Article

The Myth of Self-Regulation

Fred C. Zacharias†

Law in the United States is a heavily regulated industry.[1] Lawyers are licensed in each state.[2] They are governed by professional rules, usually adopted and enforced by state supreme courts.[3] The courts regulate lawyers separately as well,

† Herzog Research Professor, University of San Diego School of Law.

The author thanks Professor Steven D. Smith for his helpful comments on an earlier draft of this article.

1. James M. Fischer, *External Control over the American Bar*, 19 GEO. J. LEGAL ETHICS 59, 60 (2006) ("Today, law is a highly regulated industry . . . ."); Mona L. Hymel, *Controlling Lawyer Behavior: The Sources and Uses of Protocols in Governing Law Practice*, 44 ARIZ. L. REV. 873, 874 (2002) ("[S]elf-regulation [of lawyers] is becoming a smaller part of the regulatory mix."); John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 RUTGERS L. REV. 101, 102 (1995) ("Increasingly, professional ideals have been turned into enforceable law, and self-regulation by the organized bar has become regulation by courts and legislatures."); Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1275 (1995) (noting that the existence of disciplinary regulation and substantial regulatory law, including "tort law, criminal law, agency law, and securities law" belies the notion that lawyers are self-regulating); Symposium, *Twenty Years of Legal Ethics: Past, Present, and Future*, 20 GEO. J. LEGAL ETHICS 321, 329 (2007) (reporting comments of Professor Stephen Gillers: "We are seeing more of the rules governing lawyers coming out of the substantive law, in malpractice cases, interpretations of fiduciary duty, through agency law, and construction of the attorney-client privilege.").

2. *See, e.g.*, NAT'L CONFERENCE OF BAR EXAMINERS & AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2007, at 3–5 (2007), *available at* http://www.ncbex.org/fileadmin/mediafiles/downloads/Comp_Guide/2007CompGuide.pdf (cataloguing state licensing requirements); Larry E. Ribstein, *Lawyers as Lawmakers: A Theory of Lawyer Licensing*, 69 MO. L. REV. 299, 301 (2004) (presenting a "new rationale for state licensing of lawyers"); Randall T. Shephard, *On Licensing Lawyers: Why Uniformity is Good and Nationalization is Bad*, 60 N.Y.U. ANN. SURV. AM. L. 453, 460–61 (2004) (arguing in favor of maintaining state-by-state licensing of lawyers).

3. *See* American Bar Association, Center for Prof'l Responsibility, Links to Other Legal Ethics and Professional Responsibility Pages, http://www

through supervisory decisions in the course of litigation and by implementing common law civil liability rules that govern legal practice.[4] These include malpractice, breach of fiduciary duty, and other causes of action.[5] Administrative agencies—particularly federal agencies—also establish and implement rules governing lawyers who practice before them.[6] Federal and state legislatures play a further role in regulating the bar, providing statutory regulations[7] and criminal penalties that apply to lawyers.[8]

Nevertheless, courts,[9] commentators,[10] and legal ethics regulators[11] continue to conceptualize law as a "self-regulated

.abanet.org/cpr/links.html (last visited Mar. 11, 2009) (providing state-by-state links to the governing legal ethics codes).

4. *See* Fred C. Zacharias & Bruce A. Green, *Rationalizing Judicial Regulation of Lawyers*, 70 OHIO ST. L.J. (forthcoming 2009) (discussing the relationship between the various forms of judicial regulation).

5. *Id.* (manuscript at 8, on file with author).

6. *See generally* Fred C. Zacharias, *Understanding Recent Trends in Federal Regulation of Lawyers*, PROF. LAW., 2003 Symposium Issue, at 16–22 (describing a range of administrative regulations of lawyers).

7. *See, e.g.*, Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7245 (2006) (authorizing the SEC to promulgate standards of conduct for securities lawyers); Heslin v. Conn. Law Clinic of Trantolo & Trantolo, 461 A.2d 938, 941 (Conn. 1983) (applying a consumer protection statute to a lawyer's misleading advertising); Fischer, *supra* note 1, at 97–108 (discussing a variety of legislative regulations of lawyer conduct); Shelley D. Gatlin, Note, *Attorney Liability Under Deceptive Trade Practices Acts*, 15 REV. LITIG. 397, 400 n.9 (1996) (cataloguing state consumer protection statutes applicable to lawyers). Arguably, insurers serve as regulators as well, but their requirements typically do not have the force of law we normally attribute to "regulation." *See generally* Fischer, *supra* note 1, at 63–95 (illustrating the ways private insurers influence lawyer conduct).

