# THE FUTURE STRUCTURE AND REGULATION OF LAW PRACTICE: CONFRONTING LIES, FICTIONS, AND FALSE PARADIGMS IN LEGAL ETHICS REGULATION

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## I. INTRODUCTION

Several years ago, I questioned the legal profession's frequent redrafting of its professional standards.[1] I posited that the profession's practice of revisiting the substance of lawyer regulation reflects the complexity of the task, the impossibility of anticipating all situations that need to be regulated, and the failure of the existing bodies of rules to acknowledge that regulation has a variety of purposes.[2] These conclusions continue to hold true. In reflecting upon this symposium's topic, however, I have come to recognize another explanation.

The redrafting phenomenon may be a reaction to the reality that many of our professional standards are based on lies, fictions, or faulty assumptions that create tensions in the practice of law. I do not mean this in a pejorative sense. Some of the false premises of the legal ethics codes, for example,[3] do reflect misconceptions.[4] But others represent well-intentioned compromises developed to provide enforceable rules or to avoid confronting trade-offs that nuanced regulation would require.[5]

Nevertheless, when new developments highlight enough situations that are inconsistent with the codes' axioms, pressure for change develops. The bar's typical response over the past several decades has been to take a new look at the codes as a whole. The resulting revisions, however, have not acknowledged the possibility that core premises underlying lawyer regulation are misguided. Instead, they have tinkered with individual provisions to alleviate the concrete problems that have surfaced.

At some point, the designers of "The Future Structure and Regulation of Law Practice" will need to come to grips with the fictions in the current codes. Part II of this Article suggests that some catalysts that induce regulators to evaluate flaws in professional standards also signal that the premises underlying the standards merit reconsideration. Part III identifies specific false assumptions on which the current codes rely, as well as particular developments that may produce pressure for reconsideration. Part IV predicts directions that twenty-first century regulation may

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1. Fred C. Zacharias, *The Quest for a Perfect Code*, 11 GEO. J. LEGAL ETHICS 787, 788 (1998).

2. *Id.* at 791–94.

3. Throughout this paper, I refer to false premises in the legal ethics codes. More accurately, however, I am referring to assumptions that permeate professional regulation of lawyers more generally. Unless otherwise specified, I will for ease and purposes of illustration refer to rules contained in the two ABA model codes that states have adopted. MODEL RULES OF PROF'L CONDUCT (1983) [hereinafter MODEL RULES]; MODEL CODE OF PROF'L RESPONSIBILITY (1969) [hereinafter MODEL CODE]. Recent amendments adopted as a result of the ABA's Ethics 2000 Project have not yet had time to find their way into state codes.

4. Some of these are discussed *infra* Part III.

5. For example, the decision to treat clients of different sophistication similarly for the purposes of certain waivers is explicable on the basis of a decision that making meaningful distinctions in the rules would be difficult and that lawyers might be unable to effectuate them.

take once the profession confronts the reality of how legal practice, and legal practitioners, operate.

In identifying premises that need reevaluation, this Article neither proposes particular resolutions nor suggests that regulators always must avoid generalized, overinclusive, or bright-line rules. Few regulations ever are perfectly precise. At the time code drafters first established standards for the profession, it may have been important to risk the consequences of employing overbroad rules.[6]

Times and analyses change, however. The upshot of this Article is that, when pushed to reconsider core counter-factual premises, regulators must be honest in determining the purposes of particular rules and should focus on whether precisely nuanced or bright-line regulation best serves those purposes. Regulators should avoid resting professional standards on idealizations about lawyers or the practice of law unless doing so actually will serve the regulators' explicit goals.

## II. WHAT MAKES REGULATORS REACT?

When drafting committees meet to amend existing rules, they rarely have reason to question core paradigms in the professional standards. Four types of legal developments sometimes force reconsideration. First, despite seemingly unambiguous prohibitory language, practicing lawyers may continually violate a rule or set of rules. This pattern often suggests that a code or rule is flawed in some essential respect. Second, new events may highlight a need for change. Third, regulators may come to realize that they have been called upon too often to redraft the same code provisions. This may suggest that a new approach is necessary. Finally, inconsistencies among code provisions or between the codes and other forms of lawyer regulation may suggest that existing standards are unrealistic. The following discussion briefly considers a few recent examples of each phenomenon.

### *A. Continuing Rule Violations*

The first situation—in which lawyers violate clear rules—can be subdivided into three subcategories. In one, everyone knows lawyers violate particular professional regulation, but regulators rarely enforce the rules. A recent empirical study highlights one such state of affairs: lawyer advertising rules, which disciplinary agencies rarely enforce and which lawyers frequently disregard.[7] Another example is class action lawyers' practice of paying the legal expenses of the persons they represent despite clear prohibitions against this conduct.

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6. When the drafters of the first model codes undertook their tasks, they needed to identify a general ethic that lawyers could understand and follow. The reasons for adopting assumptions like "all lawyers should be governed by the same rules" may, at the time, have been compelling; differentiating among lawyers might have undermined the development of a general client-centered role that lawyers should play. Several decades later, however, that role has become entrenched. Modern rulemakers not only can draft new regulation with the benefit of experience under the old regime, but also may have more leeway to draw distinctions without risking a collapse of the entire enterprise.

7. Fred C. Zacharias, *The Practical Impact of Underenforced Professional Rules: Legal Advertising and Beyond*, 87 IOWA L. REV. 971 (2002). The study also alludes to other areas of underenforced professional regulation.

The bar's response to continuing advertising violations has been to decrease substantive limitations in the rules. As Part II will discuss, however, the bar has not come to grips with the underlying fallacy of the advertising rules: the notion that lawyers operate differently than regular businessmen and somehow can be held to a higher standard of propriety than other citizens.[8] Likewise, the bar, courts, and commentators have responded to the class action financing phenomenon by considering novel methods of appointing class counsel, rather than by reconsidering the essential role lawyers play in the unique setting of class actions.[9]

The second subcategory of the rule violation pattern involves regulations that discipliners and courts enforce when they can, but that lawyers nevertheless keep violating. The best example is conflict-of-interest rules. Why are lawyers unable to follow the rules faithfully and why do clients accept obvious conflicts that violate the rules? Code drafters continue to tinker with presumptions in the conflict-of-interest provisions,[10] but they have failed to confront the striking core questions about client autonomy and lawyer incentives that the continuing violations highlight.[11]

The third subcategory involves regulations which lawyers have not yet begun to violate, but which lawyers have threatened to violate in the future. For example, faced with competition from international accounting firms that provide "full service" to clients, American law firms have insisted that lawyers be allowed to associate with nonlawyers for the purpose of offering legal and nonlegal services under the same aegis.[12] The ABA Commission on Multidisciplinary Practice recently responded to this pressure by recommending liberalization of the rules, but did so holding firm to the questionable assumption that all fields of law must be treated alike.[13] The ABA's membership found the Commission's resolution unsatisfactory[14]—at least in part

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8. *See infra* text accompanying note 72.

9. *See infra* text accompanying note 67.

10. *See* Fred C. Zacharias, *Waiving Conflicts of Interest*, 108 YALE L.J. 407, 411–12 nn.19–20 (1998) (discussing the distinctive approaches of California, Oregon, D.C. and other jurisdictions).

11. *See infra* text accompanying note 47.

12. *Regulation of Bar: ABA Refuses to Change Ethics Rules Unless Studies of MDPs Dispel Concerns*, 15 Laws. Man. on Prof. Conduct (ABA/BNA) 396, 397 (Aug. 18, 1999) (noting ways lawyers already engage in conduct equivalent to multidisciplinary practice); John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 FORDHAM L. REV. 83, 88 (2000) (discussing the fear that failure to allow multidisciplinary practice will lead to a transfer of legal work abroad); Gary A. Munneke, *A Nightmare on Main Street (Part MXL): Freddie Joins an Accounting Firm*, 20 PACE L. REV. 1, 16 (1999) (discussing the legal profession's "nightmare" when confronted by competition from international accounting firms); *see also* Laurel S. Terry, *A Primer on MDPs: Should the "No" Rule Become a New Rule?*, 72 TEMP. L. REV. 869, 877 (1999) (recounting the history of the multidisciplinary practice debate).

13. *See infra* text accompanying note 42.

14. To view the Commission's proposals, see AM. BAR ASS'N COMM'N ON MULTIDISCIPLINARY PRACTICE, REPORT TO THE HOUSE OF DELEGATES, *available at* http://www.abanet.org/cpr/mdpfinalrep2000.html (last visited Sept. 29, 2002). Several commentators have provided reactions to the Report. *See, e.g.*, Richard W. Painter, *Jurisdictional Competition as Federalism's Answer to the Multidisciplinary Practice Debate*, 36 WAKE FOREST L. REV. 185, 186 (2001) (describing the arguments for and against the

because the proposed changes required redefinition of appropriate legal practice in areas other than the limited contexts threatened by the accounting firms.[15] The Commission's failure to address the core assumption that all lawyers should be treated alike arguably doomed its proposals.

### *B. New Developments*

The multidisciplinary practice experience also illustrates how significant events or issues can produce pressure for change. In the case of multidisciplinary practice, the new competition from the accounting firms served as a catalyst that caused the bar to consider the complaints of the large, multinational law firms. The resulting inquiry into multidisciplinary practice regulation has forced the profession to reassess potentially faulty assumptions in the prevailing rules.[16]

The California decision of *Birbrower v. Superior Court*,[17] described in the margin,[18] is another example of a major event that has forced regulators to acknowledge regulatory problems that should have been foreseen,[19] but that

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proposals and urging compromise); Robert A. Stein, *Multidisciplinary Practices: Prohibit or Regulate?*, 84 MINN. L. REV. 1529, 1531–33 (2000) (canvassing analyses of the Commission's proposals).

15. James C. Moore, *Lawyers and Accountants: Is the Delivery of Legal Services through the Multidisciplinary Practice in the Best Interests of the Clients and the Public?*, 20 PACE L. REV. 33, 40 (1999) (arguing that multidisciplinary practice will reduce lawyers' independence); *cf.* Ted Schneyer, *Multidisciplinary Practice, Professional Regulation, and the Anti-Interference Principle in Legal Ethics*, 84 MINN. L. REV. 1469, 1470–71 (2000) (discussing the argument that multidisciplinary practice undermines attorney loyalty, competence, confidentiality, and independent judgment).

16. *See infra* text accompanying note 64; *see also* Marc N. Biamonte, Note, *Multidisciplinary Practices: Must a Change to Model Rule 5.4 Apply to All Law Firms Uniformly?*, 42 B.C. L. REV. 1161 (2001) (arguing that multidisciplinary regulation should vary for different kinds of practice and, in particular, should be relaxed for solo and small firm practitioners).

17. Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court, 949 P.2d 1 (Cal. 1998).

18. In *Birbrower*, a New York law firm represented a California corporation in negotiating a settlement of an arbitration claim involving events that occurred in California and governed by California law. *Id.* The company later sued the firm for malpractice and the firm counterclaimed in an effort to recover its fees. The trial court concluded that: (1) Birbrower was "not admitted to the practice of law in California"; (2) Birbrower "did not associate California counsel"; (3) Birbrower "provided legal services in this state"; and (4) "The law is clear that no one may recover compensation for services as an attorney in this state unless he or she was a member of the state bar at the time those services were performed." *Id.* at 4. The California Supreme Court affirmed the lower court's decision, though it acknowledged "tension . . . between interjurisdictional practice and the need to have a state-regulated bar." *Id.* at 6. The court held that the "plain meaning" of California's unauthorized practice rules required the court to sanction even transactional practice by out-of-state lawyers within the state. *Id.* at 7–8.

19. Problems with relying on state regulation of multijurisdictional, federal, and international practice have long been evident. *See* Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 345–65 (1994) (suggesting a need for federal legislation to regulate lawyer conduct). A few states have started to respond by considering safe harbor provisions for visiting transactional lawyers. *See, e.g.*, *California MJP Reform Plan Features Registration,*

previously were downplayed as having little practical importance.[20] *Birbrower* and its progeny resulted in the establishment of yet another ABA commission.[21] The resulting report, while an advance on previous proposals, represented a political compromise on the key substantive issues regarding the role of state regulation.[22] In assuming the basic axiom that, "The ABA [should] affirm its support for the principle of state judicial regulation of the practice of law,"[23] the Commission avoided confronting traditional broad misconceptions inherent in existing multijurisdictional regulation.[24]

### *C. Frequent Code Amendments*

The third catalyst for reconsideration of traditional approaches to professional regulation occurs when the legal ethics codes constantly seem to need amending. The conflict-of-interest provisions, for example, have been overhauled more frequently and more significantly than most other rules, to reflect changing case law and a modern recognition that the original formulations were too simplistic.[25] The

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*"Safe Harbors"*, 17 Laws. Man. on Prof. Conduct (ABA/BNA) 488 (Aug. 15, 2001) (discussing a California task force's recommendations for changes to rules limiting practice in California by out-of-state lawyers).

20. Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 665, 703 n.122 (1995) (characterizing the call for federalization of legal ethics as "imaginative, yet unconvincing").

21. *See Admissions: ABA Names Panel Members Who Will Study Issues Raised by Multijurisdictional Practice*, 16 Laws. Man. on Prof. Conduct (ABA/BNA) 471 (Aug. 30, 2000) (discussing appointment of the Commission on Multijurisdictional Practice).

22. Stephen Gillers, *Lessons from the Multijurisdictional Practice Commission: The Art of Making Change*, 44 ARIZ. L. REV. 685 (2002).

23 AM. BAR ASS'N, REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE 1 (Aug. 2002), *available at* http://www.abanet.org/cpr/mjp-home.html (last visited Nov. 6, 2002).

24. *See infra* text accompanying note 161 (discussing false paradigms implicated by reliance on state regulation of multijurisdictional practice).

25. The Model Rules dramatically amended the Model Code, moving from catch-all provisions in DR 5-101(A) and 5-105(A) and a few specific rules governing business and financial interests of lawyers in DR 5-103 and DR 5-104 to two focused general provisions in Model Rules 1.7 and 1.9 and a series of rules in Model Rule 1.8 dealing with specific potential conflict situations. MODEL RULES, *supra* note 3, at R. 1.7, 1.8; MODEL CODE, *supra* note 3, at DR 5-101 to 5-105. Individual states have tinkered with or rejected many of the Model Rules changes. The comment to Model Rule 1.7 itself was amended in 1987 to add procedural requirements for identifying conflicts. *See* MODEL RULES, *supra* note 3, at R. 1.7 cmt. 1 ("[T]he lawyer should adopt reasonable procedures . . . to determine . . . the parties and issues involved and to determine whether there are actual or potential conflicts of interest."). Subsequent ABA and state modifications have included rules governing sex with clients, part-time prosecutors, and particular loans to clients. *See, e.g.*, authorities cited *infra* notes 27 and 75 (regarding rules prohibiting sexual relationships with clients); IND. RULES OF PROF'L CONDUCT R. 1.8(k) (2002) (regulating practice by part-time prosecutors); MONT. RULES OF PROF'L CONDUCT R. 1.8(e) (2002) (allowing lawyers to guarantee, but not make, certain loans). The Ethics 2000 Project successfully recommended additional changes to aspects of Model Rule 1.8 governing gifts, sexual relationships, and acceptance of media rights. *See* AM. BAR ASS'N ETHICS 2000 COMM'N, COMMISSION ON EVALUATION OF THE RULES OF PROFESSIONAL CONDUCT, REPORT WITH RECOMMENDATIONS TO THE HOUSE OF DELEGATES, R. 1.8(c)-(d), 1.8(j) (proposed Aug. 2001),

Model Rules incorporated a series of new conflict provisions addressing specific types of arrangements between lawyers and clients that had come into the public eye.[26] More recently, the ABA has sought to add a sex-with-clients provision to the conflict rules and repeatedly has reassessed conflict-screening rules.[27] In drafting new measures, however, the code drafters have rarely, if ever, engaged in a dialogue about the reasons for honoring, or dishonoring, client choice in establishing attorney-client relationships.

The history of the ethics provisions governing ancillary businesses also illustrates the reconsideration phenomenon.[28] The recurring controversy concerning ancillary business regulation highlighted an underlying issue about how lawyers should view their roles; namely, whether lawyers should act, in all respects, differently from businessmen with whom they compete.[29] Yet the debates regarding the various rule amendments, for the most part, addressed only whether lawyer affiliation with ancillary businesses would undermine compliance with the general notion of "professionalism" or with traditional provisions in the codes.[30]

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*available at* http://www.abanet.org/cpr/e2k-report_home.html (last visited Sept. 29, 2002) [hereinafter A.B.A. ETHICS 2000 COMM'N REPORT].

26. MODEL RULES, *supra* note 3, at R. 1.8.

27. *See ABA Stands Firm on Client Confidentiality, Rejects "Screening" for Conflicts of Interest*, 17 Laws. Man. on Prof. Conduct (ABA/BNA) 492, 493–94 (Aug. 15, 2001) (reporting the ABA House of Delegates' approval of a proposed new Model Rule 1.8(j) providing that "a lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced").

