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Crisis Regulation

James E. Moliterno

Washington and Lee University School of Law, moliternoj@wlu.edu

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CRISIS REGULATION

James E. Moliterno

2012 MICH. ST. L. REV. 307

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I am by no means blind to the failings of the legal profession. . . . I know that we are often too conservative. We don’t realize that the world is changing. We don’t sufficiently look ahead. Instead of trying to help in so shaping changes that they accomplish benefits with a minimum of disturbance, we often stand stubbornly for the maintenance of methods that have been outworn.¹

INTRODUCTION

What does the American legal profession’s history of crisis management tell us about the future of lawyer regulation? Can lawyers effectively regulate lawyers in a forward-looking, manage-for-the-future way? Should lawyers explicitly share regulation of the legal profession with non-lawyers?

1. Henry P. Chandler, *What the Bar Does Today*, 7 AM. LAW SCH. REV. 1017, 1022 (1930-34).

The American legal profession has engaged in a largely crisis-management form of regulation, and it has done so poorly, narrowly-mindedly, and myopically. The 1908 Canons were in large part the result of the elite branch of the profession's fear of the profession's changing demographics and the influence of the incoming eastern and southern European immigrants. The Kutak Commission and the resulting Model Rules were one of the profession's responses to the Watergate crisis. An embarrassed legal profession acted in response to the diminished public opinion of lawyers generated by their prominent place in the scandals. Now, Ethics 2020 is in some measure the result of Enron and related events that produced an outcry against lawyers, accountants and businesspeople, as well as the economic crisis of the 2000s. Regulatory-reform decisions made in these crisis management modes have been largely lawyer-protectionist, and specifically status quo protectionist. The American legal profession has managed crisis mainly by drawing in, staffing the ramparts, and protecting against the influence of the world outside the profession, while making only enough change to appease the public or the government and allow the current crisis to pass. It tends to exclude or reduce to a minimum the views of those outside the profession, characterizing outsiders as ill-informed and lacking in understanding of the true nature of the legal profession. At every turn, the reforms and changes made have had little or no effect on the lives of the elite lawyers who created the changes. The profession is reacting to the current economic crisis in the same narrow fashion, and it will produce the same predictably backward-looking results. The American legal profession has managed crisis mainly by drawing in, staffing the ramparts, and protecting against the influence of the world outside the profession, while making only enough change to appease the public or the government and allow the current crisis to pass. At every turn, the reforms and changes made have had little or no effect on the lives of the elite lawyers who created the changes. Future regulation should no longer be inward-looking reactions to crisis, but instead forward-looking and innovative for those who are members of the legal profession. Only when the legal profession welcomes the influence, views, and expertise of the world outside its membership will effective, forward-looking regulation of the legal profession be possible.

Views from outside of the profession are essential in making large-scale decisions about how the legal profession should be formed and managed. Management of an enterprise as important, massive, and influential as the legal profession should be neither protectionist nor inbred. Lawyers and exclusively-membered lawyer organizations are handicapped as managers by their narrow range. I suggest that greater advances and more effective regulation could occur by looking outward to find in society and culture the causes of and connections with the legal profession's crises. Doing so would allow the profession to grow with the society, solve problems *with*

rather than *against* the flow of society, and be more attuned to the society the profession claims to serve.

I. CRISIS

What do I mean by “crisis” in the legal profession? I claim the profession engages in “regulation-by-crisis.” So what do I mean by that phrase?

In some ways, the American legal profession is always in crisis. By their very nature, American lawyers and courts find themselves at the center both of social movements and of more transient controversies alike. Being a part of such events produces a feeling of crisis, or of unsettledness. That day-to-day placement of the legal profession in controversy’s path then creates a perpetual sensation of crisis. But that perpetual sense of crisis is not what I mean by “crisis” in the phrase “regulation-by-crisis.” Instead, by “crisis,” I mean periods in the history of the American legal profession when it might fairly be said that the crisis sense was different, more pronounced, to be sure, but even different-in-kind from the usual. Outside these special times, the profession is confident in the midst of its daily regime of controversy, sees its place rightly there, and sees that the profession is a steadying influence amid crisis and controversy. Unlike the day-to-day sense of crisis, during these special crisis times that are the subject of this Article, the profession itself sees the crisis, feels and reacts to the crisis, and even fears it. During these times, the profession is unsure of itself and less confident about its future and its place. The phrase “regulation-by-crisis” is about some of those special times and about the profession’s response. Does the profession see itself and its difficulties during such times as part the larger society’s problems and attributes? Does the profession respond to its crises by looking inward or outward?

My thesis is that the profession too often looks inward to diagnose and solve its crises. Doing so has caused the profession to be a late-arriving member of the society during times of change. Doing so has caused the profession too often to fail in what could have been a leadership role in the society. Rather, the profession has too often been seen as a last bastion of a prior time, clinging too tightly to its past and failing to grow in step with world developments. This is not to say that the profession should dismiss its core attributes at the first signs of societal change; it is to say that a perceptive growing with change would be preferable to consistent, persistent resistance to change. We credit the greatest lawyers with being able to anticipate and predict the course of law’s change and the readiness of society for change. But as an institution, the legal profession has been a poor lawyer by this measure, most often staying blind to change that is happening all around it. The legal profession has engaged in regulatory reform in response to crisis, and when doing so, has tended to resist partnership with the society

when it should seek to lead. Such a regulatory management style is doomed to be backward-looking and behind the times.

I will use the following three historical examples: (1) immigration in the twentieth century, (2) Watergate, and (3) multijurisdictional practice and globalization, to illustrate my thesis that the profession reacts to crises by making as few changes to the status quo as possible, and when change is made, to avoid change that affects current members of the profession.²

A. Example 1: Immigration in the Early Twentieth Century

At the turn of the twentieth century, the legal profession regarded itself as being in a crisis brought on by a changing membership. The character of the bar was changing. It had already changed from a largely rural bar with the “country lawyer” as the prototype to a more urban bar with the corporate lawyer as the prototype. But now the urban segment of the bar was developing into a two-strata bar with corporate lawyers as the elite, and urban, ethnic lawyers as an underclass.³

This development was viewed askance for at least two reasons. First, the character of the bar as an elite, white male Protestant-dominated profession was threatened if not by the influence of the new lawyer-underclass, then by the underclass’s growing numbers.⁴ The smirch on the purity of the bar by an influx of Jewish and Catholic lawyers was being felt by the professional elite. Second, the work being done by this new lawyer underclass directly harmed the interests of the elite’s clientele. The underclass represented workers and to some extent consumers of products with claims against their employers and the corporate producers of products. Many of these claims were contingent fee claims. Further, many of the relationships between the underclass of lawyers and their clients were being forged through the lawyers’ advertising and solicitation practices. Practices that had once been thought to be poor form, but not unethical or unlawful, were now actually having a deleterious effect on the bar elite and their clients. Previous experiences with lawyer advertising had been little more than mild annoyance. Nineteenth-century country lawyers had advertised; even founding father lawyers had placed newspaper notices addressed to prospective clients.⁵ But now the practice of advertising mattered. Claims that would not

2. More on these three and other such crisis periods in the legal profession will be included in my forthcoming book, JAMES E. MOLITERNO, *A PROFESSION IN CRISIS* (Oxford University Press 2013) (under contract).

3. James Moliterno, *Lawyer Creeds and Moral Seismography*, 32 WAKE FOREST L. REV. 781, 810 (1997).

4. *Id.* at 810-14.

5. 1 ANTON-HERMONN CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* 41 n.109 (1965); see also ERWIN C. SURRENCY, *THE LAWYER AND THE REVOLUTION* (1964),

otherwise be brought were being brought. And those claims were being brought against the elite lawyers' clients.

The profession was effectively in the control of the elite lawyers at the time, as newly formed bar associations asserted their claims to speak for the profession, and bar discipline committees made decisions about the application of new lawyer ethics codes. What did the profession do in response to this influx of urban, ethnic lawyers and the claims being filed by their formerly unrepresented clients? Through a variety of methods, the profession sought to exclude the new lawyers from the profession, it sought to minimize the new lawyers' ability to communicate with prospective clients, and it sought to limit the ability of the new lawyers to undertake matters on contingent fees, the only fee arrangement possible for many of their clients.⁶ By proposing and adopting these changes, the bar elite sought to maintain the status quo while the rest of society and culture changed: corporate lawyer, white male, Protestant domination of the profession and few worker claims while the population diversified and industrialization altered corporate-worker relationships and interdependence.

At its foundation, the organized bar wielded its own newly-forged weapons against the politically undesirable new segment of the bar. Indeed, beyond being a mere social club, arguably the very purpose of the organized bar's foundation was the preservation of a white, Anglo-Saxon Protestant (WASP) elite and the elimination or marginalization of the newer southern and eastern European lawyers who were increasingly populating American industrial centers.⁷ The early bar had many goals, but all stemmed from the same motive: the desire to exclude undesirable groups from the practice of the law, and reduce the ability of those already licensed to reach and serve their clientele. Ostensibly, of course, the bar had nobler goals in mind; it sought to restore the legal profession to the height of respect that it had enjoyed in Abraham Lincoln's time. At the root, however, the aim was to exclude the poor and immigrant lawyers who, with the help of part-time law schools in large urban centers, were entering the profession at an increasing rate.

1. *The Birth of Bar Associations*

After the Civil War had come to a close, the American bar was composed of a basically homogenous group: overwhelmingly white, Anglo-Saxon, and Protestant men. The prototype of the "country lawyer" dominat-

reprinted in READINGS IN THE HISTORY OF THE AMERICAN LEGAL PROFESSION 74 (Dennis R. Nolan ed., 1980).

6. Moliterno, *supra* note 3, at 810-14.

7. *Id.*

ed the American legal profession.⁸ Even as America industrialized and the country lawyer therefore became more and more an anachronism, “images remained vivid of that child of the American frontier, self-taught in a Kentucky log cabin, the circuit-riding country lawyer in Illinois who became President to save the Union and died to make men free.”⁹ This image expressed everything that the American lawyer desired to be: both aristocrat and democrat, uniting the higher class and the lower to achieve the perfect democracy. This was the “Golden Age” of the American bar, the age for which many lawyers would continually pine for more than a century to come.

However, as industrialization increased, immigration increased with it, and the composition of the American bar began to reflect that of the country as a whole. Lawyers became alarmed that “[t]he proportion of white Anglo-Saxon Protestants within the legal profession and American society was diminishing as changing immigration and demographic patterns swelled cities and the profession with the foreign-born and their children.”¹⁰ The aristocratic and democratic country lawyer had arisen out of a mostly homogenous society; but by 1900, that homogenous national and professional culture no longer existed. Many lawyers saw a need to act to save this paradigm of the country lawyer, which no longer fit an industrialized and urbanized society; they saw these largely industrial and urban immigrants as a threat to that paradigm.¹¹ Their response was to organize themselves into bar associations, from which the lawyers of this new underclass could be denied admission and thus prestige in their profession. Bar associations were, in the first instance, simply a way of separating the elite from the recent immigrants who were so distressing the WASP establishment. The first bar associations were voluntary, invitation-only organizations and did not encompass anywhere near the entire range of a given geographic area’s bar. They resembled clubs more than today’s more professional, more inclusive trade organizations. During this period, lawyers created voluntary associations “to insulate themselves from the rougher, unethical parts of the bar.”¹² The composition of those “rougher, unethical parts” can be deduced from the location of the first bar association, New York City, the arrival point of the

8. JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 15 (1976).

9. *Id.*

10. *Id.* at 5.

