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## The Trouble with Lawyer Regulation

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# THE TROUBLE WITH LAWYER REGULATION

*James E. Moliterno*\*

## ABSTRACT

*The American legal profession has been a backward-looking, change-resistant institution. It has failed to adjust to changes in society, technology, and economics, despite individual lawyers' efforts to change their own practices and entrepreneurs' efforts to enter the legal marketplace to serve the needs of middle- and lower-income clients. When change does come, the legal profession is a late-arriver, usually doing no better than catching up to changes around it that have already become well ensconced. This failure robs society of what could be a positive role of the legal profession in times of change, and it deprives the profession itself of being as robust and successful as it could be.*

## INTRODUCTION

The history of the legal profession's self-regulation during self-identified crises—such as the present—is not a happy one. The profession has resisted change. When it did institute change, the change was directed not at the existing members of the profession, but at new entrants.<sup>1</sup> Mostly, change that has come has been forced by influences of society, culture, economics, and globalization—not by the profession itself. Watergate, communist infiltration, the arrival of waves of immigrants, the litigation explosion, the civility crisis, and the current economic crisis have blended with dramatic changes in

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<sup>1</sup> For example, the changes made after Watergate—adding the required lawyer ethics course and the Multistate Professional Responsibility Exam (MPRE)—affected no one already in the profession. JAMES E. MOLITERNO, *THE AMERICAN LEGAL PROFESSION IN CRISIS: RESISTANCE AND RESPONSES TO CHANGE* 18–46, 96–107 (2013).

technology, communications, and globalization.<sup>2</sup> In each of these instances, the profession held fast to its history and ways long after those ways had become anachronistic.<sup>3</sup> The profession seems to repeat the same question in response to every crisis: How can we stay even more “the same” than we already are?

In short, the legal profession is ponderous, backward looking, and self-preserving. The currently functioning American Bar Association’s Commission on Ethics 20/20 was established because of the dramatic changes in the economics of law practice, globalization, and technology.<sup>4</sup> Yet its mission statement sets the tone for its work: “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.”<sup>5</sup> Protect, preserve, and maintain. This most recent “reform” mission statement is strikingly similar to that of the first bar association’s, born in the 1870s of “crisis” and formed to “protect, purify and preserve the profession.”<sup>6</sup> This Article recommends a more forward-looking approach that welcomes the views, and even control, of nonlawyers and innovators in business and other enterprises. My hope is that the legal profession can be more like companies that have thrived because of their innovative tendencies (e.g., Apple, IBM, and Western Union), and less like companies whose stagnancy caused large-scale problems (e.g., Kodak).<sup>7</sup>

Albert Einstein taught us, “You cannot solve a problem from the same consciousness that created it. You must learn to see the world anew.”<sup>8</sup> The American legal profession tries to solve problems with the same thinking that created the problems. It clings to the past and precedent and seeks only to

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<sup>2</sup> These themes were developed in MOLITERNO, *supra* note 1.

<sup>3</sup> *Id.*

<sup>4</sup> See ABA COMM’N ON ETHICS 20/20, INTRODUCTION AND OVERVIEW 3–7 (2012), available at [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/20120508\\_ethics\\_20\\_20\\_final\\_hod\\_introduction\\_and\\_overview\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_hod_introduction_and_overview_report.authcheckdam.pdf).

<sup>5</sup> Memorandum from the ABA Comm’n on Ethics 20/20 Working Grp. on Alt. Bus. Structures to ABA Entities, Courts, Bar Ass’ns (State, Local, Specialty & Int’l), Law Sch., & Individuals 1 (Apr. 5, 2011) [hereinafter ABA 20/20 Memo] (on file with author) (concerning alternative business structures).

<sup>6</sup> *Professional Organization*, 6 ALB. L.J. 233, 233 (1872).

<sup>7</sup> See *infra* Part I.B.

<sup>8</sup> His Royal Highness the Prince of Wales, Speech to the Italian Chamber of Deputies (Apr. 27, 2009), available at <https://www.princeofwales.gov.uk/media/speeches/speech-hrh-the-prince-of-wales-the-italian-chamber-of-deputies-rome-italy>. Other versions of this quote, credited to Einstein, include: “We can’t solve problems by using the same kind of thinking we used when we created them.” David Mielach, *We Can’t Solve Problems by Using the Same Kind of Thinking We Used When We Created Them*, BUS. INSIDER (Apr. 19, 2012), [http://articles.businessinsider.com/2012-04-19/strategy/31366385\\_1\\_business-lessons-success-business](http://articles.businessinsider.com/2012-04-19/strategy/31366385_1_business-lessons-success-business).

“protect[] . . . preserv[e] . . . and [maintain].”<sup>9</sup> The American legal profession 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 each crisis, exacerbates the impact of each crisis. More than anything else, the legal profession would benefit from the thinking patterns of innovative nonlawyers.

When change comes to the legal profession, it is brought by forces outside the bar. For example, early twentieth-century immigrants eventually integrated themselves into the bar notwithstanding the bar’s efforts to diminish and exclude them.<sup>10</sup> Other changes in demographics and culture that led to the entry of women and African Americans into the profession were inevitable, yet were resisted by the profession at various times.<sup>11</sup> Communism came and went without being affected by the bar’s efforts to stem the tide of its professional infiltration.<sup>12</sup> The “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.<sup>13</sup> The profession’s decades-long, repeated efforts to protect confidentiality even in the face of corporate frauds finally collapsed in the post-Enron era, when change in the Model Rules of Professional Conduct was largely driven by Securities and Exchange Commission (SEC) regulations adopted over the profession’s objections.<sup>14</sup> Economic changes from the 2000s are what they are. The legal market—domestic and global—will continually undergo change, and the bar’s reaction to these changes will not stay their effects. Instead of resisting change, the profession should become more attuned to events and trends outside its walls. The profession should adjust and become a player in how change is assimilated into established ways and how outmoded (but established) ways are replaced by more effective ones.

The change occasionally wrought at the hands of the organized bar seems designed to leave the lives of the bar’s elite unchanged to the greatest extent

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<sup>9</sup> See ABA 20/20 Memo, *supra* note 5 (“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.”).

<sup>10</sup> See James E. Moliterno, *Politically Motivated Bar Discipline*, 83 WASH. U. L.Q. 725, 731–34 (2005) [hereinafter Moliterno, *Bar Discipline*]. See generally MOLITERNO, *supra* note 1.

<sup>11</sup> See MOLITERNO, *supra* note 1, at 63–95.

<sup>12</sup> See Moliterno, *Bar Discipline*, *supra* note 10, at 734–39.

<sup>13</sup> See MOLITERNO, *supra* note 1, at 131–61.

<sup>14</sup> *Id.* at 162–77.

possible.<sup>15</sup> The major changes that followed from Watergate raised entry barriers, including the Multistate Professional Responsibility Examination (MPRE) and required ethics courses in law school, but they had barely a wisp of effect on lawyers already admitted to the bar.<sup>16</sup>

The legal profession and the society it claims to serve would be better served 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. Successful businesses and institutions engage in forward-looking, strategic planning; examine society's trends to predict future markets; and modify their own ways to be well positioned to succeed in achieving their goals, regardless of the circumstances.

