853 (2007), Griffin, *supra* note 105; Daniel Richman, *Decisions About Coercion: The Corporate Attorney-Client Privilege Waiver Problem*, 57 DEPAUL L. REV. 295 (2008) (defending the waiver policy), and William H. Simon, *After Confidentiality: Rethinking the Professional Responsibilities of the Business Lawyer*, 75 FORDHAM L. REV. 1453, 1454 (2006) (concluding that "[c]orporate confidentiality is dead," and deservedly so).

199. See MODEL RULES OF PROF'L CONDUCT R. 4.3 (2008); ANN. MODEL RULES OF PROF'L CONDUCT 408-09 (6th ed. 2007); Colin P. Marks, *Thompson/McNulty Memo Internal Investigations: Ethical Concerns of the "Deputized" Counsel*, 38 ST. MARY'S L.J. 1065, 1085-99 (2007).

200. FED. R. EVID. 502.

201. 26 U.S.C. § 6050I (2006); see also 26 C.F.R. § 1.6050I-1(c)(7) ex. 2 (2008) (noting that a cash payment received by a criminal defense lawyer is a covered transaction).

202. *E.g.*, United States v. Ritchie, 15 F.3d 592, 595 (6th Cir. 1994). See generally Brian L. Porto, Annotation, *Attorney-Client Privilege and the Reporting of Cash Transactions in Excess of \$10,000, as Required by § 6050I of Internal Revenue Code (26 U.S.C.A. § 6050I)*, 152 A.L.R. FED. 459 (1999 & Supp. 2008). European Union legislation against money laundering that requires lawyer reports has likewise been challenged. *E.g.*, Case C-305/05, *Ordre des barreaux francophones et germanophones v. Conseil des ministres*, 2007 E.C.R. I-5305, I-5306-07 (holding that the legislation does not apply to lawyers in litigation and is valid as to transactional work).

more likely to pay in cash and disclosure of their identities is more likely to incriminate them and expose them and their lawyers to forfeiture. This legislation has some similarity to the 2004 tax shelter legislation already discussed,<sup>203</sup> which requires advisors—including lawyers—in certain transactions to report them to the Internal Revenue Service and to maintain lists of participants for government inspection.<sup>204</sup>

Technically, it might be said that these statutes do not change the law of lawyering. As courts have pointed out when upholding and enforcing them, the attorney client privilege does not usually protect the identity of clients or their financial transactions with lawyers.<sup>205</sup> In exceptional cases in which the privilege applies, courts have found ways to exempt lawyers from disclosing the client's name.<sup>206</sup> Turning from privilege to the lawyer's duty of confidentiality, fees and client identity do constitute confidential information that a lawyer may not reveal unless an exception applies, but compliance with a valid law is one of the exceptions.<sup>207</sup> Beyond technicality, it can be argued that a client who is only able to pay in cash is probably paying with the proceeds of crime. Likewise, if the promoter of a tax shelter is required to disclose information

---

203. *See supra* Part II.B.

204. American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 815, 118 Stat. 1418, 1581 (codified as amended at I.R.C. §§ 6111-12 (2006)). *See generally* Richard Lavoie, *Making a List and Checking It Twice: Must Tax Attorneys Divulge Who's Naughty and Nice?*, 38 U.C. DAVIS L. REV. 141 (2004).

205. *E.g.*, United States v. Blackman, 72 F.3d 1418, 1419 (9th Cir. 1995); United States v. Goldberger & Dubin, P.C., 935 F.2d 501, 504-05 (2d Cir. 1991); Matthew P. Harrington & Eric A. Lustig, *IRS Form 8300: The Attorney-Client Privilege and Tax Policy Become Casualties in the War Against Money Laundering*, 24 HOFSTRA L. REV. 623, 646-53 (1996); *see also* United States v. BDO Seidman, 337 F.3d 802 (7th Cir. 2003) (holding that identities of tax shelter clients were not protected from disclosure).

206. United States v. Sindel, 53 F.3d 874, 876 (8th Cir. 1995); United States v. Gertner, 873 F. Supp. 729, 735 (D. Mass.), *aff'd on other grounds*, 65 F.3d 963 (1st Cir. 1995).

207. *E.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(4) (2008); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 63 (2000).

about a tax shelter to the IRS, why not the lawyer who helped the promoter set up the shelter?<sup>208</sup>

Nevertheless, it makes a difference when lawyers must routinely report the identity and fees of certain clients or face substantial penalties.<sup>209</sup> Sometimes lawyers will report to avoid trouble even when their clients might have had a valid reason not to. Like placing a government surveillance camera at the entrance of a lawyer's office, such requirements, even if justified, change the expectations of clients and reduce the confidentiality that lawyers can offer them.<sup>210</sup>

3. *Controlling legal services lawyers.* Since its creation in 1974,<sup>211</sup> the Legal Services Corporation has helped many people who could not otherwise afford lawyers, but has evoked fierce opposition. As a result, it has been grossly underfunded and subjected to numerous Congressional restrictions.<sup>212</sup> Underfunding is the more serious problem, but regulation by restriction is what will be considered here.

---

208. See *United States v. Lawless*, 709 F.2d 485, 487-88 (7th Cir. 1983) (holding that communication to lawyer was not privileged when information was to be included in client's tax return). The requirements of I.R.C. §§ 6111-12 apply to promoters as well as lawyers.

209. *Gerald B. Lefcourt, P.C. v. United States*, 125 F.3d 79, 81, 88 (2d Cir. 1997).

210. See *Stern & Hoffman*, *supra* note 180, at 1837 (arguing that existing privilege protection is too narrow).

211. Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378 (codified as amended at 42 U.S.C. §§ 2996-2996l (2000)). Precursor federal programs, part of the War on Poverty, date back to 1964. See generally EARL JOHNSON, JR., *JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM* (1974).

212. William P. Quigley, *The Demise of Law Reform and the Triumph of Legal Aid: Congress and the Legal Services Corporation from the 1960's to the 1990's*, 17 ST. LOUIS U. PUB. L. REV. 241 (1998). Some restrictions are codified in 42 U.S.C. §§ 2996e-2996f. Congress included others in appropriations bills. See, e.g., Act of Apr. 26, 1996, Pub. L. No. 104-134, §§ 501-09, 110 Stat. 1321, 1321-51 to 1321-59, continued by, Act of Nov. 22, 2005, Pub. L. No. 109-108, tit. V, 119 Stat. 2290, 2328. Legal Services Corporation regulations, cited below, embody the Corporation's construction of the restrictions. See generally David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CAL. L. REV. 209 (2003) (relating these restrictions to attacks on IOLTA funds and attorney fee recovery statutes).

Forbidding Legal Services Corporation lawyers to accept many kinds of cases and clients might not look like professional regulation, but it is. True, it may be a valid Constitutional argument that Congress may decide which services to subsidize and may require its grantees to use grants only to provide those services.<sup>213</sup> But the result is to exclude much of the very limited pool of lawyers available to represent the poor<sup>214</sup> from certain kinds of practice, which are to that extent unavailable to poor clients. The situation is comparable, albeit less sweeping, to legislation excluding treatments of certain diseases from Medicare and Medicaid. Congress extended the impact of its prohibitions by providing that they extend to all of a legal services organization's activities, not just those federally funded.<sup>215</sup> Many states have likewise enacted similar restrictions for activities funded by their Interest on Lawyer Trust Account (IOLTA) plans, which are the main source of funding for legal services in civil matters outside the Legal Services Corporation.<sup>216</sup> So, poor people may be able to obtain legal assistance in certain legal matters only from lawyers in private practice willing to live up to their obligation to help those who cannot afford to pay.<sup>217</sup> It is also possible that, had Congress not created the Legal Services Corporation and saddled it with restrictions, a less restrictive system might have come into existence. If that is so, which is far

---

213. *Compare* *Rust v. Sullivan*, 500 U.S. 173 (1991) (accepting this rationale), *with* *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) (recognizing limited exception).

214. *See generally* DEBORAH L. RHODE, *ACCESS TO JUSTICE* 1, 13, 61-62 (2004); Rebecca L. Sandefur, *Lawyers' Pro Bono Service and American-Style Civil Legal Assistance*, 41 *LAW & SOC'Y REV.* 79, 83-85 (2007).

215. Act of Apr. 26, 1996, Pub. L. No. 104-134, § 504(d)-(e), 110 Stat. 1321, 1321-56 to 1321-57 (codified at 45 C.F.R. §§ 1610.1-.9 (2007)); David S. Udell, *The Legal Services Restrictions: Lawyers in Florida, New York, Virginia, and Oregon Describe the Costs*, 17 *YALE L. & POL'Y REV.* 337, 338 (1999). For the pending challenge to the restriction, see *Brooklyn Legal Servs. Corp. B v. Legal Servs. Corp.*, 462 F.3d 219 (2d Cir. 2006).

216. Robert R. Kuehn, *Undermining Justice: The Legal Profession's Role in Restricting Access to Legal Representation*, 2006 *UTAH L. REV.* 1039, 1054-56.

217. MODEL RULES OF PROF'L CONDUCT R. 6.1 (2008) (non-mandatory provision); DEBORAH L. RHODE, *PRO BONO IN PRINCIPLE AND IN PRACTICE* 19-21, 133-42 (2005).

from certain, Congress is not just declining to fund certain services, but has blocked others from offering them.

The restrictions in question are significant ones. Prisoners and most illegal aliens may receive no services at all,<sup>218</sup> even though they have long been considered especially in need of help.<sup>219</sup> Others may not receive services in matters of abortion, desegregation, redistricting, certain evictions of people with drug records from public housing, or assisted suicide.<sup>220</sup> Note that the first three of these categories concern Constitutional rights. If a state's ethics rules were to impose such restrictions on part of the bar, it would be considered a radical innovation.

Another class of Congressional restrictions is based, not on the client or the nature of the case, but on the services a Legal Services Corporation lawyer may provide; therefore it regulates how lawyers may practice law, forbidding certain otherwise lawful means of representing clients. The Supreme Court struck down one such restriction, reasoning that to allow legal services lawyers to represent clients seeking welfare rights while prohibiting them from trying to change or challenge existing law in the process was an infringement of free speech.<sup>221</sup> However, prohibitions on class actions, legislative representation, and participation in agency rulemaking remain on the books.<sup>222</sup> So does a ban on accepting cases resulting from in-person solicitation,<sup>223</sup> even

---

218. Act of Apr. 26, 1996, Pub. L. No. 104-134, § 504(a)(11), (15), 110 Stat. 1321, 1321-54 to 1321-55; 45 C.F.R. §§ 1626.1-.12, 1637.1-.5 (2007).

219. *E.g.*, Exodus 22:21; Matthew 25:34-40.

220. 42 U.S.C. §§ 2996(b), 14404(a)-(b)(1)(E) (2000); § 504(a)(1), (14), (17), 110 Stat. at 1321-54 to -56; 45 C.F.R. §§ 1632.1-.4, 1633.1-.4, 1643.1-.5 (2007).

221. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) (holding § 504(a)(16), 110 Stat. at 1321-55 to -56, unconstitutional, which purported to bar any efforts to reform the welfare system).

222. § 504(a)(2)-(4), (7), 110 Stat. at 1321-53; 45 C.F.R. §§ 1612.1-.11, 1617.1-.4 (2007); *cf.* MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2008) (stating that a lawyer may limit the scope of representation if the limit is "reasonable" and the client "gives informed consent"); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 334 (1975) (declaring that prohibition of class actions when needed to protect a client's interests would be unethical).

223. § 504(a)(18), 110 Stat. at 1321-56; 45 C.F.R. § 1638.1-.5 (2007).

though such solicitation is lawful when not conducted for pecuniary gain.<sup>224</sup>

Lastly, Congress has on several occasions required Legal Services Corporation lawyers to withdraw from pending cases. When it imposed new restrictions in 1996, it provided that lawyers should cease representing clients in violation of those restrictions, in some instances after a brief grace period.<sup>225</sup> Withdrawal is likewise required when a client, during the representation, becomes a prisoner or enters the prohibited category of aliens.<sup>226</sup> In 1982, and again in 1996, Congress drastically reduced the funding the Corporation received,<sup>227</sup> forcing legal services organizations to terminate representation of many clients. The American Bar Association Ethics Committee struggled to find ways in which these terminations could be reconciled with professional rules.<sup>228</sup> In reality, the rules on termination of services<sup>229</sup> had changed for legal services lawyers. Because Congress has provided that no previous Corporation grantee may be given any preference in the competition for new and renewed grants,<sup>230</sup> there may well be future client terminations when grants shift to new grantees, even if the Corporation avoids future funding cuts.

### III. PROTECTING NONCLIENTS FROM LAWYERS

Although the protection of opposing parties and third persons against overzealous lawyers has long been a goal of

---

224. *In re Primus*, 436 U.S. 412 (1978); MODEL RULES OF PROF'L CONDUCT R. 7.3(a) (2008).

225. Act of Apr. 26, 1996, Pub. L. No. 104-134, § 508(b), 110 Stat. 1321, 1321-57 to 1321-58.

226. 45 C.F.R. §§ 1626.9, 1637.4 (2007).

227. Quigley, *supra* note 212, at 256-57, 260-61. The Nixon administration also tried to defund the legal services program, but was blocked by injunction. *Local 2677, Am. Fed'n of Gov't Employees v. Phillips*, 358 F. Supp. 60, 65, 83 (D.D.C. 1973).

228. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 96-399 (1996); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 347 (1981).

229. *E.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.16 (2008).

230. Act of Apr. 26, 1996, Pub. L. No. 104-134, § 503(e), 110 Stat. 1321, 1321-53; 45 C.F.R. § 1634.9(b) (2007).

professional regulation,<sup>231</sup> it occupies a relatively small role in contemporary lawyer codes compared to the delineation and enforcement of lawyers' duties to their clients. To use a crude measure, roughly eleven of the fifty-eight rules of the Model Rules of Professional Conduct are primarily concerned with a lawyer's obligations to nonclients.<sup>232</sup>

One explanation is that the proper functioning of the adversary system requires giving lawyers considerable freedom to pursue their clients' interests.<sup>233</sup> Another is that lawyers benefit more from protecting their professional interests and the interests of those who retain them than from looking out for others.<sup>234</sup> Under either explanation, there is much room for outside regulators to step in, rightly or wrongly, to protect nonclients from lawyers. That has frequently happened in recent decades, sometimes on the initiative of an interest group harmed by lawyers' activities, and sometimes not. In addition, following the Supreme Court's rejection of a professional exception to the antitrust laws,<sup>235</sup> courts have become more willing to apply to the practice of law general legislation forbidding antisocial

---

231. *See* Rose, *supra* note 12, at 49-73.

232. MODEL RULES OF PROF'L CONDUCT R. 3.1-3.4, 3.8, 4.1-4.4, 8.2, 8.3 (2008).

233. For critical analyses of such claims, see sources cited *supra* note 3.

234. *Compare* MAGALI SARFATTI LARSON, THE RISE OF PROFESSIONALISM (1977) (describing the classical statement of the professional self-interest theory), *with* BURRAGE, *supra* note 12 (providing a powerful critique of that theory).

235. Goldfarb v. Va. State Bar, 421 U.S. 773, 787 (1975).

conduct of one sort or another,<sup>236</sup> even when this exposes lawyers to criminal sanctions.<sup>237</sup>

Some changes that I consider as meant to protect nonclients grow out of measures traditionally defended as protecting clients. Regulating the size of contingent fees is one example. The older examples of such regulation emanated from the bench and bar, and applied across the board to all personal injury actions.<sup>238</sup> Recently, almost half the states have passed restrictions limited to medical malpractice actions, almost always as part of a package of similarly limited measures.<sup>239</sup> Clearly, these statutes are

---

236. *E.g.*, *Bakker v. McKinnon*, 152 F.3d 1007, 1012-13 (8th Cir. 1998) (affirming an award of punitive damages under the Fair Credit Reporting Act against a lawyer who improperly obtained opposing party's credit information); *Stochastic Decisions, Inc. v. DiDomenico*, 995 F.2d 1158, 1161-64 (2d Cir. 1993) (affirming district court's finding of liability under RICO and state transfer in fraud of creditors statute for helping clients frustrate judgment); *Kimmel v. Goland*, 793 P.2d 524, 526-27, 531 (Cal. 1990) (holding that attorney was not immune from liability under state privacy statute for assisting clients with phone eavesdropping). *But see, e.g.*, *Custer v. Sweeney*, 89 F.3d 1156, 1162 (4th Cir. 1996) (noting that a lawyer representing an employee benefits plan is not ordinarily an ERISA "fiduciary").

237. *E.g.*, *United States v. Cueto*, 151 F.3d 620, 626-27, 634-36 (7th Cir. 1998) (finding obstruction of justice and conspiracy to defraud U.S. where a lawyer obtained state court injunction to block a FBI investigation threatening the lawyer and his client); *United States v. Eisen*, 974 F.2d 246 (2d Cir. 1992) (affirming holding that attorneys, law firm's investigators, and its office administrator could be liable as a fraudulent racketeering enterprise under RICO); *United States v. Sattar*, 395 F. Supp. 2d 79, 84-85, 90-91 (S.D.N.Y. 2005) (upholding jury's conviction of defendant for conspiracy to defraud and making false statements in order to frustrate administrative measure limiting her imprisoned client's communications). *But see, e.g.*, *Maness v. Meyers*, 419 U.S. 449, 468 (1975) (holding a lawyer cannot be convicted for advising client, in good faith, to assert 5th Amendment privilege); *Commonwealth v. Stenhach*, 514 A.2d 114, 125-27 (Pa. Super. Ct. 1986) (holding that statutes pertaining to hindering prosecution and evidence tampering were unconstitutionally overbroad as applied to proper lawyer activities). For further discussion, see Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 *FORDHAM L. REV.* 327 (1998).