11. *Id.*

12. Walter W. Steele, Jr., *Cleaning up the Legal Profession: The Power to Discipline—The Judiciary and the Legislature*, 20 ARIZ. L. REV. 413, 420 (1978).

great part of the immigrants who began flooding into the country, the so-called "dumping ground of the world."¹³

The fact that the organized bar saw the new immigrants as undesirables who must be excluded is evident in the literature of the period. No less a figure than Roscoe Pound, dean of the Harvard Law School, referred to such people by implication as "the defective, the degenerate of decadent stocks, and the ignorant or enfeebled victim of severe economic pressure"¹⁴ In fairness, Pound was attempting to solve the legal problems that the presence of such "defectives" posed in his day; his work was not one of racist or anti-Semitic polemic. However, the fact that Pound was willing to refer to such people in this way, even if he was discussing ways of fulfilling their legal necessities, betrays the general attitude of the early twentieth century bar.

The purpose generally claimed for the organized bar, "to raise the standards of the profession and speak as a unified voice for the interests of attorneys as a class,"¹⁵ was undoubtedly genuine. Lawyers truly bemoaned the decline in the reputation of the profession that accompanied its adherence to the corporate elites in America. However, the corporation lawyers who had become dominant still considered themselves to be the heirs of the country lawyer tradition and of all that was best in American legal life. The corporation lawyers did share common ethnic origins with the country lawyer as well as the men of industry whom they now served. There must, therefore, be some other cause for the destruction of the esteem in which Americans once held the legal profession, since corporate lawyers were, in their own eyes, the same as the country lawyers that Americans once loved. That cause was the pollution of the bar by immigrants, who had no idea of ethical behavior, spoke broken English,¹⁶ and belonged to strange religions that were either traditionally held in reprobation by English-descended Americans¹⁷ or were so alien that they denied Christianity altogether.¹⁸

13. *Id.*; Edward S. Thurston, *Proceedings of the Section of Legal Education*, 34 ANN. REP. A.B.A. 632, 646 (1911) (Statement of F. M. Danaher) [hereinafter *Proceedings of the SLE, 1911*].

14. Roscoe Pound, *The Administration of Justice in the Modern City*, 26 HARV. L. REV. 302, 311 (1913).

15. Terry Radtke, *The Last Stage in Reprofessionalizing the Bar: The Wisconsin Bar Integration Movement, 1934-1956*, 81 MARQ. L. REV. 1001, 1002-03 (1998).

16. See AUERBACH, *supra* note 8, at 49 (quoting Isidore J. Kresel, *Ambulance Chasing, Its Evils and Remedies Therefor*, in 52 N.Y. ST. BAR ASS'N, PROCEEDINGS AND COMMITTEE REPORTS, 337-39 (1929)) (citing an investigation in which the fact that attorneys "could not speak the King's English correctly" was considered proof of their unfitness to practice law).

17. Catholicism, of course, had been illegal in England, with short reliefs, since the fifteenth century, was only made legal in the nineteenth, and the prejudice that Protestant Englishmen had toward it was often carried over to America. See, e.g., JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925*, 5-7 (1988).

“Raising the standards of the profession,” then, meant eliminating unethical conduct, and unethical conduct was whatever was not in accord with the country lawyer tradition that Americans had once so revered. Codes of ethics were therefore adopted to express this past legal tradition so perfectly that they immediately became an anachronism in their own time, a time dominated not by the country lawyer but by the urban, corporation lawyer.

2. *The Code of Ethics*

The code of ethics that this bar erected was designed to affect principally the immigrant lawyers. These lawyers were primarily urban solo practitioners, and their professional practices were about to be declared unethical because the established lawyers said they were. It is amply clear that the impetus behind the 1908 Canons was in large measure a subterfuge for class and ethnic hostility. The code was a subterfuge because it was not openly nativist. However, the reasons cited for requiring the code of ethics specifically target the practices of lower-class lawyers, who were in large part from poor and foreign backgrounds. Furthermore, the Committee’s report has an overtly nativist tone despite its lack of specific derogation.¹⁹ Historians and lawyers alike have found that “[t]he ethical crusade that produced the Canons concealed class and ethnic hostility,”²⁰ and the content of “unethical” behavior therefore became the behavior of the disfavored ethnicities, regardless of its actual character. As one ethics scholar commented, the Canons “were motivated in major part by the large numbers of Catholic immigrants from Italy and Ireland and Jews from Eastern Europe beginning in about 1880,”²¹ and “[d]eviance was less an attribute of an act than a judgment by one group of lawyers about the inferiority of another.”²²

Two pillars of this code were most prominent in their attack on lower-class lawyers; both of them, however, can be united under the single de-

18. While wealthy Jews generally enjoyed success in the American legal community, as lawyers such as Felix Frankfurter bear witness, Jews of eastern or southern European background, who tended to be poor and without prominent connections, were discriminated against much as were all immigrants from that region. See AUERBACH, *supra* note 8, at 185 (stating that “[a] few German Jews from an earlier generation—Brandeis, Louis Marshall, Julian Mack, Samuel Untermyer—had securely established themselves”); *id.* at 186-87 (showing that even so, Jews often had a more difficult time securing employment than Anglo-Saxon Protestants); *id.* at 52 (citing southern and eastern European background as a factor in rendering a candidate’s Jewishness too pervasive to be overlooked).

19. See A.B.A. Comm. on Code of Prof’l Ethics, *Report of the Committee on Code of Professional Ethics*, 29 ANN. REP. A.B.A. 600, 601 (1906) [hereinafter *Report on Professional Ethics*].

20. AUERBACH, *supra* note 8, at 50.

21. MONROE H. FREEDMAN, UNDERSTANDING LAWYERS’ ETHICS 3 (1990).

22. AUERBACH, *supra* note 8, at 50.

rogatory appellation of “commercialization of the profession,” or, more specifically, “ambulance chasing.”

a. Advertisement

One of the most prominent objections to immigrant lawyers’ practices was that they tended to advertise. The corporation lawyers who had become the elite in late nineteenth and early twentieth century America did not advertise; they had no need to do so. Elite lawyers already had enough connections to supply them with new clients, or they were retained by businesses as counsel and therefore had no need of new clients, particularly from the lower classes who had little or nothing with which to pay them. The fact that the new lawyers, on the other hand, did advertise and aggressively sought new clients, particularly for tort cases taken on a contingent fee, made advertising *ipso facto* unethical.²³

Here again the ideals of the country lawyer, as realized in the industrial revolution’s big business firm, obfuscated the [then] current situation of the profession. The country lawyer and the corporation lawyer were both well-known in the community; they could rely on clients coming to them. In the lower-strata urban situation, however, relationships between lawyers and clients were entirely different. Lawyers were not well-known in the community simply by virtue of their profession; they were required to advertise in order to acquire clients, both for justice’s sake and for their own economic necessity. The code of ethics prohibited nearly all advertising, a prohibition that would affect only the practices of the urban and largely immigrant underclass. Opposition to the “commercialization” of lawyers, the bugaboo that the established corporate society presented as the reason for their new prohibition on advertising, was the innocent front that sheltered the antagonism toward lawyers from ethnic minority groups who represented the formerly unrepresented in making claims against the elite lawyers’ clients. Like the Anatole France quote about laws prohibiting sleeping

23. More or less all advertising was prohibited under the Canons. All “solicitation of business by circulars or advertisements” was deemed unprofessional; it was “equally unprofessional to procure business by indirection through touters of any kind.” Even “[i]ndirect advertisement . . . by furnishing or inspiring newspaper comments concerning causes in which the lawyer has been or is engaged, or concerning the manner of their conduct” was prohibited. Effectively all advertising was, then, forbidden, except, of course, for business cards. *Those were used by the professional elite, and therefore could not possibly be unethical.* ABA CANONS OF PROF’L ETHICS, Canon 27 (1908), *reprinted in* ABA COMM. ON PROF’L ETHICS & GRIEVANCES, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES: WITH THE CANONS OF PROFESSIONAL ETHICS, ANNOTATED, AND THE CANONS OF JUDICIAL ETHICS, ANNOTATED 19 (1957) [hereinafter ABA CANONS OF PROF’L ETHICS].

under bridges, the advertising rules applied to lawyers for the rich and poor alike.²⁴

Interestingly enough, this prohibition on advertising *was* new. Despite the fact that it is perfectly suited to the country lawyer ethos, those country lawyers themselves never saw a need to implement such a prohibition and freely engaged in the limited advertising that the technology of their time allowed. One of the ethical treatises on which the new code of ethics was based, Sharswood's in 1853, put no restrictions on advertising, and many ethical systems, including those of most of the states, permitted certain amounts of newspaper advertising, at least.²⁵ The new 1908 ABA Canons of Ethics, however, prohibited nearly all advertising; even business cards received only reluctant approval.²⁶ This sudden discovery of a legal norm against lawyer advertising, entirely baseless in the traditions of the profession, reinforces the conclusion that the corporate legal community imposed the rule as an ethnic and economic weapon, rather than as an attempt to restore the image of the profession in the public eye. To the extent it was a genuine effort to restore the public image of lawyers, it was an expression that the practices of the new underclass lawyers were the cause of any diminished public image of lawyers.

Included in the prohibition on advertising was any direct seeking of clients, including simply approaching them, telling them that they probably had a legal claim, and offering to represent them.²⁷ These acts of solicitation were considered the height of commercialism and formed the substance of what was derisively called "ambulance chasing." To be sure, those lawyers engaged in these practices did so because the practices were an economic necessity to their livelihood. But they also doubtlessly considered themselves to be performing a needed service by informing those who might be ignorant of their claims of the legal recourse available to them. The ABA considered such education to be decidedly unethical. The hypocrisy of the elite in this matter is ironic, as one commentator noted, saying that "my experience has been that it is the corporation agents who are the ones who rush to the hospital, or bedside of the dying, and try to get their releases from them."²⁸ Indeed, as late as 1955 one prominent bar leader and commentator stated that "[o]f all the forms of unethical conduct possible, it is

24. ANATOLE FRANCE, *THE RED LILY* 75 (The Modern Library 1917) (It is "the majestic equality of the laws, which forbid rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread.").

25. GEORGE SHARSWOOD, *AN ESSAY ON PROFESSIONAL ETHICS* (1854); see HENRY S. DRINKER, *LEGAL ETHICS* 213 (1953); Moliterno, *supra* note 3, at 791-92.

26. ABA CANONS OF PROF'L ETHICS, Canon 27.

27. *Id.* Canon 28.

28. Frank C. McGirr, *Sanitation of the Bar: Exposure at Bar Association Meeting of the Latest Methods for Employing Courts for Vicious Purposes by Ambulance Chasers*, 4 J. AM. JUDICATURE SOC'Y, June 1920, at 5, 6.

doubtful that any embody more elements tending to weaken the force of the legal profession and hinder the administration of justice than does ambulance chasing.²⁹ The ABA leadership itself was hardly more subtle; indeed, it was ambulance chasing that inspired them to promulgate their code of ethics in the first place.³⁰ The Canons vehemently declared that “[i]t is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so,”³¹ which may be fairly translated as “except when corporate lawyers do it.” The ABA also decided that employing others to seek out valid claims and recommend a lawyer’s services was unethical.³² No justification was given for its proclamation. Scholars, too, continually decried the supposed evils of ambulance chasing.

Not only ethnic but also monetary considerations played a role in the prohibition on advertising. Most of the framers of the code represented business interests; most lawyers who advertised were serving the poor, often representing them in tort cases that arose as a result of injuries received in working for businesses. Such claims would be far less likely to be brought if urban, ethnic, underclass lawyers could be restrained from advertising about their services, soliciting the business of injured persons, and offering contingent fee arrangements to those unable to afford a pay-as-you-go lawyer fee, especially since most of those bringing the claims were ignorant of their claims’ value until their lawyers’ runners informed them of it. Since these advertising restrictions were virtually the only substantive changes from former state codes of ethics to the new ABA Canons, the inference is strong that the new restrictions masked ethnic and economic advantage-taking. The prohibition on advertising had no other purpose than the suppression not only of the largely immigrant lawyers who relied on it for their livelihoods, but also of the largely immigrant blue-collar workers who made use of those lawyers to litigate their claims against the business interests that the elite lawyers who so despised the underclass almost universally represented.

b. The Contingent Fee

A contingent fee is simply an agreement by which payment to the attorney is subject to some contingency, generally either favorable settlement or favorable result at trial, the creation of a *res* from which the lawyer’s fee can be drawn. Since ancient times, however, agreements between a litigant and a stranger to the claim to share the proceeds have been condemned as

29. Note, *Legal Ethics: Ambulance Chasing*, 30 N.Y.U. L. REV. 182, 186 (1955).

30. A.B.A. Comm. on Code of Prof’l Ethics, *Report of the Committee on Code of Professional Ethics*, 31 ANN. REP. A.B.A. 676, 682 (1907).