In contrast, the American legal profession regulates primarily in response to crisis.<sup>17</sup> When the ABA does regulate, it makes the least possible change. Much of the “change” that is made is done to preserve the status quo. For example, the 1908 ABA Canons of Professional Ethics were almost entirely copied from materials published in 1834, 1854, and 1870, and the only new material prohibited advertising and was meant to thwart the effectiveness and market penetration of the emerging plaintiff's lawyer class, composed mainly of immigrant stock.<sup>18</sup> In the late 1970s, the scramble of change was meant primarily to quell the furor over Watergate. Today, the proposed changes made by the ABA Commission on Ethics 20/20<sup>19</sup> do little more than formally capitulate to the irresistible forces of technology and global changes that have

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<sup>15</sup> For example, the changes made after Watergate—adding the required lawyer ethics course and the MPRE—affected no one already in the profession. The addition of advertising and solicitation rules in the early twentieth century was meant to police the newly entering immigrant lawyers. The ABA Canons of Professional Ethics were in force for sixty-two years (1908 to 1970) until they were replaced by the Model Code of Professional Responsibility. The ink on the Model Code had barely dried when Watergate sent the profession scrambling for public relations cover in 1976 in the form of the Model Rules. The major amendments to the Model Rules between 1983 and 2012 have been driven by forces outside the profession, such as the post-Enron amendments to Model Rules 1.6 and 1.13 and the currently proposed ABA Ethics 20/20 amendments that largely reflect changes in technology that have already occurred. Otherwise, the amendments to the Model Rules are more akin to tinkering than reform. *See id.* 18–46, 96–107.

<sup>16</sup> The change from the Model Code to the adopted Model Rules was more akin to repackaging than concept or lawyer-obligation changing.

<sup>17</sup> *See Professional Organization*, *supra* note 6, at 233.

<sup>18</sup> *See* James E. Moliterno, *Lawyer Creeds and Moral Seismography*, 32 WAKE FOREST L. REV. 781, 788–95 (1997).

<sup>19</sup> *See generally* ABA, AUGUST 2012 AMENDMENTS TO ABA MODEL RULES OF PROFESSIONAL CONDUCT (2012), available at [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/20120808\\_house\\_action\\_compilation\\_redline\\_105a-f.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120808_house_action_compilation_redline_105a-f.authcheckdam.pdf).

already happened.<sup>20</sup> This is management by looking backward and inward, management in service of the status quo.

Change should be studied and embraced rather than resisted and mollified. For the legal profession to do so, it must fundamentally change its manner of regulation. It must welcome the views of nonlawyers not merely to mollify the public, but because lawyers are not all knowing. The legal profession must view change for its benefit rather than its detriment. 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.

## I. THE BUSINESS WORLD AS A MODEL FOR FORWARD-LOOKING REGULATION

### A. *Current Condition of the Legal Profession*

To open itself to forward-looking regulation, the legal profession needs the help of nonlawyers. Why nonlawyers? Lawyers—by nature, training, and practice—are not aggressively forward-looking, organizational planners. Litigators work to minimize the harm or maximize the gain from past events. Their work is by its nature backward looking.<sup>21</sup> Even transactional lawyers, while focused on the future plans of their clients, do their work with a goal of avoiding controversy for their clients. In their drafting and negotiating, transactional lawyers work to avoid future conflict for their business clients, while the business clients look to the future of their businesses, anticipate new markets, and position their businesses to take advantage of what they believe the future may hold. The business clients do this work by being sensitive to trends and changes in culture and society, and by seeing opportunity and growth rather than seeing and avoiding controversy.

I am not diminishing the importance of the lawyer's work; without the lawyer's sensitivity to conflict avoidance, a business client may fall into life's traps and be swallowed by dangerous future liabilities. But the lawyer does not seek to grow a client's business. A lawyer relies on precedents and hard statements of current legislation and regulation to do her work. Lawyers are

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<sup>20</sup> Email, outsourcing, and embedded metadata have existed for decades now, whether the profession approved or not.

<sup>21</sup> Thomas D. Morgan, *Toward Abandoning Organized Professionalism*, 30 HOFSTRA L. REV. 947, 975 (2002).

ted to the past and bound by habit and training to overvalue the past. Drafting of documents itself provides 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, formalisms, and coupled synonyms is well-documented evidence of lawyers’ tendency to be conservative, reliant on the past, and even insecure.<sup>22</sup> Lawyer regulation needs the talents of those who can see the road ahead. Such people are more likely to be nonlawyers than lawyers—more like Steve Jobs than John W. Davis.

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,<sup>23</sup> is an unlikely candidate for Chairman of the U.K. Bar Council. Certainly, were he an American, he would not likely rise to become 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 the interest in modest change—if any—is most likely to preserve current competitive advantages earned by years of steady, conservative management.

The path to organized bar leadership is well marked. Of the eleven ABA presidents from 2001 to 2012,<sup>24</sup> one came from a firm of less than 100 lawyers, most came from firms of 150 to 800 lawyers, while several came from firms of 2,000 lawyers. All had long leadership records with the ABA, American Law Institute (ALI), or state bars; and each past ABA president was licensed in the 1970s or earlier.<sup>25</sup> Interestingly, unlike early generations of ABA presidents,

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<sup>22</sup> DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* 294–95 (1963).

<sup>23</sup> See generally RICHARD SUSSKIND, *TOMORROW’S LAWYERS: AN INTRODUCTION TO YOUR FUTURE* (2013); RICHARD SUSSKIND, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES* (2008) [hereinafter SUSSKIND, *END OF LAWYERS*]; RICHARD SUSSKIND, *TRANSFORMING THE LAW: ESSAYS ON TECHNOLOGY, JUSTICE AND THE LEGAL MARKETPLACE* (2000).

<sup>24</sup> Past ABA presidents during this time period include: William T. Robinson III (2011–2012); Stephen N. Zack (2010–2011); Carolyn B. Lamm (2009–2010); H. Thomas Wells Jr. (2008–2009); William H. Neukom (2007–2008); Karen J. Mathis (2006–2007); Michael S. Greco (2005–2006); Robert J. Grey, Jr. (2004–2005); Dennis W. Archer (2003–2004); Alfred P. Carlton Jr. (2002–2003); Robert Edward Hirshon (2001–2002). See *List of Presidents of the American Bar Association*, WIKIPEDIA, [http://en.wikipedia.org/wiki/List\\_of\\_Presidents\\_of\\_the\\_American\\_Bar\\_Association](http://en.wikipedia.org/wiki/List_of_Presidents_of_the_American_Bar_Association) (last modified Jan. 16, 2013).

<sup>25</sup> See *Wm. T. (Bill) Robinson III*, FROST BROWN TODD LLC, [http://www.frostbrowntodd.com/professionals-bill\\_robinson.html](http://www.frostbrowntodd.com/professionals-bill_robinson.html) (last visited Mar. 24, 2013); *Stephen N. Zack*, BOIES SCHILLER & FLEXNER LLP, <http://www.bsflp.com/lawyers/data/0398> (last visited Mar. 24, 2013); *Carolyn B. Lamm*, WHITE & CASE, <http://www.whitecase.com/clamm/#.URheDlqjdc8> (last visited Mar. 24, 2013); *H. Thomas Wells, Jr.*, MAYNARD COOPER & GALE PC, <http://www.maynardcooper.com/attorneys/h-thomas-wells-j> (last visited Mar.

most did not graduate from elite law schools. At least for this generation, an elite law school diploma was not a prerequisite to professional success. A possible explanation for this is that “[l]awyers tend to look backward, and bar leaders who have been financially successful under the current system have little incentive to face squarely the world as it is likely to become.”<sup>26</sup> By contrast, successful businesspeople, scientists, and others who lead successful institutions *must* and *do* face squarely the world as it is likely to become.