28. After the adoption of the Model Rules in 1983, observers reported an increase in the incidence of law firms providing clients with nonlegal, but law-related services. Arash Mostafavipour, *Law Firms: Should They Mind Their Own Business?*, 11 GEO. J. LEGAL. ETHICS 435, 437–38 (1998) (describing the history of the ancillary business controversy). The absence of rules governing ancillary businesses left unclear the standards applicable to such activities.

The ABA considered two proposals. *See generally*, Ted Schneyer, *Policymaking and the Perils of Professionalism: The ABA's Ancillary Business Debate as a Case Study*, 35 ARIZ. L. REV. 363, 367 (1993). One proposal authorized and regulated the provision of ancillary services. The other prohibited ancillary business activities except those related to legal services a lawyer is providing existing clients. *Id.* at 371. In 1991, the ABA adopted a rule embodying the latter proposal. One year later, the rule was repealed. John Gibeaut, *Since the ABA's Rejection of Multidisciplinary Practices, More Law Firms are Branching Out into Law-Related Businesses*, 87 A.B.A. J. 50 (Feb. 2001) (noting that no state had followed the ABA's lead). In 1994, the ABA again reconsidered its position. It adopted the current rule, allowing lawyers to provide ancillary services and subjecting these services to the professional rules if the services are not distinct from the lawyer's legal services or, even when the services are distinct, if the lawyer fails to tell the client that the protections provided in the professional rules are inapplicable. MODEL RULES, *supra* note 3, at R. 5.7.

29. *See, e.g.*, Mostafavipour, *supra* note 28, at 444–48 (arguing the need to allow lawyers to compete for business).

30. *See* Schneyer, *supra* note 28, at 372 (arguing that the original rule and its proponents focused too much on issues of "professionalism,"—as defined by whether ancillary business practice would interfere with the exercise of "independent judgment," undermine the profession's reputation, and lead to outside regulation—instead of good policymaking).

*D. Inconsistency With Other Law*

A fourth catalyst for regulatory reconsideration can be the recognition that the codes require conduct at odds with conduct required or sanctioned by other law. One early example of this phenomenon involved legal advertising rules, which began by strictly prohibiting all advertising by lawyers,[31] but which code drafters adjusted as constitutional decisions upheld challenges to regulation.[32] Recent revisions to advertising regulation have tended to track first amendment law[33] and, to a small extent, the consumer orientation of the court cases.[34] The drafters, however, never have taken a second look at their initial characterizations of the role or status of lawyers who might advertise.

Two similar sets of developments are evident in the criminal arena. Prior to *Nix v. Whiteside*,[35] the ethics community was engaged in a debate over the propriety of assisting (or allowing) criminal defendants to perjure themselves.[36] Deciding only a

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31. The original Model Code forbade lawyers to use "any form of public communication that contains professionally self-laudatory statements calculated to attract lay clients." MODEL CODE, *supra* note 3, at DR 2-101; *see* Wyn Bessent Ellis, *The Evolution of Lawyer Advertising: Will it Come Full Circle?*, 49 S.C. L. REV. 1237, 1239 (1998) (noting the ABA's early view that advertising harmed the profession). Most states adopted this provision.

32. Expecting constitutional challenges, the ABA proposed amending the advertising rules six times starting in 1974, but not all states followed the ABA's lead. *See* LOUISE L. HILL, LAWYER ADVERTISING 44–52 (1993) (describing the amendments). In *Bates v. State Bar of Arizona*, 433 U.S. 350, 383–84 (1977), the United States Supreme Court held that the broad advertising bans prevailing in most states were unconstitutional. The ABA subsequently continued a fairly restrictive approach, designating in the codes what lawyers could include in advertisements. HILL, *supra*, at 47. In 1983, the Model Rules adopted a more liberal approach. *See* AM. BAR ASS'N, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT 289–310 (1998) (discussing the ABA rules' evolution); J. GORDON HYLTON, PROFESSIONAL VALUES AND INDIVIDUAL AUTONOMY: THE UNITED STATES SUPREME COURT AND LAWYER ADVERTISING 40 (1998) (noting that the 1976 amendments did not go nearly as far as the Standing Committee on Ethics and Professional Responsibility had recommended, but did break from the traditional opposition to all advertising).

33. *See, e.g.*, AM. BAR ASS'N, A LEGISLATIVE HISTORY, *supra* note 32, at 306–09 (noting that various amendments to Model Rule 7.2-7.3 arose from their inconsistency with recent federal court decisions); AM. BAR ASS'N 'COMM'N ON ADVERTISING, YELLOW PAGES LAWYER ADVERTISING: AN ANALYSIS OF EFFECTIVE ELEMENTS 17 (1992) (discussing DR 2-102 before *Bates* required its amendment in 1977); Wesley W. Horton & Kimberly A. Knox, *Lawyer Advertising*, 73 CONN. B.J. 23, 24–25 (1999) (noting that states such as Maryland, New Mexico, and Connecticut liberalized advertising rules solely to comply with Supreme Court decisions); Bernadette Miragliotta, *First Amendment: The Special Treatment of Legal Advertising*, 1990 ANN. SURV. AM. L. 597, 601 (1992) (describing state reactions to the Supreme Court decisions).

34. *See, e.g.*, Bates v. State Bar of Arizona, 433 U.S. 350, 376–77 (1977) (noting the benefits of legal advertising for consumers of legal services).

35. 475 U.S. 157 (1986).

36. Advocates of extreme partisanship argued that criminal clients have a right to trust lawyers with confidences regarding possible perjury and that the remedy for perjury is cross-examination. Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1478 (1966) (discussing a lawyer's obligations when client wishes to commit perjury). They also argued that actions by

constitutional issue that did not resolve the ethical question,[37] the Supreme Court's opinion in *Nix* led to quick adoption of clear professional standards that followed the Court's approach.[38]

A more recent example of the effects of inconsistent professional regulation and legal standards involves the issue of whether agents of prosecutors may, in an undercover capacity, contact persons represented by counsel prior to their arraignment or indictment. Some state professional codes forbid contact[39] but, as a matter of constitutional law, the right to counsel does not forbid such contact until a criminal prosecution formally begins.[40] The theoretical (though not necessarily legally binding) inconsistency with constitutional law has led prosecutors to challenge the prohibitory state rules and has forced code drafters to reconsider the whole field.[41]

In short, there are several reasons why code drafters may come to perceive flaws in current rules. This recognition can prompt several reactions, ranging from minor adjustments in individual provisions to reformulation of a whole set of rules. One logical reaction might also be a realization by the regulators that the catalyst for reform signals an essential failure of the regulators' initial approach. In practice, however, code drafters rarely have been willing to confront the possibility that the

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counsel to prevent perjury undermine the attorney-client relationship and, under some circumstances, constitute ineffective assistance of counsel. *See* Whiteside v. Scurr, 744 F.2d 1323 (8th Cir. 1984), *rev'd*, 475 U.S. 157 (1986) (finding ineffective assistance of counsel). Opponents of these positions were equally fervent. *See, e.g.*, David G. Bress, *Professional Ethics in Criminal Trials: A View of Defense Counsel's Responsibility*, 64 MICH. L. REV. 1493, 1494–98 (1966) (arguing that lawyers should not countenance perjury); John T. Noonan, Jr., *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485, 1486–89 (1966) (challenging Monroe Freedman's position).

37. *Nix* rejected the claim that failing to assist clients in committing perjury constituted ineffective assistance of counsel. 475 U.S. at 172. The Supreme Court relied, in part, on a misreading of the state and ABA professional codes, stating that these required lawyers to prevent client perjury. *Id.* at 170. The Court suggested its approval of this approach but did not (and was without power to) force state codes to include a prohibition on lawyer assistance to perjuring clients. *Id.*

38. *See* MODEL RULES, *supra* note 3, at R. 3.3(b) (provision adopted immediately after *Nix*, requiring lawyers to remedy client perjury).

39. The ABA codes are somewhat ambiguous about their applicability to prosecutorial activity, because they contain an exception authorizing contact with represented parties "when authorized by law." *E.g.*, MODEL RULES, *supra* note 3, at R. 4.2. In the 1980s, however, defense attorneys started pressing an interpretation of the rule that encompasses prosecutors. *E.g.*, United States v. Hammad, 858 F.2d 834, 841 (2d Cir. 1988) (suppressing a recording of suspect procured by informant acting under a prosecutor's direction). Thereafter, numerous state codes were interpreted broadly.

40. The Sixth Amendment right to counsel attaches only once a "criminal prosecution" commences. Exactly what this means is debatable, but courts have interpreted it to begin, at the earliest, when "adversary judicial proceedings" are instituted. *See* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE §11.2, at 569 (3d ed. 2000).

41. For citations to cases and articles discussing state and federal court approaches to the no-contacts issue, see Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381, 384 nn.2, 4 (2002); 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, 429–30 nn.1, 6–7 (1996).

codes are based on false assumptions or paradigms idealizing the way lawyers or clients operate or the nature of their roles.

## III. EXAMPLES OF REGULATORY FICTIONS

Of course, code drafters, like anyone else, can make mistakes. In referring to lies, delusions, and false assumptions in the ethics codes, this Article focuses on something deeper and more intentional; namely, the tendency of professional regulators to rely on fictions about lawyers, clients, or the way regulation should address the practice of law that skew the resulting regulation.

Regulators may rely on such fictions for several reasons—some valid, some less so. They may simply misconceive or idealize the status of lawyers, lawyers' sense of "professionalism," or the way lawyers practice in the real world. Alternatively, regulators may incorporate overgeneralizations or overbroad premises into the rules in an effort to create easily enforceable standards or to avoid the transaction costs of dealing with issues on a nuanced, case-specific basis. Sometimes, the reliance on generalizations just reflects a compromise among regulators who are unable to agree upon a specific approach—or the goals—of a set of standards.

The following section of this Article identifies some of the significant fictions that lurk within the existing professional codes, attempts to categorize them, and points out a few rules within each category that may have developed poorly because of the drafters' counter-factual approach. Presumably, if future regulators combine an understanding of false premises in the professional codes with the ability to recognize when the false premises might be undermining existing regulation (as discussed in Part II), the regulators at least will consider adopting more realistic standards of behavior.

### *A. Fictions of Symmetry*

The professional codes are replete with what might be called "fictions of symmetry." The codes assume, throughout, that all lawyers are equally competent. Similarly, they posit that all clients are similar. As a result, the codes presume that all lawyers should be governed by the same rules, regardless of whom they represent or in what context.

#### *1. All Lawyers are Competent*

Consider first the unspoken presumption that lawyers are competent, perhaps even equally competent. This finds its way into numerous code provisions, not the least of which is the competence rule itself, Model Rule 1.1.[42] Rule 1.1 states that lawyers unfamiliar with particular areas of law may undertake representation involving those fields if they can make themselves competent.[43] The primary reason for this concession is obvious: it enables lawyers, particularly inexperienced lawyers,

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42. MODEL RULES, *supra* note 3, at R. 1.1 ("A lawyer shall provide competent representation to a client.").

43. *Id.* at cmt. 2 ("A lawyer can provide adequate representation in a wholly novel field through necessary study.").

to expand their practices. The rule is justified on the basis that lawyers are trained in law school to think like lawyers and that, except in highly specialized fields, lawyers can teach themselves to serve clients as well as the experts do.[44]

No one truly believes this fiction. Specialists undeniably have an advantage over novices. Bringing a new lawyer up to speed, even if possible, adds to a client's expense.

The assumption of equal competence shows up in more particularized provisions of the ethics codes as well. In many situations, for example, the conflict-of-interest rules forbid clients to retain their lawyer of choice even when the clients are prepared to waive a conflict or to accept a situation in which a potential conflict may arise. Clients often are forbidden to acquire joint representation.[45] They may not hire an especially good but expensive lawyer by paying the lawyer through assignment of media rights.[46] Other examples abound.[47] The code drafters' assumption is that the clients are wrong in believing that retaining the particular lawyer will lead to better representation; other lawyers are available and at least close enough in competence that clients should not be permitted to risk conflict-laden representation.

The questionable assumption that all lawyers are equally competent also underlies code provisions that constrain the ability of lawyers to represent clients on a

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44. *Id.* (explaining why a novice lawyer can be "competent").

45. *See, e.g.*, MODEL RULES, *supra* note 3, at R. 1.7(a)(1) (forbidding joint representation even when clients consent if the lawyer believes "the representation [of one client] will . . . adversely affect the relationship with the other client"). Underlying this prohibition is the questionable assumption that new counsel can represent the two clients as well as, or better than, the original lawyer. *See* Zacharias, *supra* note 10, at 412–16 (pointing out the fallacy of the blanket prohibition on joint representation).

46. *See, e.g.*, MODEL RULES, *supra* note 3, at R. 1.8(d) (forbidding a lawyer to "negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation"). The rules again presume that a client who is unable to pay for a lawyer who insists on media rights in lieu of high fees can obtain equally competent representation elsewhere. *Cf.* Fred C. Zacharias, *Limits on Client Autonomy in Legal Ethics Regulation*, 81 B.U. L. REV. 199, 228 (2001) ("[G]ranting media rights may be the only method for obtaining counsel of choice.").

47. Model Rule 1.8, for example, contains a series of prohibitions on arrangements between lawyers and clients which may, in theory, prevent a client from retaining the best lawyer for the job. These prohibitions include financial arrangements by which a lawyer obtains "an ownership, possessory, security or other pecuniary interest adverse to the client," a "substantial gift," a prospective limitation on liability to the client, or a "proprietary interest in the cause of action or subject matter of litigation." MODEL RULES, *supra* note 3, at R. 1.8(a),(c),(h), (j). Interpretations of the basic conflict-of-interest rules also cast doubt on a client's ability to give a specialized lawyer an advance waiver that would allow the lawyer to accept future clients with adverse interests, even when the lawyer would refuse to accept the initial representation without such a waiver. *See* ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 93-372 (1993) (holding that a lawyer must show that a "particular future conflict of interest as to which the waiver is invoked was reasonably contemplated at the time the waiver was given"); *cf.* A.B.A. ETHICS 2000 COMM'N REPORT, *supra* note 25, at R. 1.7(b) cmt. 22 (proposed version of Model Rule 1.7(b) that would open the door to advance waivers); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 15 cmt. C (2000) (approving some prospective waivers).

limited basis.[48] These provisions rely on the faulty premise that clients always are better off receiving full representation from cheaper (but presumably competent or able) lawyers.[49] This approach skews the quality of representation some clients receive and produces other perverse economic effects.[50] And it conflicts with the position of substantive law; contract, tort, and malpractice standards insulate from civil liability lawyers who expressly limit their obligations to clients.[51] This inconsistency between the professional standards and the substantive law ultimately may induce code drafters to confront the counter-factual nature of their assumptions.

*2. All Clients are the Same*

Perhaps the most clearly false premise in the codes is that all clients are the same (or, at least, should be treated the same for purposes of the rules).[52] Although many of the professional standards focus on the intelligence or state of mind of clients, they do not differentiate among clients. Some rules, for example, require client participation in decisionmaking.[53] Others call for particular types of waivers, assuming that any client who has been informed sufficiently can make intelligent decisions about his or her choices.[54] Yet others forbid lawyers to let clients agree to certain arrangements on the basis that clients are incapable of making the decision or need protection from their lawyers.[55]

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48. See MODEL RULES, *supra* note 3, at R. 1.2 cmt. 1, 1.5 cmt. 3 (prohibiting agreements whereby clients agree to limit the lawyer's "professional obligations," or accept "terms [that] might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interests").

49. Fred C. Zacharias, *Limited Performance Agreements: Should Clients Get What They Pay For?*, 11 GEO. J. LEGAL ETHICS 915, 927 (1998).

50. *Id.* at 933–42.

51. *See, e.g.*, Johnson v. Jones, 652 P.2d 650, 651–52 (Idaho 1982) (upholding contractual limitation on attorney performance over breach of fiduciary duty claim); *In re* Harris, 514 N.E.2d 462, 464 (Ill. 1987) (reversing disciplinary action based on court's view that clients and lawyer had agreed to the conduct that the regulators viewed to be a code violation); Grand Isle Campsites, Inc. v. Cheek, 249 So. 2d 268, 273 (La. Ct. App. 1971) (holding that lawyer had no duty to provide more than the contracted-for services).

52. There are various possible explanations for the code drafters' reliance on this premise, ranging from basic misconception to a belief that using anything other than a bright-line rule would precipitate inordinate transaction costs. However plausible or appealing the latter view may seem, it has never been fully vetted or tested.

53. *See, e.g.*, MODEL RULES, *supra* note 3, at R. 1.2(a) ("A lawyer shall abide by a client's decisions concerning the objectives of representation. . . and shall consult with the client as to the means by which they are to be pursued."); *id.* at R. 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

54. *See, e.g.*, MODEL RULES, *supra* note 3, at R. 1.5 (regulating fee arrangements); *id.* at R. 1.7(a)(2),(b)(2) (authorizing and limiting conflict waivers); *id.* at R. 1.8(a) (setting standards for transactions with clients); *id.* at R. 1.8 (f) (requiring waivers regarding third-party payor); *id.* at R. 1.8(h) (limiting prospective waivers of liability).

