The *(d)*Evolution of Ethics and Apocalyptic Visions[1]

Kelly L. Faglioni
Hunton Andrews Kurth LLP

Ethics: moral principles that govern a person's behavior or the conducting of an activity.

Apocalypse: An event involving destruction or damage on an awesome or catastrophic scale.

Changes, or the lack of changes, in certain professional rules and the underlying policy considerations might be characterized as ethics evolution by some and stagnation, devolution, **dystopia**, or "apocalypse" for the profession by others.

Following a general overview of the path of the profession to the ABA Rules of Professional Conduct, these materials look at some of the changes or lack of changes related to the following topics:

- The Relationship Between Licensing and a Lawyer's Professional Independence: Insight into the (d)Evolution of State-by-State Licensing and Regulation of Lawyers.
- A (d)Evolution from Encouraging "Zealous" Representations Toward Rules and Laws Conscripting Lawyers to Amplified Gatekeeping Duties.
- Market-driven (d)Evolutions:
  - ✦ The (d)evolution from the doctrine of champerty to the acceptance for contingency fee work and litigation funding.
  - ✦ The (d)evolution from bans on lawyer advertising to rules that broaden the ways in which lawyers may share information about legal services.
  - ✦ The (d)evolution from the need to strictly safeguard a lawyer's professional independence from non-lawyer ownership and management to (some) tolerance for non-lawyer involvement in management or potentially law firm ownership.
  - ✦ The (d)evolution from full-service lawyers and law firms to unbundled legal services and artificial intelligence.
  - ✦ The (d)evolution to client-defined engagement terms and standards of lawyer conduct.

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Overview: The Path to the ABA Rules of Professional Conduct

> It has often been remarked that we seem to be turning back to some of the universal ideas of what we once mistakenly called the dark ages. In the great creative era of the later Middle Ages men had ideas of doing things for the glory of God and the advancement of justice, and not merely toward competitive individual acquisition, which we are learning to invoke once more. Not the least of these ideas is the idea of a profession.
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> —Roscoe Pound[2]

The practice of law in what is now the United States predates the country's Declaration of Independence. The path to becoming a lawyer typically involved apprenticing in the office of an established lawyer while studying standard treatises or "reading law." The apprentice would then be admitted to the local court in order to practice law. In an article entitled "Legal Profession in America," Roscoe Pound observed:

> Law depends upon lawyers and law and lawyers are little needed until there is a considerable economic development. Hence, there was little in the way of law in the American colonies in the greater part of the seventeenth century and lawyers were few, untrained, and of little influence. Many things concurred to hold back the development of lawyers in the seventeenth and early part of the eighteenth century.[3]

Pound pointed to the unpopularity of lawyers with Puritans who came to the colonies as dissenters, the lack of availability of law books, and the supremacy of the clergy or alternatively royal governors. Acknowledging common law as an inheritance from England, Pound explains that America's reception of the common law as a law for America begins in the eighteenth century with the setting up of court and judicial justice in place of executive and legislative justice. This, he says, was not complete until the end of the first third of the nineteenth century when "[n]eed for lawyers came with the economic development of colonies and the rise of trade and commerce in the eighteenth century."[4]

With economic development driving the growing need for lawyers, Pound describes the beginnings of the development of the profession across several states, noting where lawyers were required to take an oath and bar associations started to form and prescribe training and develop professional ethics.[5] According to Pound, increasing numbers of lawyers were college educated, nothing the increasing number of colleges, and trained in England. This presented "every

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[2] Roscoe Pound, *Legal Profession in America*, 19 Notre Dame L. Rev. 334, 354 (1944), http://scholarship.law.nd.edu/ndlr/vol19/iss4/2 (hereafter "Pound").

[3] Pound, supra note 1, at p. 334.

[4] Pound, supra note 1, at p. 336.

[5] Pound, supra note 1, at pp. 336-338.

prospect of development of the profession in America along traditional common-law lines when events after the Revolution set back the whole development."[6] Pound claims that "[a]t the time of the Revolution, the old prejudice against lawyers had largely worn away," noting the number of lawyers who were signers of the Declaration of Independence and members of the Constitutional Convention.[7] However, Pound lists the following factors as setbacks to the development of the legal profession in America following the Revolution:

> (1) Conservatism, characteristic of lawyers, which led some of the strongest to take the royalist side and so decimated the profession;
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> (2) economic conditions which gave rise to widespread dissatisfaction with law and distrust of lawyers;
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> (3) political conditions which gave rise to distrust of English law and of lawyers;
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> (4) social conditions which gave rise to disbelief in professions and led to de-professionalizing of all callings; and
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> (5) geographical conditions which gave rise to an extreme decentralizing of justice and so of the bar.[8]

Notwithstanding his negative assessment of the profession's standards and practices, Pound acknowledged that the creative legal achievement of the period between the Revolution and Civil War "will compare favorably with those of any period of growth and adjustment in legal history" because of the "work of great judges and great lawyers practicing before them, for there was a high type at the upper level of the profession throughout this period."[9] Assessing bar associations as little more than "social organizations," particularly after the Civil War, Pound credits contributions of outstanding individuals rather than organizations of the profession with any development of the law or legal profession. According to Pound, a "change began with the organization of the American Bar Association in 1878," summarizing its "useful activities" as:

> (1) Its promotion of the Conference of Commissioners on Uniform State Laws; (2) its work for reform of procedure; (3) its work for improvement of the conditions of admission to the bar; (4) its work for codification of legal ethics, i.e., the canons of professional conduct. In all of these very important movements it has taken a leading part. Great steps forward have resulted in the present century.[10]

Perhaps consistent with Pound's overall assessment about the import of individual contribution, there were two writings that formed the foundational resources for what were to

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[6] Pound, supra note 1, at p. 338.

[7] Pound, supra note 1, at p. 339.

[8] Pound, supra note 1, at p. 339.

[9] Pound, supra note 1, at p. 343.

[10] Pound, supra note 1, at pp. 345-346.

become the first ethical code adopted by the American Bar Association (ABA) in 1908.[11] First, in 1835, a Baltimore lawyer named David Hoffman wrote what he called "Fifty Resolutions in Regard to Professional Deportment."[12] Hoffman's "Fifty Resolutions" speak to many of the principles that persist in today's professional rules: no side switching; abstaining from frivolous or vexatious defenses; courtesy toward other lawyers; taking cases for those who cannot pay; keeping clients' funds separate from counsel's monies; reasonable fees; lawyer not appearing as a witness in a cause in which he is also counsel; duty not to mislead the court; courtesy toward witnesses; and no contact with opposing party except through his counsel.[13]

Thereafter in 1854, Judge George Sharswood of Philadelphia, also a Professor of Law at the University of Pennsylvania, published a series of lectures that would become titled "An Essay on Professional Ethics."[14] Not surprisingly writing from the perspective of the bench, Judge Sharswood cautioned against *ex parte* dealings with the court, unnecessary communications with jurors, misleading the court, misleading opposing counsel, and developing a reputation as a "sharp practitioner."[15] Judge Sharswood encouraged lawyers to develop and maintain good relations with their fellow lawyers; be diligent and zealous in representing clients; take cases regardless of the offense or the accused or the nature of the cause; exercise candor in dealing with clients; represent the poor pro bono; and establish fair fees.[16]

Judge Sharswood's Essay catalyzed debate and state efforts to adopt professional codes, with Alabama's Code of Ethics being the first in 1887, with ten more following by 1906 (Georgia, Virginia, Michigan, Colorado, North Carolina, Wisconsin, West Virginia, Maryland, Kentucky and Missouri).[17] At its 1905 meeting, the ABA joined the efforts, forming a committee to report on the advisability and practicability of the adoption of an ABA code of professional ethics.[18] When the committee reported favorably on both points at the 1906 meeting, the ABA then formed a committee from the bench and the bar to draft a series of canons and professional ethics.[19]

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[11] Preface to Bennett and Gunnarsson, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT (9th edition, Center for Professional Responsibility of the ABA, 2019) (hereafter "Annotated ABA Model Rules").

[12] Forest J. Bowman, *The Proposed Model Rules of Professional Conduct: What Hath the ABA Wrought?* 13 PAC. L. J. 273 (1982), https://scholarlycommons.pacific.edu/mlr/vol13/iss2/4 (hereafter "Bowman"), citing H. Drinker, LEGAL ETHICS 338 (1953) (hereafter "Drinker").

[13] Bowman, supra note 11, at p. 275, citing Drinker at 339-349.

[14] Bowman, supra note 11, at p. 276.

[15] Bowman, supra note 11, at p. 276, citing G. Sharswood, An Essay on Professional Ethics 55, 66-74 (1896) (hereafter "Sharswood").

[16] Bowman, supra note 11, at pp. 276-277, citing Sharswood at 75-76, 90.

[17] Bowman, supra note 11, at p. 280, citing Drinker at 23.

[18] Final Report of the Committee on Code of Professional Ethics dated August 1908 ("1908 Final Report"), ¶ 2.

[19] *Id*.

The committee submitted a report at the 1907 ABA meeting that contained a compilation of the codes of ethics adopted in various states[20] along with reprints of (i) Hoffman's "Fifty Resolutions" and (ii) Judge Sharswood's Essay.[21] It noted the ongoing efforts by committees in other states aimed at developing a standard of professional conduct to "not only serve as a guide to the youthful practitioner, but [place the profession] before the public in its true light, and thereby free it from the unmerited public criticism and censure which have at times been bestowed upon it by the unthinking, as a result of the misconduct of the small percentage of unworthy men who steal into its ranks, yet who in no way represent its spirit or morale."[22]

Ultimately the committee proposed a canon of ethics based on the Alabama Code of Ethics, which by then had been adopted with slight modifications in eleven other states.[23] The 1908 Canons of Ethics adopted by the ABA consisted of a Preamble, 32 canons of ethics, and an oath of admission. By 1924, they were reportedly adopted by almost all of the state and local bar associations in the country.[24] The 1908 Canons of Ethics were superseded in 1970 by the ABA Model Code of Professional Responsibility.[25] In that just over sixty-year time period, 15 new canons were added to the original 32: Canons 33-45 in 1928, 46 in 1933, and 47 in 1937.[26]

In his article "Considering the A.B.A.'s 1908 Canons of Ethics," James M. Altman argues that the 1908 Canon of Ethics are "much more than just a restatement of or a new form for the ethical view" embodied in the existing codes and written works of the time.[27] He casts them as the ABA's "response to President Theodore Roosevelt's criticism of lawyers during a June 1905 commencement address at Harvard University, in which he disparagingly described lawyers as 'hired cunning' because they thwarted what he viewed as the public interest by their lucrative representation of corporations and wealthy entrepreneurs."[28] Moreover, Altman cited the 1906 report of the ABA ethics committee as describing "the pervasive commercialism" that "was threatening to reduce a prestigious profession with an essential role in the administration of

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[20] The 1908 Final Report referenced the following states with codes of ethics as a result of statutory enactments or bar association adoption: Alabama, California, Colorado, Florida, Georgi, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Virginia, Washington, West Virginia, and Wisconsin. 1908 Final Report ¶3.

[21] *Id*. at ¶¶ 2-3.

[22] *Id.* at ¶ 3.

[23] *Id.*at ¶ 4.

[24] Report of the Standing Comm. On Professional Ethics and Grievances, 49 A.B.A. Rep. 466, 467 (1924).

[25] Report of Special Committee on Evaluation of Ethical Standards, 94 A.B.A. Rep. 728 (1969).

[26] *See* 53 A.B.A. Rep. 29, 130 (1928); 58 A.B.A. Rep. 41, 178, 429 (1933); 62 A.B.A. Rep. 761, 767 (1937).

[27] James M. Altman, "Considering the A.B.A.'s 1908 Canons of Ethics," 71 Fordham L. Rev. 2395, 2399 (2003) (citations omitted), https://ir.lawnet.fordham.edu/flr/vol71/iss6/3 (hereafter "Altman").

[28] *Id.*

justice to a mere money-getting trade."[29] The aim, he says, of the ethical canons was to help "the legal profession enhance its reputation and, thereby, better perform its important social and political role as American's 'governing class.'"[30]

From the outset of its adoption, the 1908 Canons of Ethics was recognized as merely aspirational and without teeth. Over time, other critics noted its haphazard mixture of ethical goals and minimal standards as well as its litigation bent despite the amount of law practice that occurs outside of a litigation practice. Some expressed the view that the 1908 Canons of Ethics were more focused on solo practitioners than firms, corporate legal departments, and government lawyers.[31] Calls for reform repeated until in August 1964, then ABA President Lewis F. Powell, Jr. asked the ABA's House of Delegates to create a Special Committee on Evaluation of Ethical Standards.[32] By July 1, 1969, that committee had drafted the Model Code of Professional Responsibility ("Model Code"), which were adopted by 1970.

The Model Code was made up of nine "Canons:"

Canon 1:	A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession.
Canon 2:	A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available.
Canon 3:	A Lawyer Should Assist in Preventing the Unauthorized Practice of Law.
Canon 4:	A Lawyer Should Preserve the Confidences and Secrets of a Client.
Canon 5:	A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client.
Canon 6:	A Lawyer Should Represent a Client Competently.
Canon 7:	A Lawyer Should Represent a Client Zealously Within the Bounds of the Law.
Canon 8:	A Lawyer Should Assist in Improving the Legal System.
Canon 9:	A Lawyer Should Avoid Even the Appearance of Professional Impropriety

These canons were further subdivided into Ethical Considerations, which were aspirational, and Disciplinary Rules, which were mandatory minimum levels of conduct below which no lawyer could fall without being subject to disciplinary action. The changes were viewed by some as

[29] *Id.*

[30] *Id.*

[31] Bowman, supra note 11, at pp. 283-284.

[32] Annotated ABA Model Rules, Preface, supra note 10.

more aimed at organization and structure than at true substantive changes in ethical standards.[33] That was not, however, a viewed shared by all.

In his article "ABA Code of Professional Responsibility: In Defense of Mediocrity," Harold Brown saw the Model Code as proposing "sweeping changes."[34] Brown focused on what he saw as five "Draconian concepts" that "raise such serious questions of morality and judgment that, without major revisions, the Code is not to be commended for adoption" by state bars:[35]

- The duty to be an informer and "police" other attorneys;[36]
- The duty to be competent and not neglect a legal matter, exposing an attorney to disbarment rather than simply to civil liability and introducing questions about whether competency is judged relative to a general practitioner or as to a specialist;[37]
- The prohibition against illegal or clearly excessive fees as potentially judged by reference to court minimum fee schedules and referral fees;[38]
- The duty to inform on a client who perpetrated a fraud in the course of the representation as trampling on client confidentiality;[39] and
- The limitations on legal service organizations designed to provide legal services for members.[40]

Nevertheless, the Model Code was adopted by the vast majority of state jurisdictions.

Calls for further review and reform began nearly immediately, and the ABA created a Commission on Evaluation of Professional Standards to undertake a comprehensive review in 1977.[41] The Commission produced the Model Rules of Professional Conduct ("Model Rules"), which were adopted by the ABA on August 2, 1983. By the end of the 1980's, thirty-two states

[33] Bowman, supra note 11, at p. 286.

[34] Harold Brown, "ABA Code of Professional Responsibility: In Defense of Mediocrity," 5 Val. U. L. Rev. 95 (1970), https://scholar.valpo.edu/vulr/vol5/iss1/6 (hereafter "Brown").

[35] *Id.* at pp. 97, 108.

[36] *Id.* at pp. 97-98.

[37] *Id.* at pp. 98-99.

[38] *Id.* at pp. 102-104.

[39] *Id.* at pp. 104-105.

[40] *Id.* at pp. 105-108.

[41] Annotated ABA Model Rules, Preface, supra note 10.

had adopted versions of the Model Rules.[42] Ten more states did so by the end of the 1990's,[43] bringing the total count to forty-two (including the District of Columbia). Eight more states adopted versions of the Model Rules before the close of the first decade of 2000,[44] leaving California as the hold out until it finally adopted a version of the Model Rules effective November 1, 2018.[45]

Notwithstanding over a century of debate and (d)evolution of professional codes, the same themes repeat in public discourse. The following commentary from early this century could well have been plucked from a century or more before:

> Any hardened observer of modern lawyer regulation cannot avoid the overwhelming sensation of churning. For years now the legal profession, the judiciary, the academy, and bar associations have decried a 'crisis' in the profession and have proposed various solution, ranging from hortatory to regulatory. . ..
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> . . . There are actually at least four related but distinct crises in these various accounts of the Job-like woes of the legal profession. First, many lament the public's low opinion of the legal profession. Second, others concern themselves with the unhappy and unhealthy nature of the legal profession itself. Third, many bemoan the loss of 'professionalism' amongst lawyers. Last, some fret over the legal profession's alleged transformation from profession to business.[46]

So, if the profession continuously churns on the same issues, swinging like a pendulum back and forth between the same corrections and counter-corrections, is the profession or its professional codes evolving or devolving? In contemplating this question, consider and compare the answer

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[42] 1984: Arizona, New Jersey; 1985: Arkansas, Delaware, Minnesota, Missouri, Montana, North Carolina, Washington; 1986: Connecticut, Florida, Idaho, Indiana, Louisiana, Maryland, Nevada, New Hampshire, New Mexico, Wyoming; 1987: Mississippi, North Dakota, Pennsylvania, South Dakota, Utah, Wisconsin; 1988: Kansas, Michigan, Oklahoma, Rhode Island, West Virginia; 1989: Kentucky, Texas. *See* https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/.

[43] 1990: Alabama, District of Columbia, Illinois, South Carolina; 1992: Colorado; 1993: Alaska, Hawaii; 1997: Massachusetts; 1999: Vermont, Virginia. *Id.*

[44] 2000: Georgia; 2002: Tennessee; 2005: Iowa, Nebraska, Oregon; 2006: Ohio; 2008: New York; 2009: Maine; 2018: California. *Id.*

[45] *See* https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-Conduct/Current-Rules.

[46] Benjamin H. Barton, *The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 N.C. L. Rev. 411 (2005), http://scholarship.law.unc.edu/nclr/vol83/iss2/4.

to the analogous question whether the human race is evolving or devolving. The biologist's answer was (emphasis added):

> From a biological perspective, there is no such thing as devolution. All changes in the gene frequencies of populations--and quite often in the traits those genes influence--are by definition evolutionary changes. The notion that humans might regress or "devolve" presumes that there is a **preferred hierarchy of structure and function**--say that legs with feet are better than legs with hooves or that breathing with lungs is better than breathing with gills. But for the organisms possessing those structures, each is a useful adaptation.
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> Nonetheless, many people evaluate nonhuman organisms according to human anatomy and physiology and mistakenly conclude that humans are the ultimate product, even goal, of evolution. That attitude probably stems from the tendency of humans to think anthropocentrically, but the scholarship of natural theology, which was prominent in 18th-and 19th-century England, codified it even before Lamarck defined biology in the modern sense. Unfortunately, anthropocentric thinking is at the root of many common misconceptions in biology.
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> Chief among these misconceptions is that species evolve or change because they need to change to adapt to shifting environmental demands; biologists refer to this fallacy as teleology. In fact, more than 99 percent of all species that ever lived are extinct, so clearly **there is no requirement that species always adapt successfully**. As the fossil record demonstrates, **extinction is a perfectly natural--and indeed quite common--response to changing environmental conditions**. When **species do evolve, it is not out of need but rather because their populations contain organisms with variants of traits that offer a reproductive advantage in a changing environment**.
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> Another misconception is that increasing complexity is the necessary outcome of evolution. In fact, **decreasing complexity is common in the record of evolution**. For example, the lower jaw in vertebrates shows decreasing complexity, as measured by the numbers of bones, from fish to reptiles to mammals. (Evolution adapted the extra jaw bones into ear bones.) Likewise, ancestral horses had several toes on each foot; modern horses have a single toe with a hoof.
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> Evolution, not devolution, selected for those adaptations.[47]

[47] Michael J. Dougherty, *Is the Human Race Evolving or Devolving*, Scientific American, July 20, 1998, https://www.scientificamerican.com/article/is-the-human-race-evolvin/.

