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## Ethics 20/20 Successfully Achieved Its Mission: It "Protected, Preserved, and Maintained"

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## **ETHICS 20/20 SUCCESSFULLY ACHIEVED ITS MISSION: IT “PROTECTED, PRESERVED, AND MAINTAINED”**

*James E. Moliterno \**

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\* The Vincent Bradford Professor of Law at Washington & Lee University. The themes in this paper are drawn from chapter 9, THE AMERICAN LEGAL PROFESSION IN CRISIS: RESISTANCE AND RESPONSES TO CHANGE (Oxford 2013). JAMES E. MOLITERNO, THE AMERICAN LEGAL PROFESSION IN CRISIS: RESISTANCE AND RESPONSES TO CHANGE ¶ 9 (Oxford 2013).

## I. INTRODUCTION

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.<sup>1</sup>

In 1930 as in 1900 as in 2013, this is the mode of crisis management and regulation of the American legal profession. The legal profession tends to look inward and backward when faced with crisis and uncertainty. The legal profession could make greater advances by looking outward and forward 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 society, solve problems *with* rather than *against* the flow of society, and be more attuned to the society the profession claims to serve.

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 society during times of change. Doing so has caused the profession too often to fail in what could have been a leadership role in society. Rather, the profession has too often seen itself 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 the law's change and the readiness of society for change. The legal profession has been a poor lawyer by this measure. The legal profession, as an institution, most often stays blind to change that is happening all around it.

The profession's focus, inward or outward, drives its understanding and its response to a looming crisis. By inward and outward focused, I mean a couple of things. First, were the profession's actions considerate of the outside world developments, or were they primarily focused on attributes of the profession? Second, did the profession attempt to adjust to world developments, or did it attempt to maintain the profession's status quo in the face of change? Looking inward regarding a crisis means defining the crisis as belonging to the profession rather than to

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

society generally. For example, the civility crisis was defined as a crisis of lawyer behavior without reference to the simple fact that lawyers were members of a broader society that was becoming far more competitive. Looking inward means searching for solutions to problems within the profession's ethos, largely assuming that any problem may be solved without professional change or adjustment. Looking outward means locating a professional woe within the broader societal context, relating lawyers' troubles to corresponding trends and phenomena in the culture generally. In some instances, the more apt descriptors will be "backward" and "forward." These terms give a more temporal than spatial sense. The comparative exists on both spectra: from inward to outward and from backward to forward. Both sets help explain the profession's manner of seeing a crisis and framing a response. Whether characterized on one spectrum or the other, backward or inward vision produces the same result: service of the status quo.

The profession, it turns out, serves the status quo in multiple ways. At times, serving the status quo means making significant changes that will fend off outsiders or cultural change. At other times, serving the status quo means doing as little as possible in the vain hope that change will pass the profession by as if it were a bad dream rendered irrelevant by the morning light. In either event, the profession loses. Change comes and washes over the profession's walls.

The profession began to organize in earnest in the 1870s as state and local bar associations sprang up. For example, the Bar of the City of New York was founded for the profession's "protect[ion], pur[ification] and preserv[ation]."<sup>2</sup> My conclusion is that the legal profession and the American Bar Association, like the Bar of New York City in the 1870s, remain focused on preserving the status quo, facing backward or inward, instead of looking forward or outward to meet the challenges of the present and to predict and engage the changes of the future.

## II. ABA COMMISSION ON ETHICS 20/20: ITS MISSION AND PERFORMANCE

Like the committee charged with drafting the Canons in 1905<sup>3</sup> and the Kutak Commission during the 1970s and early 1980s, aiming to cure the current professional malaise came the 2009 Ethics 20/20

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2. *Professional Organizations*, 6 ALBANY L. J. 233, 233 (1873); Walter B. Hill, *Bar Associations*, 5 GA. B. ASS'N. REP. 51, 75 (1888).

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

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.”<sup>4</sup> This is a worthy enterprise to be sure. But as with most ABA commissions, its membership is entirely made up of lawyers.<sup>5</sup> Experts in technology and global economic trends were not appointed to advise and guide the Commission, let alone speak and vote on it. 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 protection of the public; preservation of core professional values; and maintenance of a strong, independent and self-regulated profession.”<sup>6</sup> “Protection, . . . preservation, . . . and maintenance . . . .”<sup>7</sup> This most recent “reform” mission statement is strikingly similar to that of the first bar associations, born in the 1870s of “crisis” and formed for their profession’s “protect[ion], pur[ification] and preserv[ation].”<sup>8</sup> One of Ethics 20/20’s first decisive acts was to rule out any suggestion of following the Australian or United Kingdom’s alternative business model innovations of the prior decade.<sup>9</sup> Once again, we learn that “hindsight is 20/20,” and this time the lesson has been delivered by the ABA’s Ethics 20/20 Commission.<sup>10</sup>

My criticisms of the Commission should be understood as one aspect of criticism of the profession generally. The profession should have understood and accommodated e-mail and the Internet sooner, understood and accommodated the global economy and the movement of foreign lawyers sooner and more than it has done, understood and

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4. *About*, A.B.A., [http://www.americanbar.org/groups/professional\\_responsibility/aba\\_commission\\_on\\_ethics\\_20\\_20/about\\_us.html](http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/about_us.html) (last visited Aug. 11, 2012).

5. *Id.*

6. *ABA President Carolyn B. Lamm Creates Ethics Commission to Address Technology and Global Practice Challenges Facing U.S. Lawyers*, A.B.A., Aug. 4, 2009, [http://apps.americanbar.org/abanet/media/release/news\\_release.cfm?releaseid=730](http://apps.americanbar.org/abanet/media/release/news_release.cfm?releaseid=730).

7. *Id.*

8. *Professional Organizations*, *supra* note 2.

9. American Bar Association, *ABA Commission on Ethics 20/20 Working Group on Alternative Business Structures: For Comment: Issue Paper Concerning Alternative Business Structures* (Apr. 5, 2011) (Finding that “[a]t 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”).

10. *Id.*

accommodated the changing economic conditions that have led to the outsourcing, and contract lawyer and General Council staff-up phenomena sooner and more effectively. By the time the Commission was formed, many of these horses were out of the barn.

