

Evolution:

The gradual development of something, especially from a simple to a more complex form

Devolution

The process of decline; descent or degeneration to a lower or worse state



Biological perspective:

- Changes in gene frequencies = evolutionary
- No preferred hierarchy of structure & function
- Species do not always adapt successfully

- Extinction is natural, common response to changing environmental conditions
- Species evolve when variant traits offer reproductive advantage in a changing environment
- Decreasing complexity is common in the record of evolution, not increasing complexity

Biological Legal perspective:

(d)Evolution = The jury's still out

- Changes in gene frequencies = evolutionary
- No preferred hierarchy of structure & function
- Species do not always adapt successfully

- Extinction is natural, common response to changing environmental conditions
- Species evolve when variant traits offer reproductive advantage in a changing environment
- Decreasing complexity is common in the record of evolution, not increasing complexity

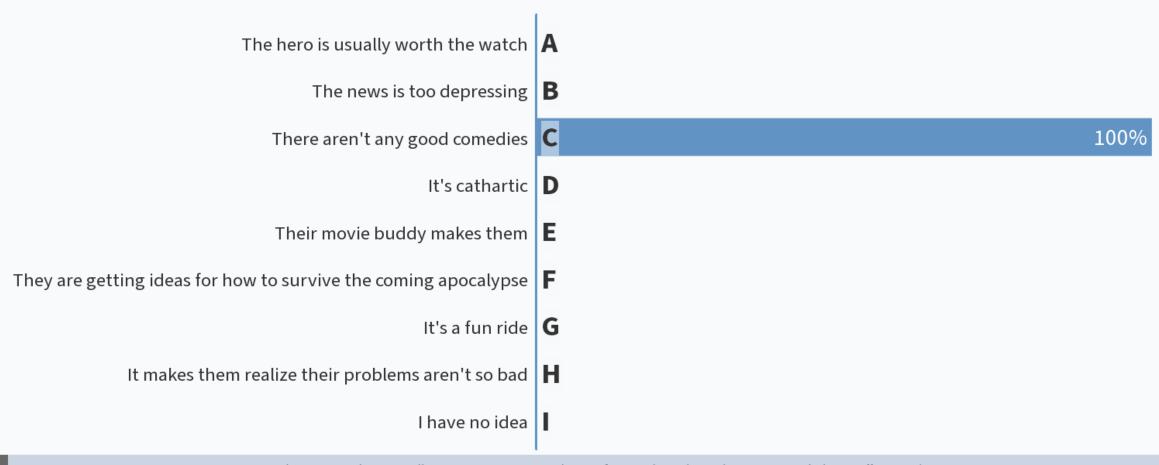
APOCALYPSE

- An event involving destruction or damage on an awesome or catastrophic scale
 - World altering or ending