*B. Learning from the Business Model: GE, IBM, Kodak, & Western Union*

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. For example, Jack Welch, the former CEO of General Electric, first wondered how the dotcoms might destroy his business, but quickly turned that analysis into ways to grow GE’s business by asking how the innovations of successful dotcom companies could be used to make GE more effective.<sup>27</sup>

Watson, the IBM computer technology, provides an example of nonlawyer thinking used to solve a problem. Rather than continue with the tried-and-true method of endlessly packing more and more information inside a computer’s memory, scientists at IBM pursued an entirely new form of computing: a computer capable of analyzing unstructured data in natural language.<sup>28</sup> “This software architecture is the standard for developing programs that analyze unstructured information such as text, audio and images.”<sup>29</sup> Thus, IBM scientists improved the company’s product by improving its computing, not simply adding more volumes of information.

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24, 2013); *About William H. Neukom*, STAN. L. SCH., [http://www.law.stanford.edu/campus/academic\\_building/about-william-h-neukom](http://www.law.stanford.edu/campus/academic_building/about-william-h-neukom) (last visited Mar. 24, 2013); *Karen J. Mathis*, AM. B. ASS’N, <http://www.americanbar.org/content/dam/aba/marketing/women/mathis.authcheckdam.pdf> (last visited Mar. 24, 2013); *Michael S. Greco*, K&L GATES, <http://www.klgates.com/michael-s-greco/#background> (last visited Mar. 24, 2013); *Robert J. Grey, Jr.*, HUNTON & WILLIAMS, [http://www.hunton.com/robert\\_grey/](http://www.hunton.com/robert_grey/) (last visited Mar. 24, 2013); *Dennis W. Archer*, DICKINSON WRIGHT, [http://www.dickinson-wright.com/DennisW\\_Archer](http://www.dickinson-wright.com/DennisW_Archer) (last visited Mar. 24, 2013); *A.P. Carlton, Jr.*, ALLEN PINNIX & NICHOLS P.A., [http://www.allen-pinnix.com/AP\\_Carlton/ap\\_carlton.htm](http://www.allen-pinnix.com/AP_Carlton/ap_carlton.htm) (last visited Mar. 24, 2013); *Robert E. Hirshon*, MICH. L., <http://www.law.umich.edu/FacultyBio/Pages/FacultyBio.aspx?FacID=rhirshon> (last visited Mar. 24, 2013).

<sup>26</sup> Morgan, *supra* note 21, at 975.

<sup>27</sup> See SUSSKIND, *END OF LAWYERS*, *supra* note 23, at 3.

<sup>28</sup> *What Powers Watson?*, IBM, <http://www-03.ibm.com/innovation/us/watson/watson-for-a-smarter-planet/watson-schematic.html> (last visited Mar. 24, 2013).

<sup>29</sup> *Id.*



In the late nineteenth century, at about the same time the legal profession created the corporate form—undoubtedly its most lasting product innovation—George Eastman founded Kodak, an American icon known for the technological innovation of cameras, film, and processing.<sup>30</sup> Kodak was once one of the top brands in America, at its peak owning 90% of the U.S. film market.<sup>31</sup> For over 120 years, Kodak looked inward for problem solving and innovation.<sup>32</sup> Market dominance reinforced the belief that the company had the right business model and management structure to continue to succeed.

By 1975, Kodak knew digital photography was coming and understood the threat to its core business. The company developed the first digital camera and had a sense of the future of photographic technology.<sup>33</sup> But the profits from its established product (film) were so enormous that Kodak feared rapid decline in film sales once digital technology was broadly available.<sup>34</sup> Kodak was so fearful of the future of image making that for twenty-five years, while the image market changed dramatically, Kodak stayed largely out of the digital market.<sup>35</sup> Kodak finally entered the digital market in 2000 and became a leader in that market within five years.<sup>36</sup> But by then, the number of competitors and changes in the way images were being created and used had largely commoditized the digital camera market, and profit margins were exceedingly thin.<sup>37</sup> A possible explanation for Kodak's failure to adapt is that:

Immensely successful companies can become myopic and product oriented instead of focusing on consumers' needs. Kodak's story of failing has its roots in its success, which made it resistant to change. Its insular corporate culture believed that its strength was in its brand and marketing, and it underestimated the threat of digital.<sup>38</sup>

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<sup>30</sup> *Kodak: What Led to Bankruptcy*, HINDUSTAN TIMES (Jan. 22, 2012, 3:19 PM), <http://www.hindustantimes.com/technology/IndustryTrends/Kodak-What-led-to-bankruptcy/SP-Article1-800633.aspx>.

<sup>31</sup> Jasper Rees, *The End of Our Kodak Moment*, TELEGRAPH (Jan. 19, 2012, 9:04 PM), <http://www.telegraph.co.uk/women/mother-tongue/9025257/The-end-of-our-Kodak-moment.html>.

<sup>32</sup> In fact, at one time the company raised its own cattle for the bones needed to produce photographic gelatin. Steve Hamm & William C. Symonds, *Mistakes Made on the Road to Innovation*, BLOOMBERG BUSINESSWEEK (Nov. 26, 2006), <http://www.businessweek.com/stories/2006-11-26/mistakes-made-on-the-road-to-innovation>.

<sup>33</sup> See *Kodak: What Led to Bankruptcy*, *supra* note 30.

<sup>34</sup> *Id.*

<sup>35</sup> See Avi Dan, *Kodak Failed by Asking the Wrong Marketing Question*, FORBES (Jan. 23, 2012, 9:59 AM), <http://www.forbes.com/sites/avidan/2012/01/23/kodak-failed-by-asking-the-wrong-marketing-question/>.

<sup>36</sup> See Hamm & Symonds, *supra* note 32.

<sup>37</sup> See *Kodak: What Led to Bankruptcy*, *supra* note 30.

<sup>38</sup> Dan, *supra* note 35.

Kodak's insular corporate culture and resistance to change caused the company to miss the shift in how consumers "consume" photography. The market became one in which it did not matter what technology was used to create the image (e.g., camera, phone, or laptop). Kodak did not foresee the shift from a product market to an electronic-services-based market. The company recognized the problem too late and was too slow to react. Kodak filed for bankruptcy protection in January 2012, with a business plan to sell its patents—a marker of a business's final capitulation.<sup>39</sup>

Kodak's stagnation is understood best by comparing it to Western Union, a company that was able to adapt to modernization. Western Union was a telegraph company that had been able to adapt to changing times by "never confus[ing] the *business* it was in with the *way* it conducted its business. At its core, Western Union was about facilitating person-to-person communications and money transfers—whether via telegraph, wireless networks, phone, or the Internet. . . . [and it] always saw [itself] as a communications company."<sup>40</sup>

Founded in 1851 as a telegraph company, Western Union's early history is one of growth by expansion to create a coast-to-coast U.S. network. It was successful in acquiring most of its competitors (but declined to buy patents from Alexander Graham Bell for telephone technology) and created a monopoly.<sup>41</sup> In 1869 it developed the first stock ticker, in 1871 it introduced money transfers, and in 1884 Western Union was one of the first eleven companies on the Dow Jones Average.<sup>42</sup>

In the United States, Western Union offered the first consumer charge card, the first singing telegram, the first city-to-city fax service; had the first commercial satellite; and sold the first prepaid, disposable phone card.<sup>43</sup> The company owned a large physical infrastructure of pre-Internet communications, but the age of the Internet changed the game. Profits had already dropped after World War II as the phone became more prevalent than the telegraph. By the early 1980s, Western Union had mounting debt and divested itself from some of its telecommunications-based assets. At the same time, deregulation offered the opportunity for the company to expand its

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<sup>39</sup> See *Kodak: What Led to Bankruptcy*, *supra* note 30.