Further, when I suggest that the profession (and the Commission) should be a more outward-looking part of the culture around it, I do not mean that the ABA should abandon its mission of furthering the interests of the American legal profession. The ABA is a trade organization and must, at the end of the day, serve the interests of its trade. But being more aware of the culture, adjusting with it rather than against its shifts, *is* in the best interests of the American legal profession. Its future depends on its ability to change with surrounding circumstances and trends rather than fight against them. The American legal profession must learn to look ahead in order to answer Richard Susskind's title query "The End of Lawyers?"<sup>11</sup> in the negative.

#### A. *Wave 1*

In its first wave of action, the Commission's recommendations were modest, and could be characterized as a combination of housekeeping, reorganizing, and modest updating to include references to more current technological advances. Aside from ruling out any consideration of the British and Australian alternative business models innovations, the Commission's main early proposals were the following:

1. Incoming Foreign Lawyers Report, Proposed Amendments to MR 5.5, May 2, 2011<sup>12</sup>

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

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11. RICHARD SUSSKIND, *THE END OF LAWYERS?* (Oxford 2008).

12. ABA Comm. on Ethics 20/20, *Initial Draft Proposal — Model Rule 5.5* (2011).

2. In House Counsel Registration May 2, 2011 Recommendation<sup>13</sup>

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

3. Outsourcing May 5, 2011<sup>14</sup>

The Report says no changes to black letter rules are required, but recommends additions to comments to Model Rules 1.1, 5.3, and 5.5, none of which would change current law.

4. Technology and Confidentiality May 2, 2011<sup>15</sup>

This Recommendation includes numerous housekeeping edits to Model Rules, most of which restate the fairly obvious. It also adds MR 1.6(c), which articulates a duty to take reasonable care with client information, not a surprising proposition.

5. Pro Hac Vice Recommendations May 2, 2011<sup>16</sup>

This Recommendation would add foreign lawyers to the scope of the rule's application, following the lead of thirteen states, and add more formalities to the application process for pro hac vice admission, making the application process somewhat more onerous.

6. Use of Technology Recommendations, June 29, 2011<sup>17</sup>

This Recommendation updates the nature of electronic client-getting in the Model Rules Comments. It changes the 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 . . . ."<sup>18</sup>

At most, the earlier proposed changes would help catch up to actual

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13. ABA Comm. on Ethics 20/20, *Initial Draft Proposal – In-House Counsel Registration* (May 2, 2011).

14. ABA Comm. on Ethics 20/20, *Initial Draft Proposal – Outsourcing* (May 2, 2011).

15. ABA Comm. on Ethics 20/20, *Initial Draft Proposals – Technology and Confidentiality* (May 2, 2011).

16. ABA Comm. on Ethics 20/20, *Initial Draft Proposal – Pro Hac Vice* (May 2, 2011).

17. ABA Comm. on Ethics 20/20, *Initial Draft Proposals on Lawyers' Use of Technology and Client Development* (June 29, 2011).

18. *Id.*

changes in technology and globalization that have occurred between the last major amendments to the Model Rules in 2002 and the present. Every technology reference in the proposed recommendations simply adds a word here or there in the Model Rules with which all have become familiar: "e-mail," "electronic document." The proposed changes do not change. They articulate what change technology has already made.

Some of 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. Some of the recommended changes to multijurisdictional practice would catch the ABA up to state-adopted changes. Many appear motivated to enhance monitoring of foreign lawyer involvement in the US, 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 reform process. Once again, change, if any, will have little effect on the bar's elite.

#### *B. Proposals to the House of Delegates, 2012*

In its group of proposals to the House of Delegates to be formally considered at the August 2012 Annual Meeting, the Commission ensured by its mildness that nothing will happen that has not already happened by virtue of already-changed technology and global trends. Once again, the American legal profession is changing as little as possible, and then only by capitulating to events that have already taken hold.

The Commission acknowledged the fact of modern lawyer life, true for at least twenty years, that lawyers move from state to state more frequently than in the past. But instead of making any proposals that would fundamentally change the state-by-state license system or even change admission on motion to a system more fitting to twenty-first century lawyer-life, the Commission merely proposed changes to the admission by motion model rule requiring practice in five of the immediately preceding seven years to three of the immediately preceding five years, which is already in place in many states. Additionally, the Commission proposed that a lawyer be permitted a temporary period of practice in a new state pending his or her



application for admission on motion. Neither proposal changes the landscape significantly, nor catches the rules up with current practice — let alone looks forward.

The Commission also proposed a useful change in the confidentiality rule, allowing a lawyer to reveal confidential information to the extent necessary to detect and resolve conflicts. While useful, this proposal has little to do with the Commission's charge to examine the rules in light of the dramatic changes in technology and globalization.

In a nod to the past decade or so, the Commission proposed adding the words "e-mail address" and "website" to the Comments to Model Rules relating to advertising media. Adding these words will not embolden lawyers to use websites and e-mail addresses. That happened in the late 1990s. The Commission proposed that the ABA strike was passé language regarding "autodialed" telephone calls. Recognizing that there are new ways of communicating electronically, the Commission proposed changing the word "e-mail" to "electronic communications." Again, these changes are not likely to affect practice.

Further in its effort to catch the Model Rules' language up with the last decade of changes to technology, the Commission proposed adding the words "or electronically stored information" to the rule regarding inadvertent disclosures. Along similar lines, the Commission proposed new language to the definition of "screen" for purposes of imputed conflict analysis that would require a screened lawyer to be kept away from electronic information as well as tangible documents. Finally on this topic, the Commission acknowledged that outsourcing of legal work is occurring and proposed adding Comment language suggesting that lawyers should be competent in making relationships with those outside the firm. Lawyers who outsource work will not be surprised to learn that they should be competent in doing so.

In perhaps its most constructive proposal, the Commission does explicitly propose adding a suggestion that lawyers be competent with respect to technology. Even this adds no new duty for lawyers, but at least creates some attention on the topic of tech-competence.

Also, without creating any new duty, the Commission does use the word "metadata" in the proposed Comments to the Model Rule regarding inadvertent disclosures. The profession must start somewhere: expanding its vocabulary cannot hurt, but it is unlikely to lend itself to forward thinking.

In August 2012, the House of Delegates considered this first wave of Ethics 20/20 Commission proposals. The proposition was proved once again: if a study commission wants the House of Delegates'

approval, it must keep the proposals modest. With slight adjustments, the House approved all of the Commission's modest proposals. Little, if any, real reform occurred.