8. *See* Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 FORDHAM L. REV. 327, 330–52 (1998) (discussing the role of criminal law in regulating lawyers).

9. *See, e.g.*, Guillen v. City of Chi., 956 F. Supp. 1416, 1424 (N.D. Ill. 1997) (discussing "the bar's capacity for self-regulation"); McConchie v. Wal-Mart Stores, Inc., 985 F. Supp. 273, 278 (N.D.N.Y. 1997) (relying on *Wieder v. Skala*, 609 N.E.2d 105 (N.Y. 1992), for the proposition that the legal profession is unique in its self-regulatory nature); Wolters Kluwer Fin. Servs. Inc. v. Scivantage, 525 F. Supp. 2d 448, 449 (S.D.N.Y 2007) ("While frequently under fire, attorney behavior remains largely self-regulating."); Averill v. Cox, 761 A.2d 1083, 1089 (N.H. 2000) ("We are aware that consumers in the legal marketplace may feel especially vulnerable to attorney misconduct because the legal profession is self-regulated."); State *ex rel.* Okla. Bar Ass'n v. Giger, 37 P.3d 856, 864 (Okla. 2001) ("The public must have confidence that the legal profession, which is self-regulated, will not look the other way when its members break the law.").

10. *See, e.g.*, Jonathan Macey, *Occupation Code 541110: Lawyers, Self-Regulation, and the Idea of a Profession*, 74 FORDHAM L. REV. 1079, 1081

profession." A Westlaw search reveals more than five hundred law review articles that refer to the concept in the last ten years alone.[12] The preamble to the recently revised ABA Model Rules of Professional Conduct maintains an emphasis on the importance of self-regulation,[13] presenting the Model Rules themselves as a form of self-regulation despite the fact that the Rules are intended to be adopted as enforceable law by state supreme courts.[14] The Preamble states:

> The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. . . .
>
> To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. . . .
>
> The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession . . . .[15]

(2005) (arguing "against self-regulation of the legal profession"); Laurie A. Morin, *Broken Trust and Divided Loyalties: The Paradox of Confidentiality in Corporate Representation*, 8 UDC/DCSL L. REV. 233, 233 n.1 (2004) ("Unlike most professions, the legal profession in the United States is largely 'self-regulating.'"); John P. Sahl, *The Public Hazard of Lawyer Self-Regulation: Learning from Ohio's Struggle to Reform Its Disciplinary System*, 68 U. CIN. L. REV. 65, 72–73, 111 (1999) (discussing the "self-regulation" of judges and lawyers in the Ohio disciplinary process); Sandra Caron George, Comment, *Prosecutorial Discretion: What's Politics Got to Do with It?*, 18 GEO. J. LEGAL ETHICS 739, 745 (2005) ("The legal profession is by and large self-regulated.").

11. *See, e.g.*, Amendments to the Rules Regulating the Fla. Bar, 795 So. 2d 1, 35 (Fla. 2001) (per curiam) (comment to proposed rule 4–8.3, stating: "Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct"); *In re* Application of Okla. Bar Ass'n to Amend Okla. Rules of Prof'l Conduct, 171 P.3d 780, 781 (Okla. 2007) (preamble to rules revision stating: "Self-regulation also helps maintain the legal profession's independence from government domination").

12. A search for *DATE(AFTER 1998) & ((lawyers "legal profession" bar) /5 self-regulat!)* in the Journals and Law Reviews database on March 11, 2009, yielded 542 documents.

13. MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 10 (2008).

14. *Id.* scope ¶ 19 ("Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process.").

15. *Id.* pmbl. ¶¶ 10–12.

The observation that many forms of law constrain the conduct of lawyers is nothing new, and no one would seriously question it.[16] It is equally clear that, because lawyers participate heavily in producing the governing professional rules and the broader external law that affects the bar, lawyers in some respects are distinct among regulated professionals.[17] Yet to judge by the continuing references to lawyer self-regulation in the commentary, many observers—among them the Model Rule drafters—hearken nostalgically back to a notion that lawyers are governed primarily through peer pressure, peer standards, and peer discipline that elevate the bar and limit the need for external regulation.[18] Alternatively, the observers assume that

16. *See* Lawrence J. Fox, *Dan's World: A Free Enterprise Dream; An Ethics Nightmare*, 55 BUS. LAW. 1533, 1549 (2000) ("[T]hat mantra of self-regulation recites what is largely a myth."); Linda Fitts Mischler, *Personal Morals Masquerading as Professional Ethics: Regulations Banning Sex Between Domestic Relations Attorneys and Their Clients*, 23 HARV. WOMEN'S L.J. 1, 93 (2000) ("Although the legal profession is often called a 'self-regulating' profession, this is a misnomer.").