<sup>40</sup> See Hamm & Symonds, *supra* note 32 (emphasis added) (internal quotation marks omitted).

<sup>41</sup> *New Valley Corporation History*, FUNDINGUNIVERSE, <http://www.fundinguniverse.com/company-histories/New-Valley-Corporation-Company-History.html> (last visited Mar. 24, 2013).

<sup>42</sup> *Our Rich History*, W. UNION, <http://corporate.westernunion.com/History.html> (last visited Mar. 24, 2013).

<sup>43</sup> *Id.*

money transfer services outside the United States. Western Union saw the opportunity and took it.<sup>44</sup>

By 1987, the company went through a massive restructuring just prior to being forced into Chapter 11 protection.<sup>45</sup> In the next several years, it transformed from an asset-based company into an electronic-services-based company with international money transfers at its core. Unlike Kodak's clinging relationship to film, the Western Union telegraph was laid to rest in 2006. But the electronic money transfer service it started in 1871 exists today in 200 countries.<sup>46</sup>

The legal profession behaves more like Kodak, whose success in the film market blinded it to the reality that it was in the image business. From its first half century of existence, the legal profession saw its conservative ideologies rejected by the American sociopolitical consensus and expended much of its energy trying to restore a lost American past.<sup>47</sup>

## II. RELYING ON NONLAWYERS FOR FUTURE REGULATION

### A. *High-Ranking Nonlawyers in Law Firms*

The legal profession needs the consultation of nonlawyers to guide its future regulation. Nonlawyers have none of the legal profession's self-interest and will more likely have the abilities and temperament conducive to forward-looking planning. Law firms, of course, have employed nonlawyers in business, marketing, planning, and leadership roles, but they are not an institutional legal profession. The nonlawyers hired by law firms to manage business interests and personnel issues within the firms are not owners of the firms, but they do occupy positions with significant decision-making power and influence.

The phenomenon of employing high-ranking nonlawyers at law firms seems to be escalating at a more rapid pace. Even ten years ago, the notion was met with discomfort, if not scorn; today, it seems highly prevalent and normal. The job descriptions and duties of nonlawyers who hold managerial positions

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<sup>44</sup> *New Valley Corporation History*, *supra* note 41.

<sup>45</sup> *Id.*

<sup>46</sup> *Our Services*, W. UNION, <http://corporate.westernunion.com/Services.html> (last visited Mar. 24, 2013).

<sup>47</sup> JOHN AUSTIN MATZKO, *THE EARLY YEARS OF THE AMERICAN BAR ASSOCIATION, 1878–1928*, at 518 (1984).

in law firms are widely available.<sup>48</sup> Law firm administrators—who are also known as executive directors, chief managing officers, and chief operating officers<sup>49</sup>—manage the business side of legal practice through such roles as hiring, branding, marketing, human resources, compensation, benefits, business development, and technology, to name just a few.<sup>50</sup>

About ten years ago, a controversial statement appeared in an ABA publication. Robert W. Denney wrote: “The practice of law is a profession, but a law firm is a business and must be managed like a business. [The] statement produced indignant replies from quite a few lawyers saying emphatically that a law firm is *not* a business . . . .”<sup>51</sup> The same kinds of statements about law having become a business have distressed lawyers for a century or more. But against all evidence, the profession persists in denying that the statement is the truth. DLA Piper recently took a highly unusual approach to senior management. “Instead of electing one of its partners as co-chair, the firm recruited an outsider for the position.”<sup>52</sup> Major law firms understand their need for nonlawyer managers.

“Although not bringing them into management positions, some other firms—both large and midsized—are involving outside business executives in management, some of whom might be non-lawyer industry experts, or top legal consultants.”<sup>53</sup> “For instance, several years ago national insurance law firm, Nelson Levine de Luca & Horst, formed an executive board of retired executives from the insurance industry to advise it on operations and strategy.”<sup>54</sup> Thus, “while the term [has not] been used in this context, the ‘new

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<sup>48</sup> See *Being Managing Partner No Longer Means Sacrificing Your Practice*, LAW OFF. MGMT. & ADMIN. REP., May 2007, at 2, 2 (“All nonlawyer managers (executive directors, administrators, and chief operating officers) ranked their key responsibilities as: 1) personnel management; 2) facilities/equipment management; and 3) office technology. These priorities were identical in firms with 130-plus attorneys.”); Sally Kane, *Legal Jobs—Part II: Non-Lawyer Careers in a Law Firm*, ABOUT.COM, <http://legalcareers.about.com/od/legalcareerbasics/a/Legal-Jobs-Part-II-Non-Lawyer-Careers-In-A-Law-Firm.htm> (last visited Mar. 24, 2013) (“The chief financial officer is a high-level financial manager. . . . [whose job it is to] direct and oversee the financial aspects of the firm including accounting, forecasting, financial planning and analysis, budgeting and financial reporting.”).

<sup>49</sup> Ellen Freedman, *How Many Non-Lawyers Does It Take to Run a Law Firm?*, PA. LAW., Mar.–Apr. 2001, at 32 (describing the roles of principal administrators, human resource managers, and marketing coordinators); Kane, *supra* note 48.

<sup>50</sup> Kane, *supra* note 48; see also Freedman, *supra* note 49.

<sup>51</sup> Bob Denney, *Managing the Firm as a Business*, LAW PRAC., Mar./Apr. 2012, at 10, 10.

<sup>52</sup> *Id.* at 11 (“That individual had most recently held two top-level corporate management positions and, prior to that, for nine years had been firm-wide managing director of Linklaters, another BigLaw firm.”).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

normal” in law firm management is business-style management with nonlawyers prominently featured.<sup>55</sup> Nonlawyers and their special skills matter in the management and planning for a law firm. But nonlawyers do not matter so far for the profession as an entity.

*B. Expanding High-Ranking Nonlawyers to the Entire Legal Profession*

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 or sensitive to cultural trends. These conservative ways of managing have caused the legal profession to manage in reaction to crisis. And even then, the legal profession seeks 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 nonlawyers—planners and evaluators of cultural trends—in the regulation of the legal profession. These people, who have a wider view and can see the path ahead and not merely the ground already trod, can regulate the legal profession without the same self-interest as established members of the bar.

The future law graduate faces a world not envisioned in the 1980s, 1990s, and even the first half of the prior decade. But now, changes in the market for legal services have occurred, despite the organized profession's futile clinging to old forms. Unauthorized-practice-of-law restrictions<sup>56</sup> must and will fall, especially but not exclusively as they relate to cross-border practice. Competition from the commoditization of law products and competition from

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<sup>55</sup> *Id.*

<sup>56</sup> *See, e.g.*, COMM'N ON MULTIJURISDICTIONAL PRACTICE, ABA, CLIENT REPRESENTATION IN THE 21ST CENTURY (2002), available at <http://www.nysba.org/AM/Template.cfm?Section=Home&ContentID=2819&template=/CM/ContentDisplay.cfm>.