The February 2013 proposals that were adopted by the House of Delegates, addressing foreign lawyers, did little to open global borders.<sup>19</sup>

On the most controversial topics, even when an ultra-modest change has been proposed by the Commission, it has been pre-stymied by the House of Delegates and cautious state bar associations. Following its pre-emptive ruling out of ABS changes on the scale of those in place in the United Kingdom and Australia, the Commission continued to consider more modest changes. The District of Columbia is the only U.S. jurisdiction to permit any non-lawyer ownership of law firms. Its form of permission is very modest, very controlled, and very restrictive. So restrictive, in fact, that it is also used very little. No untoward consequences of this crack in permission for non-lawyer ownership have been noticed in the ten years of its limited District of Columbia existence. The Commission concluded that it would propose a change in the ABA rules that would be a *still more modest* crack than that adopted and successfully implemented in the District of Columbia. This proposal would have been debated at the February 2013 ABA meeting. In an April 2012 pre-emptive strike, however, the Illinois Bar, in conjunction with the ABA Senior Lawyers Division, interposed a resolution that, if adopted, would prohibit even the discussion of the more modest District of Columbia reform. From the Report supporting the Resolution:

Substantial media attention has been placed on the Commission's activities. Among other things, this attention may have created the perception that the ABA is going to change its Model Rules to permit fee splitting and non-lawyer ownership of law firms. . . . The American Bar Association should wait no longer to make it clear to the public that this is not going to happen.<sup>20</sup>

As the days passed, the Illinois proposal gained more and more momentum. When Illinois State Bar President John Thies briefed his association on the progress of their proposal, a number of states had already indicated their support for the ISBA/Senior Lawyers Division

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19. See generally *ABA Commission on Ethics 20/20*, [http://www.americanbar.org/groups/professional\\_responsibility/aba\\_commission\\_on\\_ethics\\_20\\_20.html](http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html).

20. Debra Cassens Weiss, *ABA House Postpones Resolution Reaffirming Opposition to Nonlawyer Ownership of Law Firms*, A.B.A. J. (Aug. 6, 2012, 11:26 AM), [http://www.abajournal.com/news/article/resolution\\_confirms\\_aba\\_stance\\_against\\_nonlawyer\\_ownership\\_of\\_law\\_firms/](http://www.abajournal.com/news/article/resolution_confirms_aba_stance_against_nonlawyer_ownership_of_law_firms/).

resolution, including Arizona, Indiana, Maryland, Mississippi, North Carolina, and Tennessee:

[T]his is about defending the core values of our profession against the encroachment of non-lawyers – to the detriment of clients. It’s gratifying that so many other states are lining up behind us, and I expect this to continue as we approach the ABA meeting in August.<sup>21</sup>

Faced with a contentious fight before getting to the merits, the Commission withdrew its proposed amendment.<sup>22</sup> Before the House of Delegates in August 2012, after a briefer than expected debate, the Illinois Resolution was postponed indefinitely. Although the Illinois resolution was postponed rather than adopted, the ABA characterization of the event was that the ABA “Reaffirms Policy on Sharing Legal Fees with Non-Lawyers.”<sup>23</sup> The 2000 rejection of Multidisciplinary practice was reaffirmed in 2012: there is to be no sharing of power with non-lawyers in the American legal profession.

### C. *Ethics 20/20 Compared with Other ABA Reform Commissions*

This failure of various commission reform proposals is a regularly occurring pattern. When the Kutak Commission proposed fraud-prevention exceptions in the original Model Rules, the House of Delegates rejected them. Revivals of the same proposals were rejected in 1991. Essentially the same proposals were shelved by the Ethics 2000 Commission in the shadow of likely rejection by the House of Delegates. Those reforms, three times rejected, were all but forced on a resistant profession by Sarbanes-Oxley and the subsequent U.S Securities and Exchange Commission (“SEC”) action. In 2002, the Multijurisdictional Practice Commission, appearing to have teed up significant reforms in cross-border practice, backed off the major reforms and settled for efforts that were largely articulations and adoptions of common practice. These efforts were useful to be sure, but not reforms. At roughly the same time, the Multidisciplinary Practice Commission proposed major reforms in 1999 and 2000, only to be first sent back for further

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21. Chris Bonjean, *ISBA Submits Resolution Regarding ABA’s Ethics 20/20*, ILL. ST. B. ASS’N. (June 20, 2012), <http://iln.isba.org/blog/2012/06/20/isba-submits-resolution-regarding-abas-ethics-2020>.

22. James Podgers, *Summer Job: Ethics 20/20 Commission Shelves Nonlawyer Ownership*, A.B.A. J. (June 1, 2012, 2:50 AM), [http://www.abajournal.com/mobile/article/summer\\_job\\_ethics\\_20\\_20\\_commission\\_shelves\\_nonlawyer\\_ownership](http://www.abajournal.com/mobile/article/summer_job_ethics_20_20_commission_shelves_nonlawyer_ownership).

23. *Reaffirms Policy on Sharing Legal Fees with Non-Lawyers*, ABA NOW, <http://www.abanow.org/2012/06/2012am10a/>.

deliberation and second rejected outright by the House of Delegates. Now, when the sledding in the House of Delegates appears to be rough, Ethics 20/20 has backed off even modest reforms on controversial subjects and settled for little more than housekeeping and tinkering.

The lesson is clear but not its implications. ABA commissions that remain modest with proposals will pass through the House of Delegates' gauntlet; ABA commissions that propose actual reform will fail. One might argue that if the successful commissions (Multidisciplinary practice and Ethics 20/20) gauge *exactly* what the House would tolerate in the way of change, they at least have accomplished that amount of change. And likewise, those commissions that fail on reform proposals (Kutak and MDP) have accomplished nothing by their willingness to propose more ambitious reform.

There are problems with this analysis, however, making it less clear that getting proposals past the House of Delegates equates with success.

First, what if the successful commissions guessed wrong and were too mild in their proposals? If so, they will have left some reform capacity on the table and the immediate opportunity will have passed. It could be, as some ideologues have suggested, that a game-advancing 5-4 Supreme Court decision is preferable to a watered-down unanimous one.