Respond at pollev.com/kellyfaglion624

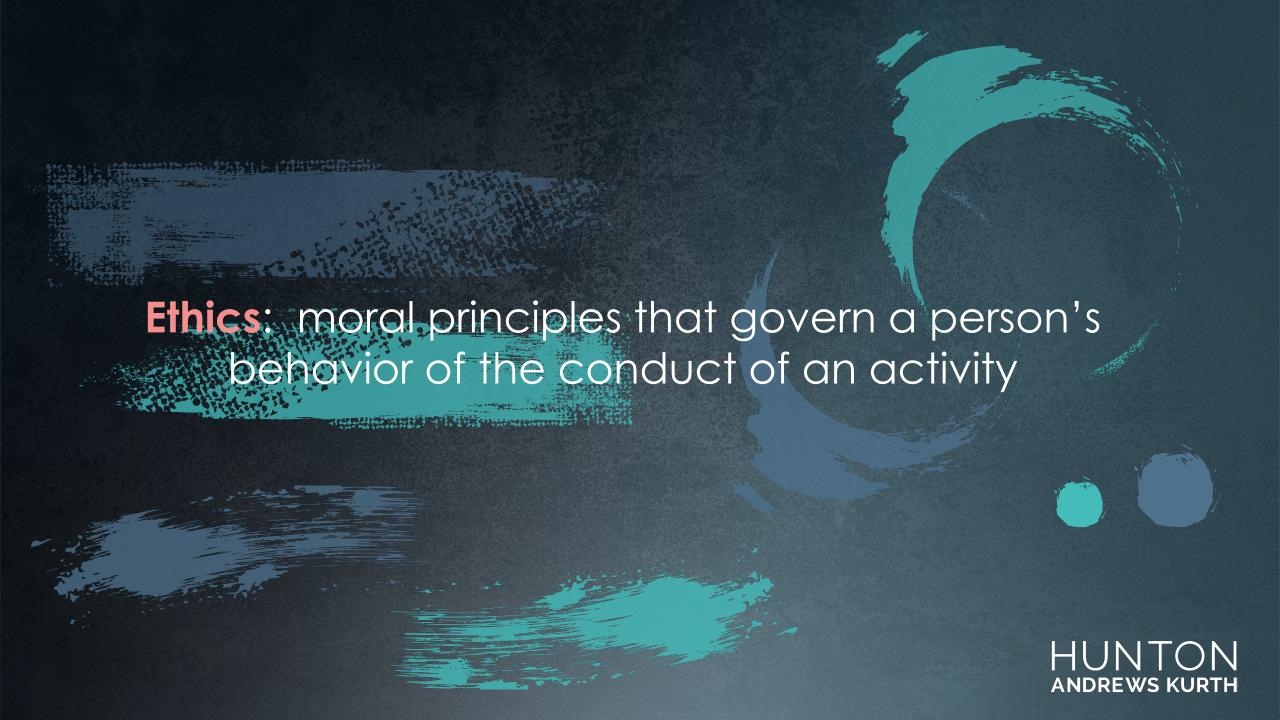
Text KELLYFAGLION624 to 22333 once to join, then A, B, C, D, E...

People watch apocalyptic/disaster movies because . . .



MOVIE CLIPS





Which best describes the state of the legal profession?

A Greenland (apocalypse is at hand, but some will make it on the ark)

B Don't Look Up (apocalypse is at hand, but nearly everyone will deny it to the end)

C We Didn't Start the Fire (we'll keep churning but change will come only for the biggest problems)

D It always feels like the apocalypse . . . get used to it

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.

—Roscoe Pound (1944)





Text KELLYFAGLION624 to 22333 once to join

Lawyers were subject to professional codes of ethics beginning

In pre-revolutionary, colonial times in courts authorized by the English crown (late 17th/early 18th centry)

From the time when Article III courts were established under the US Constitution (late 18th century)

Mid-19th century

Late 19th/early 20th century

Mid-20th century

Post-Revolution: Inhibitors to (d)evolution of the legal profession

- Lawyers more likely Royalists
- Economic conditions =
 widespread
 dissatisfaction with law,
 distrust of lawyers
- Political conditions = distrust of English law & lawyers

- Social conditions = hostility to professions
- Geographical conditions = extreme decentralization of justice system/bar

HUNTON ANDREWS KURTH

- "Hired Cunning"
- "Mere money-getting trade"

Perform social & political role

PROFESSIONAL CODES

(D) EVOLUTION



David Hoffman: 50 Resolutions
Judge Sharswood Essay
1887 AL Code of Ethics
+10 more by 1906
1905 ABA committee

1970 MODEL CODE OF PROFESSIONAL RESPONSIBILITY

9 Canons
Ethical Considerations
Disciplinary Rules

1983 MODEL RULES OF PROFESSIONAL CONDUCT

32 states before 1990 + 10 before 2000 + 8 before 2010

+ California (11/1/18)

HUNTON ANDREWS KURTH

Which best describes the nature of the changes to the professional rules over time?

A Evolution

B Devolution

C Stagnation

Public's low opinion

Unhappy, unhealthy nature of the profession

1908

1970

(D)EVOLUTION 1983

2005

Loss of civility, professionalism

"Mere trade, business"

