

REFORM OR PROFESSIONAL RESPONSIBILITY AS USUAL: WHITHER THE INSTITUTIONS OF REGULATION AND DISCIPLINE?

*Fred C. Zacharias**

In this article, the author predicts five institutional changes in the realm of Professional Responsibility that are likely to occur in the twenty-first century. First, he suggests that the enforcement of professional ethics will likely become more nationalized. Traditionally, each state has been responsible for enacting and enforcing its own ethic rules. However, with the increase of national, multistate, and international practice, lawyers should expect a more uniform system of professional regulation in the future and a greater degree of negotiation among the states and the federal government concerning the types of regulation that are appropriate.

Second, the author suggests that disciplinary systems likely will become more transparent. Traditionally, policy making in the disciplinary process and information regarding enforcement have been kept from public scrutiny. Opening the process would help develop respect for the rules and would improve enforcement techniques.

Third, he suggests that local bar associations will reevaluate the functions they perform and will acknowledge the multiplicity of the goals they seek to achieve. In the process, they will recognize that these goals are sometimes inconsistent. The long-term result will be that local bars will rely more on other regulators to restrain lawyer misconduct. They will shift their priorities towards functions, including lawyer assistance, that bar associations are uniquely suited to fulfilling.

Fourth, the author predicts changes in the licensing and admission of lawyers. Traditionally, all lawyers have been treated the same for purposes of admission, regulation, and discipline. In the future, it

* Herzog Research Professor and University Professor, University of San Diego School of Law. The author thanks Professors Michael Devitt and Shaun Martin for their thoughtful comments and Soo Cho, Paul Greco, Karli Jungworth, Laura McKenna, and Leah Plaskin for their research assistance. Work on this Article was financially supported by the University of San Diego Law School's generous research assistance program.

is likely that a system of specialty examination and licensing will provide official methods of differentiating among lawyers.

At the same time, the author suggests that the definition of the practice of law will result in a decrease in some forms of licensing. Greater recognition of the interrelationship between legal and nonlegal work will open the door to negotiation among the professions regarding who may provide services tangential to law. Opening the door to lay-providers may also be a necessary reaction to the growing, unsatisfied need of the poor and middle classes for law-related services.

An eighteenth-century British essayist once wrote, "If the world were good for nothing else, it is a fine subject for speculation."¹ Nowhere do these words ring truer than in the world of professional responsibility. Speculation is on the rise, as the new century has embarked with routine soothsaying concerning the fate of legal ethics regulation.

The anticipation of change began with the publication of the Restatement of the Law Governing Lawyers,² which was heralded as refocusing the attention of the professional responsibility community on "law" broader than the legal ethics codes.³ Soon thereafter, the American Bar Association's (ABA's) Ethics 2000 Commission completed the project of reviewing and revising the existing model codes.⁴ Then, two other major ABA Commissions studied narrower perplexing rules governing traditionally regulated activities: multidisciplinary practice⁵ and

1. William Hazlitt, *Characteristics: In the Manner of Rochefoucault's Maxims*, No. 302 (1823), reprinted in COLUMBIA DICTIONARY OF QUOTATIONS 862 (Robert Andrews ed., 1993).

2. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000) [hereinafter RESTATEMENT].

3. See, e.g., Lawrence J. Latta, *The Restatement of the Law Governing Lawyers: A View from the Trenches*, 26 HOFSTRA L. REV. 697, 708-09 (1998) (describing the unprecedented broad scope of the Restatement of the Law Governing Lawyers); David C. Little, *The Potential Impact of the Restatement (Third) of the Law Governing Lawyers*, 25 COLO. LAW., Sept. 1996, at 83, 86 (noting the Restatement's scope and arguing that it "will certainly have an impact on the entire practice of law and the lawyer's relationship with clients, courts and third parties"); Charles W. Wolfram, *The Concept of a Restatement of the Law Governing Lawyers*, 1 GEO. J. LEGAL ETHICS 195, 199-203 (1987) (describing the Restatement's scope and purpose).

4. See REPORT OF THE ETHICS 2000 COMMISSION, FINAL RULES, at www.abanet.org/cpr/e2k-final_rules2.html (last visited Apr. 10, 2003). The Commission described its charge as: "1) conducting a comprehensive study and evaluation of the ethical and professionalism precepts of the legal profession; 2) examining and evaluating the ABA Model Rules of Professional Conduct and the rules governing professional conduct in the state and federal jurisdictions; 3) conducting original research, surveys and hearings; and 4) formulating recommendations for action." ETHICS 2000 COMMISSION ON THE EVALUATION OF THE RULES OF PROFESSIONAL CONDUCT, MISSION STATEMENT, at http://www.abanet.org/cpr/e2k-mission_statement.html (last visited Apr. 10, 2003).

5. See ABA COMM'N ON MULTIDISCIPLINARY PRACTICE, REPORT TO THE HOUSE OF DELEGATES (July 2000), at <http://www.abanet.org/cpr/mdpfinalrep2000.html>. The Commission's charge was to "study and report on the extent to which and the manner in which professional service firms operated by accountants and others who are not lawyers are seeking to provide legal services to the public." *About the Commission*, at http://www.abanet.org/cpr/mdp_abt_commission.html (last visited Apr. 17, 2003).

multijurisdictional practice.⁶ An ABA “task force” began to work on the issue of how the concept of “the practice of law” might be defined, but ultimately decided to leave the issue for review by the states.⁷ In this atmosphere of introspection and revision, numerous academic symposia charged participants with predicting changes in lawyer regulation that we will see as the twenty-first century develops.⁸ These symposia, like the instant conference,⁹ reflect the gospel that it is fun, as well as intellectually stimulating, to forecast the future. With the disclaimer that I too am only speculating, I happily join the predictive process.

Despite the hoopla generated by the events of the past few years, one fair observation about both the Restatement and the Ethics 2000 Project is that, because of their missions, neither acknowledged the possibility of fundamental change in the regulation of professional responsibility. By its terms, the Restatement confined itself to “restating” existing law.¹⁰ Although the drafters sometimes saw fit to depart from this stricture,¹¹ they typically did so only to the degree of adopting limited approaches to specific issues that some American jurisdictions already

6. For a catalogue of the Commission’s activities, see ABA COMM’N ON MULTIJURISDICTIONAL PRACTICE, at <http://www.abanet.org/cpr/mjp-home.html> (last visited Apr. 10, 2003). The mission delegated to the Commission was to

research, study and report on the application of current ethics and bar admission rules to the multijurisdictional practice of law . . . [to] analyze the impact of those rules on the practices of in-house counsel, transactional lawyers, litigators and arbitrators and on lawyers and law firms maintaining offices and practicing in multiple state and federal jurisdictions . . . [to] make policy recommendations to govern the multijurisdictional practice of law that serve the public interest . . . [to] review international issues related to multijurisdictional practice in the United States.

ABA COMM’N ON MULTIJURISDICTIONAL PRACTICE OF LAW, MISSION STATEMENT, at http://www.abanet.org/cpr/mjp-mission_statement.html (last visited Nov. 13, 2002).

7. See ABA TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, at www.abanet.org/cpr/model_def_home.html (last visited Apr. 10, 2003). *Unauthorized Practice: Utah and Arizona Define Practice of Law; ABA Group Optes Not to Set Model Definition*, 19 ABA/BNA LAW. MAN. ON PROF. CONDUCT 212 (Apr. 9, 2003) (reporting the ABA Task Force’s decision not to adopt a model definition for what it means to practice law).

8. Chronologically, the first symposium took place at Hofstra Law School on September 9–11, 2001, and addressed the question “Legal Ethics: What Needs Fixing?”. Fordham Law School sponsored a conference on November 8–9, 2001, which asked “What does it mean to practice law in the interests of justice in the 21st century?” A February 22, 2001, University of Arizona Law School symposium then focused on “The Future Structure and Regulation of Law Practice.”

9. The organizers of this symposium have asked the participants to address the following question: “Ethics 2000 and Beyond: Reform or Professional Responsibility as Usual?” Letter from Richard W. Painter, Professor of Law, University of Illinois College of Law (Oct. 10, 2001) (on file with the University of Illinois Law Review).

10. This is the traditional goal of all the restatements, and the Restatement of the Law Governing Lawyers ostensibly accepted this as its goal as well. See Wolfram, *supra* note 3, at 198–99 (describing the Restatement’s Chief Reporter’s vision of the project).