For a realistic assessment of the interrelationship between lawyer self-regulation (including professional discipline) and external constraints see Ted Schneyer, *From Self-Regulation to Bar Corporatism: What the S&L Crisis Means for the Regulation of Lawyers*, 35 S. TEX. L. REV. 639 (1994). Professor Schneyer evaluates the practical explanations for why external regulation, including administrative regulation and civil lawsuits, targeted lawyers complicit in the savings and loan crisis of the 1980s while disciplinary regulation was absent. *Id.* at 640–66. Schneyer then suggests that, in light of the practical realities of regulation and banking practice, future professional regulation needs to provide more detailed prophylactic protocols for the conduct of banking lawyers. *Id.* at 667. Such protocols would not, according to Schneyer, reflect "a major loss of influence for the profession," but rather would illustrate that bar organizations should operate "in tandem," or as co-regulators, with external overseers of lawyer conduct. *Id.* at 643.

17. Randy Lee, for example, emphasizes that, because judges are lawyers, "judicial regulation of lawyers remains lawyers regulating lawyers." Randy Lee, *The State of Self-Regulation of the Legal Profession: Have We Locked the Fox in the Chicken Coop?*, 11 WIDENER J. PUB. L. 69, 73 (2002). Benjamin Barton argues that, in promulgating professional codes, state supreme courts often are influenced—perhaps too heavily—by the proposals of the bar. Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1186–88 (2003); *see also Developments in the Law—Corporations & Society*, 117 HARV. L. REV. 2169, 2237 (2004) ("The legal profession has historically conceived of itself as independent and self-regulating, and local bar associations continue to influence the ethics rules that state courts of last resort promulgate."(footnote omitted)).

18. *See, e.g.*, Kevin Hopkins, *The Politics of Misconduct: Rethinking How We Regulate Lawyer-Politicians*, 57 RUTGERS L. REV. 839, 865–66 (2005) ("The organized bar has contended that public confidence in lawyers is critical for the proper functioning of the legal profession, and therefore, effective self-

because the profession is self-regulated, the resulting behavioral norms and implementation of discipline are self-serving.[19]

regulation is necessary to preserve public faith in the integrity of the administration of justice and to maintain the profession's reputation for trustworthiness."); Susanna M. Kim, *Dual Identities and Dueling Obligations: Preserving Independence in Corporate Representation*, 68 TENN. L. REV. 179, 255 (2001) ("[L]awyers have the power of self-regulation. In comparison to all other professions, the legal profession is the most free of external governmental control."); Karel Ourednik IV, *Multidisciplinary Practice and Professional Responsibility After Enron*, 4 FLA. COASTAL L.J. 167, 193 (2003) ("As a group that self-regulates, lawyers must address [the post-Enron] issues, formulate policy, and draft rules and regulations with effective enforcement."); Kathleen M. Sullivan, *The Good That Lawyers Do*, 4 WASH. U. J.L. & POL'Y 7, 21 (2000) ("Lawyers are self-regulated. . . . The price of professional autonomy and self-regulation is some duty of service."); Christopher M. Von Maack, *Civility in the Practice of Law: A Young Lawyer's Perspective*, UTAH B.J., Nov./Dec. 2006, at 22 ("As a self-regulated *profession* . . . lawyers have an individual and collective role to play in maintaining civility in the practice of law."); *cf.* Keith R. Fisher, *The Higher Calling: Regulation of Lawyers Post-Enron*, 37 U. MICH. J.L. REFORM 1017, 1025 (2004) ("The question is thus starkly posed: whether the legal profession remains completely capable of self-regulation, of providing legal services with honesty, integrity, and decorum, and of accepting fiduciary responsibilities not merely to clients but to a broader definition of interests a 'learned profession' should serve."); Deborah L. Rhode, *Teaching Legal Ethics*, 51 ST. LOUIS U. L.J. 1043, 1056 (2007) (suggesting that legal ethics courses should "remind future practitioners of the opportunities and obligations that come with membership in a largely self-regulating profession").