On the one hand, perhaps like biological evolution, adjustments in the professional codes governing lawyers result from advantageous adaptations or responses to changing societal conditions in which lawyers are called to practice. As discussed further below, technology and globalization certainly provided "conditions" against which to test which of the professional codes' adaptations would prove advantageous and which might become "extinct." On the other hand, unlike biological evolution, perhaps there are preferred hierarchies of structure and function for the justice system and a lawyer's role in it. The "churning" within the world of professional regulation may reflect the fact that the profession is always aiming at those preferred hierarchies. However, in light of changing conditions, sometimes the profession has to dial back the strength of the regulatory hand to let clients and the marketplace drive innovation and efficiency and sometimes it has to dial up the strength of the regulatory hand to "course correct" when those market forces take the justice system off course from its preferred hierarchies. Will the current wave of adaptations of the profession to technology and globalization be met with some "course corrections" or apocalypse?

I. The Relationship between Licensing and a Lawyer's Professional Independence: Insight into the (d)Evolution of State-by-State Licensing and Regulation of Lawyers.

> The client's power to control . . . is fortified by the circumstance that he is the employer and the lawyer employee [and thus the ethical lawyer acts] under penalty of losing his clients.[48]
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> Thomas H. Hubbard
> Member of ABA Ethics Committee drafting 1908 Canons of Ethics

> No man can serve two masters: for either he will hate the one and love the other; or else he will hold to the one, and despise the other, Ye cannot serve God and mammon.
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> Matthew 6:24
> Bible (King James Version)

According to University of Chicago Professor Michael Schudson, late 19th century American lawyers were coming to espouse "responsibility to their clients" as their primary and even *exclusive* moral obligation as lawyers.[49] Recall that Teddy Roosevelt's public condemnation of lawyers as "hired cunning" came at a time of an expanding market for legal services as well as the increasing dominance of the market orientation of twentieth century

[48] Altman, supra note 26, at p. 2494, citing Gen. Thomas H. Hubbard & Simeon E. Baldwin, Lectures Delivered Before the Students of Law Department of Union University 14, 18 (Nov. 12, 1903) (on file with Altman) [hereinafter Hubbard & Baldwin, Union Lectures].

[49] Michael Schudson, *Public, Private, and Professional Lives: The Correspondence of David Dudley Field and Samuel Bowles*, 21 Am. J. Legal Hist. 191, 193 (1977).

American capitalism.[50] Was this client-centric focus actually a shift in philosophy? It could not come as a surprise that lawyers were hired by clients with duties to those clients. The commentary, however, may reflect a reaction to the degree to which clients' bargaining power in an environment of "pervasive commercialism . . . was threatening to reduce a prestigious profession with an essential role in the administration of justice to a mere money-getting trade."[51]

As discussed above, the perception that the "profession" had a higher caller and yet was devolving into a "mere trade" catalyzed the development of the 1908 Canons of Ethics and its state equivalents. One commentator explained that "[t]rust is at the heart of the attorney-client relationship," and "the public could not place its trust in a profession that was governed only by the law of competition."[52] The 1908 Canons of Ethics set forth a vision of what was called "conscientious lawyering" in which lawyers zealously represent their clients, but only insofar as they could do so in conformity with their personal duties, views as gentlemen, and republican duties as "officers of the court" with a special obligation for achieving moral and legal justice.[53] "Lawyers were to measure those duties by their own consciences, not those of their clients."[54] In the originally adopted version of the 1908 Canons of Ethics, Canon 32 was the last Canon entitled "The Lawyer's Duty in Its Last Analysis," which summed up this view of conscientious lawyering:

> No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive, nor should any lawyer render, any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. Correspondingly, he advanced the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But above all a lawyer will find his highest honor in a deserved

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[50] Altman, supra note 26, at pp. 2402 - 2409.

[51] Altman, supra note 26, at p. 2399.

[52] Richard D. Copaken, Group Legal Services for Trade Associations, 66 Mich. L. Rev. 1211, 1215 (1968), https://repository.law.umich.edu/mlr/vol66/iss6/4 (hereafter "Copaken") (hereafter "Copaken"), summarizing H. Drinker, Legal Ethics 22 (1953).

[53] Altman, supra note 26, at p. 2401.

[54] *Id.*

> reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.

That vision of "conscientious lawyering" is what would eventually become partly expressed as professional "independence" in both the Model Code and the Model Rules. That vision also carried through in the Preambles to both the Model Code and Model Rules as well as in the rules that override lawyer duties to clients in favor of "candor," "fairness," and "the bounds of the law."

A code of ethics alone was not going to be enough, however, to stand against the power of the marketplace. In a 1903 lecture on legal ethics at Albany Law School, Thomas H. Hubbard – a member of the ABA committee that drafted and proposed the 1908 Canons of Ethics – explained that an enforcement mechanism for the lawyer code of ethics would be necessary to combat the economic power of the client in the market for legal services. "Absent some new mechanism to enforce the Canons' provisions, the market for legal services was likely to undermine the Canons' vision of conscientious lawyering and its anti-commercialism and create, with respect to ethical practice, a 'race to the bottom.'"[55] Although these enforcement mechanisms were not well developed or formally ensconced at the time of adoption of the 1908 Canons of Ethics, the mechanisms that eventually evolved were those of state definition of the practice of law, state licensing requirements for the practice of law, and a state-based system of "self-regulation" as to the code of professional ethics.

There is irony in the assertion that a lawyer can only be sufficiently "conscientious" or "independent" – meaning independent from the unbridled desire and influence of the client who pays the lawyer or other market forces – when a lawyer is adequately regulated. But the idea that takes shape is that the lawyer does in fact serve at least two masters: the client and the justice system. In a report to the ABA entitled "Lawyer Regulation for a New Century," the ABA Commission on Evaluation of Disciplinary Enforcement ("ABA Disciplinary Enforcement Commission") recounted the history of judicial regulation of lawyers as "officers of the court" and adopted as its first recommendation that the "[r]egulation of the legal profession should remain under the authority of the judicial branch of government."[56]

At the time of the original adoption of the 1908 Canons of Ethics, standards for becoming a lawyer and for lawyer discipline were decidedly local. A lawyer would be admitted to the bar of a particular court, with variation among the courts on what would suffice for attaining and keeping that admission. The ABA Disciplinary Enforcement Commission Report explains that "[i]n the nineteenth century, both the judiciary and the legislature exercised some control over the profession. Disputes between the two usually arose over bar admissions. By the end of the nineteenth century, however, state courts were asserting an exclusive right to regulate lawyers.

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[55] Altman, supra note 26, at pp. 2495, 2401-2402. *Accord*, Copaken, supra note 51 at pp. 1215-1216, citing H. Drinker, Legal Ethics 22 (1953).

[56] *Lawyer Regulation for a New Century*, a Report of the ABA Commission on Evaluation of Disciplinary Enforcement (September 18, 2018), https://www.americanbar.org/groups/professional_responsibility/resources/report_archive/mckay_report/ (hereafter "ABA Disciplinary Enforcement Commission Report").

They based this right on the constitutional doctrines of inherent power and separation of powers."[57]

As the regulation of lawyers formalized and centralized, what generally emerged were state statutory frameworks under the banner of the exercise of the state's police powers to protect the public that would:

- define the practice of law,
- require lawyer licensure (as might occur with respect to other professions, trades, or occupations), and
- define criminal penalties for the unauthorized practice of law.

Against that basic framework, however, the task of setting lawyer qualifications and fitness necessary for obtaining and retaining licensure has generally been ceded to the state courts, which then typically delegate to mandatory state bar associations the task of lawyer discipline under the professional rules adopted by the highest court of the state.[58] Although the unauthorized practice of law can be a matter for state law enforcement, it also amounts professional misconduct.

The original 1908 Canons of Ethics did not include a canon addressing the "unauthorized practice of law." It was not until 1937 that the ABA adopted Canon 47 admonishing lawyers not to knowingly assist in the unauthorized practice of law ("UPL"): "No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate." By the time of the adoption of the Model Code in 1970, the topic of UPL received considerably more attention with nine "Ethical Considerations" to elaborate on Canon 3's statements that a "lawyer should assist in preventing the unauthorized practice of law." Not only did the Model Code amplify its attention on UPL, but it also evolved the lawyer's role from "not permitting" UPL under the 1908 Canons of Ethics to assisting "in preventing" UPL in the 1970 Model Code. This specific shift was part of a broader shift within the Model Code framework to a more active role for lawyers in "policing" the "self-regulated" profession.

The Model Code Disciplinary Rule 3-101 states the prohibition against UPL in two parts. The first is focused on not assisting others to commit UPL: "[a] lawyer shall not aid a non-lawyer in the unauthorized practice of law." The second is focused on the lawyer: "[a] lawyer

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[57] *Id.*, citing Alpert, *The Inherent Power of the Courts to Regulate the Practice of Law: An Historical Analysis*, 32 BUFFALO L. REV. 525 (1983).

[58] *See* ABA Disciplinary Enforcement Commission Report, supra note 55 ("Today, judicial regulation of lawyers is a principle firmly established in every state. A 1987 study by The National Center for State Courts found that thirteen state constitutions expressly grant the judiciary authority to regulate lawyers. The study found state high courts' opinions unanimous that regulation of lawyers is an inherent judicial function.).

shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction."

The nine UPL-focused Ethical Considerations of Model Code's Canon 3 explain that the prohibition against law practice by nonlawyers is "grounded in the need of the public for integrity and competence of those who undertake to render legal services," Model Code EC 3-1, noting further that a nonlawyer is not governed by the professional rules or the disciplinary authority governing lawyers, Model Code EC 3-3. As written, the Ethical Considerations do not focus on the need for lawyers to be licensed and regulated to protect the lawyers' role as officers of the court from the encroachments of the client or powerful pressure of the competitive marketplace. This may be because the power to regulate lawyers and the framework for doing so was, by this time, better established than when the 1908 Canons of Ethics were adopted or even when Canon 47 was added in 1937. On that point, note [7] to the Model Code Ethical Considerations of Canon 3 observed: "That the States have broad power to regulate the practice of law is, of course, beyond question," citing *United Mine Workers v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967).

The Ethical Considerations may explain the importance of Model Code DR 3-101's admonition to a lawyer not to assist a nonlawyer in UPL. However, those Ethical Considerations are less persuasive with respect to the Model Code DR 3-101's admonition to *lawyers* not to commit UPL. Nevertheless, the admonition to *lawyers* not to commit UPL is recognition that the state's power to regulate the practice of law stops at its border, a circumstance that EC 3-9 expressly recognized as at least inconvenient, if not an undesirable, market constraint:

> Regulation of the practice of law is accomplished principally by the respective states. Authority to engage in the practice of law conferred in any jurisdiction is not per se a grant of the right to practice elsewhere, and it is improper for a lawyer to engage in practice where he is not permitted by law or by court order to do so. **However, the demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by the states.** In furtherance of the public interest, the legal profession should discourage regulation that unreasonably imposes territorial limitations upon **the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice** in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not **permanently** admitted to practice.

Although EC 3-9 recognizes the power of the state, note [12] to DR 3-101 also recognizes that there could be circumstances when federal law, preempting state law, may authorize conduct that would otherwise be UPL.

The Model Rules preserved the same prohibitions against committing UPL or assisting UPL, as well as the ability to practice in accordance with authorization under federal law. But at the recommendation of the ABA Commission on Multijurisdictional Practice (MJP Commission) in 2002, the Model Rules yielded further ground to the "demands of business" and the "mobility of our society" in "circumstances that do not create an unreasonable risk to the interests of their

clients, the public or the courts."[59] Rule 5.5(c) defines circumstances in which a lawyer admitted in another United States jurisdiction "may provide legal services on a temporary" as opposed to a "continuous and systematic" basis when they:

> (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
>
> (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
>
> (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or
>
> (4) are not within paragraphs (c) (2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.[60]

In addition, under Model Rule 5.5(d), a lawyer admitted in another United States jurisdiction may "provide legal services through an office or other systematic and continuous presence" if provided to the "lawyer's employer or its organizational affiliates."[61] As with the "temporary" exceptions of Model Rule 5.5(c), comment [16] explains that the in-house counsel exception "does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work."

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[59] Model Rule 5.5, comment [5]. *See* June 6, 2002 Report of the Commission on Multijurisdictional Practice to the ABA, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_mjp_rpt_6_5_1.pdf (hereafter "MJP Commission's 2002 Report").

[60] Model Rule 5.5(c).

[61] Model Rule 5.5(d) states in full: "(d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that: (1) are provided to the lawyer's employer or its organizational affiliates, are not services for which the forum requires pro hac vice admission; and when performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice."

The 2002 MJP Commission made nine recommendations to address "the dynamic change and evolution in nature and scope of legal practice during the past century, facilitated by a transformation in communications, transportation and technology."[62] As context for the nine recommendations, the MJP Commission explained the historical development of UPL restrictions in the United States:

> Jurisdictional restrictions on law practice were not historically a matter of concern, because most clients' legal matters were confined to a single state and a lawyer's familiarity with that state's law was a qualification of particular importance. However, the wisdom of the application of UPL laws to licensed lawyers has been questioned repeatedly since the 1960s in light of the changing nature of clients' legal needs and the changing nature of law practice. Both the law and the transactions in which lawyers assist clients have increased in complexity, requiring a growing number of lawyers to concentrate in particular areas of practice rather than being generalists in state law. Often, the most significant qualification to render assistance in a legal matter is not knowledge of any given state's law, but knowledge of federal or international law or familiarity with a particular type of business or personal transaction or legal proceeding. Additionally, modern transportation and communications technology have enabled clients to travel easily and transact business throughout the country, and even internationally. Because of this globalization of business and finance, clients sometimes now need lawyers to assist them in transactions in multiple jurisdictions (state and national) or to advise them about multiple jurisdictions' laws.
>
> Although client needs and legal practices have evolved, lawyer regulation has not yet responded effectively to that evolution. As the work of lawyers has become more varied, specialized and national in scope, it has become increasingly uncertain when a lawyer's work (other than as a trial lawyer in court) implicates the UPL law of a jurisdiction in which the lawyer is not licensed. Lawyers recognize that the geographic scope of a lawyer's practice must be adequate to enable the lawyer to serve the legal needs of clients in a national and global economy. They have expressed concern that if UPL restrictions are applied literally to United States lawyers who perform any legal work outside the jurisdictions in which they are admitted to practice, the laws will impede lawyers' ability to meet their clients' multi-state and interstate legal needs efficiently and effectively.

Against that backdrop, the MJP Commission made the following recommendations, which include the Rule 5.5 changes noted above, all of which were adopted by the ABA at its August 2002 meeting:

[62] MJP Commission's 2002 Report, supra note 58, at p. 3.

- **Recommendation 1**: The MJP Commission affirmed the principle of the regulation of the practice of law by the state judicial branch of government, which includes jurisdictional limits on legal practice, and recommended that the ABA affirm its support for this fundamental principle.

- **Recommendation 2**: The MJP Commission recommended revisions to Model Rule 5.5 that would recognize circumstances for "temporary" practice by an out of state lawyer as well as "continuous and systematic" practice within the state as in-house counsel.

- **Recommendation 3**: The MJP Commission recommended revisions to Model Rule 8.5 that would make a lawyer subject to the disciplinary authority of a jurisdiction if the lawyer provides services in the jurisdiction even if not licensed in that jurisdiction and providing for a "choice of law" in the event the rules of multiple jurisdictions could apply.

- **Recommendation 4**: The MJP Commission recommended amendments to Rules 6 and 22 of the ABA Model Rules of Lawyer Disciplinary Enforcement that would encompass the potential application to someone not admitted in that jurisdiction.

- **Recommendation 5**: The MJP Commission recommended use of the National Lawyer Regulatory Data Bank to promote interstate disciplinary enforcement mechanisms and urging jurisdictions to require lawyers to report discipline in any jurisdiction to all jurisdictions in which they are licensed.

- **Recommendation 6**: The MJP Commission recommended adoption of a Model Rule on Pro Hac Vice Admission.

- **Recommendation 7**: The MJP Commission recommended adoption of a Model Rule on Admission by Motion (without examination) to licensure in another state.

- **Recommendation 8**: The MJP Commission recommended adoption of a Model Rule for the Licensing of Legal Consultants addressing the work of foreign lawyers (outside the United States).

- **Recommendation 9**: The MJP Commission recommended adoption of a Model Rule for Temporary Practice by Foreign Lawyers (outside the United States).[63]

About a decade after the MJP Commission's recommendations, the ABA Commission on Ethics 20/20 ("Ethics 20/20 Commission") was again tasked with a review of the Model Rules and related policies to recommend any changes to "keep pace with social change and the evolution of law practice," particularly in light of the ways that "[t]echnology and globalization have transformed the practice of law."[64] The Ethics 20/20 Commission noted its governing

[63] MJP Commission's 2002 Report, supra note 58.

[64] Report of the Commission on Ethics 20/20 to the ABA House of Delegates (August 2020), Introduction, p. 1, https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final

principles as "protecting the public; preserving the core professional values of the American legal profession; and maintaining a strong, independent, and self-regulated profession."[65] To address what it observed was the ever-increasing need for lawyer mobility, the Ethics 20/20 Commission recommended a new Model Rule on Practice Pending Admission, which would allow a lawyer to begin practicing in a new jurisdiction (under defined circumstances and for a defined time period) while the lawyer pursues admission through an authorized procedure in that state.[66] Moreover, the Ethics 20/20 Commission proposed to decrease from 5 of 7 to 3 of 5 of the past years for the period of active practice required under the ABA Model Rule for Admission by Motion.[67]

In the same year that the Ethics 20/20 Commission was formed, the ABA Center for Professional Responsibility, the ABA Standing Committee on Professional Discipline, and the Georgetown Law Center for the Study of the Legal Profession co-sponsored a conference called "The Future Is Here: Globalization and Regulation of the Legal Profession."[68] Presenters and panelists at the conference offered an overview of lawyer regulation outside the United States (particularly in the United Kingdom and Australia), contrasting "consumer-" and "risk management" focused regulatory schemes with the U.S. scheme focused on lawyer discipline.[69] One speaker noted the following dynamics in the U.S. legal community that might pave the way for a shift in the lawyer regulatory model in the US:

- Congress and federal agencies have become more active as regulators.
- Increasing numbers of attorneys are limiting their practices to specialties that are rooted in federal law; these specialty bars may not be as committed to the primacy of state court regulation.