PROFESSIONAL INDEPENDENCE

(D)EVOLUTION

LICENSING





Client

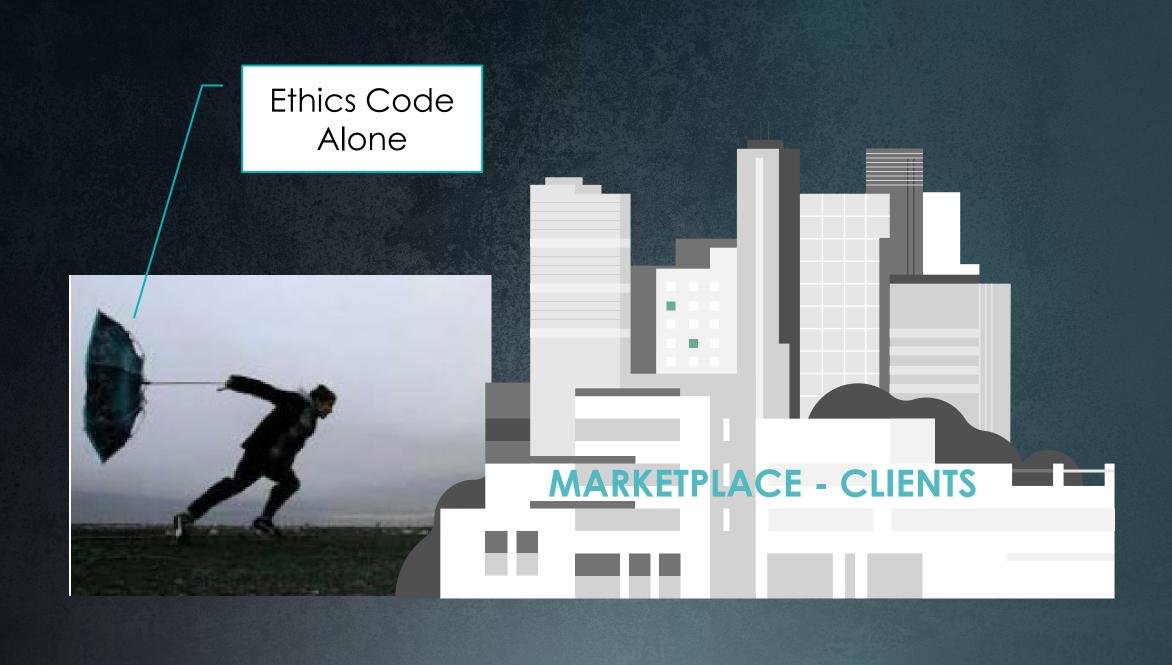
The client's power to control . . . is fortified by the circumstance that he is the employer and the lawyer employee [and thus the ethical lawyer acts] under penalty of losing his clients.

—Thomas H. Hubbard (1903)