19. *See* RICHARD L. ABEL, AMERICAN LAWYERS 142 (1989) ("The content of the ethical code and the nature of its enforcement both reflected jockeying among lawyers for competitive advantage."); David Barnhizer, *Profession Deleted: Using Market and Liability Forces to Regulate the Very Ordinary Business of Law Practice for Profit*, 17 GEO. J. LEGAL ETHICS 203, 225 (2004) ("There is a universal law that tells us no one is capable of fairly judging themselves."); 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, 419 (2005) ("[B]ecause the legal profession is basically self-regulating, most regulations governing lawyers are self-serving and aimed at increasing lawyer profits and protecting the monopolistic nature of the legal profession."); John C. Coffee, Jr., *The Attorney as Gatekeeper: An Agenda for the SEC*, 103 COLUM. L. REV. 1293, 1316 (2003) ("[P]rivate self-regulation of attorneys through bar associations means the continued government of the guild, by the guild, and for the guild."); Anthony E. Davis, *Professional Liability Insurers as Regulators of Law Practice*, 65 FORDHAM L. REV. 209, 231 (1996) ("[T]he bar has proved itself to be supremely self-serving in regulating itself . . . ."); Brian Finkelstein, *Should Permanent Disbarment Be Permanent?*, 20 GEO. J. LEGAL ETHICS 587, 594–95 (2007) ("The public perception that lawyers, members of a self-regulated profession, are merely 'protecting themselves' by not utilizing permanent disbarment, is a real threat to the reputation of all lawyers."); Kay A. Ostberg, *The Conflict of Interest in Lawyer Self-Regulation*, PROF. LAW., Summer 1989, at 6, 7 (characterizing the ABA and state bar associations as "trade organizations charged with advancing the interests of lawyers" and concluding that "[b]ecause trade associations do not represent the public, they

The debates concerning proposed amendments to the professional rules routinely include statements that *if* lawyers do not regulate themselves, external regulators *will* fill the vacuum.[20] The debates also tend toward the position that foreclosing external regulation would be a good thing.[21]

should have . . . no role in deciding who enters the profession or in deciding conflicts between its own members and the public"); *cf.* Debra Lyn Bassett, *Redefining the "Public" Profession*, 36 RUTGERS L.J. 721, 724 (2005) ("With scandals come calls for additional rules and regulations, typically accompanied by criticism of the self-regulating nature of the legal profession as protectionism."); Andrew M. Perlman, *Toward a Unified Theory of Professional Regulation*, 55 FLA. L. REV. 977, 993 (2003) (arguing that the bar's professional norms, in significant measure, have as their objective "the protection of the bar's economic well-being").

20. *See* W. William Hodes, *Truthfulness and Honesty Among American Lawyers: Perception, Reality, and the Professional Reform Initiative*, 53 S.C. L. REV. 527, 537 (2002) ("Unless the organized bar cleans its own house, sooner or later government agencies will remove the unique measure of self-regulation granted to the legal profession . . . ."); Abraham C. Reich & Michelle T. Wirtner, *What Do You Do When Confronted with Client Fraud?*, BUS. L. TODAY, Sept./Oct. 2002, at 39, 43 ("[L]awyers opposed to self-regulation beware: If the profession fails to adequately police itself, our government will enact legislation that not only polices lawyers, but extends liability for corporate governance fiascos."); Kenneth M. Rosen, *Lessons on Lawyers, Democracy, and Professional Responsibility*, 19 GEO. J. LEGAL ETHICS 155, 167 (2006) ("Yet if lawyers are unwilling to recommit themselves to the regulation of their profession and their responsibilities to society, one might expect additional [external] regulations . . . ."); *cf.* Lester Brickman, *Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees*, 81 WASH. U. L.Q. 653, 699 (2003) ("The self-regulatory regime that the bar maintains serves mostly to fend off other regulatory regimes."); Morin, *supra* note 10, at 234 n.4 ("The legal profession has jealously guarded its self-regulatory status, and I believe that the House of Delegates' reversal of its long-standing position in August 2003 was based as much on its fear of state regulation as on any principled change of heart regarding client confidentiality."); Ted Schneyer, *An Interpretation of Recent Developments in the Regulation of Law Practice*, 30 OKLA. CITY U. L. REV. 559, 569 (2005) (noting that "state supreme courts and general-purpose bar associations do not consider 'self-regulation' moribund" and citing instances in which they "continue, often with ABA support, to resist federal 'intrusions'").