31. ABA CANONS OF PROF’L ETHICS, Canon 28.

32. *Id.*

champerty.³³ In the case of a contingent fee, the attorney was considered a stranger to the lawsuit: that is, he was neither plaintiff nor defendant and he pursued the litigant's claim by paying for it (with his services) in exchange for part of the settlement. The rule made some degree of sense in the pre-industrial society for which it was made; contingent fees were unnecessary, since the tort claims for which contingent fees primarily evolved were comparatively rare and litigants were more likely to be on a level playing field financially. Allowing contingent fees in such a situation would have been nothing more than giving attorneys and clients an incentive to file dubious claims for their nuisance value.³⁴ It has been thought that the arrangement might even encourage perjury, since a lawyer, knowing that his fee rests upon his prevailing, may encourage his client or witnesses to stretch or invent the truth to achieve a favorable result.³⁵ The contingent fee offered little benefit and substantial cost. With the advent of industrialization, however, the balance of the benefits and costs of the prudential value of the contingent fee radically changed.

It was "the Industrial Revolution which brought into sharp contrast the group of lawyers who were willing to take cases on contingencies and those who were not."³⁶ The division was, of course, that between the hoi polloi and the elite:

The latter [those who would not take a case on contingency] represented the defendant railroads, steamships, factories, power companies. They were the admitted leaders of the bar. The former [those who would take contingent fees] were the young lawyers struggling to make a living. They could scarcely help being an inferior class.³⁷

The organized bar's continued opposition to contingent fees made this division perfectly obvious. Contingent fees, often the only way a poor person could afford any sort of legal service, were the heart of the immigrant lawyer's practice; without them, no one could afford his services, he could not afford to live, and his practice would necessarily fall to the wayside.

33. James E. Moliterno, *Broad Prohibition, Thin Rationale*, 16 GEO. J. LEGAL ETHICS 223 (2002); Max Radin, *Maintenance By Champerty*, 24 CALIF. L. REV. 48 (1935).

34. See Max Radin, *Contingent Fees in California*, 28 CALIF. L. REV. 587, 589 (1940) ("The contingent fee certainly increases the possibility that vexatious and unfounded suits will be brought.").

35. See, e.g., George Sharswood, *An Essay on Professional Ethics*, 32 ANN. REP. A.B.A. 1, 160-64 (1907) (suggesting that an attorney on a contingent fee would be "tempted to make success, at all hazards and by all means, the sole end of his exertions."); see also Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 40 (1989) (that contingent fees are prohibited in criminal cases because of the risk of the attorney impeding justice, "presumably by suborning perjury").

36. Radin, *supra* note 34, at 588.

37. *Id.*

Both the poor, injured worker and the immigrant lawyer needed the contingent fee for their survival.

The lawyer needed the contingent fee because he was not part of the new elite that could rely upon being retained by the great industrial corporations for his livelihood. The lower-class lawyer required a certain degree of client turnover in order to survive, and offering a contingent fee to those otherwise unable to pay for legal services was the only way to ensure that turnover. The poor worker needed contingent fees even more. Auerbach eloquently described the necessity of such fees for the poor:

An alarming proliferation of work and transportation accidents, most often borne by those least able to afford lawyers' fees, generated human tragedies which a profit economy and its legal doctrines exacerbated. Accident victims—and the surviving members of their families—were compelled to bear the full burden for the risks inherent in dangerous work. Corporate profit was the primary social value. . . . legal services were available only to those who could afford to purchase them. . . . In more than half of all work-accident fatalities in Allegheny County [for example], widows and children bore the entire income loss. In fewer than one-third of these cases did an employer pay as much as five hundred dollars—the equivalent of a single year's income for the lowest-paid workers. Similarly, more than half of all injured workers received *no* compensation; only 5 percent were fully compensated for their lost working time while disabled.³⁸

Workers in such situations could hardly afford the out-of-pocket expense of retaining a lawyer at an hourly rate, particularly with the substantial risk of losing, thus suffering not only the expenses of their injuries but also the equally unrequited expenses of an unsuccessful legal venture. The contingent fee, however, provided a way for such workers to pursue their claims without worsening their situation. The arrangement was and is a necessary consequence of the desire to provide everyone with the capability of pursuing meritorious legal claims.

By the late nineteenth and early twentieth century, when the new code of ethics was being formed and promulgated, the prudential value of the contingent fee was already outweighing the risks beyond any serious question. In a rapidly growing and industrialized society, “[t]here were far too many persons who could pay no retainers and far too many lawyers who could not afford to insist on them.”³⁹ At a time in which workers had precious little assistance, “the contingent fee arrangement did enable some workers to secure otherwise unattainable legal services.”⁴⁰ The balance of the possibility of unmeritorious suits being brought and the certainty of the denial of any recourse for the wrongfully injured and others with legal claims can come down on only one side. Furthermore, one could argue whether the possibility of unmeritorious suits is a problem unique to, or

38. AUERBACH, *supra* note 8, at 44.

39. Radin, *supra* note 34, at 588.

40. AUERBACH, *supra* note 8, at 45.

even especially associated with, the contingent fee agreement, since no one would deny “that vexatious and unfounded suits have been brought by men who could and did pay substantial attorneys’ fees for that purpose.”⁴¹ If anything, the stake undertaken by a plaintiff’s lawyer may reduce the likelihood of frivolous claims. The contingent fee lawyer is unlikely to contribute his services to what he regards as a claim unlikely of success. It was not the practice of defendants to pay significant sums to settle weak claims. The societal costs of the contingent fee, then, are substantially outweighed by its value.

However, elite corporate lawyers bemoaned the existence of the contingent fee as an attack upon legal professionalism. Nothing despaired the professional elite more than contingent fees and the negligence lawyers whose practice depended upon them. All manner of the profession’s woes were laid at the feet of the contingent fee. The reduced status and declining spirit of the entire profession were the claimed fruits of the contingent fee. Furthermore, corporate clients were losing money on the suits that contingent fees made possible, which gave the corporate legal elite no end of headache. One lawyer present during the debates over the lawfulness of the contingent fee wrote “that every lawyer that got up here today in favor of this bill [which restricted contingent fees] was a corporation lawyer. Why they are so opposed to contingent fees I do not know”⁴² Of course, he knew exactly why they were so opposed to contingent fees.

No objection to the contingent fee was too ridiculous or contrary to common sense to be forwarded as dispositive. One objection, for example, was that the client’s interests are likely to suffer from the lawyer’s urge to make as much money as possible.⁴³ Putting aside the assumption that a lawyer on a contingent fee will be greedier than one on an hourly fee (a questionable assumption at best), the more likely conclusion is that a lawyer would be *more* zealous for his client’s interests, because he is receiving part of the recovery. An hourly lawyer, on the other hand, receives his fee whether he wins or loses, and has significantly less monetary incentive to pursue his client’s goals. Nevertheless, this objection was voiced often, as though questioning its obviously specious reasoning amounted to sympathizing with greed itself.

The disapproval of the contingent fee was pervasive among the elite. Therefore, when this same elite decided to draw up a code of ethics, it drew up a special canon intended to sharply limit the contingent fee.

The Canons could not, of course, eliminate the contingent fee entirely because the laws of the United States considered the validity of such fees

41. Radin, *supra* note 34, at 589.

42. McGirr, *supra* note 28, at 11.

43. *Legal Ethics: Ambulance Chasing*, *supra* note 29, at 185.

“beyond legitimate controversy”⁴⁴ as early as 1877. Indeed, even many early state codes of ethics, based largely upon the 1888 Alabama code,⁴⁵ acknowledged that the contingent fee was valid, including a statement that contingent fees may permissibly be higher than other fees because of the risk involved.⁴⁶ The most that ethical theorists could say was that contingent fees were “somewhat inconsistent” with the prohibition on stirring up litigation.⁴⁷ Contingent fees were therefore put under what was intended to be a severe stricture by the ABA: the Canons declared that contingent fee arrangements “should be under the supervision of the Court in order that clients may be protected from unjust charges.”⁴⁸ This Canon betrayed so much the prejudices of its authors that each point of it bears individual consideration.

The rationale for so restricting contingent fees, “that clients may be protected from unjust charges,”⁴⁹ is transparently specious. Presumably the writers of the Canon reasoned that contingent fees were often excessive. However, all fees were subject to the preceding Canon, which proposed no fewer than six factors for consideration in setting a neither exorbitant nor minimal fee.⁵⁰ One of those six factors was precisely whether the fee was contingent.⁵¹ Why, then, were contingent fees subject to such additional scrutiny? Why insult the lawyer who worked for contingent fees with the presumption that he would charge extravagant fees for minimal service? Many of the contingent fee lawyers were foreign-born; many were the children of foreign-born parents; almost all were from poor backgrounds; all were representing clients bringing claims against the Canon-drafters’ clients. That, it seems, was reason enough.

Waves of immigrants strained and blurred the legal profession’s self-image. A crisis of identity ensued. The profession had choices. Look outward at a changing population to be served by lawyers and expand the vision of what lawyers do and for whom, or attempt to still the advances of time and culture and demographics to maintain the status quo in the profession. The legal profession chose the latter.

44. *Stanton v. Embrey*, 93 U.S. 548, 556 (1877).

45. See A.B.A. Comm. on Code of Prof’l Ethics, *supra* note 30, at 678; see also Moliterno, *supra* note 3, at 789.

46. See A.B.A. Comm. on Code of Prof’l Ethics, *supra* note 30, at 709. While most of the codes did say that contingent fees “lead to many abuses,” and that “certain compensation is to be preferred,” no strictures were leveled against them that were not leveled against other forms of compensation. *Id.* at 710.

47. DRINKER, *supra* note 25, at 65.

48. ABA CANONS OF PROF’L ETHICS, Canon 13.

49. *Id.* Canon 13.

50. *Id.* Canon 12.

51. *Id.*

The animus against the new lawyers is nowhere more evident than in the matters of ambulance chasing and the contingent fee, an animus which was enshrined in the code of ethics which governed the legal profession until 1969,⁵² and persisted thereafter until the Supreme Court trimmed the bar's sails based on First Amendment application.⁵³ The two issues are commingled so thoroughly that even the contradictions of the hatred of them cannot be extricated. Indeed, often the elite's hatred of one contradicted its rationale for hatred of the other.

The standard condemnation of ambulance chasing, for example, including its system of runners who informed injured parties of their claims and recommended the services of a lawyer, was that it created litigation which would not otherwise have existed, fomenting disputes and otherwise disrupting society. The ABA condemned it on these grounds, declaring that it was "[s]tirring up strife and litigation" and that "to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action"⁵⁴ was an unethical practice. However, the contingent fee upon which these ambulance chasers rested their practices was condemned upon the exactly opposite grounds. The elite contended that, because it was more lucrative for the contingent fee lawyer to settle a case than to litigate it, that an ambulance chaser on a contingent fee was likely to settle rather than litigate, which might injure the interests of his client.⁵⁵ Their criticisms have come full circle; ambulance chasing was unethical because it stirred up litigation, whereas the contingent fee was unethical because it encouraged settlement rather than litigation. The new legal underclass simply could not win; but that was, after all, the idea.