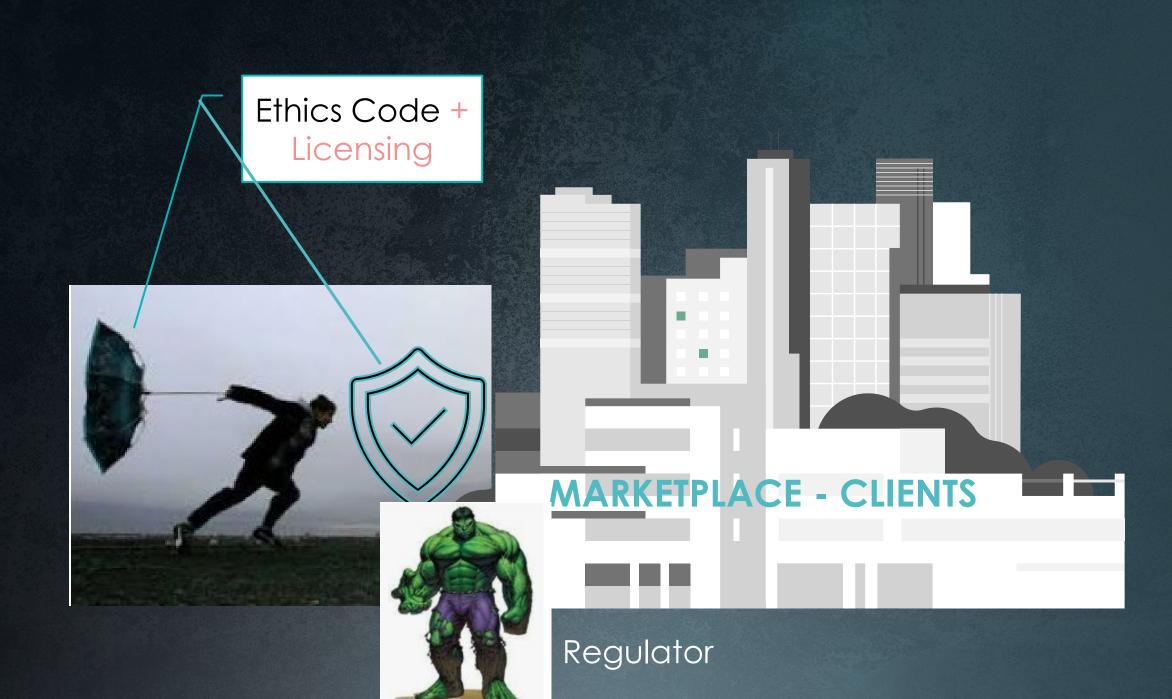
The Law
The Court
Legal System

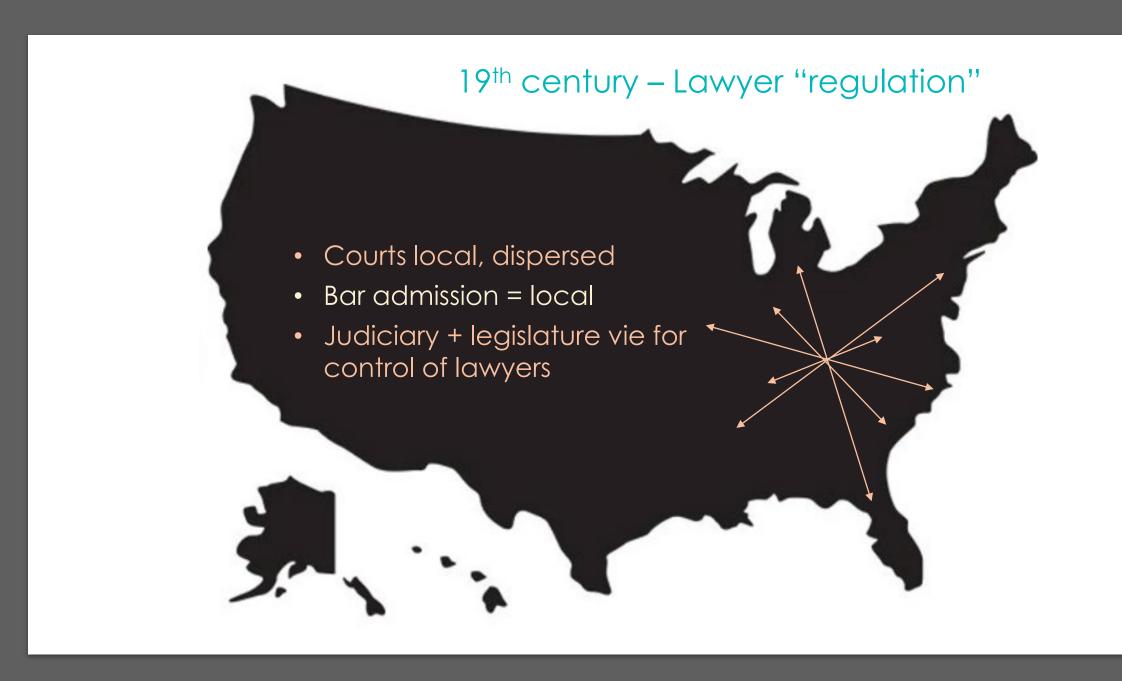
HUNTON ANDREWS KURTH



MOVIE CLIPS

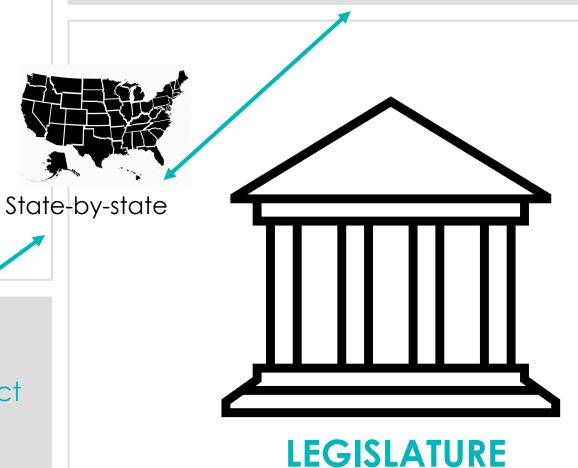






JUDICIARY

- Define the practice of law
- Require licensure
- Define criminal penalties for UPL



- Lawyer qualification & fitness
- Defining professional misconduct
- Delegation to state bars

1908 Canons: No UPL

1937: Canon 47

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

1970: Canon 3

- A lawyer should assist in <u>preventing</u> the unauthorized practice of law
 - 9 Ethical Considerations
 - DR 3-101: "shall not aid" a non-lawyer in UPL +
- Shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction."