U.K. law firms—armed with new corporate financing that will enhance their global dominance—will drive the reform that the organized bar resists. In such a new legal services market, fewer graduates will find high-figure paychecks being cut by employers, and more graduates will be entrepreneurs.

*C. Training Lawyers to Be Successful like Nonlawyers*

Law schools must reform at long last to generate law graduates better able to contribute to clients of law firms and of their solo or small-firm entrepreneurial endeavors. Teaching one skill—legal analysis—as was done from the 1880s until the 1980s, is no longer enough even for elite law schools whose market strength will cause the school greater delay in reacting to change. Teaching the laundry basket of skills of the 1980s and 1990s (e.g., interviewing, negotiating, advocacy, writing), as critical as they are as a base, is no longer enough. Law schools must prepare students to contribute by being positive members of teams, understanding how projects are managed, and being creative in their view of legal analysis, business, markets, and the needs of clients. Law schools must prepare students to engage in sophisticated practice for higher paying clients. To do so, students need to acquire the sensibilities of successful lawyers. They need to take ownership of client problems, be willing to venture unorthodox, creative solutions to problems, and not merely answer posed questions.

There are those who would abolish the third year of the J.D. degree.<sup>57</sup> If the third year remained a mere extension of the first two years, I would not disagree. But rather than abandon the opportunity to educate in the third year, legal education should produce value in the third year.

The most advantageous answer for this kind of education is sophisticated experiential education. Law schools should abandon term skills education because its usual meaning has become too narrow and pejorative in some circles. In its broadest meaning, skills education begins with the teaching of the lawyer's critical thinking skills in the classic first-year courses. In its narrowest

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<sup>57</sup> See, e.g., Samuel Estreicher, Essay, *The Roosevelt-Cardozo Way: The Case for Bar Eligibility After Two Years of Law School*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 599 (2012). Paul Carrington suggested it be abolished in a report funded by the Ford Foundation and published by the Association of American Law Schools (AALS) in 1971. See E. CLINTON BAMBERGER ET AL., ASS'N AM. LAW SCH., TRAINING FOR THE PUBLIC PROFESSIONS OF THE LAW: PROPOSED FINAL DRAFT (1971); Christopher T. Cunniffe, *The Case for the Alternative Third-Year Program*, 61 ALB. L. REV. 85, 91 (1997); see also RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 286-95 (1999) (resuscitating the Carrington-report suggestion that the third year of law school be eliminated).

meaning, skills education equates to teaching students how to find the courthouse address. There is no common understanding of what the term means today. Instead, it has become a term used by some academics to demean education in the role of lawyer, much as if skills education would reduce law schools to trade school status. Adding to experiential education means more clinics, to be sure, and traditional skills courses (e.g., legal writing, trial advocacy, negotiation), but it means far more. This should come in the form of sophisticated, practice-setting, sensitive simulation courses taught by a mixture of professors and expert practitioners. In these courses, students would be urged to make the transition from student to lawyer. Students would continue to learn law, but would learn as lawyers do: with a client's need as the driver rather than a three-hour exam. In such circumstances, students would transition to the thought processes of lawyer–problem-solver and away from learning only to acquire knowledge for an exam. This kind of third year can be a year with one foot in the academy and one in the practice. Far from exclusively skills courses, these courses would develop habits of the lawyer's mind that are not developed in the traditional courses aimed at appellate legal analysis. This third year would serve as a “mental pathways' transition time.”

An economic transfer is taking place. Law firms formerly trained beginning lawyers in their specific firm ways mainly by billing their hours to corporate clients.<sup>58</sup> That system no longer exists. Now, law firms are demanding that law schools provide law students with more practical preparation.<sup>59</sup> Ironically, thirty or more years ago, major law firms preferred that law schools not so engage, fearing that law faculty would ruin otherwise trainable new associates. But the transfer is now taking place from corporate client and law firm expenditures to law school expenditures aimed at more expensive clinical and practical-skills courses. The only way for this transfer to function well is for it to be incomplete: law schools must engage the low-cost, part-time faculty resources that are available to teach practice preparation. At some schools, this has long been the case for courses in trial advocacy and mediation skills. Elaborate simulation courses focused on particular practice settings and specialties would be even more effective. For example, courses like *The Lawyer for Failed Businesses* might replace or supplement a bankruptcy course; a course called *Corporate Counsel* or *The Defense Lawyer* might do

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<sup>58</sup> Patrick G. Lee, *Law Schools Get Practical*, WALL ST. J., July 11, 2011, at B5; David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 20, 2011, at A1.

<sup>59</sup> See, e.g., TASK FORCE ON LAW, THE ECON. & UNDEREMPLOYMENT, MASS. BAR ASS'N, BEGINNING THE CONVERSATION 5 (2012), available at <http://www.massbar.org/media/1246788/beginning%20the%20conversation.pdf>; see also Lee, *supra* note 58; Segal, *supra* note 58.

the same for courses in corporate law and criminal procedure. Depending on how the new courses were structured, they might replace the former course or add a layer of application to it. Attracting and welcoming this no- or low-cost contribution from excellent lawyers (often alumni) not only ameliorates cost, but also represents a more altruistic contribution of the practicing bar to the education enterprise. Rather than exclusively teaching their particular firm's newest associates, practicing attorneys would be providing their expertise to any students who enroll in their course.<sup>60</sup>

#### *D. Reforming the Profession Through Government*

Aside from wished-for innovation coming directly from the profession, there are two other obvious sources of regulation outside the profession itself: government and competition. The former is especially resisted in the United States, while the latter has and will continue to force changes and regulatory reform on an unwelcoming profession.

Government has been the source of reform in the United Kingdom.<sup>61</sup> The so-called Tesco law, permitting nonlawyer ownership of law firms,<sup>62</sup> was not initiated by the legal profession but by parliamentary studies and action.<sup>63</sup> In the United States, arguably the most significant, substantive change in the law that has governed lawyers of the past century was forced by government action.<sup>64</sup> The early twenty-first century reduction in the scope of the duty of confidentiality that was signaled by amendments to the ABA Model Rules 1.6 and 1.13 was born not of professional preference or reform, but of the fallout and government action following the Enron defalcations. Nearly the same language, finally adopted by the ABA in 2003,<sup>65</sup> was rejected in the 1980s

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<sup>60</sup> This is no pipe dream, as it is precisely what has occurred at Washington & Lee University Law School. About thirty such new courses exist, half of which are taught by part-time faculty members who have, for practical measures, donated their time and are doing excellent work instructing their courses.

<sup>61</sup> For an excellent account of these reforms, see Christopher J. Whelan, *The Paradox of Professionalism: Global Law Practice Means Business*, 27 PENN ST. INT'L L. REV. 465, 472–82 (2008).

<sup>62</sup> See Legal Services Act, 2007, c. 29, §§ 89–102, sch. 13 (Eng.).

<sup>63</sup> Legal Services Act, 2007, c. 29, pmb. (Eng.); DAVID CLEMENTI, REVIEW OF THE REGULATORY FRAMEWORK FOR LEGAL SERVICES IN ENGLAND AND WALES: FINAL REPORT 2–3 (2004), available at <http://webarchive.nationalarchives.gov.uk/+http://www.legal-services-review.org.uk/content/report/report-chap.pdf>.

<sup>64</sup> The only competitor for “most significant single change” came from the courts applying First Amendment principles, striking down the organized bar's near-blanket prohibitions on advertising. See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 381–84 (1977).