55. *See, e.g.*, MODEL RULES, *supra* note 3, at R. 1.5(e) (prohibiting direct referral fees); *id.* at R. 5.4 (prohibiting sharing fees with nonlawyers); *id.* at R. 7.3 (forbidding even desired solicitation of clients); *id.* at R. 1.8(h) (forbidding prospective limitations of lawyer

These rules distinguish sophisticated from unsophisticated or unintelligent clients only at the margins.[56] In doing so, they limit the freedom of some clients to make choices that would benefit them and allow some clients to control decisions that are beyond their capacity to make.[57] The reality is that sophisticated clients—who sometimes even are represented by counsel in their dealings with the lawyer[58]—might need regulatory protection far less than unintelligent or legally unsophisticated clients.

*3. All Lawyers and Clients Should be Governed by the Same Rules*

The assumptions that all lawyers and all clients are the same have led to perhaps the most dramatic delusion inherent in the modern professional codes; namely, that a single set of rules should apply equally to, and can adequately govern, all legal representation. This premise finds justification only by reference to the notion that lawyers and clients simply could not understand or work with more nuanced professional standards. Yet the premise often leads to bad rules or to situations in which lawyers feel tempted to disobey the rules.

This Article will not catalogue the many situations that fit within this category.[59] But consider the prominent example of matrimonial lawyers bound by the universal obligation of lawyers to be loyal to the client who hires them. May matrimonial lawyers involved in a bitter custody dispute take into account the interests of the unrepresented children? Many matrimonial lawyers will do so even when their clients resist.[60] The nonbinding standards promulgated by the Academy of Matrimonial Lawyers sanction this approach.[61] Yet because the professional codes in

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liability); *see generally* Zacharias, *supra* note 46, at 211–14, 226–29 (discussing the rationales for paternalistic professional regulation).

56. In other words, the codes distinguish between clients who cannot become "informed" and ordinary clients, but do not make other distinctions based on "clients" intelligence or psychological capacity to make wise choices.

57. *See* Zacharias, *supra* note 49, at 933–44 (noting ways clients might benefit from limited representation prohibited by the rules); Zacharias, *supra* note 10, at 412–16 (discussing ways clients might benefit from prohibited joint representation); *cf.* Fred C. Zacharias, *Reply to Hyman and Silver: Clients Should Not Get Less Than They Deserve*, 11 GEO. J. LEGAL ETHICS 981, 984 (1998) (suggesting appropriate limits on autonomy in the limited-retainer context).

58. As, for example, when house counsel acts as intermediary for a corporate client in dealing with outside counsel.

59. In previous work, I set out categories of situations that seem to call for nuanced rulemaking and identified approaches regulators might use to distinguish different types of practice. Fred C. Zacharias, *Reconceptualizing Ethical Roles*, 65 GEO. WASH. L. REV. 169 (1997) [hereinafter Zacharias, *Reconceptualizing*]; *see also* Fred C. Zacharias, *The Civil-Criminal Distinction in Professional Responsibility*, 7 J. CONTEMP. LEGAL ISSUES 165, 182–84 (1996) (suggesting the potential need to treat categories of clients differently for purposes of professional regulation).

60. *See, e.g.*, American Academy of Matrimonial Lawyers, *The Bounds of Advocacy*, 9 J. AM. ACAD. MATRIMONIAL LAW. 1, 3 (1992) ("[M]any matrimonial lawyers believe themselves obligated to consider the best interests of children, regardless of which family member they represent."); Donald G. Tye, *How Do You Protect the Child? What are the Ethical Boundaries a Lawyer Must Observe in a Divorce?*, 9 FAM. ADVOC., Winter 1987, at 20, 23 (discussing divorce lawyers' potential obligations to protect the interests of children).

61. American Academy of Matrimonial Lawyers, *supra* note 60, at 6–39; *see also* Richard E. Crouch, *The Matter of Bombers: Unfair Tactics and the Problem of Defining*

virtually all states decline to differentiate among lawyers, clients, and types of practice, the conduct of these matrimonial attorneys technically is improper.[62]

Adhering to the rigid regulatory approach also has had ramifications in the multidisciplinary practice context.[63] The catalyst for the proposals of the Commission on Multidisciplinary Practice was the desire of large American law firms representing sophisticated global clients to respond to accounting firms' ability to offer an array of legal and nonlegal services.[64] In truth, virtually no one within the ABA code-drafting community wishes to prevent large American firms from competing. Nor does anyone doubt, even in the post-Enron world, that sophisticated multinational corporate clients can protect themselves from the risks of multidisciplinary representation.[65] The opposition to the Multidisciplinary Practice Commission's proposals arose primarily because of the Commission's insistence that the same rules apply to all lawyers. Regulating based on that view necessarily results in regulation that subjects unsophisticated individual clients to the same risks as the multinational law firms' sophisticated clients.[66] Faced with the threat to attorney-client confidentiality if, for

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*Unethical Behavior in Divorce Litigation*, 20 FAM. L.Q. 413, 435–38 (1986) (arguing for a "special ethics code to govern matrimonial practice"); Norman N. Robbins, *Family Law Ethics*, 4 AM. J. FAM. L. 117, 124 (1990) (urging a family law code, in part because of potential conflicts between interests of the parent and child).

62. Another prominent example is the application of rules against contact with represented persons to all lawyers, including civil litigators, criminal defense attorneys, and prosecutors. MODEL RULES, *supra* note 3, at R. 4.2. The strong arguments for exempting prosecutors from the rules have led to major controversy in recent years. *See* Zacharias, *supra* note 41, at 429–31 (describing the controversy); Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 225–35 (2000) (describing potential differences between prosecutors and nonprosecutors for purposes of professional regulation). There may be reasons to differentiate defense counsel as well, including the reality that most witnesses the government would like to consider "represented" (e.g., eye-witnesses and police officers) either are public officials or are supposed to be neutral parties. *Cf.* Green & Zacharias, *supra* note 41, at 457–62 (discussing problems with treating prosecutors and defense counsel differently for purposes of the professional rules).

63. *See supra* text accompanying note 12.

64. Dave Foster, *Get off my Turf! Attorneys Fight Accountants Over Whether to Allow Multidisciplinary Practice*, 31 TEX. TECH L. REV. 1353, 1375 (2000) (describing restrictions on lawyers that enable accounting firms to compete); Gary A. Munneke, *Lawyers, Accountants, and the Battle to Own Professional Services*, 20 PACE L. REV. 73 (1999) (describing changes in the accounting field that led to the Multidisciplinary Practice Commission).

65. For example, a corporate client that fears a lawyer will be distracted from his obligations to the client by the lawyer's association with nonlawyers or fears that the lawyer may divulge confidences to nonlawyers who may feel free to abuse the confidences will insist upon contractual and procedural safeguards to obviate these concerns.

66. Although the Commission addressed how legalizing multidisciplinary practice might affect practice involving individual clients, its reports and recommendations never seriously considered applying different rules to such practice. *Cf.* Terry, *supra* note 12, at 893 (forewarning that a threshold issue for the multidisciplinary practice debate should be whether to apply the same rules "for a Big Five-affiliated MDP as for a very small MDP"); *Regulation of Bar: ABA Refuses to Change Ethics Rules Unless Studies of MDPs Dispel Concerns*, *supra* note 12, at 396 (discussing fear that allowing multidisciplinary practice would undermine the professional tradition of loyalty to clients); Jennifer R. Garcia, Comment, *Multidisciplinary*

example, real estate lawyers are allowed to merge with brokers or the danger that nonlegal associates will come to control individual attorney-client relationships, the ABA's membership has, for now, rejected the Commission's proposals. Never, however, did the Commission or the membership evaluate the need for a uniform rule or truly confront the possibility that the traditional assumption of regulatory symmetry should give way.

*4. The Paradigm of Class Action Representation*

Perhaps the most interesting illustration of the fictions of symmetry—that all lawyers are the same, that all clients are the same, and that all lawyers and clients should be treated alike—involves the regulation of plaintiffs' lawyers in class action litigation. With few exceptions, professional regulation adheres to these false premises and regulates plaintiffs' lawyers and class clients like all others.[67] In reality, however, everyone knows they are distinctive.

Plaintiffs' lawyers tend to be the real parties in interest. They typically bear the costs of the litigation. Class plaintiffs, especially in small-injury consumer class actions, often have little interest in the result and rarely monitor the decisions or fee requests of class counsel.[68]

Recent legal developments are exposing the counter-factual nature of the professional standards in the class action context. In an effort to reduce the expense of legal fees, judges in several cases have auctioned the right to represent a class.[69] The auction procedure relies on the notion that all lawyers are equally competent, but directly calls into question clients' right to choose their own counsel. These recent cases have led the Third Circuit Court of Appeals to commission a task force to study

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*Practices: What is Wrong with the Legal Profession's Ethics Rules?*, 44 ST. LOUIS U. L.J. 629, 661 (2000) (criticizing the Commission proposal on the basis that it endangers protections for clients); Michael Traynor, *Some Open Questions About Attorney-Client Privilege and Work Product in a Multidisciplinary Practice*, 36 WAKE FOREST L. REV. 43, 46 (2001) (discussing issues of client protection that would arise in multidisciplinary practice firms).

67. For example, the rules do not relax any of the duties lawyers have to individual clients either in terms of fees, communication, loyalty, confidentiality, decisionmaking power, or the provision of financial support. In reality, of course, class counsel often finance the litigation, have the equivalent of a "proprietary interest" in it, make all the key decisions, and communicate only after-the-fact through court-approved documents.

68. This may be different in securities class actions, in which some injured shareholders are likely to have suffered large injuries. *See* 15 U.S.C.S. § 78u-4 (West 2002) (requiring courts in securities class actions to "appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members"); Sakhrani v. Brightpoint, Inc., 78 F. Supp. 2d 845 (S.D. Ind. 1999) (holding that plaintiff suffering the greatest loss was entitled to be lead plaintiff); Gluck v. CellStar Corp., 976 F. Supp. 542 (N.D. Tex. 1997) (holding that lead plaintiffs must be those with the largest financial interest in settlement).

69. *See In re* Oracle Sec. Litig., 131 F.R.D. 688, 690 (N.D. Cal. 1990) (implementing a fee auction); *In re* Cendant Corp. Litig., 182 F.R.D. 144 (D. N.J. 1998) (authorizing an auction process); *In re* Auction Houses Antitrust Litig., 13 F.R.D. 162, (S.D.N.Y. 2000) (approving the use of auctioning for the determination of lead counsel).

the auction procedure,[70] as well as the even more radical proposal that class claims themselves should be auctioned to lawyers—who would then act as the real parties in interest. The latter approach stands the traditional conceptions of the roles of lawyers and clients on their head.

This Article's point is not to oppose or support the new developments, but rather to note that they will inevitably cause professional regulators to rethink their premises. The judicial innovations introduce market decisionmaking into class action litigation in order to limit fees and to avoid settlements that help lawyers rather than clients. But if, for example, courts end up letting class counsel purchase proprietary interests in class litigation, professional regulators will need to consider whether that right should be extended to all lawyers. Similarly, to the extent courts accept that lawyers, rather than clients, are the driving force behind some litigation, regulators may need to recognize this reality as well. If so, rules governing loyalty, client decisionmaking, and payment of litigation costs would have to be revisited and considered within subcategories of representation.

### *B. Fictions Relating to the Image of Lawyers*

Professional regulation incorporates at least four delusions about lawyers. First, the regulators assume that lawyers somehow are, or should be, better people than ordinary citizens.[71] Second, code drafters often seem to believe that providing rules alone can produce appropriate lawyer conduct. They assume that, once lawyers are advised of the professional standards, lawyers will follow the standards regardless of any personal incentives they have to violate the rules. Third, certain key rules rely on the importance of client trust in lawyers and rest on the unproven assumption that standards designed to enhance the "image of lawyers" increase that trust. Finally, professional regulation makes some questionable assumptions about the quality of services lawyers provide; in particular, that lawyers governed by professional rules provide better representation than lay providers offering similar services. Let us consider each of these faulty premises in turn.

#### *1. Lawyers are Better than Other Citizens*

In recent years, the bar has seemed preoccupied with three common attorney vices: (1) alcohol/substance abuse;[72] (2) sexual relations with clients;[73] and

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70. *Final Report from Third Circuit Task Force Advises Limits on Attorney Selection Auctions*, 18 Laws. Man. on Prof. Conduct (ABA/BNA) 140 (2002) (reporting the conclusions of the task force).

71. This view, of course, is shared by many judges. *See, e.g.*, Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 490 (1988) (O'Connor, J., dissenting) (arguing that lawyer regulation should reinforce that "it is improper for any member of this profession to regard it as a trade or occupation like any other").

72. For specific state approaches, see *infra* note 75. For discussions of the problem and possible alternative approaches, see, for example, Michael A. Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is it Time for a New Approach?*, 61 TEMP. L. REV. 1409, 1417 (1988), which discusses existing approaches and Nathaniel S. Currall, *The Cirrhosis of the Legal Profession: Alcoholism as an Ethical Violation or Disease Within the Profession*, 12 GEO. J. LEGAL ETHICS 739, 745–49 (1999), which catalogues different approaches.

(3) mishandling client funds.[74] Regulation, in the form of new rules and discipline, has multiplied with respect to each vice.[75] Yet the instances of lawyers engaging in the prohibited behavior seem, if anything, to have increased in number.[76]

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73. *See, e.g.*, A.B.A. ETHICS 2000 COMM'N REPORT, *supra* note 25, at R. 1.8(j) (proposing rule governing sexual relationships with clients). A few of the articles discussing modern regulation of lawyer sex with clients are: Abed Awad, *Attorney-Client Sexual Relations*, 22 J. LEGAL PROF. 131, 135–70 (1998) (surveying different jurisdictions' approaches to lawyers who engage in sexual conduct with clients); William D. Langford, Jr., Note, *Criminalizing Attorney-Client Sexual Relations: Toward Substantive Enforcement*, 73 TEX. L. REV. 1223, 1234 (1995) (arguing for alternative forms of regulation); Margit Livingston, *When Libido Subverts Credo: Regulation of Attorney-Client Sexual Relations*, 62 FORDHAM L. REV. 5, 54 (1993) (comparing lawyer and psychiatrist regulation).

74. Gail Kleven Gelb, *Common Ethical Problems*, 79 MASS. L. REV. 167, 178 (1994) (noting that mishandling of client trust accounts is a "hot issue").

75. The response of the U.S. jurisdictions to lawyers' chemical addiction has been varied, ranging from suspending lawyers for substance abuse, to providing intervention procedures, to eliminating addiction as a mitigating factor in disciplinary proceedings. *See, e.g.*, ILL. COMP. STAT. SUP. CT. RULE 758 (2002) (placing attorneys disabled by the use of intoxicants on inactive status or permitting attorneys to continue to practice law subject to court imposed conditions); MISSOURI BAR AND JUDICIARY RULE 16, Mo. Ann. R. (Vernon Supp. 1988) (providing intervention procedures for substance abusers); *In re* Hein, 516 A.2d 1105 (N.J. 1986) (rejecting chemical dependency as a mitigating factor in disciplinary proceedings involving misappropriation of client funds).

The Model Rules do not yet address sex with clients, but numerous states have adopted strict rules on the subject. *See, e.g.*, IOWA CODE OF PROF'L RESPONSIBILITY DR 5-101(B) (1997) ("A lawyer shall not engage in sexual relations with a client."); N.C. RULES OF PROF'L CONDUCT R. 1.18 (1997) ("A lawyer shall not have sexual relations with a current client."). Other states have adopted more tempered provisions. *See* UTAH RULES OF PROF'L CONDUCT R. 8.4(g) (1997) (forbidding a lawyer to "engage in sexual relations with a client that exploit the lawyer-client relationship"); WIS. RULES OF PROF'L CONDUCT R. 1.8(k)(2) (1995) ("A lawyer shall not have sexual relations with a current client unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced."); *cf.* CAL. RULES OF PROF'L CONDUCT R. 3-120 (2002) (only prohibiting sexual relations that involve coercion, intimidation, undue influence, or cause a lawyer to perform incompetently).

Most states follow one of the ABA's model rules providing protection of client funds, but many have adopted wrinkles to supplement the protections. *See, e.g.*, CAL. RULES OF PROF'L CONDUCT R. 4-100 (1993) (requiring maintenance of a client ledger and account journal in hard copy); N.Y. CODE OF PROF'L RESPONSIBILITY DR 9-102(D)(10) (2002) (requiring lawyers to maintain financial records using means that cannot be altered without detection); UTAH RULES OF PROF'L CONDUCT R. 1.15(a) (1998) (requiring trust accounts to be deposited in financial institutions that agree to report to Office of Professional Conduct in the event any instrument is presented against an attorney trust account containing insufficient funds).