The legal profession's official response to changing demographics was to resist their reality. For at least forty years while the face of America changed, the legal profession tried in vain to remain unchanged. The futility of such an effort is apparent. The cost in terms of lost opportunities to expand the understanding of what lawyers can do for the society is immeasurable.⁵⁶ The changes in advertising rules, heightening of educational standards, and enhanced resistance to contingent fees changed nothing about the

52. Moliterno, *supra* note 3, at 792 ("The 1908 Canons remained the official governing norm of the legal profession until the ABA promulgated a comprehensive reformulation in 1969.").

53. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 385 (1977).

54. ABA CANONS OF PROF'L ETHICS, Canon 28.

55. *See Legal Ethics: Ambulance Chasing*, *supra* note 29, at 185.

56. In addition to these efforts to debilitate the practice of the new lawyers, the organized bar sought to prevent as many as possible from entering the profession at all. Raising educational standards for admission, enforcing the emerging good character requirement in discriminatory ways, and adding citizenship requirements were all partly motivated by an effort to "purify the stream [of lawyers] at its source." AUERBACH, *supra* note 8, at 113.

lives of the elite lawyers who spearheaded the changes, except to protect them and their clients from the new class of plaintiffs' lawyers.

B. Example 2: Watergate "American Lawyers—A Sick Profession?"⁵⁷

The sense of crisis overwhelmed the legal profession in the wake of the Watergate revelations. The prominent role of lawyers in the scandals presented an unprecedented public relations crisis for the profession.

And now, once again, with the advent of new scandals in Washington in which a number of lawyers have been accused of unethical conduct, our profession is once more faced with a crisis and our stock has sunk to what is, perhaps, its lowest point in the past twenty years.⁵⁸

Watergate has sent a pall over the country and a shadow over our profession. While it is patently unfair to blame our profession for Watergate just because many participants happen to be lawyers, I do think that the blame that has been cast upon us ultimately will have a healthy effect on the profession and a positive influence on the country. We have been compelled to recognize that we must move deliberately but more quickly to provide additional protection for the public and to discipline those among us who are not following the highest principles of the profession.⁵⁹

In 1975, the ABA's Standing Committee on Professional Discipline reported on the progress of state bar discipline of those involved in Watergate, but emphasized that "Watergate is regarded as a national problem, and the profession's efforts to cope with it will be assessed on a national basis."⁶⁰

The legal profession was enormously embarrassed by the Watergate scandals. Lawyer after lawyer, many, including many high government officials, were shown to be involved in various politically-motivated crimes and shenanigans. Checks were doctored; files stolen; financial and other records destroyed; letters forged. Lawyers were deeply involved.⁶¹ The turn-

57. *America's Lawyers: A Sick Profession?* U.S. NEWS & WORLD REP., Mar. 25, 1974, at 23.

58. Burton B. Laub, Dean, Dickinson Sch. of Law, Law—A Bad Trade but a Noble Profession, Address at Joint Luncheon of National Conference of Bar Examiners (Aug. 7, 1973), in 42 B. EXAMINER 156, 157 (1973).

59. Chesterfield Smith, 1973-74: *Activity on Many Fronts for the Association*, 60 A.B.A. J. 1041, 1041 (1974); see also Robert W. Meserve, *The Legal Profession and Watergate*, 59 A.B.A. J. 985 (1973) (suggesting in 1973 that the national profession must respond to the national crisis created by Watergate).

60. A.B.A. Comm. on Prof'l Discipline, *Report of the Standing Committee on Professional Discipline*, 100 ANN. REP. A.B.A. 324, 325 (1975).

61. See Robert W. Meserve, *President's Page: Watergate: Lessons and Challenges for the Legal Profession*, 59 A.B.A. J. 681, 681 (1973) (stating that "[t]he Watergate scandal, its ramifications still unfolding, is certain to rank as a dark episode in our political history. It has posed serious challenges to the legal profession because lawyers in high places are

around from pride in Richard Nixon and his key men as lawyers to shame was swift. In 1969, ABA President William Gossett proudly connected the legal profession to Nixon and his men:

Let me record in passing that not only is President Nixon a lawyer; twelve members of his cabinet and sub-cabinet also are members of the profession. And no fewer than fifteen of the President's appointments to key positions in federal agencies have been lawyers who have been active as officers or as Section or Committee chairmen of the Association.⁶²

By 1972, the ABA was racing to distance itself from any connection with the President and his men.

Watergate occurred in the midst of a period marked by a massive shift in social thinking about those in authority. Watergate was the capper and not the onset of society's mistrust of authority and public officials. Throughout the preceding decade, slogans like, "Think for yourself" and "Question Authority" were popularized by Timothy Leary and others.⁶³ The civil rights movement, the anti-war movement, and the early stages of the women's movement all partook in a strong measure of mistrust of officialdom. By the time the Watergate dust settled, the nation had had its fill with those in authority. Watergate expanded those to be mistrusted to lawyers in a new and powerful way.

Perhaps no single event had ever created such an enormous crisis for the legal profession as did the Watergate break-in and cover-up. In one stroke, the legal profession found itself in the cross-hairs of the public and potential public regulators. And in that same stroke, the nation found a focal point for the building skepticism of leaders and government and authority that had been growing during the preceding decade. As much as the embarrassment of so many lawyers being involved in the scandal, the legal profession's responsibility for the justice system and leadership in the government brought the profession into public scrutiny.

The measure of embarrassment was so great that the word "Watergate" could barely be uttered in official ABA writings.⁶⁴ The ABA even

among those linked with it and because the faith of the American people in the justice system, and in the governmental structure itself, are at stake.").

62. William T. Gossett, *President's Page: The State of the Union*, 55 A.B.A. J. 699, 699 (1969).

63. The term was later attributed to Leary, but all who lived through the time recall the familiar bumper sticker. See, e.g., Phillip E. Johnson, *The Creationist and the Sociobiologist: Two Stories About Illiberal Education*, 80 CALF. L. REV. 1071, 1071 (1992) ("The student revolt of the 1960s opened with a 'Free Speech Movement,' and the bumper sticker that directs us to 'Question Authority' . . .").

64. See *Watergate, Sex, and Marijuana Dominate Debate at Washington August Meeting*, 59 A.B.A. J. 1131, 1132 (1973) (stating that "[t]he action on Watergate consisted of a resolution, which declared that the Association 'condemns and denounces any action on the part of members of the legal profession which might cast aspersions upon the integrity of the

managed to adopt a resolution reaffirming its ethics code and condemning those involved in the Watergate crimes without mentioning the word "Watergate:"

"WHEREAS, The Code of Professional Responsibility, promulgated by the American Bar Association and adopted by the various jurisdictions, recognizes the vital role of the lawyer in the preservation of society and is predicated upon the obligation of lawyers to maintain the highest standards of ethical conduct; and

WHEREAS, The code specifically enjoins lawyers from all illegal and morally reprehensible conduct; and

WHEREAS, Congressional and judicial proceedings and reports of the news media have disclosed alleged instances of professional misconduct by members of the legal profession; and

WHEREAS, The American Bar Association recognizes that a primary objective of the organized bar is the preservation of the integrity of our system of ordered liberty under law; and

WHEREAS, It is in the interest of the profession, the public, and any individuals involved that appropriate proceedings be instituted properly;

BE IT RESOLVED, That the American Bar Association reaffirms its dedication to the ethical standards as set forth in the Code of Professional Responsibility; and

FURTHER RESOLVED, That the Association condemns and denounces any action on the part of members of the legal profession which might cast aspersions upon the integrity of the profession; and

FURTHER RESOLVED, That those lawyers whose conduct contravenes the Code of Professional Responsibility should be subjected to prompt and vigorous disciplinary investigation and appropriate action should be taken forthwith; and

FURTHER RESOLVED, That a certified copy of this resolution be sent to the Bar Associations of all states."⁶⁵

The ABA moved swiftly to quell the disastrous public reaction to the legal profession's perceived ethical lapse, and with some measure of cover. Although the move toward some reforms preceded Watergate, during the next few years, the ABA pushed through approval of the MPRE, approval of the ethics requirement for law schools, and set the Kutak Commission to its work of making the lawyer ethics code more law-like.⁶⁶ The positive

profession' and calls for prompt disciplinary action against lawyers whose conduct violates the Code of Professional Responsibility. The resolution as adopted omits any direct reference to the Watergate affair.").

65. *Id.* at 1132.

66. See *House Disapproves UMVARA, Supports the Exclusionary Rule, and Adopts New Law School Standards*, 59 A.B.A. J. 384, 384 (1973) ("The actions that prompted the most debate were: . . . Law school standards. The house approved a complete revision of the Association's standards for the approval of law schools, but only after amending the standards to require instruction in the duties and responsibilities of the legal profession.").

changes made by the profession were reactive and not proactive.⁶⁷ They were what the profession needed to do to dampen the fire of negative public opinion. The need for such changes could easily enough have been foreseen by a profession better in tune with the rising distrust of public officials, government, and authority generally. Society had for a decade begun to question authority and demand more openness and accountability. The good that could have been done by a profession able to make proactive changes to enhance ethics training for lawyers and modification of its code to a more law-like format was lost. Instead, the profession regulated itself only in response to embarrassment and scandal. It engaged in regulation-by-crisis. The society's sense of the profession's genuineness in enhancing its ethics training was predictably dubious.

What did the profession do? In the weeks, months, and years following Watergate's major revelations, the American legal profession moved to require all freshly-minted lawyers take a course in lawyer ethics and pass a lawyer ethics exam.⁶⁸ Even more fundamentally, it charged a commission with the responsibility of revamping its own model ethics code, adopted only two years prior to the onset of the Watergate defalcations.

1. *Lawyer Ethics in Law Schools*

In the days and months following the major Watergate revelations, the ABA moved to spearhead the addition of lawyer ethics courses in law schools, first proposing that law schools *offer* such courses and then as Watergate-fever intensified, mandating that law schools *require* such courses of all students. In the end, no one could earn a degree from an ABA-accredited law school without a course on lawyer ethics, including the then-dominant ABA Model Code of Professional Responsibility. And without a degree from an ABA accredited law school, only a handful of states permit one to take the bar exam. In effect, the ABA required that nearly every future lawyer will study its model code of ethics. What better way to demonstrate to the public that the dominant lawyer organization cares about lawyer ethics?

It is true that the accreditation standard regarding law school teaching of lawyer ethics (Section 302) existed in draft form prior to the Watergate scandal, and the scholarly attribution of Section 302's adoption to Wa-

67. See Robert W. Meserve, *The Legal Profession and Watergate*, 59 A.B.A.J. 985, 986 (1973) ("We must act in the present era of anxiety to sustain and serve the moral and tolerant tradition that has taken generations of patient effort to create.").