11. See, e.g., Charles W. Wolfram, *Bismarck’s Sausages and the ALI’s Restatements*, 26 HOFSTRA L. REV. 817, 818–19 (1998) (noting that at least one position taken in the Restatement could not be justified on the basis of even one American jurisdiction’s position). See generally Fred C. Zacharias, *Fact and Fiction in the Restatement of the Law Governing Lawyers: Should the Confidentiality Provisions Restate the Law*, 6 GEO. J. LEGAL ETHICS 903 (1993) (questioning the degree to which the Restatement restates, or should restate, the law).

follow.¹² Likewise, the Ethics 2000 Project only evaluated the existing model code provisions and suggested tinkering to provide marginally improved results.¹³ Neither of these examinations of the preexisting law, however, reconsidered traditional regulation's basic assumptions about lawyers, the practice of law, or the reality of states' ability to regulate lawyers. The Multidisciplinary Practice Commission and the Multijurisdictional Practice Commission, which had opportunities to engage in such reconsideration within narrower spheres, also opted to avoid proposing core reforms.¹⁴

I recently wrote of my belief that the future of professional regulation will involve coming to grips with false assumptions and false paradigms on which traditional regulation is based.¹⁵ I also identified some of the reasons why it seems inevitable that regulators eventually must confront reality.¹⁶ In an effort to avoid repeating myself here, I will adhere to the limited task assigned by this symposium's sponsors¹⁷ and will focus on a few narrow areas in which I think future changes from the status quo—and from the system the Restatement and Ethics 2000 drafters envisioned—are likely.

For purposes of this paper, I do not consider whether particular substantive changes in individual professional standards are appropriate. The Restatement, Ethics 2000, and the two ABA Commissions have already provided plenty of grist for that mill. Instead, I address an assumption that none of these endeavors—surprisingly, not even the Multijurisdictional Practice Commission¹⁸—has seriously examined. Each of these

12. The position of the Restatement's Reporter was that relying on the position of a single jurisdiction, or a few jurisdictions, fairly could be viewed as "restating" the law. See Wolfram, *supra* note 11, at 818–19 (noting "the view—which we have striven to follow in the Restatement of The Law Governing Lawyers—that a substantive position in a Restatement is warranted as 'restating' the law if it can be rested on the support of at least one decision in an American jurisdiction").

13. See REPORT OF THE ETHICS 2000 COMMISSION, FINAL RULES, *supra* note 4.

14. The Multidisciplinary Practice Commission, for example, could have addressed comprehensively the question of how the professional rules might regulate different types of lawyers and different types of practices separately, implementing context-specific rules. Early in their deliberations, however, the Commission adopted the premise that all lawyers must be regulated identically.

Likewise, the Multijurisdictional Practice Commission might have considered the possibility that state professional regulation should start from the premise that it merely complements and supplements other forms of lawyer regulation (e.g., extracode regulation and regulation by federal and other nonstate regulators). However, the Commission seems to have accepted the traditional conceptualization of regulation by fifty independent states, each viewing its own professional rules as plenary and comprehensive—with the one exception of recognizing the force of other states' potential interests in regulating the same lawyers and subject matter.

15. Fred C. Zacharias, *The Future Structure and Regulation of Law Practice: Confronting Lies, Delusions and False Paradigms in Legal Ethics Regulation*, 44 ARIZ. L. REV. 829 (2002).

16. *Id.* at 831–38.

17. See Painter, *supra* note 9.

18. Because the catalyst for the Multijurisdictional Practice Commission was the problems caused by the existence of multiple regulations governing the same lawyers and the same types of conduct, one would have expected the Commission to evaluate the possible responses broadly, including the possibility of reassigning traditional regulatory functions to institutions other than the state bar associations. After conducting hearings in which a range of options were mentioned, however, the

projects seems to have taken for granted that individual states—adopting rules and enforcing them independently through conventional disciplinary institutions—will continue to be the primary force for the ethical regulation of lawyers. I, in contrast, propose to “speculate” that traditional regulation and enforcement mechanisms will become somewhat archaic as professional regulation develops in the twenty-first century.

One caveat, however. This paper should by no means be taken as the final word on any of the subjects it addresses. My charge is limited to presenting a few pages¹⁹ that identify trends I have observed and that forecast how the trends will progress. In that spirit, I offer some themes, or predictions, without attempting to support the likelihood of their occurrence in detail. In particular, I will suggest five basic points (one in each part of this brief article) that may open lines of inquiry for future development.

Part I addresses the evolving role of individual states as regulators. Parts II and III consider potential changes in the disciplinary process and in the regulatory institutions’ approaches to the goals of legal ethics regulation. Part IV argues that a transformation in society’s paradigms, or idealization, of lawyers will lead to increased emphasis on specialized licensing and admissions standards. Part V suggests that further changes may arise because of maturation in society’s conceptualization of the practice of law itself.

I. THE CHANGING ROLE OF THE STATES AS REGULATORS-IN-CHIEF

The history of professional regulation in the United States has revolved around state regulation. Although the ABA has taken the lead in developing model codes since early in the twentieth century,²⁰ individual states have maintained a monopoly on implementing (and revising) the codes and enforcing them through discipline. Moreover, each state typically has acted in an insular fashion, applying its own rules to lawyers practicing or licensed within the jurisdiction, without much regard to how those lawyers might be affected by professional rules elsewhere.

In *Federalizing Legal Ethics*,²¹ I argued that modern legal practice required a reassessment of this approach. The nationalization of practice, the increase in multistate litigation, and other factors all suggested that the problems of separate, nonuniform regulation throughout the states would pose increasing problems over time.

Commission settled into the “comfortable” option of offering a method by which traditional state regulators can cooperate with one another.

19. The conference ground rules asked participants to limit their written presentations to twenty to thirty pages. See Painter, *supra* note 9.

20. For a discussion of the history of ABA and state regulation, see Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1315–27 (1995).

21. Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335 (1994).

More recent developments have validated this prediction. In *Birbrower v. Superior Court*²² and other cases,²³ individual jurisdictions have signaled their intention to enforce their professional standards against out-of-state lawyers who enter the state.²⁴ These cases not only highlight the difficulties for lawyers who engage in interstate practice and states that regulate them, but the decisions also invite retaliation by regulators in other jurisdictions.

At the same time as the problems of multijurisdictional practice are coming to the fore, other developments have highlighted the effects that internationalization of legal practice may have on local regulation. The ABA's Commission on Multidisciplinary Practice,²⁵ prompted by the desire of *international* law firms to compete with accountants for *global* business,²⁶ ended up focusing on local state rules that affect international, multistate, and local practice identically.²⁷ The notion that individual

22. *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1, 13 (Cal. 1998) (applying California unauthorized practice of law rules to prevent out-of-state transactional lawyer from receiving fees for services provided to a California client).

23. See, e.g., *In re Desilets*, 247 B.R. 660, 670–71 (W.D. Mich. 2000), *aff'd*, 255 B.R. 294 (W.D. Mich. 2000) (limiting the significance of a lawyer's admission to federal bankruptcy court for purposes of local bankruptcy practice); *Koscove v. Bolte*, 30 P.2d 784, 786 (Colo. Ct. App. 2001) (*petition for reh'g pending*) (holding that early services performed by lawyer later admitted pro hac vice nevertheless constituted unauthorized practice); *In re Murgatroyd*, 741 N.E.2d 719, 721 (Ind. 2001) (holding written solicitations by out-of-state lawyers to Indiana accident victims to be unauthorized practice); *Somuah v. Flachs*, 721 A.2d 680, 688 (Md. 1998) (holding that lawyers are obliged to disclose that they are unlicensed to practice in the state in which the claim arises); *Spivak v. Sachs*, 211 N.E.2d 329, 330–31 (N.Y. 1965) (*pre-Birbrower* case reaching the same result with respect to out-of-state matrimonial lawyer advising a New York client); *Office of Disciplinary Counsel v. Pavlik*, 732 N.E.2d 985, 990 (Ohio 2000) (disciplining in-state lawyer for arranging for unlicensed out-of-state lawyer to represent his client); *In re Ferrey*, 774 A.2d 62, 65 (R.I. 2001) (applying *Birbrower*-type reasoning to out-of-state attorney's agency-approved participation in Rhode Island administrative proceedings).

24. For fuller discussion of *Birbrower*, together with citations to authorities discussing the related cases and issues, see Zacharias, *supra* note 15, at 858–59 and authorities cited at *id.*

25. See *supra* note 5.

26. See, e.g., John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 *FORDHAM L. REV.* 83, 88 (2000) (noting that fear of a transfer of legal work abroad was a catalyst for the work of the Multidisciplinary Practice Commission); Gary A. Munneke, *A Nightmare on Main Street (Part MXL): Freddie Joins an Accounting Firm*, 20 *PACE L. REV.* 1, 16 (1999) (describing the profession's "nightmare" of competition from international accounting firms); Robert L. Ostertag, *Our Profession Is Not for Sale*, 18 *NO. 1 GPSOLO* 22, 26–27 (Jan./Feb. 2001) (arguing that Multidisciplinary Practice reform is necessary to defend the bar against competition from the international accounting firms); see also Laurel S. Terry, *A Primer on MDPs: Should the "No" Rule Become a New Rule?*, 72 *TEMP. L. REV.* 869, 875–77 (1999) (recounting the history of the multidisciplinary practice debate).