238. MICH. CT. R. 8.121; N.J. CT. R. 1:21-7; N.Y. APP. DIV. 1ST DEP'T R. 603.7; *see also* WOLFRAM, *supra* note 24, at 534-45 (discussing, generally, limits on contingent fees).

239. Casey L. Dwyer, Note, *An Empirical Examination of the Equal Protection Challenge to Contingency Fee Restrictions in Medical Malpractice Reform Statutes*, 56 *DUKE L.J.* 611, 615-17 & 615 n.20 (2006) (citing statutes from twenty-four states).

based at least in part on the theory that contingent fees promote the multiplication of socially undesirable claims<sup>240</sup> from which medical service providers should be protected. In a sense, such measures circle back to a still earlier period in which contingent fees were banned altogether as stirring up litigation.<sup>241</sup>

#### A. *Lawyers As Debt Collectors*

In 1986, Congress amended the Fair Debt Collection Practices Act (FDCPA)<sup>242</sup> to remove a previous exemption for lawyers collecting debts for clients.<sup>243</sup> That is something that American lawyers have long done, both by bringing suit for creditors<sup>244</sup> and by seeking to collect debts without suit.<sup>245</sup> Both kinds of collection are now subject to the FDCPA<sup>246</sup> when the debtors are natural persons and the lawyer regularly attempts to collect debts.<sup>247</sup> As a result, many

---

240. See, e.g., Lester Brickman, *On the Relevance of the Admissibility of Scientific Evidence: Tort System Outcomes Are Principally Determined By Lawyers' Rates of Return*, 15 CARDOZO L. REV. 1755, 1774-78 (1994). For another view, see HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENT FEE LEGAL PRACTICE IN THE UNITED STATES (2004).

241. See, e.g., F.B. MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES (1964); see also *supra* text accompanying notes 129-31.

242. Pub. L. No. 95-109, 91 Stat. 874, (codified as amended at 15 U.S.C. §§ 1692-1692p (1977)).

243. Act of July 9, 1986, Pub. L. No. 99-361, 100 Stat. 768 (repealing former 15 U.S.C. § 1692a(6)(F)).

244. On debt litigation as formerly constituting the main civil business of courts, see, for example, ROBERT A. SILVERMAN, LAW AND URBAN GROWTH: CIVIL LITIGATION IN THE BOSTON TRIAL COURTS, 1880-1900 (1981); Clinton W. Francis, *Practice, Strategy, and Institution: Debt Collection in the English Common-Law Courts, 1740-1840*, 80 NW. U. L. REV. 807 (1986).

245. MAXWELL BLOOMFIELD, AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876, at 277 (1976).

246. *Heintz v. Jenkins*, 514 U.S. 291, 298-99 (1995). Compare CAL. BUS. & PROF. CODE § 6077.5 (2008) (providing that attorneys are covered by the California debt collector statute), with *Reid v. Ayers*, 531 S.E.2d 231, 236 (N.C. Ct. App. 2000) (holding lawyers are not covered by North Carolina's debt collector statute).

247. 15 U.S.C. § 1692a(3), (6) (2006); see, e.g., *Hodges v. Sasil Corp.*, 915 A.2d 1, 11 (N.J. 2007) (holding that lawyers who regularly file summary dispossess actions for nonpayment of rent are debt collectors subject to the FDCPA).

lawyers are now subject to provisions intended to prevent harassment of debtors and ensure accurate and full disclosure.<sup>248</sup>

Applying the FDCPA to lawyers was not regulation by inadvertence such as we have encountered elsewhere. Although there is no sign that Congress considered anything so dull as the Model Rules of Professional Conduct, it did make an explicit decision to include lawyers and has since twice amended the statute to limit its application to judicial pleadings.<sup>249</sup> The legislative history of the 1986 statute<sup>250</sup> states two reasons for its passage. One (pressed by organizations of competing debt collectors) was that lawyers were taking advantage of their exclusion from the FDCPA to advertise that they were not bound by its restrictions and to expand their share of the market. The other (pressed by consumer groups including the legal consumer organization H.A.L.T.) was that some lawyer collectors had acted abusively, and that they had not received professional discipline. Unsurprisingly, the American Bar Association and Commercial Lawyers League argued to the contrary.

The FDCPA adds to preexisting professional rules by making far more detailed their vague prohibition of acts that are criminal, or fraudulent, or “have no substantial purpose other than to embarrass, delay, or burden a third person.”<sup>251</sup> It forbids acts ranging from communicating with the debtor at inconvenient times, to refusing to stop communicating when requested, to disclosing embarrassing facts to the debtor’s employer, to making anonymous phone calls, to using abusive and profane language.<sup>252</sup> One might assume in favor of the usual bar regulators that they have not enacted similar prohibitions because they find them

---

248. 15 U.S.C. §§ 1692b-i (2006).

249. Act of Oct. 13, 2006, Pub. L. No. 109-351, § 802(a), 120 Stat. 1966, 2006 (codified at 15 U.S.C. § 1692g(d)); Act of Sept. 30, 1996, Pub. L. No. 104-208, § 2305, 110 Stat. 3009, 3009-425 (codified at 15 U.S.C. § 1692e(11) (2006)).

250. H.R. REP. NO. 99-405, at 2-12 (1985); 131 CONG. REC. 33,583 (1985). There was no Senate committee report or floor discussion.

251. See MODEL RULES OF PROF’L CONDUCT R. 1.2(d), 4.4(a), 8.4(b) (2008).

252. 15 U.S.C. §§ 1692c, 1692d, 1692f (2006).

implicit in the existing rules,<sup>253</sup> or because they think that specifying the duties of each kind of practitioner would be too cumbersome. Yet, it would be hard to object to the substance of the prohibitions, and ground rules applicable to all debt collectors may provide useful guidance and obviate a race to the bottom.

Although the prevention of lawyer dishonesty has been a major concern of the bench and bar,<sup>254</sup> here too the FDCPA has changed the rules. For one thing, courts applying the statute are often meticulous in detecting inaccuracies in a collector's assertions, for example, when a letter purports to come from a lawyer who has not in fact been meaningfully involved in the case.<sup>255</sup> For another, the FDCPA requires an array of disclosures when a debt collector communicates with a debtor,<sup>256</sup> while the traditional regulatory authorities do not require lawyers to volunteer information except when that is necessary to avoid assisting unlawful acts or to prevent what they say from being misleading.<sup>257</sup> Once again, courts enforce the statutory requirements with rigor.<sup>258</sup>

As in other situations we have considered,<sup>259</sup> the FDCPA's sanctions provisions are at least as important as its substantive requirements, in this instance because they

---

253. *See, e.g.*, *La. State Bar Ass'n v. Harrington*, 585 So. 2d 514, 517 (La. 1991) (disciplining attorney for invading debtor's home, making threats and false statements); *In re Bechhold*, 771 P.2d 563, 564 (Mont. 1988) (disciplining attorney for harassing debtor corporation's employee).

254. *E.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.3, 3.4(b), 4.1, 4.3, 8.4(c) (2008).

255. *E.g.*, *Nielsen v. Dickerson*, 307 F.3d 623, 631 (7th Cir. 2002); *see also* *McMillan v. Collection Prof'ls, Inc.*, 455 F.3d 754, 761-63 (7th Cir. 2006) (finding that language questioning debtor's good intentions could mislead unsophisticated reader); *Bartlett v. Heibl*, 128 F.3d 497, 500 (7th Cir. 1997) (finding confusing statements about when creditor would sue).

256. 15 U.S.C. §§ 1692e(11), 1692g(a) (2006).

257. *See* MODEL RULES OF PROF'L CONDUCT R. 4.1(b) & cmt. 1, 4.3 (2008).

258. *E.g.*, *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols & Clark L.L.C.*, 214 F.3d 872, 875-76 (7th Cir. 2000) (holding that duty to state sum due required lawyer to calculate interest as of the date of the letter, rather than saying that interest would be added); *Carroll v. Wolpoff & Abramson*, 961 F.2d 459, 460-61 (4th Cir. 1992) (noting failure to state in follow up letter that only purpose was debt collection).

259. *See supra* Part II.A.

markedly increase a lawyer's incentives to heed the concerns of an opposing party even at the expense of his client. Violating the statute exposes a lawyer to an action for damages, a penalty of up to one thousand dollars, and attorney fees.<sup>260</sup> The plaintiff need not show negligence, though the lawyer can avoid liability by showing that he made a good faith error despite following procedures reasonably calculated to avoid mistakes.<sup>261</sup> This diverges strikingly from the view that proper representation requires that a lawyer often be protected except in egregious circumstances from liability to an opposing party.<sup>262</sup> For example, the Tenth Circuit has held that a plaintiff may go to the jury on the claim that a lawyer sued for relief to which, as a matter of law, his client turned out not to be entitled, even though the lawyer had ascertained that there was no relevant authority on either side (except some default judgments supporting his client's position) because the lawyer did not try to predict how the state supreme court would resolve the issue.<sup>263</sup> This departs from previous authority protecting lawyers who make a good faith argument for the extension or modification of existing law.<sup>264</sup>

## B. *Bankruptcy Lawyers*

1. *Conflict of interest rules.* As part of the Bankruptcy Reform Act of 1978, Congress enacted standards for use in appointing lawyers and other professionals to assist or represent the trustee in bankruptcy or debtor in possession. These provide for court approval of persons who "do not hold or represent an interest adverse to the estate, and that are

---

260. 15 U.S.C. § 1692k(a) (2006).

261. 15 U.S.C. § 1692k(c) (2006).

262. *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 51 cmt. c, & Reporter's Note, 57 (2000).

263. *See Johnson v. Riddle*, 443 F.3d 723, 727, 730 (10th Cir. 2006); *see also Todd v. Weltman, Weinberg & Reis Co.*, 434 F.3d 432, 437-47 (6th Cir. 2006) (finding that lawyer who wrote affidavit supporting garnishment not entitled to absolute witness immunity).

264. *See* FED. R. CIV. P. 11(b)(2); MODEL RULES OF PROF'L CONDUCT R. 3.1 (2008).

disinterested persons.”<sup>265</sup> A lawyer who represents a creditor is not automatically disqualified in certain proceedings, but may not be appointed over objection if the court finds an “actual conflict of interest.”<sup>266</sup>

These provisions presumably respond to some of the characteristics of bankruptcy proceedings. Such proceedings often involve many creditors and other parties who may shift between cooperation and conflict. These parties may have different views about how the bankrupt estate should be administered, as may the bankrupt debtor and (if the debtor is a corporation) its constituents. The court is charged with protecting relevant interests and preventing lawyers and others from plundering the estate; hence the requirement that it approve appointments and fee awards out of the estate, and that appointees fully disclose to it potential conflicts.<sup>267</sup>

Just how these bankruptcy provisions, as applied, add to the conflicts of interest rules applicable to other lawyers is hard to say. There are many types of bankruptcy conflicts, each with its own accumulation of caselaw.<sup>268</sup> The special features of bankruptcy proceedings sometimes make comparison to other cases difficult. The Bankruptcy Code does not follow the general approach to conflicts of the Model Rules of Professional Conduct, but uses its own terminology—for example “disinterested person”<sup>269</sup> and

---

265. Pub. L. No. 95-598, § 327(a), 92 Stat. 2549, 2563 (1978) (codified as amended at 11 U.S.C. § 327(a) (2006)). On these provisions’ applicability to debtors in possession, see 11 U.S.C. § 1107(a) (2006); *Lamie v. U.S. Trustee*, 540 U.S. 526, 536-39 (2004).

266. 11 U.S.C. § 327(c) (2006).

267. 11 U.S.C. §§ 327-29 (2006); FED. R. BANKR. P. 2014, 2016.

268. See generally STANLEY B. BERNSTEIN, COLLIER COMPENSATION EMPLOYMENT AND APPOINTMENT OF TRUSTEES AND PROFESSIONALS IN BANKRUPTCY CASES 1.03-1.07 (2005); William I. Kohn et al., *Deciphering Conflicts of Interest in Bankruptcy Representation: An Update*, 105 COM. L.J. 95 (2000).

269. 11 U.S.C. §§ 101(14), 327(a) (2006). See generally Todd J. Zywicki, *Mend It, Don’t End It: The Case for Retaining the Disinterestedness Requirement for Debtor in Possession’s Professionals*, 18 MISS. C. L. REV. 291 (1998). As this article notes, disinterestedness was sometimes required even before the Bankruptcy Code was enacted in 1978, but the Code expanded the requirement’s scope. *Id.* at 297-98.

“actual conflict,”<sup>270</sup>—to which caselaw has added a spongy “appearance of conflict” inquiry.<sup>271</sup> So it is not surprising that more than one group of reformers has abandoned the effort to improve the resulting precedential morass.<sup>272</sup> Perhaps the most that can be said is that the requirements for disclosure to the court,<sup>273</sup> and their enforcement by denial of compensation<sup>274</sup> and occasional criminal sanctions,<sup>275</sup> seem to go beyond those applicable outside bankruptcy.

Whatever their details may be, the Bankruptcy Code’s provisions are meant to do more than protect the Trustee or debtor in possession that counsel is to advise or represent. They also tend to ensure that counsel will not favor the interests of the debtor or of one group of creditors, but will collect as much money as possible for the creditors. That is consistent with the nature of bankruptcy proceedings, in which the bankrupt debtor’s assets are to be collected and divided among the creditors.

2. *Representing consumer debtors.* By the time Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA),<sup>276</sup> the protection of creditors in consumer bankruptcy cases was at the core of its concern. That is so whether one views the goal of the Act as preventing irresponsible debtors from going bankrupt to

---

270. 11 U.S.C. § 327(c); *see also In re First Jersey Sec., Inc.*, 180 F.3d 504, 514 (3d Cir. 1999).

271. *See, e.g., In re Martin*, 817 F.2d 175, 183 (1st Cir. 1987).

272. *See generally* Charles W. Wolfram, *The Boiling Pot of Lawyer Conflicts in Bankruptcy*, 18 MISS. C. L. REV. 383 (1998). For reform proposals, *see* Nancy B. Rapoport, *Turning and Turning in the Widening Gyre: The Problem of Potential Conflicts of Interest in Bankruptcy*, 26 CONN. L. REV. 913, 975-95 (1994).

273. 11 U.S.C. §§ 327, 328 (2006); FED. R. BANKR. P. 2014, 2016.

274. *See, e.g., Rome v. Braunstein*, 19 F.3d 54 (1st Cir. 1994); *In re The Leslie Fay Cos.*, 175 B.R. 525 (Bankr. S.D.N.Y. 1994); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37 (2000) (fee forfeiture).

275. *See, e.g., United States v. Gellene*, 182 F.3d 578, 585-89 (7th Cir. 1999). For the story behind this decision, *see* MILTON C. REGAN JR., *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* (2004).

276. Pub. L. No. 109-8, 119 Stat. 23.

duck their debts, as did many of the Act's supporters,<sup>277</sup> or as advancing the interests of the credit industry at the expense of the financially distressed, as did many of its opponents.<sup>278</sup> Whatever the goal, Congress for the most part did not focus specifically on lawyers but targeted a broad class of "debt relief agen[cies]."<sup>279</sup> It is not even clear that lawyers are included in this class, but the more persuasive analyses conclude that they are,<sup>280</sup> and I shall follow that view.

Two provisions of BAPCPA require debt relief agencies to give clients what amounts to misleading advice. One forbids them to advise clients to "incur more debt in contemplation" of bankruptcy.<sup>281</sup> As noted by the courts that have found this provision to violate the First Amendment,<sup>282</sup> incurring debt (for example by refinancing a mortgage at a lower interest rate) is sometimes a lawful way to advance a client's interests. Presumably, this provision would require a lawyer to refuse to answer or give false advice if a client sought her counsel on such a refinancing. The second provision requires advising clients that, if they file for

---

277. See, e.g., H.R. REP. NO. 109-31, at 1-22 (2005); 151 CONG. REC. S1813, S1842-45 (2005) (statement of Sen. Hatch); see also Todd J. Zywicki, *An Economic Analysis of the Consumer Bankruptcy Crisis*, 99 NW. U. L. REV. 1463, 1525-27 (2005) (defending a variant of this view).

278. See, e.g., 151 CONG. REC. S1835-41 (2005) (statement of Sen. Kennedy); Susan Block-Lieb & Edward J. Janger, *The Myth of the Rational Borrower: Rationality, Behavioralism, and the Misguided "Reform" of Bankruptcy Law*, 84 TEX. L. REV. 1481 (2006); Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 STAN. L. REV. 213 (2006).

279. 11 U.S.C. § 101(12A) (2006).

280. E.g., *Milavetz, Gallop & Milavetz P.A. v. United States*, 541 F.3d 785, 791-92 (8th Cir. 2008); Jean Braucher, *The Challenge to the Bench and Bar Presented by the 2005 Bankruptcy Act: Resistance Need Not Be Futile*, 2007 U. ILL. L. REV. 93, 113-17. *Contra In re Reyes*, 361 B.R. 276, 280 (Bankr. S.D. Fla. 2007).

281. 11 U.S.C. § 526(a)(4) (2006).

282. E.g., *Milavetz*, 541 F.3d at 794. *But see* *Hersh v. United States*, No. 07-10226, 2008 U.S. App. LEXIS 26510 (5th Cir. Dec. 18, 2008) (reading statute narrowly to avoid this Constitutional issue).

bankruptcy, they will have to pay a filing fee,<sup>283</sup> which is not always the case.<sup>284</sup>

Obviously, requiring lawyers to abstain from advising acts that will benefit clients without violating the law or compelling them to provide inaccurate information changes the law of lawyering.<sup>285</sup> The closest parallel is one we have already discussed, the rule that a tax lawyer may not consider when giving certain advice: the likelihood that the IRS will fail to catch his client.<sup>286</sup> But tax advice based on that likelihood comes close to encouraging unlawful acts, which is far more dubious than the impact on lawful acts that BAPCPA seeks to ban.