68. Joe E. Covington & Eugene L. Smith, *Multistate Professional Responsibility Examination*, 50 B. EXAMINER 21, 21, 22 (1981) ("Following Watergate, public attention was strongly focused on the ethical standards of the legal profession. . . . The purpose of MPRE is not to exclude persons from the practice of law, but it is to ensure that persons admitted to the bar are prepared to cope with ethical problems in the practice of law.").

tergate has been mixed.⁶⁹ Some claim that the existence of the draft prior to Watergate makes Watergate a watered-down cause of the resolution's adoption.⁷⁰ But the draft that existed before the full Watergate affair came to light did not mandate that law schools *require* a course in lawyer ethics. It merely required that law schools *offer* such a course, along with several others required to be offered by the same provision.⁷¹ The motion to amend the draft resolution came during the February 1973 floor debate, when a motion brought by the State Bar of Arizona was passed in the House of Delegates.⁷² So the weak draft that existed before Watergate became a much stronger mandate by floor action in 1973, by which time there were new Watergate revelations emerging almost daily. Although it did not begin

69. Paul T. Hayden, *Putting Ethics to the (National Standardized) Test: Tracing the Origins of the Empire*, 71 *FORDHAM L. REV.* 1299, 1332, 1333 (2003) (suggesting no connection, "It is tempting to attribute the adoption of Standard 302(a) to the Watergate scandal, but such a literal connection simply cannot exist." But acknowledging that "[s]cholars are certainly not wrong to connect Watergate to the rapid creation of required ethics courses in law schools—that did generally occur after the full lawyer involvement in the scandal had become clear—but Standard 302(a) itself was motivated much more by the burgeoning enrollments . . ." (footnotes omitted)); Kathleen Clark, *The Legacy of Watergate for Legal Ethics Instruction*, 51 *HASTINGS L.J.* 673, 673 (2000) (suggesting connection, "The profession apparently felt that it had to do something to repair the image of lawyers, and in 1974 the ABA did indeed take action. What kind of reforms did the ABA adopt in order to prevent future Watergates? The ABA adopted an accreditation requirement that law schools ensure that each graduate receive instruction in legal ethics."); Philip C. Kissam, *Lurching Towards the Millennium: The Law School, the Research University, and the Professional Reforms of Legal Education*, 60 *OHIO ST. L.J.* 1965, 1984 (1999) (suggesting connection, "[T]he Watergate affair aroused public and professional concerns about the ethical behavior of lawyers, and the profession responded by establishing a professional ethics part to state bar examinations and by requiring law schools to teach 'legal ethics.'"); Robert MacCrate, *Educating a Changing Profession: From Clinic to Continuum*, 64 *TENN. L. REV.* 1099, 1123 (1997) (suggesting connection, "The 1973 [accreditation standards] recognized developments in clinical skills instruction as well as the growing attention to professional responsibility in law school curricula. . . . 'but in August 1974, in the wake of Watergate,' the following specification was added to the Standard: 'Such required instruction need not be limited to any pedagogical method as long as the history, goals, structure and responsibilities of the legal profession and its members, including [the ABA Code of Professional Responsibility] are all covered.'" (second alteration in original)); Roger C. Cramton & Susan P. Koniak, *Rule, Story, and Commitment in the Teaching of Legal Ethics*, 38 *WM. & MARY L. REV.* 145, 148 (1996) (suggesting connection, discussion of the ABA requirement of accredited law schools to teach professional responsibility was "[f]irst adopted in August, 1973, in the midst of the Watergate disclosures").

70. Hayden, *supra* note 69, at 1332.

71. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, A.B.A., *Report No. 1 of the Section of Legal Education and Admissions to the Bar*, 98 *ANN. REP. A.B.A.* 351, 354 (1973) (Section 302(a) reads, "The law school shall offer: (i) instruction in those subjects generally regarded as the core of the law school curriculum, (ii) Training in professional skills, such as counseling, the drafting of legal documents and materials, and trial and appellate advocacy, (iii) Instruction in the duties and responsibilities of the legal profession").

72. *House Disapproves UMWARA*, *supra* note 66, at 388-90.

hearings until May, the Senate Select Committee (chaired by Sam Ervin) was formed on February 7, 1973. A month earlier still, when Judge Sirica opened the Watergate burglars' trial on January 7, federal investigators already knew of the Committee to Re-Elect the President (CREEP) slush fund used to finance illegal activities against Democrats.⁷³ The convictions of McCord and Liddy were entered on January 30. As far back as August 1, 1972, *The Washington Post* reported that funds meant for CRP had been deposited in a Watergate burglar's account.⁷⁴ Of the floor amendment adoption in 1973, ABA President Robert Meserve said that this amendment evidenced the ABA's "desire that there be greater law school emphasis on the teaching of professional responsibility."⁷⁵ Although it is fair to say that the major revelations were yet to come when the ethics course requirement was adopted in February 1973, the lawyer-involvement in Watergate writing was on the wall.

Furthermore, consideration of pre-existing lawyer ethics proposals changed in Watergate's wake. To be adopted after Watergate, even pre-existing proposals had to meet the standard of aiding the recuperation of an ailing profession in public eyes. For example, in 1975, the ABA held a conference in Chicago to discuss a draft of new rules that would reform its highly restrictive advertising rules. They concluded, however, that advertising would only serve to fortify the public's qualms with the profession.⁷⁶ The fear of added public displeasure caused the bar to maintain an out-of-date status quo that would soon be stricken as unconstitutional by the Supreme Court.⁷⁷ In doing so, the Court cited societal change and sounded the strong consumerist notes that had emerged in the prior decade. So the pre-existence of Section 302 as one provision in a package of accreditation changes does not disconnect its adoption from Watergate. Its adoption would be touted as a way for the profession to enhance public perception of its efforts to instill ethical norms in lawyers.⁷⁸

73. *The Watergate Files--The Watergate Trial: Overview*, GERALD R. FORD LIBRARY & MUSEUM, http://www.fordlibrarymuseum.gov/museum/exhibits/watergate_files/content.php?section=1&page=a (last visited Feb. 5, 2012).

74. *Watergate: Brief Timeline of Events*, WATERGATE.INFO, <http://watergate.info/chronology/brief.shtml> (last visited Feb. 6, 2012).

75. Robert W. Meserve, *President's Page: House Charts Association Course in Critical Areas*, 59 A.B.A. J. 327, 327 (1973).

76. JETHRO K. LIEBERMAN, *CRISIS AT THE BAR* 91 (1978).

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

78. Meserve, *supra* note 75, at 327 (highlighting this change as evidence of the ABA's, "desire that there be greater law school emphasis on the teaching of professional responsibility").

2. MPRE

Post-Watergate, the profession moved to show its concern about lawyer ethics by adding a national lawyer ethics exam to the bar admission process.⁷⁹ The Multistate Professional Responsibility Exam came into being and flourished in the latter half of the 1970s.⁸⁰

Its creation is credited to the National Conference of Bar Examiners (NCBE). The NCBE came into existence in 1931 as the states were establishing formal bar exams as entry gates to the profession.⁸¹ The establishment of bar exams was one of many entry barriers established as an outgrowth of the profession's reaction to the wave of immigrants in the first third of the century.⁸²

The NCBE is a nonprofit and was founded in 1931.⁸³ It is a U.S. based nonprofit organization that developed the standardized tests for admission to the bar exam in individual states.⁸⁴ The MBE resulted from "a universal concern among bar examiners regarding the mounting burden of preparing and grading papers in the light of the . . . increase in law school enrollment" during the late 1960s.⁸⁵ The present bar exam format, a 200 question, multiple-choice, multistate exam (the MBE), combined with a set of essay questions on state law, dates from only the 1970s.⁸⁶ The MBE was added to the bar exam in February 1972 as a way to both increase efficiency of grading and aid in ensuring as much fairness as possible.⁸⁷ NCBE's mission, as per its website is:

- to work with other institutions to develop, maintain, and apply reasonable and uniform standards of education and character for eligibility for admission to the practice of law; and
- to assist bar admission authorities by
 - providing standardized examinations of uniform and high quality for the testing of applicants for admission to the practice of law,
 - disseminating relevant information concerning admission standards and practices,

79. Leslie C. Levin, *The MPRE Reconsidered*, 86 KY. L.J. 395, 399 n.14 (1997).

80. *Id.*

81. *About Us: NCBE Mission*, NCBE (2011), <http://www.ncbex.org/> (last visited Feb. 6, 2012).

82. *See supra* Section I.A.

83. *About Us: NCBE Mission*, *supra* note 81.

84. *Id.*

85. John Eckler, *The Multistate Bar Examination: Its Origins and Objectives*, 65 B. EXAMINER 14, 15 (1996).

86. *Society of American Law Teachers Statement on the Bar Exam, July 2002*, 52 J. LEGAL EDUC. 446, 446 (2002).

87. *About Us: NCBE Mission*, *supra* note 81.

- conducting educational programs for the members and staffs of such authorities, and
- providing other services such as character and fitness investigations and research.⁸⁸

Although some have discounted the MPRE success story's connection to Watergate, the profession's consistent efforts in the 1970s to upgrade its public image as ethics-sensitive is too much to ignore.⁸⁹ Even those who discount the connection acknowledge "that several strong historical forces coalesced in the late 1970s to propel the MPRE's initial development"⁹⁰ Watergate was not merely among those strong historical forces, it played a major role in generating them, even if sometimes referred to by MPRE Committee drafters as "the involvement of prominent lawyers in widely publicized political scandals."⁹¹ Others were more open in attributing credit for the increased attention on ethical testing to Watergate.⁹²

3. *Quick Move to New Code, Kutak Commission*

The existing lawyer code at the time of Watergate was the nearly-new, unanimously adopted⁹³ Model Code of Professional Responsibility, said by Lewis Powell, the ABA President who launched the Model Code drafting committee, to "truly reflect[] the essential spirit and ideals of our profession."⁹⁴ The ink was barely dry on the new ABA Model Code when the CREEP and its so-called "plumbers" began their political crimes and shenanigans, including the dismantling of Edmund Muskie's campaign.⁹⁵ The ABA Canons of Legal Ethics had lasted for more than sixty years; but in Watergate's wake, the ABA would set the Kutak Commission to work at revamping the Model Code a mere seven years after its much-ballyhooed adoption.

"The social climate mandating improvements in ethical standards arose in the wake of the Watergate scandal. . . . Because of problems with the Code and public perception of the profession, the ABA formed another

88. *Id.*

89. See Hayden, *supra* note 69, at 1301.

90. *Id.*

91. Eugene Scoles, *A Decade in the Development and Drafting of the Multistate Professional Responsibility Examination*, 59 B. EXAMINER 20, 21 (1990).

92. Covington & Smith, *supra* note 68.

93. Bernard G. Segal, *President's Page*, 55 A.B.A. J. 893, 893 (1969).

94. *Association's House of Delegates Meets in Dallas, August 11-13*, 55 A.B.A. J. 970, 970 (1969) (quoting Lewis F. Powell, Jr.).

95. Carl Bernstein & Bob Woodward, *FBI Finds Nixon Aides Sabotaged Democrats*, WASH. POST, Oct. 10, 1972, at A1.

commission to reconsider the established standards.”⁹⁶ The “transformation of legal ethical standards from internal fraternal norms to public code of law, though met with considerable resistance in the legal community, was a necessary response to diminishing public faith in lawyers.”⁹⁷ “The result was a new era of intensified internal regulation, and external scrutiny by courts and legislatures.”⁹⁸

Despite the claim that the new code would repair Watergate-related problems of the 1969 Code, the ABA chose not to adopt provisions that might actually do so. Proposed rules included a disclosure provision that would allow an attorney to disclose information if the head of an organization insisted on committing illegal activities that were detrimental to the organization.⁹⁹ However, the ABA decided to draft a rule that only allowed the attorney to withdraw from representation, which is in essence what the CRP attorneys did.¹⁰⁰ The ABA also refused to adopt a proposed confidentiality provision that would allow attorneys to disclose a client’s fraud in order to rectify the consequences of that fraud. The best the new ABA code did was allow for a “noisy withdrawal,” meaning that an attorney could disclose the fact that he or she was withdrawing and possibly alert the public about a potential problem. Many critics were disappointed by the ABA’s decisions on new Code provisions, and some states did not adopt the proposed amendments. Eighteen years after the ABA’s adoption of the Model Rules, a mere four states had approved codes based on the Model Rules¹⁰¹

Again, as had been the case in the early part of the Century, the reforms and changes imposed no burden on the lawyers who created the changes. Increased ethics teaching in law schools, an additional hurdle in the bar admission process, and the modest changes to the substance of the ethics code would have no effect on established lawyers. In essence, change was no change for them.

96. Roberta K. Flowers, *What You See Is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors*, 63 MO. L. REV. 699, 710 (1998).