_hod_introdution_and_overview_report.pdf (hereafter "Ethics 20/20 Commission August 2012 Report Introduction").

[65] *Id*. at p. 1.

[66] Ethics 20/20 Commission Report 105D (Practice Pending Admission) (August 2012 to ABA House of Delegates) https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105d_filed_may_2012.pdf.

[67] Ethics 20/20 Commission Report 105E (Admission by Motion) (August 2012 to ABA House of Delegates) https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105e_filed_may_2012.pdf.

[68] *Regulation of Bar: Chief Justices, Others, Consider Ideas on Regulating Lawyers in Global Setting,* 25 Law. Man. Prof. Conduct 300 (June 10, 2009), https://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/ (hereafter "Regulating Lawyers in Global Setting Conference"). Conference materials are available here: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/regulation_migrated/conf_materials.pdf.

[69] *Id.*

- More lawyers are working in multidisciplinary consulting firms—for example, with accountants, economists, and lobbyists—and are not holding themselves out as practicing law.
- With more lawyers practicing in multiple jurisdictions, some state supreme courts are asserting disciplinary jurisdiction over "outside" lawyers who violate the court's rules while in the state—making more tenuous the connection between licensure and disciplinary jurisdiction.
- The distribution of legal services to paying clients has shifted toward ever-larger law firms serving ever-larger business clients, with the large-firm corporate bar separating from the rest of the bar.[70]

Although the Ethics 20/20 Commission was not necessarily referring to the views and ideas expressed at this conference, it did expressly note but ultimately declined to endorse what it perceived as a call to change the state-based judicial regulation of the profession.[71]

Even with fairly widespread adoption of the MJP and Ethics 20/20 Commissions respective recommendations at the state levels, pressure to adapt to the increasingly amorphous concept of what it means to practice law "in" the state continues to intensify. The COVID-19 pandemic exponentially impacted tolerance for remote work, which frequently resulted in a physical presence in one home location while being "held out" as practicing from a different law office location. Numerous ethics opinions emerged to grapple with the remote work circumstances, leading one commentator to credit the pandemic with the "welcome development" in the legal profession of renewed focus on the problem for lawyers who are practicing across state lines.[72] However, on the UPL topic, it is less than clear that much useful ground was reliably gained. What is clear is that the topic is still a state-by-state topic.

ABA Formal Opinion 495 (Dec. 16, 2020) addresses "Lawyers Working Remotely" ("ABA Op. 495"), focusing on the UPL issue. But ABA Op. 495 "punts" to the states, as it must, on the ultimate question, saying that "[i]f a particular jurisdiction has made the determination, by statute, rule, case law, or opinion, that a lawyer working remotely while physically located in that jurisdiction constitutes the unauthorized or unlicensed practice of law, then Model Rule 5.5(a) also would prohibit the lawyer from doing so." The question comes right back to the question what it means to practice law "in" a state, and on that question, you need to

[70] *Id.*

[71] Ethics 20/20 Commission August 2012 Report Introduction, supra note 63, at p. 2.

[72] Vish Mohan, *Update on the 'Remote Work' Problem: Where Can I Safely Site While Practicing From My Home State?* Professional Responsibility Law Blog of Frankfurt Kurnit Klein & Selz PC, Feb. 6, 2022, https://professionalresponsibility.fkks.com/post/102h9vx/update-on-the-remote-work-problem-where-can-i-safely-sit-while-practicing-fro.(last visited Oct. 16, 2022)

look at the state where you might be viewed as being "in." And being present physically, whether at home or in an office, is certainly a circumstance that merits deeper investigation.

That said, ABA Op. 495 offers some support for the inference that establishing an "office or other systematic and continuous presence" is connected to something public-facing and not a merely physical presence "invisible" to clients because of the remote work platform. ABA Op. 495 observed that absent a state-specific prohibition, "the lawyer may practice from home (or other remote location) whatever law(s) the lawyer is authorized to practice by the lawyer's licensing jurisdiction, as they would from their office in the licensing jurisdiction." This would include federal law or "temporary practice involving other states'" laws. ABA Op. 495 emphasizes that the lawyer must not "hold out" as authorized to practice from the home location if not actually licensed there, which includes not using or holding out "an address in the local jurisdiction as an office," not using a local jurisdiction address "on letterhead, business cards, websites," or in other places that may indicate a lawyer's physical presence. In sum, according to ABA Op. 495, "it does not 'establish' a systematic and continuous presence in the jurisdiction for the practice of law since the lawyer is neither practicing the law of the local jurisdiction nor holding out the availability to do so. The lawyer's physical presence in the local jurisdiction is incidental; it is not for the practice of law." ABA Op. 495 cited Maine Ethics Opinion 189 (2005) and Utah Ethics Opinion 19-03 (2019) as in agreement.

A concurring opinion expressed by an Ohio Supreme Court justice in *In re Application of Jones,* No. 2018-045, 2018 WL 5076017 (Ohio, Oct. 17, 2018) noted the potential federal and state constitutional limitations of the state's power to prohibit an out-of-state lawyer from practicing consistent with the out-of-state license. That concurring opinion asserts that Ohio's UPL rules serve no legitimate Ohio interest when applied to a lawyer licensed in another state who is not practicing Ohio law, not practicing for Ohio client, not appearing in Ohio courts, and not holding out as available to practice in Ohio. *Id.* at *8-17. Accordingly, the concurrence would find that applying the Ohio UPL rule under the circumstances of the case to violate both Fourteenth Amendment to the U.S. Constitution and Article I, Section 1 of the Ohio Constitution.

The Due Process argument did not carry the majority decision in the *Jones* case. Nevertheless, the state ethics opinions or rules that appear to offer hope for some relief on "remote work" scenarios are also laden with some qualifying statements that muddy the waters on what is "in" or "out" of bounds as highlighted below:

- **ABA Op. 495**: ". . . a lawyer may practice the law authorized by the lawyer's licensing jurisdiction for clients of that jurisdiction, while physically located in a jurisdiction where the lawyer is not licensed if the lawyer does not hold out the lawyer's presence or availability to perform legal services in the local jurisdiction **or actually provide legal services for matters subject to the local jurisdiction**, unless otherwise authorized." In context, this comment refers back to applying the law of that state or serving a client connected to that.

- **Maine Ethics Opinion 189**: It is not UPL for a lawyer to work remotely from Maine when licensed elsewhere if "the lawyer is working for the

benefit of a **non-Maine client** on a matter **focused in a jurisdiction other than Maine**."

- **Utah Ethics Advisory Opinion Committee**, Opinion No. 19-03 (May 14, 2019): "In order to avoid engaging in the unauthorized practice of law, the out-of-state attorney who lives in Utah must not establish a public office in Utah **or solicit Utah business**."

- **Rule Regulating the Florida Bar 4-5.5(b)(1),** amended following ***Florida Bar re Advisory Opinion – Out-of-State Attorney Working Remotely from Florida Home,* 318 So. 3d 538 (Fla. 2021):** "[A] lawyer licensed in another United States jurisdiction does not have a regular presence in Florida for the practice of law when the lawyer works remotely while physically located in Florida for an extended period of time if the lawyer **works exclusively on non-Florida matters**, and neither the lawyer **nor any firm employing the lawyer hold out to the public as having a Florida presence**." As noted in the opinion that catalyzed the rule amendment, the petitioner was practicing federal IP law, his firm had no office in Florida, and he had no Florida clients.

These qualifications relate to separating out where the state has a legitimate interest from where it does not.

Even though a state may have an interest in protecting its residents from unqualified lawyers, these opinions recognize that geographical presence – an historical cornerstone of state-by-state licensing –is simply far less important to the lawyer-client relationship for significant portions of consumers of legal services who are not being served by lawyers within the same jurisdiction as they are. But if state licensing authority is premised on the state's inherent authority to protect the public, is it the state where the legal consumer lives or does business, the state where the lawyer practices, the state that has the strongest nexus to the legal services, such as a regulatory agency or court or the state whose laws are applied, or all of those? While the opinions noted above are saluting the concept that their respective interests may not be implicated by physical presence alone, it simply is not always clear when a client's work might be viewed as connected to a particular state's interest. Would it be enough if the client is an entity organized under the laws of that state? Is it enough if the entity transacts business in the state? What if the client has affiliates or employees in the state? Does it depend on the substance of the legal question? What happens if you need to research the law of that state? Even if it is clearcut, how does this practically get monitored in a firm with a national or international practice?

II. A (d)Evolution from Encouraging "Zealous" Representations Toward Rules and Laws Conscripting Lawyers to Amplified Gatekeeping Duties.

> "Half of the practice of a decent lawyer consists in telling would-be clients that they are damn fools and should stop."
>
> Elihu Root[73]

That a lawyer owes a client zealous representation is a concept long embedded in the conception of the lawyer-client relationship. As discussed in Section II above, from the outset of the drafting the 1908 Canons of Ethics, the lawyer-client relationship and market incentives seemed to be taking care of "zeal" at least for the paying client in civil matters. Admittedly, some expressed reticence toward zealous defense of criminal defendants when the evidence left "no just doubt of their guilt."[74] Overall, drafters of the Canons of Ethics seemed to be more concerned for tamping down a lawyer's zeal than for admonishing a lawyer to zealous representation. Adopting a professional code was seen as a way of counteracting the natural gravitational pull of the client's and marketplace's influences on the lawyer, or to put it differently, to define the circumstances when the lawyer's duties to a client take a back seat to the lawyer's duties as an officer of the court.

Canon 15 of the 1908 Canons of Ethics is the only canon to use the word "zeal," and where it is used, it appears with the concept of representation "within . . . the bounds of the law:"

> The lawyer owes "entire devotion to the interest of the client, warm **zeal** in the maintenance and defense of his rights and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by the rules of law, legally applies. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense. But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.

The "zeal" concept is directly and succinctly continued in the articulation of 1970 Model Code Canon 7, under which a lawyer is called to "represent a client **zealously** within the bounds of the law." Although none of the Disciplinary Rules themselves direct a lawyer to "zealously represent" a client, DR 7-101 is entitled "Representing a Client Zealously," and it states what a

[73] 1 Phillip C. Jessup, Elihu Root 133 (1938).

[74] Bowman, supra note 11, at p. 275, citing Drinker at 340.

lawyer shall not intentionally do (fail to seek the client's lawful objectives through reasonably available means; fail to carry out the contract of employment except when withdrawal is permitted; prejudice a client) and what a lawyer "may" do (exercise professional judgment to waive or fail to assert a right or position; refuse to aid or participate in conduct believed to be unlawful). This rule is followed by DR 7-102 entitled "Representing a Client Within the Bounds of the Law."

By the time of the Model Rules, the term "zeal" is relegated to the Preamble and a comment to Model Rule 1.3. *See* Preamble to the Model Rules, comment [2] ("A lawyer performs various functions. . . . As advocate, a lawyer **zealously** asserts the client's position under the rules of the adversary system."); Preamble comment [8] ("when an opposing party is well represented, a lawyer can be a **zealous** advocate on behalf of a client and at the same time assume that justice is being done."); Preamble comment [9] ("These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system"); and Model Rule 1.3, comment [2] ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").[75]

No matter where the term "zeal" was used, it connected with other obligations that the various iterations of the professional rules have espoused as fundamental to the lawyer-client relationship. The chart below identifies those concepts and references where they appear in each of the 1908 Canons of Ethics, Model Code, and Model Rules:

	1908 Canons of Ethics	**Model Code**	**Model Rules**
Competence	**Canon 8** (obtain full knowledge; give candid opinion on merits and probably result)	**Canon 6** (a lawyer should represent a client competently); and **ECs 6-1 through 6-6; and DR 6-101 and 6-102** (a lawyer shall not limit liability to a client for malpractice)	**Model Rule 1.**1 (provide competent representation, which requires legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation)

[75] For a discussion of the origin of ethical "zeal" and its "disappearance" from the Model Rules, *see* Lawrence J. Vilardo, Vincent E. Doyle III, *Where Did the Zeal Go?* ABA Litigation Journal (Fall 2011) https://www.americanbar.org/groups/litigation/publications/litigation_journal/2011_12/fall/where_did_zeal_go/.

	1908 Canons of Ethics	Model Code	Model Rules
Diligence	**(See zeal discussion above); Canon 5** (in criminal defense, present every defense that the law permits)	**(See zeal discussion above) DR 6-101(A)(3)** (lawyer shall not neglect a legal matter) **Canon 7** (represent a client zealously within the bounds of the law); **DR 7-101** (do not fail to seek lawful objectives through reasonably available means or fail to carry out representation absent permitted withdrawal) **through DR 7-110**.	**Model Rule 1.3** (act with reasonable diligence and promptness) See also **Model Rule 1.1 (above)**.
Loyalty	**Canon 6** (disclose relationships; do not represent conflicting interests; represent client with undivided fidelity) **Canon 10** (don't acquire interest in litigation) **Canon 13** (Court supervision of contingent fees)	**Canon 5** (exercise independent professional judgment on behalf of a client); and **ECs 5-1 through 5-24; and DR 5-101 through DR 5-107** (avoiding a variety of conflict of interests based on representations of other clients, lawyer's own interests, third party payors, or role as witness)	**Model Rules 1.7 – 1.11** (avoiding a variety of conflict of interests based on representations of other clients, lawyer's own interests, third party payors, or role as witness)
Confidentiality	**Canon 6** (obligation not to divulge client secrets of confidences)	**Canon 4** (preserve confidences and secrets of a client), including **ECs 4-1 through 4-6 and DR 4-101** (shall not knowingly reveal a confidence or secret to the disadvantage of a client; shall not use a confidence of secret to the disadvantage of a client or to the advantage of the lawyer or third person; **may revel** exceptions; reasonable care to prevent improper disclosure or use)	**Model Rule 1.6** (lawyer shall not reveal client confidential information; may reveal with consent and in other defined circumstances; reasonable efforts to prevent inadvertent or unauthorized disclosure) **Model Rule 1.8(b)** (shall not use client confidential information to the disadvantage of the client) **Model Rule 1.9(c)** (shall not use confidential information of former client)
Good steward of property	**Canon 11** (No commingling)	**Canon 9** (lawyer should avoid the appearance of impropriety) **EC 9-5 and DR 9-102** (no commingling of funds)	**Model Rule 1.15** (no commingling and rules for safekeeping property of client and third parties)

As highlighted below, the various iterations of the professional rules consistently identified circumstances in which a lawyer's "zeal" must give way to the vision of the "conscientious

lawyer" set forth in the 1908 Canons of Ethics, the "guardians of the law" set forth in the Model Code, and the "officer of the legal system" set forth in the Model Rules:

	1908 Canons of Ethics	Model Code	Model Rules
Bounds of the law	**Canon 15** (bounds of the law; obey own conscience and not that of client) **Canon 16** (restrain and prevent client from wrongdoing or terminate relationship) **Canon 31** (responsibility for advising questionable transactions, for bringing questionable suits, for urging questionable defenses, is the lawyer's responsibility) **Canon 32** (no lawyer should render any service or advice involving disloyalty to the law, disrespect of the judicial office, corruption of any public office or private trust, or deception or betrayal of the public).	**Canon 7** (represent a client zealously within the bounds of the law); **ECs 7-1 through 7-39 (**recognizing that the bounds of the law can be difficult to ascertain; lawyer should be mindful of role as advocate vs. advisor; no frivolous arguments; cannot knowingly assist a client to engage in illegal conduct); **DR 7-101 through DR 7-110** **DR 7-102** (no claims to merely harass or maliciously injure; no frivolous claims; no false statement of law or fact; no use of perjured testimony or false evidence; nothing illegal or fraudulent) **DR 2-110** (requiring a lawyer to withdraw from a representation if it would result in a violation of the rules)	**Preamble comment [9]**: (Lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.) **Model Rule 1.2(d)** (shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent)
Civility to adversary	**Canon 17** (ill feelings between clients should not influence counsel in their conduct and demeanor to each other) **Canon 25** (do not take "technical advantage" of opposite counsel)	**DR 7-106(C)(5-7)** (follow local customs of courtesy or practice; do not engage in undignified or discourteous conduct which is degrading to a tribunal; follow rules of procedure or evidence) **Canon 7** (bounds of the law); **EC 7-10** (obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm) **EC 7-37** (ill feelings between clients should not influence counsel in their conduct and demeanor to each other)	**Rule 8.4(g)** (no harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law)

	1908 Canons of Ethics	Model Code	Model Rules
		EC 7-38 (be courteous and accede to reasonable requests in accordance with local customs; be punctual)	
Civility to witnesses	**Canon 18** (treat with fairness and due consideration; improper speech is not excusable)	**DR 7-106(C)(6)** (do not engage in undignified or discourteous conduct which is degrading to a tribunal) **Canon 7** (bounds of the law); **EC 7-10** (obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm) **EC 7-25** (should ask questions of witness only to harass or embarrass)	**Rule 3.4** (in trial lawyer should not allude to any matter not reasonably believed relevant or that will not be supported by admissible evidence) **Rule 8.4(g)** (no harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law)
Respect for Court	**Canon 1** ("duty of the lawyer to maintain towards the Courts a respective attitude") **Canon 21** (Be punctual, concise, direct)	**DR 7-106(C)(5-7)** (follow local customs of courtesy or practice; do not engage in undignified or discourteous conduct which is degrading to a tribunal; follow rules of procedure or evidence) **Canon 7** (bounds of the law); **EC 7-10** (obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm) **EC 7-36** (do not offend dignity and decorum of proceedings; be respectful, courteous, and above-board with judge)	**Rule 3.2** (expedite litigation) **Rule 3.4** (follow tribunal rules and orders) **Rule 3.5** (no conduct intended to disrupt tribunal) **Rule 8.4** (no conduct prejudicial to the administration of justice)
Harassment	**Canon 16** (restrain and prevent client from doing thing the lawyer ought not to do) **Canon 30** (decline to bring claim if intended merely to harass or injure or to work oppression or wrong)	**Canon 7** (bounds of the law); **EC 7-21** and **DR 7-105** (shall not threaten criminal prosecution to coerce civil resolution) **DR 7-102** (no claims to merely harass or maliciously injure; no frivolous claims)	**Rule 3.1** (no frivolous claims) **Rule 3.4** (no frivolous discovery) **Rule 4.4** (use no means that have no substantial purpose other than to embarrass, delay, or burden another or use

	1908 Canons of Ethics	Model Code	Model Rules
			methods to obtain evidence that violate the legal rights of such person)
Candor and Fairness	**Canon 9** (do not communicate with party represented by counsel; do not mislead or advise unrepresented party) **Canon 22** (conduct should be characterized by candor and fairness)	**Canon 7** (bounds of the law); **EC 7-23** (duty to disclose controlling authority) **EC 7-26, 7-28** (no use of fraudulent, false, or perjured testimony of evidence; no witness bribery) **EC 7-27** (no suppression of evidence) **DR 7-102 (B)** (reveal client's fraud to affected person or tribunal except when information is protected as privileged) **DR 7-104** (do not communicate with someone represented by counsel; do not advise someone not represented) **DR 7-106** (disclose controlling authority; disclose client identity; do not allude to inadmissible evidence or personal knowledge; comply with local customs; be courteous; comply with rules of evidence)	**Rule 3.3** (no false statements of fact or law; disclose controlling authority; remediate known criminal or fraudulent conduct related to a proceeding) **Rule 3.4** (no obstructing access to evidence; no falsifying evidence; follow tribunal rules; no frivolous discovery) **Rule 4.1** (no false statements of material fact or law; no failure to disclose if necessary to avoid assisting crime or fraud unless disclosure is prohibited by Rule 1.6) **Rule 4.2** (no communication with represented party) **Rule 4.3** (do not state or imply disinterest; clarify role; no legal advice) **Rule 4.4** (notify of inadvertently produced document) **Rule 8.4** (no dishonesty, fraud, deceit or misrepresentation)

There is much consistency across the three sets of professional codes in the circumstances that cause the lawyer's role as officer of the court to trump the lawyer's duties to the client. It is interesting to note, however, that along with relegating the "zeal" and "within the bounds of the law" language to the Preamble and comments, the Model Rules also omit the types of explicit references to "civility" that were contained in the 1908 Canons of Ethics and Model Code. Not only is "civility" missing from the Model Rules, one commentator suggests that it is waning from the profession as well:

> Civility in our profession is waning, especially in the litigation arena. Lawyers routinely sling insults at each other, and even at judges. Yelling occurs in depositions and courtrooms. Requests for extensions are improperly withheld to gain tactical advantage. Email, while a convenient

> communication tool, has led many of us to write things that could have been said with more tact (citation omitted). [76]

Other commentators suggests that lawyers use the call to zealous representation to "justify their own uncivil and even unethical behavior," noting that "the ordinary meaning of the term 'zealot' is a person who is fanatical and uncompromising."[77] They do not suggest that civility be reintroduced to the Model Rules but that the word "zeal" and "zealous" be replaced with something like "conscientious and ardent" or "diligent" wherever it appears.[78] Even though the Model Rules do not expressly call for civility, many courts and bar associations have implemented civility standards and incorporated a pledge to civility in the oath upon admission.[79] This is potentially more than aspirational when courts can use such standards or oaths, along with court rules, professional rules, and statutes addressing harassing or dilatory conduct or frivolous claims to impose sanctions.