1970: Canon 3

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

<u>1983 + 2002 (MJP Commission) Model Rule 5.5</u>

- No UPL + no assist UPL
- "Temporary" practice exceptions (in associat oh, pro hac, arbitration, arise out of home practice
 - Systematic + continuous OK if federal, in-house (not unreasonably risk to client)

Client protection * State authority * Independence?

2002 MJP Commission

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.

UPL (d) Evolutions

- Professional independence (duty to legal system)
- Client protection
- Limit of jurisdictional authority

- Temporary Practice
- Choice of law (8.5)
- Practice Pending Admission
- UBE
- Admission on Motion
- Foreign Legal Consultants



UPL (d) Evolutions: Remote Work

- "Temporary" (COVID)
- Due process (as applied)
- Not "in" the state for practice of law



 Focuses on choice of law issue







(D) EVOLUTION

GATEKEEPING

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



Zealousness - Gatekeeping



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

—Elihu Root (1938)



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.

Canon 15, 1908 Canons of Ethics

Represent a client zealously within the bounds of the law

Canon 7, 1970 Model Code

Lawyer shall not intentionally:

- 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

Lawyer may

- Exercise professional judgment to waive or fail to assert right or position
- Refuse to aid or participate in conduct believed to be unlawful



Relegated to Preamble + comment

Is our zeal diminishing or has it been right-sized?

Preamble, comment [2]:

 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.

Comment [2] Rule 1.3 (Diligence)

 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.

Concepts consistent across professional codes: 1908 Canons > 1970 Model Code > Model Rules

*But see

- Competence
- Diligence
- Loyalty
- Confidentiality

Advisor

Advocate

Negotiator

Evaluator

*Zeal

- Bounds of the Law
- Civility respect for people, court, law
- Nothing harassing, frivolous
- Candor & fairness

Admonitions to "civility" dropped from text of Model Rules

Text KELLYFAGLION624 to 22333 once to join

Which statement do you most agree with regarding zeal in the profession today?

A Lawyers are more zealous now than in the past

B Lawyer zeal probably isn't any different now than in the

C Lawyers are less zealous now than in the past

D Lawyer overzealousness or underzealousness isn't even in the top 10 list of problems for the profession

E Zeal is just a tool on the lawyer's toolbelt to be deployed to achieve the client's goal

F Clients expect lawyers to demonstrate zeal and lack confidence in lawyers who do not

Text KELLYFAGLION624 to 22333 once to join

Which statement do you most agree with regarding civility in the profession today?

A Lawyers are less civil now than in the past

B Civility in the profession probably isn't any different now than in the past

C Lawyers are more civil now than in the past

D Lawyer civility isn't even in the top 10 list of problems for the profession right now

Concepts consistent across professional codes: 1908 Canons > 1970 Model Code > Model Rules

*But see

- Competence
- Diligence
- Loyalty
- Confidentiality

- * Bounds of the Law
- Civility, respect for people, court, law
- Nothing harassing, frivolous
- * Candor & fairness

Model Code, Model Rules make "gatekeeper" role potentially more active

GATEKEEPER

(D)EVOLUTION

1908 Canons:

Conscientious lawyer: decline to act, restrain client wrongdoing, withdraw

Model Code

Adds potential to "reveal" a "fraud" except when information is protected as a privileged communication

Model Rules

Adds potentially mandatory duties to disclose to tribunal and potentially a regulator or third party (Rules 1.13 (SOX counterpart), 3.3, 4.1)

Permissive disclosures in Rule 1.6

APOCALYPSE

- Encroaching on lawyer-client relationship (confidentiality, loyalty)
 - "Critics are using such terms as 'orwellian' to describe the [Sarbanes-Oxley] proposal."
 - The ABA proposed rule is "bartering away a piece of our professional soul to gain some hoped-for public approval."
 - The ABA proposed rule makes a corporate lawyer an "uberdirector."
 - The ABA proposed rule is "utterly wicked."
 - The "gatekeeper initiative" is the "single most alarming threat to the attorney-client privilege to be seen in a long time."
 - Worried that "the [SEC] would be using the attorney as the Commission's eyes and ears to build a case against the client."
 - With respect to the proposed gatekeeper initiative, "Doesn't that conjure up a sort of East German notion of reporting all 'suspicious' behavior?"
 - SEC's proposed noisy withdrawal rule threatens to "turn lawyers into 'policemen, prosecutors, judges, and regulators."