27. Thus, in both its interim and final reports, the Multidisciplinary Practice Commission proposed new model state rules that would have applied equally to all lawyers and allowed lawyers to participate in some arrangements to practice in conjunction with nonlawyers, but would have required nonlawyer participants in these arrangements to abide by all professional rules governing the legal profession—regardless of what standards their own profession imposed. See ABA COMM'N ON MULTIDISCIPLINARY PRACTICE REPORT TO THE HOUSE OF DELEGATES, at <http://www.abanet.org/cpr/mdpfinalrep2000.html> (final report) (last visited Apr. 10, 2003); ABA COMM'N ON MULTIDISCIPLINARY PRACTICE REPORT TO THE HOUSE OF DELEGATES, at <http://www.abanet.org/cpr/marchrec.html> (proposal) (last visited Apr. 10, 2003); ABA COMM'N ON MULTIDISCIPLINARY PRACTICE REPORT TO THE HOUSE OF DELEGATES, at <http://www.abanet.org/cpr/mdpfinalreport.html> (last visited Apr. 10,

states regulating professional matters of local concern hold the cards to the resolution of national and global issues is troubling. When one considers the possibility of fifty different approaches to the issues, the need for some unifying regulatory strategy becomes glaring.

While all of this has been occurring, the federal government has complicated the regulatory issues on several fronts. The Department of Justice has asserted a right to preempt state regulation.²⁸ Several administrative agencies have implemented rules that have serious impact on the role that most states seem to have assigned lawyers.²⁹ Even Congress has begun to involve itself in the field of legal ethics regulation.³⁰

2003); see also *ABA Rejects Multidisciplinary Practice, Stands Firm Against Sharing Legal Fees*, 16 ABA/BNA LAW. MANUAL ON PROF. CONDUCT 367 (July 19, 2000) (discussing the rejection of the Multidisciplinary Practice Commission's proposals by the ABA House of Delegates).

28. See *Communications with Represented Persons*, 59 Fed. Reg. 29,910 (June 9, 1994) (to be codified at 28 C.F.R. pt. 77) (Department of Justice regulation purporting to exempt Department lawyers from state and federal court rules prohibiting contacts with represented persons). For discussions of the Department of Justice's efforts to exempt itself from state and federal court ethics regulation, see Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381 (2002) (analyzing the Department's position); Fred C. Zacharias, *Who Can Best Regulate the Ethics of Federal Prosecutors, Or, Who Should Regulate the Regulators?: Response to Little*, 65 FORDHAM L. REV. 429 (1996) (discussing the merits of the Department's claim) and authorities cited at 429-30 nn.1-7.

29. In the notorious *Kaye, Scholer* case, for example, the federal Office of Thrift Supervision (OTS) government took the position that lawyers representing clients subject to OTS regulation themselves became subject to that regulation, even to the extent that the regulation required professional conduct inconsistent with that required by local professional codes. Other government agencies have since adopted the same approach. The many articles reporting and analyzing this development include Dennis E. Curtis, *Old Knights and New Champions: Kaye, Scholer, the Office of Thrift Supervision, and the Pursuit of the Dollar*, 66 S. CAL. L. REV. 985, 991-94 (1993); Anthony E. Davis, *The Long-Term Implications of the Kaye Scholer Case for Law Firm Management—Risk Management Comes of Age*, 35 S. TEX. L. REV. 677 (1994); Joyce A. Hughes, *Law Firm Kaye, Scholer, Lincoln S&L and the OTS*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 177 (1993); Brian W. Smith & Lindsay Childress, Note, *Avoiding Lawyer Liability in the Wake of Kaye, Scholer*, 8 ST. JOHN'S J. LEGAL COMMENT. 385 (1993); Charles R. Zubrzycki, Note, *The Kaye, Scholer Case: Attorneys' Ethical Duties to Third Parties in Regulatory Situations*, 6 GEO. J. LEGAL ETHICS 977 (1993).

30. The most prominent area in which Congress has become involved in the professional regulation of lawyers is the field of prosecutorial ethics. In recent years, Congress has adopted two significant laws regulating federal prosecutors. See 18 U.S.C. § 3006A note (2000) (authorizing federal courts to award attorneys' fees to prevailing federal criminal defendants who have been prosecuted vexatiously, frivolously or in bad faith); Citizens Protection Act, 28 U.S.C.A. § 530(B) (2000) (subjecting federal prosecutors to state ethics regulation). More legislation seems to be on the way. See, e.g., *Uniting and Strengthening America Act*, S. 1510, 107th Cong. (2001) (proposal to amend McDade Act, as part of antiterrorist measures); *Professional Standards for Government Attorneys Act of 1999*, S. 855, 106th Cong. (1999) (proposal by Senator Leahy to amend the Citizens' Protection Act); *Federal Prosecutor Ethics Act*, S. 250, 106th Cong. (1999) (proposal by Senator Hatch to amend the Citizens' Protection Act). For a discussion of the appropriateness of such legislation, see Green & Zacharias, *supra* note 28, at 451-53 (discussing the role Congress would most appropriately play in regulating federal prosecutors' ethics), and Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 210 (2000) (analyzing the Citizens' Protection Act).

More recently, Congress adopted the Sarbanes-Oxley Act to respond to the possible involvement of lawyers in the Enron and WorldCom events. In section 307 of the Act, Congress specifically required the Securities and Exchange Commission to issue a rule:

(1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and

What does this mean for the future? Simply that the business of regulation cannot proceed as we have always known it. The state monopoly on regulation and discipline has already begun to deteriorate. Federal courts and agencies have become more assertive about their capacity to effectuate professional rules.³¹ Other professions have integrated more with the legal profession,³² with the inevitable portent that regulations governing other professionals may be applied to lawyers as well.

It is too early to predict *how* state monopolies on lawyer regulation will adapt, but adapt they must. Experience has taught us that the dream of uniform, voluntary state adoption of the ABA models will never be fulfilled. Accordingly, some jurisdictions have already begun to explore the possibility of forming compacts with neighboring states in an effort to deal with multijurisdictional practice.³³ Some have invited compromise

(2) if the counsel or officer does not appropriately respond to the evidence . . . requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.

Sarbanes-Oxley Act of 2002, H.R. 3763, 107th Cong. § 307 (2002).

31. Thus, for example, the federal Department of Justice has expanded its role in regulating the professional conduct of its lawyers, *see supra* note 27 and accompanying text, and has established a free-standing subdivision, named the Office of Professional Responsibility, to regulate the conduct of Department lawyers. *See* U.S. GENERAL ACCOUNTING OFFICE, FOLLOW-UP INFORMATION ON THE OPERATIONS OF DOJ'S OFFICE OF PROFESSIONAL RESPONSIBILITY (Jan. 19, 2001) *available at* <http://www.gao.gov/new.items/d01135r.pdf> (summarizing OPR's findings and specific allegations in cases from 1997 to March 2000).

Federal judicial assertiveness has taken several forms. First, many federal courts have taken an expansive view of their "inherent power" as including a general power to regulate the ethics of lawyers who appear before them. *See, e.g.,* *Berger v. Cuyahoga County Bar Ass'n*, 983 F.2d 718, 724 (6th Cir. 1993), *cert. denied*, 508 U.S. 940 (1993) ("Federal courts have the inherent authority to discipline attorneys practicing before them and to set standards for their conduct."); *United States v. Klubock*, 832 F.2d 664, 667 (1st Cir. 1987) (en banc) (relying upon inherent and statutory authority to prescribe local ethics rules); *Flaksa v. Little River Marine Constr. Co.* 389 F.2d 885, 888 (5th Cir. 1968), *cert. denied*, 392 U.S. 928 (1968) ("The inherent power of a court to manage its affairs necessarily includes the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it."). Second, the federal Judicial Conference and Administrative Office of the United States courts have, for the last several years, been studying and considering the possibility of adopting rules of professional conduct to govern lawyers in the federal courts. *See* Daniel R. Coquillette, *Report on Local Rules Regulating Attorney Conduct in the Federal Courts*, in WORKING PAPERS OF COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, SPECIAL STUDIES OF FEDERAL RULES GOVERNING ATTORNEY CONDUCT 1, 4 (1997). Third, at least one federal circuit court of appeals has asserted the authority to establish a "task force" to consider class action issues that have professional responsibility ramifications. *See* THIRD CIRCUIT TASK FORCE, FINAL REPORT ON SELECTION OF CLASS COUNSEL (Jan. 2002), *available at* <http://www.ca3.uscourts.gov/classcounsel/final%20report%20of%20third%20circuit%20task%20force.pdf>.

32. For example, one major accounting firm has established an independent affiliate law firm under its own name, designed in part to circumvent the spirit of the professional rules against multidisciplinary practice. *See Ernst & Young Allies with D.C. Law Firm*, CPA JOURNAL (Jan. 2000), *at* <http://www.nysscpa.org/cpajournal/2000/0100/nv10a.html>.