The bigger shift in the balancing of the lawyer's role as officer of the court and the lawyer's duties to the client occurs with respect to the circumstances in which a lawyer may be called on to do more than abstain from assisting a client in wrongdoing and instead "inform on" a client. The 1908 Canon of Ethics made clear that the "conscientious lawyer" was not required to act for every person who may wish to become a client (Canon 31). Moreover, the "conscientious lawyer" should not render service outside the bounds of the law and should terminate the representation if the lawyer could not restrain the client from wrongdoing (Canons 15 and 16). There were not, however, any defined circumstances in which a lawyer was called on to "correct" false statements of fact or law or report on a client's conduct or intended conduct.

The Model Code took the lawyer's "officer of the court" role a step farther by requiring the lawyer not just to attempt to restrain a client from wrongful conduct or, failing that, withdraw from the representation, but to "reveal" a "**fraud** upon a person or tribunal, except when the information is protected as a **privileged** communication." Model Code DR 7-102(B)(1). Those who questioned whether "society's welfare requires such policing of a client by his own attorney" pointed to the "well established doctrine of absolute confidence between client and attorney."[80] Objectors, moreover, pointed out the potential vagueness of the term "fraud"

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[76] Siobhan A. Cullen, *Civility in the Practice of Law,* ABA Practice Points, May 22, 2018, https://www.americanbar.org/groups/litigation/committees/products-liability/practice/2018/civility-in-the-practice-of-law/ (hereafter "Cullen").

[77] Daniel Harrington and Stephanie K. Benecchi, *Is it Time to Remove 'Zeal' from the ABA Model Rules of Professional Conduct*, ABA Litigation Section, Ethics & Professionalism, May 26, 2021, https://www.americanbar.org/groups/litigation/committees/ethics-professionalism/articles/2021/is-it-time-to-remove-zeal-from-the-aba-model-rules-of-professional-conduct/.

[78] *Id.*

[79] *See* Cullen, supra note 75; Jayne R. Reardon, *Civility as the Core of Professionalism*, ABA Business Law Today, Sept. 18, 2014, https://www.americanbar.org/groups/business_law/publications/blt/2014/09/02_reardon/.

[80] Brown, supra note 33, at p. 105.

particularly when cross-referenced to Model Code DR 4-101(C)'s exceptions to a lawyer's duty of confidentiality. Under DR 4-101(C), a lawyer "may reveal: . . .

> (2) Confidences or secrets when **permitted** under Disciplinary Rules or required by law or court order.
>
> (3) The intention of his client to commit a crime and the information necessary to prevent the crime."

DR 7-102(B)(1)'s "shall report" requirement tied to a lawyer receiving information clearly establishing that the client had in the course of the representation perpetrated a fraud. It looked to past conduct, so DR 4-101(C)(3) did not apply. DR 4-101(C)(2) allows a lawyer to reveal confidence when the Disciplinary Rules permit it, and DR 7-102(B)(1) requires it "except when the information is protected as a privileged communication." So, the lawyer "shall report" if the information is "confidential" but not if it is "privileged."

Under the Model Rules, a lawyer's "gatekeeping" functions as related to the potential for "informing" on the client included some potentially mandatory disclosure obligations and some permissive confidentiality exceptions. Even as to what could be read as potentially mandatory disclosure obligations, the Model Rules build in some discretion for "reasonable remedial measures," noting that they may include disclosure.

(Potentially) Mandatory reporting	**"Permissive" confidentiality exceptions**
Rule 3.3(a)(2): If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered **material evidence** and the lawyer comes to know of its **falsity**, the lawyer shall take reasonable **remedial measures**, including, if necessary, **disclosure** to the tribunal. [(c) applies to the conclusion of the proceeding and applies even if compliance requires disclosure of information otherwise protected by Rule 1.6.]	**Rule 1.6(b)(1):** to prevent reasonably certain death or substantial bodily harm;
Rule 3.3(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person **intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding** shall take **reasonable remedial measures**, including, if necessary, **disclosure** to the tribunal. [(c) applies to the conclusion of the proceeding and applies even if compliance requires disclosure of information otherwise protected by Rule 1.6.]	**Rule 1.6(b)(2):** to prevent the client from *committing a crime or fraud* that is reasonably certain to result in **substantial injury to the financial interests or property** of another and in furtherance of which the client **has used or is using the lawyer's services**;
Rule 4.1. In the course of representing a client a lawyer shall not knowingly:	**Rule 1.6(b)(3):** to prevent, mitigate or rectify *substantial injury* to the **financial interests or property** of another that is reasonably certain to result or has resulted from the client's commission

(Potentially) Mandatory reporting	"Permissive" confidentiality exceptions
(a) make a false statement of material fact or law to a third person; or (b) fail to disclose a **material** fact to a third person when disclosure is **necessary** to avoid assisting a criminal or **fraudulent** act by a client, unless disclosure is **prohibited** by Rule 1.6.	of a crime or fraud in furtherance of which the **client has used the lawyer's services**;
Rule 1.6(b)(6): to comply with other law or court order	
	Rule 1.13(b): If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law. c) Except as provided in paragraph (d), if (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

The circumstances allowing a lawyer to compromise client confidentiality are narrow because of the priority placed on encouraging clients to make full disclosures to lawyers as recognized in Model Code EC 4-1:

> Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

When client confidentiality is targeted, it is often characterized as a competition between the obligations owed by the lawyer to the client versus those owed by the lawyer to the justice system. This is partly true. However, it obscures a broader truth. When a lawyer serves as a client's agent, the lawyer *is* meeting obligations to the justice system, not just to the client as an individual. The justice system rests upon the approval of the people. Yet the justice system, including its laws and institutions, is complex and specialized. Those untrained in the law require advice of those who have studied it and who are experienced in navigating its institutions. A lawyer serves the justice system by acquiring the knowledge and skills to properly function as a client's agent and establishing a relationship in which the lawyer can elicit sufficient information to properly and competently advise the client. In adversarial matters, the assumption is that truth will best be gleaned when adversaries test and refine the issues, develop the facts, and argue their respective cause. So, at a broader perspective, it also is true to say that when confidentiality is targeted, it isn't just a competition between the obligations owed by the lawyer to the client versus those owed by the lawyer to the justice system but a prioritization of the lawyer's duties to the justice system.

No matter how this competition is characterized for purposes of describing the priority of lawyer duties, preserving confidences versus making disclosures is one of the persistently "more troublesome and controversial areas of legal ethics and professional responsibility."[81] Each time the question of conscripting lawyers into a whistleblower role to thwart crime or other wrong doing comes up, opponents may predict "apocalypse" for either attorney-client privilege or confidentiality or the legal profession. For example, in 2003, the Securities Exchange Commission ("SEC") adopted rules pursuant to the Sarbanes-Oxley Act of 2002 that required securities lawyers who become aware of credible evidence that a client is violating a federal or state securities law or is materially breaching a fiduciary duty arising under federal or state law to report the matter to the up the management chain of the client company. In addition, in some circumstances, the rule would require attorneys to withdraw from the representation, notify the

[81] Harold C. Petrowitz, *Some Thoughts about Current Problems in Legal Ethics and Professional Responsibility*, Duke Law Journal Vol. 1979, No. 6, Symposium on Law and Ethics (Dec. 1979), https://www.jstor.org/stable/1372120.

SEC of the withdrawal, and disaffirm any SEC submission that the attorney participated in preparing that had been tainted by the violation. In a similar time frame, the ABA proposed revisions to its Model Rule 1.13 that would parallel the SEC "reporting up and out" rule with respect to organizational clients whether publicly traded or not. Internationally, the Financial Action Task Force was considering recommendations to combat money laundering activities that included compliance and reporting obligations for gatekeeper professions, including attorneys.[82] In short, there were at the time many ongoing conversations about turning up the dial on lawyer "gatekeeping" rules at the potential expense of client confidentiality. One commentator sampled the "flamboyant rhetoric" of "outraged opponents:"[83]

- "Critics are using such terms as 'orwellian' to describe the [Sarbanes-Oxley] proposal."[84]
- The ABA proposed rule is "bartering away a piece of our professional soul to gain some hoped-for public approval."[85]
- The ABA proposed rule makes a corporate lawyer an "uberdirector." [86]
- The ABA proposed rule is "utterly wicked." [87]
- The "gatekeeper initiative" is the "single most alarming threat to the attorney-client privilege to be seen in a long time." [88]
- Worried that "the [SEC] would be using the attorney as the Commission's eyes and ears to build a case against the client." [89]

[82] *See generally,* the discussion in Fred C. Zacharias, *Lawyers as Gatekeepers*, University of San Diego Public Law and Legal Theory Research Paper Series 20 (2004), https://digital.sandiego.edu/lwps_public/art20 (hereafter "Zacharias").

[83] *Id.* at p. 1.

[84] *Id.* at p. 1 n.2, citing Jonathon Peterson, SEC Examines Lawyers' Rules; Attorneys Fighting Codes to Make Them Whistleblowers, AKRON BEACON J., June 1, 2003, at 1.

[85] Zacharias, supra note 81, at p. 2 n.2, citing Seth Stern, Attorneys Face New Rules on Secrets, CHRISTIAN SCI. MONITOR, Aug. 13, 2003, at 2 (quoting William Paul, former ABA President).

[86] Zacharias, supra note 81, at p. 2 n.2, citing ABA Amends Ethics Rules, supra note 1, at 469 (quoting Lawrence Fox).

[87] Zacharias, supra note 81, at p. 2 n.2, citing ABA Amends Ethics Rules, supra note 1, at 469 (quoting Judah Best.

[88] Zacharias, supra note 81, at p. 2 n.2, citing ABA Update of Model Ethics Rules All But Completed in Philadelphia, 18 ABA/BNA LAW. MANUEL ON PROF'L CONDUCT 99, 101 (2002) (quoting Stephen A. Saltzburg).

[89] Zacharias, supra note 81, at p. 2 n.2, citing W. Bradley Wendel, How I Learned to Stop Worrying and Love Lawyer-Bashing: Some Post-Conference Reflections, 54 S.C. L. REV. 1027, 1044 (2003).

- There are plenty of watchdogs already in place, and lawyers are poorly positioned to be gatekeepers. [90]
- Efforts to "make lawyers 'gatekeepers' of the financial system may further impede the ability of criminal defense lawyers to properly represent their clients." [91]
- In close cases, the Sarbanes-Oxley regulations put attorneys "in the role of judge rather than advocate." [92]
- With respect to the proposed gatekeeper initiative, "Doesn't that conjure up a sort of East German notion of reporting all 'suspicious' behavior?" [93]
- SEC's proposed noisy withdrawal rule "threatened to turn lawyers into a police force." [94]
- SEC's proposed noisy withdrawal rule threatens to "turn lawyers into 'policemen, prosecutors, judges, and regulators.'" [95]
- An attorney should . . . not be cast in the role of policemen or watchman over his client." [96]

Despite the observed rhetoric, this commentator argued that "gatekeeping" was traditionally part of a lawyer's role and could be categorized into functions that might require a lawyer to prevent client wrongdoing: "(1) advising clients, (2) screening cases and legal arguments, (3) avoiding personal participation in improper behavior, and (4) disclosing confidences, when permitted by rule, to serve interests that trump the clients."[97]

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[90] Zacharias, supra note 81, at p. 2 n.3, citing Howard Stock, S-O's Lawyer Rule May Chill Information Flow, INVESTOR REL. BUS., Aug. 18, 2003 (quoting Professor Jill Fisch).

[91] Zacharias, supra note 81, at p. 2 n.3, citing David E. Rovella, Going from Bad to Worse: Defense Bar Fears Jail over Tainted Fees, NAT'L L.J., Mar. 11, 2002, at A1.

[92] Zacharias, supra note 81, at p. 2 n.3, citing Corporate Counsel Critique SEC Proposal On Lawyer Reporting Mandated by New Law, 18 ABA/BNA LAW. MANUAL ON PROF'L CONDUCT 698 (2002).

[93] Zacharias, supra note 81, at p. 2 n.4, citing Programs Explore Concern that Government is 'Federalizing' Professional Ethics Rules, 19 ABA/BNA LAW. MANUAL ON PROF'L CONDUCT 320 (2003).

[94] Zacharias, supra note 81, at p. 2 n.4, citing Bruce Moyer, The Dawn of Federal Regulation of Attorney Conduct?, 50 FED. LAW. 5 (2003).

[95] Zacharias, supra note 81, at p. 2 n.4, citing ABA Amends Ethics Rules, supra note 1, at 467 (quoting William Paul).

[96] Zacharias, supra note 81, at p. 2-3 n.4, citing John C. Elam, *Lawyers Shouldn't Be Police Agents: ABA Must Preserve Client Confidentiality*, NAT'L L.J., Aug. 1, 1983, at 20.

[97] Zacharias, supra note 81, at p. 4.

At this point, lawyers have adjusted to the Sarbanes-Oxley "noisy withdrawal" rules as well as the presence in the Model Rules of circumstances in which the lawyer's duty to "tell" overrides a duty of confidentiality. Although forecast in the early part of this century, lawyers in the United States have not yet faced through legislation what some lawyers outside the United States already face in terms of anti-money laundering ("AML") compliance, with the potential requirement to "report" a client suspected of engaging in a money laundering transaction. That "regulatory hand" is not currently a threat from within the profession. Rather, the United States Congress has considered so-called gatekeeper bills that would require more from lawyers and others, including the potential submission of detailed information about businesses' beneficial owners or treating lawyers like financial institutions for purposes of some AML requirements.[98] So far, the ABA has opposed key aspects of the gatekeeper bills, pointing in large part to the potential for intrusion on lawyer-client privilege and confidentiality:

> The ABA supports reasonable and necessary domestic and international measures designed to combat money laundering and terrorist financing. However, the Association opposes legislation and regulations that would impose burdensome and intrusive gatekeeper requirements on small businesses or their attorneys or that would undermine the attorney-client privilege, the confidential attorney-client relationship, or the right to effective counsel.[99]

Although the ABA has publicly opposed direct legislative regulation that sweeps lawyers into an AML regulatory compliance regime, the ABA has made clear that a lawyer's longstanding duty to abstain from engaging in or assisting a client in a crime or fraud is not passive endeavor.

Perhaps looking to deflect some of the efforts to directly subject lawyers to AML laws, the ABA in a 2020 formal opinion made clear that a lawyer already has an ethical duty of due diligence under Rule 1.2(d)'s general prohibition against assisting a client in conduct that the lawyer "knows" is criminal or fraudulent. *See* Formal Opinion 491 ("Obligations Under Rule 1.2(d) to Avoid Counseling or Assisting in a Crime or Fraud in Non-Litigation Settings") (April 29, 2020). According to Opinion 491, a lawyer's obligation to inquire in certain circumstances is "well-grounded in authority interpreting Rule 1.2(d) and in the rules on competence [Rule 1.1], diligence [Rule 1.3], communication [Rule 1.4], honesty [Rule 8.4(b and c), among others], and withdrawal [Rule 1.16(a)]."

As is fairly typical of the professional rules – and likely the law in general – whether or not the lawyer has a duty to make further inquiry "will depend on the circumstances." Opinion 491. More specifically, a "lawyer who has knowledge of facts that create a high probability that a client is seeking the lawyer's services in a transaction to further criminal or fraudulent activity has a duty to inquire further to avoid assisting that activity under Rule 1.2(d)." *Id.* Opinion 491

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[98] *See Gatekeeper Regulations on Attorneys*, ABA at https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_legal_profession/bank_secrecy_act/.

[99] *Id.*

points out that "actual knowledge" is defined in Rule 1.0(f), which provides that "[a] person's knowledge may be inferred from circumstances." If a client refuses to provide information or if the information confirms that providing services would assist in a crime or fraud, Opinion 491 states that the lawyer must decline or withdraw from the representation. Finally, Opinion 491 discusses five hypothetical scenarios to clarify when circumstances might require further inquiry, although in three of the five scenarios, Opinion 491 advises that the "duty to inquire depends on contextual factors, most significantly, the lawyer's familiarity with the client and the jurisdiction."