21. *See* Schneyer, *supra* note 20, at 583 ("The organized bar typically opposes legislative or administrative initiatives that enlist lawyers as gatekeepers . . . because the bar views the initiators as unwelcome 'intruders' on the traditional turf of professional 'self-regulation.'"); David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 812–13 (1992) ("For more than a century, bar officials asserted that 'self-regulation' was the only enforcement system compatible with the fact that lawyers are 'independent professionals.'"); *cf.* Barnhizer, *supra* note 19, at 217 ("Self-regulation is at the core of lawyers' arguments that they should be entrusted with oversight of the behavior of lawyers, but self-regulation by lawyers and judges has not worked."); Mark D. Nozette & Robert A. Creamer, *Professionalism: The Next*

This Article argues that the continued emphasis on lawyer self-regulation exacts costs. Conceiving of the disciplinary codes as mere professional self-regulation rather than as one element of an expansive regulatory regime governing the bar misleads courts, code drafters, lawyers, and laypersons alike. The myth of self-regulation has serious ramifications both for the development of the law governing lawyers and for everyday legal practice. The Article therefore proposes an amendment to the Model Rules that would eliminate all reference to self-regulation and replace it with a more accurate statement of the status of the professional codes.

It is important, at the outset, to acknowledge that commentators attribute various meanings to the term "self-regulation."[22] Some commentators, recognizing that the power to discipline lawyers has shifted from bar organizations to state judiciaries, assume that lawyer-judges who supervise disciplinary cases are likely to give special solicitude to the interests of the bar.[23] By their reasoning, any regulation which involves lawyers as contributors to, or in the enforcement of, the prevailing norms is "self-regulation."[24] This Article, in contrast, pre-

Level, 79 TUL. L. REV. 1539, 1540 (2005) (characterizing self-regulation as a "core professional value").

22. *See* F. Raymond Marks & Darlene Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?*, 1974 U. ILL. L.F. 193, 194–95 ("[T]wo tasks are involved in the process of self-regulation: the task of monitoring conduct and the task of maintaining the quality of performance.").

23. *See, e.g.*, Margaret Onys Rentz, *Laying Down the Law: Bringing Down the Legal Cartel in Real Estate Settlement Services and Beyond*, 40 GA. L. REV. 293, 307 (2005) ("[L]eniency in disciplinary action—a product of the bar's self-regulation—is no doubt part of what fuels public contempt for the profession."); Sahl, *supra* note 10, at 74–75 (drawing a link between negative public perception of the bar and its sense that self-regulation through the disciplinary process is ineffective).

24. *See* Benjamin H. Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?*, 59 ALA. L. REV. 453, 455 (2008) (arguing that the regulation of lawyers "by lawyers/justices from the state supreme courts . . . has been exceptionally helpful to the legal profession as a whole"); Nancy J. Moore, *The Usefulness of Ethical Codes*, 1989 ANN. SURV. AM. L. 7, 15 (noting that supervising courts "are comprised of judges, who are not only members of the broader legal profession, but also former (and potentially future) practicing lawyers. . . . As a result, the legal profession has achieved a degree of self-regulation far beyond . . . the expectations of any other professional group"); Eric H. Steele & Raymond T. Nimmer, *Lawyers, Clients, and Professional Regulation*, 1976 AM. B. FOUND. RES. J. 917, 921–22 (discussing self-regulation in terms of bar enforcement of admission requirements and the disciplinary codes); *cf.* Marks & Cathcart, *supra* note 22, at 197 ("Perhaps the best way to understand the present status of professional self-regulation is to

supposes that judges overseeing lawyers take their independence from the bar and their regulatory functions seriously. The Article therefore treats discipline by courts as a form of regulation external to the profession.[25] Even if this were not the case, however, the Article's core point would remain, because judicial enforcement of the disciplinary codes is only one of many forms of regulation governing the bar.