33. Joyce E. Cutler, *California Directs Task Force to Examine Reciprocity Issues for State Bar Admission*, 16 ABA/BNA LAW. MANUAL ON PROF. CONDUCT 520 (2000) (stating that the California Supreme Court is forming a task force to look into reciprocal state bar admission); *Philadelphia Bar Seeks to Open N.J. Office for Pennsylvania Lawyers Licensed There*, 16 ABA/BNA LAW. MANUAL ON PROF. CONDUCT 444 (2000) (describing attempts by the Philadelphia Bar to help Philadelphia lawyers practice law in New Jersey).

on the part of other jurisdictions by proposing regulatory changes that accommodate the interests underlying the other states' regulations.³⁴

Despite the pressures for increased uniformity in regulation and the assertion of regulatory power by federal agencies, however, it is unlikely that state professional regulation itself will become extinct. This is primarily because states continue to provide the one service that other potential regulators do not want to assume—implementation of the costly disciplinary process. Because of the budgetary implications of a national legal ethics scheme, one can reasonably anticipate that the development of more preemptive regulation by the federal government will be accompanied by a delegation of enforcement power.³⁵ Some federal funding of any federal “mandate” also seems likely, both because that is the trend in recent legislation and because it may be necessary to induce cooperation in enforcing extrajurisdictional rules at the state level.³⁶

As this process occurs, however, meaningful negotiation between the federal government and the various jurisdictions becomes more plausible—regarding which rules apply and when, about who has primary enforcement authority in which situations, and about how federal rules should interact with state rules and how state rules should interact with each other. Such negotiation may occur before the fact, as it would if Congress adopts federal standards and delegates enforcement responsibility after completion of a legislative process³⁷ or if regulation is promulgated through some other national rulemaking body.³⁸ Alternatively, ne-

34. See, e.g., *States Move to Reform MJP Regulations to Permit Temporary Interstate Practice*, 18 ABA/BNA LAW. MANUAL ON PROF. CONDUCT 43 (Jan. 16, 2002) (reporting task force recommendations in three states in favor of relaxing unauthorized practice rules governing out-of-state lawyers).

35. See Green & Zacharias, *supra* note 28, at 453–68 (discussing enforcement possibilities for federal regulation of prosecutorial ethics).

36. In its limited forays into the realm of legal ethics regulation thus far, Congress has tended simply to adopt and apply state rules, as in the recent Citizens Protection Act (C.P.A.), or to exempt federal attorneys from complying with state standards, as in recent proposals to amend the C.P.A. See Citizens Protection Act, 28 U.S.C. § 530B (2000) (subjecting federal attorneys to state and federal court ethics rules); Professional Standards for Government Attorneys Act of 1999, S. 855, 106th Cong. (1999) (proposal sponsored by Senator Leahy to amend the C.P.A.); Federal Prosecutor Ethics Act, S. 250, 106th Cong. (1999) (proposal by Senator Hatch to reverse the C.P.A.). These approaches add little to the burdens of state disciplinary agencies because they do not call for state discipline that otherwise would not occur. As Congress becomes more embroiled in legal ethics matters, however, its framework for legislation may change in a way that fosters the development of new rules. One recent proposal to amend the C.P.A., for example, would require the federal courts to develop uniform rules to govern federal attorneys, wherever they practice. See Uniting and Strengthening America Act, S. 1510, 107th Cong. § 501 (2001) (proposal to amend McDade Act and to require uniform federal court ethics rules applicable to federal prosecutors). In the Sarbanes-Oxley Act, Congress required the Securities and Exchange Commission (SEC) to promulgate particular preemptive rules governing securities lawyers. Sarbanes-Oxley Act of 2002, H.R. 3763, 107th Cong. § 307 (2002).

37. Congress adopted this approach, for example, with respect to the C.P.A. See *supra* note 36 (holding federal prosecutors subject to state ethics regulation).

38. Some possibilities include: the Federal Judicial Conference and Administrative Office of the Courts, see Green & Zacharias, *supra* note 28, at 410 (discussing federal judicial rule-making); the National Conference of State Judges, which has become increasingly active with respect to professional regulation issues in recent years; and legislative rule-making that is based largely on deference to private organizations such as the ABA.

gotiation of a sort is possible after the adoption of competing regulation—through adjudication of competing jurisdictions' claims of regulatory supremacy³⁹ or through separate admission and qualification requirements for the practice of particular aspects of law.⁴⁰

So what will the future patchwork of regulation look like? Probably very different than it does today. Society will be forced to acknowledge that, at least in some fields, more uniformity in regulation is necessary and that the dominant regulating body should lie outside the individual states. Identifying those fields will require the professional responsibility community to parse types of practice and types of lawyering more finely than current regulation does.⁴¹ Except for limited aspects of lawyer conduct that fairly can be viewed as being confined within one jurisdiction, the states will need to learn methods of communication.⁴² Direct negotiation, compacts or joint legislation, or conscious parallelism in legislation that invites an accommodating response by others or that accepts the notion of deference to neutral rulemaking bodies will become the order of the day.

II. SUNSHINE IN THE DISCIPLINARY PROCESS

With the developments discussed above, it seems almost inevitable that state disciplinary processes will become more open. I do not mean to suggest that individual discipline cases will be tried publicly, for both lawyers and clients have interests in maintaining secret proceedings.⁴³ Rather, I refer to the possibility that disciplinary agencies will surrender their inclination to keep enforcement policies and priorities, as well as statistics regarding the nature of prosecutions, hidden from public view.⁴⁴

39. The principal active example of this process concerns the question of who controls the regulation of federal prosecutorial ethics. The ABA has claimed that federal prosecutors are fully subject to state professional codes and states, supported by federal legislation, have asserted regulatory supremacy. The Department of Justice has attempted to exempt itself from state regulation. The federal courts, sometimes themselves asserting supremacy, have attempted to evaluate the competing claims. For full discussions of these issues, see generally Green & Zacharias, *supra* note 28; Zacharias & Green, *supra* note 30.

40. Although it is customary to think of lawyer licensing exclusively in terms of state bar admission requirements, other licensing may occur as well—for example, governing the right to practice before particular courts or administrative agencies, or as specialists in particular fields of law.

41. See *infra* note 83 and accompanying text.

42. Of course, communication need not take the form of direct oral or written conversations, though those too are possible. Communication may occur through the introduction of parallel legislation or even the adoption of cooperative legislation unilaterally, with the proviso that the legislation will be repealed if a partner jurisdiction does not respond in kind.

43. Lawyers have a legitimate interest in protecting their reputations from being besmirched by unfounded allegations. Clients have an interest in maintaining as much confidentiality as possible regarding the subject matter of their dealings with the lawyer. *But cf.* Kristina Serafini Pennex, Note, *Lifting the Veil of Secrecy by Opening Michigan's Disciplinary System*, 73 U. DET. MERCY L. REV. 569 (1996) (advocating less confidentiality in the disciplinary process).

44. See Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 773–74 (2001) (discussing secrecy in the disciplinary process).

One should not underestimate the importance of such a change. Until recently, few observers of the professional responsibility landscape have focused upon the relationship between the substance of professional standards and their enforcement.⁴⁵ Yet it seems undebatable that the impact of professional rules upon lawyer behavior will vary with lawyers' understanding of the likelihood that consequences will follow violation of the rules.⁴⁶ One response of the regulators—largely the current response—is to maintain secrecy regarding discipline policy and the likelihood of enforcement in the hope that lawyers will feel equally deterred by all the rules. The primary dangers inherent in this response are two: (1) that lawyers will comprehend the underenforcement of particular standards and will come to disregard them, and (2) that faulty enforcement policies will never become subject to meaningful review.

Consider, for example, a jurisdiction in which the disciplinary agency has adopted a policy of first focusing on cases involving lawyers' mishandling of clients' money and then addressing other rule violations only to the extent that its limited resources permit. At first glance, this policy is appealing. The misconduct is serious. The rules are relatively clear. Violations are identifiable and provable, without an extreme drain on the regulators' limited resources. Successful prosecutions breed a sense in the bar that the disciplinary agencies are watching and that rule violations will be enforced.

Though plausible, and probably the policy actually followed in many jurisdictions,⁴⁷ this policy may be short-sighted. If disciplinary agencies truly face a situation in which resources are limited but nevertheless hope that the fear of discipline will induce compliance with the rules, the agencies may be better off with a random enforcement approach. To the extent the published disciplinary cases reflect meager enforcement of particular provisions,⁴⁸ an agency may need to take a proactive stance toward investigating violations of those provisions.⁴⁹ And, although little attention has ever been paid to the dissemination of in-

45. *But see* Fred C. Zacharias, *Specificity in Professional Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 249–57 (1993) (discussing the goals of professional regulation and their relationship to code-drafting, enforcement, and extracode constraints).

46. *See* Fred C. Zacharias, *What Lawyers Do When Nobody's Watching: Legal Advertising as a Case Study of the Practical Impact of Underenforced Professional Rules*, 87 IOWA L. REV. 971, 1005 (2002) (discussing the relationship between enforcement and the potential for success of professional rules).

47. In California, for example, a large proportion of all disciplinary matters involve mishandling of client funds. *See* Ellen R. Peck, *Lawyers' Handling of Funds and Other Property*, 555 PLI/Lit 205, 207 (1996) (stating that mismanagement of funds is the second most frequent complaint to California Bar and “one of the most frequent causes of discipline”); *see also* *Client Funds and Property*, in 45 ABA/BNA LAW. MANUAL ON PROF. CONDUCT § 202 (1993) (noting that trust account misconduct is a frequent cause of state bar discipline).