The introduction section of Opinion 491 gives some additional insight into the types of concerns to which a lawyer should be alert, citing counterterrorism and money-laundering laws and related reports, proceedings, and prosecutions. Although "dishonest clients" can be dishonest in a variety of ways not limited to terrorist or money laundering schemes, the professional rules mentioned above are still the relevant rules to consider. The recent Opinion 491 should wake lawyers up to the fact that "I didn't know" will not be a sufficient defense even if the standard is "knowledge." More is expected of a profession considered to be a "gatekeeper" profession. And in terms of managing liability risk arising from dishonest clients, conducting diligence "further inquiries" will go a long way toward eliminating Monday-morning quarterbacking on the topic of what the lawyer should have known.

The ABA has collaborated with the International Bar Association and the Council of Bars and Law Societies of Europe to compile "A Lawyer's Guide to Detecting and Preventing Money Laundering" ("Lawyer's Guide").[100] The Lawyer's Guide imposes no specific obligation on a lawyer, but provides guidance on, among other things, "the vulnerabilities of the legal profession to misuse by criminals in the context of money laundering," "a risk-based approach to detecting red flags, red flag indicators of money laundering activities and how to respond to them," and "case studies to illustrate how red flags may arise in the context of providing legal advice." Lawyer's Guide, p. 2. In short, the "Lawyer's Guide" elaborates on the kinds of circumstances that might trigger a lawyer's ethical duty to inquire further as explained in Opinion 491.

The Lawyer's Guide also acknowledges the tension between imposing reporting requirements on lawyers and a lawyer's duty of confidentiality and loyalty to a client:

> A public interest underlies both [anti-money laundering ("AML")] measures and the duties of confidentiality that lawyers owe to clients. However, as mentioned above in the context of Recommendation 21, there is a tension between compliance with AML obligations and the duties of confidentiality and loyalty that the legal profession owes to its clients. In requiring lawyers to file [reports] on their clients, the 40 Recommendations risk compromising the independence of the profession, because by reporting on their clients' suspect transactions and activities to the authorities, lawyers are effectively becoming agents of the state.

[100] *See* https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/abaguide-preventing-money-laundering.pdf?logActivity=true.

The "no-tipping off rule", which forbids lawyers who file [reports] from informing their client that they have done so, may further damage the clients' confidence in their lawyers' services and impact the administration of justice.

Traditionally, communications between lawyers and clients in the provision of legal advice and representation in current and future litigation have been protected by legal professional privilege (a common law concept) and professional secrecy (a continental law concept), which are only abrogated in certain countries under certain circumstances by statute, ethical rule, or because the arrangement between lawyer and client is criminal in nature. As mentioned [above], the tension between simultaneous compliance with AML and confidentiality obligations is addressed through the Interpretative Note to Recommendation 23, which excludes lawyers from the obligation to report suspicious transactions where they obtain information about them in privileged circumstances or subject to professional secrecy. The Interpretative Notes, like the Recommendations themselves, are also directed at countries implementing the Recommendations, rather than at lawyers. Further, the Interpretative Note to Recommendation 23 also states that "[i]t is for each country to determine the matters that would fall under legal professional privilege or professional secrecy". Accordingly, knowledge of national laws relating to privilege or professional secrecy is key for lawyers concerned about breaching confidentiality when making [a report], as national laws will determine whether there is a concept of privilege or professional secrecy in the relevant jurisdiction and what circumstances it covers. As an example, the U.K. has a specific "privileged circumstances" defence to the requirement to report suspicions of money laundering. Lawyers should consult guidance published by their local bar association to determine the existence, and extent, of any privilege or professional secrecy exception in their jurisdiction.

Where national legislation does not provide an answer, the following three factors should help reduce the perceived tension between AML compliance and confidentiality obligations and highlight the common ground between the two duties:

(i) AML obligations mostly arise in the context of activities that are criminal;

(ii) the goal behind the FATF 40 Recommendations of trying to prevent lawyers from assisting clients in money laundering and terrorist financing activities is consistent with the ethical obligations of lawyers; and

(iii) the ethical obligation to act in accordance with the client's interests as the overriding imperative guiding professional behaviour is not necessarily absolute.

The IBA's International Principles on Conduct for Lawyers make it clear that the principle of treating client interests as paramount is qualified by duties owed to a court and the requirement to act in the interests of justice. The same concept is found in ABA Model Rule of Professional Conduct 3.3, in which certain specific obligations to the tribunal take precedence over obligations to the clients. The CCBE Code of Conduct lays down similar principles for European lawyers. The ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 463 in May 2013 dealing with the ethical dimensions of the ABA's voluntary AML good practice guidance and noting the tensions between compliance with AML obligations and the duty of confidentiality that lawyers owe to their clients. While guidance from the IBA, CCBE and the ABA is not binding, it does underscore the fact that members of the legal profession are also guardians of justice and are expected by society to uphold the rule of law. Any duties owed by lawyers by virtue of the fact that they are lawyers should be interpreted in light of the role that members of the legal profession are expected to play in society – such expectation does not include creating barriers that can be abused by persons engaging in money laundering and terrorist financing for their criminal gain. Although there seems to be a global consensus that lawyers owe obligations to multiple constituencies, there is great variation in how these competing interests are balanced in any particular country. All agree that a lawyer should not assist a client in criminal activities, but the details of how these obligations are implemented vary from country to country. The resolution is often the result of detailed policy considerations, input from stakeholders and consideration of the context and history within the jurisdiction. Accordingly, one can agree on the overarching principle that lawyers should not assist criminals in illegal activity, as FATF has sought to promulgate, but implementation should be appropriate to each jurisdiction. The key point is that it is vital that lawyers are not facilitating criminal financial flows and that, instead, they uphold the law.

Lawyer's Guide, pp. 20-22.

The Lawyer's Guide explains that its risk-based approach guidance for lawyers divides risk into three categories and summarizes a number of factors for consideration as follows:

Country/ Geographic Risk	Client Risk	Service Risk
Countries subject to sanctions, embargoes or similar measures issued by, for example, the UN *Countries identified by credible sources (i.e., well-known bodies that are regarded as reputable, e.g., International Monetary Fund, The World Bank, and OFAC) as:* • *generally lacking appropriate AML laws, regulations and other measures;* • *being a location from which funds or support are provided to terrorist organisations; or* • *having significant levels of corruption or other criminal activity.*	*Domestic and international PEPs* *Entity, structure or relationships of client make it difficult to identify its beneficial owner or controlling interests (e.g., the unexplained use of legal persons or legal arrangements)* *Charities and "not-for-profit" organisations that are not monitored or supervised by authorities or SROs* *Use of financial intermediaries that are neither subject to adequate AML laws nor adequately supervised by authorities or SROs*	*Where lawyers, acting as financial intermediaries, actually handle the receipt and transmission of funds through accounts they control* *Services to conceal improperly beneficial ownership from competent authorities* *Services requested by the client for which the lawyer does not have expertise (unless the lawyer is referring the request to an appropriately trained professional for advice)* *Transfer of real estate between parties in an unusually short time period*
	Clients who: • *conduct their business relationships or request services in unconventional circumstances;* • *are cash-intensive businesses (e.g., money service businesses and casinos), that are not usually cash-rich but generate substantial amounts of cash;* • *have no address, or multiple addresses; or* • *change settlement or execution instructions.*	*Payments from un-associated or unknown third parties and payments for fees in cash where this would not be typical* *Consideration is inadequate or excessive* *Clients who offer to pay extraordinary fees for services that would not warrant such a premium*

Lawyer's Guide, pp. 28-29.

The Lawyer's Guide summarizes the "red flags" associated with the client, which should be viewed with consideration of where the client is from as well as the nature of the proposed representation.

Client's behaviour or identity	Concealment techniques	The relationship between the client and counterparties
Client is secretive or evasive about: • *its identity or that of its beneficial owner;* • *the source of funds or money; or* • *why it is doing the transaction in the way it is* **Client is:** • *known to have convictions, or to be currently under investigation for, acquisitive crime or has known connections with criminals;* • *related to or a known associate of a person listed as being involved or suspected of involvement with terrorists or terrorist financing operations;* • *involved in a transaction that engages a highly technical or regulatory regime that imposes criminal sanctions for breaches (increasing the risk of a predicate offence being committed); or* • *unusually familiar with the ordinary standards provided for by the law in satisfactory customer identification, data entries and STRs, or asks repeated questions on related procedures*	• *Use of intermediaries without good reason* • *Avoidance of personal contact for no good reason* • *Reluctance to disclose information, data and documents that are necessary to enable the execution of the transaction* • *Use of false or counterfeited documentation* • *The client is a business entity that cannot be found on the Internet*	• *Ties between the parties of a family, employment, corporate or any other nature generate doubts as to the real nature/ reason for transaction* • *Multiple appearances of the same parties in transactions over a short period of time* • *The parties attempt to disguise the real owner or parties to the transaction* • *The natural person acting as a director or representative does not appear to be a suitable representative* **The parties are:** • *native to, resident in, or incorporated in a higher-risk country;* • *connected without apparent business reason;* • *of an unusual age for executing parties;* • *not the same as the persons actually directing the operation*

Lawyer's Guide, p. 33.

Moreover, the Lawyer's Guide summarizes the "red flags" associated with funds involved in any transaction:

Size of funds	Source of funds	Mode of payment
There is no legitimate explanation for: • *a disproportionate amount of private funding, bearer cheques or cash (consider individual's socio-economic, or company's economic, profile);* • *a significant increase in capital for a recently incorporated company or successive contributions over a short period of time to the same company;* • *receipt by the company of an injection of capital or assets that is high in comparison with the business, size or market value of the company performing;* • *an excessively high or low price attached to securities being transferred;* • *a large financial transaction, especially if requested by a recently created company, where it is not justified by the corporate purpose, the activity of the client or its group companies; or* • *the client or third party contributing a significant sum in cash as collateral provided by the borrower/debtor rather than simply using those funds directly.*	**The source of funds is unusual because:** • *third party funding either for the transaction or for fees/taxes involved with no apparent connection or legitimate explanation;* • *funds are received from or sent to a foreign country when there is no apparent connection between the country and the client;* • *funds are received from or sent to higher-risk countries;* • *the client is using multiple bank accounts or foreign accounts without good reason;* • *private expenditure is funded by a company, business or government; or* • *the collateral being provided for the transaction is currently located in a higher-risk country.*	• *The asset is purchased with cash and then rapidly used as collateral for a loan.* **There is no legitimate explanation for:** • *an unusually short repayment period having been set;* • *mortgages being repeatedly repaid significantly prior to the initially agreed maturity date; or* • *finance being provided by a lender, either a natural or legal person, other than a credit institution.*

Lawyer's Guide, p. 36.

Although lawyers in the United States are not yet bound to a specific set of AML requirements, there is ample guidance from which lawyers can conclude that a gatekeeping function is expected as it relates to money laundering and terrorist financing. The body of recommendations across the globe would undoubtedly serve as a reference point for what circumstances might give rise to a "duty to inquire" and what measures could become the yardstick for measuring whether the inquiry was reasonable.

The 1908 Canons of Ethics admonished the lawyer not to be an agent of a client misusing the legal system:

> No lawyer is obliged to act either as advisor or advocate for every person who may wish to become his client. He has the right to decline employment. Every lawyer upon his own responsibility must decide what business he will accept as counsel . . . The responsibility for advising questionable transactions, for bringing questionable suits, for urging questionable defenses, is the lawyer's responsibility. He cannot escape it by urging as an excuse that he is only following his client's instructions.

But in today's world, under the "officer of the court" rationale, lawyers are being called to a more proactive "duty to inquire," not just a "duty to decline." To the extent that professional codes or other laws impose "notice" obligations on lawyers in derogation of confidentiality and privilege, it is a call to a "duty to defend" and not just a duty not to engage in or assist. It is the difference between saying "I cannot work for you" and "sometimes I am required to work against you." That is a fissure in the conception of an attorney's role within the legal system. The question remains whether the fissure is an adaptation that opens up needed flexibility for overall long-term stability or whether it is the first step of what becomes a yawing gap that brings about the apocalypse or end times for the current conception of the attorney's role within the legal system.

III. Market-Driven (d)Evolutions

> A reawakening of the profession to the needs of the public, coupled with a recognition that new concepts of service may be necessary if these needs are to be met, can certainly be a healthy development. Nevertheless, it would be unfortunate if the profession, in its zeal for reform, should overlook the dangers at which the [1908 Canons of Ethics] were originally directed, which may continue to exist, or the values which the Canons sought to perpetuate, which may have continuing vitality. Bold experimentation is called for in this period, but perspective is equally necessary.[101]
>
> Richard D. Copaken
> "Group Legal Services for
> Trade Associations" (1968)

[101] Copaken, supra note 51, at p. 1214.

The prior sections focused on the ABA's development and (d)evolution of professional codes as a way of prioritizing the attorney's roles and duties as an agent of client and officer of the court. The next section focuses on the ways in which the marketplace is driving (d)evolution of professional codes to spur innovations or extract efficiencies – i.e., reduce costs – in legal services.

A. The (d)evolution from the doctrine of champerty to the acceptance for contingency fee work and litigation funding.

> The inhabitants of [England] are lost in the law, such and so many are the references, orders and appeals, that it were better for us to sit down by the loss than to seek for relief .... The price of right is too high for a poor man.
>
> —John Warr[102]

The doctrines of champerty and maintenance were developed at common law to "prevent officious intermeddlers from stirring up strife and contention by vexatious and speculative litigation which would disturb the peace of society, lead to corrupt practices, and prevent the remedial process of the law."[103] Maintenance is "an officious intermeddling in a suit which in no way belongs to one, by maintaining or assisting either party, with money or otherwise, to prosecute or defend it."[104] Champerty, a species of maintenance, consists of an agreement under which a person who has no interest in the suit of another undertakes to maintain or support it at his own expense in exchange for part of the litigated matter in the event of a successful conclusion of the cause.[105]

Champerty, maintenance, and barratry – the continuing practice of maintenance or champerty – are English law doctrines for which statutory enactments against such offenses can be found as far back as the thirteenth century.[106] According to Stephan Landsman in his article "The History of Contingency and the Contingency of History," the "frequency and vehemence of the English denunciation of champerty and its cousins" suggests that contingency fee representation or other forms of litigation-related risk sharing played a significant role in English

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[102] Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, a History to 1940*, 47 DePaul L. Rev. 231 (1998), https://via.library.depaul.edu/law-review/vol47/iss2/3 (hereafter "Karsten"), citing John Warr, The Corruption and Deficiency of the Laws of England Soberly Discovered (Lond, Giles Calvert 1649), reprinted in A Spark in the Ashes: The Pamphlets of John Warr 102 (Stephen Gedley & Lawrence Kaplan eds., 1992).

[103] 14 C.J.S. Champerty and Maintenance § 3; *Curry v. Dahlberg*, 341 Mo. 897, 910, 110 S.W.2d 742, 748,749 (1937), *rehearing overruled*112 S.W.2d 345 (banc 1937).

[104] *Moffett v. Commerce Trust Company*, 283 S.W.2d 591, 596 (Mo. 1955).

[105] *Watkins v. Floyd*, 492 S.W.2d 865, 871 (Mo. App. 1973).

[106] Stephan Landsman, *The History of Contingency and the Contingency of History*, 47 DePaul L. Rev. 261, 262 (1998), https://via.library.depaul.edu/law-review/vol47/iss2/4 (hereafter "Landsman") (citations omitted).

legal activity.[107] Landsman observes that the doctrines, when coupled with England's "loser pays" attorney's fees rule, increases a litigant's risks associated with litigation and therefore inhibits access to the courts.

The contingent fee, on the other hand, was used to provide access to courts for those who might not otherwise have the economic ability to seek redress. The colonies and eventually the United States' judicial system inherited both the philosophy embodied in the doctrines of champerty and maintenance along with the common practical practice of contingency fee representation. Judge Sharswood, whose 1854 "Essay on Professional Ethics" was cited in the development of the 1908 Canons of Ethics, gave voice to those who saw the need for laws against champerty, condemning contingent fee representation for its effect on the lawyer's professional character:

> It is to be observed, then, that such a contract changes entirely the relation of counsel to the cause. It reduces him from his high position of an officer of the court and minister of justice, to that of a party litigating his own claim. Having now a deep personal interest in the event of the controversy, he will cease to consider himself subject to the ordinary rules of professional conduct. He is tempted to make success, at all hazards and by all means, the sole end of his exertions. He becomes blind to the merits of the case, and would find it difficult to persuade himself, no matter what state of facts might be developed in the progress of the proceedings, as to the true character of the transaction, that it was his duty to retire from it . . . The worse consequence is yet to be told, -- its effect upon professional character. It turns lawyers into higglers with their clients.[108]

Nevertheless, even earlier, Justice Hugh Henry Brackenridge observed that "at an early period, [the contingency fee] was tolerated, and has become common"[109] notwithstanding early decisions finding such fee arrangements to be champertous and void. Hoffman's 1835 "Fifty Resolutions," which also were cited in the cited in the development of the 1908 Canons of Ethics, expressly approved of contingent fees in his 24th Resolution, citing the same access to courts argument that persists today.[110]

Peter Karsten's article, "Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, a History to 1940,"[111] details the development and scrutiny of contingency fees. According to the history Karsten recounts, early champerty-embracing commentators and courts feared the abuses associated with contingency fees, with some grudgingly and narrowly recognizing a limited role for contingency fees as important in giving access to the courts to the truly impoverished. In addition, many championed the idea that

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[107] *Id*.

[108] Bowman, supra note 11, at p. 277, citing Sharswood at 60.

[109] Karsten, supra note 101, at p. 234, citing H.H. Brackenridge, Law Miscellanies xx (Stanley Katz et al. eds., New York, Arno Press 1972) (1814).

[110] Bowman, supra note 11, at p. 277, citing Drinker at 343.

[111] Karsten, supra note 101.

attorneys should be free to contract with their clients like other professionals. On a more limited scale, some cited as a positive factor the alignment of the attorney's interests with the client's interests.[112]

Both case law and state statutes evolved against the ongoing debate between concerns for access and abuses. This could still be detected in the treatment of the topic of contingency fees in the 1908 Canons of Ethics. In the original report submitted to the ABA for consideration, the committee proposed the following version of Canon 13: "Contingent fees lead to many abuses, and where sanctioned by law should be under the supervision of the Court."[113] However, the following language was substituted and ultimately adopted as Canon 13 of the 1908 Canons of Ethics: "Contingent fees, where sanctioned by law, should be under the supervision of the Court in order that clients may be protected from unjust charges."

Six decades later, the ABA Model Code placed its treatment of contingency fees solidly under the banner of "access" as articulated in Canon 2: "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available." While contingency fees continued to be viewed as ethically tolerable and perhaps even socially desirable, Ethical Considerations 1, 16, and 20 (emphasis added below) under this Canon still make clear a strong preference that contingency fees be limited to circumstances in which the client is ***unable*** to pay.

> **EC 2-1** The need of members of the public for legal services1 is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laymen to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to **assist in making legal services fully available**.
>
> ***Financial Ability to Employ Counsel: Generally***
>
> **EC 2-16** The legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate compensation for services rendered, and reasonable fees should be charged in appropriate cases to clients able to pay them. Nevertheless, **persons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services, and lawyers should support and participate in ethical activities designed to achieve that objective**.
>
> ***Financial Ability to Employ Counsel: Persons Able to Pay Reasonable Fees***

[112] Karsten, supra note 101, at pp. 234-248.