<sup>65</sup> CTR. FOR PROF'L RESPONSIBILITY, ABA, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2005, at 133–34 (2006).



during ABA consideration of the Kutak Commission proposals<sup>66</sup> and again in the Ethics 2000 proposals in 2002.<sup>67</sup> When the reduction in the duty of confidentiality was finally adopted in 2003, it was merely the play out of a *fait accompli* set in motion by the Sarbanes-Oxley Act and the resultant SEC regulations. True, the SEC regulations governed only lawyers representing publicly traded corporations,<sup>68</sup> but the government attention to what it regarded as a demonstrably flawed duty of confidentiality that allowed Enron's lawyers to keep secret their client's frauds essentially dictated the ABA action.<sup>69</sup> Even in this instance of regulation coming from government action, the ABA used a "saturation bombing attack" to stave off the original proposed version of the SEC regulations that would have increased the obligations of lawyers to report up the ladder.<sup>70</sup>

Despite this major instance of government regulation forcing reform of the law that governs lawyers, the mood for such regulation is far different in the United States than, for example, the United Kingdom, and certainly from typical civil law jurisdictions. The independence of the legal profession from government power, as is true for judicial independence as well, is far more pronounced in the United States than elsewhere. In most civil law jurisdictions, the legal profession is explicitly subject to a ministry of justice or its equivalent.<sup>71</sup> In the United Kingdom, unlike the United States, government has

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<sup>66</sup> *Id.* at 101–31.

<sup>67</sup> *Id.* at 124–29.

<sup>68</sup> Lawrence J. Fox, *The Academics Have It Wrong: Hysteria Is No Substitute for Sound Public Policy Analysis*, in ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS 851, 865–67 (Nancy B. Rapoport & Bala G. Dharan eds., 2004).

<sup>69</sup> Morgan, *supra* note 21, at 970 (“[T]he effect of competition on clients will have an inevitable impact on their lawyers.”). Morgan argued that ABA pronouncements are of decreased importance because policy justifications for a lawyer monopoly are losing their persuasiveness. Morgan further argued that lawyers have no unique claim to core lawyer values. Furthermore, lawyers’ attempts to limit who clients may consult are doomed to fail due to market forces. *Id.* at 962.

<sup>70</sup> Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1189 (2003) (“Prior to Sarbanes-Oxley, the corporate bar had long strenuously resisted adding an ‘up-the-ladder’ reporting requirement to its ethics rules; although, in the wake of the Enron scandal, and seeing the writing on the wall, an ABA Task Force actually did recommend this modest but important reform in 2002. In December, 2002, the SEC proposed rules that would put teeth into up-the-ladder reporting by requiring lawyers whose client’s boards failed to take any action to make a ‘noisy withdrawal’ from representing that client—i.e., to inform the SEC that they were withdrawing for professional reasons. The ABA and many other bar organizations and law firms conducted a saturation bombing attack on the proposed rules and have succeeded, at least for the present, in getting the SEC to suspend the ‘noisy withdrawal’ rule, pending more comments.” (footnotes omitted)).

<sup>71</sup> For example, in France, the Civil Affairs and Seals Directorate, a subdivision of the Ministry of Justice, supervises the legal profession, including lawyers. *Justice in France*, MINISTÈRE DE LA JUSTICE,

treated the legal profession far more like any other business.<sup>72</sup> In the United States, professional resistance to being treated like other businesses subject to government regulation is much more powerful. As Lawrence Fox has noted:

The very idea of the Senate of the United States enacting or directing others to enact rules of professional responsibility for lawyers should be enough to cause collective professional indigestion and indignation. A foundation of our independent profession is that our rules of professional conduct are promulgated by the states. Time and again, we have quite correctly resisted efforts to have the federal government usurp . . . the traditional role of regulating lawyers through the respective state Supreme Courts. . . . [T]here is no greater threat to lawyer independence than having anyone other than courts establish the lawyer rules for practice.<sup>73</sup>

In *Hishon v. King & Spalding*,<sup>74</sup> an issue statement in King & Spalding's brief makes clear that one of its chief arguments against the applicability of race, religion, and gender discrimination laws to law firms was the fact that these laws are administered by a government agency—the Equal Employment Opportunity Commission. The statement read as follows: “Whether Congress intended, through Title VII of the Civil Rights Act of 1964, to give the Equal Employment Opportunity Commission (EEOC), a politically appointed advocacy agency engaged in litigation, jurisdiction over invitations to join law firm partnerships.”<sup>75</sup>

When the Federal Trade Commission (FTC) preliminarily decided that lawyers should be covered by its regulations pursuant to the Gramm–Leach–Bliley Act,<sup>76</sup> the ABA responded quickly and requested a lawyer exemption from the privacy-policy regulations.<sup>77</sup> Despite support from select members of

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<http://www.justice.gouv.fr/multilinguisme-12198/english-12200/justice-in-france-22126.html> (last updated Jan. 3, 2013).

<sup>72</sup> See, e.g., Legal Aid and Advice Act, 1949, 12, 13 & 14 Geo. 6, c. 51, §§ 1–27, schs. 1–3 (Eng.) (establishing the availability of legal aid services in the United Kingdom). This Act's propriety and wisdom was debated by U.S. lawyers on the pages of the *ABA Journal*. Compare Robert G. Storey, *The Legal Profession Versus Regimentation: A Program to Counter Socialization*, 37 A.B.A. J. 100, 101 (1951), with Warren Freedman, *The Legal Profession and Socialization: A Reply to Dean Robert G. Storey*, 37 A.B.A. J. 333 (1951).

<sup>73</sup> Fox, *supra* note 68, at 866.

<sup>74</sup> 467 U.S. 69 (1984).

<sup>75</sup> Brief for Respondent at 16, *Hishon*, 467 U.S. 69 (No. 82-940) (citation omitted).

<sup>76</sup> Pub. L. No. 106-102, 113 Stat. 1338 (1999) (codified in scattered sections of 12 U.S.C. and 15 U.S.C.).

<sup>77</sup> Letter from Dennis W. Archer, President, Am. Bar Ass'n, to Members, Am. Bar Ass'n (2004) (on file with author).

Congress, the FTC declined to grant an exemption for lawyers. Lest the legal profession be regulated by a federal agency on this narrow topic, the ABA and the New York State Bar Association filed lawsuits in federal district court seeking to have the application of the FTC regulations to lawyers enjoined.<sup>78</sup> Nineteen state and local bar associations filed amicus briefs with the court.<sup>79</sup> The litigation succeeded and lawyers were effectively exempted from the privacy obligations of the regulations.<sup>80</sup>

Similar protestations occurred as the SEC was drafting its regulations pursuant to the Sarbanes-Oxley Act.<sup>81</sup> As a government opponent in litigation, the SEC was seen as a biased, outside force in its efforts to generate lawyer-regulation reform. Of course the profession had its chances to implement its own such reforms, but it rejected them in the consideration of the Kutak Commission Report in 1983<sup>82</sup> and again when the ABA's Ethics 2000 Commission proposed such reforms in 2002.<sup>83</sup> Government imposed its will on the profession, albeit in a watered-down fashion after heavy professional lobbying, regarding corporate counsel confidentiality only after repeated rejection of such reforms by the profession over a two-decade period.<sup>84</sup> The ABA's Ethics 2000 Commission had very recently sent the academic proponent of the eventual SEC regulation "packing"<sup>85</sup> less than a year before Sarbanes-Oxley Section 307<sup>86</sup> was passed, triggering the SEC to adopt its regulations.