Another BAPCPA provision protecting creditors forbids debt relief agencies to make or advise any statement “that is untrue and misleading, or that upon the exercise of reasonable care, should have been known by such agency to be untrue or misleading.”<sup>287</sup> The statute provides for court penalties but does not mention liability to opposing parties; and, although the quoted language appears to forbid negligence or even impose strict liability, the sanction clause points in the opposite direction.<sup>288</sup> Whether this provision modifies the usual prohibitions of knowing lawyer dishonesty<sup>289</sup> thus remains to be determined. The same may be true of other lawyer sanction provisions in BAPCPA.<sup>290</sup>

Some of BAPCPA’s provisions regulating lawyers and other debt relief agencies appear to benefit debtor clients but might also be considered as creditor protection. These provisions require debt relief agencies to honor representations to clients, exact extensive disclosures and written contracts, and compel the inclusion of information

---

283. 11 U.S.C. § 527(b) (2006).

284. 28 U.S.C. § 1930(f) (2006).

285. See MODEL RULES OF PROF’L CONDUCT R. 2.1 (2008).

286. 31 C.F.R. §§ 10.35(c)(3)(iii), 10.37(a) (2008); see also *supra* Part II.B.

287. 11 U.S.C. § 526(a)(2) (2006).

288. 11 U.S.C. § 526(c)(5) (stating that the court may penalize intentional violations or clear and consistent patterns of violation).

289. See 15 U.S.C. §§ 1692b-i (2006).

290. See 11 U.S.C. § 707(b)(4)(B) (2006).

in advertisements.<sup>291</sup> These might well be considered enlightened consumer protection provisions such as only a few states have yet enacted for the clients of lawyers.<sup>292</sup> One might also view them as helping creditors by confronting debtors with warnings that filing for bankruptcy will subject them to arduous requirements and potential criminal liabilities.<sup>293</sup> On either reading, these provisions regulate the relationship between lawyers and clients.

A final BAPCPA provision treats lawyers as gatekeepers for clients entering reaffirmation agreements. Such agreements revive debts that a discharge in bankruptcy would otherwise cancel, in exchange for some benefit such as being allowed to keep property subject to a security interest. Enlarging a requirement dating to 1984,<sup>294</sup> BAPCPA requires any lawyer who has represented the debtor in negotiating a reaffirmation agreement to certify, *inter alia*, that it does not impose an undue hardship on the debtor or the debtor's dependent, and in certain cases that in the lawyer's opinion the debtor is able to make the payment.<sup>295</sup> Making such a certification without adequate investigation exposes a lawyer to fee forfeiture, and perhaps other sanctions.<sup>296</sup> The certification requirement is meant to

---

291. 11 U.S.C. §§ 526(a)(1), (3), 527, 528 (2006).

292. *See* N.Y. COMP. CODES R. & REGS. tit. 22, §§ 1210.1 (2007) (posting statement of client rights); *id.* at 1215.1-2 (letter of engagement); *id.* at 1400.1-.5 (provisions for domestic relations lawyers); RULES REGULATING THE FLA. BAR: FLA. R. PROF'L CONDUCT R. 4-1.5(f), *available at* <http://www.floridabar.org> (click "Links"; then click "Rules Regulating the Florida Bar") (similar rules for contingent fee cases). *See generally* Stephen Gillers, *Caveat Client: How the Proposed Final Draft of the Restatement of the Law Governing Lawyers Fails to Protect Unsophisticated Consumers in Fee Agreements with Lawyers*, 10 GEO. J. LEGAL ETHICS 581 (1997).

293. *See, e.g.*, 11 U.S.C. §§ 342(b)(1), 527(a) (2006).

294. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 308(b)(3), 98 Stat. 333, 354; *see also* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 103(a), 108 Stat. 4106, 4108.

295. 11 U.S.C. § 524(c)(3), (k)(5) (2006).

296. *See* FED. R. BANKR. P. 9011; *In re Vargas*, 257 B.R. 157, 167 (Bankr. D.N.J. 2001). A similar BAPCPA provision requires lawyers to certify, subject to sanctions, that their clients' petitions, pleadings, and motions are well grounded in fact. *See* 11 U.S.C. § 707(b)(4)(C), (5)(A) (2006).

protect debtors from making improvident agreements,<sup>297</sup> though it has been argued that the credit industry favored it in order to avoid more stringent judicial scrutiny.<sup>298</sup> Reaffirmation agreements are thus added to the many transactions in which lawyer opinion letters are, by law or practice, required and their authors are subject to liability.<sup>299</sup> It differs from most of them in that the requirement protects the client rather than a third party, calls on the lawyer to pronounce on issues of fact, and ultimately imposes the costs of the lawyer's investigation on clients far poorer than those who engage in other transactions requiring lawyer certification.

### C. Securities Lawyers

1. *Liability for securities fraud.* Starting in the late 1960s, the SEC increasingly targeted lawyers in its enforcement of antifraud securities legislation.<sup>300</sup> Soon, private plaintiffs were asserting damages claims against

---

297. See generally David B. Wheeler & Douglas E. Wedge, *A Fully-Informed Decision: Reaffirmation, Disclosure and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 789 (2005).

298. See, e.g., Jason J. Kilburn, *Who's in Charge Here?: Putting Clients in Their Place*, 37 GA. L. REV. 1, 52-55 (2002). See generally Marianne B. Culhane & Michaela M. White, *Debt After Discharge: An Empirical Study of Reaffirmation*, 73 AM. BANKR. L.J. 709 (1999) (concluding that lawyer scrutiny often fails to prevent imprudent reaffirmations).

299. See MODEL RULES OF PROF'L CONDUCT R. 2.3 (2008) (describing lawyer's duties when asked to provide opinion to be relied on by nonclient); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51(2) cmt. e, Reporter's Note cmt. e; *supra* Part II.B (discussing tax shelter opinions). FED. R. CIV. P. 11, as remodeled in 1983 and 1993, likewise makes lawyers into gatekeepers. See, e.g., FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE § 3.13 (5th ed. 2001). See generally JOHN C. COFFEE JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 192-244 (2006).

300. See, e.g., SEC v. Spectrum, Ltd., 489 F.2d 535 (2d Cir. 1973); SEC v. Frank, 388 F.2d 486 (2d Cir. 1968); SEC v. Nat'l Student Mktg. Corp., 360 F. Supp. 284 (D.D.C. 1973); 457 F. Supp. 682 (D.D.C. 1978); see also *In re Carter & Johnson*, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,847 (SEC 1981) (asserting disciplinary authority over securities lawyers who fail to deal appropriately with client fraud); *In re Keating, Muething & Klekamp*, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,124 (SEC 1979) (disciplining firm for lack of internal procedures to gather and evaluate facts known to its lawyers).

lawyers under provisions of that legislation.<sup>301</sup> Much of the organized bar resisted,<sup>302</sup> and the Supreme Court subsequently narrowed the scope of securities law liability in general<sup>303</sup> and of the damages liability of lawyers and accountants in particular.<sup>304</sup> Plaintiffs have continued to name lawyers as defendants, both in individual suits and in class actions, but only when the lawyers themselves can be shown to have engaged in knowing or reckless falsehood<sup>305</sup> do plaintiffs have much hope of success.<sup>306</sup>

Even though the rules of law applied in securities fraud actions against lawyers may not differ much, if at all, from the traditional prohibition of dishonesty,<sup>307</sup> the possibility of being sued by a nonclient, perhaps in a class action, may nudge lawyers toward more disclosure and greater care in framing assertions. Like legal malpractice suits, such actions may be tried by juries, which are probably less sympathetic to lawyers than are lawyer disciplinary authorities, and which enjoy the benefits of hindsight. Once

---

301. For a survey, see 2 RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* ch. 12 (5th ed. 2000).

302. See Koniak, *supra* note 6, at 1248-68.

303. See, e.g., *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 212-14 (1976) (stating that Rule 10b-5 liability requires scienter).

304. See, e.g., *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 191 (1994) (holding no Rule 10b-5 liability to private parties for aiding and abetting); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 386 n.22 (1983) (finding no liability of lawyers and accountants under section 11 of the Securities Act of 1933 except for those lawyers acting as “experts”); see also *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 768-69 (2008) (reading *Central Bank of Denver* broadly). But see 15 U.S.C. § 78t(e) (2006) (confirming SEC’s authority to proceed against aiders and abettors); Marc I. Steinberg & Chris Claassen, *Attorney Liability Under the State Securities Laws: Landscapes and Minefields*, 3 BERKELEY BUS. L.J. 1 (2005) (discussing possible greater lawyer liability under state law).

305. See, e.g., *Rubin v. Schottenstein, Zox & Dunn*, 143 F.3d 263, 270 (6th Cir. 1997); *Kline v. First W. Gov’t Sec., Inc.*, 24 F.3d 480, 487 (3d Cir. 1994).

306. See Kathy Patrick, *The Liability of Lawyers for Fraud Under the Federal and State Securities Laws*, 34 ST. MARY’S L.J. 915 (2003).

307. See MODEL RULES OF PROF’L CONDUCT R. 4.1, 8.4(c) (2008); WOLFRAM, *supra* note 24, at 719-27.

again, making it easier<sup>308</sup> for an adversary to enforce a rule constitutes in itself a regulatory initiative.

2. *Class action plaintiffs' lawyers.* Although Congress has devoted considerable effort to reining in securities fraud class actions and the lawyers who bring them, its means for doing so have relied on changing civil procedure and substantive securities law more than on directly regulating lawyers. The Private Securities Litigation Reform Act of 1995 (PSLRA) thus regulates pleading and discovery as well as constricting damages liability for certain forward looking statements.<sup>309</sup> The Securities Litigation Uniform Standards Act of 1998 preempts state law securities fraud class actions, and provides for removal of state court securities class actions to federal court.<sup>310</sup> The removal approach has now been extended to most large nonsecurities class actions by the Class Action Fairness Act of 2005, which also broadens the original jurisdiction of the federal courts over such actions.<sup>311</sup>

But the PSLRA does contain a number of provisions that, although in a sense procedural, also affect the law governing lawyers. In effect, it forbids class action lawyers to pay referral fees not only to brokers and dealers—which is nothing new<sup>312</sup>—but also to named plaintiffs who bring them a profitable class action.<sup>313</sup> The Justice Department added a criminal law twist to this prohibition by

---

308. For common law fraud suits against lawyers, see 1 MALLEN & SMITH, *supra* note 301, at 564-68; Elizabeth Cosenza, *Rethinking Attorney Liability Under Rule 10b-5 in Light of the Supreme Court's Decisions in Tellabs and Stoneridge*, 16 GEO. MASON L. REV. 1 (2008).

309. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in various sections of 15 U.S.C.). The provisions mentioned in the text are in 15 U.S.C. §§ 77z-1(b), (c), 77z-2, 78u-4(b), (c), 78u-5 (2006).

310. Pub. L. No. 105-353, 112 Stat. 3227 (codified as amended in scattered sections of 15 U.S.C.).

311. Pub. L. No. 109-2, 119 Stat. 4 (to be codified in 28 U.S.C. §§ 1332, 1453, 1711-15); see also Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593 (2008).

312. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 7.2(b) (2008); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 10 (2000).

313. See, e.g., 15 U.S.C. §§ 77z-1(a)(2)(vi), (4), 78u-4(a)(2)(vi), (4), 78o(c) (2006).

prosecuting the Milberg Weiss firm and some of its partners for secretly paying off named plaintiffs.<sup>314</sup> Other PSLRA provisions seek to keep class lawyers in line by promoting the designation of large shareholders as lead plaintiffs, giving lead plaintiffs the main role in selecting class counsel, and limiting attorney fee awards to a reasonable percentage of what the class members actually receive.<sup>315</sup> To the extent that the PSLRA provisions are meant to affect the division of authority between lawyer and client, these innovations enter territory traditionally occupied by lawyer rules.<sup>316</sup> They purport to protect clients—or at least quasi-clients, depending on how one classifies class members<sup>317</sup>—but the promoters of the PSLRA hoped that the result would also be less aggressive prosecution of class actions (at least baseless ones) against corporations and their officers and directors.<sup>318</sup>

3. *Corporate lawyers again.* Soon after the PSLRA regulated lawyers who sue corporations, section 307 of the Sarbanes-Oxley Act of 2002 regulated lawyers who advise them.<sup>319</sup> Like the PSLRA, Sarbanes-Oxley dealt specifically with lawyers, not just sweeping them up in a larger category, but did so as just one part of a broader attack. The PSLRA resulted mainly from corporate complaints about being sued, but Sarbanes-Oxley's main motivation was public outrage over the fraudulent activities and subsequent

---

314. See Peter Elkind, *The Law Firm of Hubris Hypocrisy & Greed*, FORTUNE, Nov. 13, 2006, at 155; Tom Gilroy, *Milberg Law Firm Admits Kickback Scheme To Generate Cases, Agrees to Pay \$75 Million*, 24 LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) No. 329 (2008).

315. *E.g.*, 15 U.S.C. §§ 77z-1(a)(3), (6), 78u-4(a)(3), (6) (2006); Stephen J. Choi & Robert B. Thompson, *Securities Litigation and Its Lawyers: Changes During the First Decade After the PSLRA*, 106 COLUM. L. REV. 1489 (2006).

316. See, *e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.2 (2008); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 25-30 (2000).

317. See FED. R. CIV. P. 23(g)(1)(B) (lawyer duties to class members); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 2004-01 (2004) (discussing who is a client).

318. See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2508 (2007); Joshua D. Fulop, *Agency Costs and the Strike Suit: Reducing Frivolous Litigation Through Empowerment of Shareholders*, 7 J. BUS. & SEC. L. 213, 214 (2007) (citing authorities).

319. Pub. L. No. 107-204, § 307, 116 Stat. 745, 784 (2002) (codified at 15 U.S.C. § 7245).

collapse of Enron,<sup>320</sup> WorldCom, and other large corporations. That the large law firms representing those corporations had, to say the least, failed to protest their misconduct helped bring them within the scope of the resulting legislation.<sup>321</sup> Section 307 of Sarbanes-Oxley required the SEC to issue rules requiring lawyers to report material breaches of securities law or of fiduciary duty to the corporation's chief counsel or chief executive officer, and if they did not respond appropriately to go to a committee of the board of directors.<sup>322</sup> The rules turned out to be long and complex.<sup>323</sup> They expanded the ABA's previous Model Rule 1.13 by requiring—not just permitting—a report up the corporate ladder, by requiring lawyers to act on the basis of sufficient information even if they did not “know” that a violation was in progress, and by requiring protest of substantial violations even if they were not likely to cause the corporation substantial harm.<sup>324</sup> In response to the Enron scandal and the pending Sarbanes-Oxley bill, the ABA hastily returned to the drawing board and reduced the first of these discrepancies, though not the others.<sup>325</sup>

Although the SEC rules build on the accepted view that the lawyer represents the corporation rather than its management and must therefore bring management illegality to the attention of higher authorities within the corporation,<sup>326</sup> Sarbanes-Oxley clearly intends to protect the public, not just the corporate client. It directs the SEC to write rules “in the public interest and for the protection of investors.”<sup>327</sup> These rules require lawyers to report any material breach of a federal or state law, or fiduciary duty,

---

320. *See, e.g.*, S. REP. No. 107-146, at 2 (2002).

321. 148 CONG. REC. S6515, 6551 (daily ed. July 10, 2002) (statement of Sen. Edwards); Koniak, *supra* note 6, at 1239-43.

322. 15 U.S.C. § 7245 (2006).

323. *See* 17 C.F.R. § 205.1-.7 (2008).

324. MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2008).

325. *Id.* *See generally* Lawrence A. Hamermesh, *The ABA Task Force on Corporate Responsibility and the 2003 Changes to the Model Rules of Professional Conduct*, 17 GEO. J. LEGAL ETHICS 35 (2003).

326. 17 C.F.R. § 205.3(a) (2008); MODEL RULES OF PROF'L CONDUCT R. 1.13(a) (2008).

327. 15 U.S.C. § 7245 (2006).

regardless of whether it is likely to harm the corporation.<sup>328</sup> The statute and rules thus edge beyond the approach on which the Federal Deposit Insurance Corporation and Resolution Trust Corporation relied when they stepped into the shoes of insolvent Savings and Loan Associations and held their lawyers liable for failing their duties to their corporate clients.<sup>329</sup> Sarbanes-Oxley treats corporate lawyers as gatekeepers who are obliged to do what they can to keep their clients legal.<sup>330</sup>

The SEC rules again pressed beyond the bar's consensus when it authorized—without requiring—lawyers to disclose confidential information to the SEC if necessary to prevent a material violation likely to injure the corporation or investors, or to rectify the consequence of such a violation in which the lawyer's services had been used.<sup>331</sup> Although some states had similar provisions,<sup>332</sup> the organized bar had resisted such disclosure for more than twenty years. Indeed, the bar continued to resist through the SEC's drafting process, and succeeded in having the rule watered down.<sup>333</sup> Here too, the Enron scandal and Sarbanes-Oxley pushed the ABA to amend its own Model

---

328. 17 C.F.R. §§ 205.2(i), 205.3(b) (2008).

329. *See supra* Part II.A.

330. *See generally* John C. Coffee, Jr., *The Attorney as Gatekeeper: An Agenda for the SEC*, 103 COLUM. L. REV. 1293 (2003).