48. *See* Zacharias, *supra* note 46, at 985 (discussing the limited published information about actual instances of discipline).

49. *Id.* at 1019–20 (discussing possible responses by disciplinary agencies).

formation regarding the activities of disciplinary agencies,⁵⁰ publication of statistics and other proof of enforcement clearly is relevant to lawyers' subjective beliefs about whether discipline occurs.⁵¹

What, though, are the catalysts for change that cause me to suggest that the traditional secrecy regarding discipline actually will decline in the future? I have already alluded to several. As the federal government and secondary jurisdictions come, by agreement, to rely on the disciplinary process in a particular state,⁵² they are likely to insist on some measure of accountability. Thus, for example, Congress already has deferred to states in adopting and enforcing ethics rules governing federal prosecutors.⁵³ Congress, however, continues to be interested in the subject, and the constituencies who question the wisdom of deference remain active.⁵⁴ As a result, it seems probable that Congress will revisit the actual operation of the delegation to the states—and, in the process will request information about and focus media attention upon the disciplinary process.

Moreover, as individual states become more important in enforcing the interests of other jurisdictions, their disciplinary resources will be stretched.⁵⁵ They thus may seek financial assistance from jurisdictions that impose extra burdens without assuming a proportionate share of their workload.⁵⁶ States that cannot realistically seek resources outside the jurisdiction will need to elevate internal appropriations. Inevitably, as the level of funding increases, legislative reluctance and oversight—and the demand for information—will increase as well.

50. See Zacharias, *supra* note 44, at 773–74 (discussing the lack of “transparency” in the disciplinary process, some of the costs of nontransparent decision making, and the need for more empirical information concerning professional discipline).

51. See, e.g., Zacharias, *supra* note 46, at 1005–08 (discussing the effects of inadequate dissemination of information regarding the reality of discipline upon lawyers considering whether to follow professional rules).

52. See *supra* note 35 and accompanying text.

53. See *supra* note 36.

54. See authorities cited *supra* note 30.

55. See ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, REPORT OF COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT (Feb. 1992), at http://www.abanet.org/cpr/mckay_report.html (noting that in the last twenty years lawyers have devoted thousands of hours and millions of dollars to implement reforms and that nearly all jurisdictions have had to expand funding and staffing of disciplinary agencies) (last visited Apr. 10, 2003); Don J. DeBenedictis, *Who's Minding the Bar?*, 76 A.B.A. J. 48 (June 1990) (discussing Nevada's increasing disciplinary budget and staff); David O. Weber, “Still in Good Standing:” *The Crisis in Attorney Discipline*, 73 A.B.A. J. 58 (Nov. 1987) (describing California's 1987 reorganization of lawyer discipline aimed at cutting backlog and increasing funding for discipline); Robert B. McKay, *Lawyer Discipline: Too Much or Not Enough*, L.A. LAW., Feb. 1990, at 25 (discussing the relationship between resources and the backlog of discipline cases).

The extent of the impact, of course, may depend on how jurisdictions interact. If their interdependence is based on a mutual agreement to adopt uniform rules, the impact will be less than if they agree to enforce each others' unfamiliar provisions.

56. The financial effects will vary for different jurisdictions, based on the frequency with which out-of-state lawyers come to practice (and violate rules) within the jurisdiction.

Perhaps the strongest reason for my suspicion that the disciplinary process will see more sunshine—and it is only a suspicion—is simply that more attention, both empirical and theoretical, is being paid to the issue of enforcement.⁵⁷ In an age of computerized research, it is becoming easier for lawyers and scholars to access information about most types of litigation,⁵⁸ yet this is not true for disciplinary cases. Only a fraction of these cases reach the computerized databases. To the extent routine discipline decisions are published at all, that typically occurs in abstracted form in fora that are not easily accessible.⁵⁹ As commentators increasingly note the consequences of lawyers' inability to adequately research what conduct violates the rules, the negative ramifications of secrecy will become more obvious. Perhaps my suspicion only reflects a "hope," but I would expect the regulators and those who fund them to recognize that opening the process to public view is a necessary step to ensure the system's effectiveness.⁶⁰

III. INSTITUTIONAL RECOGNITION OF REGULATION'S MULTIPLE PURPOSES

One of the interesting phenomena of recent years has been the increasing focus of local bar associations upon providing programs to assist lawyers with problems of alcohol and drug abuse.⁶¹ This is a departure from an era in which the associations limited themselves to three main functions: (1) informing and educating lawyers;⁶² (2) providing rules and disciplining lawyers; and (3) offering opportunities for lawyers to participate in serving a broader cross-section of the community.⁶³ Traditionally,

57. See, e.g., Lester Brickman, *Contingency Fee Abuses, Ethical Mandates, and the Disciplinary System: The Case Against Case-by-Case Enforcement*, 53 WASH. & LEE L. REV. 1339, 1360 (1996) (surveying and analyzing reactions of bar counsel to a hypothetical scenario involving potential ethics violations); Jack A. Guttenberg, *The Ohio Attorney Disciplinary Process—1982 to 1991: An Empirical Study, Critique, and Recommendations for Change*, 62 U. CIN. L. REV. 947 (1994) (empirical study of professional discipline in Ohio); John P. Sahl, *The Public Hazard of Lawyer Self-Regulation: Learning from Ohio's Struggle to Reform Its Disciplinary System*, 68 U. CIN. L. REV. 65, 70–72 (1999) (arguing for reforms in disciplinary enforcement mechanisms); Zacharias, *supra* note 44 (evaluating, empirically, the professional discipline of prosecutors); Zacharias, *supra* note 46 (quantifying the implementation of lawyer advertising rules in California and elsewhere); Jennifer M. Kraus, Comment, *Attorney Discipline Systems: Improving Public Perception and Increasing Efficacy*, 84 MARQ. L. REV. 273 (2000) (proposing an alternative model for attorney discipline systems).

58. See, e.g., Fred C. Zacharias, *The Restatement and Confidentiality*, 46 OKLA. L. REV. 73, 81 (1993) (discussing the development of computerized reporting systems).

59. Zacharias, *supra* note 46, at 985.

60. Perhaps one indication of this trend is the fairly recent development of the practice, in major states like California and New York, of publishing abstracted references to disciplinary cases in local legal newspapers. See the section entitled "Disciplined Lawyers" in the CALIFORNIA LAWYER and the section entitled "Disciplinary Proceedings" in the NEW YORK LAW JOURNAL.

61. See Zacharias, *supra* note 15, at 844–46; *infra* notes 62, 65, 68.

62. For example, most states have imposed continuing legal education requirements and produced seminars and other programs to help lawyers fulfill those requirements.

63. Bar associations have sought to promote wider representation by supporting *pro bono* programs and by sponsoring lawyer referral services.

any inquiry into a lawyer's alcohol or drug use would have been confined to the issue of whether the lawyer in question should be disciplined or denied admission to the bar.

One ramification of devoting significant resources to this changing focus is that the institutions regulating the bar will, more and more in the twenty-first century, need to consider what their goals are. I am not observing anything new by noting that professional regulation has multiple purposes, only one of which is to discipline lawyers for misconduct.⁶⁴ Sometimes code drafters have acknowledged that fact, sometimes not. Almost uniformly, however, the institutions implementing the professional standards—disciplinary agencies, bar associations, and the courts—have failed to address the multiplicity of goals.

Recent developments like the substance abuse programs (and the distress which they address⁶⁵) highlight publicly that the functions of the regulating institutions are sometimes inconsistent. Helping a lawyer with respect to substance abuse, for example, entails obtaining the lawyer's cooperation, which in turn militates in favor of assuring programmatic confidentiality at the expense of the interests of current and future clients who are unaware of the lawyer's problem.⁶⁶ The more that the regulatory institutions branch out in such endeavors, the greater the pressure is for them to question what functions they actually should serve.

The diminishing monopoly of bar regulators provides a second reason to expect bar institutions to reconsider their roles. Over the past two decades, lawyer misconduct has received increasing attention from non-bar regulators. Malpractice liability is on the rise. Courts throughout the

64. See, e.g., Fred C. Zacharias, *Limits on Client Autonomy in Legal Ethics Regulation*, 81 B.U. L. REV. 199, 229 (2001) (discussing the relationship between code drafting and an accurate identification of the purposes of regulation); Zacharias, *supra* note 45, at 231–32 (discussing the multiple purposes of professional regulation).

65. See, e.g., Connie J.A. Beck et al., *Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns Among a Sample of Practicing Lawyers*, 10 J.L. & HEALTH 1, 3 (1995) (reporting a study suggesting that seventy percent of lawyers will suffer some alcohol-related problem during their careers); G. Andrew H. Benjamin et al., *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers*, 13 INT'L J.L. & PSYCHIATRY 233, 241 (1990) (reporting a study of substance abuse among lawyers in Washington); Jennifer L. Reichert, *Lawyers and Substance Abuse*, 36 TRIAL 6, 76 (2000) ("According to a fact sheet from the American Bar Association's (ABA) Commission on Lawyer Assistance Programs, over 56,000 ABA members will have a lifetime alcohol dependency disorder; over 30,000 will have a lifetime drug disorder (other than alcoholism); and over 100,000 will have a lifetime substance abuse disorder."); Alex Gronke, *The State Assembly OKs Bar-Funded Rehab for Lawyers Health*, L.A. TIMES, June 22, 2001, at B8 ("30% to 40% of the California bar's discipline cases involve substance abuse in some way.")