Beyond the independence shield to government regulation, lawyers have dominated legislative bodies to a greater extent in the United States than elsewhere. In the late 1950s, two-thirds of the Senate and a little more than half of the House of Representatives were occupied by lawyers.<sup>87</sup> The lawyer dominance in legislatures is on the decline but retains significance. For example, in the early 1970s, 51% of Senators were lawyers, compared to 37%

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<sup>78</sup> N.Y. State Bar Ass'n v. FTC, 276 F. Supp. 2d 110, 118 n.8 (D.D.C. 2003).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 146.

<sup>81</sup> Fox, *supra* note 68, at 865–66.

<sup>82</sup> CTR. FOR PROF'L RESPONSIBILITY, *supra* note 65, at 100–01.

<sup>83</sup> *Id.* at 124–29.

<sup>84</sup> *Id.* at 291–314.

<sup>85</sup> Fox, *supra* note 68, at 864.

<sup>86</sup> This Section was described by its profession opponent, Lawrence Fox, as an "eerily captioned 'Rules of Professional Responsibility for Lawyers.'" *Id.* at 865.

<sup>87</sup> Ross L. Malone, *The American Lawyer's Role in Promoting the Rule of Law*, 43 MARQ. L. REV. 3, 5 (1959).

in 2012.<sup>88</sup> In the 1960s, 43% of Congressmen were lawyers, compared to 24% in 2012.<sup>89</sup> This reality alone makes significant reform at the hands of government less likely and confined to narrow issues that present real electoral fallout for candidates, such as the Enron disaster.

In all likelihood, reform of the legal profession and the law governing lawyers in specific areas will continue to be the result of government imposition. But just as likely, in the United States wide-ranging reforms allowing nonlawyer investment in law firms, like those represented by the United Kingdom, will not be adopted by government. Alternative Business Structure (ABS) innovations will be stymied by lawyer-dominated legislatures and well-organized professional resistance.

Of course, all the assertions of self-governance and the relative silence of legislatures mask a reality about who or what actually governs lawyers' behavior.<sup>90</sup> Bar ethics rules and disciplinary processes are but one form, but likely not the most important form, of lawyer regulation on the ground. In a lawyer's day-to-day life, he or she is more likely to be governed by a dizzying array of forces and factors. For example, malpractice liability, a creature of state law, governs lawyer conduct. The procedure and evidence rules that govern lawyer conduct have been mostly adopted by the courts with some assistance and influence from Congress or a state legislature.<sup>91</sup> Decisional law regulating prosecutorial misconduct governs some lawyers' conduct.<sup>92</sup> Through rulings on motions to disqualify, state and federal courts now have responsibility for policing conflicts of interests.<sup>93</sup>

Even outside the realm of publicly made law, the private law of malpractice insurance carriers governs lawyer conduct.<sup>94</sup> Malpractice carriers direct lawyers in their adoption of office procedures to ferret out conflicts of interest,

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<sup>88</sup> Debra Cassens Weiss, *Fewer Prelaw Students Interested in Political Careers; Is Money the Reason?*, A.B.A. J. (Apr. 9, 2012, 5:00 AM), [http://www.abajournal.com/news/article/fewer\\_prelaw\\_students\\_interested\\_in\\_political\\_careers\\_is\\_money\\_the\\_reason/](http://www.abajournal.com/news/article/fewer_prelaw_students_interested_in_political_careers_is_money_the_reason/).

<sup>89</sup> *Id.*

<sup>90</sup> See David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 802–03 (1992); Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147, 1152–54 (2009).

<sup>91</sup> Examples include the evidentiary privilege, mainly a creature of the common law with modest procedural rule modifications. See FED. R. EVID. 501; FED. R. EVID. 502. Another example includes frivolous claims rules under federal law and their state-law counterparts. FED. R. CIV. P. 11.

<sup>92</sup> See, e.g., *Williams v. Taylor*, 529 U.S. 362 (2000); *Brady v. Maryland*, 373 U.S. 83 (1963); *People v. Reichman*, 819 P.2d 1035 (Colo. 1991) (en banc) (per curiam).

<sup>93</sup> See Zacharias, *supra* note 90, at 1168.

<sup>94</sup> *Id.* at 1167.

protect confidentiality, and supervise nonlawyer staff, among many other matters. All of these and more lawyer control devices have advantages over bar discipline as a motivator of proper lawyer behavior. Malpractice liability is more attractive for claimants because they receive compensation for successful claims. Violations of evidence and procedural law can have direct monetary consequences for the governed lawyer.<sup>95</sup> Malpractice insurance carriers have a virtual monopoly on a necessary commodity for lawyers, and the carriers are motivated to regulate lawyer conduct to control their own level of risk.

### *E. Market Forces & Lawyer Regulation*

Finally, the market also governs lawyer conduct and regulation. Competition is playing a greater role in reforming the legal profession than ever before. In the international sphere, U.K. law firms now have the prospect of tapping capital markets for expansion, especially into emerging global markets. U.S. law firms were slower than their U.K. counterparts to recognize and chase foreign markets for legal services.<sup>96</sup> But that is changing, and the need to compete will drive U.S. law firms to lobby the ABA and Congress for the opportunity to compete more effectively in global markets.<sup>97</sup> Clearly, the organized profession will not adopt on its own United Kingdom- or Australia-like ABS models. In one of its first actions, the ABA Commission on Ethics 20/20 preemptively rejected any such changes taking place during its examination of radical changes of technology and globalization.<sup>98</sup> When the Commission boldly proposed an even more modest reform than the policy that has existed without problem in Washington, D.C. for several years, the Illinois Bar stepped in and interposed a resolution prohibiting even the discussion of an ABS or MDP reform, no matter how modest. The Commission, apparently wishing to avoid a fight, withdrew its proposal.

Other sources of competition are forcing reforms in the delivery of legal services. Some of these reforms will force change in lawyer regulation, as web-based providers cross borders and larger general counsel offices clamor for the right to sell their services to their own corporate customers.

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<sup>95</sup> See Wilkins, *supra* note 90, at 830–33.

<sup>96</sup> See ABA 20/20 Memo, *supra* note 5, at 7, 13–15.

<sup>97</sup> *Id.* at 2.

<sup>98</sup> *Id.* at 5–6.

General counsel offices are staffing up and changing the way they do business with law firms.<sup>99</sup> Corporate procurement offices now manage the purchase of legal services much as they manage the purchase of paper clips, or in the United Kingdom, as they manage the purchase of “loo rolls.”<sup>100</sup> Outsourcing of low-level legal tasks has continued to grow, being utilized by both corporate clients and law firms alike.<sup>101</sup> Large firm lawyers have moved out to form their own leaner, small firms, sometimes moving to the suburbs or to smaller markets to save rent and overhead expenses and allow them to compete for the corporate business against urban firms.<sup>102</sup> Online providers such as Legalzoom.com, and other virtual law firms, have entered the market for service provision to small businesses and individuals.<sup>103</sup> Private judging websites promote the opportunity to skip the need for both lawyers and courts when resolving modest-value disputes.<sup>104</sup>

In a dramatically different form, the legal profession is being influenced and changed by nonlawyers in the form of corporate clients. Through their general counsels, corporate clients are imposing behavior guidelines on their

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<sup>99</sup> Press Release, Clark Baird Smith LLP, Nationally Recognized Labor and Employment Law Attorneys Establish Law Firm Serving Public and Private Sector Management Clients (Sept. 1, 2010) (on file with author).