[113] Canon 13, 1908 Final Report. Recall that the 1908 Canons of Ethics were modeled on the Alabama Code of Ethics, which in Canon 51 stated a preference against contingent fees: "Contingent fees may be contracted for; but they lead to many abuses, and certain compensation is to be preferred."

EC 2-20 Contingent fee arrangements in civil cases have long been commonly accepted in the United States in proceedings to enforce claims. The historical bases of their acceptance are that (1) they often, and in a variety of circumstances, provide the only **practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim**, and (2) a successful prosecution of the claim produces a *res* out of which the fee can be paid. Although **a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee**, it is not necessarily improper for a lawyer, where justified by the particular circumstances of a case, to enter into a contingent fee contract in a civil case with any client who, after being fully informed of all relevant factors, desires that arrangement. Because of the human relationships involved and the unique character of the proceedings, **contingent fee arrangements in domestic relation cases are rarely justified**. In administrative agency proceedings contingent fee contracts should be governed by the same consideration as in other civil cases. **Public policy properly condemns contingent fee arrangements in criminal cases, largely on the ground that legal services in criminal cases do not produce a *res* with which to pay the fee**.

The text of Disciplinary Rule 2-106 (emphasis added below), which falls under Canon 2, adds little to the contingency topic other than placing it under the umbrella of the prohibition against an "illegal or clearly excessive fee."

DR 2-106 -Fees for Legal Services.

(A) **A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee**.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) **Whether the fee is fixed or contingent**.

(C) **A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case**.

So, under the Model Code, the contingency fee was ethical provided that it was not "illegal" or "clearly excessive" and outside the context of a criminal or domestic case. The concept of "supervision by a court," expressly present in Canon 13 of the 1908 Canons of Ethics, did not carry forward explicitly in the language of the canon, the ethical considerations, or the disciplinary rule. Nevertheless, the Sixth Circuit Court of Appeals in *Krause v. Rhodes* – expressly invoking Canon 13 – made clear that the omitted reference to court supervision in the Model Code, which cited Canon 13, would not, in fact, inhibit court supervision:

> A federal district judge has broad equity power to supervise the collection of attorneys' fees under contingent fee contracts. As has often been stated, "where an attorney recovers a fund in a suit under a contract with a client providing that he shall be compensated only out of the fund he creates, the court having jurisdiction of the subject matter of the suit has power to fix the attorney's compensation and direct its payment out of the fund." [citation omitted] Further, "(t)he sum determined to be a reasonable attorney's fee is within the discretion of the district court; before a reviewing court should disturb the holding there should be a clear showing that the trial judge abused his discretion." [citation omitted] Thus, an attorney's right to contract for a contingent fee is not completely beyond judicial control. [citation omitted]
>
> Indeed, the [Model Code] imposes considerable limitations upon the ability of lawyers to contract for contingent fees. See DR 2-106 and EC 2-20. As indicated by the drafters' footnotes, the cited [Model Code] provisions are based largely upon Canon 13 of the [1908 Canons of Ethics, which provided that a] contract for a contingent fee, where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of a court, as to its reasonableness.[114]

As the *Krause* Court made clear, the overall requirement that the contingent fee be "reasonable" – though DR 2-106 actually says not "clearly excessive" – allows the contingency fee to do its job of providing access while allowing courts to curb abuses.

Disciplinary Rule 2-106 did not just prohibit a "clearly excessive" (or unreasonable) fee, it also prohibited an "illegal" fee. Accordingly, DR 2-106 was crafted to live alongside statutory or case law that might yet preserve some aspects of the doctrines of champerty and maintenance. For example, the Model Code pointed to restrictions related to litigation expenses: "A contract for a reasonable continent fee where sanctioned by law is permitted by Canon 13, but the client must remain responsible to the lawyer for expenses advanced by the latter. 'There is to be no

[114] *Krause v. Rhodes*, 640 F.2d 214 (6th Cir. 1981) (citations omitted).

barter of the privilege of prosecuting a cause for gain in exchange for the promise of the attorney to prosecute at his own expense." EC 2-20 of the Model Code, Note 31, citing Canon 13, ABA Opinion 246 (1942), and *In re Gilman,* 251 N.Y. 265, 270-71 (1929) (C.J. Cardozo). Karsten's historical overview of the development of contingency fees explained that those opposed to contingency fees also argued that an attorney's promise to pay litigation costs was champertous, noting that the "end run" around the problem involved having the attorney "advance" or "loan" the costs to the client.[115] Provided that the contingency fee agreement did not stipulate that the attorney would receiving "nothing" if unsuccessful, courts found the agreement lawful "despite the fact that most parties to such agreements clearly understood that the client was not expected to pay if the suit failed."[116] This is consistent with Canon 10 of the 1908 Canons of Ethics stating that a "lawyer should not purchase any interest in the subject matter of the litigation which he is conducting."

The Model Code's Disciplinary Rule 5-103 carries forward Canon 10 of the 1908 Canons of Ethics and works in tandem with DR 2-106 on contingency fees. Specifically, it prohibits a lawyer from acquiring a proprietary interest in the cause of action, except for a contingency fee and an *advance* on expenses provided the client remains liable for them:

> **DR 5-103 -Avoiding Acquisition of Interest in Litigation.**
>
> (A) -A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may:
>
> (1) -Acquire a lien granted by law to secure his fee or expenses.
>
> (2) -Contract with a client for a reasonable contingent fee in a civil case.
>
> (B) -While representing a client in connection with contemplated or pending litigation, a lawyer **shall not advance or guarantee financial assistance** to his client, **except that a lawyer may advance or guarantee the expenses of litigation**, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, **provided the client remains ultimately liable for such expenses**.

This rule is under Model Code Canon 5 admonishing that a "lawyer should exercise independent professional judgment on behalf of a client," which encapsulates one of the particular concerns about contingency fees. The Model Code's Ethical Considerations 5-1, 5-7, and 5-8 (emphasis added below) elaborate on and caution the lawyer to prioritize the client over the lawyer's economic self-interest in a contingency fee or recovery of invested litigation costs and warn of the risk to the lawyer's professional judgment:

> **EC 5-1** The professional judgment of a lawyer should be exercised, within the bounds of the law, **solely for the benefit of his client** and free of compromising influences and loyalties. Neither his **personal interests**, the

[115] Karsten, supra note 101, at p. 253.

[116] *Id.* at 253.

interests of other clients, nor the desires of third persons should be permitted to **dilute his loyalty to his client**.

EC 5-7 The **possibility of an adverse effect upon the exercise of free judgment by a lawyer on behalf of his client during litigation generally makes it undesirable for the lawyer to acquire a proprietary interest in the cause of his client or otherwise to become financially interested in the outcome of the litigation.** However, it is not improper for a lawyer to protect his right to collect a fee for his services by the assertion of legally permissible liens, even though by doing so he may acquire an interest in the outcome of litigation. **Although a contingent fee arrangement gives a lawyer a financial interest in the outcome of litigation, a reasonable contingent fee is permissible in civil cases because it may be the only means by which a layman can obtain the services of a lawyer of his choice. But a lawyer, because he is in a better position to evaluate a cause of action, should enter into a contingent fee arrangement only in those instances where the arrangement will be beneficial to the client.**

EC 5-8 A financial interest in the outcome of litigation also results if **monetary advances** are made by the lawyer to his client. Although this assistance generally is not encouraged, there are instances when it is **not improper** to make loans to a client. For example, the advancing or guaranteeing of payment of the costs and expenses of litigation by a lawyer may be the only way a client can enforce his cause of action, **but the ultimate liability for such costs and expenses must be that of the client.**

In sum, the Model Code makes clear that contingency fees and litigation cost advances are not *per se* unethical, although they are discouraged and should be reserved for circumstances in which they are necessary to provide access to the court to those without economic resources. In those circumstances, the "access" policy outweighs the concerns for "abuse" rooted in the lawyer's self-interest and the "stirring up litigation" concerns that had historically justified the doctrines of champerty and maintenance.

Contingency fees (d)evolved under the Model Rules in several ways. Model Rule 1.5 (emphasis added below) serves as the counterpart to Model Code DR 2-106, continuing to recognize that a contingency fee is ethical except for criminal and domestic relations matters and unless prohibited by "other law" (such as any remnants of champerty and maintenance), subject to the overarching requirement of "reasonableness" of fees:

Rule 1.5 Fees

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. . ..

. . .

> (c) A fee **may be contingent** on the outcome of the matter for which the service is rendered, **except in a matter in which a contingent fee is prohibited by paragraph (d) or other law**. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.
>
> (d) A lawyer shall not enter into an arrangement for, charge, or collect:
>
> (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or
>
> (2) a contingent fee for representing a defendant in a criminal case.

However, in Model Rule 1.5, the contingency fee rule has been stripped of its tie to court "access" and the accompanying admonitions to limit the circumstances for using contingency fees. There is much more focus in Model Rule 1.5 on ensuring proper notification to clients about the details of a contingency fee agreement. Very little is said in the comments to Model Rule 1.5 about contingency fees, although comment [3] to Model Rule 1.5 elaborates on the "reasonableness" standard and what may be "prohibited by law:"

> In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

Amendments to comment [3] in 2002 deleted a requirement that a lawyer offer a client alternative arrangements if there is doubt about whether a contingent fee is in the client's best interest. This change provoked on commentator to predict yet more abuse of contingent fees.[117]

[117] *See* Lester Brickman, *The Continuing Assault on the Citadel of Fiduciary Protection: Ethics 2000's Revision of Model Rule 1.5*, 2003 U. Ill. L. Rev. 1181 (2003).

Model Rule 1.8 (particularly subparts e and i) is the counterpart to Model Code DR 5-103 relating to acquiring a proprietary interest in a cause of action or subject matter of litigation. Model Rule 1.8 (emphasis added below) represents a reversal of Model Code DR 5-103 in allowing lawyers to make repayment of advanced litigation costs and **expenses**, like payment of fees, contingent on the outcome of the matter:

> **Rule 1.8: Current Clients: Specific Rules**
>
> . . . .
>
> (e) A lawyer **shall not provide financial assistance** to a client in connection with pending or contemplated litigation, **except that**:
>
> (1) **a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter**.

This rule does not wholly relieve the client from responsibility for the costs and expenses. If the outcome of the case is successful, the lawyer must charge the client for the advanced expenses or run afoul of the prohibition against providing financial assistance. However, for indigent clients, a lawyer may pay court costs and expenses of litigation regarding of outcome and "provide modest gifts to the client for food, rent, transportation, medicine and other basic living expenses." Model Rule 1.8(e)(2 and 3). One commentator on a draft of the Model Rules bemoaned this liberalization of the approach to contingency fees, claiming that prior restraints were "based on the understanding of human nature that a lawyer who 'owns' a piece of the case may tend to lose objectivity."[118] Comment [10] to Model Rule 1.8(e) recites the "access to court" rationale, calling the rule change allowing for contingent repayment of advanced costs "virtually indistinguishable from contingent fees."

Echoing the old champerty and maintenance themes, comment [10] to Model Rule 1.8 also notes that lawyers cannot advance "living expenses" because doing so would improperly encourage lawsuits:

> Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted

[118] Bowman, supra note 11, at p. 308.

In short, the line separating "access" and "abuse" has moved from the time of the 1908 Canons of Ethics to the time of the Model Rules. Once the availability of contingent fees was reluctantly admitted as ethical in order to improve access to courts and counsel for the impoverished while "abuse" included advancing litigation expenses and living expenses. Now, economic means are not tied to the ethics of contingent fees and expenses generally, although for the indigent, attorneys can even forego repayment of court expenses even with a successful outcome and provide gifts for food, rent, transportation, medicine and other basic living expenses.

The market for contingency fee representations has expanded beyond its traditional use in connection with personal injury litigation and into commercial litigation. The commercial plaintiff may not have been the focal point for "access" to courts and lawyers' concerns, but many commercial plaintiffs found hourly rate litigation an uneconomic solution to enforce their rights or seek redress. The question was not whether the commercial plaintiff had "access." The question whether "accessing" the courts made economic sense. If accessing the courts made no practical sense in terms of vindication of rights, then what good is "access?" Increasingly, the contingency fee agreement became the tool to rationalize the risk-reward calculus for the commercial plaintiff by shifting the cost and risk, as well as a larger portion of the "reward," to the lawyers.

Many commentators had historically expressed concerns about the contingency fee's potentially negative impact on an attorney's professional objectivity. By contrast, the commercial plaintiffs seeking contingency fee arrangements reason that an hourly rate lawyer's overarching economic incentives are at odds with those of the client, voicing suspicions of "overbilling" or "overworking" a case. The theory is that the contingency fee agreement could better align the economic interests of lawyer and client. Still questions about objectivity, independence, and conflict of interest persist. Will the attorney who has invested large amounts in litigation expenses become risk averse and recommend in favor of an unfavorable settlement? Or become unrealistic and recommend against a reasonable settlement offer? Will the attorney be more likely to cut corners on the representation to hedge against the potential defense verdict? Will the client become unrealistic because the client is now disconnected from the economic cost of pursuing recovery? The concerns are real, but many view the commercial plaintiff as better positioned to protect themselves vis-à-vis their lawyers than individuals without economic resources.

With the rise of contingency fee litigation in the commercial context comes the rise of third-party litigation funding. According to an Insurance Information Institute article, "[f]unding of lawsuits by international hedge funds and other financial third parties – with no stake in the outcome other than a share of the settlement – has become a $17 billion global industry."[119] For the adherents to the principles behind the doctrines of champerty and maintenance, this may signal the final apocalypse as the tool for "access" transforms into an opportunity for return on investment. Not surprisingly, the insurance industry lines up with those ready to condemn third

[119] Jeff Dunsavage, *A Piecemeal Approach Toward Transparency in Litigation Finance*, The Triple-I Blog (Insurance Information Institute, April 27, 2022), https://www.iii.org/insuranceindustryblog/a-piecemeal-approach-toward-transparency-in-litigation-finance/ ((last visited Oct. 16, 2022) hereafter "Dunsavage").

party litigation funding with the same fervor once used to oppose contingency fee representations. According to one insurance industry commentator, third party litigation funding is causing "social inflation":

> Third-party litigation funding was once widely prohibited. As bans have been eroded in recent decades, it has grown, spread, and become a contributor to "social inflation": increased insurance payouts and loss ratios beyond what can be explained by economic inflation alone.[120]

Commenting on a federal case in Delaware, Stef Zielezienski, executive vice president and chief legal officer for the American Property Casualty Insurance Association, remarked: "By its very nature, third-party litigation financing promotes speculative litigation and increases costs for everyone."[121] Sound familiar? According to insurance groups and the U.S. Chamber of Commerce, "litigation funding needs more rules to prevent abuses of the legal system and to protect consumers, who often pay exorbitant interest rates on money they borrow to pay legal expenses."[122]

One current approach seems to be to push for "transparency" on the identity of litigation funders. The Litigation Funding Transparency Act was introduced and referred to the Senate Judiciary Committee in October 2021. The bill would require lawyers for plaintiffs in certain lawsuits to provide the court and other parties in the lawsuit with any agreement that entitles an outside business (i.e., a business that is not a party, class member, or counsel in the lawsuit) to receive payment contingent on the lawsuit's outcome. It would also require lawyers for the plaintiffs to provide the identity of the outside business. As proposed, the requirements would apply to any class action or multi-district litigation (i.e., related civil cases pending in different districts that are consolidated for pretrial proceedings).[123]

Notwithstanding the familiar calls for curbing the potential for abuse, the third party funding landscape remains "largely unregulated," such that funders must "navigate a shirting mosaic of common law, regulator guidance, and bar association opinions in order to operate."[124] In August 2020, the ABA adopted "The American Bar Association Best Practices for Third-Party Litigation Funding" in which it acknowledged "exponential growth" in third-party litigation funding but abstained from taking a position on whether litigation funding should be permitted "as a matter of law or legal ethics" or "whether, when and in how much detail a

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[120] *Id.*

[121] *Id.*, citing April 20, 2022, Press Release of APCIA https://www.apci.org/media/news-releases/release/71134/.

[122] Dunsavage, supra note 118.

[123] H.R. 2025 – Litigation Funding Transparency Act of 2021 (see https://www.congress.gov/bill/117th-congress/house-bill/2025?s=1&r=1).

[124] Latif Zaman, *ABA Outlines Best Practices for Third-Party Litigation Funding*, on Americanbar.org (December 10, 2020), https://www.americanbar.org/groups/business_law/publications/committee_newsletters/consumer/2020/202011/third-party/.

funding arrangement need to be disclosed."[125] Consistent with its neutral stance, the ABA Best Practices for Litigation Funding straightforwardly describes funding as "a form of distributing risk" just as contingent fee arrangements also "distribute risk between the lawyer and client."[126]

Key aspects of the "mosaic" of issues that may arising in the third-party litigation funding scenarios include:

- **Fee Splitting**: Lawyers may not directly bargain away portion of lawyers' contingent fee in exchange for **investment/loan from <u>non-lawyers</u>** to fund litigation expenses, because lawyers cannot share fees with non-lawyers under Model Rule 5.4. However, there may be some recognition for funding at a portfolio level in some jurisdictions, with calls for focus not on the source of the payment but on "independence" considerations.[127]
- **Referral Fees**: Should not be paid by attorneys to funders (Model Rule 7.2(b)) or by funders to attorneys (Model Rules 1.7, 1.8(f)).[128]
- **Protection of Confidential and Privileged Information**: Attorneys must not share client confidential information without client consent (Model Rule 1.6) and should not share information with a funder even with client consent without communicating with the client about the pros and cons of doing so, including the potential impact on privilege (Model Rule 1.1, 1.4), and securing appropriate non-disclosure commitments from the funder.[129]
- **Potential Conflicts**: Attorneys must address the potential for conflict issues when a funder is involved (Model Rules 1.7, 1.8). This could occur if the funder asks for changes in the attorney's engagement with the client or if the funder asks the attorney to subordinate any attorney's lien to the funder's lien, give first priority on distribution of funds to the funder, undertake obligations to the funder, take "irrevocable" instructions from the funder, or otherwise sign any three-way agreements among the funder, the client, and the attorney. The lawyer should advise the client to seek independent legal advice if the litigation funding arrangement will result in modification the terms of the lawyer's engagement. Conflicts could also occur in the course of the representation if, for example, there is a disagreement over whether to accept a settlement offer, hire a particular expert, or the funder threatens to cut off funding for payment of attorney's fees or expenses in order to exert control over decision making. [130]

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[125] American Bar Association, "American Bar Association Best Practices for Third-Party Litigation Funding" (August 3-4, 2020), https://www.americanbar.org/content/dam/aba/directories/policy/annual-2020/111a-annual-2020.pdf (hereafter "ABA Best Practices for Litigation Funding").

[126] *Id.* at p. 4.

[127] *Id.* at pp. 4-5.

[128] *Id.* at p. 5.