331. 17 C.F.R. § 205.3(d)(2) (2008) (also allowing disclosure to prevent crimes such as perjury). Sarbanes-Oxley was not limited to reporting up the ladder; it authorized rules prescribing “minimum standards of professional conduct for attorneys appearing and practicing before the Commission . . .” 15 U.S.C. § 7245. Another provision protects whistleblowers who are corporate employees. 18 U.S.C. § 1514A (2006).

332. For a summary, see THOMAS D. MORGAN & RONALD D. ROTUNDA, MODEL RULES OF PROFESSIONAL CONDUCT AND OTHER SELECTED STANDARDS INCLUDING CALIFORNIA AND NEW YORK RULES ON PROFESSIONAL RESPONSIBILITY 144-64 (2007); *see also* Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190, 1194-95 (2d Cir. 1974) (upholding lawyer's disclosure to the SEC under the self-defense exception).

333. RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY: A STUDENT'S GUIDE 259-76 (2006); Koniak, *supra* note 6, at 1248-78. *But see* Stephanie Francis Ward, *The Hammer Goes In-House*, A.B.A. J., Jan. 2008, at 14 (“What has emerged . . . is the SEC's efforts to obtain through the enforcement process what it could not obtain through rule-making.”).

Rules,<sup>334</sup> but most states have not yet adopted the changes.<sup>335</sup>

Unlike the other regulatory interventions we have surveyed, Sarbanes-Oxley concerns an issue of professional conduct that had long been controversial in the bar. Law teachers in particular,<sup>336</sup> as well as others,<sup>337</sup> had criticized the reluctance to allow lawyers to act more decisively against corporate fraud. Some of the teachers responded to the Enron revelations by appealing to the federal government. Richard Painter and colleagues wrote to the SEC and, when Senator John Edwards followed up, Susan Koniak helped draft the amendment that became section 307 of Sarbanes Oxley.<sup>338</sup> Enron and Congress jarred the ABA House of Delegates into adapting a disclosure rule it had previously rejected three times, most recently in 2002.<sup>339</sup> And the SEC, which had wavered in exercising its authority to discipline lawyers who did nothing to stop

---

334. See MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2), (3) (2008); Hamermesh, *supra* note 325, at 36.

335. 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, 1125-26 (2006).

336. See, e.g., DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 106-15 (2000); Geoffrey C. Hazard, Jr., *Lawyers and Client Fraud: They Still Don't Get It*, 6 GEO. J. LEGAL ETHICS 701, 701-02 (1993); Nancy J. Moore, *Limits to Attorney-Client Confidentiality: A "Philosophically Informed" and Comparative Approach to Legal and Medical Ethics*, 36 CASE W. RES. L. REV. 177 (1986) (setting out an analytical framework in which to evaluate the controversies surrounding attorney-client confidentiality); Richard W. Painter & Jennifer E. Duggan, *Lawyer Disclosure of Corporate Fraud: Establishing a Firm Foundation*, 50 SMU L. REV. 225, 228 (1996) (suggesting that changes in the securities laws should have included rules clearly stating how lawyers should handle client fraud). See generally Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185 (2003) (explaining how lawyers were key players in transactions that ultimately ruined major corporations)

337. See AM. BAR ASS'N, 116 ANNUAL REPORT 12-16 (1991); AM. BAR ASS'N, 108 ANNUAL REPORT, 295-99, 312-16 (1983); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 67 (2000).

338. 148 CONG. REC. S6515, S6551-52 (daily ed. July 10, 2002) (statement of Sen. Edwards); Koniak, *supra* note 6, at 1238. Disclosure: the author of this article was one of those signing the Painter letter.

339. See sources cited *supra* notes 333, 336, 337.

corporate fraud,<sup>340</sup> has now started to impose discipline.<sup>341</sup> The moral is that it now sometimes pays to carry professional responsibility issues beyond the bar and bench.

#### IV. PROTECTING CLIENTS FROM LAWYERS

Compared to the interventions we have considered, recent attempts to alter the rules established by the bench and bar to protect clients from their lawyers have been relatively peripheral. Sometimes, as we have already seen, measures that purport to protect clients can be better understood as promoting the interests of others.<sup>342</sup> Sometimes, as we shall soon see, state legislatures have even acted to protect lawyers from clients.<sup>343</sup>

One explanation for this comparative unwillingness to intervene is that the existing rules adequately protect clients. Certainly many of them appear to do so, though some argue that there is less here than meets the eye.<sup>344</sup> Another explanation is that lawyers are well situated to protect their own interests before legislatures and government agencies, while the legal consumers lobby is far weaker.<sup>345</sup> Lawmakers are therefore likely to adopt measures protecting clients only when clients fall within a larger consumer group, or when some nonconsumer group thinks that client protection or the appearance of it will

---

340. See Painter & Duggan, *supra* note 336, at 244-55.

341. See Lewis D. Lowenfels et al., *Attorneys as Gatekeepers: SEC Actions Against Lawyers in the Age of Sarbanes-Oxley*, 37 U. TOL. L. REV. 877 (2006); see also Dan Small, *In-House Counsel, Beware!*, NAT'L L.J., Oct. 15, 2007, at 22 (describing federal False Claims Act damages action against former general counsel).

342. See *supra* Parts II.B, III.B.2, III.C.

343. See *infra* Part IV.B.

344. See generally Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639 (1981); Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243 (1985); Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977).

345. The only legal consumer organization I know of is Help Abolish Legal Tyranny (HALT), which has more than 50,000 members, a staff of seven, and 2006 revenues slightly exceeding one million dollars. See HALT, [http://www.halt.org/about\\_halt/](http://www.halt.org/about_halt/) (last visited Apr. 29, 2009).

advance its own agenda. It is consistent with both explanations that many of the recent measures seem to focus on reducing the cost of legal services and providing more information to clients. Those benefits are ones that clients care about,<sup>346</sup> that the bar pays little attention to, and that clients share with other consumers.

#### A. *Removing Barriers to Competition*

When the Supreme Court relied on the antitrust laws to strike down bar minimum fee scales in *Goldfarb v. Virginia State Bar*,<sup>347</sup> it legitimated a new reliance on competition among lawyers to advance the interests of clients.<sup>348</sup> Three years later it invalidated professional restrictions on competitive bidding.<sup>349</sup> Such measures were now seen as driving up fees for the benefit of lawyers rather than as ensuring that lawyers would be paid well enough to provide quality services and that clients would choose lawyers on the basis of ability, not cost.<sup>350</sup> After *Goldfarb*, the organized bar saw the handwriting on the wall and hastily cut back its campaigns against the unauthorized practice of law as well as repealing treaties it had reached with other professional organizations to exclude them from practice areas it wished

---

346. See Eric H. Steele & Raymond T. Nimmer, *Lawyers, Clients, and Professional Regulation*, 1976 AM. B. FOUND. RES. J. 917, 946-56 (describing client complaints to disciplinary authorities).

347. 421 U.S. 773 (1975); see also *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) (condemning boycott by court-appointed criminal defense lawyers to obtain better pay); *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982) (invalidating maximum fee scale for doctors in medical care arrangement); cf. ABA Comm. on Prof'l Ethics, Canon 12 (1967) (stating that lawyers should avoid undervaluing their services as well as overestimating them, and should consider bar association's minimum fee schedule).

348. See John Leubsdorf, *Three Models of Professional Reform*, 67 CORNELL L. REV. 1021, 1026-35 (1982). But see Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STAN. L. REV. 1689 (2007).

349. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978); see also *Third Circuit Task Force Report on Selection of Class Counsel*, 74 TEMP. L. REV. 685 (2001) (identifying relevant factors for judges to consider in determining if and when the bidding method is appropriate); cf. ABA Comm. on Prof'l Ethics, Formal Op. 292 (1957) (stating that lawyer may not accept invitation to bid).

350. See, e.g., ABA Comm. on Prof'l Ethics, Formal Op. 307 (1962).

to reserve for lawyers.<sup>351</sup> It also took care that all its rules were promulgated by state supreme courts, not by the bar itself, protecting them under the doctrine that acts required by a state are not subject to the antitrust laws.<sup>352</sup> Ironically, the United States Supreme Court's entry into the regulatory field wound up strengthening the hand of state supreme courts.

But making professional rules state commands, while immunizing them from the antitrust laws, makes them state action subject to the Constitution; and the Supreme Court relied on the First Amendment to ban the almost complete prohibition of lawyer advertising that the bar had labored to maintain for many decades.<sup>353</sup> In a series of decisions, the Court upheld the rights of lawyers to advertise their fees,<sup>354</sup> practice areas,<sup>355</sup> and credentials,<sup>356</sup> and to target those facing specific problems in advertisements<sup>357</sup> and letters,<sup>358</sup> always provided their statements were not inaccurate or misleading.<sup>359</sup> Although the Supreme Court declined to overturn the prohibition on personal solicitation by lawyers,<sup>360</sup> it did require an exception for nonprofit solicitation for a public or charitable organization.<sup>361</sup> As a result, lawyer advertising, staid or

---

351. WOLFRAM, *supra* note 24, at 826-27.

352. *See, e.g.*, Hoover v. Ronwin, 466 U.S. 558 (1984); Thomas D. Morgan, *The Impact of Antitrust Law on the Legal Profession*, 67 *FORDHAM L. REV.* 415 (1998).

353. *See* William Hornsby, *Clashes of Class and Cash: Battles from the 150 Years War to Govern Client Development*, 37 *ARIZ. ST. L.J.* 255 (2005).

354. *See, e.g.*, Bates v. State Bar of Ariz., 433 U.S. 350 (1977).

355. *See, e.g.*, *In re R.M.J.*, 455 U.S. 191, 205 (1982).

356. *See id.* at 205-06 (Bar memberships); *see also* Peel v. Attorney Registration & Disciplinary Comm'n of Ill., 496 U.S. 91, 110-11 (1990) (specialist certification).

357. *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985).

358. *See* Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 476-78 (1988).

359. *See, e.g.*, *Zauderer*, 471 U.S. at 638.

360. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).

361. *See In re Primus*, 436 U.S. 412 (1978) (American Civil Liberties Union lawyer); *NAACP v. Button*, 371 U.S. 415 (1963); *see also* *Edenfield v. Fane*, 507 U.S. 761 (1993) (finding solicitation by accountants constitutionally protected, suggesting that lawyer solicitation must also be allowed absent dangers of overreaching and intrusion).

otherwise, by brochure, website, or the media, is now routine for many lawyers.

The Supreme Court has been more hesitant than in its antitrust and First Amendment decisions in promoting access to justice through means not relying on the market. It struck down one restriction on the activities of Legal Services Corporation lawyers,<sup>362</sup> and narrowly upheld the use of interest on client funds held by lawyers to finance legal services when paying the interest to the clients is impractical.<sup>363</sup> But its early decisions favoring the use of attorney fee recovery by prevailing plaintiffs to finance civil rights and other litigation have given way to far more restrictive readings.<sup>364</sup>

The Court was not the only federal regulator or deregulator. The Antitrust Division of the Justice Department and the Federal Trade Commission sued and prodded the organized bar into revising its advertising rules.<sup>365</sup> On the other hand, when the Court upheld a Florida prohibition of contacting accident victims within thirty days after the accident,<sup>366</sup> Congress promptly imposed a similar forty-five day ban on contact with airplane accident victims.<sup>367</sup> So the encouragement of competition has its limits.

---

362. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001); *see supra* Part II.C.3.

363. *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003) (5-4 decision).

364. *Compare* *City of Riverside v. Rivera*, 477 U.S. 561, 573-74 (1986) (upholding fee award much larger than plaintiff's recovery), *and* *Blum v. Stenson*, 465 U.S. 886, 895-96 (1984) (explaining that legal aid lawyers recover the market value of their time, not their salary rates), *and* *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 420-22 (1978) (suggesting that prevailing plaintiffs recover more easily than prevailing defendants), *with* *Buckhannon Bd. & Care Home, Inc., v. W. Va. Dep't of Health*, 532 U.S. 598, 605 (2001) (explaining that there is no fee when defendants moot case by giving plaintiffs what they request), *and* *City of Burlington v. Dague*, 505 U.S. 557 (1992) (holding that the risk of going unpaid does not warrant increasing fees), *and* *Evans v. Jeff D.*, 475 U.S. 717, 730-32 (1986) (upholding settlement in which plaintiffs waived their lawyers' fees).

365. *See* Hornsby, *supra* note 353, at 274-79; *FTC Staff Warns of Restrictions on Lawyer Advertising in Louisiana*, [2007] 23 *Laws. Man. on Prof. Conduct* (ABA/BNA) No. 436 (Aug. 22, 2007).

366. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 635 (1995).

367. 49 U.S.C. § 1136(g)(2) (2000).

The legitimization of group legal services likewise involved judicial, executive and legislative initiatives. The organized bar long opposed plans under which an automobile association, labor union, or other organization retained lawyers for its members, typically on the ground that the organization was unlawfully practicing law.<sup>368</sup> These plans were a form of legal services insurance that helped beneficiaries to share risks and obtain lower prices. Responding first to Southern efforts to harass the Civil Rights movement,<sup>369</sup> and then to bar association campaigns against labor unions that helped members bring workers compensation and other claims,<sup>370</sup> the Supreme Court held that the First Amendment right to associate extended to such joint efforts to press claims in court. In a battle that lasted several years, the Antitrust Division then pressed the American Bar Association to revise the Model Code of Professional Conduct to comply with these decisions.<sup>371</sup> Meanwhile, Congress, as part of ERISA, preempted state regulation of legal services plans provided by employers,<sup>372</sup> in part to block state bar association attempts to forbid “closed panel” plans.<sup>373</sup> Today, millions of Americans

---

368. See ABA Comm. on Prof'l Ethics and Grievances, Canon 35, 47 (1957); Note, *The Unauthorized Practice of Law by Lay Organizations Providing the Services of Attorneys*, 72 HARV. L. REV. 1334 (1959).

369. See *NAACP v. Button*, 371 U.S. 415 (1963).

370. See *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576 (1971); *United Mine Workers v. Ill. State Bar Ass'n*, 389 U.S. 217 (1967); *Bhd. of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1 (1964).

371. WOLFRAM, *supra* note 24, at 911-17.

372. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, §§ 3, 514, 88 Stat. 829, 833, 897 (codified as amended at 29 U.S.C. §§ 1002(1), 1144 (2006)). Congress had previously allowed employee legal services plans under the Taft-Hartley Act, 29 U.S.C. § 186(c)(8) (2000), and for a time encouraged them with tax benefits. See 26 U.S.C. § 120 (2000).

373. 120 CONG. REC. 29,933, 29,949 (1974) (statements of Sens. Williams and Javits). *But see Gerosa v. Savasta & Co.*, 329 F.3d 317, 324 (2d Cir. 2003) (noting that ERISA does not preempt ordinary malpractice claim against plan lawyer or other advisor); *Custer v. Sweeney*, 89 F.3d 1156, 1161-62 (4th Cir. 1996) (explaining that plan's lawyer is not ordinarily a statutory “fiduciary”); *In re UAW Legal Servs. Plan*, 416 N.Y.S.2d 133, 133-34 (App. Div. 1979) (stating that ERISA does not preempt regulation of professional conduct of plan lawyers).

participate in such plans, while millions more buy other forms of legal services insurance.<sup>374</sup>

Although these various ways of increasing consumer information and promoting lawyer competition may well have benefited clients, they may not have hurt lawyers. Some lawyers at least must have gained new clients, albeit at the expense of other lawyers. More broadly, as Richard Abel has pointed out, these innovations can be seen as part of a professional strategy of demand creation, replacing increasingly unsuccessful efforts to control the supply of legal services.<sup>375</sup> Although the organized bar fought change, those who brought it about were also lawyers, for example lawyers who asserted the right to advertise, who helped form and defend group legal services plans, who spoke for the Antitrust Division, or who decided cases in their role of federal judge. In that sense, one can say (with some oversimplification) that lawyers continued to a substantial extent to regulate themselves, and that the change was one from regulation through state supreme courts and the organized bar, to regulation through other institutions and procedures.

### B. *Protecting Clients in the Relationship*

Almost every state has a consumer protection statute. In some states, these statutes apply to lawyers, in others they do not apply, and in some, they only apply in certain respects, typically in those concerning commercial aspects of legal practice.<sup>376</sup> The cases upholding client claims typically involve overcharging<sup>377</sup> or misrepresentation.<sup>378</sup> One recent

---

374. See Judith L. Maute, *Pre-Paid and Group Legal Services: Thirty Years After the Storm*, 70 *FORDHAM L. REV.* 915, 933-35 (2001).

375. Abel, *supra* note 344, at 653-67.

376. 1 MALLEN & SMITH, *supra* note 301, at 879-87.

377. *E.g.*, *Sears, Roebuck & Co. v. Goldstone & Sudalter, P.C.*, 128 F.3d 10, 11-12 (1st Cir. 1997) (applying Massachusetts statute); *Short v. Demopolis*, 691 P.2d 163, 164 (Wash. 1984). See generally *Barnard v. Mecom*, 650 S.W.2d 123 (Tex. App. 1983).

378. *E.g.*, *Streber v. Hunter*, 221 F.3d 701, 727-29 (5th Cir. 2000) (discussing how misrepresentation and failure to disclose inducing clients to continue case); *Latham v. Castillo*, 972 S.W.2d 66, 67 (Tex. 1998) (addressing

decision, for example, upheld a claim that the defendants' advertisements portrayed them as highly skilled lawyers who would obtain full value for every client, when in fact they ran a high volume, quick settlement mill.<sup>379</sup> Whether such rulings stretch the standards already enforced by legal malpractice law may be doubted,<sup>380</sup> but they do sharpen the impact of those standards on lawyers by awarding plaintiffs attorney fees and sometimes multiple damages.<sup>381</sup>

Another source of client protection has been the California legislature, which has legislated about many matters that other states handle through court rules. These include telling clients about settlement offers,<sup>382</sup> giving clients written contracts covering specified matters,<sup>383</sup> compulsory fee arbitration at the client's request,<sup>384</sup> using interest on lawyers' trust accounts to support legal services for the poor (IOLTA),<sup>385</sup> and prohibiting most drafters of wills from receiving bequests under them.<sup>386</sup> In the case of sexual harassment of clients—a serious problem that the ABA and most states have approached case by case without adopting prohibitory rules<sup>387</sup>—the legislature first directed

---

false statements that lawyer was prosecuting client's suit); *Short*, 691 P.2d at 164 (discussing misrepresentation of who would handle case).