76. *See, e.g.*, Patricia Sue Heil, Comment, *Tending the Bar in Texas: Alcoholism as a Mitigating Factor in Attorney Discipline*, 24 ST. MARY'S L.J. 1263, 1264 (1993) (noting that 20% of American attorneys have substance abuse problems); Dan S. Murrell et al., *Loose Canons: A National Survey of Attorney-Client Sexual Involvement: Are There Ethical Concerns?*, 23 MEMPHIS ST. U. L. REV. 483, 488 n.27 (1993) (stating that 32% of surveyed lawyers knew of other lawyers who had had sex with clients); Ellen R. Peck, *Lawyers' Handling of Funds and Other Property*, 555 PRACTICING L. INST. LITIG. & ADMIN. PRAC. COURSE HANDBOOK SERIES LITIG. 205 (1996) (noting frequent complaints regarding trust account misconduct); Sean P. Murphy, *Lawyer Thefts From Clients Soaring*, BOSTON GLOBE,

We shouldn't be surprised. Lawyers are human beings. Faced with the temptations of money, drugs, and sex, some lawyers will succumb.

What do the continuing violations of the professional standards in each of these areas suggest for the bar? First, they suggest that providing a professional standard—even threatening discipline—is unlikely to eliminate the vices. Second, if lawyers are to become more resistant to the temptations in question, they need to be forewarned and educated about the dangers. Finally, experience suggests that a certain number of lawyers will give in to personal and financial incentives, like citizens in all sectors of the community. There is no sense in which lawyers are superior or in which professional self-regulation will take care of the matter.[77]

Facing this reality suggests some significant conclusions for the future of legal regulation. Professional regulators should admit that they cannot control, or at least cannot fully control, lawyers who engage in human misconduct. These lawyers ought to be punished and deterred just like laypersons engaging in such vices. Professional self-regulation should address primarily misbehavior that truly relates to, and affects, the practice of law.

Moreover, instead of intimating that self-regulation addresses the vices, the bar should encourage, when appropriate, the use of civil suits and criminal punishment. Mishandling of client funds typically constitutes conversion or theft. Sex with clients may be rape or assault, as well as a civil breach of fiduciary duties.[78]

At the same time, if the bar exposes lawyers to increased civil and criminal prosecution, future regulation probably should also incorporate enhanced efforts to educate and help lawyers avoid problems. A few jurisdictions have already moved to assist lawyers with substance abuse problems,[79] rather than simply punishing addicted

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Aug. 27, 1990, at 1, *available at* 1990 WL 5834844 (noting a sharp increase in complaints of lawyer theft).

77. Many in the bar may take offense at the above conclusion, on the basis that lawyers *are* different—in the sense of having clients to protect and potentially owing an obligation to courts (as "officers of the court") or society more generally. This Article does not dispute the right of the profession to demand that lawyers obey their prescribed role, nor the right of regulators to discipline lawyers who fail to safeguard client interests. The Article's simple observation is that regulation and discipline cannot change the fact that lawyers are subject to human weaknesses and failings and that regulation may be more effective if the regulators accept that baseline understanding. *See generally* Fred C. Zacharias, *The Humanization of Lawyers*, PROF'L LAWY. (forthcoming 2003, on file with author) (discussing the profession's growing recognition that lawyers should not be treated as less "human" than other citizens).

78. Under some circumstances, mishandling client funds violates clear prophylactic professional rules. Similarly, engaging in sex with clients sometimes represents a failure to deal with a conflict of interest or may result in incompetent representation, each of which present a compelling case for regulation and discipline. *See* Zacharias, *supra* note 46, at 231, 235 (discussing the fact that sex with clients may be forbidden under fiduciary principles and general code provisions).

79. See AM. BAR ASS'N STANDING COMM. ON BAR ACTIVITIES AND SERVICES, ABA MAP PROGRAM: ALCOHOL AND DRUG ABUSE PROGRAMS FOR LAWYERS AND JUDGES, Tab I (noting twenty-six state bar associations and thirty-seven local bar associations with substance abuse assistance programs); Bloom & Wallinger, *supra* note 72, at 1426 (noting that every state has at least a contact person for lawyers with substance abuse problems).

lawyers as persons who have fallen below the standard of the profession's paradigm.[80] Statistics show a dramatic incidence of addiction in the profession,[81] which suggests that a sharper focus on education, in addition to intervention, is appropriate. Likewise, instead of exclusively seeking to punish those who have sexual relationships with clients or who mishandle client funds, regulators should expand their roles to include educational efforts aimed at teaching lawyers why sexual interaction is potentially dangerous and how to avoid trust fund problems.

*2. Make the Rules and Lawyers Will Follow Them*

Closely related to the wistful assumption that lawyers are especially good citizens is the belief that mere adoption of a professional rule will cause lawyers, at least most lawyers, to follow them. Some rules clearly can serve valid hortatory functions.[82] Nevertheless, code drafters need to regulate more realistically, to take into account lawyers' personal and financial incentives to violate the codes.[83]

The previous section's examples of regulatory prohibitions that lawyers transgress because of human failings illustrate instances that future code drafters probably will confront because of their visible nature.[84] But there are a host of more

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80. *See, e.g.*, Twohy v. State Bar of Cal., 769 P.2d 976, 983–84 (Cal. 1989) (denying mitigation of punishment based on a lawyer's cocaine addiction); *In re* Zauber, 583 A.2d 1140, 1144 (N.J. 1991) ("[D]rug addiction, whether to legal or illegal drugs, may not mitigate serious ethical infractions."); *In re* Eads, 734 P.2d 340, 348 (Or. 1987) ("In cases where disbarment is the norm, we hold that drug or alcohol dependency will not reduce that sanction."); *cf.* Fla. Bar v. Knowles, 500 So. 2d 140, 141 (Fla. 1986) (recognizing alcoholism as a mitigating factor but nevertheless disbarring attorney); Janine C. Ogando, Note, *Sanctioning Unfit Lawyers: The Need for Public Protection*, 5 GEO. J. LEGAL ETHICS 459, 461 (1991) (urging increased imposition of discipline to protect clients from addicted attorneys).

81. *See, e.g.*, Rick B. Allan, *Alcoholism, Drug Abuse and Lawyers: Are We Ready to Address the Denial?*, 31 CREIGHTON L. REV. 265, 265–66 (1997) (citing studies); Connie J.A. Beck et al., *Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns Among a Sample of Practicing Lawyers*, 10 J.L. & HEALTH 1, 3 (1996) (reporting a finding that 70% of lawyers are likely to have an alcohol problem sometime in their career); G. Andrew H. Benjamin, Elaine J. Darling, & Bruce Sales, *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers*, 13 INT'L J.L. & PSYCHIATRY 233, 240–41 (1990) (describing a study in Washington state); Alex Gronke, *The State Assembly OKs Bar-Funded Rehab for Lawyers Health*, L.A. TIMES, June 22, 2001, at B8 ("30% to 40% of the California bar's discipline cases involve substance abuse in some way."); Jennifer L. Reichert, *Lawyers and Substance Abuse*, 36 TRIAL, June 2000, at 76 (citing ABA statistics that "over 56,000 ABA members will have a lifetime alcohol dependency disorder; over 30,000 will have a lifetime drug disorder (other than alcoholism); and over 100,000 will have a lifetime substance abuse disorder");.

82. Fred C. Zacharias, *Specificity in Professional Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 231, 236–37 (1993).

83. Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1352–53 (1995).

84. In other words, media attention and modern empirical evidence ultimately are likely to encourage the bar to address the issues, if only because it feels a public relations need to "appear" to be doing something. *See* Langford, *supra* note 73, at 1223 ("The legal profession, amid a rush of negative publicity, has finally begun to respond to the harms and abuses that inevitably result from even 'consensual' sexual relationships carried on within the

common professional rules that also highlight the failure of the drafters to face reality. The most potent example is lawyer-reporting rules.[85] Virtually all states' professional codes contain them, but they are rarely enforced and even more rarely followed.[86] Likewise, rules requiring lawyers to give their clients information regarding all important matters,[87] to expedite litigation,[88] to avoid making extrajudicial statements,[89] and to practice full candor towards a tribunal[90] are obeyed largely in the breach, for a variety of reasons relating to the pressures of everyday practice.[91]

Then there are those provisions that regulators know lawyers often disobey because they directly contravene lawyers' financial interests. Regulation barring multijurisdictional practice without a license in each affected state interferes with the practice of national practitioners.[92] If lawyers strictly adhered to the rules against advancing clients money and obtaining proprietary interests in litigation, class action lawyers would not be able to handle most of their cases.

Finally, there are rules the regulators probably hope lawyers will follow, but which the regulators do not or can not enforce even when violations are evident. Violations of advertising rules are routine.[93] Lawyers tend to ignore altogether permissive rules that would permit them to avoid using evidence whose truthfulness

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attorney-client context."); J. Choi et al., *State Bar of California*, 14 CAL. REG. L. REP. 208, 209–10 (1994) (outlining California Bar recommendations for changes in trust account regulation in light of public media exposure and the resulting internal investigation); Fred Maher, *Addicted Professionals: A Growing Problem*, PA. L.J. REP., Mar. 7, 1988, at S1, col. 1 (focusing on addiction in the legal profession); Linda Fitts Mischler, *Reconciling Rapture, Representation, and Responsibility: An Argument Against Per Se Bans on Attorney-Client Sex*, 10 GEO. J. LEGAL ETHICS 209, 210 (1997) ("Scorched in the limelight of negative press, the legal profession has scrambled to issue pronouncements and enact rules prohibiting sexual relationships between attorneys and clients.").

85. *See, e.g.*, MODEL RULES, *supra* note 3, at R. 8.3(a) (requiring lawyers to report another lawyer's rule violation "that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer").

86. *See, e.g.*, Cynthia L. Gendry, Comment, *Ethics: An Attorney's Duty to Report the Professional Misconduct of Co-workers*, 18 S. ILL. U. L. J. 603, 606–07 (1994) (citing "notoriously poor" compliance with and enforcement of peer-reporting rules); Julie L. Hussey, *Reporting Another Attorney for Violating the Rules of Professional Conduct: The Current Status of the Law in the States Which Have Adopted the Model Rules of Professional Conduct*, 23 J. LEGAL PROF. 265, 266–67 (1999) (noting the existence of only two reported cases in which lawyers have been disciplined solely for violating the reporting rules).

87. *E.g.*, MODEL RULES, *supra* note 3, at R. 1.4.

88. *E.g.*, *id.* at R. 3.2.

89. *E.g.*, *id.* at R. 3.6.

90. *E.g.*, *id.* at R. 3.3.

91. The causes for noncompliance with these rules vary, including the pressures inherent in juggling a filled caseload, the psychological and financial incentives to help clients win at virtually all costs, and the natural inclination to want to counteract conduct by opposing counsel.

92. *See* Zacharias, *supra* note 19, at 345–57 (discussing lawyer activities involving regulable cross-state practice).

93. *See generally* Zacharias, *supra* note 7 (empirical analysis of compliance with underenforced advertising rules).

they doubt[94] or which authorize, but do not require, disclosure under attorney-client confidentiality rules.[95] Presumably, the code drafters envisioned that lawyers would exercise their discretion under these rules, but lawyers rarely do—in part because lawyers fear that implementing the rules will open them up to competition from less ethical advocates. Yet, because of the rules' equivocal wording, disciplinary agencies cannot enforce compliance and lawyers do not obey their spirit voluntarily.

In light of the actual operation of the codes, one can hardly credit the premise that "if we write a rule, lawyers will follow it." Regulators who do not already know how far reality falls short of this ideal probably are simply closing their eyes to the facts. Yet, the more such rules are violated, and the more frequently that individual states try to enforce the rules—as California began to enforce unauthorized practice rules against out-of-state lawyers through the *Birbrower* case—the more likely it becomes that the regulators will need to reassess hortatory provisions. That is not to say the codes will, in the future, cease to guide lawyers with respect to conduct that cannot be enforced. It does, however, mean that the future of legal regulation probably will include a greater focus on disciplinary issues[96] and that the recent trend toward "legalization" of the codes will continue.[97]

*3. Rules that Improve the Bar's Image Enhance Client Trust*

One of the "image" assumptions underlying many code provisions is that forcing lawyers to act in certain ways makes lawyers *seem* better than other service providers, which in turn enhances client trust in lawyers. The clearest example of this approach is attorney-client confidentiality regulation; clients supposedly trust lawyers more simply because the rules require lawyers to be trustworthy with client confidences.[98] Another prominent example is unauthorized practice of law rules, which posit that lay service providers should be excluded from particular work not only because lawyers are naturally better at providing the services,[99] but also because the professional rules hold lawyers to higher standards of service than nonlawyers.[100]

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94. *E.g.*, MODEL RULES, *supra* note 3, at R. 3.3(c); *see also* Fred C. Zacharias & Shaun Martin, *Coaching Witnesses*, 87 KY. L.J. 1001, 1009 (1999) (discussing the effect of permissive rules allowing lawyers not to use evidence they distrust).

95. *E.g.*, MODEL RULES, *supra* note 3, at R. 1.6(b).

96. *See, e.g.*, Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 773–77 (2001) (basing recommendations for professional regulation of prosecutors on empirical evidence relating to the discipline of prosecutors); Zacharias, *supra* note 7, at 1005–12 (discussing the relationship between underenforcement of professional rules and their value).

97. *See, e.g.*, Geoffrey C. Hazard, *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1241 (1991) ("[T]he professional norms have become 'legalized'.").

98. *See, e.g.*, Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 358 n.28, 364–65 (1989) (identifying and questioning the premises of attorney-client confidentiality rules).

99. *See* Edieth Y. Wu, *Why Say No to Multidisciplinary Practice?*, 32 LOY. U. CHI. L.J. 545, 559 (2001) ("[T]he unauthorized practice provisions protect the public by prohibiting laymen from rendering services that they are not qualified to render."); *see also* Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—or Even Good Sense?*, 1980 AM. B. FOUND. RES. J. 159, 161–90 (tracing the origins of the law governing unlicensed and incompetent practitioners); Deborah L. Rhode,

The flaw inherent in many of these kinds of regulations is that their factual premises regarding the significance of image are incorrect. Recent studies have shown, for example, that clients do not necessarily trust lawyers more than other service providers just because of the existence of legal confidentiality rules.[101] Critics increasingly have challenged the premises underlying the unauthorized practice rules[102] and related rules that require lawyers to "bundle" all aspects of representation when they are engaged to handle a matter.[103]

The increasing availability of empirical evidence[104] and the Multidisciplinary Practice Commission's focus on whether lawyer regulation actually produces

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*Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 3 (1981) (questioning the bar's public welfare justifications for unauthorized practice of law rules).

100. *See, e.g.*, Marcus J. Lock, *Increasing Access to Justice: Expanding the Role of Nonlawyers in the Delivery of Legal Services to Low-Income Coloradans*, 72 U. COLO. L. REV. 459, 500 (2001) (arguing that "[t]he public interest is best served in legal matters by [lawyers]" because nonlawyers are "not governed as to integrity or legal competence by the same rules that govern the conduct of a lawyer . . . [and lawyers are] committed to high standards of ethical conduct").

101. *See, e.g.*, Leslie C. Levin, *Testing The Radical Experiment: A Study Of Lawyer Response To Clients Who Intend To Harm Others*, 47 RUTGERS L. REV. 81, 121–23 (1994) (empirical study on client and public perceptions of confidentiality, concluding that lawyers often do not even inform clients of confidentiality); Zacharias, *supra* note 98, at 383–85 (empirical study suggesting that confidentiality rules do not dramatically foster client trust); Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226, 1236–37 (1962) (study on attorney-client privilege indicating that most subjects were either unaware of the attorney-client privilege or believed that it extended to other professional relationships).

102. Julee C. Fischer, *Policing the Self-Help Legal Market: Consumer Protection or Protection of the Legal Cartel?*, 34 IND. L. REV. 121, 139 (2000) ("[T]here is strikingly little case law involving injury to individuals from unauthorized practice."); Meredith Ann Munro, *Deregulation of the Practice of Law: Placenta or Placebo?*, 42 HASTINGS L.J. 203, 214 (1990) (noting that "critics reject the argument that rules prohibiting the unauthorized practice of law protect the public and the court system").

103. Derek Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570, 571 (1983) (explaining inefficiencies of mandatory bundling); David A. Hyman & Charles Silver, *And Such Small Portions: Limited Performance Agreements and the Cost/Quality/Access Trade-off*, 11 GEO. J. LEGAL ETHICS 959, 960 (1998) (questioning unbundling prohibitions); Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 423 (1994) (arguing that unbundling would enhance provision of family law services).

104. *See, e.g.*, PATRICIA EWICK & SUSAN S. SILBEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE 23(1998) (reporting a study of how laypeople view the law); Susan Daicoff, *Articles Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1361–62 (1997); Susan Saab Fortney, *Are Law Firm Partners Islands Unto Themselves? An Empirical Study of Law Firm Peer Review and Culture*, 10 GEO. J. LEGAL ETHICS 271, 280 (1997) (describing increasing law firm use of ethics committees, ethics counsel, and peer review); Jack A. Guttenberg, *The Ohio Attorney Disciplinary Process: 1982 to 1991: An Empirical Study, Critique and Recommendations for Change*, 62 U. CIN. L. REV. 947, 1008 (1994) (reporting an empirical study of Ohio's disciplinary process); John P. Heinz et al., *Lawyers and their Discontents: Findings from a Survey of the Chicago Bar*, 74 IND. L. J. 735, 755 (1999) (reporting an

performance superior to that of lay service providers[105] herald a fresh look at the validity of the rules' reliance on lawyers' image. Among the likely targets for reconsideration are rules that treat lawyers differently than ordinary businessmen based on the need to preserve the profession's prestige.[106] These include, among others, advertising and solicitation regulation. More substantive regulation, such as the attorney-client confidentiality rules discussed above, also depend on potentially misplaced instrumental assumptions about how clients perceive lawyers and the effect this perception has on representation.