97. Audrey I. Benison, *The Sophisticated Client: A Proposal for the Reconciliation of Conflicts of Interest Standards for Attorneys and Accountants*, 13 GEO. J. LEGAL ETHICS 699, 708 (2000).

98. *Id.* (footnote omitted).

99. ABA, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT 91 (1987) (citing Commission Proposed Rule 1.13(c)).

100. *Id.*

101. *Chronological List of States Adopting Model Rules*, ABA CENT. FOR PROF. RESP., http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/chrono_list_state_adopting_model_rules.html (last visited Feb. 5, 2012).

C. Example 3: Multijurisdictional Practice and Globalization

Dynamic change “over the last century” in the nature of law practice, especially its increasingly cross-border nature, inspired the ABA to establish the Multijurisdictional Practice Commission in 2000.¹⁰² It engaged in a wide gathering of information for its lawyer-membership to consider. When it issued its final report, the tone appeared to foretell major recommendations for change. It recited considerable evidence that would support major change, including the abolition of the anachronistic, outdated state-by-state licensing system. But after the bold-sounding build-up, its first recommendation was to preserve the state-by-state licensing system in the U.S.

From the Report:

In the early twentieth century, states adopted “unauthorized practice of law” (UPL) provisions that apply equally to lawyers licensed in other states and to nonlawyers. These laws prohibit lawyers from engaging in the practice of law except in states in which they are licensed or otherwise authorized to practice law. UPL restrictions have long been qualified by *pro hac vice* provisions, which allow courts or administrative agencies to authorize an out-of-state lawyer to represent a client in a particular case before the tribunal. In recent years, some jurisdictions have adopted provisions authorizing out-of-state lawyers to perform other legal work in the jurisdiction.

Jurisdictional restrictions on law practice were not historically a matter of concern, because most clients’ legal matters were confined to a single state and a lawyer’s familiarity with that state’s law was a qualification of particular importance. However, the wisdom of the application of UPL laws to licensed lawyers has been questioned repeatedly since the 1960s in light of the changing nature of clients’ legal needs and the changing nature of law practice. Both the law and the transactions in which lawyers assist clients have increased in complexity, requiring a growing number of lawyers to concentrate in particular areas of practice rather than being generalists in state law. Often, the most significant qualification to render assistance in a legal matter is not knowledge of any given state’s law, but knowledge of federal or international law or familiarity with a particular type of business or personal transaction or legal proceeding. Additionally, modern transportation and communications technology have enabled clients to travel easily and transact business throughout the country, and even internationally. Because of this globalization of business and finance, clients sometimes now need lawyers to assist them in transactions in multiple jurisdictions (state and national) or to advise them about multiple jurisdictions’ laws.

Although client needs and legal practices have evolved, lawyer regulation has not yet responded effectively to that evolution. As the work of lawyers has become more varied, specialized and national in scope, it has become increasingly uncertain when a lawyer’s work (other than as a trial lawyer in court) implicates the UPL law of a jurisdiction in which the lawyer is not licensed. Lawyers recognize that the geographic scope of a lawyer’s practice must be adequate to enable the lawyer to serve the legal needs of clients in a national and global economy. They have expressed concern that if UPL restrictions are applied literally to United

102. ABA, REPORT OF THE COMM’N ON MULTIJURISDICTIONAL PRACTICE 2-3 (2002).

States lawyers who perform any legal work outside the jurisdictions in which they are admitted to practice, the laws will impede lawyers' ability to meet their clients' multi-state and interstate legal needs efficiently and effectively.

This concern was sharpened by the California Supreme Court decision, *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court of Santa Clara County*, 949 P.2d 1 (Cal.1998), which held that lawyers not licensed to practice law in California violated California's misdemeanor UPL provision when they assisted a California corporate client in connection with an impending California arbitration under California law, and were therefore barred from recovering fees under a written fee agreement for services the lawyers rendered while they were physically or "virtually" in California. Although the state law was subsequently and temporarily amended to allow out-of-state lawyers to obtain permission to participate in certain California arbitrations, concerns have persisted.¹⁰³

The Commission recommends:

1. The ABA affirm its support for the principle of state judicial regulation of the practice of law.¹⁰⁴

II. TODAY'S CRISIS

Today's American legal profession, already wracked with uncertainty because of the late 90s rise of unofficial MDPs and the Enron debacle, found itself a victim of the mid to late-2000s economic crisis. Calls for abolition of state-by-state licensure resulted in the modest changes eventually adopted to multijurisdictional practice restrictions.¹⁰⁵ Enron and the resulting SEC reforms temporarily quelled the call for MDP approval.¹⁰⁶ Then the economic crisis, even as Australia and the UK were adopting major provisions, allowing alternative business structures and outside investment on law firms.¹⁰⁷

A. Global Financial Crisis

The global economy has been in decline for the latter part of the 2000s. The origins of this crisis can be traced back to the burst of the tech bubble in the late 1990s.¹⁰⁸ The decline in the stock market beginning in 2000 and subsequent recession in 2001 led to the Federal Reserve dramati-

103. *Id.* (footnotes omitted).

104. *Id.* at 5.

105. *Id.* at 5-6; MODEL RULES OF PROF'L OF CONDUCT R. 5.5 (2006).

106. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat 745 (2002). See also Robert R. Keatinge, *Multidimensional Practice in a World of Invincible Ignorance: MDB, MJP, and Ancillary Business after Enron*, 44 ARIZ. L. REV. 717, 718-19 (2002).

107. *Legal Profession Act 2004* (Nsw) 112 (Austl.), available at http://www.austlii.edu.au/au/legis/nsw/consol_act/lpa2004179/a; *Legal Profession Regulation 2005* (Nsw) reg 455 (Austl.), available at http://www.austlii.edu.au/au/legis/nsw/consol_reg/lpr2005270/.

108. *Economic Crisis and Market Upheavals*, N.Y. TIMES, Oct. 11, 2011, http://topics.nytimes.com/top/reference/timestopics/subjects/c/credit_crisis/index.html.

cally lowering interest rates.¹⁰⁹ Lower interest rates led to greater demand for homes, which in turn increased prices.¹¹⁰ Many homeowners at this time also refinanced their homes.¹¹¹ As the housing market experienced growth, banks increasingly made subprime loans with homeowners, which are high-risk loans given to homeowners with poor credit histories.¹¹² These high-risk loans, along with other assets, were mixed together to create collateralized debt obligations, which were then sold to global investors.¹¹³

Interest rates then rose from 1% to 5.35% from 2004 to 2006, which triggered a slowdown in the housing market.¹¹⁴ Homeowners began to default on their mortgages, as many could barely afford the payments when interest rates were low.¹¹⁵ The defaults on subprime loans impacted banks worldwide.¹¹⁶ In June 2007, Bear Stearns announced the collapse of two hedge funds it owned.¹¹⁷ These funds had been heavily invested in the subprime market.¹¹⁸ Liquidity in the credit market dried up, and the rate at which banks would lend to each other increased sharply.¹¹⁹ In September 2007, Northern Rock, a British bank, asked for emergency financial support from the Bank of England, as the lack of liquidity in the credit markets dried up its funding.¹²⁰ The day after this announcement, depositors withdrew large sums of money, creating for the largest run on a British bank for over a century.¹²¹ The next month, several other investment banks, including UBS, Citigroup, and Merrill Lynch, all announced billions of dollars in losses related to subprime investments.¹²²

The Federal Reserve took several steps to help the situation on Wall Street.¹²³ In March 2008, the Fed assumed \$30 billion in Bear Stearns liabilities and helped engineer a sale of the investment bank to JP Morgan Chase to prevent its bankruptcy.¹²⁴ However, losses on Wall Street continued, with the subprime crisis spreading to other sectors, including commer-

109. *Id.*

110. *Id.*

111. *Id.*

112. *Timeline: Credit Crunch to Downturn*, BBC NEWS, Aug. 7, 2009, <http://news.bbc.co.uk/2/hi/business/7521250.stm#table>.

113. *Id.*

114. *Id.*

115. *Economic Crisis and Market Upheavals*, *supra* note 108.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Timeline: Credit Crunch to Downturn*, *supra* note 112.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Economic Crisis and Market Upheavals*, *supra* note 108.

124. *Id.*

cial property, consumer debt, and company debt.¹²⁵ Concerns over the sliding stock prices of Freddie Mae and Freddie Mac, the U.S.'s largest lenders, led to government takeover of these entities on September 7, 2008.¹²⁶ A few days later, government and finance officials gathered to discuss the fate of investment bank Lehman Brothers, which was facing bankruptcy.¹²⁷ This time, the U.S. government failed to intervene, and Lehman collapsed, the first major bank to do so since the beginning of the credit crisis.¹²⁸ Merrill Lynch, in order to avoid the fate of Lehman, sold itself to Bank of America that month.¹²⁹ AIG, the U.S.'s largest insurance company, was then bailed out by the government with an \$85 billion rescue package.¹³⁰

On September 18, Treasury Secretary Henry Paulson announced a \$700 billion government proposal to bail out the U.S.'s largest banks by buying toxic assets from major banking institutions.¹³¹ This plan was designed to increase confidence in the U.S. markets and improve the banks' balance sheets.¹³² The bailout plan was the largest U.S. government intervention into the financial markets since the Great Depression.¹³³ Days after Congress approve the bailout package, European countries also followed suit with bailouts for Hypo Real Estate, a large German lender, and Fortis, a major European financial company.¹³⁴

In November, stocks fell to their lowest levels in a decade, while unemployment reached its highest level in fifteen years.¹³⁵ Home prices fell, and retailers suffered major losses, with stores such as Sharper Image, Circuit City, and Linens 'n Things filing for bankruptcy.¹³⁶ The Fed cut its benchmark interest rate to an unprecedented rate of nearly zero percent in December, while other nations cut interest rates as well.¹³⁷

In the beginning of 2009, Congress passed a \$787 billion stimulus package to revive the U.S. economy.¹³⁸ By the summer of 2009, it seemed that a total financial meltdown had been avoided, and by the end of the year major banks reported large profits and were in the process of repaying the bailout money they had received from the U.S. government.¹³⁹ However,

125. *Timeline: Credit Crunch to Downturn*, *supra* note 112.

126. *Economic Crisis and Market Upheavals*, *supra* note 108.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Timeline: Credit Crunch to Downturn*, *supra* note 112.

134. *Id.*

135. *Economic Crisis and Market Upheavals*, *supra* note 108.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

despite the increased stability in the financial markets, throughout 2009 unemployment levels rose to the highest seen in a generation.¹⁴⁰ The U.S. unemployment rate rose from 5.0% in December 2007 to 9.9% in December 2009.¹⁴¹

B. Impact on U.S. Legal Market

The decline in the U.S. economy had a major impact on the legal market. Law firms had hired more employees during the early economic boom of the 2000s, with an emphasis on adding attorneys to corporate law practice groups.¹⁴² With the downturn in the financial sector, however, firms had to drastically reduce the number of attorneys in these practice groups.¹⁴³ Firms shifted attorneys in corporate practice areas, like real estate and securitization practice groups, into other areas, such as bankruptcy.¹⁴⁴

Instead of merely shifting practice groups, other law firms reacted to the economic downturn with large attorney layoffs. In 2009, law firms laid off 12,259 attorneys and staff, often in large numbers at once.¹⁴⁵ In early February 2009, six major law firms—Bryan Cave, Dechert, DLA Piper, Faegre & Benson, Goodwin Procter, and Holland & Knight—reported large attorney and staff layoffs.¹⁴⁶ On one day alone in late February 2009, Latham and Watkins laid off 440 employees, a total of 190 attorneys and 250 staff.¹⁴⁷ During a two-week period that March, law firm layoffs totaled nearly 2,700.¹⁴⁸ While not as massive, an additional 234 lawyers and 511 staffers, a total of 745 law firm employees, were laid off in 2010.¹⁴⁹ Even more drastic than layoffs, several firms ceased to exist in light of the poor economic conditions. Wolf Block of Philadelphia and Thelen and Heller Ehr-

140. *Id.*

141. *Labor Force Statistics from the Current Population Survey*, BUREAU OF LABOR STATISTICS, <http://data.bls.gov/timeseries/LNS14000000> (last visited Feb. 1, 2012).