MOVIE CLIPS



APOCALYPSE

Encroaching on lawyer-client relationship (confidentiality, loyalty)

NEXT APOCALYPSE: Anti-money laundering measures

"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."

LAWYER (D) EVOLUTION:

CONSCIENT OUS LAWYER

OFFICER OF THE COURT

LAWYER CONSCRIPTED TO LAW ENFORCEMENT?







Text KELLYFAGLION624 to 22333 once to join

The right balance between lawyer duties to a client and lawyer role as officer of the court is achieved when a lawyer ONLY has to:

A Lawyer has the duty to decline, abstain, withdraw from representation or specific scope of work that would advance wrongdoing

B The above PLUS: Lawyer has a duty of candor, which includes correcting mis-statements or false impressions

C The above PLUS: Lawyer has permissive disclosure options for serious and limited circumstances

D The above PLUS: Lawyer has mandatory disclosure options for serious and limited circumstances (after warning client)

E The above PLUS: Lawyer has permissive disclosure options for serious and limited circumstances (without warning client)

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.

Richard D. Copaken (1968)





(D) EVOLUTIONS

LITIGATION FUNDING

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



Champerty → Contingency → 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 (1649)





(d)Evolution Champerty→Contingency←→Litigation Funding

Maintenance:

 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

Champerty:

- Form of maintenance
- 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

Barratry

Continuing practice of maintenance and champerty



What separates them?

1908 Canons:

- OK if unable able to pay & supervised by court
- No criminal
- No domestic

Maintenance

Barratry

Champerty

Model Code (DR 2-106, DR 5-103):

- OK if not illegal and "not clearly excessive"
- Ethical considerations references access to legal services
- Advance of expenses OK, but . . .
- Client must remain responsible for costs
- No criminal
- No domestic

Model Rules (Rules 1.5, 1.8):

- OK if not illegal and if total fee is reasonable
- Advance of expenses OK with repayment contingent
- No other financial assistance except for indigent
- No criminal
- No domestic

Contingency

Litigation Funding



Competing concerns

Abuse Access

Maintenance
Barratry
Champerty

 Exercise independent judgment for client (loyalty; objectivity)

 Client controls decision making (settlement)

- Assist in making legal services
 [available to the poor / those unable to pay] [more affordable]
- Ensure access to the courts
- Allocate risk of loss to others

Contingency

Litigation Funding

Fees

Costs

Medical care

Living Expenses



Litigation Funding – some specific issues

- Fee splitting (non-lawyers) / Rule 5.4
 - Lawyers cannot directly bargain with funders (except possibly at portfolio level), but clients can
- Referral fees cannot be paid in either direction (Rule 7.2(b); 1.7, 1.8(f))
- Protection of confidential & privileged information (Rules 1.6, 1.1, 1.4)
- Potential Conflicts (Rules 1.7, 1.8)
- Reasonable Fee (Rule 1.5)
- Third party liability to funder / misrepresentation and reliance



Litigation Funding – some specific issues

June 2020 MN case (Maslowski v. Prospect Funding Partners)

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).



MOVIE CLIPS





(D) EVOLUTIONS

ADVERTISING

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



ADVERTISING | (D) EVOLUTION

1908 Canons:

Unprofessional, intolerable, defies tradition (not client protection)

Model Code after 1977 Battes v. State Bar of Arizona

"Client education" + fulfilling duty to make counsel available is the appropriate focus No soliditation

Advertising micro-managed via Model Code (retained admonitions against the undignified) State-by-state regulation unworkable

Model Rules (post constitutional challenges & tech revolution)