[129] *Id.* at pp. 5, 17-18.

[130] *Id.* at p. 6.

- **Protection for Client's Right to Control Litigation and Expense.** A funder will undoubtedly seek to protect its investment to the fullest extent possible. An attorney's ethical duty to the client along with the risk associated with overstepping into a voidable arrangement help hold the line against an overly controlling funder. Model Rule 1.2 makes clear that the client sets the goals of the representation and has absolute control over settling the claim. Even if a client makes commitments to the funder, the client may choose to breach those commitments. If so, the lawyer is still bound to follow the client's direction after counseling with the client about the consequences of doing so.[131]

- **Third Party Payor**. If a third-party funder pays the lawyer directly, the lawyer must
  - obtain the client's consent to the third-party payor;
  - ensure that there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
  - protect the client's information consistent with professional rules (obtaining clear instruction from client about who makes the decisions and shares in any information after explaining any issues related to client authority to make settlement decision and risk to privilege of sharing information). [132]

- **Reasonable Fee.** The lawyer's total fee must be "reasonable." (Model Rule 1.5) Litigation funding may introduce more variety in contingency fee agreements with options for full or partial contingency fees as well as options for funding expenses in part or in total. As the lawyer's "risk" decreases, so should the reward – that is, the actual percentage fee.

- **Misrepresentation and Reliance.** A funder inevitably will seek both case information and, to some degree, case assessments from the litigation lawyer. A lawyer should take great precaution to limit any risk of claim by third party lender against the lawyer for misrepresentation, fraud, or other reliance.[133]

Notwithstanding the myriad of issues, in many (but not necessarily all) jurisdictions, **clients** may bargain away to a funder for investment purposes a ***share of proceeds*** from a litigation judgment or settlement to fund the litigation. *See, e.g., Charge Injection Techs.*, 2016 WL 937400, at *4 (Del. Super. Ct. 2016) (rejecting champerty claim since funder did not bargain to enforce a claim that plaintiff was not disposed to prosecute, plaintiff remained the "bona fide owner" of the claims, funder had no right to maintain the action, and funder did not have rights to the direction, control, settlement, or other conduct of the litigation). However, this is not universally true. The doctrines of champerty and maintenance, which vary by jurisdiction (statute and common law), present some risk that third party funding agreements could be found void and unenforceable. *See, e.g., WFIC, LLC v. Labarre*, 148 A.3d 812 (Pa. Super. Ct. 2016) (finding litigation funding agreement invalid because all three elements of champerty had been clearly met: first, the investors were completely unrelated parties who had no legitimate interest in the litigation; second, the investors loaned their own money simply to aid in the cost of the

[131] *Id.* at p. 15.

[132] ***See*** Model Rule 1.8(f)

[133] ABA Best Practices for Litigation Funding, supra note 124 at p. 13.

litigation; and third, the investors were promised to be paid principal, interest, and incentive out of the proceeds of the litigation). Acceptance of third-party funding could vary based on whether the funding was for the purpose of initiating litigation or funding ongoing litigation. It also may simply arise from a case-by-case analysis of circumstances that amount to overreaching or violations of public policy (e.g., bargaining away too much control to funding entity; commercial funding source rather than friend/relative, etc.). Usury laws may be implicated, although most such laws commonly will be inapplicable if the obligation to repay is tied to outcomes of litigation.

In abolishing Minnesota's common-law prohibition against champerty in a June 2020 decision, the Supreme Court of Minnesota recounted the (d)evolution of the issue and summed up it well as follows:

> The common law's disapproval of champerty and maintenance traces back many centuries.
>
> . . .
>
> [In 1897] [w]e explained that the 'general purpose of the law against champerty and maintenance was to prevent officious intermeddlers from stirring up strife and contention by vexatious or speculative litigation which would disturb the peace of society, lead to corrupt practices, and pervert the remedial process of the law' (citation omitted).
>
> . . .
>
> Champerty is a common law doctrine, and the development of the common law is 'determined by the social needs of the community which it governs' (citation omitted) . . . We have previously explained that, as society changes, 'the common law must also evolve' with it (citation omitted). Our review of changes in the legal profession and in society convinces us that the ancient prohibition against champerty is no longer necessary.
>
> We first recognized the prohibition against champerty in the years before we adopted formal rules of ethics and before we adopted Minnesota's Rules of Civil Procedure. Today, the rules of professional responsibility and civil procedure address the abuses of the legal process that necessitated the common-law prohibition. Although attorneys may advertise to the general public, there are strict limits on solicitation (citations omitted). Attorneys who file frivolous claims or use the legal system for harassment are subject to discipline and sanctions. (citations omitted).
>
> Along with the increase in regulation, another important development in the law has been the narrowing or abolition of other common law prohibitions based on concerns about champerty and maintenance. Although contingency fees were disfavored under early common law, all American jurisdictions now allow attorneys to take cases on contingency (citations omitted). Today, we understand contingent fee agreements as a way to facilitate access to justice by incentivizing attorneys to take cases

> that they might otherwise decline because the client cannot afford their services on an hourly or fixed-fee basis (citations omitted).
>
> Similarly, attitudes have shifted concerning the assignment of choses in action (citations omitted).
>
> Societal attitudes regarding litigation have also changed significantly. Many now see a claim as a potentially valuable asset, rather than viewing litigation as an evil to be avoided (citations omitted). The size of the market for litigation financing reflects this attitudinal change (citations omitted). Businesses often seek financing to mitigate the risks associated with litigation and maintain cash flow for their operations (citations omitted). It is also possible that litigation financing, like the contingency fee, may increase access to justice for both individuals and organizations (citations omitted). [134]

For those supportive of third-party funding, the Minnesota decision sounds like a giant leap forward in approach, but that assessment may be overly optimistic. The case was remanded for consideration of enforceability on the particulars of the litigation funding agreement. Champerty may be gone in Minnesota, but on remand, the lower courts were not reluctant to establish boundaries, finding the liquidated damages provisions, penalty clauses, and interest rate provision to be unenforceable, unconscionable, and usurious respectively.[135]

Does the Minnesota decision coupled with the outcome on remand represent progress? Or have the remedial processes of the law been corrupted? Evolution or devolution, it is clear that the costs of litigation have been consistently viewed as barriers to entry to those with and without economic resources.

B. The (d)evolution from bans on lawyer advertising to rules that broaden the ways in which lawyers may share information about legal services.

> It's the end of the world as we know it (and I feel fine).
>
> R.E.M.

Lawyer advertising has undergone many makeovers. The 1908 Canons of Ethics described advertising as "unprofessional" and "intolerable" except in very limited instances:

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[134] *Maslowski v. Prospect Funding Partners LLC, et al.*, 944 N.W.2d 235 (Minn. 2020), https://www.bloomberglaw.com/public/desktop/document/MaslowskivProspectFundingPartnersLLCNoA1819062020BL205483MinnJune?1664909747.

[135] *Id.*

> The most worth and effective advertisement possible, even for a young lawyer, and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust. This cannot be forced, but must be the outcome of character and conduct. The publication or circulation of ordinary simple business cards, being a matter of personal taste or local custom, and sometimes of convenience, is not *per se* improper. **But solicitation of business by circulars or advertisements, or by personal communications or interviews, not warranted by personal relations, is unprofessional**. **It is equally unprofessional to procure business by indirection through touters of any kind**, whether allied real estate firms or trust companies advertising to secure the drawing of deeds or wills or offering retainers or in exchange for executorships or trusteeships to be influenced by the lawyer. Indirect advertisement for business by **furnishing or inspiring newspaper comments** concerning causes in which the lawyer has been or is engaged, or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the lawyer's positions, and **all other like self-laudation, defy the traditions and lower the tone of our high calling, and are intolerable**.[136]

Client protection is not the stated rationale, and client education is not spared a thought. Rather, the overall impression is that "tone" and tradition" underlie this ethical canon. It was unseemly for lawyers to advertise. The practice of advertising was thought to taint the practice of law with attributes of a "trade" and brand it as a mere commercial endeavor rather than elevate the practice to a venerable and trusted "profession." But the marketplace would force a makeover.

The (d)evolution in the professional codes' approach to advertising began when the U.S. Supreme Court applied First Amendment protection to commercial free speech generally in the 1976 decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*[137] and to lawyers' truthful and non-deceptive commercial free speech specifically in *Bates v. State Bar of Arizona* in 1977.[138] Thereafter, client education became the mantra justifying lawyer dissemination of certain forms of legal information under Canon 2, which proclaims: "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available." Client protection became the mantra for justifying micromanagement of lawyer advertising first under the Model Code and then the Model Rules. Model Code EC 2-1 encapsulates the "about face" from the 1908 Canons of Ethics' expressed distaste for lawyer advertising:

> The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laymen

[136] Canon 17, 1908 Canons of Ethics (emphasis added).

[137] 425 U.S. 748 (1976).

[138] 433 U.S. 350 (1977).

> to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.

As is appropriate to the topic of "advertising," the packaging of an idea matters such that "educating" members of the public as to their "legal problems" can be accepted as a service to the public just as "stirring up" litigation can be accepted in order to provide "access to justice" as discussed above with respect to contingency fee and third-party litigation funding. As a result of this changed focus, the right purpose of "legal information" – i.e., "advertising" – was education rather than "to obtain publicity for particular lawyers."[139]

Although "advertising" could serve a public interest, the professional codes still reflected the view that the public needed to be protected from lawyer overreaching. This view gave rise to protections against client solicitations and lawyer referrals as well as detailed regulation of the type, manner, content, and even "style" of lawyer advertising. Model Code DR 2-101 and DR 2-102 catalog the restrictions on "Publicity in General" and specify the details for "Professional Notices, Letterheads and Offices." Model Code DR 2-101 adopted the belt and suspenders approach of stating both what lawyers could not do (nothing false, fraudulent, misleading, deceptive, self-laudatory or unfair) under subpart DR 2-101(A) as well as what the lawyers could do under subpart (B). Lawyers who wanted to expand the type of information that could be made available or the manner of its dissemination would have to propose the expansion to the bar and justify whether the proposal was necessary to "facilitate the process of informed selection of lawyers by potential consumers of legal services" and accords with "standards of accuracy, reliability and truthfulness" under DR 2-101(C). DR 2-101 retained references to the avoidance of the self-laudatory, the express rejection of the purpose of "attraction of clients," and the admonition to using "dignified" references to self. Model Code DR 2-103 regulated referrals and prohibited solicitation. Public protection and education may have been the adopted "mantras" to defend against constitutional attacks on the rules, but the longstanding notion that lawyer advertising was unseemly continued to linger even in the post-*Bates* iterations of the Model Code rules on advertising.

The ABA acknowledged that the organized bar has promulgated many regulatory provisions governing the communication of legal services over the past 25 years that subsequently have been found to be unconstitutional, requiring frequent revisions of model rules.[140] Even when states had adopted professional codes based on the Model Code or Model Rules, states commonly either struggled to keep up with the changes or went their own way on the level of detail and requirements in their counterpart rules. This resulted in a patchwork of lawyer advertising rules that became increasingly impractical to navigate in a world in which geographical borders were become less and less relevant to the practice of law generally and even more so to advertising, which increasingly became internet based.

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[139] Model Code EC 2-2.

[140] "Lawyer Advertising and Solicitation Chapter from Lawyer Advertising at the Crossroads," Chapter II (The Constitutional Dimensions of Lawyer Advertising), ABA Center for Professional Responsibility, https://www.americanbar.org/groups/professional_responsibility/resources/professionalism/crossroads/.

The Model Rule approach ultimately did trend toward simplification, setting a standard against anything "false or misleading" in Model Rule 7.1 and recognizing that lawyers could advertise through any media in Model Rule 7.2(a). Paying for referrals or giving anything of value for recommendations is still generally prohibited with some narrow exceptions under Model Rule 7.2(b). In addition, Model Rule 7.3 still protects clients relative to in person solicitations, but that protection is more narrowly targeted to circumstances more prone to a lawyer's potential overreaching.

The (d)evolution in lawyer advertising restrictions occurred as a result of lawyers' continuous and sustained constitutional challenges to restrictions.[141] Even now, the ABA's organizational view is not one that appears to warmly embrace lawyer advertising. Rather, it appears to accept that this battle is mostly over because of the constitutional limitations on the ability to regulate lawyer advertising:

> The [ABA] has been advised by those appearing before it, regardless of their points of view, that the organized bar can do no greater disservice to itself, its members or the public than to promote or encourage unconstitutional regulations governing lawyer advertising and other aspects of the communications of legal services.[142]

Lawyers should not make the mistake of viewing the simplification or scaling back of advertising and solicitation rules as the complete elimination of any standards. Since the *Bates* decision, the U.S. Supreme Court has upheld the constitutionality of the regulation of in-person solicitation as advancing an important state interest, noting that the "potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured or distressed person."[143] In addition, the Supreme Court has upheld restrictions narrowly tailored to make a communication not misleading, specifically declining to ban communications about contingency fee representations but upholding a requirement to make disclosures regarding responsibility for costs in contingency fee cases advertised as "no fee" absent recovery.[144] In that same case, however, the Supreme Court did not see "dignity" of the profession or the potential for "some members of the population" to find "advertising embarrassing or offensive" to be a sufficiently strong state interest to justify suppressing it.[145]

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[141] *Id.*

[142] *Id.*

[143] *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 465 (1978).

[144] *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

[145] *Id.* at 670.

C. The (d)evolution from the need to strictly safeguard a lawyer's professional independence from non-lawyer ownership and management to (some) tolerance for non-lawyer involvement in management or potentially law firm ownership.

> You cannot solve a problem from the same consciousness that created it. You must learn to see the world anew.
>
> Albert Einstein[146]

ABA Model Rule 5.4 (and Model Code DR 3-102 before it) prohibits a lawyer from sharing legal fees with a nonlawyer (with some exceptions). It also prohibits a lawyer from practicing law in an entity (partnership or professional corporation or association) in which a nonlawyer is an equity owner or occupies a position in which the nonlawyer has the right to direct or control the professional judgment of the lawyer (as did Model Code DR 3-103 before it). According to ABA Formal Ethics Op. 01-423 (2001), the rule is intended to protect a lawyer's independent professional judgment by limiting the influence of nonlawyers who are not subject to the same professional rules and fiduciary duties. It is also intended to safeguard the duties owed by lawyers to their clients, such as the duties of loyalty and confidentiality, by ensuring that lawyers have managerial control and the associated duties under Model Rules 5.1 and 5.3 to "push down" responsibilities under the professional rules to lawyers and non-lawyers in the organization.

As discussed above, the licensing and regulatory framework for lawyers was also, in part, motivated by a desire to buffer lawyers against client and marketplace pressures that would interfere with the lawyer's exercise of independent judgment and performance as officers of the court. As the licensing and regulatory framework evolved, so did the professional codes with Canon 47 of the 1908 Canons of Ethics admonishing lawyers not to knowingly assist in the unauthorized practice of law. The Model Code amplified its attention on UPL, evolving the lawyer's role from "not permitting" UPL under the 1908 Canons of Ethics to assisting "in preventing" UPL in the 1970 Model Code. The current "independence" focus of Model Rule 5.4 reaches back to the admonition to lawyers not to assist non-lawyers in the unauthorized practice of law as part of the bulwark protecting lawyer independence as recognized in Model Code EC 3-8: "Since a lawyer should not aid or encourage a layman to practice law, he should not practice law in association with a layman or otherwise share legal fees with a layman."

It isn't without irony that with respect to advertising regulations as discussed above, it is the nonlawyer who needs protection from the "professional trained in the art of persuasion." But with respect to running a law firm, it is the very same professional who need protection from interference and influence of the nonlawyers who are not trained in the ways of the lawyer. Admittedly, it isn't really supposed to be for the lawyer's protection but ultimately for the clients' protection. When the supply of legal services does not meet the demand for legal services, it raises questions about what this level of "protection" is costing.

[146] Attributed to Albert Einstein, but the attribution is unclear and debated.

Market pressures, therefore, have catalyzed and may still catalyze reform with respect to nonlawyer involvement in ownership and management of law firms. Writing in support of group legal services for trade associations in 1968 and against rule restrictions that operate as a barrier, Richard Copaken argued that the "highest ethical standards cannot meet the needs of the public if deviation from laisse-faire competitive ideals also forces the price of adequate legal services to rise beyond the reach of large segments of the public."[147] According to Copaken, change was needed to "strike some balance between the allocation of our legal resources which the marketplace would dictate as most efficient and the ethical ideal of the highly personalized attorney-client relationship, accompanied by undivided loyalty, which the present Canons demand."[148]

More recently writing in 2016 on the potential role of alternative business structures in the practice of law, James McCauley noted that notwithstanding "the oversupply of lawyers and the shrinking opportunities for placement in the legal services market, the unmet legal needs of the poor and middle class continues to grow."[149] As discussed with respect to third party litigation funding, even businesses find it sometimes uneconomic to avail themselves of legal processes to pursue legal remedies using a traditional lawyer-client relationship and fee structure.

An alternative business structure (ABS) is a business entity that provides legal services and includes nonlawyers who have an economic interest or decision-making authority within the entity. The ABA re-opened debate on whether to lift the ban on non-lawyer ownership in 2016.[150] Commenters followed the expected "access to justice" versus "independence" lines of argument. Beyond the "access to justice" argument, however, is the increasing complexity and specialization of the practice of law. The training, skill, and experience of nonlawyers are increasingly valuable to serving the legal needs of clients. It is this rationale that underlies the District of Columbia's liberalization of its Rule 5.4, which allows a lawyer to practice law in an organization in which a nonlawyer holds a financial interest or managerial authority under defined conditions:

> (b) A lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients, but only if:

[147] Copaken, supra note 51, at p. 1216.

[148] *Id.*

[149] James M. McCauley, *The Future of the Practice of Law: Can Alternative Business structures for the Legal Profession Improve Access to Legal Services?*, 51 U. Rich. L. Rev. 53, 55 (2020), https://scholarship.richmond.edu/lawreview/vol51/iss5/7.

[150] See Blake Edwards, *ABA Re-Opens Alternative Business Structures Debate*, Bloomberg Law (Business & Practice, May 6, 2016), https://news.bloomberglaw.com/business-and-practice/aba-re-opens-alternative-business-structures-debate.

(1) The partnership or organization has as its sole purpose providing legal services to clients;

(2) All persons having such managerial authority or holding a financial interest undertake to abide by these Rules of Professional Conduct;

(3) The lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1;

(4) The foregoing conditions are set forth in writing.

Comment [7] makes clear that the purpose of the liberalization of DC's Rule 5.4 is:

> to permit nonlawyer professionals to work with lawyers in the delivery of legal services without being relegated to the role of an employee. For example, the rule permits economists to work in a firm with antitrust or public utility practitioners, psychologists or psychiatric social workers to work with family law practitioners to assist in counseling clients, nonlawyer lobbyists to work with lawyers who perform legislative services, certified public accountants to work in conjunction with tax lawyers or others who use accountants' services in performing legal services, and professional managers to serve as office managers, executive directors, or in similar positions. In all of these situations, the professionals may be given financial interests or managerial responsibility, so long as all of the requirements of paragraph (c) are met.