### *C. Fictions Relating to the Image of Legal Practice*

The previous sections focus on the emphasis regulators place on the image of lawyers as superior human beings and especially trustworthy service providers. A second, and potentially more important regulatory emphasis is on controlling the public's image of the practice of law itself. Much current professional regulation is devoted to promoting the perception that lawyers, unlike other service providers, serve in a fiduciary capacity for their clients. Another category of regulation focuses on differentiating the practice of law from ordinary business.

Consider a series of rules that cast lawyers as fiduciaries. Only the rules concerning representation of clients with a disability implement fiduciary principles directly.[107] However, all conflict-of-interest rules[108]—including those governing transactions with clients[109]—purport to implement a duty of loyalty.[110] The codes

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empirical study of the Chicago bar); Lee A. Pizzimenti, *Screen Verite: Do Rules About Ethical Screens Reflect the Truth About Real-Life Law Firm Practice?*, 52 U. MIAMI L. REV. 305, 323 (1997) (reporting an empirical study on the use of screening).

105. *Regulation of Bar: Vocal Debate on MDP Report Continues as Both Sides Prepare for Delegates' Vote*, 15 Laws. Man. on Prof. Conduct (ABA/BNA) 323, 324 (July 7, 1999) (discussing opposition to the first Commission proposal based on fears that control by laypersons of lawyer performance will undermine the quality and integrity of legal representation); Bruce A. Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 MINN. L. REV. 1115, 1146–47 (2000) (questioning the premise that lawyers are better and more honest service providers); Moore, *supra* note 15, at 33–34 (discussing studies conducted by the ABA). This assumption, of course, underlies the ABA Commission's belief that not only should lawyers operating in multidisciplinary practice organizations be governed by the professional codes, but that those associating with lawyers in those organizations should be governed by the bar's standards too. *See* ABA COMM'N ON MULTIDISCIPLINARY PRACTICE, 1999 REPORT, app. A, *available at* http://www.abanet.org/cpr/mdppendixa.html (last visited Sept. 29, 2002) (proposed Model Rule 5.8 cmt. 7).

106. *See* Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1232 (1995) (arguing that "the practice of law is a business" and that regulation of lawyers and lay service-providers, should be adjusted to take this "paradigm" into account).

107. *E.g.*, MODEL RULES, *supra* note 3, at R. 1.14 (requiring a lawyer for a disabled client to seek the appointment of a guardian to safeguard the client's interests).

108. *E.g.*, *id.* at R. 1.7–1.9.

109. *E.g.*, *id.* at R. 1.8(a).

110. In other words, they establish standards designed to prevent the lawyer from representing a client when the lawyer has or represents interests that might conflict with the client's.

seem to require lawyers to help clients make choices that will benefit themselves.[111] They forbid lawyers to accept certain client decisions that might be against clients' best interests.[112] Similar considerations justify constraints on agreements to limit the scope of representation,[113] advancing money to clients,[114] or acquiring proprietary interests in the subject matter of the litigation.[115] The thrust of the codes' regulation of lawyer dealings with clients is to cast the practice of law as placing the clients' interests first.

In reality, however, the codes are not so clear. They are at least sufficiently ambiguous to allow lawyers to treat the retainer stage of the attorney-client relationship as an arm's length transaction.[116] If lawyers jump through the informational hoops established by the rules, they may accept client decisions that are in the lawyers' interests, but not the client's.[117] Nor do the codes necessarily require lawyers to dissuade clients from making those choices.[118] Likewise, the rules against

111. *E.g.*, MODEL RULES, *supra* note 3, at R. 1.7(b)(2) (requiring the provision of information regarding the risks of waiving a conflict of interest); *see generally* Zacharias, *supra* note 46, at 206–12 (identifying rules requiring lawyers to provide information to guide client decisions).

112. *E.g.*, MODEL RULES, *supra* note 3, at R. 1.7(a)(1),(b)(1) (precluding lawyers from accepting certain waivers of conflicts of interest); *see generally* Zacharias, *supra* note 46, at 213–14 (identifying rules that forbid lawyers to accept certain informed client choices).

113. *See* Zacharias, *supra* note 49, at 921–26 (discussing the codes' limits on the ability of lawyers and clients to limit the scope of representation).

114. *See, e.g.*, MODEL RULES, *supra* note 3, at R. 1.8(e)(1); MODEL CODE, *supra* note 3, at DR 5-103(B) (governing advancing money to clients); *see also* Zacharias, *supra* note 17, at 227 (noting that the prohibition against lawyers providing financial assistance to a client may limit clients' "freedom to make economic choices" in a way contrary to the clients' best interests).

115. *See, e.g.*, MODEL RULES, *supra* note 3, at R. 1.8(j) (governing acquiring proprietary interests); *see also, e.g.*, Keith A. Canterbury, *What May an Attorney Purchase from a Client?*, 19 J. LEGAL PROF. 387, 389–90 (1995) ("If an attorney acquires an interest in the outcome of a suit in addition to his fees, it can lead to the attorney placing his own recovery ahead of his client."); Rhonda Wasserman, *Equity Transformed: Preliminary Injunctions to Require the Payment of Money*, 70 B.U. L. REV. 623, 632 n.29 (1990) ("Acquisition by a lawyer of a proprietary interest in a cause of action . . . can lead to the attorney placing his own recovery ahead of the client.").

116. Lawyers may need to give clients information regarding the risks of waiving certain rights or limiting representation, but the rules do not seem to require lawyers to advise clients whether waiver or retention decisions are in their best interests or to act specifically in the clients' interests. Zacharias, *supra* note 10, at 432–33. Certainly, the rules do not identify explicitly any duty to avoid representation or to send clients to cheaper or more qualified practitioners. *Cf.* Zacharias, *supra* note 49, at 946 (arguing that lawyers have a fiduciary obligation to clients at the retainer stage).

117. Thus, a lawyer who wants to keep a client in many cases may simply inform the client of a potential conflict of interest and encourage the client to waive the conflict. *See* Zacharias, *supra* note 10, at 427 (discussing the faulty messages sent to lawyers by California's conflict waiver rules).

118. *Id.*; *see also* Lester Brickman, *The Continuing Assault on the Citadel of Future Protection*, U. ILL. L. REV. (forthcoming 2002) (manuscript at 29–30 and nn.64–65, on file with author) (arguing that courts have recognized a fiduciary obligation of lawyers to clients at the retainer stage of representation, but that this protection has been eroded by modern developments).

advancing money may protect lawyers more than clients;[119] it may often be to the clients' advantage to have lawyers finance the litigation.[120] The regulatory paradigm that lawyers always act as fiduciaries thus may be false, or, at least, an overstatement. The tension between reality and the hopeful spirit of the codes may account for both continuing violation and constant amendment of the conflict-of-interest rules.[121]

The codes' attempts to suggest that law is not a business, and therefore should not be regulated like other businesses,[122] are evidenced by a host of provisions. These include advertising and solicitation rules,[123] rules governing the "reasonableness" of fees,[124] rules limiting the ability of lawyers to become executors of wills[125] or gaining other benefits from the clients' property,[126] restrictions on accepting cases in which a lawyer may become a witness,[127] regulation of class counsel,[128] limits on engaging in ancillary businesses,[129] and conflict-of-interest prohibitions. Of course, many of these rules have no teeth.[130] Rightly or wrongly, lawyers have tended either to violate or find ways around most of these restrictions when doing so benefits them.[131] Arguably, the more lawyers engage in business-like

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119. *See* Zacharias, *supra* note 46, at 237 (discussing the self-protective aspects of the anti-financing rules).

120. For example, when a personal injury plaintiff must wait for a meritorious claim to be settled, the client's ability to endure interim lost wages may vary with the funding that the lawyer can advance to the client.

121. *See supra* text accompanying note 10.

122. *See, e.g.*, MODEL RULES, *supra* note 3, at Preamble ("The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar."); *id.* ("To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated.").

123. *E.g.*, MODEL RULES, *supra* note 3, at R. 7.2–7.3.

124. *E.g.*, *id.* at R. 1.5.

125. *E.g.*, MODEL CODE, *supra* note 3, at EC 5–6.

126. *E.g.*, MODEL RULES, *supra* note 3, at R. 1.8(a),(b),(c),(j).

127. *E.g.*, *id.* at R. 3.7.

128. *E.g.*, *id.* at R. 1.8(e).

129. *E.g.*, *id.* at R. 5.4, 5.7.

130. For example, the Model Rules' prohibition on "unreasonable fees" lacks force if "reasonableness" is defined as what the market bears. *Id.* at R. 1.5. Likewise, more specific rules, like legal advertising regulation, mean little to lawyers if the rules are not enforced. *See* Zacharias, *supra* note 7, at 1005–07 (discussing the impact of underenforced advertising rules).

131. In the area of advertising and solicitation regulation, lawyers have challenged the rules directly. *See, e.g.*, *In re* R.M.J., 455 U.S. 191 (1982) (upholding challenge to regulation of lawyer advertising concerning areas of specialization); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (finding lawyer advertising to be constitutionally protected). In other areas, lawyers have either circumvented, ignored, or sought to change the rules. *See, e.g.*, Charles Silver and Lynn Baker, *I Cut, You Choose: The Role of Plaintiff's Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465, 1471–72 (1999) (discussing ways lawyers have circumvented aggregate settlement rules like Model Rule 1.8(g)); LAWRENCE J. FOX, MINORITY REPORT TO THE REPORT OF THE ETHICS 2000 COMMISSION (2001), *available at* http://www.abanet.org/cpr/e2k-dissent.html (arguing that the Ethics 2000 Commission's proposals to allow screening and advance waivers of conflicts reflect the "best interests" of lawyers rather than the interests of "clients, the system of justice and society".

activities, such as advertising, the more natural it will become to reconceptualize law as a business for purposes of professional regulation.

The development of the Commission on Multidisciplinary Practice provides an interesting case study. In the multidisciplinary context, the rules that treat lawyers differently from other service providers conflict with the economic interests of large law firms that compete with international accounting firms for business. Since these firms have influence with the ABA, they have, in recent years, been able to force reconsideration of the basic premise that lawyers should be regulated specially.[132] Similarly, the trend towards changes in "anti-screening rules"[133] can be explained by the economic cost that conflict-of-interest regulation limiting the ability of lawyers to change firms (and the ability of firms to hire new lawyers) imposes on lawyers—even though the rules clearly do help assure clients that they can be more secure in the loyalty of lawyers than of other service providers.[134] Seemingly, rules that enforce the counter-factual image that lawyers are not engaging in business as usual find particular resistance within the bar and give rise to the most persistent attempts to reform the codes.[135]

### *D. Fictions About the Adversary System*

With few exceptions,[136] the professional rules rely upon the paradigm of lawyers advocating the cases of individual clients within an adversary system.[137] This

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132. *See supra* text accompanying note 72; *see also* Schneyer, *supra* note 15, at 1473–74 (arguing the inevitability of "MDP legalization" in part because of the desires of "bar constituencies ranging from 'Main Street' lawyers to corporate counsel, whose employers welcome an MDP-enriched legal services market"); *cf.* Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677, 700 (1989) (describing the role interest groups play in ABA rulemaking).

133. *See generally* Fox, *supra* note 131 (challenging the Ethics 2000 Commission's proposal to allow screening as self-serving and economically driven on the part of the bar).

134. In applying the successive client conflict rules, the courts not only have prevented adverse representation by a lawyer's new firm when confidences of the former client have been passed to another lawyer in the firm, but also have precluded the representation when confidences "could," in theory, be obtained by the new firm. The justification for this prophylactic approach is that the former client has a right to a sense of security that his lawyer will always remain loyal and maintain confidentiality. *See, e.g.*, Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263 (7th Cir. 1983).

135. *See supra* text accompanying note 28 (discussing the bar's reaction to lawyers' demand for the right to provide ancillary business services); A.B.A. ETHICS 2000 COMM'N REPORT, *supra* note 25, at R. 1.10(proposing screening to overcome a theoretical conflict of interest arising when lawyers move among firms); Schneyer, *supra* note 28, at 395 (criticizing the tendency to focus on issues like "professionalism" to avoid policymaking that takes into account the business realities of law practice).

136. There are a few rules that do focus on specific types or contexts of lawyering. *See, e.g.*, MODEL RULES, *supra* note 3, at R. 2.1 (discussing lawyers as advisors); *id.* at R. 2.2 (discussing lawyers as intermediaries); *id.* at R. 4.1 cmt. 2 (referring tangentially to lawyers' obligations in the course of negotiations).

137. *See, e.g.*, DAVID LUBAN, *The Adversary System Excuse*, *in* THE GOOD LAWYER 83 (David Luban ed., 1984) (challenging the adversarial premises of the codes); DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE 51–58 (2000) (tracing and characterizing the "adversary system" premises of the professional codes); *cf.* Ted Schneyer, *Moral Philosophy's Standard*

paradigm incorporates at least two sets of faulty assumptions. First, much of the practice of law does not occur within an adversarial litigation setting. Second, the premises that the code drafters attribute to the adversary system sometimes do not hold true.

The first of these criticisms should not need much support. Many types of advice and transactional representation simply do not call for the fierce partisanship that the codes envision.[138] Many clients, particularly business clients represented by counsel, are sufficiently experienced or savvy to protect themselves in the attorney-client relationship without the benefit of rules designed to foster attorney loyalty.[139]

The second criticism lies at the heart of a controversy that has surrounded professional responsibility regulation since its modern inception.[140] Strict attorney-client confidentiality rules, for example, have fostered more debate than perhaps all other professional rules put together. Underlying the debate are empirical questions regarding the importance and need for such rules to foster client trust, meaningful attorney-client relationships, and competent representation.[141] Studies have cast doubt on the codes' assumptions that the adversary system requires ultra-strict confidentiality in order to work,[142] which, in turn, has prompted modern regulators to revisit the issues.[143]

Likewise, the *Kaye, Scholer* incident[144] called into question the codes' paradigm of lawyers as advocates. According to the government's position, lawyers in

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*Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529, 1531–32 (challenging academics' emphasis on a characterization of professional regulation as based entirely on adversarial notions).

138. *See* Zacharias *Reconceptualizing*, *supra* note 59, at 172 (discussing various goals of representation that may call for lesser partisanship).

139. Such rules include conflict-of-interest rules that prevent certain kinds of representation and attorney-client confidentiality rules that emphasize confidentiality for the purpose of promoting client trust.

140. For a discussion of the history of professional rules and the controversy surrounding adoption of a strong adversary system perspective, see Zacharias, *supra* note 83, at 1314–27.

141. *See, e.g.*, Zacharias, *supra* note 98, at 361–77 (questioning the factual validity of premises underlying the confidentiality rules).

142. *See, e.g.*, Levin, *supra* note 101, at 103 (reporting empirical study concerning confidentiality exception); Zacharias, *supra* note 98, at 379–98 (reporting results of a study of confidentiality in Tompkins County, N.Y.).

143. Accordingly, the ABA Ethics 2000 project has revisited the Model Rules and proposed a number of changes, including some—like a proposed liberalization of confidentiality exceptions—based on data that call the original rules into question.

144. In *Kaye, Scholer*, the Office of Thrift Supervision (OTS) charged a New York Law firm with $275 million in damages for failing to make disclosures on behalf of its savings and loan client pursuant to federal regulations. OTS claimed that when the firm completed forms on behalf of its client, it assumed the client's obligation to answer in a "nonmisleading" fashion. Although the firm contested the charges, claiming that it had merely acted as an advocate, the firm agreed to pay $41 million after OTS served an order freezing the firm's assets. Numerous commentators have characterized the settlement as symbolizing a clash between the traditional lawyer's role and OTS' view that federal regulations trump lawyers' responsibility to advocate their client's positions in a partisan fashion. *See, e.g.*, Dennis E. Curtis, *Old Knights and New Champions: Kaye, Scholer, the Office of Thrift Supervision, and*

some contexts must assume other roles and responsibilities, including the responsibility to act for the client in fulfilling the clients' legal obligations.[145] The merits of the government's position in *Kaye, Scholer* aside,[146] this well-publicized case highlighted the possibility that the codes take too narrow a view of the lawyer's role—that sometimes lawyers should not act in pure advocate's fashion.[147]

Other developments have cast doubt on different assumptions of the adversarial system that the professional codes accept as near gospel. Rule 11[148] and a series of cases requiring lawyer candor that might be proscribed under attorney-client confidentiality rules[149] seem to contradict the codes' premise that aggressive advocacy and full partisanship maximize the search for truth. The Supreme Court's decision in

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*the Pursuit of the Dollar*, 66 S. CAL. L. REV. 985, 991–94 (1993) (discussing OTS' position in *Kaye, Scholer*); Anthony E. Davis, *The Long Term Implications of the Kaye Scholer Case for Law Firm Management: Risk Management Comes of Age*, 35 S. TEX. L. REV. 677, 682 (1994) (discussing *Kaye, Scholer*'s implications).