Second, what if the change that the House is willing to approve is no real change at all? If so, then what can really be said about the enormous personal resources spent by commission members and staff? Did passage of proposals amount to enough to warrant the cost? Even if the modest changes are just that, baby steps in times of rapid technological and social change just cannot keep up.

Third, what if the ABA is not the end of the reform game? The Kutak Commission fraud revelation proposals were defeated by the House of Delegates in the early 1980s. But twenty years later, they were adopted almost verbatim by an ABA that was forced to act by Congress and the SEC following the Enron debacle. The Kutak Commission proposals may have had no connection to the later action whatsoever; but, they may have laid groundwork for it. Indeed, in the 1980s and 90s, so many states adopted the Kutak fraud revelation proposals that by the time the ABA was forced to act twenty years later, the ABA and the states were out of step with social need.

Ethics 20/20 has succeeded in getting its proposals adopted by the House of Delegates. But did it succeed at reform? Much was studied and many excellent papers were prepared by the Reporters examining critical issues, but in the end, precious little real change occurred. One good way to determine the Commission's success at reform is to ask

what has actually changed in the law governing lawyers as a result of its work. Examining the nature of the adopted proposals makes it clear that little has changed. There will be little or no work for treatise and casebook authors in their next editions based on the proposals adopted. One new section of the confidentiality rule that adds no new duty and multiple changes to Model Rule Comments that articulate what has already happened as a result of technology and lawyer mobility. The casebook and treatise writers can make the Ethics 20/20 induced changes to their next editions in thirty minutes or less.

The success of Ethics 20/20 in August 2012 was success in achieving its mission statement: It protected, preserved and maintained.

## II. THE AMERICAN LEGAL PROFESSION IS GOVERNED BY EXTERNAL EVENTS AND CONDITIONS, NOT BY THE PROFESSION ITSELF

The history of the legal profession's self-regulation during self-identified crisis times (such as the present) is not a happy one. The profession has resisted change. When it did institute change, it was directed not at the existing members of the profession, but at new entrants. Changes made have been in service of the status quo. Mostly, change that has come has been forced by influences of society, culture, technology, economics, and globalization, and not by the profession itself. Watergate, communist infiltration, arrival of waves of immigrants, the litigation explosion, the civility crisis, and the current economic crisis blend with the dramatic changes in technology, communications, and globalization. In every instance, the profession held fast to its history and ways, long after those ways became anachronistic. 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?

Time after time, the profession has resisted change when it cannot prevent it. The profession's efforts to keep out immigrants failed to reflect the true spirit of the changes that were happening in America all around the profession: The country was growing stronger by the cultural contributions and diversity of viewpoint that was the true baggage being unloaded from boats full of immigrants. The profession's efforts to prevent the new kind of lawyering that accompanied the civil rights movement failed because the newest entrants to the profession were already steeped in the notion that activism could cure social ills. The profession's efforts to stem the tide of competitive juices that fueled what the profession deemed incivility failed because the lawyers of the

time were also people of the time, and the world had become a more competitive place.

When change comes to the legal profession, forces outside of the profession impact it. The turn of the twentieth-century immigrants eventually integrated themselves into the bar notwithstanding the bar's efforts to diminish and exclude them. Other changes in demographics and culture, leading to the entry of women and blacks into the profession, have been inevitable, even if resisted by the profession at various times. Communism came and went on its own without being affected by the bar's efforts to stem the tide of its professional infiltration. 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. 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 was largely driven by SEC regulations adopted over the profession's objections. Economic changes in the 2000s are what they are. The domestic and global legal market will be what it will be, 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.

What change is occasionally<sup>24</sup> wrought at the hands of the organized bar seems designed to leave the lives of the bar's elite as-is to the greatest extent possible. The major changes that followed in Watergate's wake raised entry barriers (the MPRE and required ethics courses in law school), but had barely a wisp of effect on the already-admitted.<sup>25</sup>

The legal profession and the society it claims to serve would be better off if regulation of the legal profession were more open and

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24. The ABA Canons were in force for sixty-two years (1908 to 1970) when at long last they were replaced by the Model Code. *See generally* MODEL RULES OF PROF'L RESPONSIBILITY (1969) (amended 1970). The ink on the Model Code barely dried when Watergate sent the profession scrambling for public relations cover in 1976 in the form of the Model Rules. The major Model Rules' amendments between 1983 and 2012 have been driven by forces outside the profession, such as the post Enron amendments to MR 1.6 and 1.13 and the currently proposed Ethics 20/20 amendments that largely reflect changes in technology that have already occurred. Otherwise, the amendments to the Model Rules have been more like tinkering than reform.

25. The change from Model Code to Model Rules, as adopted rather than as proposed, was more repackaging than concept or lawyer-obligation changing.

viewpoint-inclusive. No entity, whether motivated by profit, altruism, or a mixture of the two, can manage itself without an eye toward the future. Successful businesses and institutions engage in forward-looking strategic planning. Successful 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.

In contrast, the American legal profession regulates primarily in response to crisis. When it does regulate, it makes as little change as possible. Much of the "change" actually made is done in the service of preserving the status quo. The 1908 Canons were almost entirely copied from materials published in 1834, 1854, and the 1880s, and the only new material prohibiting advertising was meant to thwart the effectiveness and market-penetration of the emerging plaintiffs' lawyer class, mainly of immigrant stock. The scramble of change in the late 1970s was meant primarily to quell the furor over Watergate; and the Ethics 20/20 current proposed changes do little more than formally capitulate to the irresistible forces of technology and global changes that have already happened. This is management by looking backward and inward, management in service of the status quo.

Change should be studied and embraced rather than resisted. For the legal profession to do this, it must change its manner of regulation in a fundamental way. It must welcome the views of non-lawyers not merely to mollify the public, but because lawyers are not all-knowing. It 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.

#### A. *Why Nonlawyers?*

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 backward looking by its nature.

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. The business-clients 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 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 liabilities. 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 and training to over-value 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' tendencies to be conservative, reliant on the past, and even insecure.<sup>26</sup> 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. Successful lawyers look backward.