379. *Crowe v. Tull*, 126 P.3d 196, 199-200 (Colo. 2006).

380. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52 cmt. d (2000) (stating that lawyers are held to representations about competence or care).

381. *See, e.g., Doucette v. Kwiat*, 467 N.E.2d 1374, 1377 (Mass. 1984). *But see Saffer v. Willoughby*, 670 A.2d 527 (N.J. 1996) (holding that attorney fees were recoverable in legal malpractice case as damages).

382. CAL. BUS. & PROF. CODE § 6103.5 (West 2003).

383. *Id.* §§ 6147, 6148.

384. *Id.* § 6200.

385. *See generally id.* §§ 6210-28. Several other states used legislation rather than court rules to create IOLTA programs. *E.g., N.Y. JUD. LAW* § 497 (McKinney 2005).

386. CAL. PROB. CODE § 21350 (West Supp. 2008).

387. *Lawyer's Interests Adverse to Client*, *Laws. Man. on Prof. Conduct* (ABA/BNA) No. 262, at 51:416-20 (2004); Anthony E. Davis & Judith Grimaldi, *Sexual Confusion: Attorney-Client Sex and the Need for a Clear Ethical Rule*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 57, 57 (1993).

the California State Bar to pass a rule, and then imposed its own rule on top of the Bar's.<sup>388</sup>

It is not clear to what extent the California statutes responded to the recalcitrance of the bar and bench,<sup>389</sup> and to what extent they resulted from the wish of state legislators to show the public that they were doing good and standing up to lawyers.<sup>390</sup> In any event, no other state legislature has been similarly active in protecting clients, and neither has Congress.<sup>391</sup>

### C. *Protecting Lawyers From Malpractice Suits*

In recent decades, state legislatures have been more devoted to guarding lawyers from malpractice suits than to increasing client protections. Presumably this responds to professional pressure—sometimes coming from doctors and other professionals as well as lawyers—that reflects the increase in malpractice claims.<sup>392</sup> Rather than turn to its usual judicial allies, the bar has turned to the legislature, either because it considers the courts unsympathetic on this issue or because it seeks changes reaching beyond the judicial province.

---

388. CAL. BUS. & PROF. CODE §§ 6106.8, 6106 (West 2003); California Rules of Professional Conduct, Rule 3-120, Aug. 1, 2008, *available at* [http://www.calbar.ca.gov/calbar/pdfs/rules/Rules\\_ProfessionalConduct.pdf](http://www.calbar.ca.gov/calbar/pdfs/rules/Rules_ProfessionalConduct.pdf).

389. California rules of professional conduct must be approved by the State Bar's Board, or by a bar initiative referendum, and only then reach the Supreme Court for its approval. CAL. BUS. & PROF. CODE §§ 6076, 6076.5 (West 2003).

390. Compare Governor Wilson's proposal to cut the powers of the State Bar, leading to a legislative deadlock and failure to fund the state disciplinary system and other bar activities. *In re Attorney Discipline Sys.*, 967 P.2d 49, 53 (Cal. 1998); *Wilson Proposes Drastic State Bar Revamp, Appointed Board*, METROPOLITAN NEWS ENTERPRISE, June 1, 1998, at 1, *available at* LEXIS.

391. *See* ABA v. FTC, 430 F.3d 457, 458-59 (D.C. Cir. 2005) (rejecting FTC claim that lawyers are "financial institutions" subject to the privacy protection provisions of 15 U.S.C. § 6801-09).

392. *See generally* Manuel R. Ramos, *Legal Malpractice: No Lawyer or Client is Safe*, 47 FLA. L. REV. 1 (1995); Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657 (1994). The increase in legal malpractice claims can partly be attributed to court decisions that have increased lawyers' exposure to liability. *E.g.*, *Burrow v. Arce*, 997 S.W.2d 229, 232 (Tex. 1999) (requiring attorney to forfeit fee after breaching fiduciary duty); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 (liability to certain nonclients).

In a number of states, a professional malpractice suit now cannot proceed unless the plaintiff files a certificate of merit from an expert.<sup>393</sup> Claims for malpractice may be subject to a special statute of limitations applying to lawyers only<sup>394</sup> or together with other professionals.<sup>395</sup> Lawyer defendants may be able to invoke “tort reform” provisions such as those limiting joint and several liability.<sup>396</sup>

The early 1990s brought a further boon to potential lawyer defendants. A deluge of state statutes allowed them to limit their liability for the acts of their partners by making their firm a professional corporation, limited liability partnership, or limited liability company.<sup>397</sup> Professional corporations had previously been recognized, but only for tax reasons, often without affecting the vicarious liability of partners for malpractice.<sup>398</sup> Lawyers and other professionals sought these statutes in reaction to a series of huge verdicts and settlements against law firms, such as those in the Savings and Loan litigation already discussed.<sup>399</sup> There had even been large law firm

---

393. *E.g.*, N.J. STAT. ANN. § 2A:53A-27 (West 2000); TEX. CIV. PRAC. & REM. CODE ANN. § 150.002 (Vernon Supp. 2008). *See generally* Jeffrey A. Parness & Amy Leonetti, *Expert Opinion Pleading: Any Merit to Special Certificates of Merit?*, 1997 BYU L. REV. 537. *Compare* PA. R. CIV. P. 1042.6 (requiring certificate of merit under court rule), *with* AA Mech. v. Superior Court, 948 P.2d 492, 492-93 (Ariz. Ct. App. 1997) (holding similar statute unconstitutional).

394. *E.g.*, CAL. CIV. PROC. CODE § 340.6 (West 2006); 735 ILL. COMP. STAT. ANN. 5/13-214.3 (West 1993).

395. *E.g.*, N.Y. C.P.L.R. 214 (McKinney 2003); N.C. GEN. STAT. § 1-15(c) (2007); TENN. CODE ANN. § 28-3-104(a)(2) (2000).

396. *E.g.*, *Cadle Co. v. Sweet & Brousseau, P.C.*, 2007 U.S. Dist. LEXIS 47318, at \*26 (N.D. Tex. June 28, 2007); *FDIC v. Clark*, 768 F. Supp. 1402, 1409 (D. Colo. 1989); *see also* GA. CODE ANN. § 24-9-67.1(c) (Supp. 2007) (noting special requirements for expert witnesses in professional malpractice suits); Barbara Glesner Fines, *From Representing “Clients” to Serving “Recipients”*: *Transforming the Role of the IV-D Child Support Enforcement Attorney*, 67 FORDHAM L. REV. 2155, 2174-75 (1999) (addressing legislative redefinition of child support recipients as nonclients).

397. Jennifer J. Johnson, *Limited Liability for Lawyers: General Partners Need Not Apply*, 51 BUS. LAW. 85, 89-90 (1995).

398. Forest J. Bowman, *The Professional Corporation—Has the Death Knell Been Sounded?*, 10 PEPP. L. REV. 515, 519-20 (1983).

399. *See* Johnson, *supra* note 397, at 85 n.1 (listing the large claims and judgments against law firms reported in the National Law Journal in 1994);

bankruptcies in which partners were required to help pay their firms' obligations.<sup>400</sup> Legislatures gave the bar what it wanted with little discussion; the Internal Revenue Service provided favorable rulings; and the rule of some states that only the state supreme court could regulate the practice of law was generally ignored.<sup>401</sup>

The change raised real problems of professional responsibility. In other countries,<sup>402</sup> and to some extent even in the United States,<sup>403</sup> it is recognized that the form in which lawyers practice influences their conduct. Under the new arrangements, although the law firm itself and all partners involved in tortious conduct remain liable, limited liability releases other partners from responsibility for the acts of their colleagues.<sup>404</sup> That reduces the incentive of partners to monitor each others' conduct and to set up firm procedures that will prevent malpractice. It also encourages them, should misconduct occur, to throw the blame on others.<sup>405</sup> A few state supreme courts have imposed vicarious

---

Leubsdorf, *supra* note 65, at 101-02 nn.2-3 (providing examples of legal malpractice settlements and judgments); *supra* Part II.A.

400. *In re Gaston & Snow*, 1996 U.S. Dist. LEXIS 17774, at \*5-\*6 (S.D.N.Y. Nov. 25, 1996); *In re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey*, 135 B.R. 456, 457 (S.D.N.Y. 1992).

401. See Allan W. Vestal & Thomas E. Rutledge, *Disappointing Diogenes: The LLC Debate That Never Was*, 51 ST. LOUIS U. L.J. 53 (2006); Charles W. Wolfram, *Inherent Powers in the Crucible of Lawyer Self-Protection: Reflections on the LLP Campaign*, 39 S. TEX. L. REV. 359 (1998).

402. JOHN LEUBSDORF, *MAN IN HIS ORIGINAL DIGNITY: LEGAL ETHICS IN FRANCE* 29-35 (2001); Anthony Thornton, *The Professional Responsibility and Ethics of the English Bar*, in *LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY* 53, 64-66 (Ross Cranston ed., 1995).

403. See MODEL RULES OF PROF'L CONDUCT R. 5.4(b), (d) (2008) (forbidding a lawyer from practicing law in a partnership where a nonlawyer is a partner; owns any interest in the firm; is a corporate director or officer or holds a position of similar responsibility; or "has the right to direct or control the professional judgment of a lawyer").

404. See Johnson, *supra* note 397, at 89; Wolfram, *supra* note 401, at 360. *But see* MODEL RULES OF PROF'L CONDUCT R. 1.8(h)(1) (2008) (forbidding lawyer-client agreements that limit malpractice liability "unless the client is independently represented in making the agreement").

405. Leubsdorf, *supra* note 65, at 143. Susan Saab Fortney, *Seeking Shelter in the Minefield of Unintended Consequences—The Traps of Limited Liability Law Firms*, 54 WASH. & LEE L. REV. 717, 731-37 (1997).

liability by rule,<sup>406</sup> or allowed only firms with adequate liability insurance to escape it.<sup>407</sup> But most authorities have accepted the new regime.<sup>408</sup> A 2002 survey reported that of the 748 law firms with fifty or more lawyers, only fourteen percent were organized as general partnerships.<sup>409</sup>

#### *D. Protecting Criminal Defendants or Preserving Convictions?*

When it began to enforce the Sixth Amendment right to counsel in criminal prosecutions,<sup>410</sup> the Supreme Court opened the door to claims that the right encompasses more than physical presence of a lawyer in the courtroom. That led to examination of just what duties a criminal defense lawyer owes a client.<sup>411</sup> Likewise, recognizing a defendant's constitutional rights inevitably led the Court to consider whether defense counsel has the authority to waive those rights.<sup>412</sup>

Considered as lawyer regulation, the resulting precedents have two unusual and related features. First, they constitute minimum regulation, both in the sense that states are free to require more than the Constitution, and in the sense that the Court has not required very much. Second, violation of the Court's standards results not in sanctions against the lawyer, but in a new trial for the

---

406. MASS. SUP. JUD. CT. R. 3:06(3) (2007) (preserving some vicarious liability); NEB. CT. R. 3-601(F).

407. *E.g.*, ILL. CT. R. & PROC. 721(d), 722 (2007); N.J. GEN. APP. R. 1:21-1A(3), 1B(4), 1C(3) (2008).

408. *E.g.*, *Henderson v. HSI Fin. Servs., Inc.*, 471 S.E.2d 885, 886-87 (Ga. 1996); *Vanderhoof v. Cleary*, 725 A.2d 917, 918 (Vt. 1998); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 96-401 (1996).

409. Robert W. Hillman, *Organizational Choices of Professional Service Firms: An Empirical Study*, 58 BUS. LAW. 1387, 1401, 1404 (2003).

410. *E.g.*, *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963); *Powell v. Alabama*, 287 U.S. 45, 65 (1932).

411. *See, e.g.*, *Strickland v. Washington*, 466 U.S. 668 (1984); WOLFRAM, *supra* note 24, at 812-15 (describing the decline of the doctrine that representation is only inadequate if it is a "farce and mockery").

412. *See, e.g.*, *Brookhart v. Janis*, 384 U.S. 1, 7-8 (1966) (holding that an attorney cannot waive his client's constitutional right by entering a plea that is "inconsistent with his client's expressed desire").

client. In theory, the lawyer might be sued for legal malpractice, were it not that state courts have developed doctrines that almost always prevent a convicted defendant from recovering.<sup>413</sup> Professional discipline is also possible, but rare.<sup>414</sup> Because the effect of upholding a defendant's claim is to free a convicted criminal or cause a burdensome retrial, the Court has been reluctant to do so. Instead, it has sometimes decided to set a low standard,<sup>415</sup> reject the claim on the ground that any violation has not been shown to harm the defendant,<sup>416</sup> or divine an arguable tactical motive for the lawyer's conduct.<sup>417</sup>

As a result, the Court's decisions give little guidance to counsel. For example, the Court's rulings on conflicts of interest focus on when the trial court must inquire about a conflict and when the defendant must bear the burden of showing that a conflict actually affected counsel's performance.<sup>418</sup> The Court has therefore not needed to say

---

413. See Susan P. Koniak, *Through the Looking Glass of Ethics and the Wrong With Rights We Find There*, 9 GEO. J. LEGAL ETHICS 1, 6 (1995).

414. Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 752-55 (2001).

415. *E.g.*, *Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000) (holding that in order to show prejudice from failure to timely appeal, "a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed"). *But see, e.g.*, *Rompilla v. Beard*, 545 U.S. 374, 377 (2005) ("[E]ven when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence."); John H. Blume & Stacey D. Neumann, *"It's Like Déjà Vu All Over Again": Williams v. Taylor, Wiggins v. Smith, Rompilla v. Beard and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel*, 34 AM. J. CRIM. L. 127 (2007) (showing that the Supreme Court is moving towards holding attorneys to a higher standard of conduct).

416. *See, e.g.*, *Mickens v. Taylor*, 535 U.S. 162, 166 (2002).

417. *See, e.g.*, *Florida v. Nixon*, 543 U.S. 175, 178-79 (2004); *Burger v. Kemp*, 483 U.S. 776, 788-97 (1987); *cf. Wainwright v. Sykes*, 433 U.S. 72, 89 (1977) (suggesting that counsel might deliberately allow a trial error to ground a challenge to any conviction).

418. *Compare Holloway v. Arkansas*, 435 U.S. 475, 484-85 (1978) (finding that a judge with knowledge of a potential conflict of interest must investigate whether substituting counsel would be appropriate), *with Mickens*, 535 U.S. at 173-74 (holding that where a trial judge failed to inquire into a potential conflict of interest, the petitioner has the burden of showing that the conflict adversely

much about when an impermissible conflict exists.<sup>419</sup> Indeed, its main contribution to conflicts law may have been to allow a court to disqualify counsel even when the defendant consents to the conflict,<sup>420</sup> a holding that can be justified more easily as preventing later collateral attack on the conviction than as serving the interests of clients. Likewise, most of the decisions on confidential communications between defendant and counsel are not directed to lawyers, but rather help lower courts decide when they may prevent client-lawyer conferences during a recess<sup>421</sup> and when the presence of an undercover agent at client-lawyer meetings may jeopardize a conviction.<sup>422</sup> The Court's main guidance to defense counsel is the well-known *Nix v. Whiteside* case,<sup>423</sup> which held that counsel may threaten with disclosure a client who insists on committing perjury in his own defense—a holding which again is not based on client protection.

The Court has crafted a more robust body of law on the allocation of the power to decide between client and lawyer. It has stated that the criminal defendant decides “whether to plead guilty, waive a jury, testify . . . or . . . appeal.”<sup>424</sup>

---

affected his representation), *and* *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980) (finding that where a defendant failed to object to the sufficiency of multiple representation during his trial, he must demonstrate that the conflict adversely affected his lawyer's performance in order to establish an ineffective assistance of counsel).

419. *Burger*, 483 U.S. at 788-96, is a partial exception.

420. *See* *Wheat v. United States*, 486 U.S. 153, 163 (1988).

421. *Compare* *Geders v. United States*, 425 U.S. 80, 88 (1976) (holding that a defendant was deprived of his right to the assistance of counsel when he was prevented from consulting with his lawyer during an overnight recess in the trial between the his direct and cross-examination), *with* *Perry v. Leeke*, 488 U.S. 272, 283 (1989) (finding that a trial court's order prohibiting the defendant from consulting with his attorney during a fifteen minute afternoon recess did not violate the defendant's right to assistance of counsel).

422. *See* *Weatherford v. Bursey*, 429 U.S. 545 (1977).

423. 475 U.S. 157 (1986).

424. *Florida v. Nixon*, 543 U.S. 175, 187 (2004); *accord* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 22(1), (cmt. d), (Reporter's Note)(cmt.d). *Compare* *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000) (holding that a lawyer must consult with his client about an appeal only if the client shows interest in appealing or rational defendant would wish to do so), *and* ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 4-8.2 (3d ed. 1993) (stating that defense counsel should

Counsel, although obliged to consult with the client about important decisions,<sup>425</sup> decides whether to call or cross-examine witnesses and what issues to argue on appeal.<sup>426</sup> It can certainly be argued that the Court's decisions should be read as addressed to the client's right to set aside a conviction, not the lawyer's obligation to follow client instructions—an approach the Restatement takes.<sup>427</sup> But the ABA Model Rules at least seem to be in accord with the Court's approach,<sup>428</sup> which is not surprising since the Court itself has relied on ABA standards.<sup>429</sup> In short, the Supreme Court's decisions on what constitutes adequate representation furnishes one more instance of the failure of new regulators to protect clients more than the rules previously in effect.