Advertising OK in any medium Nothing false, misleading No solicitation unless

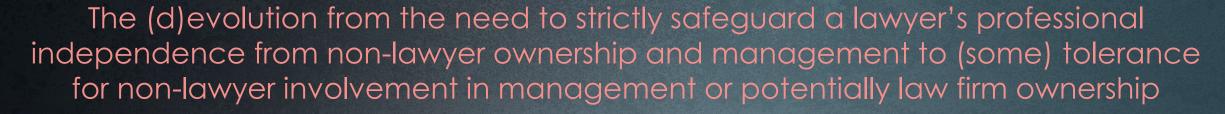
MOVIE CLIPS





(D) EVOLUTIONS

ABS





Alternative Business Structure D) EVOLUTION

1908 Canons:

No mention

Model Code

Client protection? DR 3-102: Lawyer cannot share legal fees with nonlawyer Or lawyer protection? DR 3-103: No partnership with nonlawyer

Safeguard duties to clients / lawyer independence / prevent UPL

Cost?
Innovation?

Model Rules

Rule 5.4 (no sharing legal fees with nonlawyer, no equity interest or managerial control)

Rule 5.5: no assisting UPL

Rules 5.1, 5.3: duty to supervise

Alternative Business Structure D) EVOLUTION

DC Rule 5.4: Allows nonlawyers as equity owners, managers if

- Lawyers take responsibility
- Nonlawyers agree to be bound by rules

Arizona / Utah

Client protection?

Or lawyer protection

Experimenting with ABS

Or lawyer protection?
AZ has new licensing scheme for limited license legal technicians

Utah accepting applications for nonlawyer ownership or management

ABA Opinion 499

Addresses choice of law issue

Lawyer can invest in ABS in jurisdiction where it is legal even if licensed lawyer is from jurisdiction where it is not if investment is passive (no law practice through ABS, no operations, no conflicts, etc.)

Internationally: ABS experimentation

- Has not caused harm
- Some increase in funding (mostly PI)

Cost?

MOVIE CLIPS



Independence Alternative Business Structures



Will lawyers (d)evolve or will the apocalypse come?

"You cannot solve a problem from the same consciousness that created it. You must learn to see the world anew."

—attributed to Albert Einstein (+/-1950's)



Text KELLYFAGLION624 to 22333 once to join

Which of the following market-driven (d)evolutions do you think has the most power to impact the legal profession?

Advertising

Third party litigation funding

Alternative Business Structure

Limited Scope (Unbundled) Legal Services

Artificial Intelligence



(D) EVOLUTIONS

UNBUNDLED SERVICES ARTIFICIAL INTELLIGENCE

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



Full Service Unbundled Artificial Intelligence



"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

"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

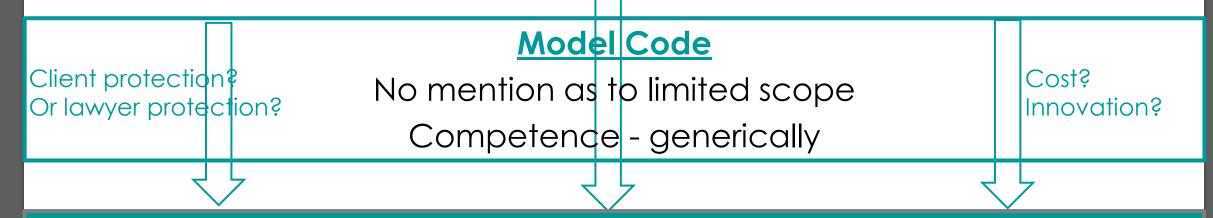


Unbundled Services,

AI D)EVOLUTION

1908 Canons:

No mention as to scope / competence generally



Model Rules

Rule 1.2 (c): limited scope if reasonable with informed consent (R. 1.4) Al = 1.1 (competence) 1.4 (communicate) 1.6 (confidentiality) 1.8(h) – limiting liability

MOVIE CLIPS





(D) EVOLUTIONS

CLIENT OCGs

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





MOVIE CLIPS



Proposed DC Rule Changes OCGs D) EVOLUTION

LAWYER/CLIENT > OFFICER OF COURT > MARKET FORCES

- Rules 1.7 & 5.6: remove the existing open-ended permission for a lawyer and client to expand the scope of what constitutes a conflict of interest
- Rule 1.8: 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
- Rule 1.16: 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
- Rule 1.6: make clear that a lawyer may use general (i.e., not client-specific)
 knowledge gained during a representation for the benefit of subsequent clients
- Rule 1.16: 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