142. Michael J. de la Merced, *The Legal Profession Feels the Pain of Recession*, N.Y. TIMES, Mar. 26, 2009, at F2.

143. *Id.*

144. *Id.*

145. Debra Cassens Weiss, *2010 Sees a Huge Dropoff in BigLaw Layoffs; Fewer than 800 Job Losses Chronicled*, ABA J., Jan. 25, 2011, http://www.abajournal.com/news/article/2010_sees_a_huge_dropoff_in_biglaw_layoffs_fewer_than_800_job_losses_chronic/.

146. Martha Neil, *Bloody Thursday: 6 Major Law Firms Ax Attorneys*, ABA J., Feb. 12, 2009, http://www.abajournal.com/news/article/bloody_thursday_4_major_law_firms_ax_attorneys_more_layoffs_at_others/.

147. Ashby Jones, *Law Firm Layoff Watch: Latham Cuts 190 Lawyers, 250 Staff*, WALL ST. J. L. BLOG, Feb. 27, 2009, <http://blogs.wsj.com/law/2009/02/27/law-firm-layoff-watch-latham-cuts-190-lawyers-250-staff/>.

148. Martha Neil, *March Mayhem: Law Firm Layoffs in 1 Week Total Nearly 1,500*, ABA J., Mar. 4, 2009, http://www.abajournal.com/news/article/march_mayhem_law_firm_layoffs_top_500_today_over_1200_since_friday/.

149. Weiss, *supra* note 145.

man of San Francisco dissolved, leaving many attorneys without employment.¹⁵⁰

As the availability of legal jobs decreased, the number of newly-minted lawyers wanting employment increased. In recent years there has been an increase in the number of law schools and law degrees awarded. In 2006, 43,883 juris doctor degrees were awarded, an increase from 2002, in which 37,909 were awarded, according to the American Bar Association.¹⁵¹ There was also an 11% increase in the number of ABA-accredited law schools since 1995, with the total now at 196.¹⁵² Many universities see value in adding law schools in terms of prestige and financial benefits. Law schools are often money-makers for universities, as “[c]osts are low compared with other graduate schools and classrooms can be large.”¹⁵³

Along with the number of juris doctor degrees awarded, the amount charged in tuition has also rapidly increased in recent years. Tuition has almost tripled the rate of inflation during the past twenty years. In 2006, graduates of public law schools borrowed an average of \$54,509 and graduates of private law schools borrowed an average of \$83,181, up 17% and 18.6% from the same figures in 2002.¹⁵⁴

Recent statistics confirm that the economic downturn has had a major effect on employment for recent law school graduates. The Association for Legal Career Professionals (NALP) report on the law school graduating class of 2009 revealed “an overall employment rate of 88.3% of graduates for whom employment status was known.”¹⁵⁵ This rate “has decreased for two years in a row,” decreasing 3.6% from the 91.9% for the Class of 2007.¹⁵⁶ The class of 2009 has the lowest employment rate reported since the mid-1990s.¹⁵⁷

And even these steadily-reducing numbers are regarded as an inflated estimate of the likelihood of post-graduation employment.¹⁵⁸ The actual employment realities for law school graduates in 2009 were bleaker still. Nearly 25% of all employment for law school graduates was reported as

150. de la Merced, *supra* note 142.

151. Amir Efrati, *Hard Case: Job Market Wanes for U.S. Lawyers*, WALL ST. J., Sept. 24, 2007, at A1.

152. *Id.*

153. *Id.*

154. *Id.*

155. Press Release, NALP, Class of 2009 Faced New Challenges with Recession: Overall Employment Rate Masks Job Market Weakness 1 (May 20, 2010), available at <http://www.nalp.org/uploads/09SelectedFindingsPressRelease.pdf> [hereinafter Class of 2009].

156. *Id.*

157. *Id.*

158. See David Segal, *Is Law School a Losing Game?*, N.Y. TIMES, Jan. 8, 2011, http://www.nytimes.com/2011/01/09/business/09law.html?_r=1&pagewanted=all.

temporary.¹⁵⁹ This includes reports that 41% of all of the public interest jobs were temporary, 30% of all business jobs were temporary, and even 8% of the private practice jobs were temporary in nature.¹⁶⁰ Many of these temporary jobs are positions as contract attorneys, often conducting document review for \$20 an hour with no benefits.¹⁶¹

Controversy has surrounded the manner in which law schools report their employment data. Law schools blame the ABA's system for collecting such data and the competition engendered by the *U.S. News* rankings system. In 2011, at least two law schools were sued by their graduates who claim that they were misled by the law schools rosier-than-true employment statistics.¹⁶² In August 2011, the ABA passed a resolution encouraging law schools to report accurate data and to make it available to prospective students.¹⁶³

The 88.3% employment rate was also bolstered by the fact that many law schools are providing recent graduates with employment to improve their employment statistics. Law schools have increasingly provided recent graduates with employment through fellowships, grant programs for public interest work, and on-campus jobs.¹⁶⁴ These programs provided an estimated 2% of employment for the Class of 2009, over 800 jobs in total.¹⁶⁵

Law school graduates are also increasingly accepting employment that is part-time or non-legal in nature. More than 10% of all employment for the law school graduates in 2009 was recorded as part-time, up 6% from the previous year.¹⁶⁶ The percentage of law school graduates employed as practicing attorneys has decreased. 70.8% of law school graduates in 2009 were employed in jobs that required a juris doctor, compared with 74.7% of the graduates in the previous year.¹⁶⁷

Along with the decrease in employment numbers for law school graduates, the economic downturn has also changed the nature of law firm hiring and recruitment. Summer associate programs, once the breeding grounds for associate jobs at law firms, have either been totally cut or shortened at many firms.¹⁶⁸ The number of students receiving employment as a summer associ-

159. Class of 2009, *supra* note 155.

160. *Id.*

161. Efrati, *supra* note 151.

162. Sarah Randag, *Grads Sue New York Law School and Cooley Law, Saying They Inflated Job and Salary Stats*, Aug. 10, 2011, http://www.abajournal.com/news/article/grads_sue_new_york_law_school_and_cooley_law_saying_they_inflated_job_and_sl/.

163. A.B.A. Res. 111b, August 2011, *available at* http://www.americanbar.org/content/dam/aba/directories/policy/2011_am_111b.authcheckdam.pdf.

164. Class of 2009, *supra* note 155, at 1-2.

165. *Id.* at 2.

166. *Id.*

167. *Id.*

168. de la Merced, *supra* note 142.

ate has also sharply decreased. In 2010, a survey reported that large law firms reduced their summer associate classes by an average of 44%.¹⁶⁹ Many law school graduates who did receive an offer for employment post-graduation at a law firm saw these offers deferred for a period of time.¹⁷⁰ These deferrals can last up to a year or longer.¹⁷¹ Some law firms provide stipends for their deferral period and have the opportunity to work in pro-bono fellowships.¹⁷² Other deferred associates were not as fortunate and had to find other employment while waiting for their start dates at firms.¹⁷³ Most law firms did eventually employ their deferred associates, although some firms rescinded their employment offers entirely during the deferral period.¹⁷⁴

The general economic woes' effect on law practice resulted in part as corporate clients became highly sensitive to the long-standing practice of staffing low-level lawyer tasks to beginning law firm associates. Instead, corporate clients began using in-house, salaried lawyers to do the work formerly done by outside counsel's associates. Clients and law firms began to outsource work to lower cost service providers in India and Pakistan, as well as contract lawyers present at the firm for task-specific duration.

Law school employment numbers plummeted, although by some measures it was hardly noticeable. Plummet, they did, however, and law schools struggled with reform efforts and realignments. At the same time, new pressures were being brought to bear on law schools. The law firm training of associates, most often done through the assignment of low-level corporate work had dried up. In essence, clients stopped paying for beginning associates to be trained on-the-job. Frequent career changes also discouraged law firms from lavish spending on associate training. All eyes turned to law schools and their deficient professional training. Both applicants and employers of graduates began to demand better preparation for practice.

The roots of the law schools' troubles date from the late 19th century when both legal and medical education underwent reform and scientification. For many reasons, the two were reformed in different ways and headed in opposite directions. Medical education decided that its mission would be

169. Nicole Hong, *Summer Hiring Survey: 44 Percent Down in 2010*, AM. LAW DAILY, July 21, 2010, <http://amlawdaily.typepad.com/amlawdaily/2010/07/summer-associates.html>.

170. See, e.g., Dana Mattioli, *First Task for Law-Firm Hires: Finding an Interim Job First*, WALL ST. J., Oct. 6, 2009, <http://online.wsj.com/article/SB125478012114565787.html>.

171. *Id.*

172. *Id.*

173. *Id.*

174. Debra Cassens Weiss, *Some Deferred Start Dates May Become Withdrawn Job Offers*, ABA J., May 12, 2009, http://www.abajournal.com/weekly/warning_possible_associate_pile-up Ahead_and_some_will_crash_and_burn.

to create doctors; legal education decided that its mission would be to create law professors. Law departments at major universities resembled philosophy or social science departments, with theory and scholarship the main products. Langdell famously said that for law, the “library is the laboratory,”¹⁷⁵ and that there was no use in having students engage with courts or practitioners, except for the study of appellate court opinions reported in the library stacks. Meanwhile, medical education began its move toward practice education, clinical work and residencies for fledgling doctors. Legal education and the legal profession still pay the price for that choice.

The recent demand that law schools do practice teaching was a 180 degree change from the 1970s and before. Major law firms preferred to teach new associates in their own ways, and were happy enough for law schools to refrain from teaching practice habits that the law firms would have to re-teach. But by bits, all that had changed until the mid 2000s, when the tide had fully turned.

Like the committee charged with drafting the Canons in 1905¹⁷⁶ and the Kutak Commission before it, to cure the current professional malaise came the 2009 Ethics 20/20 Commission, formed to “perform a thorough review of the ABA Model Rules of Professional Conduct and the U.S. system of lawyer regulation in the context of advances in technology and global legal practice developments.”¹⁷⁷ This is a worthy enterprise to be sure. But its membership is entirely made up of lawyers.¹⁷⁸ Despite the impetus for the Commission’s creation (“radical” advances in globalization and new technologies), its fundamental principles sound a preservative, inward-looking note: The principles guiding the Commission’s work are to “protect the public, preserve core professional values; and maintain a strong, independent and self-regulated profession.”¹⁷⁹ Protection, preservation, and maintenance.¹⁸⁰ Among its first decisive acts was to rule out of order any suggestion of following the Australian or UK alternative business model innovations of the prior decade.¹⁸¹

175. Barbara Bintliff, *Update on Proposed Changes to ABA Standard 603(d): Faculty Status and Tenure for Law Library Directors*, available at http://www.aallnet.org/isis/allsis/newsletter/24_3/ABAstandardsupdate.htm (last visited July 12, 2012).

176. See *Transactions of the Twenty-Eighth Annual Meeting of the American Bar Association*, 28 ANN. REP. A.B.A. 3, 132 (1905).

177. *About*, ABA, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/about_us.html (last visited Apr. 12, 2012).

178. *Id.*

179. Press Release, ABA President Carolyn B. Lamm Creates Ethics Commission to Address Technology and Global Practice Challenges Facing U.S. Lawyers, ABA 1 (Aug. 4, 12) available at http://apps.americanbar.org/abanet/media/release/news_release.cfm?releaseid=730.