66. Compare, e.g., Rick B. Allan, *Alcoholism, Drug Abuse and Lawyers: Are We Ready to Address the Denial*, 31 CREIGHTON L. REV. 265, 275–76 (1997) (advocating treatment and intervention programs for addicted lawyers), Michael A. Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is It Time for a New Approach?*, 61 TEMP. L. REV. 1409, 1425–26 (1988) (same), and Nathaniel S. Curral, *The Cirrhosis of the Legal Profession—Alcoholism as an Ethical Violation or Disease Within the Profession*, 12 GEO. J. LEGAL ETHICS 739, 750 (1999) (urging treatment of alcoholism among lawyers as a disease), with Janine C. Ogando, *Sanctioning Unfit Lawyers: The Need for Public Protection*, 5 GEO. J. LEGAL ETHICS 459, 481–82 (1991) (urging increased imposition of disposition to protect the public from addicted attorneys).

states have recognized new causes of action against lawyers.⁶⁷ Federal agencies have imposed their own standards.⁶⁸ Lawyers increasingly have become the targets of criminal investigations.⁶⁹

The external enforcement of standards of behavior should have two notable effects for bar-driven regulatory institutions. First, these institutions may come to accept that controlling lawyer misconduct no longer is the sole responsibility of the bar. Implementing other goals of regulation may, as a result, seem more legitimate. Second, as the codes increasingly overlap other forms of regulation, efficient use of bar resources requires the bar to consider explicitly how lawyer regulation and extracode constraints intersect.⁷⁰ The logical first step in this consideration is to identify the goals of particular code provisions and how those goals are being furthered.

The process of identifying the purposes of regulation, of course, is not simple. Some professional standards have a clear, single purpose, but most do not. Initially, it is up to the code drafters to identify their substantive goals, so that implementation can fall in line with that intent. However, it is equally important for the institutions that enforce the rules to maintain a focus on the goals of discipline and enforcement because only they can evaluate on an ongoing basis whether extracode constraints already do a sufficient job of deterring, punishing, or providing guidance to lawyers. This change in institutional orientation likely will mesh with my earlier speculation that disciplinary authorities will, in the coming years, open their policymaking to public view and be forced to set priorities with a view to the goals of the standards that they aim to implement.

IV. EMPHASIZING LICENSING AND ADMISSION REGULATION

I will not address, as I have elsewhere, the range of assumptions and paradigms in professional regulation that code drafters may reassess in the twenty-first century.⁷¹ Let me focus instead on the possible *regulatory* ramifications of reevaluating one of those assumptions—that all lawyers should be treated the same for purposes of admission, regulation, and discipline. In my view, modern realities will simultaneously force not only theoretical reconsideration of the substantive premise, but also a practical shift in regulatory resources to new bar admission and licensing requirements and institutions.

67. See STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 742–52 (5th ed. 1998) (describing the “expanding universe” of laws and causes of actions that address lawyer incompetence and misconduct).

68. See *supra* note 28 and accompanying text.

69. See, e.g., Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 FORDHAM L. REV. 327 (1998) (discussing the increasing use of criminal law and its interaction with state bar professional conduct regulation).

70. See Zacharias, *supra* note 45, at 255 (discussing the relevance of extracode constraints to professional regulation).

71. Zacharias, *supra* note 15.

No one would question that law has become more complex over time. The most obvious byproduct of that complexity has been increasing specialization within the profession.⁷² The current codes cling to the notion that lawyers can train themselves into competence in fields that are foreign to them.⁷³ The codes encourage public reliance on “generalists” by imposing obstacles to lawyers’ claims of specialization⁷⁴—obstacles that in some instances ensure a level of competence on the part of lawyers allowed to claim expertise, but that in others are artificial in nature.⁷⁵ Most notably, admission to the bar carries with it a license to practice in all fields of law.

There are many reasons for the regulators’ resistance to specialization regulation. Rules limiting practice seem monopolistic in nature and may therefore be attacked on antitrust grounds.⁷⁶ Depending on how specialization rules are implemented, they can raise the costs of obtaining representation by reducing the number of available service providers within any given field. Such rules certainly run counter to the philosophy of commentators who call for opening more legal practice to unlicensed service providers.⁷⁷

72. See, e.g., Michelle L. Anderson, *Pending Bankruptcy Bill Recognizes Value of Board Certification*, AM. BANKR. INST. J., May 2001, at 33 (stating that the number of certified attorneys nationally is growing); Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 548 (1994) (noting a “steady increase in de facto specialization”); Buddy O. Herring, *Liability of Board Certified Specialists in Legal Malpractice Action: Is There a Higher Standard?*, 12 GEO. J. LEGAL ETHICS 67 (1998) (noting the growth of specialization and its effect on liability); cf. Alec M. Schwartz, *Board Certification Rises 41% in Half-Decade*, at <http://www.lexisone.com/professionaldevelopment/pdlibrary/certification.html> (2001) (stating that since 1994 there has been a forty-one-percent increase in the number of certified specialists).

73. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.1 cmt. (1983) (“A lawyer can provide adequate representation in a wholly novel field through necessary study.”).

74. See, e.g., *id.* R. 7.4 (limiting the circumstances under which a lawyer may state or imply that he has been “recognized or certified as a specialist in a particular field of law”). In adopting specialist certification rules, the ABA largely was responding to a Supreme Court decision that forced the bar to accept some ability of lawyers to claim specialist status. See *Peel v. Attorney Registration & Disciplinary Comm’n of Ill.*, 496 U.S. 91 (1990) (invalidating generalized prohibitions against advertising “specialist” status). Because the ABA’s response was involuntary, the ABA may not have taken a fully open-minded view towards the issues surrounding specialization and certification of specialists.

75. The rules largely identify the types of organizations that may certify specialists, but do not delineate the criteria these organizations must use to assess lawyers’ qualifications. States and the certifying organizations they designate are free to rely on a range of criteria, some meaningful, some less so—including examination, experience, education, and membership in organizations interested in fields of law.

76. Cf. *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975) (striking down bar-mandated fee schedule as a violation of the Sherman Antitrust Act).

77. See, e.g., DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE, REFORMING THE LEGAL PROFESSION 135–41 (2000) (arguing in favor of opening the door to lay practice); Julee C. Fischer, *Policing the Self-Help Legal Market: Consumer Protection or Protection of the Legal Cartel?*, 34 IND. L. REV. 121, 139 (2000) (“[T]here is strikingly little case law involving injury to individuals from unauthorized practice.”); Meredith Ann Munro, *Deregulation of the Practice of Law: Panacea or Placebo?*, 42 HASTINGS L.J. 203, 214 (1990) (noting that “critics reject the argument that rules prohibiting the unauthorized practice of law protect the public and the court system”); Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1232 (1995) (arguing in favor of “allowing nonlawyers to provide legal services but retaining a role for the organized bar with bar membership serving as a cer-

Perhaps more poignantly, identifying meaningful special expertise is difficult. Experience in any type of matter helps, but often a lawyer's general skill is more important than his familiarity with a particular set of laws. How narrowly to define areas of specialization is a related thorny issue.

Nevertheless, an increasing number of jurisdictions have accepted the ABA's invitation⁷⁸ to at least certify specialists.⁷⁹ The development of these certification programs supports speculation on a number of fronts. First, how meaningful are the various jurisdictions' certification requirements? How accurate and demanding are they? Second, how do lawyers react to specialization rules that fall short of direct licensing? In other words, what is the force of a certification rule that is unaccompanied by any actual restriction on practice by persons who are not certified?⁸⁰ Third, and most interestingly, to what use are limited specialist certifications being put? If they are meaningful (to clients and as a substantive matter), one would expect not only advertising by certified specialists, but also efforts by the bar itself to encourage lawyers to seek certification and to provide benefits to certified lawyers by publicizing the significance of certification.

tificate rather than a license"); *see also* Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—or Even Good Sense?*, 1980 AM. B. FOUND. RES. J. 159, 161–201 (tracing the origins of, and questioning the law governing, unlicensed practitioners).

78. *See* MODEL RULES R. 7.4(c) (allowing lawyers to claim certification as a specialist where a state-approved certification process has been adopted).