Certainly there are exceptions, but the most forward-thinking lawyers are not likely to be the leaders of the profession. Richard Susskind, for example, a forward-thinker and lawyer, is an unlikely candidate for Chairman of the United Kingdom Bar Council. Certainly, were he an American, he would not likely rise to President of the ABA. He simply has not followed the historical 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 path to high leadership in the ABA and the profession is well-marked. Of the eleven ABA Presidents from 2001 to 2012,<sup>27</sup> one came from a firm of less than 100. Most came

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26. See generally DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* (Little Brown & Co. 1963).

27. Wm. T. (Bill) Robinson III, (2011-2012); Stephen Zach, Immediate Past President (2010-2011); Carolyn Lamm (2009-2010); H. Thomas Wells Jr. (2008-2009); William H. Neukom (2007-2008); Karen Mathis (2006-2007); Michael S. Greco (2005-2006); Robert S. Grey (2004-2005); Dennis Archer (2003-2004); Alfred P. Carleton Jr. (2002-2003); and Robert E. Hishon (2001-2002).



from firms of 150 to 800. Several came from firms of 2,000 lawyers. All had long leadership records with ABA, ALI, or state bars. First bar licensing for each was in the 1970s or before. Interestingly, unlike earlier generations of ABA Presidents, most did not graduate from elite law schools. At least for this generation, an elite law school diploma is not a prerequisite to professional success. “Lawyers 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>28</sup> By contrast, successful business-people, scientists, and others who lead successful institutions *do* face squarely the world as it is likely to become. They must. Innovative individual lawyers must also face the world as it is likely to become. But as of yet, they are as unlikely to be bar leaders as are business-people or scientists. This, too, needs to change for the future health of the profession.

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 General Electric, 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.<sup>29</sup>

Watson, the IBM computer technology, provides an example of non-lawyer 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, the IBM scientists pursued an entirely new form of computing: creating a computer capable of analyzing unstructured data in natural language.<sup>30</sup> Not more volumes of information; better computing.

#### B. *Be Western Union, Not Kodak*

Two household-name corporations, founded in the same era as the legal profession organized, provide a lesson in contrasting management from which the legal profession could learn.

In the late nineteenth century, at about the same time that the legal

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28. Thomas Morgan, *Toward Abandoning Organized Professionalism*, 30 HOFSTRA L. REV. 947, 975 (2002).

29. RICHARD SUSSKIND, *THE END OF LAWYERS* at 3 (Paperback ed., Oxford 2010).

30. *The Science Behind Watson*, IBM, [http://www-03.ibm.com/innovation/us/watson/science-behind\\_watson.shtml](http://www-03.ibm.com/innovation/us/watson/science-behind_watson.shtml).

profession created undoubtedly its most lasting product innovation, the corporate form, George Eastman was founding Kodak, an American icon known for technology innovation of cameras, film, and processing.<sup>31</sup> Kodak was once one of the top brands in America, at its peak owning 90 percent of the U.S. film market.<sup>32</sup> For more than 120 years, Kodak looked inward for problem solving and innovation. In fact, at one time they raised their own cattle for the bones needed to produce photographic gelatin. 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.<sup>33</sup> It developed the first digital camera and had a sense of the future of photographic technology. But the profits from its established product, film, were so enormous that they feared rapid decline in film sales once digital technology was broadly available. 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. Within five years of its late entry in 2000, it became a leader in that market, 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>34</sup>

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>35</sup>

Kodak's insular corporate culture and resistance to change caused them to miss the shift of how consumers 'consumed' photography. The market became one in which it did not matter what technology was used to create the image (camera, phone, or laptop). Kodak did not foresee the shift from a product market to an electronic services-based market. They recognized the problem too late, and were too slow to react. Nancy West, a University of Missouri professor who wrote a history of

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31. 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/>.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

Kodak's early years, commented:

When (George Eastman) died, . . . Kodak immediately became bound up in nostalgia. Nostalgia's lovely, but it doesn't allow people to move forward.<sup>36</sup> . . . The seeds of the problems of today go back several decades. . . . Kodak was very Rochester-centric and never really developed a presence in centers of the world that were developing new technologies. It's like they're living in a museum.<sup>37</sup>

Kodak filed for bankruptcy protection in January 2012, with a business plan to sell its patents, a marker of a business' final capitulation.

Had Kodak looked outside itself, it might have behaved more like Western Union. Founded in the same era as Kodak and the organized form of the American legal profession, Western Union adjusted to each change in society's development. It handled the first transcontinental telegram in 1861 and started the business of transferring money by wire ten years later. Like Kodak, it executed a series of firsts: a city-to-city facsimile service, a microwave communications system, a commercial satellite network, and online money transfer.<sup>38</sup>

Why has Western Union been able to adapt to severe disruptions and survive over so many years? It never confused the *business* it was in with the *way* it conducted its business (emphasis added). At its core, Western Union was about facilitating person-to-person communications and money transfers — whether via telegraph, wireless networks, phone, or the Internet. 'We always saw ourselves as a communications company.'<sup>39</sup>

Founded in 1851 as a telegraph company, Western Union's early company history is one of growth by expansion to create a coast-to-coast U.S. network.<sup>40</sup> 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. In 1869, it developed the first stock ticker; and in 1871 introduced money transfers.<sup>41</sup> Western Union

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36. *Kodak: What Led to Bankruptcy*, HINDUSTANTIMES, Jan. 22, 2012, <http://www.hindustantimes.com/technology/IndustryTrends/Kodak-What-led-to-bankruptcy/SP-Article1-800633.aspx>.

37. *Id.* (quoting Rosabeth Kanter, the Ar buckle Professor of Business Administration at Harvard Business School).

38. Steve Hamm & William C. Symonds, *Mistakes Made on the Road to Innovation*, BLOOMBERG BUSINESSWEEK MAGAZINE, Nov. 26, 2006, <http://www.businessweek.com/stories/2006-11-26/mistakes-made-on-the-road-to-innovation>.

39. *Id.* (quoting Christina Gold, Western Union President).