<sup>100</sup> Christopher J. Whelan & Neta Ziv, *Privatizing Professionalism: Client Control of Lawyers' Ethics*, 80 *FORDHAM L. REV.* 2577, 2586 (2012) (internal quotation marks omitted).

<sup>101</sup> See, e.g., *id.* at 2595 (noting that Wal-Mart used 680 outside law firms as of 2009); Debra Cassens Weiss, *Nixon Peabody Isn't Shy About Its Hiring of an Outsourcing Company*, A.B.A. J., [http://www.abajournal.com/news/article/nixon\\_peabody\\_isnt\\_shy\\_about\\_its\\_hiring\\_of\\_an\\_outsourcing\\_company/](http://www.abajournal.com/news/article/nixon_peabody_isnt_shy_about_its_hiring_of_an_outsourcing_company/) (last updated Feb. 1, 2012).

<sup>102</sup> See Press Release, Clark Baird Smith LLP, *supra* note 99.

<sup>103</sup> LEGALZOOM, <http://www.legalzoom.com> (last visited Mar. 24, 2013). Legalzoom is identified as one of the most innovative new companies, according to Fast Company. *The World's 50 Most Innovative Companies*, FAST COMPANY, <http://www.fastcompany.com/most-innovative-companies/2012/legalzoom> (last visited Mar. 24, 2013). Various state bars and patent lawyers have accused it of unauthorized practice. See, e.g., Letter from Anthony S. di Santi, Chair, N.C. State Bar Authorized Practice Comm., to Charles E. Rampenthal, LegalZoom.com, Inc. (May 5, 2008), available at <http://greatestamericanlawyer.typepad.com/ncapccd4.pdf>; Nathan Koppel, *Seller of Online Legal Forms Settles Unauthorized Practice of Law Suit*, WALL ST. J.L. BLOG (Aug. 23, 2011, 11:47 AM), <http://blogs.wsj.com/law/2011/08/23/seller-of-online-legal-forms-settles-unauthorized-practiced-of-law-suit/>; *Informal Opinion 2008-01*, CONN. B. ASS'N, <http://www1.ctbar.org/sectionsandcommittees/committees/UPL/08-01.pdf> (last visited Mar. 24, 2013); Gene Quinn, *LegalZoom Sued in Class Action for Unauthorized Law Practice*, IP WATCHDOG (Feb. 9, 2010, 4:04 PM), <http://www.ipwatchdog.com/2010/02/09/legalzoom-sued-in-class-action-for-unauthorized-law-practice/id=8816/>. Legalzoom has also been fought over by states wishing to bring in Legalzoom staff jobs. *Gov. Perry: LegalZoom to Move up to 600 Jobs to Austin, TX*, IP WATCHDOG (Feb. 19, 2010, 3:11 PM), <http://www.ipwatchdog.com/2010/02/19/legalzoom-to-move-600-jobs-to-tx/id=9176/>.

<sup>104</sup> See, e.g., JUSTICEBOX, <http://www.justicebox.net/> (last visited Mar. 24, 2013).

outside counsel in the form of outside counsel procedures.<sup>105</sup> These documents come in all sizes and shapes—some quite modestly requiring outside counsel to behave ethically, and others dictating employee policies for outside counsel, including diversity hiring, task staffing, work-and-life balance, and flextime policies.<sup>106</sup> Behaving ethically in this context means more than merely abiding by professional norms. It includes maintaining whistleblower protection, engagement in the community, and other distinctively nonlawyer professional norms.<sup>107</sup>

This private reform of the legal profession is simply driven by contract, although at present the legal services market dictates that corporate clients need to do little if any negotiating over the terms of their outside counsel policies. A turn in economic times could alter the bargaining positions of major law firms vis-à-vis their corporate clients, but the outside counsel policies are here to stay, even if they become somewhat modified by future economic realities.

A rather twisted explanation of the outside-counsel-policy phenomenon could claim that it is self-governance in a new form. After all, the drafters and main enforcers of the outside counsel policies are general counsels. Courts are not bar associations either, but they are essentially lawyers governing lawyers, and court regulation has been the core of the profession's claim of self-governance. But of course this argument is twisted: the general counsels are not lawyers governing lawyers. They are doing their corporate employers' bidding and not attempting to impose professional norms on their fellow outside counsel. This is private ordering pure and simple and cannot be characterized as self-regulation.

In a fashion, this phenomenon is like the practice of insurance carriers providing guidelines for counsel engaged to represent their insured.<sup>108</sup> Both insurance carrier and outside counsel policies endeavor to influence counsel's staffing, use of electronic resources, and other expenses, but the outside counsel policies go far beyond by imposing internal policies, employment policies, environmental policies, and community engagement policies on outside law firms. Moreover, outside counsel policies are imposed by clients.

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<sup>105</sup> See generally Whelan & Ziv, *supra* note 100 (examining the guidelines imposed on outside counsel and the impact of such guidelines).

<sup>106</sup> *Id.* at 2578–79.

<sup>107</sup> *Id.* at 2588–89.

<sup>108</sup> See, e.g., Pfeifer v. Sentry Ins., 745 F. Supp. 1434 (E.D. Wis. 1990).

Insurance carrier guidelines, though heavily influential on insurance defense lawyers, must always remain in the form of guidelines because they come from a third party paying for the legal services and not from the insured client.

Outside counsel policies even go so far as to create new norms in traditional areas of professional regulation. Conflict rules, as imposed on retained outside counsel, have expanded to preclude engagements with other clients at the preference of the client.<sup>109</sup> Coke, for example, might require its outside counsel to refrain from representing Pepsi, when the bar ethics rules would have nothing to say about it.<sup>110</sup>

## CONCLUSION

In the end, change always comes. At the same time as the profession was trying to turn back the civil rights clock, John F. Kennedy was looking ahead: “[T]ime and the world do not stand still. Change is the law of life. And those who look only to the past or the present are certain to miss the future.”<sup>111</sup> The legal profession has no choice about whether change will come. The legal profession’s choice is whether to be engaged in the process of change or to have change imposed by forces of competition, government, technology, culture, and economics. Turning to creative nonlawyers presents the most advantageous way for the legal profession to grow and change on its own terms. Creative nonlawyers can predict and manage change that is likely to result from competitive forces. In the United States, changes made by the profession itself are highly likely to dampen pressure for change dictated by government. In the absence of self-reform, change will be affected either by government or the forces of competition.

A future of claimed self-regulation without the input of creative nonlawyers will be no self-regulation at all. Instead, it will be regulation that results from competitive forces and government. The American legal profession can no longer stand on its claims of special status among businesses and pseudo-self-regulation. It can no longer act as if the world will somehow return to the late nineteenth century.

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<sup>109</sup> Whelan & Ziv, *supra* note 100.

<sup>110</sup> *Id.* at 2591–92.

<sup>111</sup> President John F. Kennedy, Address in the Assembly Hall at Paulskirche in Frankfurt (June 25, 1963), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=9303>. The full quote reads: “And our liberty, too, is endangered if we pause for the passing moment, if we rest on our achievements, if we resist the pace of progress. For time and the world do not stand still. Change is the law of life. And those who look only to the past or the present are certain to miss the future.” *Id.*



I do not lament this future legal profession that would be absent lawyers regulating lawyers. Some would say it has never actually been so. And no one can claim that in reality it remains exclusively self-governed. To the extent it has ever been genuine self-regulation, it has failed repeatedly.