79. *See, e.g.*, ARIZ. RULES OF PROF'L CONDUCT R. 7.4 (1997) (allowing attorneys to state that they are specialists in particular fields of practice when they have been certified by the State Board of Legal Specialization Programs); CAL. RULES OF PROF'L CONDUCT R. 1-400(D)(6) (1996) (providing for State Bar designation of attorneys as specialists and the accreditation of private certifying entities); FLA. RULES OF PROF'L CONDUCT R. 4-7.2(c)(3) (1994) (allowing certification of lawyers by the Florida Bar Board of Legal Specialization and recognizing private certification programs); LA. RULES OF PROF'L CONDUCT R. 7.4 (2000) and LA. STATE BAR ASS'N PLAN OF LEGAL SPECIALIZATION, § 12(C)(1), *available at* http://www.lsb.org/specialization/html/plan_of_legal_specialization.html (stating the form for announcing certification) (last visited Nov. 13, 2002); N.C. RULES OF PROF'L CONDUCT R. 7.4 (2002) (permitting lawyers to communicate information regarding certification); N.J. RULES OF PROF'L CONDUCT R. 7.4(b) (1999) (setting forth requirements for certification); N.M. RULES OF PROF'L CONDUCT R. 16-704(C) (2002) (permitting lawyers to state they are specialists); S.C. RULES OF PROF'L CONDUCT R. 7.4 (2002) (providing that a specialist must be certified as a specialist by Supreme Court of South Carolina); TENN. CODE OF PROF'L RESP. DR 2-101(c) (2002) (providing rules regarding certification and certification programs); TEX. RULES OF PROF'L CONDUCT R. 7.04(b)(2) (1998) (stating rules regarding certification).

80. One can imagine a range of responses, ranging from defiance of the rules by uncertified lawyers, to a determination by potentially qualified lawyers that the benefits of obtaining certified status is not worth the candle, to political efforts to strengthen the significance of certification, to in-fighting regarding the areas in which certification may be obtained. *Cf. Zacharias, supra* note 46, at 1005–07 (discussing reactions of lawyers to underenforced professional rules). In implementing actual certification plans, states have varied significantly in their emphases upon lawyers' years in practice, their previous practice in the specialty field, special education experience, and examinations. They have also diverged in the definitions of fields, whether to grandfather in previously recognized specialists who do not fit the formal qualifications, and the kinds of training and education that justify specialist status. *See* Judith Kilpatrick, *Specialist Certification for Lawyers: What Is Going On?*, 51 U. MIAMI L. REV. 273, 336 (1997) (describing the development of and considerations relevant to specialist certification programs); Joanne Pelton Pitulla, *Great Expectations—The Ethical Challenges of Specialization*, 6 PROF. LAW. 12 (1994) (discussing the progression of certification standards).

I mention these questions only as a means of pointing out the tension in lawyer regulation that they highlight. The regulators have no desire to place limits on the ability of lawyers to garner business. Accordingly, they have avoided actually licensing specialists and precluding generalists from invading their fields. On the other hand, constitutional decisions have forced the regulators to acknowledge the right of deserving lawyers to claim relevant expertise, which brings with it the danger that some unqualified lawyers will mislead clients. Underlying this tension is the bar's dark secret: it knows the falsity of its assumption that lawyers are equally competent—or can make themselves competent—to practice in all areas of law.

The current crop of compromise certification programs are only beginning to be evaluated.⁸¹ The further the bar limits what lawyers can say about their expertise, the more inevitable litigation seems—be it First Amendment litigation challenging advertising restrictions or antitrust claims directed at advertising limitations based on immaterial criteria. These, one would think, might lead the bar finally to recognize that the key to valid regulation of specialization should not be indirect—that is, regulation of what lawyers may say about their abilities—but rather a greater involvement by the bar in providing meaningful evaluations of the qualifications of different lawyers. The emphasis, in other words, may shift from arguing about professional standards governing advertising to more substantive implementation of state licensing and admissions authority.

This would be a significant and controversial change—and one that many of my colleagues in academia doubt will ever occur. As discussed in part V of this article, modern pressures have tended to be towards less, rather than more, licensing. Nevertheless, the growing recognition that many areas of practice actually require specialized experience—be it in pension law or death penalty litigation—militates in favor of increased bar participation in assessing competence within those fields.

As a result, I would expect states to start differentiating among lawyers—perhaps at many stages in their career. There are, admittedly, several ways to differentiate, of which direct licensing is only one. Some jurisdictions may create specialized bars, along the lines that already exist in a few fields such as patent law and bankruptcy by virtue of federal in-

81. See, e.g., Johannes P. Burlin, *Lawyer Certification and Model Rule 7.4: Why We Should Permit Advertising of Specialty Certifications*, 5 GEO. J. LEGAL ETHICS 939, 940 (1992) (concluding that certification standards should incorporate voluntariness, higher standards of care, and more state regulation); Judith Kilpatrick, *Specialty Lawyer Associations: Their Role in the Socialization Process*, 33 GONZ. L. REV. 501, 506–07 (1998) (discussing the role and structure of lawyer specialty associations and their effect on the profession); Deborah L. Rhode, *The Rhetoric of Professional Reform*, 45 MD. L. REV. 274, 292–93 (1986) (noting that the effect of certification programs has been inconsistent); Graydon S. Staring, *The Proctor's Dilemma: Certifying Specialties in Admiralty*, 28 J. MAR. L. & COM. 503, 504–05 (1997) (discussing admiralty/maritime specialization and its relationship to general lawyer specialist regulation). See generally Michael Ariens, *Know the Law: A History of Legal Specialization*, 45 S.C. L. REV. 1003 (1994).

tervention.⁸² It would not surprise me to see the initial bar examination supplemented with a series of specialized bar examinations, the passage of which could either be required for new lawyers to practice in particular fields or, in line with current practice, be required to justify public claims of specialist status. More experienced lawyers might be required to take additional examinations in order to qualify for the right to handle particular types of cases or to claim stronger expertise.

What I have proposed, especially in its most extreme form, would reflect a significant change in the mechanism for regulating lawyers—a shift in influence from code drafters to licensing or certifying authorities. I may be wrong in my view that the profession will focus on licensing, rather than merely limiting claims of expertise further. But I feel confident that the bar will at least strengthen its efforts in the latter regard by helping define for the public what being a specialist or expert means.

If I am correct in these predictions, this structural shift may herald a maturation in basic lawyer regulation as well, for it highlights the limitations of the assumption that all lawyers are similar. The acceptance of segmented, specialized bars implicitly supports the notion that regulation of activity within specialized practice fields calls for a variety of practice-sensitive professional rules. This, in turn, ultimately may result in a fundamental change in the way professional regulators approach the drafting of professional rules.⁸³

V. REDEFINING THE UNAUTHORIZED PRACTICE OF LAW

Thus far, I have addressed a sequence of reforms in the institutions that implement ethics standards and in the institutions' approaches to regulatory issues. I have predicted changes in the identity and foci of the regulatory institutions, the opening of the disciplinary process, and the need for regulatory institutions to evaluate their goals. My final speculation focuses on the granddaddy of regulation: the way the fifty states define the category of lawyers.

The definition of lawyers, of course, is important because it both subjects a particular group of service providers to the regulation dis-

82. In these areas, the federal government has asserted authority to impose separate licensing requirements because the bulk of practitioners in the field must appear before specialized federal tribunals. *See, e.g.*, 37 C.F.R. § 10.5-7 (2001) (setting standards for lawyers to practice before the U.S. Patent and Trademark Office, including the passage of a patent bar); FED. R. BANKR. P. 9010(a) (2002) (“A debtor, creditor, equity security holder, indenture trustee, committee or other party may (1) appear in a case under the Code and act either in the entity’s own behalf or by an attorney authorized to practice in the court.”) (emphasis added); *see also* Sperry v. Florida, 373 U.S. 379 (1963) (forbidding Florida to enjoin nonlawyer from preparing and filing patent applications pursuant to federal Patent Office regulations).

83. *See, e.g.*, Fred C. Zacharias, *Reconceptualizing Ethical Roles*, 65 GEO. WASH. L. REV. 169, 186–203 (1997) (discussing ways in which code drafters could draft the professional codes based on distinctions among lawyers and types of practice); Zacharias, *supra* note 15, at 864–65 (discussing the possibility of regulating by practice area).

cussed above and insulates those service providers from competition. The literature is replete with criticisms of unauthorized practice of law rules. For the most part, the critics argue that lawyer licensing limits the availability of so-called legal services and increases the costs of services that nonlawyers could provide as well.⁸⁴

I will not repeat those criticisms, or the responses,⁸⁵ here. But no set of predictions regarding the future of lawyer-regulating institutions can be complete without some allusion to recent harbingers of change in the existing restrictions on lay practice. The work of the ABA's Multidisciplinary Practice Commission, for example, highlighted the regulators' conundrum. On the one hand, the bar sought changes in the professional rules to allow lawyers to compete for business against international accounting firms. On the other hand, the need to compete with accountants highlighted that "legal work" is not a self-identifying concept.