40. *Id.*

41. *Id.*

was one of the first 11 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. It owned a large physical infrastructure of pre-Internet communications. The age of the Internet changed the game. Profits had already dropped after WWII 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 it to expand its money transfer services outside the United States; Western Union saw the opportunity and took it.<sup>43</sup>

By 1987, the company went through a massive restructuring just before it was forced into Chapter 11 protection. 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.<sup>44</sup> But the electronic money transfer service it started in 1871 is in 200 countries today. "At its core, Western Union was about facilitating person-to-person communications and money transfers — whether via telegraph, wireless networks, phone, or the Internet."<sup>45</sup>

The legal profession behaves more like Kodak, whose own 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 being rejected by the American socio-political consensus, and expended much of its energy trying to restore a lost American past.<sup>46</sup>

### C. *If Not from Forward-Looking Leadership, From Where Will Change Come*

Two other obvious sources of regulation and forced-change outside the profession present themselves: government and competition. The

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42. *Id.*

43. *New Valley Corporation History*, FUNDINGUNIVERSE, <http://www.fundinguniverse.com/company-histories/New-Valley-Corporation-Company-History.html> (last visited Aug. 8, 2012); *Our Rich History*, WESTERN UNION, <http://corporate.westernunion.com/history.html> (last visited Aug. 8, 2012).

44. *Id.*

45. Hamm & Symonds, *supra* note 38.

46. John Matzko, *The Early Years of the American Bar Association, 1878-1928*, 518 (1984) (unpublished dissertation, University of Virginia) (on file with author).

former is especially resisted in the U.S. context 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>47</sup> The so-called Tesco law, permitting nonlawyer ownership of law firms, was not initiated by the legal profession, but by Parliamentary studies and action.<sup>48</sup> In the United States, arguably the most significant, single substantive change in the law governing lawyers of the past century was forced by government action.<sup>49</sup> The early twenty-first century reduction in the scope of the duty of confidentiality that was signaled by amendments to 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, was rejected in the 1980s during ABA consideration of the Kutak Commission proposals<sup>50</sup> and again in the Ethics 2000 proposals in 2002. When the reduction in 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, 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>51</sup> Even in this instance of regulation coming from government action, the ABA used a "saturation

47. For an excellent account of these reforms, see Christopher Whelan, *The Paradox of Professionalism: Global Law Practice Means Business*, 27 PENN ST. INT'L. L. REV. 465, 472-82 (2008).

48. THE CLEMENTI REPORT; LEGAL SERVICES ACT OF 2007.

49. 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. *Bates v. Ariz. Bar*, 433 U.S. 350 (1977) (striking down near-blanket prohibitions on advertising); *Goldfarb v. Va. St. Bar*, 421 U.S. 773 (1975) (holding minimum fee schedules to be unlawful); *Sup. Ct. of N.H. v. Piper*, 470 U.S. 274 (1985) (striking down residency requirements); *In re Griffiths*, 413 U.S. 717 (1973) (striking down citizenship requirements).

50. CTR. FOR PROF'L RESPONSIBILITY, ABA, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005 101 (2006).

51. Thomas D. Morgan, *Toward Abandoning Organized Professionalism*, 30 HOFSTRA L. REV. 947, 970 (2002) ("[T]he effect of competition on clients will have an inevitable impact on lawyers"). Morgan argues that ABA pronouncements are of decreased importance because policy justifications for a lawyer monopoly are losing their persuasiveness. Morgan argues lawyers have no unique claim to core lawyer values. *Id.* Furthermore, lawyers' attempts to limit who clients may consult are doomed to fail due to market forces. CTR. FOR PROF'L RESPONSIBILITY, ABA, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005 101, 118-9, 133-7, 291, 308 (ABA Center for Professional Responsibility, 2006).

bombing attack" to stave off the originally proposed version of the SEC regulations that would have increased the obligations of lawyers to report up the ladder.<sup>52</sup>

Despite this major instance of government regulation forcing reform of the law governing lawyers, the mood for such regulation is far different in the United States from, 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>53</sup> In the United Kingdom, the legal profession has long been treated far more like any other business by the government.<sup>54</sup> In the United States, professional resistance to being treated like other businesses subject to government regulation is much more powerful.

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

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52. Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1189 (2003), reprinted in ENRON CORPORATE FIASCOS AND THEIR IMPLICATIONS 571, 767 (Nancy B. Rapoport & Bala G. Dharan eds. 2004). "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, and ABA Task Force actually did recommend this modest but important reform in 2002. *Id.* 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." *Id.* "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." *Id.*

53. *Justice in France*, MINISTÈRE DE LA JUSTICE (Apr. 26, 2011), <http://www.justice.gouv.fr/multilinguisme-12198/english-12200/justice-in-france-22126.html>. In France, the Civil Affairs and Seals Directorate, a subdivision of the Ministry of Justice, supervises the legal professions including lawyers. *Id.*

54. *Welcome to the Legal Services Board*, LEGAL SERVICES BOARD, <http://www.legalservicesboard.org.uk/>. The new independent body responsible for overseeing the regulation of lawyers in England and Wales shares regulatory objectives with the Approved Regulators. *Id.* See, e.g., LEGAL AID AND ADVICE ACT OF 1949. This Act's propriety and wisdom was debated by U.S. lawyers on the pages of the ABA Journal. Robert G. Storey, *The Legal Profession Versus Regimentation: A Program to Counter Socialization*, 37 A.B.A. J. 100, 101 (1951); Warren Freedman, *The Legal Profession and Socialization: A Reply to Dean Robert G. Storey*, 37 A.B.A. J. 333, 333 (1951).

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>55</sup>

In *Hishon v. King & Spaulding*,<sup>56</sup> an Issue Statement in the Supreme Court brief of King and Spaulding 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 EEOC: “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>57</sup>

When the FTC preliminarily decided that lawyers should be covered by its regulations pursuant to the Gramm-Leach-Bliley Act of 1999,<sup>58</sup> the ABA responded quickly, requesting a lawyer-exemption from the privacy-policy regulations.<sup>59</sup> Despite support from select members of Congress, the FTC declined to make the lawyer-exemption. 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. Nineteen state and local bar associations filed amicus briefs with the court. The litigation succeeded and lawyers were effectively exempted from the privacy obligations of the regulations.<sup>60</sup>

Similar protestations occurred as the SEC was drafting its regulations pursuant to the Sarbanes-Oxley Act.<sup>61</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 rejected them in the consideration of the Kutak Commission report in 1983<sup>62</sup> and again

55. LAWRENCE J. FOX, *The Academics Have It Wrong: Hysteria Is No Substitute for Sound Public Policy Analysis*, in ENRON CORPORATE FIASCOES AND THEIR IMPLICATIONS 851, 866 (Nancy Rapoport, Bala Dharan eds., 2004).