DC Rule 5.4(c) prohibits a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services. In other words, a nonlawyer may be an owner or manager, but a lawyer employee must not allow the nonlawyer to interfere with the lawyer's exercise of independent professional judgment for the client.

In August 2020, Arizona went a step further than DC, eliminating its version of Rule 5.4 entirely effective January 1, 2021. Arizona Supreme Court Chief Justice Robert Brutinel explained:

> The Court's goal is to improve access to justice and to encourage innovation in the delivery of legal services. The work of the task force adopted by the Court will make it possible for more people to access affordable legal services and for more individuals and families to get legal

> advice and help. These new rules will promote business innovation in providing legal services at affordable prices.[151]

The Arizona Supreme Court relied on a task force report asserting that Rule 5.4 was rooted in economic protectionism rather than protection of the public. [152] Nevertheless, Arizona requires a new licensing scheme that would include educational and experiential requirements, examination, and a character and fitness review. Moreover, these "limited license legal technicians" would become affiliate members of the state bar and be subject to the same ethical rules and discipline process as lawyers. [153]

Also in August 2020, the Utah Supreme Court approved reforms that allow for nonlawyer ownership or investment in law firms and permit legal services providers to try new ways of serving clients during a two-year pilot program.[154] The Court's stated purpose was to spur innovations that would open up the legal market to new providers, business models, and services options in order to achieve real change in meeting the need for access to affordable legal services.[155]

The ABA has not yet itself acted to amend or change Model Rule 5.4. In recognition of the current and ongoing experimentation in the states, however, the ABA issued Formal Opinion 499 entitled "Passive Investment in Alternative Business Structures" on September 8, 2021. ABA Opinion 499 makes clear that a lawyer who is licensed in a jurisdiction with a more traditional version of Model Rule 5.4 can nevertheless "passively invest" in an ABS operating in a jurisdiction that permits ABS entities. The "passively investing" lawyer cannot practice law through the ABS, manage or hold a position of corporate or managerial authority in the ABS, or be involved in the daily operations of the ABS. Moreover, the "passively investing" lawyer must address any "personal interest" conflicts that exist or may arise because of the investment relative to the lawyer's law practice, if any, elsewhere.

According to the ABA Commission on the Future of Legal Services,[156] more jurisdictions outside the United States permit ABS (pointing to Australia, England and Wales, some Canadian

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[151] Bob Ambrogi, *Arizona Is First State to Eliminate Ban on Nonlawyer Ownership of Law Firms*, LawSites (August 31, 2020), https://www.lawnext.com/2020/08/arizona-is-first-state-to-eliminate-ban-on-nonlawyer-ownership-of-law-firms.html.

[152] *Id.*

[153] *Id.*

[154] Lyle Moran, *Utah embraces nonlawyer ownership of law firms as part of broad access-to-justice reforms,* ABAJournal (Practice Management, August 14, 2020), https://www.abajournal.com/web/article/utah-embraces-nonlawyer-ownership-of-law-firms-as-part-of-broad-reforms.

[155] *Id.*

[156] ABA Commission on the Future of Legal Services Issues Paper Regarding Alternative Business Structures, ABA Center for Innovation (April 8, 2016), https://www.americanbar.org/groups/centers_commissions/center-for-innovation/past-work/commission-on-the-future-of-legal-services/.

provinces, Singapore, New Zealand, and to a more limited extend other European countries).[157] The hoped for benefits include: increased access to justice, enhanced financial flexibility, enhanced operational flexibility, and increased cost-effectiveness and quality of services.[158] The Commission also cited the potential risks of ABS: threat to lawyers' core values, decreased pro bono work, threat to attorney-client privilege, and failure to deliver identified benefits.[159] As of 2016, the Commission noted several empirical studies, concluding that the studies show that (i) there is no evidence that ABS has caused harm; (ii) ABS has increased funding for innovation (most prevalent in the personal injury area), and (iii) jurisdictions have stayed with ABS.[160] There appears to have been little additional supplementation of the empirical support for either the predicted benefits or apocalyptic visions.

D. The (d)evolution from full-service lawyers and law firms to unbundled legal services and artificial intelligence.

> "Before we work on artificial intelligence why don't we do something about natural stupidity?"
>
> —Steve Polyak

> "By far, the greatest danger of Artificial Intelligence is that people conclude too early that they understand it."
>
> —Eliezer Yudkowsky

> The development of full artificial intelligence could spell the end of the human race. […] It would take off on its own, and re-design itself at an ever-increasing rate. Humans, who are limited by slow biological evolution, couldn't compete, and would be superseded."
>
> — Stephen Hawking

The ABA Commission on the Future of Legal Services observed that "despite sustained efforts to expand the public's access to legal services, significant unmet needs persist."[161] As examples of efforts to expand the public's access, the Commission specifically cited both advancements in technology and innovations by lawyers, law firms, and general counsel, such as:

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[157] *Id.* at pp. 5-7.

[158] *Id.* at pp. 7-9.

[159] *Id.* at pp. 9-11.

[160] *Id.* at pp. 11-15.

[161] Final Report of the ABA Commission on the Future of Legal Services, ABA Center for Innovation (April 8, 2016), p. 5, https://www.americanbar.org/content/dam/aba/administrative/center-for-innovation/2016-fls-final-report.pdf.

- Alternative Billing
- Document Assembly and Automation
- Legal Process Outsourcing
- Legal Startups
- Medical-Legal Partnerships
- Artificial Intelligence
- Mobile Applications
- Nonprofits
- Procurement Efficiencies to Lower Costs
- Project Management and Process Improvement
- Prepaid Legal Services Plans and Insurance Coverage
- Unbundling of Legal Services[162]

Both unbundled legal services and artificial intelligence represent market-driven shifts from the traditional lawyer-client role, thus implicating lawyer duties to clients under professional codes.

> According to the ABA's "Unbundling Resource Center,"
>
> Unbundling, or limited scope representation, is an alternative to traditional, full-service representation. Instead of handling every task in a matter from start to finish, the lawyer handles only certain parts and the client remains responsible for the others. It is like an à la carte menu for legal services, where: (1) clients get just the advice and services they need and therefore pay a more affordable overall fee; (2) lawyers expand their client base by reaching those who cannot afford full-service representation but have the means for some services; and (3) courts benefit from greater efficiency when otherwise self-represented litigants receive some counsel.[163]

That a lawyer can ethically provide unbundled legal services is made clear in Model Rule 1.2(c), which expressly states that a lawyer "may limit the scope of the representation fi the limitation is reasonable under the circumstances and the client gives informed consent." "Informed consent" is a defined term at Model Rule 1.0(e) that "denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." That limiting the scope of a representation under Model Rule 1.2(c) requires "informed consent" marries up with a lawyer's duty under Model Rule 1.4(b) to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

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[162] *Id*. at p. 5.

[163] See ABA's Unbundling Resource Center (Standing Committee on the Delivery of Legal Services), https://www.americanbar.org/groups/delivery_legal_services/resources/.

Model Rule 1.2(c) allowing limited scope representation had no counterpart in the Model Code nor the 1908 Canons of Ethics. Although "unbundling" is held up as an innovation that can improve access to legal assistance, limited scope representations are not required to be used only when a client cannot afford a full scope representation. As comment [6] to Model Rule 1.2 explains, limited scope representations are appropriate to exclude scopes of work to manage conflict issues (such as limiting representation of an insured to the insured claim and excluding representation on coverage issues to avoid conflicts for counsel regularly retained by the insurer on behalf of insureds) or because the client has a limited objective.

Limited scope representations have proven to be useful in filling the legal needs of those who might otherwise go wholly unrepresented. The arrangement does shift some risk to the lawyer to fully foresee and explain the risks to the client. It typically is easier to identify the scope of work that the lawyer ***is*** doing than to fully identify what the lawyer is ***not*** doing, even though explaining the "risks" of a limited scope representation could call for the lawyer to do just that. Notwithstanding this added risk, there appeared to be little opposition or backlash to the rule change that expressly allowed lawyers to provide unbundled legal services. This likely is because lawyers were free to provide limited scope representations or not and because the limited scope representation was useful in navigating conflict issues.

The rule change allowing unbundling, moreover, gave rise to relatively few practical issues other than the challenges associated with "ghostwriting," which is when a lawyer helps prepare pleadings for a pro se litigant but neither signs the pleadings nor makes a court appearance on behalf of the litigant. The concerns implicate the attorney's role as an "officer of the court." For example, some courts raised concerns about the potential for misrepresentation, meaning the suggestion that the litigant was unrepresented when in fact the litigant had assistance of counsel. Other courts had concerns that the "behind-the-scenes" lawyer evaded the good faith certification that comes with signing a pleading, opening the door to the potential for abuse. Before providing a limited scope representation that involves ghostwriting, a lawyer should check the court's rule and guidance in the jurisdiction to comply with any disclosure or signing requirements.[164]

Artificial intelligence ("AI"), like limited scope representation, is also a market-driven innovation in the provision of legal services that seeks to lower the cost of those services. In fact, if press chatter were the yardstick, AI would seem to have the greatest potential for transforming the provision of legal services. According to Anthony Davis, AI is already in use for six primary areas – litigation review (using search criteria rather than document by document review); expertise automation (commoditizing legal knowledge, for example in the use of legal forms); legal research (finding connections and patterns and information); contract analytics; contract and litigation document generation; and predictive analytics.[165] However, incorporating

[164] See generally, Ellen J. Bennett and Helen W. Gunnarsson, Annotated Model Rules of Professional Conduct, (9th ed., ABA Center for Professional Responsibility 2109), p. 41-43 (addressing ghostwriting court documents for pro se litigants in annotation to Model Rule 1.2).

[165] Anthony E. Davis, *The Future of Law Firms (and Lawyers) in the Age of Artificial Intelligence*, The Professional Lawyer Vol. 27, No. 1 (ABA Center for Professional Responsibility, Oct. 2, 2020), https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/27/1/th

AI in place of more traditional legal services also introduces challenges and risks for the lawyer in fulfilling the duties inherent in a traditional lawyer-client relationship.

The first challenge for the lawyer using AI starts with the duty of competence under Model Rule 1.1. Competence is a fundamental expectation for lawyers that has been a part of the professional codes since the 1908 Canon of Ethics (and part of the common law duty prior to that). Canon 8 of the 1908 Canon of Ethics called the lawyer to "endeavor to obtain full knowledge of his client's cause." The Model Code stated that a lawyer shall not "handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it." Model Code DR 6-101. Competent representation "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Model Rule 1.1. In comment [8] to Model Rule 1.1, the ABA made clear that "competence" extends to keeping abreast of the "tools of the trade:" "[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, ***including the benefits and risks associated with relevant technology***."

Understanding the risks and benefits of AI means knowing enough about its logic, parameters, inputs, decision trees, limitations, algorithms, etc. to know the ways in which the output may be both overly broad and simultaneously overly narrow. For example, a lawyer searching a very large database may not realize that there is a parameter limiting the number of documents returned on a search, thus possibly rendering the search less than complete. The lawyer may not understand how "holes" in the data were filled or not filled and how that might affect search terms. For "smarter" tools that look for patterns or connections, it is at best challenging if not nearly impossible to ferret out irrelevant, undesirable, or even illegal biases. These are the kinds of lessons that tend to be learned over time and experience with particular software tools and platforms. But that learning curve is nearly unattainable in the world of continuous software "upgrades" and new releases, which might fix known issues but introduce new ones.

Not only will a lawyer need to be "competent" in any AI used, but Davis also believes that any AI used will likely impact the types of "competencies" a lawyer will need. As AI transforms what clients need from their lawyers, Davis says the role of the lawyer will need to focus on functions that the AI cannot perform: judgment, empathy, creativity, and adaptability. In other words, according to Davis, lawyers will provide the "last mile: of solution delivery—the application of those human functions to the output of the AI tools.[166]

Explaining enough about what the lawyer knows and does not know about the AI solution also poses a significant challenge in terms of meeting the lawyer's duty to communicate under Model Rule 1.4. The client is likely to be tuned in to the "benefits" of potential cost savings rather than to the "risks" of the known *and* unknown unknowns. And who wouldn't be?

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e-future-law-firms-and-lawyers-the-age-artificial-intelligence/#:~:text=In%20general%2C%20there%20are%20six,and%20(6)%20predictive%20analytics.

[166] *Id.*

When a problem is discovered, the client might rightly claim that the specific risk was not disclosed. And that might be because the specific risk was not known so that it could not be disclosed. And round and round it goes. The point is that the Model Rules make the lawyer responsible for the representation and for competence in the tools of the trade. If the client wants the cost savings associated with the "tools," the lawyer gets the risk and may not be able bargain to allocate that risk. Model Rule 1.8(h) theoretically allows a lawyer to prospectively limit liability for malpractice if the client is independent represented in making the agreement. However, there are several issues associated with this theoretical possible way of mitigating the added risk. First, many states have a more limited version of Model Rule 1.8(h) such that prospectively limiting liability is off the table entirely. Second, it is not clear what types of AI "failures" might count as malpractice by the lawyer. With unclear theories of liability, it is harder to "bargain" for contractual protection or risk allocation. Third, even with clear theories of liability, the types of clients who insist that their lawyers use AI solutions are likely the types of clients with sufficient leverage not just to avoid limitations of liability but to insist on indemnifications aimed at ramping up lawyer liability scenarios.

Using AI is just another drop in the bucket of exploding technology challenges to client confidentiality. Client data is used and stored, and the questions are what data, how used, and where stored? Can it be extracted, returned, or deleted if so required by the client or applicable protective orders? Who must have access to the systems and data to help keep the AI operating? Have the lawyers fulfilled their duties under Model Rules 5.1 and 5.3 to "supervise" lawyers and non-lawyers and "push down" their duties of confidentiality under Model Rule 1.6? Is there a data recovery plan in the event of failures or a ransomware attack? What are the security protocols and are they commensurate with the risk?

The issues identified seem unlikely to spur (d)evolution of professional rules to make the *lawyer-client relationship* adjust to the market demand for AI. Instead, if (d)evolution of lawyer regulation is needed for AI, it seems more likely to come relative to the role nonlawyers may have to play or the ways that AI integrates with ABS or even unbundled services. AI solutions could accelerate the acceptance of ABS as lawyers look to team up with the right technology talent to deliver AI solutions. States looking to make better progress on access to legal services might recognize more nonlawyer roles in rolling out AI solutions to clients. Limited scope – that is, unbundled – representations could allow clients to make more strategic use of lawyers when AI reaches the limit of what it can do to achieve the client's goal.

E. The (d)evolution to client-defined engagement terms and standards of lawyer conduct.

There are a handful of instances in which the Model Rules require consent or agreement to be confirmed *in a writing*[167] or even confirmed *in a writing* ***signed by the client***.[168] A fee

[167] *See,* e.g., Model Rule 1.5(e) (client agreement to division of fee between lawyers must be confirmed in writing) and Model Rules 1.7 and 1.9 (conflict consent must be confirmed in writing).

[168] *See,* e.g., Model Rule 1.5(c) (contingency fee agreement must be in writing signed by the client) and Model Rule 1.8(a) (business transaction with client requires advising client in writing of desirability of seeking independent legal counsel and informed consent in a writing signed by a client).

agreement, however, is not one of the ones that is required to be in writing at all (other than a contingency fee agreement), though a writing is recommended. Model Rule 1.5(b) admonishes a lawyer to communicate to the client, "***preferably*** in writing," the "scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible." The Model Code predecessor also addresses a fee agreement only as a recommendation in EC 2-19:

> As soon as feasible after a lawyer has been employed, it is desirable that he reach a clear agreement with his client as to the basis of the fee charges to be made. Such a course will not only prevent later misunderstanding but will also work for good relations between the lawyer and the client. It is usually beneficial to reduce to writing the understanding of the parties regarding the fee, particularly when it is contingent. A lawyer should be mindful that many persons who desire to employ him may have had little or no experience with fee charges of lawyers, and for this reason he should explain fully to such persons the reasons for the particular fee arrangement he proposes.

The 1908 Canons of Ethics charged lawyers with keeping fees reasonable (Canon 12), did not make any recommendation as to a writing, but did discourage controversies and lawsuits with clients concerning compensation (Canon 14).

The rules do not comment on whether a "writing" that explains the terms of the representation should originate with the attorney or with the client. With the rise of in-house legal or procurement departments at corporate clients, it has become commonplace for clients to insist on using their own engagement terms, often called outside counsel guidelines ("OCGs"). According to James E. Moliterno, "[t]through their general counsels, corporate clients are imposing behavior guidelines on their outside counsel in the form of outside counsel procedures"[169] that range from expected cost-controlling terms to social reform related terms. According to Moliterno, "[o]utside-counsel policies even go so far as to create new norms in traditional areas of professional regulation. Conflict rules, as imposed on retained outside counsel, have expanded to preclude engagements with other clients at the preference of the client."[170]

The ways in which outside counsel guidelines may bump into those "traditional areas of professional regulation" became the topic of a January 2022 Report of the District of Columbia Bar Rules of Professional Conduct Review Committee to the Board of Governors Proposing Changes to the D.C. Rules of Professional Conduct Relating to Client-Generated Engagement Letters and Outside Counsel Guidelines (as approved by the Board of Governors and transmitted to the D.C. Court of Appeals (March 2022)) (hereafter "2022 DC Bar Proposal").[171] Broadly speaking, the 2022 DC Bar Proposal's amendments, if adopted, would:

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[169] James E. Moliterno, *The Trouble with Lawyer Regulation*, 62 Emory Law Journal 101, 122-123 (2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2264351.

[170] *Id.*

[171] https://www.dcbar.org/getmedia/a2fed463-f33e-4155-82e4-3622e1e37afb/Report-of-OCGs-2022-Final-Transmittal-to-DCCA.

- Amend Rules 1.7 and 5.6 to remove the existing open-ended permission for a lawyer and client to expand the scope of what constitutes a conflict of interest under the D.C. Rules, except where broader coverage is required by other law;

- Amend Rule 1.8 to prohibit a lawyer from proposing or accepting conditions that impose liability on a lawyer that is broader than the liability imposed by statute or common law;

- Amend Rule 1.16 to make clear that a lawyer may retain copies of client files, including the lawyer's work product, but may not use that work product in other matters if the Rules' confidentiality provisions prohibit such use;

- Amend Rule 1.6 to make clear that a lawyer may use general (i.e., not client-specific) knowledge gained during a representation for the benefit of subsequent clients; and

- Amend Rule 1.16 to provide that where a lawyer has agreed (or is claimed by a client to have agreed) that the client may make unilateral changes in the terms of a representation, the lawyer may withdraw if the client makes a material change to which the lawyer is unwilling to assent.

Whether any rule changes will result remains to be seen. The inherent issue is ultimately the same one that was in play at the time Hubbard argued that a code of ethics and an enforcement mechanism would be needed to combat the economic power of the client in the market for legal services. How much buffer do lawyers need against the power of the marketplace to serve the "independence" goal?