Likewise, the rise in the number and boldness of paralegal organizations—operating with only meager lawyer supervision—illustrates the continuing economic need and public sentiment in favor of amending existing unauthorized practice regulation.⁸⁶ Recent decisions that have upheld the authority of lay practitioners to assist pro se clients, particularly in filling out legal forms, are fueling the pressure for change.⁸⁷

It is important to juxtapose the move towards countenancing lay or multidisciplinary practice with my suggestion, above, that states will shift

84. See, e.g., Margaret F. Brown, *Domestic Violence Advocates' Exposure to Liability for Engaging in the Unauthorized Practice of Law*, 34 COLUM. J.L. & SOC. PROBS. 279, 296–97 (2001) ("Critics of unauthorized practice bans argue that the prohibition is a protectionist measure by the legal profession intended to stifle competition and keep legal fees high."); cf. Munro, *supra* note 77, at 204–05 ("Critics of the Bar's 'monopoly' of the practice of law point to the commercial successes of lay practitioners . . . [and] reject the traditional argument that lay practitioners, not bound by the educational and ethical restraints that bind lawyers, pose a risk to the public of incompetence or fraud.").

85. See, e.g., Michael J. Herzog, *Tax Dispute Representation: The Time Is Ripe to Allow Certified Public Accountants Access to the Tribunal*, 18 J.L. & COM. 355, 356 (1999) ("Restrictions on the unauthorized practice of law are premised upon . . . arguments [that] the regulation of the practice of law serves to maintain judicial integrity [and that the restrictions] protect the public from incompetent practitioners."); Quintin Johnstone, *Bar Associations: Policies and Performance*, 15 YALE L. & POL'Y REV. 193, 218 (1996) ("Not only are consumers [of legal services] insufficiently informed to determine whether lay providers are competent and honest, the risks are too great to allow them to make that choice.").

86. See generally Herbert M. Kritzer, *The Future Role of "Law Workers": Rethinking the Forms of Legal Practice and the Scope of Legal Education*, 44 ARIZ. L. REV. 917 (2002) (discussing the increasing number of activities performed by nonlicensed "law workers"); Geraldine Mund, *Paralegals: The Good, The Bad and the Ugly*, 2 AM. BANKR. INST. L. REV. 337 (1993) (discussing the role of paralegals in providing bankruptcy representation); Wendy I. Wills, *The Ethical Utilization of Paralegals in Ohio*, 45 CLEV. ST. L. REV. 7611 (1997) (analyzing the utilization of paralegals in Ohio and its relation to the unauthorized practice of law and noting the development of regulation of legal support positions); cf. Munro, *supra* note 77 (arguing for relaxation of unauthorized practice of law rules to allow nonlawyers to perform more legal services).

87. See, e.g., *Rodriguez v. Gavette*, 3 P.3d 977, 980–82 (Ariz. Ct. App. 1999) (holding that a personal representative who filled in the decedent's requests on forms did not engage in the unauthorized practice of law); *In re Reed*, 208 B.R. 695, 696–97 (N.D. Cal. 1997) (holding that a bankruptcy petition preparer acted properly by accepting money to be delivered to the court with the petition); *Perkins v. CTX Mortgage Co.*, 969 P.2d 93, 100 (Wash. 1999) (holding that a mortgage company could prepare legal documents incident to their business where there is no exercise of legal discretion).

towards *increased* licensing with respect to particular areas of law. These are not inconsistent concepts. They both reflect movement towards regulating on the basis of realistic approaches towards actual practice.⁸⁸ Law has become highly specialized over time; arguably, only those with special legal competence should handle particular cases.⁸⁹ On the other hand, the difficulty of performing some legal tasks has been used as an excuse by the bar for avoiding competition in the broad array of other services not calling for special expertise. The pressures towards increased (specialization) regulation and decreased (practice of law) regulation both find their roots in empirical claims concerning the realities of what lawyers do. More nuanced regulation that identifies the services which only some lawyers are competent to perform, those which require at least a lawyer with general training, and those which do not require a lawyer at all can address the calls both for increased and for decreased licensing.

Is there any reason to expect unauthorized practice of law rules to be liberalized? The recognition that lay service providers could satisfy some unmet needs for legal services is not new.⁹⁰ However, this realization alone has never carried sufficient weight to force a change, probably because of the political influence exerted by a self-interested bar.⁹¹

On the other hand, as the bar gains incentives to negotiate with other professions—as it must negotiate publicly with the accounting profession in determining appropriate multidisciplinary practice rules—legislative acceptance of hitherto “unauthorized” providers seems more likely. The Multidisciplinary Practice Commission’s suggestion, for example, that nonlawyer partners in multidisciplinary practice should be bound by lawyers’ professional standards⁹² could only be implemented by legislation. The suggestion seems unworkable unless the partners (e.g., accountants) and their regulating bodies agree, under some compromise that the legislatures will adopt. Pressure for legislative intervention ex-

88. Cf. Benjamin Hoorn Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 432–34 (2001) (urging a comprehensive economic examination of “underlying justifications for the regulations we have” and a fuller consideration of whether the “entry restrictions in the legal market . . . [under the] current system [are] defensible”).

89. Or, at least, clients should be made aware of the limited knowledge and experience of their noncertified representatives.

90. Alex J. Hurder, *Nonlawyer Legal Assistance and Access to Justice*, 67 FORDHAM L. REV. 2241, 2241 (1999) (“Nonlawyer legal assistance is a necessary ingredient of any plan for meaningful access to the courts.”); Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 1 J. INST. FOR STUDY OF LEGAL ETHICS 197, 206 (1996) (“The only comparative research to date on these practitioners, in contexts such as pro se divorce and agency proceedings, finds that nonlawyer specialists perform about as effectively as lawyers . . . [and that] on consumer satisfaction, lay practitioners rate higher than attorneys.”).

91. Rhode, *supra* note 90, at 202 (“Over the last half-century, state bars repeatedly have fought publication of self-help law books; opposed introduction of standardized forms; prevented court clerks from providing routine legal assistance; shut down form preparation services; and blocked licensing systems for nonlawyer practitioners.”).

92. See *supra* note 27 and accompanying text.

ists; clients often want nonlawyer assistance, because it can be cheaper or more efficient.⁹³ And inevitably, the negotiating and legislative process will trigger a serious look at when the activities of nonlawyers are so “legal” in nature that they require the imposition of legal ethics standards. This in turn may require reconsideration of when those activities are the practice of law at all.⁹⁴

VI. CONCLUSION

Oscar Wilde once wrote, “There are only two kinds of people who are really fascinating—people who know absolutely everything, and people who know absolutely nothing.”⁹⁵ While I hope that the above speculations regarding the future do not place me in the latter category, I readily concede that they are not the product of one who knows it all. Most of my predictions merely reflect extensions of trends that have already begun. Regulators *have* started to adjust their roles, *have* begun to interact with one another more realistically, and *have* undertaken some introspective inquiries and practical programs that ultimately may require them to confront a changing world. Thus, because the future I predict, “is made of the same stuff as the present,”⁹⁶ I feel relatively comfortable in predicting it.

Of course, nowhere in my remarks have I tried to evaluate the consequences of my predicted changes. Nor have I assessed whether the changes will be for the better. I simply have attempted to answer this symposium’s question—whether the near future will be characterized by “reform or professional responsibility as usual.”⁹⁷

In a foreword to a different symposium, I questioned the circular nature of legal ethics reform—the continuous reevaluation of the same subjects, in the same way.⁹⁸ The twentieth century has ended with a forceful repetition of “professional responsibility as usual,” but with a

93. See, e.g., David A. Hyman & Charles Silver, *And Such Small Portions: Limited Performance Agreements and the Cost/Quality/Access Trade-Off*, 11 GEO. J. LEGAL ETHICS 959, 974 (1998) (observing that where nonlawyers are allowed to compete with lawyers, they deliver comparable services at lower cost); Fred C. Zacharias, *Reply to Hyman and Silver: Clients Should Not Get Less Than They Deserve*, 11 GEO. J. LEGAL ETHICS 981, 984 (1998) (noting the potential benefits of legitimizing lay service providers).

94. After this Article was prepared, the ABA announced the establishment of a “task force” to embark on precisely the type of reconsideration predicted here. The Task Force, however, determined that it would be wiser, at least initially, to leave the issue of how the practice of law should be defined for individual state consideration. See *Unauthorized Practice: Utah and Arizona Define Practice of Law*, 19 ABA/BNA LAW. MAN. ON PROF. CONDUCT, *supra* note 7, at 212 (reporting the ABA Task Force’s decision not to adopt a model definition for what it means to practice law); see also *supra* note 7 and accompanying text.

95. COLUMBIA DICTIONARY OF QUOTATIONS, *supra* note 1, at 498.

96. Simone Weil, *Some Thoughts on the Love of God* (1942) (stating that “[t]he future is made of the same stuff as the present”), reprinted in COLUMBIA DICTIONARY OF QUOTATIONS, *supra* note 1, at 359.

97. See Painter, *supra* note 9.

98. Fred C. Zacharias, *The Quest for a Perfect Code*, 11 GEO. J. LEGAL ETHICS 787, 791 (1998).

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twist. In asking the questions addressed by the Multidisciplinary Practice and Multijurisdictional Practice Commissions, the ABA for the first time, and perhaps unwittingly, has begun the process of recognizing the dissonance between the ABA's traditional regulatory efforts and the reality of the legal world they govern. One can only hope that the related process of *doing something* as a result of that recognition will not be far behind.