56. *Hishon v. King & Spaulding*, 467 U.S. 69 (1984).

57. Brief for King & Spaulding, at \*16, *Hishon*, 467 U.S. 69 (No. 82-940) (citation omitted).

58. Gramm Leach Bliley Act, Pub. L. No. 106-102 (1999).

59. *Governmental & Legislative Work*, ABA, [http://www.americanbar.org/advocacy/governmental\\_legislative\\_work.html](http://www.americanbar.org/advocacy/governmental_legislative_work.html).

60. *N.Y. St. Bar Ass’n. v. FTC*, 276 F. Supp.2d 110 (S.D.N.Y. 2003).

61. FOX, *supra* note 55 at 851-2.

62. CTR. FOR PROF’L RESPONSIBILITY, ABA, A LEGISLATIVE HISTORY: THE DEVELOPMENT

when Ethics 2000 proposed such reforms in 2002.<sup>63</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>64</sup> The ABA's Ethics 2000 Commission had very recently sent the academic proponent of the eventual SEC regulation "packing"<sup>65</sup> less than a year before Sarbanes-Oxley section 307 ("eerily captioned 'Rules of Professional Responsibility for Lawyers'" as described by profession-opponent Fox)<sup>66</sup> was passed, triggering the SEC to adopt its regulations.

Beyond the independence shield to government regulation, lawyers have dominated legislative bodies to a far greater extent in the United States than elsewhere. In the late 1950s, lawyers occupied two-thirds of the Senate seats and 56 percent of the House seats.<sup>67</sup> The lawyer-dominance in legislatures is on the decline, but retains significance. In the early 1970s, 51 percent of Senate members were lawyers, compared to 37 percent in 2012.<sup>68</sup> In the 1960s, 43 percent of U.S. House members were lawyers, compared to 24 percent in 2012.<sup>69</sup> This reality alone makes significant reform at the hands of government less likely and confined to narrow issues that present real electoral fall-out 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 it is just as likely that in the United States, 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 lawyer's behavior.<sup>70</sup> Bar ethics rules and disciplinary processes are but one form, and likely not the most important form, of lawyer regulation

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OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005 100 (2006).

63. *Id.* at 117-29.

64. *Id.* at 291-314.

65. FOX, *supra* note 55, at 864.

66. *Id.* at 865.

67. Ross Malone, *The Lawyer's Role in Promoting the Rule of Law*, 43 MARQ. L. REV. 3, 5 (1959).

68. Debra Cassens Weiss, *Fewer Prelaw Students Interested in Political Careers; Is Money the Reason?*, ABAJOURNAL (Apr. 9, 2012, 6:00 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/).

69. *Id.*

70. David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 887 (1992); Fred. C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147, 1158 (2009).



“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. Malpractice liability, a creature of state law, governs lawyer conduct. Procedure and evidence rules, adopted by courts, sometimes with an assist and influence by Congress or a state legislature, govern lawyer conduct.<sup>71</sup> Decisional law regulating prosecutorial misconduct governs some lawyers’ conduct. Courts, state and federal, in the form of rulings on motions to disqualify, now have the responsibility of policing conflicts of interests. Even outside the realm of publicly made law, the private law of malpractice insurance carriers governs lawyer conduct. Malpractice carriers direct lawyers in their adoption of office procedures to ferret out conflicts of interest, to protect confidentiality, to supervision of non-lawyer staff, and many other matters. All of these and more lawyer control devices have advantages over bar discipline as a motivator of lawyer behavior. Malpractice liability is more attractive for claimants because they receive compensation. Violations of evidence and procedural law can have direct monetary consequences for the governed lawyer. Malpractice insurance carriers have a virtual monopoly on a necessary commodity for lawyers, and the carriers are powerfully motivated to regulate lawyer conduct to control their own level of risk.

Finally, of course, the market governs lawyer conduct and regulation as well. 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. But this is changing and as it does, 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. Clearly, the organized profession will adopt U.K. or Australia-like ABS models on its own. In one of its first actions, ABA Ethics 20/20 pre-emptively rejected any such changes taking place during its examination of “radical” changes of technology and globalization.<sup>72</sup>

Other sources of competition are forcing reforms in the delivery of legal services. Some of these reforms will force change in lawyer

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71. Examples include the evidentiary privilege, mainly a creature of the common law with modest procedural rule modifications F.R.E. 501, 502, and frivolous claims rules such as F.R.C.P. 11 and its state law counterparts.

72. ABA Commission on Ethics 20/20, Working Group on Alternative Business Structures, *For Comment: Issues Paper Concerning Alternative Business Structures* (Apr. 5, 2011).

regulation as web-based providers cross borders and staffed-up General Council ("GC") offices clamor for the right to sell their services to their own corporate customers.

General Council offices are staffing up and changing their way of doing business with law firms.<sup>73</sup> Corporate procurement offices now manage the purchase of legal services much as they have managed the purchase of paper clips, or in the United Kingdom as they manage the purchase of "loo rolls."<sup>74</sup> Outsourcing of low-level legal tasks has continued to grow, being utilized by both corporate clients and law firms alike.<sup>75</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, allowing them to compete for the corporate business against urban firms.<sup>76</sup> LegalZoom<sup>77</sup> and other online providers, including virtual law firms, have entered the market for service provision to small businesses and individuals. Private judging websites such as legalfaceoff.com promote the opportunity to skip both lawyers and courts when resolving modest-value disputes.

In a dramatically different form, the legal profession is being influenced and changed by non-lawyers, in the form of corporate clients. Through their General Counsels, corporate clients are imposing behavior guidelines on their outside counsel in the form of Outside Counsel

73. Jennifer Smith, *Law Firms Keep Squeezing Associates*, WALL ST. J., LAW JOURNAL (Jan. 30, 2012), <http://online.wsj.com/article/SB10001424052970203363504577186913589594038.html>.

74. Christopher J. Whelan & Neta Ziv, *Privatizing Professionalism: Client Control of Lawyers' Ethics*, 80 FORDHAM L. REV. 2577, 2586 (2012).

75. *Id.* at 2583; Debra Cassens Weiss, *Nixon Peabody Isn't Shy About Its Hiring of an Outsourcing Company*, ABAJOURNAL (Jan. 31, 2012 9:20 AM), [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/).