145. *See, e.g., OTS Chief General Counsel Defends Action Against Kaye, Scholer*, 8 Laws. Man. on Prof. Conduct (ABA/BNA) 77 (1992) (describing OTS's position); Howell E. Jackson, *Reflections on Kaye, Scholer: Enlisting Lawyers to Improve the Regulation of Financial Institutions*, 66 S. CAL. L. REV. 1019, 1049 (1993) (analyzing *Kaye, Scholer*'s effect on lawyers' view of their role); Peter C. Kostant, *When Zeal Boils Over: Disclosure Obligations and the Duty of Candor of Legal Counsel in Regulatory Proceedings after the Kaye Scholer Settlement*, 25 ARIZ. ST. L.J. 487, 521 (1993) (discussing the government's perspective).

146. Numerous commentators have criticized the government's position in *Kaye, Scholer* that lawyers act as agents for clients and assume the clients' regulatory responsibilities when responding to administrative requests for information. *See, e.g.*, George C. Harris, *Taking the Entity Theory Seriously: Lawyer Liability for Failure to Prevent Harm to Organizational Clients through Disclosures of Constituent Wrongdoing*, 11 GEO. J. LEGAL ETHICS 597, 619 (1998) (discussing implications of role OTS assigned lawyers in light of the paucity of case law defining the role); W. Frank Newton, *A Lawyer's Duty to the Legal System and to a Client Drawing the Line*, 35 S. TEX. L. REV. 701, 705 (1994) (expressing concern over the government's position); *cf.* 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, 251 (1998) (criticizing the commentators' failure to analyze fairly the substance of OTS's position).

147. *See* RHODE, *supra* note 137, at 79 (questioning whether lawyers should act in ultra-partisan fashion); Zacharias, *Reconceptualizing*, *supra* note 59, at 172–78 (arguing the varying importance of aggressive advocacy in different contexts).

148. FED. R. CIV. P. 11 (imposing limits on claims lawyers can make); *see, e.g.*, Karen S. Beck, Note, *Rule 11 and Its Effect on Attorney/Client Relations*, 65 S. CAL. L. REV. 875, 916 (1992) (arguing that attorneys should be able to use privileged information to defend themselves in Rule 11 disputes); Edward D. Cavanagh, *Frivolous Litigation: Developing Standards Under Amended Rule 11 of the Federal Rules of Civil Procedure*, 14 HOFSTRA L. REV. 499, 523 (1986) (questioning "how reasonable inquiry can be established without compromising either the attorney-client privilege or the attorney work-product doctrine," but suggesting that "disclosure of . . . attorney-client matters may be authorized in such circumstances").

149. *E.g.*, Virzi v. Grand Trunk Warehouse and Cold Storage Co., 571 F. Supp. 507, 511 (E.D. Mich. 1983) (holding that a lawyer must volunteer news of his client's death before settlement of a personal injury case because it was a "major event" that "would have had a significant bearing on defendants' willingness to settle"); S. Trenching, Inc. v. Diago, 600 So. 2d 1166 (Fla. Dist. Ct. App. 1992) (requiring a new trial because of lawyer's failure to volunteer information about a prior accident involving the injuries at issue).

*Nix v. Whiteside*[150] similarly called into question the extent to which the adversary system depends on absolute partisanship.[151] Scholars also have questioned the codes' notion that negotiations should be conducted on the basis of an adversarial model[152]—that puffing and following adversarial conventions in negotiations helps produce optimal results for the system;[153] the adversarial approach seems questionable in the negotiations context in the absence of adversarial protections, such as a neutral arbiter.

### *E. Fictions of Regulation*

The final series of fictions in professional regulation relate to the way regulators perceive the codes to work. First, the regulators always have accepted that states should be the regulating bodies for lawyers and that individual states, operating independently, can implement regulation successfully. As discussed below, however, the practice of law has become more national and international than in the past,[154] making increased federal involvement in regulating lawyers inevitable.[155] More attention needs to be paid to how states regulate their own lawyers in other jurisdictions and how they regulate the practice of visiting lawyers.[156]

Second, underlying most professional regulation is the faulty assumption that professional discipline works to deter lawyer misconduct. This premise is inherently questionable. Many aspects of the codes are not seriously enforced, nor can they be.[157] Moreover, so long as the disciplinary process remains secret, lawyers are unlikely to be deterred unless they are involved in the particular cases in which discipline is imposed.[158]

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150. 475 U.S. 157 (1986).

151. *Id.* at 171.

152. *See, e.g.*, MODEL RULES, *supra* note 3, at R. 4.1 cmt. 2 (setting loose rules for truthfulness in negotiations).

153. As discussed in Zacharias, *supra* note 83, at 1332–36, there are good reasons for professional regulation to hold lawyers to a higher than ordinary level of truthfulness in the negotiation context, but the codes are sufficiently ambiguous to enable lawyers to justify any approach. *See also* Thomas F. Guernsey, *Truthfulness in Negotiation*, 17 U. RICH. L. REV. 99, 100 (1982) (noting problems inherent in relying on conventions to govern truthfulness in negotiations); Alvin B. Rubin, *A Causerie on Lawyer's Ethics in Negotiation*, 35 LA. L. REV. 577, 580, 589 (1975) (arguing for rules requiring lawyers to "act honestly and in good faith" in negotiations).

154. *See supra* text accompanying note 17, at 164.

155. *See generally* Zacharias, *supra* note 19 (discussing the pressures militating in favor of federalization of legal ethics).

156. *Cf.* Green & Zacharias, *supra* note 41, at 423 (discussing problems resulting from regulation of federal prosecutors by multiple jurisdictions).

157. *See infra* text accompanying note 179.

158. The disciplinary process is shrouded in secrecy. In most states, the fact of the proceedings itself is kept confidential until a disciplinary agency has made a finding of attorney wrongdoing. Once culpability is found, disciplinary agencies may issue private forms of discipline that other lawyers do not hear about. Even public discipline is poorly reported. For the most part, disciplinary decisions are published, at most, through abstracts in local periodicals. As a result, uninvolved lawyers are unlikely to read about the discipline or, if they do, learn the details of the case. Moreover, this method of publication is not easily susceptible

Perhaps the greatest delusion of the modern codes is the notion that the professional rules are all-encompassing. In other words, the codes give rise to a sense that they address all lawyer misconduct and that their standards are enforceable. Indeed, one of the ABA's express goals in developing professional regulation has been to supplant and obviate the need for regulation by lay institutions.[159] Nevertheless, professional regulators at some point will need to come to grips with the reality that the codes serve a variety of purposes other than legislating behavior and that the codes play only a small (though significant) role in constraining lawyer misconduct.[160]

*1. States as the Prime Regulators*

In an ideal world, there would be good reasons to rely on states as the regulators of lawyer behavior. States traditionally have taken the lead in this realm.[161] Only states have disciplinary mechanisms readily available.[162] Our federalist society prizes the opportunity for state-to-state experimentation in developing new approaches and in identifying means of enforcement.[163]

But there are signs all around us that this paradigm is unrealistic. Several years ago, I pointed to the increased nationalization of legal practice and suggested problems that might occur if each state actually took seriously its mandate to regulate all lawyers practicing within its jurisdiction.[164] I was castigated for dabbling in unimportant issues and suggesting unrealistic solutions.[165] Yet California's recent *Birbrower* decision,[166] and others,[167] have substantiated my predictions. The new

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to research by attorneys who want to know how often particular conduct has been the grounds for discipline. Finally, disciplinary agencies tend not to publish even general statistics concerning the types of cases that they have focused upon and prosecuted.

159. *See, e.g.*, MODEL RULES, *supra* note 3, at Preamble (urging adoption of the professional rules because self-regulation may obviate "the occasion for government regulation").

160. *See infra* text accompanying note 191.

161. *See* Zacharias, *supra* note 19, at 373–76 (discussing the arguments against federalizing legal ethics regulation).

162. *See* Green & Zacharias, *supra* note 41, at 418–34 (analyzing the justifications for relying on traditional state regulation to govern federal prosecutors, including enforcement problems inherent in federal regulation).

163. *See, e.g.*, Charles W. Wolfram, *Parts and Wholes: The Integrity of the Model Rules*, 6 GEO. J. LEGAL ETHICS 861, 901 (1993) (noting areas in which states have experimented and arguing that "one would expect movement toward improving lawyer regulation to start [in the states]").

164. Zacharias, *supra* note 19, at 345–71.

165. Wolfram, *supra* note 20, at 703 n.122.

166. Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court, 949 P.2d 1 (Cal. 1998).

167. Since *Birbrower v. Superior Court*, numerous cases have applied *the same* approach. *See, e.g.*, *In re* Desilets, 247 B.R. 660, 672 (W.D. Mich. 2000), *aff'd*, 255 B.R. 294 (W.D. Mich. 2000) (holding that a lawyer's admission to federal bankruptcy court did not entitle lawyer to hold himself out as eligible to practice bankruptcy law in the state in which the court was located); Koscove v. Bolte, 30 P.3d 784, 7863 (Colo. Ct. App. 2001), *cert. denied*, 122 S.Ct. 1066 (2002) (holding that services performed by lawyer before being admitted *pro hac vice* constituted unauthorized practice); *In re* Murgatroyd, 741 N.E.2d 719, 720–21 (Ind.

reaction in the literature is that the sky is falling; with the advent of computer technology and cross-state advertising, things will only get worse.[168] Somehow modern regulation will need to confront the question of how national and interstate practice should be monitored, and who should control the substance of the regulation.[169]

The Multidisciplinary Practice Commission highlights the related global phenomenon. States not only must deal with out-of-state practitioners, but also international practice—by foreigners here and our lawyers abroad. It is unlikely that states will be able to address the practice of international law meaningfully on their own. Regulation of practice abroad may infringe on the sovereignty of foreign nations.[170] Local regulation of foreign practice may impinge upon federal commerce

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2001) (holding written solicitations to accident victims by out-of-state attorneys constituted the unauthorized practice of law in Indiana); *In re* Ferrey, 774 A.2d 62, 69 (R.I. 2001); *Admissions: Ruling Limits* Pro Hac Vice *Status and Fees for Out-of-State Attorney*, 17 Laws. Man. on Prof. Conduct (ABA/BNA) 416 (July 18, 2001) (denying fees for services out-of-state attorney provided in Rhode Island administrative proceedings with the approval of the agency); *cf.* Estate of Condon, 76 Cal. Rptr. 2d 922, 925–26 (Cal. Ct. App. 1998) (allowing out-of-state probate lawyer to recover fees because *Birbrower* allows lawyers to recover fees for services nonlawyers may legally perform and California's probate code allows out-of-state lawyers to render services to a California estate); *In re* Opinion 33 of Comm. on Unauthorized Practice of Law, 733 A.2d 478, 486 (N.J. 1999) (limiting a New Jersey ethics opinion that had held attorneys not admitted in New Jersey to be engaging in unauthorized practice when they advised governmental bodies regarding the issuance of state and municipal bonds); Edward J. Cleary, *Crossing State Lines: Multijurisdictional Practice*, 57 BENCH & B. OF MINN. (Oct. 2000) at 29, 29–30 (2000) (canvassing different state positions on practice by out-of-state attorneys).

168. *See, e.g.*, Anthony E. Davis, *Multijurisdictional Practice by Transactional Lawyers: Why the Sky Really is Falling*, 11 PROF. LAW. 1 (2000) (arguing that unauthorized practice rules harm the profession and clients); Fischer, *supra* note 102, at 153 (noting problems use of the internet poses for unauthorized practice analysis); Jesse H. Sweet, *Attorney Advertising on the Information Superhighway: A Crash Course in Ethics*, 24 J. LEGAL PROF. 201, 224 (2000) (discussing the intersection of the internet and cases like *Birbrower*).

169. The bar's traditional response has been to rewrite the codes, in the hope that some formulation suddenly will be adopted by all the states. *See* Zacharias, *supra* note 1 (discussing the bar's "quest" to obtain a consensus regarding professional regulation). The American Law Institute restatement on the subject had a similar goal, but at least had the virtue of acknowledging and addressing state differences directly. RESTATEMENT, *supra* note 47, at §§ 1–13.

170. States that regulate what American lawyers may do when working abroad may interfere with foreign governments' notions about how their economies, and professions within their economies, should work. If such regulation has the effect of eliminating American lawyers in that work force, it may also affect the nature of transnational practice. *Cf.* Richard A. Eastman, *International Decision:* Birbrower, Montalbano, Condon & Frank v. Superior Court, 94 AM. J. INT'L L. 400, 404 (2000) (discussing the potential negative impact of *Birbrower* on representation involving international arbitration); Detlev F. Vagts, *Professional Responsibility in Transborder Practice: Conflict and Resolution*, 13 GEO. J. LEGAL ETHICS 677, 689 (2000) (discussing problems caused by *Birbrower* for transnational practice); Comment, *Multidisciplinary Partnerships in the United States and the United Kingdom and Their Effect on International Business Litigation*, 36 TEX. INT'L L.J. 365, 370 (2001) (discussing the interrelationship between foreign and domestic regulation).

power.[171] As a practical matter, regulation of international practice may require federal expertise in negotiating with foreign countries, federal intervention by way of treaty, or simply the broader perspective of federal regulators.

Recent developments also have highlighted the presumptuousness of state regulators' assumption that the federal government will remain on the sidelines with respect to lawyer regulation. The *Kaye, Scholer* incident was simply one instance in which federal agencies have directly challenged state regulation.[172] In other instances, the Department of Justice has attempted to supercede state regulation of practice by federal lawyers[173] and has claimed a broader power to preempt state regulation.[174] Congress, too, has entered the field.[175] In implementing federal class action rules, federal courts have taken steps that effectively preempt state professional rules governing plaintiffs' counsel.[176] Increased federal judicial intervention in state

171. The U.S. Constitution vests power "to regulate commerce with foreign Nations" in Congress. U.S. CONST., art. I, § 8, cl. 3. That commerce presumably includes the practice of law. *See* Zacharias, *supra* note 19, at 337 n.4 (noting that the regulation of lawyers falls within the federal commerce power).

172. *See supra* text accompanying note 144. The government's position in *Kaye, Scholer* challenged traditional regulation because it seemed to override lawyers' duties of confidentiality and partisanship (i.e., under state professional codes) by force of administrative regulation. *See* Nancy J. Valerio, *Professional Liability*, 13 ANN. REV. BANKING 1, 19–20 (1993) (reporting ABA working group's opposition to the OTS position); *cf.* George H. Brown, *Financial Institution Lawyers as Quasi-Public Enforcers*, 7 GEO. J. LEGAL ETHICS 637, 673 (1994) (predicting resistance by state courts to the OTS position); Simon, *supra* note 48, at 251 (arguing that the OTS position is consistent with traditional professional standards). Although *Kaye, Scholer's* theory is applicable to other contexts, few federal agencies have pressed the theory to its hilt. *See* Jill Evans, *The Lawyer as Enlightened Citizen: Towards a New Regulatory Model in Environmental Law*, 24 VT. L. REV. 229, 277 (2000) (arguing that lawyers' response to *Kaye, Scholer* has been to disclose too much voluntarily).

173. *See, e.g.*, Communications With Represented Persons, 59 Fed. Reg. 10086 (Mar. 3, 1994) (*codified at* 28 C.F.R. pt. 77) (exempting Department of Justice attorneys from state and federal court rules prohibiting contact with represented persons).

174. The Department's position is that, in establishing the Department and authorizing it to enforce the law, Congress has vested the Department with authority to supersede all regulation that may interfere with its mission. *Id.*

175. *See, e.g.*, 18 U.S.C.A. § 3006A (West 1997) (authorizing federal courts to award attorneys' fees to prevailing federal criminal defendants who have been prosecuted vexatiously, frivolously or in bad faith); 28 U.S.C.A. § 530B (West 1998) (subjecting federal prosecutors to state and federal court ethics regulation); *see also* Professional Standards for Government Attorneys Act of 1999, S. 855, 106th Cong. (1999) (proposing amendments to 28 U.S.C. § 530B); Federal Prosecutor Ethics Act, S. 250, 106th Cong. (1999) (also proposing amendments to 28 U.S.C. § 530B).