#### V. REGULATION BEYOND THE STATE AND FEDERAL GOVERNMENT

The centrifugal forces pulling at legal ethics are not limited to the governmental bodies already discussed. The profession itself has increasingly become the site of competing opinions and groups; clients and insurers seek to shape professional practices and a lawyer admitted in one state must reckon, more and more, with lawyers and rules from other jurisdictions.

---

explain to the client his or her right to appeal and discuss the pros and cons of doing so), *with* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2008) (failing to list whether the decision to appeal rests with the client).

425. *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

426. *Taylor v. Illinois*, 484 U.S. 400, 418 (1988); *Jones v. Barnes*, 463 U.S. 745, 754 (1983); *see* *Gonzalez v. United States*, 128 S. Ct. 1765 (2008) (stating that counsel may consent to magistrate's presiding over voir dire and jury selection). *But see* *Schiro v. Landrigan*, 550 U.S. 465 (2007) (holding that a defendant who made clear he wanted no mitigating evidence cannot complain of lawyer's failure to introduce it).

427. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 21-23, 26, 27.

428. *See* MODEL CODE OF PROF'L CONDUCT R. 1.2(a) (2008); ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standards 4-5.1 to 5.2, 4-8.3(d) (3d ed. 1993).

429. *See, e.g., Jones v. Barnes*, 463 U.S. 745, 753 n.6 (1983) (rejecting, however, one ABA position).

A. *Professional Fragmentation*

1. *Lawyer groups.* The bars of the United States have often been divided within themselves. In John Adams's Boston,<sup>430</sup> and again when bar associations developed in the late nineteenth century,<sup>431</sup> lawyers who considered themselves an élite strove to distinguish themselves from their assertedly less ethical and refined brethren. That effort often involved the attempt to impose their own standards on less prestigious lawyers whose needs and ideals might differ.<sup>432</sup>

Status distinctions continue to pervade the bar,<sup>433</sup> but two things have changed. First, in recent decades, lawyers of lower status have become less willing to endure silently the imposition of the standards of others, and those of higher status have become less willing or able to exclude them from what has become bar politics.<sup>434</sup> Second, as the bar has become larger, more ethnically and sexually diverse, and more specialized,<sup>435</sup> there have been more

---

430. See Daniel R. Coquillette, *Justinian in Braintree: John Adams, Civilian Learning, and Legal Elitism, 1758-1775*, in LAW IN COLONIAL MASSACHUSETTS 1630-1800, at 359 (Daniel R. Coquillette et al. eds., 1984); Charles R. McKirdy, *Massachusetts Lawyers on the Eve of the American Revolution: The State of the Profession*, in LAW IN COLONIAL MASSACHUSETTS *supra*. Needless to say, colonial Boston's bar was not representative of bars throughout the nation, then or later.

431. See generally JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 62-63 (1976); MARTIN, *supra* note 22, at 40-49.

432. See generally CARLIN, *supra* note 35; Charles L. Cappell & Terence C. Halliday, *Professional Projects of Elite Chicago Lawyers, 1950-1974*, 1983 AM. B. FOUND. RES. J. 291; Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910-1920)*, 20 LAW & HIST. REV. 97 (2002); Shuchman, *supra* note 35.

433. See generally HEINZ & LAUMANN, *supra* note 35.

434. See MICHAEL J. POWELL, *FROM PATRICIAN TO PROFESSIONAL ELITE: THE TRANSFORMATION OF THE NEW YORK CITY BAR ASSOCIATION* (1988); Sara Parikh & Bryant Garth, *Philip Corboy and the Construction of the Plaintiffs' Personal Injury Bar*, 30 LAW & SOC. INQUIRY 269 (2005).

435. ELIZABETH CHAMBLISS, *MILES TO GO: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION*, ABA COMM'N ON RACIAL AND ETHNIC DIVERSITY IN THE PROFESSION (2004); AM. BAR FOUND., *THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2000* (2004); Judith Kilpatrick, *Specialty Lawyer Associations: Their Role in the Socialization Process*, 33 GONZ. L. REV. 501, 507-11 (1997-98).

groups with their own perspectives and their own willingness to organize and speak out.

As a result, when the American Bar Association set out in 1977 to develop the Model Rules of Professional Conduct, pressure groups within the bar mobilized to influence the result.<sup>436</sup> The American Trial Lawyers Association (ATLA) even proposed its own alternative code.<sup>437</sup> Indeed, the American Law Institute's Restatement of the Law Governing Lawyers might be considered still another competing set of rules, developed in part by scholars dissatisfied with the Model Rules, and then influencing the revisions to those rules proposed by the Ethics 2000 Commission.<sup>438</sup>

Conflict continued in the states. The 1969 ABA Model Code of Professional Responsibility had been adopted virtually unchanged by every state except California, but almost every state adopting the Model Rules modified them in one way or another.<sup>439</sup> Outside the rule-making area, the Supreme Court has legitimated factionalism within state integrated bar associations by letting dissenters challenge the use of their dues for "political" and "ideological" projects.<sup>440</sup>

The pattern of lobbying and politicking set at the creation of the Model Rules reappeared in subsequent controversies about the Rules. In the "pay to play" dispute, proposals by the SEC to regulate political contributions by lawyers seeking government work were fiercely opposed by bond lawyers, so the ABA ultimately passed a much diluted

---

436. See Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677 (1989).

437. ROSCOE POUND—AM. TRIAL LAWYERS FOUND., THE AMERICAN LAWYER'S CODE OF CONDUCT (1980) (the ATLA has since changed its name to the American Association for Justice); Schneyer, *supra* note 436, at 710-11.

438. See Nancy J. Moore, *Lawyer Ethics Code Drafting in the Twenty-First Century*, 30 HOFSTRA L. REV. 923, 927-28, 935-41 (2001-02); see also Ted Schneyer, *The ALI's Restatement and the ABA's Model Rules: Rivals or Complements?*, 46 OKLA. L. REV. 25 (1993).

439. Compare ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, CODE OF PROF'L RESPONSIBILITY BY STATE (1977), with ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 01:11-94 (2007).

440. See *Keller v. State Bar of Cal.*, 496 U.S. 1, 2 (1990).

provision,<sup>441</sup> which only a handful of states have adopted.<sup>442</sup> In the later dispute over multidisciplinary practice, the partisans included large accounting firms that employed many lawyers to provide tax and other advice, law firms that hoped to follow their example, law firms anxious to avoid their competition, and other lawyers engaged in various kinds of multidisciplinary alliances.<sup>443</sup> The large firms were generally successful in preventing any changes to the ABA rules,<sup>444</sup> a success sealed for the moment (so far as accounting firms are in question) when the Enron scandal led to legislation barring auditors from providing unrelated legal services.<sup>445</sup>

Because conflicting groups within the bar tend to frustrate any effort to change the existing rules, two alternative approaches suggest themselves. One is to shift efforts from the American Bar Association to other regulators. The other is to narrow the scope of changes so that only one group of practitioners will be affected. We have seen both strategies at work outside the bar in the legislative arena—and it is worth noting that, although the novelties described in this article have come from regulators outside the organized bar, lawyers have usually been involved in proposing and advocating them. However,

---

441. See Brian C. Buescher, *ABA Model Rule 7.6: The ABA Pleases the SEC, But Does Not Solve Pay to Play*, 14 GEO. J. LEGAL ETHICS 139 (2000). (It should be noted that the author of this article served as a reporter on an ABA Task Force that proposed a rule more stringent than the one the ABA adopted.)

442. See Lucian T. Pera, *Grading ABA Leadership on Legal Ethics Leadership: State Adoption of the Revised ABA Model Rules of Professional Conduct*, 30 OKLA. CITY U. L. REV. 637, 798-99 (2005).

443. See Robert R. Keatinge, *Multidimensional Practice in a World of Invincible Ignorance: MDP, MJP, and Ancillary Business After Enron*, 44 ARIZ. L. REV. 717 (2002); Susan Poser, *Main Street Multidisciplinary Practice Firms: Laboratories for the Future*, 37 U. MICH. J.L. REFORM 95 (2003) (N.B.: The author of this article served on a New York State Bar Association committee on this issue).

444. See MODEL CODE OF PROF'L CONDUCT R. 5.4 (2008) (prohibiting partnership with nonlawyers or ownership by nonlawyers). *But see id.* R. 5.7 (applying the rules to the provision of law-related services under control of lawyers); *id.* R. 7.2(b)(4) (amended in 2002 to allow strategic alliances with non-law firms); Bryant G. Garth & Carole Silver, *The MDP Challenge in the Context of Globalization*, 52 CASE W. RES. L. REV. 903, 941-42 (2002) (predicting the continuing development of law firms toward multidisciplinary practice).

445. See 15 U.S.C. § 78j-1(g)(8) (2000).

similar strategies can also be applied within the bar itself by working through one of the more than one thousand legal specialty associations that exist alongside the ABA.<sup>446</sup>

As Ted Schneyer has noted, some specialty associations have issued their own ethical codes, standards, or commentaries, and others have been proposed.<sup>447</sup> Some of these put what is at least a controversial twist on professional standards, for example, when the trusts and estate lawyers assert that a lawyer may with client consent do estate planning for a husband and wife as separate clients whose secrets are not shared<sup>448</sup>; when the matrimonial lawyers urge a lawyer representing a parent to place a child's well-being above the client's conflicting wishes or interests<sup>449</sup>; or when the trial lawyers disallow disclosure of a client's confidences simply to comply with a court order.<sup>450</sup> In many other instances the specialty standards state principles of good conduct that neither track, nor contradict, the professional rules, and which (like the specialty standards in general) have no provision for sanctions.<sup>451</sup> Such provisions resemble the hortatory approach of the old ABA Canons of Legal Ethics and the civility codes that some courts have adopted.<sup>452</sup> Lastly, the specialty standards contain applications of professional

---

446. Kilpatrick, *supra* note 435, at 508.

447. *E.g.*, AM. COLL. OF TRIAL LAWYERS, CODE OF PRETRIAL CONDUCT AND CODE OF TRIAL CONDUCT (2002); BOUNDS OF ADVOCACY: AMERICAN ACADEMY OF MATRIMONIAL LAWYERS STANDARDS OF CONDUCT (1991); AM. COLL. OF TRUST AND ESTATE COUNSEL, *Commentaries on the Model Rules of Professional Conduct* (4th ed. 2006), [http://www.actec.org/Documents/misc/ACET\\_Commentaries\\_4th\\_02\\_14\\_06.pdf](http://www.actec.org/Documents/misc/ACET_Commentaries_4th_02_14_06.pdf); Schneyer, *supra* note 2, at 562-65.

448. *Compare* AM. COLL. OF TRUST AND ESTATE COUNSEL, *supra* note 447, at 91-96, *with* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 130 (cmt. c), (Reporter's Note) (2000).

449. *See* AM. ACAD. OF MATRIMONIAL LAWYERS, *supra* note 447, at 2.23; Schneyer, *supra* note 2, at 563 n.16.

450. *Compare* AM. COLL. OF TRIAL LAWYERS, *supra* note 447, at R. 6 *with* ABA MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(6) (2008). These confidentiality rules also differ in other ways not discussed here.

451. *See, e.g.*, AM. COLL. OF TRIAL LAWYERS, *supra* note 447, at R. 5 ("In discovery, as in all other professional matters, a lawyer's conduct should be honest, fair, and courteous.").

452. *See, e.g.*, SUPREME COURT OF TEXAS & COURT OF CRIMINAL APPEALS, THE TEXAS LAWYER'S CREED: A MANDATE FOR PROFESSIONALISM (1989).

rules to circumstances that lawyers of the specialty routinely encounter.<sup>453</sup> This process of particularization by specialty is also being forwarded by the publication of guides to proper conduct for lawyers of one specialty or another.<sup>454</sup> Such initiatives respond to the fact that the generality of professional rules in effect leaves unregulated many situations that specialists routinely confront.

2. *Practice settings.* The standards we have just discussed illustrate how the rise of specialty practice influences the opinions of the specialists as to what behavior is proper. But the practice settings of different kinds of lawyers also affect the rules applied to them. Corporate house counsel, for example, are far more under the control of their sole client than the lawyers in private practice that the framers of professional rules have usually contemplated. Indeed, some nations take the position that jurists who are employees of nonlawyers lack the independence necessary for admission to the bar.<sup>455</sup> Some of the usual protections that clients enjoy therefore seem unnecessary for house counsel, and in fact likely to make them undesirably subservient to the wishes of their client-employer. Courts have therefore allowed them to sue their corporation and in some jurisdictions have limited the

---

453. See, e.g., AM. COLL. OF TRUST AND ESTATE COUNSEL, *supra* note 447, at 32.

454. See BUREAU OF NAT'L AFFAIRS, LEGAL ETHICS FOR IN-HOUSE CORPORATE COUNSEL (2007); R. MICHAEL CASSIDY, PROSECUTORIAL ETHICS (2005); WILLIAM H. FORTUNE ET AL., MODERN LITIGATION AND PROFESSIONAL RESPONSIBILITY HANDBOOK (2d ed. 2001); JOHN WESLEY HALL, JR., PROFESSIONAL RESPONSIBILITY IN CRIMINAL DEFENSE PRACTICE (3d ed. 2005); WILLIAM WESLEY PATTON, LEGAL ETHICS IN CHILD CUSTODY AND DEPENDENCY PROCEEDINGS: A GUIDE FOR JUDGES AND LAWYERS (2006); MILTON C. REGAN, JR. & JEFFREY D. BAUMAN, LEGAL ETHICS AND CORPORATE PRACTICE (2005); IRMA S. RUSSELL, ISSUES OF LEGAL ETHICS IN THE PRACTICE OF ENVIRONMENTAL LAW (2003); MARC I. STEINBERG, LAWYERING AND ETHICS FOR THE BUSINESS ATTORNEY (2002); WOLFMAN ET AL., *supra* note 93; see also ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

455. See, e.g., LEUBSDORF, *supra* note 60, at 27-28 (France); *infra* note 515 (other countries). For the pressures on in-house counsel, see Robert L. Nelson & Laura Beth Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 LAW & SOC'Y REV. 457 (2000).

corporation's right to discharge them at will.<sup>456</sup> Law firm associates share the vulnerability of house counsel and have received some protection from the courts,<sup>457</sup> but much remains to be done.<sup>458</sup>

Government lawyers, who like house counsel now constitute eight percent of the bar,<sup>459</sup> also share some of their vulnerability<sup>460</sup> but their practice setting has its own characteristics as well. The Model Rules recognize some of these in special conflict of interest rules grounded in the asserted benefits of the revolving door between private and public practice, the undesirability of disqualifying all the lawyers in a governmental entity because of one lawyer's conflict, and the need to protect private persons who disclose information to the government.<sup>461</sup> The Model Rules likewise recognize to some extent, by establishing special rules for prosecutors, the problems of the government lawyer whose office entitles him or her to make decisions otherwise entrusted to clients.<sup>462</sup> As the controversy over the discharge of U.S. Attorneys on apparently political grounds

---

456. *See, e.g.*, *Doe v. A Corp.*, 709 F.2d 1043 (5th Cir. 1983); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 32 Reporter's Note cmt. b (1998); *see also id.* Reporter's Note § 37 (Reporter's Note) (cmt. e).

457. *E.g.*, *Hishon v. King & Spalding*, 467 U.S. 69, 78-79 (1984) (holding that in considering a lawyer for partnership, a law firm must do so without regard to the lawyer's sex). *See generally* *Wieder v. Skala*, 609 N.E.2d 105 (N.Y. 1992) (holding that when a law firm employs an attorney, there is an implied understanding that both the attorney and the firm will conduct their practice in accordance with the ethical standards of the profession, and an attorney who is fired for being a whistleblower may have a valid claim for breach of contract).

458. John Leubsdorf, *The Independence of the Bar in France: Learning from Comparative Legal Ethics*, in *LAWYERS' PRACTICE & IDEALS: A COMPARATIVE VIEW* 275, 295-98 (John J. Barceló III & Roger C. Cramton eds., 1999).

459. Am. Bar Ass'n, *Lawyer Demographics* (2006), [http://www.abanet.org/marketresearch/lawyer\\_demographics\\_2006.pdf](http://www.abanet.org/marketresearch/lawyer_demographics_2006.pdf) (using 2000 statistics).

460. *See generally* *Branti v. Finkel*, 445 U.S. 507 (1980) (holding that a government lawyer who does not make policy may not be discharged for political affiliation); *Santa Clara County Counsel Attorneys Ass'n v. Woodside*, 869 P.2d 1142, 1144 (Cal. 1994) (holding that governmental lawyers may sue employer/client to enforce labor legislation). *But see, e.g.*, *Garcetti v. Ceballos*, 547 U.S. 410, 426 (2006) (limiting First Amendment rights of government lawyers and other employees).