76. Clark Baird Smith LLP, Press Release of Sept. 1, 2010 (on file with author).

77. LEGALZOOM, <http://www.legalzoom.com/> (identified as one of the most innovative new companies). See David Lidsky, *For Bringing Tech and Accessibility to the Hidebound Legal Industry*, FASTCOMPANY, <http://www.fastcompany.com/most-innovative-companies/2012/legalzoom>. See *We The People and LegalZoom Document Preparation Services*, <http://www1.ctbar.org/sectionsandcommittees/committees/UPL/08-01.pdf>; Letter from Anthony S. di Santi, Chair, Authorized Practice of Law Committee, to Charles E. Rampenthal, Vice President and General Counsel, LegalZoom.com, Inc. (May 5, 2008), <http://greatestamericanlawyer.typepad.com/ncapccd4.pdf>; Nathan Koppel, *Seller of Online Legal Forms Settles Unauthorized Practice of Law Suit*, WSJ BLOGS (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/>. (accused of unauthorized practice by various state bars). See Gene Quinn, *LegalZoom Sued in Class Action for Unauthorized Law Practice*, IPWATCHDOG, <http://www.ipwatchdog.com/2010/02/09/legalzoom-sued-in-class-action-for-unauthorized-law-practice/id=8816/>. See *Gov. Perry: LegalZoom to Move Up to 600 Jobs to Austin, TX*, IPWATCHDOG (Feb. 19, 2010, 3:11 PM), <http://www.ipwatchdog.com/2010/02/19/legalzoom-to-move-600-jobs-to-tx/id=9176/>. (fought over by states wishing to bring in LegalZoom staff jobs).

Procedures.<sup>78</sup> These documents come in all sizes and shapes, some quite modestly requiring outside counsel to behave ethically and others dictating employee policies to outside counsel, including diversity hiring, task-staffing policies, and establishment of work/life balance and flextime policies. “Behaving ethically” in this context itself means more than merely abiding by professional norms. It includes maintaining whistleblower protection, engagement in the community, and other distinctively non-lawyer professional norms.<sup>79</sup>

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

A rather twisted explanation of the OC policy phenomenon could claim it to be self-governance in a new form. After all, the drafters and main enforcers of the OC policy are lawyers, GCs. Not bar authorities to be sure, but lawyers nonetheless. 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 GCs are not lawyers governing lawyers. They are doing their corporate employers’ bidding and not attempting to impose professional norms on their outside counsel brothers and sisters. 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>80</sup> But the OC policy phenomenon is much more: Both endeavor to influence counsel’s staffing, use of electronic resources, and other expenses. But the OC policies go far beyond imposing internal policies on outside law firms, employment policies, environmental policies, and community engagement policies. And OC policies are imposed by the client. Insurance carrier guidelines, though heavily influential on insurance defense lawyers, must always remain in the form of “guidelines” because they come not from the insured client, but from a third party paying for the legal services.

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78. See generally Whelan & Ziv, *supra* note 74 at 2479.

79. *Id.* at 2589 (citing Apple’s Outside Counsel Policy).

80. See *Pfeiffer v. Sentry Ins.*, 745 F. Supp. 1434, 1441-42 (E.D. Wis. 1990).

OC policies even go so far as to create new norms in traditional areas of professional regulation. Conflict "rules," as imposed on retained outside counsel, expand to preclude engagements with other clients at the preference of the client. 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>81</sup>

### III. IN THE END, CHANGE COMES. ALWAYS.

In the end, change always comes. At the same time as the profession was trying to turn back the civil rights clock, John 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 present are certain to miss the future."<sup>82</sup> The legal profession has no choice about whether change will come or not. The legal profession's choice is whether or not 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 non-lawyers presents the most advantageous way for the legal profession to grow and change on its own terms. Creative non-lawyers 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 effected either by government or the forces of competition.

A future of claimed self-regulation without the input of creative non-lawyers 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 to 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.

The need for non-lawyers is now critical. For one, fleeting moment of admirable humility and clear vision in 1989, the profession flirted with the notion of needing outsiders to help solve its problems. "The legal profession alone cannot solve its own problems, the problems of the justice system or those of the communities it serves."<sup>83</sup> The moment

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81. Whelan, *supra* note 74, at 2591.

82. The full quote is as follows: "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." (Address in the Assembly Hall at Paulskirche in Frankfurt, June 25, 1963).

83. *ABA Taskforce on Outreach to the Public*, 114 Ann. Rep. A.B.A. 88, 88 (1988-89).

was fleeting, as little action followed realization. So there is hope, however small, that the legal profession has the capacity, somewhere, to see outside itself.

But if it cannot humble itself to look outside its walls for help, it will find itself as whatever change created by technology, competition, globalization, and government leave behind. It will have lost, finally, whatever vestige and claim of self-governance remains.

The ABA's and the profession's governance systems are badly flawed. They all but dictate a backward-looking institution, one that cannot see the road ahead. A panel member at this symposium defended the ABA, quoting Winston Churchill: "It has been said that democracy is the worst form of government, except for all those other forms that have been tried from time to time."<sup>84</sup> Churchill may well have been correct about governments and political bodies; but there are better ways to manage institutions and organizations than by cumbersome, political processes designed to maintain the status quo. Businesses and institutions need forward-looking, nimble management. They need open-eyed evaluations of market trends and economic and cultural change. The legal profession is an institution and a business, not a nation's government. It need not have a governing body that is larger and even more ponderous than the U.S. House of Representatives. It need not function as a multi-party legislature with too many factions to act responsibly. It should instead consider the future of the legal profession's viability in a way that does not seek to perpetuate its past.

I, for one, do not lament the prospect of a future legal profession that would be absent lawyers exclusively regulating lawyers. Some would say it has never actually been so. Certainly it has not been so since forces of governance for lawyers beyond bar discipline have been recognized. To the extent it has ever been genuine self-regulation, the profession has failed repeatedly. No time remains for exclusively looking inward and backward. Change has come and will again. Unless the profession changes its change-game, it will do as it has always done and be washed over and passed by with every major development.

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84. Winston Churchill, *Quotation #24926 from Classic Quotes*, THE QUOTATIONS PAGE, <http://www.quotationspage.com/quote/24926.html>.