176. For example, a few federal courts have auctioned the position of lead class counsel, trumping the notion that clients should choose their own representatives and potentially creating conflicts between class counsel and the interests of the class. *E.g.*, *In re* Oracle Sec. Litig., 131 F.R.D. 688, 690 (N.D. Cal. 1990) (implementing a fee auction); *In re* Auction Houses Antitrust Litigation, 13 F.R.D. 162 (S.D.N.Y. 2000). Some commentators have advocated the even further step of treating class counsel as the principal in the litigation. *See, e.g.*, Jill E. Fisch, *Class Action Reform, Qui Tam, and the Role of Plaintiff*, 60 LAW & CONTEMP. PROBS. 167, 170 (1997) (arguing for making class counsel the class representative); Jonathan R. Macey & Geoffrey P. Miller, *A Market Approach to Tort Reform Via Rule 23*, 80 CORNELL L. REV. 909, 912 (1995) (arguing for the auctioning of class claims to class counsel,

professional regulation governing criminal litigation also has been recently proposed.[177] The broad assumption that each state can control the conduct of lawyers licensed in that state thus seems passé.[178]

*2. The Effectiveness of Professional Discipline*

Law students taking the basic professional responsibility course inevitably assume that professional codes are the primary constraint on lawyer conduct. Like the public, untutored students have high expectations for the range of conduct that should be forbidden. And they expect that lawyers who violate the codes will be disciplined; they are horrified when lawyers escape punishment for misbehavior. The bar, hopeful of avoiding regulation by outside institutions, does little to eliminate public misconception about the effectiveness of professional regulation.

In reality, of course, professional discipline is not all it is cracked up to be. The resources of the disciplining bodies are limited. They must choose among the policies of pursuing violations they consider to be the worst, pursuing a random assortment of code violations, or targeting prosecutions that will produce the most general deterrence.[179] They must choose between acting on cases that come to their attention easily or proactively seeking out and investigating violations.[180] In practice, most jurisdictions have focused on lawyer mishandling of client funds, to the exclusion of most other misconduct.[181]

The result is that many rules simply go unenforced or are patently underenforced. The most notable examples include advertising and lawyer reporting

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thus making them the effective clients); *see also* Jill E. Fisch, *Aggregation, Auctions, and Other Developments in the Selection of Lead Counsel Under the PSLRA*, 64 LAW & CONTEMP. PROBS. 53, 64 (2001) (surveying options for changing the traditional method of selecting and paying for class counsel). These changes implicate all of the rules regarding client-centered representation and lawyers' avoidance of proprietary interests in litigation.

177. Green & Zacharias, *supra* note 41, at 385 n.6.

178. One possibility, which I hesitate to designate a "prediction," is that as traditional methods of insulating the bar from competition break down, the profession will seek to capture federal regulation as an alternative. The ABA has strong lobbying capability and can hope to achieve protections for the bar, or regulation that enhances the image of the bar, through Congress.

179. *See* authorities cited in Zacharias, *supra* note 96, at 768 n.165 (discussing policy choices disciplinary agencies must make).

180. *See id.* at 774 (discussing the need for proactive discipline of prosecutorial misconduct); Zacharias, *supra* note 7, at 1019–20 (discussing when proactive discipline is most important).

181. *See, e.g.*, Geoff Davidian, *State Bar Policing Lawyers at Record Pace*, HOUS. CHRON., Sept. 22, 1992, at 19 (noting that three-fourths of Texas disbarments involved trust account misconduct); Guttenberg, *supra* note 104, at 1007 (finding that 25% of Ohio Supreme Court disciplinary decisions involved mishandling of trust accounts); *Client Funds and Property*, *in* ABA/BNA LAWYERS MANUAL ON PROFESSIONAL CONDUCT REFERENCE MANUAL 45:501 (1993) (finding misappropriations to be a frequent cause of discipline).

rules.[182] But one could safely hazard the assertion that few rules truly are enforced in a way that makes lawyers fear discipline for violating them.[183]

That is not to say that professional rules have no effect. They may guide well-meaning lawyers.[184] They may provide a basis for civil suits[185] or consequences enforceable in judicial proceedings.[186] They may inform lawmakers regarding the bar's vision of appropriate conduct.[187] But it does mean that a public which assumes that professional regulation is all-encompassing both is being misled and inevitably will be disappointed with the product of the regulation.

One cannot point to any groundswell or modern development that will cause the regulators to confront the false premise. There have been a few academic attempts

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182. *See* authorities cited *supra* note 86 (regarding enforcement of lawyer reporting rules). *See also* Zacharias, *supra* note 7, at 995–1001 (analyzing underenforced advertising rules, and others); *cf.* Lester Brickman, *Contingency Fee Abuses, Ethical Mandates, and the Disciplinary System: The Case Against Case-by-Case Enforcement*, 53 WASH. & LEE L. REV. 1339, 1345–46(1996) ("[T]here are virtually no disciplinary sanctions applied to contingency fee lawyers for charging unreasonable fees."); Bruce A. Green, *Lawyer Discipline: Conscientious Noncompliance, Conscious Avoidance, and Prosecutorial Discretion*, 66 FORDHAM L. REV. 1307, 1309 (1998) (discussing the reluctance of regulators to enforce rules forbidding lawyers to lend clients money).

183. One problem confronting regulators is that, even when disciplinary agencies try to enforce particular rules, the cases rarely are reported in the national reporting systems consulted by most lawyers. *See* Zacharias, *supra* note 7, at 984–85 (noting the frequency of private discipline and the reporting of discipline in unindexed local publications). Lawyers may become overconfident in the lack of enforcement, except with respect to the most common violations involving financial misconduct and failure to appear in court.

184. *See* Zacharias, *supra* note 82, at 231 (describing the guidance function of professional regulation); Zacharias, *supra* note 7, at 1005–06.

185. The introduction to the Model Rules disavows the codes as a basis for civil liability. *See* MODEL RULES, *supra* note 3, at Scope ("Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached."). Nevertheless, because ordinary lawyers consult the codes for guidance regarding appropriate behavior, the standards become relevant to the core malpractice liability issue; namely, whether an ordinary prudent lawyer would have committed the misconduct. *See, e.g.*, RESTATEMENT, *supra note* 47, § 52, at 375 (describing the malpractice duty of care and positing that "[p]roof of a violation of a rule or statute regulating a lawyer . . . may be considered by a trier of fact as an aid in understanding and applying the standard of care"). Moreover, in fee disputes, violations of the codes often are used as a basis for denying an attorney's demand for compensation. *See, e.g.*, *In re* Estate of Winston, 625 N.Y.S.2d 927, 927 (N.Y. App. Div. 1995) ("[A]n attorney who engages in misconduct by violating the Disciplinary Rules is not entitled to legal fees for any services rendered.").

186. The conflict-of-interest rules, for example, have been used as a basis for lawyer disqualification from participation in judicial proceedings.

187. *See, e.g.*, Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1427 (1992) (discussing the significance of professional regulation in expressing the bar's vision of appropriate substantive law); Fred C. Zacharias, *Harmonizing Privilege and Confidentiality*, 41 S. TEX. L. REV. 69, 75 (1999) (noting the relationship between the professional and judicial standards governing attorney-client secrecy); Zacharias, *supra* note 82, at 274–78 (describing the codes' goal of "influencing judicial standards").

to establish, empirically, the limits of discipline.[188] In the case of individual rules, continued violation may bring about pressure for change.[189] In the end, however, nothing prevents regulators from ignoring the limited effectiveness of professional discipline and the need to address the relationship between discipline and other means of enforcement—except self-interest. The public will continue to complain of the inadequacy of professional regulation until it has reason to understand the bar's limits.[190]

*3. The Primacy of the Professional Codes*

The previous section alludes to a broader issue than the limits of professional discipline; namely the limits of professional regulation itself. Implicit in the failure of the codes to admit their own limitations is an assumption that the codes can satisfy the needs of all potential constituencies of the drafters. Lawyers need guidance regarding how to act. The public needs safeguards against misconduct. The court and legal system need tools to arrive at just decisionmaking. Discipliners need rules they can enforce. The codes seem to provide all.

Again, the reality is different. The codes have multiple purposes but, in pursuing various goals, their effectiveness inevitably becomes limited. Providing guidance on a broad variety of issues comes at the expense of providing clear enforceable rules.[191] Providing enforceable rules may cause code drafters to limit client protections, or to avoid providing guidance on broader issues.[192] Simply writing too many rules may undermine the goal of identifying a general role for lawyers to play.[193] As a result, if the various purposes of the codes are to be fulfilled, the codes must rely on other law to help accomplish their goals.

The bar has started to recognize this reality. The publication of the *Restatement of the Law Governing Lawyers* is an express admission that the professional codes are but a small part of the law that governs, guides, affects, and deters lawyers.[194] The *Restatement*, however, only attempts to set out existing law.[195]

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188. *E.g.*, Jennifer Blair, Comment, *The Regulation of Federal Prosecutorial Misconduct by State Bar Associations: 28 U.S.C. § 530B and the Reality of Inaction*, 49 UCLA L. REV. 625 (2001); Zacharias, *supra* note 7; Zacharias, *supra* note 96.

189. *See supra* text accompanying note 7.

190. *See* John A. Humbach, *Abuse of Confidentiality and Fabricated Controversy: Two Proposals*, 11 No. 4 PROF. LAW. 1 (2000) (reporting a decline in the public's perception of lawyer honesty).

191. *See generally* Zacharias, *supra* note 82, at 260 (analyzing how the purposes of professional regulation interrelate).

192. *Id.* at 255 ("A highly specific provision that merely restates, or duplicates, extra-code standards may influence behavior less than a general rule that lawyers might interpret as applying more broadly.").

193. *See* Zacharias, *supra* note 46, at 230 (noting that making the codes prolix undermines the guidance they provide for the lawyer's general role).

194. RESTATEMENT, *supra* note 47.

195. *Cf.* Fred C. Zacharias, *Fact and Fiction in the Restatement of the Law Governing Lawyers: Should the Confidentiality Provisions Restate the Law?*, 6 GEO. J. LEGAL ETHICS 903, 918–19 (1993) (discussing the tension between the Restatement's goal of restating the law and the reality of what it includes).

The normative project left for the regulators is to address how the codes and other law *should* relate and to make clear the purposes and limitations of each set of professional rules.

## IV. WHAT WILL HAPPEN WHEN WE CONFRONT THE FAULTY PREMISES OF PROFESSIONAL REGULATION?

Thus far, this Article has attempted to identify the kinds of developments that may force regulators to reevaluate counter-factual paradigms on which they traditionally have relied. It has highlighted a series of specific paradigms that the regulators probably will need to reconsider in the near future. The Article's only normative conclusion for how regulators should respond is to suggest that they identify the purposes of a particular regulation and that, if they choose to continue to rely on a fiction, they should explicitly determine whether the benefits of a counter-factual approach justify the costs. Although this Article does not presume to predict how the regulators in fact will react, the following sections offer a few speculative notions regarding the changes that we are likely to see.

### *A. Changes in the Substance of Regulation*

Implicit in everything this Article has suggested is the belief that "The Future Structure and Regulation of Law Practice" will encompass more realistic and accurate regulation. That is not to say future regulators never will choose bright-line rules or adopt regulation that is over- or under-inclusive for purposes of efficiency. It does mean, however, that regulators should be more honest in identifying the purposes of particular regulation. Once they do that, they can better limit their reliance on overgeneralizations to situations in which the benefits (*e.g.*, in enforcement) outweigh the costs. In the end, the tendency to avoid the false paradigms described above—the lies of symmetry, the lies of image, and the like—will result in increasingly nuanced rulemaking that takes into account distinctions among lawyers, clients, and types of practice.

As a result, one might expect the future to encompass an increased emphasis on lawyer specialization, both in licensing and in the professional standards. Some jurisdictions have accepted the ABA's invitation to certify specialists for purposes of legal advertising rules.[196] The regulations, however, typically have not determined who may hold themselves out privately to clients as competent to practice particular kinds of law, or under what circumstances. Nor have the requisite examinations, if

196. *See* MODEL RULES, *supra* note 3, at R. 7.4 ("A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law unless: (1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and (2) the name of the certifying organization is clearly identified in the communication."). The states vary dramatically in their responses to Model Rule 7.4, but my quick perusal of state law suggests that at least seventeen jurisdictions have established or approved certifying organizations. Student Research Memorandum (on file with author).

any, partaken of the rigor of specialization examinations in non-law fields that seek to insure the competence of practitioners in the specialty.[197]

One also might expect professional rules to differentiate more among clients, lawyers, and the contexts of practice. This Article has already suggested some counterproductive effects of rules that fail to acknowledge the different needs and decision-making capability of clients.[198] There are a variety of ways code drafters might appropriately differentiate among lawyers—both in terms of fields of practice and in terms of the settings in which the lawyers operate.[199] For example, regulators might extend to transactional lawyers (and clients) some leeway to depart from the adversarial ideal and might temper the obligations of in-house counsel with the reality that they often function more like common employees than lawyers with multiple clients.

Finally, greater nuancing may come to include a more realistic focus on what occurs at different stages of representation. The incentives of lawyers at the retainer stage of representation, for example, are different than at later stages; the lawyers' prime interest is to obtain the commission. The regulators therefore cannot rely on lawyers' general sense of obligation to client well-being at the retainer stage and need to spell out the obligations more specifically.[200] A better ability to distinguish among clients inevitably will accompany a greater focus on the operation of actual practice.

Recognizing the inaccuracy of the traditional image of lawyers and legal practice cannot help but feed into a more economic view of regulation. Russell Pearce has described a "new paradigm" of regulation that would treat law as a business.[201] Others have suggested similar, though less theoretical, changes in professional regulation that would take into account a more economics-oriented view of the lawyer-client relationship.[202] There will always be proponents of the traditional

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197. The medical profession, for example, has rigorous requirements for specialization. Specialist candidates must spend three to seven years of post-degree full-time training under an experienced professional in an accredited residency program. Most of the medical specialty boards require evaluations and documentation of performance of the candidate, followed by passage of a written exam. Fifteen of the boards also require an oral exam administered by senior specialists. Recertification programs typically require continuing education. AMERICAN BOARD OF MEDICAL SPECIALTIES, WHICH MEDICAL SPECIALIST IS FOR YOU? (2001), *available at* http://www.abms.org/which.asp; Phillip G. Bashook et al., *Credentialing Physician Specialists: A World Perspective*, *in* PROCEEDINGS OF THE AMERICAN BOARD OF MEDICAL SPECIALITIES CONFERENCE (June 8–10, 2000), *available at* http://www.abms.org/ conferences.asp (discussing requirements for medical specialists); *cf.* 14 C.F.R. § 61.1–61.217 (2001) (setting specialist requirements for pilots to fly particular aircraft, including medical, written, and practical evaluations and experiential requirements and continuing education).

198. *See supra* text accompanying note 56.

199. Zacharias *Reconceptualizing*, *supra* note 59.

200. *Cf.* Brickman, *supra* note 116; Brickman, *supra* note 182, at manuscript at 23 (arguing that allowing lawyers to charge contingency fees without offering the client an option of hourly-rate representation in some cases allows lawyers to emphasize their own "financial self-interest" over their fiduciary obligation to act in the clients' interests).

201. Pearce, *supra* note 106.

202. *See, e.g.*, Lynn A. Baker & Charles Silver, *The Aggregate Settlement Rule and Ideals of Client Service*, 41 S. TEX. L. REV. 227, 227–28 (1999) (arguing for reconsideration of

images within the leadership of the bar, but the pressures of the modern world described above seem increasingly likely to carry the day.[203]

Accordingly, it seems very likely that future regulators will concede the long-touted unbundling of legal services[204] and open the door to more lay practice.[205] One can also anticipate greater emphasis in the codes on the *full* provision of information to clients[206] combined with greater deference to client autonomy in decisionmaking with which the regulators might disagree.[207] As the door to lay practice opens, so also will the need for lawyers to compete in the market and to join in economically efficient associations. Regulators will face strong pressure to allow lawyers to merge operations with nonlawyers. To counteract the long-feared adverse impact of such associations on clients, regulators probably will increase regulation in some respects—regulating lawyers more forcefully like other businesses and creating incentives for adherence to professional regulation by imposing liability for rule violations on the entire entities through which lawyers practice.[208]

The hallmark of ordinary business regulation is specificity, because legislators and administrators always must be wary of litigation that challenges the

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aggregate settlement regulation to allow freedom of contract); George M. Cohen, *When Law and Economics Met Professional Responsibility*, 67 FORDHAM L. REV. 273, 274–75 (1998) (discussing recent attention to the economics of professional regulation); Richard A. Epstein, *The Legal Regulation of Lawyers' Conflicts of Interest*, 60 FORDHAM L. REV. 579, 581 (1992) (offering economic analysis of conflict rules); Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 20 (1998) (offering economic analysis of confidentiality rules); Jonathan R. Macey & Geoffrey P. Miller, *An Economic Analysis of Conflict of Interest Regulation*, 82 IOWA L. REV. 965, 966 (1997); Charles Silver, *Preliminary Thoughts on the Economics of Witness Preparation*, 30 TEX. TECH L. REV. 1383, 1389 (1999) (discussing witness preparation and witness preparation regulation in economic terms).

203. *Regulation of Bar: ABA Multidisciplinary Practice Commission Recommends Amending Rules to Allow MDPs*, 15 Laws. Man. on Prof. Conduct (ABA/BNA) 250 (June 9, 1999) (statements by former ABA president, arguing that changes in multidisciplinary practice rules are "inevitable" because of the realities of legal practice); Gibeaut, *supra* note 28, at 51 (arguing that the ABA cannot prevent structures similar to multidisciplinary practice firms because the profession's interest in them is increasing).