461. MODEL RULES OF PROF'L CONDUCT R. 1.11.

462. *See id.* at R. 3.8; *see also, e.g.*, *Alliance, AFSCME/SEIU v. Commonwealth*, 682 N.E.2d 607, 610 (Mass. 1997).

illustrates, it is not acceptable to treat such government officials as lawyers who can be discharged for any reason.<sup>463</sup> Other authorities seek to limit the power of government lawyers to restrict citizen access under the rule forbidding lawyers to contact represented parties without the permission of those parties' lawyers.<sup>464</sup> The complex structure of the government and its obligations to the citizenry may give rise to further modifications or specifications of generally applicable lawyer rules.<sup>465</sup>

When it comes to class action lawyers, the practice setting that affects their professional obligations is the class action itself, in which the lawyer speaks for many class members, only some of whom have retained him or her, and who may have conflicting interests. Many of the doctrines channeling what such lawyers should do are classified as civil procedure, which means that courts expounding them are not bound by the usual professional rules. Such doctrines include those governing who may be represented in a single class,<sup>466</sup> when a lawyer may communicate with class members,<sup>467</sup> when a lawyer may remain in a case and advocate a settlement against the wishes of some or all of the named plaintiffs,<sup>468</sup> to what extent a lawyer may sacrifice the interests of some class members in negotiating

---

463. Bruce A. Green & Fred C. Zacharias, *"The U.S. Attorneys Scandal" and the Allocation of Prosecutorial Power*, 69 OHIO ST. L.J. 187 (2008); John McKay, *Train Wreck at the Justice Department: An Eyewitness Account*, 31 SEATTLE U. L. REV. 265 (2008).

464. See *Frey v. Dep't of Health & Human Servs.*, 106 F.R.D. 32 (E.D.N.Y. 1985); CAL. R. PROF. CONDUCT, R. 2-100(C)(1)(2008), available at <http://calbar.ca.gov/calbar/pdfs/rules/Rules-Professional-Conduct.pdf>; RESTATEMENT (THIRD) OF THE LAW: THE LAW GOVERNING LAWYERS § 101(2) (2000); see also *id.* at Reporter's Note.

465. See WOLFRAM, *supra* note 24, at 753-70.

466. *E.g.*, *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591 (1997).

467. See, *e.g.*, *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101-02 (1981); Debra L. Bassett, *Pre-Certification Communication Ethics in Class Actions*, 36 GA. L. REV. 353, 354-56 (2002).

468. *E.g.*, *Lazy Oil Co. v. Witco*, 166 F.3d 581 (3d Cir. 1999); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1325 (2d Cir. 1990); *Bash v. Firstmark Standard Life Ins. Co.*, 861 F.2d 159 (7th Cir. 1988).

a settlement,<sup>469</sup> and what financing arrangements a class action lawyer may accept.<sup>470</sup> These and other issues have given rise to a large literature,<sup>471</sup> as well as legislative intervention,<sup>472</sup> but rarely to ethical opinions.<sup>473</sup>

Yet another group of lawyers, those working for accounting and consulting firms, has abandoned the more traditional practice settings and seeks to exempt itself from almost all the professional rules by calling its members' activities not the practice of law.<sup>474</sup> This is presumably done to avoid the prohibition on law practice by employees of a corporation not run and owned by lawyers, except as house counsel representing only the employer.<sup>475</sup> So far this effort has been successful.<sup>476</sup> To the extent that "law consultants," not subject to professional rules or benefiting from the lawyer-client privilege but able to offer "one stop shopping," compete successfully with traditional law firms, legal ethics will tend to become optional. Clients will have a choice whether it is worth its costs, and lawyers will find themselves switching in and out of professional rules as they change jobs.

3. *Ideologies.* Recent decades have yielded an increasing variety of approaches to professional responsibility. The

---

469. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 854-59 (1999); see FED. R. CIV. P. 23(g)(1)(B) (discussing a lawyer's duty to represent the interests of a class).

470. See *Rand v. Monsanto Co.*, 926 F.2d 596 (7th Cir. 1991) (discussing payment by lawyers of litigation costs); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 216 (2d Cir. 1987) (describing loan from some class lawyers to others).

471. *E.g.*, Nancy J. Moore, *Who Should Regulate Class Action Lawyers?*, 2003 U. ILL. L. REV. 1477; David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913 (1998); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469 (1993-94).

472. See *supra* Part III.A.

473. *But see, e.g.*, THE NEW YORK CODE OF PROF'L RESPONSIBILITY: OPINIONS, COMMENTARY & CASELAW, OPINION 2004-01 (2004).

474. Tanina Rostain, *The Emergence of "Law Consultants,"* 75 FORDHAM L. REV. 1397, 1397-98 (2006); Elijah D. Farrell, Note, *Accounting Firms and the Unauthorized Practice of Law: Who Is the Bar Really Trying to Protect?*, 33 IND. L. REV. 599 (2000).

475. MODEL RULES OF PROF'L CONDUCT R. 5.4 (2008).

476. See William D. Elliott, *Unauthorized Practice of Law: Failure of Proof or Failure of Will?*, 81 TAX NOTES 517 (1998).

simplicistic book of Henry Sandwith Drinker<sup>477</sup> was succeeded by Charles W. Wolfram's far more critical and thorough 1986 treatise.<sup>478</sup> Wolfram hoped that a consensus could be forged out of the diverging authorities he analyzed, as shown by his proposing the Restatement project for which he became the Reporter.<sup>479</sup> Whether because of trends in academic legal scholarship, the post-Watergate boom in teaching and writing about legal ethics, changes in the profession, or a broader decline in social consensus, later scholarship has tended less toward the synthesis of authorities than to the presentation of personal views about what legal ethics should be doing. Those in the field will recognize at once the marked differences between the approaches of Monroe Freedman,<sup>480</sup> David Luban,<sup>481</sup> Deborah Rhode,<sup>482</sup> Thomas Shaffer,<sup>483</sup> and William Simon,<sup>484</sup> to speak only of the authors of books. During the last few years, a number of authors have endorsed an openly pluralistic approach in which clients could choose among different styles of lawyering.<sup>485</sup>

Whatever one thinks of the influence of these academic theorists on actual behavior, the "collaborative law"

---

477. See HENRY S. DRINKER, *LEGAL ETHICS* (1953). Drinker was a practicing lawyer a name partner at a large Philadelphia firm.

478. See WOLFRAM, *supra* note 24.

479. Charles Wolfram, *The Concept of a Restatement of the Law Governing Lawyers*, 1 *GEO. J. LEGAL ETHICS* 195 n.\* (1987). For a contemporary discussion of differing theories of lawyer regulation, see Leubsdorf, *supra* note 56.

480. See, e.g., MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* (3d ed. 2004).

481. See LUBAN, *supra* note 3, at xxii.

482. See RHODE, *supra* note 336.

483. See THOMAS L. SHAFFER & MARY M. SHAFFER, *AMERICAN LAWYERS AND THEIR COMMUNITIES: ETHICS IN THE LEGAL PROFESSION* (1991).

484. See SIMON, *supra* note 3.

485. E.g., Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 *COLUM. L. REV.* 509 (1994); Gordon, *supra* note 36; Richard W. Painter, *Rules Lawyers Play By*, 76 *N.Y.U. L. REV.* 665 (2001); Scott R. Peppet, *Lawyers' Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism*, 90 *IOWA L. REV.* 475 (2005); Fred C. Zacharias, *Limited Performance Agreements: Should Clients Get What They Pay For?*, 11 *GEO. J. LEGAL ETHICS* 915 (1998).

movement provides a clear example of pluralism in practice. The legal core of a collaborative law process is the lawyers' contractual commitment to withdraw should the case be litigated, but the process also involves a commitment by both parties and lawyers to full disclosure and discussion and to amicable resolution, often supported by a multidisciplinary team and by training in how to foster the process.<sup>486</sup> It is usually, but not always, used in divorces. Although I have found no statistics on how many lawyers practice collaborative law, there are organizations promoting it in many states, and three have passed statutes to facilitate its use.<sup>487</sup> Collaborative law alters the usual professional rules, at least as to partisanship and withdrawal,<sup>488</sup> except to the extent that the client's informed consent may validate it.<sup>489</sup>

### B. *Clients and Others*

There have always been clients who have their own ideas about how their lawyers should behave,<sup>490</sup> but corporate clients have now begun to assert themselves more systematically and collectively as a force molding lawyer behavior. House counsel from different corporations have developed and shared techniques for reducing the cost of litigation, including shopping for lawyers, alternative fee arrangements, litigation planning and budgeting, and

---

486. See generally SHEILA M. GUTTERMAN, *COLLABORATIVE LAW: A NEW MODEL FOR DISPUTE RESOLUTION* (2004); PAULINE H. TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* (2001).

487. CAL. FAM. CODE § 2013 (West 2004 & Supp. 2008); N.C. GEN. STAT. §§ 50-70 to 50-79; TEX. FAM. CODE ANN. § 6.603 (Vernon 2006).

488. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1, 1.16 (2008).

489. *Id.* at R. 1.2(c), 1.16 cmt. 8. On the ethical issues, see ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-447 (2007), RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 19 (2000), and John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315 (2003). But see Jill Schachner Chanen, *A Warning to Collaborators: Colorado Bar Ethics Panel Takes Aim at a Growing ADR Practice*, 93 A.B.A. J., May 2007, at 22, 22.

490. See, e.g., DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* 13-15 (1974) (arguing that clients who actively try to "understand their problem" and "influence its solution" fare better).

advance approval requirements for research projects, depositions, or the assignment of new lawyers to the case.<sup>491</sup> They developed an “ADR Pledge” signed by many corporations, and by 400 out of the 500 largest law firms.<sup>492</sup> Corporations have also joined to urge law firms to increase their racial diversity.<sup>493</sup>

None of these initiatives contravenes or modifies any professional rule. However they may well affect the norms of practice, and this effect may not be limited to those clients who have joined in urging them. That may not be a bad thing. Indeed, there is something to be said for professional norms requiring lawyers to weigh the costs and benefits of proposed activities,<sup>494</sup> to consider carefully the possibilities of resolving disputes without litigation,<sup>495</sup> and to engage in affirmative action when they hire new lawyers. The American Bar Association has rather remarkably failed to include a prohibition of discrimination in its Model Rules, though a few states have done so.<sup>496</sup>

---

491. Corporate Counsel Section, N.Y. State Bar Ass'n, *Report on Cost-Effective Management of Corporate Litigation*, 59 ALB. L. REV. 263 (1995).

492. Catherine Cronin-Harris, *Mainstreaming: Systematizing Corporate Use of ADR*, 59 ALB. L. REV. 847, 862-63 (1996).

493. J. Cunyon Gordon, *Painting by Numbers: “And, Um, Let’s Have a Black Lawyer Sit at Our Table,”* 71 FORDHAM L. REV. 1257, 1259-60 (2003); David B. Wilkins, *From “Separate Is Inherently Unequal” to “Diversity Is Good for Business”: The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1556-57 (2004); Leigh Jones, *Microsoft to Offer Counsel Diversity Bonuses*, NAT’L L.J., July 21, 2008, at 4; Rick Palmore, *Signing on to Diversity*, NAT’L L.J., Oct. 20, 2008, at S1.

494. *See, e.g., In re Fordham*, 668 N.E.2d 816, 825 (Mass. 1996) (imposing sanctions on an attorney who charged an excessive fee in a driving under the influence case). *But see City of Riverside v. Rivera*, 477 U.S. 561, 561 (1986) (upholding a fee award that was much larger than the damages recovered).

495. *See* MODEL RULES OF PROF’L CONDUCT R. 2.1 cmt. 5 (2008) (stating that sometimes a lawyer must inform his or her client of alternatives to litigation).

496. *See, e.g.,* N.Y. JUD. LAW ANN. DR 1-102(A)(6) (McKinney 2006) (forbidding discrimination in all aspects of practicing law); D.C. RULES OF PROF’L CONDUCT, R. 9.1 (2007) (forbidding employment discrimination); ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 16 (mandating that law schools seek diversity in admission and hiring).

Far more controversial has been the imposition of cost control techniques by liability insurers.<sup>497</sup> The ethical problem here is that in many states only the insured and not the insurer is the client of a lawyer defending a case against the insured for which the insurer is liable under the insurance policy, while in other states both insurer and insured are clients.<sup>498</sup> Under the first view, and perhaps the second as well, the insurer's payment for the lawyer does not entitle it to interfere "with the lawyer's independence of professional judgment."<sup>499</sup> Detailed control over what the lawyer does, or at least what the lawyer gets paid to do, may well violate this prohibition. Furthermore, insurers spend more than fifteen billion dollars a year on defense counsel,<sup>500</sup> which gives them a strong interest in minimizing lawyer fees and the insurance defense bar a strong interest in resisting.

Efforts of insurers to reshape defense practices have therefore led to disputes about whether insurers may assign house counsel to defend cases,<sup>501</sup> whether they may require outside counsel to accept a standard flat fee,<sup>502</sup> and whether they may require advance insurer approval for measures taken by outside counsel.<sup>503</sup> Controversy reached the American Law Institute, where insurance company lawyers lobbied with some success for relaxation of the rules.<sup>504</sup>

---

497. See generally Susan Randall, *Managed Litigation and the Professional Obligations of Insurance Defense Lawyers*, 51 SYRACUSE L. REV. 1 (2001).

498. *Shaya B. Pacific, LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 827 N.Y.S.2d 231, 237 (App. Div. 2006) (citing authorities).

499. MODEL RULES OF PROF'L CONDUCT R. 1.8(f)(2) (2008).

500. Randall, *supra* note 497, at 1 (\$16.2 billion annually).

501. Compare *In re* Petition of Youngblood, 895 S.W.2d 322 (Tenn. 1995) (yes, if insureds are not deceived), with *Am. Ins. Ass'n v. Ky. Bar Ass'n*, 917 S.W.2d 568 (Ky. 1996) (no).

502. *Am. Ins. Ass'n*, 917 S.W.2d at 572 (no).

503. Compare *In re* Rules of Prof'l Conduct & Insurer Imposed Billing Rules & Procedures, 2 P.3d 806, 815 (Mont. 2006) (no), with ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-421 (2001) (finding that attorneys must be sensitive to the financial constraints on insurers while not allowing this sensitivity to impact their professional judgment).

504. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 134(2)(b) cmts. d, f (2000); see also William T. Barker, *Lobbying and the American Law Institute: The Example of Insurance Defense*, 26 HOFSTRA L. REV. 573 (1998).

Whatever one may think of the process or the result, they show that pressure groups from outside the bar can influence the profession's own formulations of its rules. No doubt the influence of insurers on what defense counsel actually do has been even greater than precedents and Restatements indicate. Lawyers who depend on insurance company referrals will think twice before they reject insurance company initiatives.

Another group of insurers, legal malpractice insurers, has likewise begun to regulate law firm practices, largely in response to the multiplication of large malpractice damage awards.<sup>505</sup> Malpractice insurers advise their insureds how to prevent malpractice claims.<sup>506</sup> They also require measures such as written retainers, conflict checking procedures, and calendaring systems.<sup>507</sup> And they exercise more subtle control by excluding some activities from coverage or charging higher rates to lawyers who engage in them.<sup>508</sup> In some of these activities, it is ultimately malpractice law itself that does the regulating, with insurers acting as messengers to make sure that lawyers hear and heed the voice of the law. But a messenger is also an interpreter, and insurers can give malpractice law a broader and deeper impact than it might otherwise have.

### C. *Jurisdictional Diversity*

Ultimately, the growth of multistate and multinational practice should tend to make professional standards more uniform.<sup>509</sup> Lawyers who must deal with rules that vary from place to place and with colleagues trained under many

---

505. *See supra*, Parts II.A, IV.C.

506. *See, e.g.*, Robert E. O'Malley, *Preventing Legal Malpractice in Large Law Firms*, 20 U. TOL. L. REV. 325 (1989) (summarizing prevention and quality control strategies); Attorneys' Liability Assurance Society, [http://www.alas.com/about\\_lp.shtml](http://www.alas.com/about_lp.shtml) (describing loss prevention program).

507. James M. Fischer, *External Control over the American Bar*, 19 GEO. J. LEGAL ETHICS 59, 72-77 (2006).

508. *Id.* at 67-68, 82; *see also* Anthony E. Davis, *Professional Liability Insurers as Regulators of Law Practice*, 65 FORDHAM L. REV. 209 (1996).

509. *See, e.g.*, Judith A. McMorrow & Daniel R. Coquillette, 30 MOORE'S FEDERAL PRACTICE §§ 802.20-23 (3d ed. 2008); Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335 (1994).

regimes will appreciate the benefits of a single standard and lessen their parochial attachments to their own rules. The European Union has already adopted a code to govern relations between lawyers from different member states.<sup>510</sup> France has likewise acted to unify the rules of its 181 local bars.<sup>511</sup>

In the short term, however, multistate and multinational lawyers must navigate among different sets of rules. The divergence and increasing complexity of state ethics rules has given rise to books seeking to state the professional rules of a single state.<sup>512</sup> Sometimes the rules are not just different but incompatible: a lawyer working on a transaction in New Jersey and New York might find herself required to disclose her client's fraud in the first state and forbidden to do so in the second.<sup>513</sup> And in transnational practice, a lawyer might have to deal with a foreign colleague in a nation in which certain communications between counsel may not be disclosed to the client,<sup>514</sup> or in which disclosures to corporate house counsel are not protected by an evidentiary privilege,<sup>515</sup> or in

---

510. COUNCIL OF BARS AND LAW SOCIETIES OF EUROPE, CODE OF CONDUCT FOR EUROPEAN LAWYERS (1988, amended 2006). For a description of this Code, which most member nations have adopted, see Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code*, 7 GEO. J. LEGAL ETHICS 1-88, 345-94 (1993).

511. Martin, *supra* note 134, at 147-49 (discussing the promulgation of standard provisions for bar bylaws); Decree No. 2005-790 of July 12, 2005, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 16, 2005, p. 22. Australia is also moving toward interstate uniformity. National Legal Profession Model Bill, <http://www.lawcouncil.asn.au/library/policies-&-guidelines/national-profession/model-bill.cfm> (already enacted in the three most populous states).