180. *Id.*

181. Memorandum from ABA Commission on Ethics 20/20 Working Group on Alternative Business Structures 2, 16 (Apr. 5, 2011), available at <http://www.americanbar.org/>

Thus far, the Commission's recommendations have been modest and could be characterized as a combination of housekeeping, reorganizing, and modest updating to include references to more current technological advances. Even these modest proposals have not yet run the ABA adoption gauntlet. Aside from ruling out any consideration of the British and Australian alternative business models innovations, the Commission's main proposals to date are the following:

1. *Incoming Foreign Lawyers Report, Proposed Amendments to MR 5.5, May 2, 2011*

Essentially maintains status quo from 2002, but moves the temporary practice authorization for foreign lawyers into MR 5.5 rather than have it in a separate model rule.¹⁸² This may have the positive effect of having more states adopt the temporary foreign authorization, but it made no substantive change in ABA policy.¹⁸³ The proposal maintained the status quo's narrower range for temporary practice by foreign lawyers.¹⁸⁴

2. *In-House Counsel Registration May 2, 2011 Recommendation*

The Report suggests amending the in-house counsel registration rule to include foreign lawyers, as has been done in seven states.¹⁸⁵

3. *Outsourcing, May 2, 2011*

No changes to black letter required, but additions to comments to 1.1, 5.3, 5.5 recommended, none of which change current law.¹⁸⁶

content/dam/aba/administrative/ethics_2020/abs_issues_paper.authcheckdam.pdf ("At its February 2011 meeting in Atlanta, the Commission decided that two options for alternative business structures—passive equity investment in law firms and the public trading of shares in law firms—would not be appropriate to recommend for implementation in the United States at this time, though both have been adopted elsewhere since July 2000.").

182. ABA Comm'n on Ethics 20/20, Initial Draft Proposal—Model Rule 5.5 (May 2, 2011), available at http://www.abanow.org/wordpress/wp-content/files_flutter/1304368246ethics2020_rule5proposals050211.pdf.

183. *Id.*

184. *Id.*

185. ABA Comm'n on Ethics 20/20, Initial Draft Proposal—In-House Counsel Registration (May 2, 2011), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/20110502_inhousecounsel.authcheckdam.pdf.

186. ABA Comm'n on Ethics 20/20, Initial Draft Proposal—Outsourcing (May 2, 2011), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/20110502_outsourcing.authcheckdam.pdf.

4. *Technology and Confidentiality, May 2, 2011*

Many housekeeping edits to Model Rules, most of which restate the fairly obvious. Adds MR 1.6(c), which articulates a duty to take reasonable care with client information.¹⁸⁷

5. *Pro Hac Vice Recommendations, May 2, 2011*

Added foreign lawyers to the scope of the rule's application, following the lead of thirteen states, and added more formalities to the application process for pro hac vice admission, making the application process more onerous.¹⁸⁸

6. *Use of Technology Recommendations, June 29, 2011*

Updates the nature of electronic client-getting in MR Comments.¹⁸⁹ Changes nature of prospective client determination in 1.18 to exclude from the category of "prospective client" one who "communicates with a lawyer for the primary purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter . . .
"¹⁹⁰

At most, these changes have caught up to changes that have occurred between the last major amendments to the Model Rules in 2002 and the present. Largely, the recommendations simply reorganize provisions (such as the inclusion of foreign lawyer temporary practice in Model Rule 5.5 rather than elsewhere). None is especially forward-looking. None modified policies in the major areas of change: alternative business models and multidisciplinary practice. The changes to multijurisdictional practice largely catch the ABA up to state-adopted changes. Many appear motivated to enhance monitoring of foreign lawyer involvement in the U.S., involvement that has become a foregone conclusion and can no longer be prevented as some might wish. The most dramatic changes possible, alternative business practices reforms, were largely ruled out of order near the beginning of the

187. ABA Comm'n on Ethics 20/20, Initial Draft Proposals—Technology and Confidentiality (May 2, 2011), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/20110502_technology.authcheckdam.pdf.

188. ABA Comm'n on Ethics 20/20, Initial Draft Proposal—Pro Hac Vice (May 2, 2011), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/20110502_prohacvice.authcheckdam.pdf.

189. ABA Comm'n on Ethics 20/20, Initial Draft Proposal—Technology and Advertising (June 29, 2011), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/tech_client_development.authcheckdam.pdf.

190. *Id.*

reform process. Once again, change, if any, will have little effect on the bar's elite.

III. HOW REGULATION WOULD BE DIFFERENT IF IT WERE MORE INCLUSIVE AND OPEN

Albert Einstein taught us, "You cannot solve a problem from the same consciousness that created it. You must learn to see the world anew."¹⁹¹ This is what the American legal profession tries to do. It clings to the past and precedent. It protects, preserves, and maintains.¹⁹² It acts as if preserving the status quo will solve all, when in fact it will solve nothing. This backward thinking, the same thinking that preceded the crisis, exacerbates the impact of the crisis. More than anything else, the legal profession would benefit from the thinking patterns of non-lawyers.

When change comes to the legal profession, it is brought by forces outside the bar. "The immigrants" eventually integrated themselves into the bar notwithstanding the bar's efforts to diminish and exclude them. The changes in demographics have been inevitable, even if resisted at various times. The so-called civility crisis of the 1990s came into the profession as the world was becoming a more competitive place and road-rage reflected one external symptom of an anxious society. Communism came and went without being affected by the bar's efforts to stop its professional infiltration. Economic changes in the 2000s are what they are. The legal market, domestic and global, will be what it will be, and the bar's reaction to these changes will not stay their effects.

What change is wrought at the hands of the bar seems designed to leave the lives of the bar's elite as-is to the greatest extent possible. The legal profession and the society it claims to serve would be better off if regulation of the legal profession were more open and viewpoint-inclusive. No entity, whether motivated by profit, altruism, or a mixture of the two, can manage itself without an eye to the future. Businesses and institutions engage in forward-looking strategic planning. Businesses and institutions examine society's trends to predict future markets and to modify their own ways to be well-positioned to succeed in whatever happens to be the business or institution's place and goal-set.

191. *Albert Einstein Quotes*, THINKEXIST.COM, available at <http://thinkexist.com/quotation/you-cannot-solve-a-problem-from-the-same/1003327.html> (July 12, 2012).

192. Memorandum from the ABA Comm'n on Ethics 20/20, *supra* note 181 ("The American Bar Association Commission on Ethics 20/20 is examining the impact of globalization and technology on the legal profession. The principles guiding the Commission's work are protection of the public; preservation of core professional values; and maintenance of a strong, independent and self-regulated profession.").

The American legal profession regulates primarily in response to crisis. And when it does regulate, it makes as little change as can be made. Much of the change that is made is made in the service of preserving the status quo. The 1908 Canons were almost entirely copied from materials published in 1854, and the new material prohibiting advertising was meant to thwart the effectiveness of the emerging plaintiffs' lawyer class; the scramble of change in the late 1970s was meant primarily to quell the furor over Watergate; and the Ethics 20/20 changes to date do little more than formally announce what has already happened. This is management by looking backward and inward.

Change should be studied and embraced rather than resisted and mollified. For the legal profession to do so, it must change its manner of regulation in a fundamental way. It must welcome the views of non-lawyers not to mollify the public because lawyers are not all-knowing. It must view change for its benefit rather than its detriment. It must embrace rather than resist change. Open meetings must be open in spirit and not merely in form. In its current mode of regulation, the legal profession necessarily fails to take advantage of trends and movements in society. To be effective, it must begin to see outside itself with open eyes rather than suspicious ones.

To open itself to forward-looking regulation, the legal profession needs the help of non-lawyers. Lawyers by nature, training and practice, are not aggressively forward-looking organizational planners. Litigators work to minimize the harm from or maximize the gain from past events. Their work is by its nature backward-looking. Even transactional lawyers, while focused on the future plans of their clients, do their work with a goal of avoiding controversy for their clients. They seek in their drafting and negotiating work to avoid future conflict for their business clients, while the business clients themselves look to the future of their business, anticipating new markets and positioning their businesses to take advantage of what they believe the future may hold. They do this work by being sensitive to trends and changes in culture and society. They do this work by seeing opportunity and growth, rather than by seeing and avoiding controversy. I am not diminishing the importance of the lawyers' work; without the lawyer's sensitivity to conflict avoidance, a business client may fall into life's traps and be swallowed up by dangerous future developments. But the lawyer does not seek to grow a client's business. A lawyer relies on precedents and on hard statements of current legislation and regulation to do her work. Lawyers are tied to the past and bound by habit to overvalue the past. Drafting of documents itself is such an indication: lawyers choose the words that have always worked, even when those words have lost their meaning in modern language. Lawyers "give, devise and bequeath" when "give" would do just as well. The reliance on ancient words and coupled synonyms is well-

documented evidence of lawyers' tendency to be conservative and even insecure.¹⁹³ Lawyer regulation needs the talents of those who can see the road ahead. Such people are more likely to be non-lawyers than lawyers, to be more like Steve Jobs than John W. Davis.

Watson, the IBM computer technology, is an example of non-lawyer thinking to solve a problem. Rather than continue with the tried and true method of packing information inside a computer's memory endlessly, the IBM scientists pursued an entirely new form of computing: create a computer capable of analyzing unstructured data in natural language. "Watson is designed according to Unstructured Information Management Architecture—UIMA for short. This software architecture is the standard for developing programs that analyze unstructured information such as text, audio, and images."¹⁹⁴

When the dotcom revolution occurred, major existing businesses were faced with a choice: hold tight to traditional ways and try to ride out this revolution until it passed, or look forward and blend what they did well with new forms and devices. Jack Welch at GE, for example, first wondered how the dotcoms might destroy his business, but quickly turned that analysis into ways to grow GE's business, asking how the successful dotcoms' innovations could be used to make GE more effective.¹⁹⁵

Certainly there are exceptions, but the most forward-thinking lawyers are not likely to be the leaders of the profession. Richard Susskind, forward-thinker and lawyer, is an unlikely candidate for Chairman of the Bar Council. Certainly, were he an American, he would not likely rise to President of the ABA. He simply has not followed the path to that position. With few exceptions, the path to organized bar leadership runs through successful practice in a large firm, where the values of precedent, history, and tradition are strongest, and where the interest in modest if any change is most likely to preserve current competitive advantages earned by years of steady, conservative management.

The legal profession needs the consultation of non-lawyers to guide its future regulation. Non-lawyers will have none of the legal profession's self-interest and will more likely have the abilities and temperament conducive to forward-looking planning.

193. DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* 11, 24-25 (2004).

194. *What Powers Watson*, IBM, <http://www-03.ibm.com/innovation/us/watson/watson-for-a-smarter-planet/watson-schematic.html> (last visited Apr. 12, 2012).

195. RICHARD SUSSKIND, *THE END OF LAWYERS?: RETHINKING THE NATURE OF LEGAL SERVICES* 3 (2010).

CONCLUSION

History demonstrates that lawyers are inept at being their own exclusive regulators. Lawyers tend to look backward to precedent and sideways to existing articulations of law. When lawyers do look forward, their primary task is to predict and guard against risk. It is not in lawyers' nature to be forward-looking planners, sensitive to cultural trends. These conservative ways of managing have caused the legal profession to manage in reaction to crisis. And even then, to seek preservation of the status quo for as long as possible, until cultural and economic events impose their own unwanted change on the legal profession.

Change happens. The American legal profession resists change until the change dictates its own terms with the profession. As a result, the legal profession is a passive member of society. The profession itself fails to play a serious role in social change, even when some of its forward-looking members are doing so. Its failure of vision seriously limits its flexibility to change. It seems to have eyes in the back of its head—but not on its face.

The unwelcome cure is to enlist non-lawyers in the regulation of the legal profession, planners, and evaluators of cultural trends: people who can participate in lawyer regulation without the self-interest of the established members of the bar; people who have a wider view; people who can see the path ahead and not merely the ground already trod.