204. *See* authorities cited *supra* note 103.

205. *See, e.g.*, Pearce, *supra* note 106, at 1232 (arguing in favor of "allowing nonlawyers to provide legal services but retaining a role for the organized bar with bar membership serving as a certificate rather than a license"); Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 1 J. INST. STUD. LEGAL ETHICS 197, 211 (1996) (arguing that "it is time to recognize reality and eliminate prohibitions on the unauthorized practice of law").

206. Full information may include not only information about the advantages and risks of particular choices, but also descriptions of alternatives and advice concerning the wisdom of following a particular course of action. *See* Zacharias, *supra* note 10, at 432 (suggesting a rule requiring such information in the context of conflict-of-interest waivers).

207. *See* Zacharias, *supra* note 46, at 234–35 (analyzing the proper role of autonomy-limiting professional regulation).

208. *See* authorities cited in Zacharias, *supra* note 83, at 1371–73 (discussing the importance of entity liability for relieving pressures on lawyers to commit misconduct from other members of their legal team).

right to regulate.[209] The specificity of lawyer regulation has varied, depending on whether the regulators are seeking to set enforceable rules, provide guidance regarding lawyer roles, or accomplish some other function. It would be sad indeed if the regulators ceased to offer guidance even within a structure that lawyers have incentives to obey.[210] Disciplinary agencies may need to conceive of strategies to maximize compliance with the codes.[211] Nevertheless, the trend towards more "legalization" in the codes probably will continue.[212] Hopefully, increasing specificity will occur mainly with respect to regulation of contexts in which lawyers have the strongest financial and personal incentives to emphasize their own self-interests—such as the retainer stage of representation. In those contexts, lawyers are least likely to follow general standards identifying their appropriate role.

The emphasis on specificity and enforceability of some aspects of the codes should make code drafters conscious of the need to maintain the credibility of their less enforceable standards.[213] The more that legal standards are incorporated into the rules, the more lawyers will have to fear their enforcement by other regulators. The more the codes' standards help provide a foundation for civil liability, the more they will deter misconduct. Even where such coordination is not possible, however, code drafters in the twenty-first century will focus more than before on building

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209. Corporate counsel, furthering the profit-maximization goals of their client, typically are poised to take advantage of vagueness in laws or rules or to challenge such rules as violating due process or equal protection. Thus, for example, many of the liberal Warren Court decisions in the 1960s designed to protect the rights of individuals became useful tools for corporate litigators. *See* Zacharias, *supra* note 83, at 1324–25.

210. One example of rules that receive little deference are the AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993). The model codes have avoided this fate for a variety of reasons. First, they represent a tradition of self-regulation that some lawyers have come to respect over time. Second, they sometimes are enforced and, when adopted by state lawmakers, always present the threat of discipline. Even when enforcement is rare, the potential provides some incentive to think about the rules as providing real prohibitions. Third, because the rules are respected by some lawyers, there are market pressures encouraging compliance. Reputations may depend, in part, on the lawyers' willingness to abide by the prevailing professional standards.

In contrast, however, relying exclusively on market pressures to produce compliance with professional standards is unlikely to work. Over time, clients and adversaries injured by lawyer misbehavior may publicize their disapproval and injure the offending lawyer's reputation. In the interim, however, clients are likely to be hurt. Moreover, clients and adversaries may never become aware of the lawyer's misconduct, or they may have the same incentives as the lawyers to engage in it. *See, e.g.*, RHODE, *supra* note 137, at 50 (discussing the incentives of lawyers to disobey professional standards). Regulators therefore must create a structure within which compliance with the standards appeals to lawyers' self-interest.

211. *See infra* text accompanying note 229.

212. *See* Hazard, *supra* note 97, at 1250 (discussing the trend toward casting professional standards in enforceable terms).

213. Some professional standards—such as the requirements that prosecutors "do justice" and that lawyers act "zealously" and maintain "loyalty"—by nature are too vague to enforce.

institutional incentives into the rules that can encourage both compliance with the rules and lawyer recognition of their own need to consider appropriate conduct.[214]

### *B. Changes in the Nature of the Regulators*

Perhaps the most inevitable redirection of future regulation will be in who regulates lawyers. We are likely to see more federal involvement in regulation through legislation, administrative regulation,[215] federal court rulemaking,[216] and treaties governing international practice.[217] We also are likely to see states attempting to respond to the nationalization of practice first by flexing their individual muscles,[218] but subsequently by forming compacts with other states in their region regarding lawyer regulation[219] or by moving towards more uniform regulation.[220]

The second likely change is that state regulators may come to recognize their relative insignificance. Sooner or later, the bar will concede that professional self-regulation is but one part of lawyer regulation. Only once this realization sets in can the bar realistically study and consider the interaction between professional standards and alternative regulation—including civil, criminal, and administrative standards and market forces. It is impossible to predict exactly how the regulators will take the

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214. The literature increasingly has noted the need for structural changes to counteract lawyers' personal incentives to avoid exercising "moral discretion." *See, e.g.*, RHODE, *supra* note 137, at 16 (discussing a failure of bar leaders to "acknowledge the possibility that self-interest might occasionally skew lawyers' judgments" and arguing for "structural reform" in regulation); Zacharias, *supra* note 83, at 1352–53 (arguing for regulation designed to counteract lawyers' incentives to exercise discretion poorly).

215. *See supra* text accompanying notes 144 and 172 (discussing the actions of the federal Office of Thrift Supervision and Department of Justice).

216. *See* Green & Zacharias, *supra* note 41, at 473 (discussing pressures for increased federal rulemaking regarding federal prosecutorial ethics).

217. *See generally* Aubrey Meachum Connatser, Note, *Restructuring the Modern Treaty Power*, 114 HARV. L. REV. 2478 (2001) (canvassing federal treaties and noting that "the United States has greatly expanded its participation in multilateral agreements that touch on subjects traditionally considered to be purely domestic").

218. As note 167 suggests, when one state enforces its rules against the unauthorized practice of law by out-of-state lawyers, other states are likely to retaliate by enforcing their own rules equally vigorously. *See, e.g.*, *In re* Desilets, 247 B.R. 660, 672 (W.D. Mich. 2000), *aff'd*, 255 B.R. 294 (W.D. Mich. 2000); Koscove v. Bolte, 30 P.3d 784, 7863 (Colo. Ct. App. 2001), *cert. denied*, 122 S.Ct. 1066 (2002); *In re* Murgatroyd, 741 N.E.2d 719, 720–21 (Ind. 2001); *In re* Ferrey, 774 A.2d 62, 69 (R.I. 2001); *cf.* Estate of Condon, 76 Cal. Rptr. 2d 922, 925–26 (Cal. Ct. App. 1998); *In re* Opinion 33 of Comm. on Unauthorized Practice of Law, 733 A.2d 478, 486 (N.J. 1999).

219. *See, e.g.*, *Speakers Review, Seek Reform of Rules That Inhibit Multijurisdictional Law Practice*, 17 Laws. Man. on Prof. Conduct (ABA/BNA) 351, 355 (June 5, 2001) (discussing proposed compact among Idaho, Oregon, and Washington to alleviate the problems of multijurisdictional practice); Fred C. Zacharias, *A Nouveau Realist's View of Interjurisdictional Practice Rules*, 36 S. TEX. L. REV. 1037, 1050 (1995) (predicting regional compacts to ameliorate complications arising from contradiction in neighboring states' rules).

220. For example, by adopting one or the other of the ABA model codes as a group or by combining to develop a set of Uniform Laws, as has been done in many areas of substantive law.

interaction into account, but one can envision that future codes will make more specific reference to other law.[221]

### *C. Changes in Discipline and Disciplinary Process*

Of all the movement that one might expect to see in "The Future Structure and Regulation of Law Practice," the greatest probably will be in the design and implementation of the disciplinary process. Significant changes already have occurred in the disciplinary process over the past several decades, with some states totally restructuring their systems.[222] As attention to professional regulation has increased,[223] many states have augmented the resources devoted to prosecuting code violations.[224] The cohesiveness and communication among discipliners in different states also has increased.[225]

But, sadly, many aspects of the disciplinary process remain static. In most jurisdictions, resources are limited. The process usually remains secret until discipline is imposed. Few cases involving discipline are publicly reported and, even when they are, not in sources easily accessible to lawyers.[226]

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221. An informative illustration of this phenomenon is the recent suggestion of Professor Nancy Moore, Chief Reporter for the Ethics 2000 Project, that failure of the Model Rules to advert to the unique conflict of interest issues in class actions should be read as a concession by the codes that these issues should be determined with reference to other law (i.e., legislative and judicial rules) that trump the professional codes. Nancy Moore, *Who Should Regulate Class Action Lawyers*, ILL. L. REV. (forthcoming 2002). As Professor Moore herself notes, the failure to identify that normative principle in the rules themselves undermines the guidance the rules provide to lawyers and states considering adoption of the ABA models, for they may well read the conflict of interest provisions and assume that they apply fully and literally to class actions. *Id.* Insofar as future code drafters attempt to take extra-code constraints into account in developing rules, hopefully they will be more explicit about their expectations.

222. *See, e.g.*, CAL. BUS. & PROF. CODE § 6079.1 (West 2002) (creating disciplinary process and vesting authority to preside over attorney disciplinary hearings in administrative law judges); *Id.* § 6086.65 (creating a Review Department of the State Bar Court).

223. The public focus on lawyer regulation began in 1969, with the adoption of the Model Code and increased with the reevaluation of the Model Code that culminated in the adoption of the Model Rules in 1983. Attention to this subject has not waned since. *See* Zacharias, *supra* note 1 (discussing the continued preoccupation with identifying perfect lawyer regulation).

224. Beginning with Clark Commission's 1970 report, many improvements to state disciplinary systems have occurred, including increasing resources. *See* AM. BAR ASS'N CTR. FOR PROF'L RESPONSIBILITY, LAWYER REGULATION FOR A NEW CENTURY: REPORT OF COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT (Feb. 1992), *available at* http://www.abanet.org/cpr/mckay_report .html. (noting reforms and increased funding of disciplinary agencies).

225. One example is the formation of the National Organization of Bar Counsel and the development of its website. Among its other activities, the N.O.B.C. participates and develops programs in connection with the ABA's annual National Conference on Professional Responsibility. *See* NATIONAL ORGANIZATION OF BAR COUNSEL, ADMINISTRATION, *at* http://www.nobc.org/Membership/Administration/adminstration.html.

226. Typically, reports of discipline appear in abstracted form in local journals that are not indexed or computerized in a way that facilitates research into enforcement issues.

Moreover, the activities of disciplinary agencies continue to be hidden from public view far more than the actions of other agencies. Few statistics concerning disciplinary agency actions are made public—not even general statistics.[227] Enforcement policies are secret as well.[228] There typically is no process for questioning decisions not to move forward with respect to alleged misconduct. One can guess at the kinds of cases the agencies emphasize based on abstracts reported in local newspapers or bar journals, but such guesses are speculation.

The secret nature of the disciplinary process undermines several aspects of professional regulation. First, the potential for professional discipline lends credibility to the standards in the codes. When, in contrast, lawyers perceive that discipline is unlikely to occur (*e.g.*, because disciplinary actions are not well-publicized), their incentives to obey the codes become muted.

Second, the policies of enforcement bear significantly on the actual drafting of the codes. If, for example, discipliners perceive their function to be maintaining the integrity of the codes by deterring lawyer violations, then a policy of random enforcement of different types of violations would serve deterrence better than simply identifying particular types of violations to pursue. On the other hand, to the extent the discipliners focus on particular violations —for example, mishandling of client funds—the drafters need to write other aspects of the codes in more self-enforcing ways.[229]

Third, the failure to identify either the policies or reality of disciplinary enforcement makes more difficult the task of coordinating discipline with other methods of sanctioning misconduct. This Article already has noted the fallacy in assuming that discipline is all-encompassing. However, if the drafters, alternative regulators, and the disciplinary agencies are to make meaningful adjustments in their own actions based on the action of the others, information must be available.

Thus, the twenty-first century should see significant sunshine in the disciplinary process. One might expect changes to be gradual. For example, public pressure to increase discipline of prosecutorial misconduct has always been apparent.[230] As disciplinary agencies move to confront the practical consequences such a focus would have on other cases (*e.g.* because of resource considerations), they

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227. *See* Zacharias, *supra* note 96, at 773–74 (noting the absence of statistics regarding discipline).

228. *Id.* (discussing the need for enforcement policies).

229. There are mechanisms code drafters can use to provide incentives towards compliance, including requirements that specific items be discussed with clients and memorialized for use in any subsequent civil litigation. Zacharias, *supra* note 19, at 1357–62, 1366–70.

230. Edward M. Genson & Marc W. Martin, *The Epidemic of Prosecutorial Courtroom Misconduct in Illinois: Is It Time to Start Prosecuting the Prosecutors?*, 19 LOY. U. CHI. L.J. 39, 47 (1987) ("Disciplinary sanctions are rarely imposed against prosecutors."); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. Rev. 693, 697–98 (1987) (criticizing the limited discipline of prosecutors for failing to produce exculpatory information); Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833, 898 (1997) ("[T]he disciplinary process has been almost totally ineffective in sanctioning even egregious Brady violations.").

might learn to welcome public involvement in the discussion.[231] Moreover, as new regulators enter the field[232] and states and bar associations begin to reassess their role, discipline becomes part of the package that must be discussed because it involves the highest commitment of resources.[233] To the extent federal intervention imposes requirements or costs upon state disciplinary agencies,[234] the disciplinary process is likely to become a public question as well.

Earlier, this Article attempted to identify the essential fictions concerning the effectiveness of professional discipline.[235] Confronting those fictions would entail, at a minimum, some opening of the disciplinary process—including discussions about agency policies and priorities and the disclosure of facts and statistics concerning cases that are brought. What additional, specific changes in disciplinary focus might one expect?

One is more proactive disciplinary enforcement.[236] If discipliners resolve to enforce the codes in a manner that maximizes deterrence of misconduct they suspect exists or that supports a particular regulatory policy, they will need to find cases fitting the mold. Heretofore, discipliners have tended to focus exclusively on cases that come to their attention easily, through complaints by allegedly aggrieved persons. Moreover, if discipliners resolve to coordinate their activities with other enforcement mechanisms, one might also expect a system to develop by which they refer cases to other agencies (*e.g.*, criminal prosecutors) or adopt a policy regarding the priority of discipline and court action in particular types of cases.[237]

Finally, and perhaps most importantly, discipliners eventually will need to define their own roles. One peculiarity of disciplinary decisions in the past has been that sanctions often have been imposed without reference to a clear notion of the purpose of professional discipline. For example, a lawyer's heavy use of alcohol or drugs, in different cases, has been relied upon as grounds for discipline, a mitigating factor, or an excuse. Once professional regulators begin to coordinate discipline with other forms of sanction, the purposes of discipline are likely to become clearer; if client protection becomes the key, punishment might become less important than deterrence notions, but mercy for the human error of lawyers equally irrelevant.

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231. Such involvement might take many forms, ranging from rulemaking open to the public, to publication of information, to more participation at professional responsibility conferences by members of the National Organization of Bar Counsel.

232. *See supra* text accompanying note 172.

233. *Cf.* Maura Dolan, *Justices Revive Dues to Fund Bar Ethics Unit*, L.A. TIMES, Dec. 4, 1998, at 1. (noting California's 1998 suspension of bar dues and that the "lack of funds forced the bar to stop investigating consumer complaints against lawyers"); Max Vanzi, *California and the West: State Bar Stops Accepting Most New Complaints*, L.A. TIMES, Apr. 30, 1998, at 3 ("Lawyer discipline takes up the majority of the [California] bar's budget.").

234. *See* Green & Zacharias, *supra* note 41, at 423 (discussing the financial implications of adopting new regulation with the expectation that it be enforced by state disciplinary agencies).

235. *See supra* text accompanying note 178.

236. *See* authorities cited *supra* note 180.

237. *Cf.* Zacharias, *supra* note 96, at 758 n.130, 762 (discussing the psychological interaction between discipliners and courts presiding over cases that might affect discipline).

## V. CONCLUSION

This Article has attempted to provide a glimpse of the future. By definition, much of what it offers is speculation. But it is speculation grounded in a reasonable assessment of the failings of current professional regulation.

Of course, in referring to the "lies" of professional regulation, the Article overstates the case. Leaders of the ABA and other rulemaking bodies typically are well-meaning, well-informed academics or practitioners who are trying to get it right. They are not mendacious, delusional, or (usually) overly goal-directed.

But the profession has become locked into its own tradition. Each generation of regulation has tended to assume the unproven axioms of the past until they become gospel. Some of those axioms prove true over time, some do not. Some of them are necessary to accomplish the purpose of particular rules, others simply are products of wistful idealizations and images of what the bar wishes to be true. Yet, while revision of professional regulation has been continual, reconsideration of the core assumptions never has played a significant role in the revising process.

So . . . perhaps some of this Article's assessments of the assumptions and paradigms in the codes are wrong. Perhaps its predictions are unworkable or overly optimistic. They are merely a starting point for a new kind of debate about the professional rules. The Article offers them in the spirit of looking ahead.