512. *E.g.*, KEVIN H. MICHELS, NEW JERSEY ATTORNEY ETHICS (2008); ROY SIMON, SIMON'S NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY ANN. (2008); GILDA TUONI RUSSELL, MASS. PROF'L RESPONSIBILITY (2d ed. 2003); PAUL W. VAPNECK ET AL., CAL. PRACTICE GUIDE: PROF'L RESPONSIBILITY (2008).

513. Compare N.J. RULES OF CT., RPC 1.6(b)(1) (Thomson/West 2007), with N.Y. JUD. LAW, DR 4-101 (McKinney 2003).

514. See COUNCIL OF BARS AND LAW SOCIETIES OF EUROPE, CODE OF CONDUCT FOR EUROPEAN LAWYERS, *supra* note 510, at 15, 28.

515. See, *e.g.*, *EU Court Denies Privilege to Documents That Client Said Were to Obtain Legal Advice*, 23 Law. Manual Prof. Conduct 507 (referring to the holding in *Akzo Nobel Chems. Ltd. v. Comm'n of the Eur. Cmtys.*, Ct. First Inst., T-253/03 (Sept. 17, 2007)); J. Triplett Mackintosh & Kristen M. Angus,

which lawyers may not interview potential witnesses.<sup>516</sup> Such situations are increasingly prevalent. United States law firms export more than four billion dollars of services yearly<sup>517</sup> and, although I have found no statistics on interstate exports, they must be even larger.

The regulatory authorities have both alleviated and increased this fractionalization of lawyer rules. The ABA has promulgated choice of law rules so that lawyers will be able to predict which professional rules will be applied to their conduct, and most states have adopted these rules.<sup>518</sup> But, while some have so far taken no action, others have decided not to adopt the choice of law provisions,<sup>519</sup> and a few have enacted substantially different provisions.<sup>520</sup> Because a parallel ABA reform authorizes disciplinary proceedings in any jurisdiction in which the lawyer was admitted to practice or in which “the lawyer provides or

---

*Conflict in Confidentiality: How E.U. Laws Leave In-House Counsel Outside the Privilege*, 38 INT'L L. 35 (2004) (discussing differences in confidentiality protections between the United States and the European Union); Jason Marin, *Invoking the U.S. Attorney-Client Privilege: Japanese Corporate Quasi-Lawyers Deserve Protection in U.S. Courts Too*, 21 FORDHAM INT'L L.J. 1558 (1998) (“discuss[ing] whether the attorney-client privilege applies to Japanese in-house legal personnel who are not members of any country’s bar”).

516. See, e.g., Catherine A. Rogers, *Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitration*, 39 STAN. J. INT'L L. 1, 3 n.8 (2003).

517. Jennifer Koncz et al., *U.S. International Services: Cross-Border Trade in 2005 and Sales through Affiliates in 2004*, at 42-43 (2006), [http://www.bea.gov/scb/pdf/2006/10October/1006\\_intlserv.pdf](http://www.bea.gov/scb/pdf/2006/10October/1006_intlserv.pdf) (reporting US legal exports of \$4.306 billion and imports of \$914 million in 2005). For an earlier survey of transnational practice, see Richard L. Abel, *Transnational Law Practice*, 44 CASE W. RES. L. REV. 737, 764-870 (1994).

518. See MODEL RULES OF PROF'L CONDUCT R. 8.5(b) (2008); ABA, *State Implementation of ABA Model Rule 8.5 (Disciplinary Authority; Choice of Law)*, [http://www.abanet.org/cpr/jclr/8\\_5\\_quick\\_guide.pdf](http://www.abanet.org/cpr/jclr/8_5_quick_guide.pdf) (as of Sept. 25, 2007).

519. See, e.g., ALA. RULES OF PROF'L CONDUCT R. 8.5, *available at* NEV. RULES OF PROF'L CONDUCT R. 8.5(b), *available at* <http://www.leg.state.nv.us/courtrules/RPC.html>.

520. See, e.g., CAL. RULES OF PROF'L CONDUCT R. 1-100(D), *available at* [http://www.calbar.ca.gov/state/calbar/calbar\\_generic.jsp?cid=10158&id=3422](http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10158&id=3422); D.C. RULES OF PROF'L CONDUCT R. 8.5(b), *available at* [http://www.dcbart.org/new\\_rules/rules.cfm](http://www.dcbart.org/new_rules/rules.cfm); VA. RULES OF PROF'L CONDUCT R. 8.5(b), *available at* <http://www.vsb.org/site/regulation/guidelines/>.

offers to provide any legal services,"<sup>521</sup> it is possible that two states will apply the choice of law's reference to the jurisdiction of "the predominant effect of the conduct"<sup>522</sup> and reach different results. In addition, the ABA rule is limited to disciplinary matters,<sup>523</sup> so a court hearing a malpractice case might not follow it.<sup>524</sup> Likewise, some federal courts apply their own standards to disqualification motions.<sup>525</sup>

Although this proliferation of standards and jurisdictions might suggest that interstate and transnational lawyers are doomed to perplexity, the reality is different. States rarely discipline their own lawyers for conduct occurring elsewhere, or discipline another state's lawyer (except for sanctioning litigation misconduct) for conduct within the state.<sup>526</sup> The obstacles include lack of investigative personnel, lack of interest, and perhaps the very multiplication of rules and disciplinary authorities we have been discussing. In any event, interstate and transnational lawyers are confronted less by over-regulation than by a regulatory vacuum.<sup>527</sup>

---

521. MODEL RULES OF PROF'L CONDUCT R. 8.5(a); *see also* ABA, *Report of the Commission on Multijurisdictional Practice* (2002), available at <http://www.abanet.org/cpr/mjp/home.html> (reporting recommendations to clarify the authority of a jurisdiction to discipline lawyers); Charles W. Wolfram, *Expanding State Jurisdiction to Regulate Out-of-State Lawyers*, 30 HOFSTRA L. REV. 1015 (2002) (discussing the ABA *Model Rules* and the defects in the local admission rule).

522. MODEL RULES OF PROF'L CONDUCT R. 8.5(b) (explaining that either the rules of the jurisdiction where the conduct occurs or the jurisdiction where the tribunal sits may be used to discipline attorney conduct).

523. *See id.*

524. *See, e.g.*, *Burns v. Geres*, 409 N.W.2d 428 (Wisc. Ct. App. 1987); *see also* ANN. MODEL RULES OF PROF'L CONDUCT R. 8.5 (6th ed. 2007).

525. RICHARD E. FLAMM, *LAWYER DISQUALIFICATION: CONFLICTS OF INTEREST AND OTHER BASES* 454-59 (2003).

526. *See* ANN. MODEL RULES OF PROF'L CONDUCT at 625-30 (6th ed. 2007) (collecting authorities).

527. *See* Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 MICH. J. INT'L L. 341, 342-43 (2002); Detlev F. Vagts, *The International Legal Profession: A Need for More Governance?*, 90 AM. J. INT'L L. 250, 261 (1996).

## CONCLUSION

The regulations we have surveyed embrace almost every kind of legal practice: banking, bankruptcy, class actions, corporate and securities law, criminal defense, debt collection, insurance defense, legal services, tax, and transnational. Some might be dismissed as window dressing, but their cumulative impact for many lawyers is enormous. They cover almost every subject considered by traditional rules and codes: advertising and solicitation, advice to clients, confidences and privilege, conflicts of interest, decision-making authority, duties to nonclients, fees, honesty, and malpractice.

Although each innovation has its own history, a number of more general factors seem to be at work. Some of these can best be appreciated from the viewpoint of the regulators. Because almost every other part of the economy is now subject to external regulation, and because the work of lawyers is entwined with the rest of the economy, lawyers cannot expect to escape outside regulation. As the number and functions of lawyers increase, lawyers have become too important to be left to the exclusive control of the bench and bar. In particular, outside regulators respond to lawyers' potential as gatekeepers, which in turn grows out of their crucial role in many transactions and the likelihood that they will know, and perhaps even follow, the law. In some instances, such as bankruptcy law and debt collection, lawyers often represent a number of small clients, offering a convenient fulcrum on which to leverage regulation that may affect many clients at once, while in fields such as corporate law it is sometimes tempting to add a second level of regulation targeting lawyers when regulation of clients falls short. The growth of multistate practice leads to a regulatory mismatch to which uniform federal regulation is an obvious response. Furthermore, as lawyers increasingly compete with other sorts of advisors, regulation transcending a single profession becomes appropriate.<sup>528</sup>

---

528. See, e.g., Laurel S. Terry, *The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as "Service Providers,"* 2008 J. PROF. LAW. 189 (2008) (explaining that the legal profession is no longer considered a distinct group from other "service providers").

Other factors promoting outside regulation arise from the nature of the legal profession. Blaming lawyers is easy and may have popular appeal, though the profession mobilizes potent powers of defense and often delays, dilutes, or defeats the bar-bashers. Lawyers themselves increasingly view themselves, and present themselves, as business people. A law firm that advertises and engages in market planning, helps market corporate tax shelters and other products, publishes its partners' high fees and earnings, boosts its associate-partner ratio to increase partner profits, hires and fires partners on the basis of how much money they bring in, and outsources functions overseas can hardly complain if it is treated like other businesses.<sup>529</sup> In addition, as it becomes clearer that the lawyer codes reflect neither uncontroversial morality nor immemorial tradition but rather a balancing of interests, the claim of the bench and bar to monopolize professional regulation has weakened—especially since their enforcement of many existing rules has never been effective. And as the bar dissolves into a conglomeration of specialties, a single set of rules rooted in the functions of litigators becomes increasingly inadequate. Lastly, conflicts within the bar have often prevented change, especially change viewed as bad for lawyers, causing its proponents to seek out other lawmakers.

These developments have obvious but limited parallels in other professions. Accounting firms, for example, have become larger and more profit oriented while the profession's self-regulation failed to prevent one accounting scandal after another. The result has been increased government regulation culminating (so far) in the establishment of the Public Company Accounting Oversight

---

529. See, e.g., MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 37-76 (1991); REGAN, *supra* note 275, at 6 (discussing “the decline of law practice from a profession to a business”); Elizabeth Goldberg, *The Departed*, AM. LAW., May 2007, at 145 (describing law firm and partner profits, partner mobility, and firing); Boris Groysberg & Robin Abrahams, *Duane Morris: Balancing Growth and Culture at a Law Firm* 1-3 (2006) (Harvard Business School case); Amy Kolz, *Miami Heat*, AM. LAW., Mar. 2007, at 1-13 (describing growth, profit seeking, and misconduct at a firm); Jayanth K. Krishnan, *Outsourcing and the Globalizing Legal Profession*, 48 WM. & MARY L. REV. 2189 (2007).

Board by the Sarbanes Oxley Act.<sup>530</sup> The medical industry has likewise grown and become increasingly lucrative for some participants. Here too, weaknesses of self-regulation,<sup>531</sup> combined in this instance with a huge influx of governmental funding, led to more external regulation.<sup>532</sup>

Yet, in some ways lawyers and their regulators have not simply followed a pattern applicable to all professions. The self-regulation of lawyers may well have been more effective than that of accountants and physicians.<sup>533</sup> Indeed, in an important sense mid twentieth century United States lawyers were not really self-regulated. It was judges, former practitioners who knew and cared about the practice of law but had attained at least some detachment from professional self-interest, who were increasingly in control.<sup>534</sup> During recent decades, although external regulation of accountants and medical professionals and institutions has increased along with external regulation of lawyers, lawyers may be unique in terms of the variety of regulators and regulations that have emerged. This may be because lawyers work with clients in many differing economic areas, each of which has its own regulatory system. Once again, the recent trend has been toward regulation by legal specialty, not regulation embracing the whole bar.

---

530. *See generally* AHMED BELKAOU, PUBLIC POLICY AND THE PRACTICE AND PROBLEMS OF ACCOUNTING (1985); ABRAHAM J. BRILLOFF, THE TRUTH ABOUT CORPORATE ACCOUNTING (1981); SUSAN E. SQUIRES *et al.*, INSIDE ARTHUR ANDERSEN: SHIFTING VALUES, UNEXPECTED CONSEQUENCES (2003); George J. Benston, *The Regulation of Accountants and Public Accounting Before and After Enron*, 52 EMORY L.J. 1325, 1326 (2003); Paul R. Brown *et al.*, *Administrative and Judicial Approaches to Auditor Independence*, 30 SETON HALL L. REV. 443 (2000).

531. *See, e.g.*, MARC A. RODWIN, MEDICINE, MONEY, AND MORALS: PHYSICIANS' CONFLICTS OF INTEREST 44 (1993).

532. *See* CARL F. AMERINGER, STATE MEDICAL BOARDS AND THE POLITICS OF PUBLIC PROTECTION (1999); PAUL STARR, THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE 379-40 (1982); Timothy Stoltzfus Jost, *Oversight of the Quality of Medical Care: Regulation, Management, or the Market?*, 37 ARIZ. L. REV. 825, 834-35 (1995).

533. HEDVAH L. SHUCHMAN *ET AL.*, NAT'L SCIENCE FOUND., SELF-REGULATION IN THE PROFESSIONS: ACCOUNTING, LAW & MEDICINE (1981).

534. *See supra* Part I.

In the face of the massive array of innovations described here, it seems almost pointless to consider whether the entry of new regulators is a good thing. Like Margaret Fuller, lawyers must accept the universe.<sup>535</sup> In any event, there could be no across the board verdict. If the bar and bench have often been delinquent in cleaning their own house, outsiders also have their own interests and agendas. As David Wilkins and others have shown, different regulators may suit different problems.<sup>536</sup>

It might be more useful to ask how the trend of more regulators and fractionated regulation might be guided for the best. One possibility is a Legal Services Board like the one now under construction in England.<sup>537</sup> Such a Board could have representatives from different constituencies and could engage in research, consultation, and planning for the future of the legal profession, or should one now begin to say legal professions? It might be empowered either to regulate lawyers on its own, or to promulgate rules that would come into effect unless Congress enacted otherwise. Granted the possibility of regulatory capture, it might still be more informed than legislatures, less parochial than the ABA, and more focused on the practice of law than the new regulators who now often sweep along lawyers as a minor and unconsidered phase of broader campaigns.

As a national body, a Legal Services Board could also help make the regimes of different states more uniform, which the growth of interstate practice plainly makes desirable, either by imposing all-inclusive rules that would preempt state regulation or by promulgating uniform national rules only when appropriate. State disciplinary systems would still play a significant role even if they

---

535. "Margaret Fuller: 'I accept the universe.' Thomas Carlyle: 'Gad! She'd better!'" THE OXFORD DICTIONARY OF QUOTATIONS 127 (2d ed. 1959).

536. See Wilkins, *supra* note 57; see also Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665 (1994); Ted Schneyer, *Legal Process Scholarship and the Regulation of Lawyers*, 65 FORDHAM L. REV. 33 (1996).

537. Legal Services Act 2007 (U.K.), pt. 2, available at [http://www.opsi.gov.uk/acts/acts2007/ukpga\\_20070029\\_en\\_2](http://www.opsi.gov.uk/acts/acts2007/ukpga_20070029_en_2). The Public Company Accounting Oversight Board established by the Sarbanes Oxley Act is another possible analogy. 15 U.S.C. § 7211 (2006); see also Pub. Co. Accounting Oversight Bd., 2006 Annual Report 4-5 (2007).

merely continued to discipline lawyers who grossly neglect their clients, misplace client funds, are convicted of crimes, and commit fraud or other egregious acts.<sup>538</sup> Indeed, they might, even under existing rules, proceed against lawyers who violate the new regulatory requirements we have been discussing.<sup>539</sup> This would complement the recent trend to recognize remedies other than professional discipline for breaches of professional rules.<sup>540</sup>

I know only too well the obstacles that proposals such as these would face, the complex problems that specifying their details would confront, and the many ways in which reforms can yield unexpected and deleterious fruit. On the other hand, the increasingly fragmented nonsystem I have been describing also has its defects. The one thing that is certain is that the unified structure of professional regulation by bench and bar that the ABA Model Rules represent no longer exists, and can be expected to become increasingly out of reach in the future.

---

538. *See* OFFICE OF ATTORNEY ETHICS, SUPREME COURT OF NEW JERSEY, STATE OF THE ATTORNEY DISCIPLINARY SYSTEM REPORT 20 (2007) (describing these as the major causes of discipline); *see also* ATTORNEY REGISTRATION AND DISCIPLINARY COMM'N, 2006 ANNUAL REPORT 10-11 (2007) (Illinois).

539. *See* MODEL RULES OF PROF'L CONDUCT R. 1.16(a)(1) (2008) (stating that a lawyer must withdraw rather than violate "the Rules of Professional Conduct or other law").

540. *See, e.g.*, *Tri-Growth Ctr. City, Ltd. v. Silldorf, Burdman, Duignan & Eisenberg*, 265 Cal. Rptr. 330, 335 (Cal. Ct. App. 1989) (discussing imposition of a constructive trust where law firm allegedly profited by misusing client confidential information); *Cornell v. Wunschel*, 408 N.W.2d 369, 372 (Iowa 1987) (affirming some damages for fraud where a lawyer breached his duty to disclose certain information to his client); *Maritrans GP Inc. v. Pepper, Hamilton & Scheetz*, 602 A.2d 1277, 1279 (Pa. 1992) (imposing an injunction against representation that would create a conflict of interest based on fiduciary duty theory); *Burrow v. Arce*, 997 S.W.2d 229, 232 (Tex. 1999) (holding that fee forfeiture was appropriate where a lawyer had breached his fiduciary duty in an aggregate settlement negotiation). On the use of professional rules in legal malpractice suits, *see* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52(2) (2000). *See generally* Leubsdorf, *supra* note 65.