This Article's goal is narrow: to highlight the various adverse consequences that arise when different actors in the system—including the co-regulators of the bar, lawyers themselves, and the public—cling to an image of self-regulation. The consequences may seem inconsistent. Sometimes, for example, thinking in terms of self-regulation creates a self-fulfilling prophecy in which an external regulator fails to adequately exercise its authority to constrain the bar. Identifying the regulator's misperception can help produce a change in its practices. At other times, however, the image of self-regulation may lead an external regulator to *falsely* assume that a different regulator has deferred to the bar, causing it to undervalue the other regulator's actions. Eliminating that misconception may be a prerequisite to properly dividing up the work of the co-regulators. In yet other circumstances, the persistent image of self-regulation affects the ways in which lawyers respond to legal ethics codes and members of the public respond to professional regulation as a whole. To the extent their responses are misguided or undermine the effectiveness of professional regulation, clarifying the reality that law is heavily regulated by multiple co-regulators can mute these reactions. This Article

observe the difference between the enunciated standards of performance and conduct . . . and the reality of disciplinary enforcement.").

25. As discussed *infra* in the text accompanying notes 80–84, in the days before the adoption of the 1983 Model Rules, professional discipline was not a vibrant enterprise. *See* ABEL, *supra* note 19, at 144 (noting that contemporary lawyers "suffer few informal sanctions for violating ethical rules" and suggesting that formal disciplinary processes are not very effective). In modern times, however, the threat of disciplinary sanction is real, bar prosecutors take themselves seriously, and courts routinely evaluate the conduct of lawyers through the disciplinary process. *See* Symposium, *Lessons from Enron: A Symposium on Corporate Governance*, 54 MERCER L. REV. 683, 711 (2003) (statement of A.P. Carlton) ("It has [been] for 200 years the judicial branch of the states that discipline lawyers. It's not self-regulation as it's often spoken of. It's regulation by the third party judicial branch or a statutory body in most states." (alteration in original)); National Organization of Bar Counsel, History of the National Organization of Bar Counsel, http://www.nobc.org/history.aspx (last visited Mar. 11, 2009) (describing the history of coordinated efforts by bar counsel).

does not propose solutions to each of the adverse consequences that the self-regulation myth produces,[26] but rather attempts to set the table for solutions by identifying the core misconception and its consequences.

Part I of the Article clarifies why the notion of law as a self-regulated industry developed and how it became archaic. The history helps explain why the Model Rule drafters continue to emphasize the concept. Part II highlights the reality that law has become a heavily regulated industry in modern times. Although lawyers may contribute to the law governing the bar by helping to develop rules and participating in the cases and legislative processes that produce substantive law constraining the bar, lawyers do not control the outcomes. Part III addresses the heart of this Article's thesis by describing the impact of continued reliance on the notion of self-regulation. In light of the resulting costs, Part IV suggests, and describes the potential benefits of, an amendment to the Model Rules of Professional Conduct that would begin to roll back the self-regulation myth.

I. THE HISTORY OF THE REGULATION OF AMERICAN LAWYERS

There have always been lawyers in America, and many played a critical role in the founding of the country.[27] Most early American lawyers trained in England[28] or apprenticed with

26. That is not to say that the author has no views on the subjects of dealing with self-interested professional regulation, the need to harmonize co-regulation, or the appropriate distribution of the work of regulating lawyers. *See generally* Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265, 312–14 (2006) (discussing self-interested professional rules); Fred C. Zacharias, *The Humanization of Lawyers*, PROF. LAW., 2002 Symposium Issue, at 9, 26–31 (discussing the appropriate distribution of the work of regulating lawyers); Zacharias & Green, *supra* note 4, (manuscript at 52–60) (discussing the importance of harmonizing various forms of judicial regulation of lawyers).

27. *See, e.g.*, ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 177–78 (1953) ("Twenty-five of the fifty-six signers of the Declaration of Independence were lawyers."); *id.* at 186 (discussing some of the great lawyers of the post-revolutionary period).

28. *See* W. HAMILTON BRYSON, LEGAL EDUCATION IN VIRGINIA 1779–1979, at 8–9 (1982) (identifying lawyers in colonial Virginia who attended the British Inns of Court and suggesting that the number decreased over time); 1 ANTON-HERMAN CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA 33 (1965) (discussing American lawyers who were trained in the British Inns of Court); E. ALFRED JONES, AMERICAN MEMBERS OF THE INNS OF COURT ix–xxx (1924) (noting the number of American lawyers who trained in the British Inns of Court during the Revolutionary period); CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 188 (1966) (noting that many colonial lawyers "received

lawyers who originally learned their skills in the motherland.[29] There were no American professional law schools as we know them today, although a few universities endowed individual chairs of law in their undergraduate colleges.[30] Bar organizations and rules of ethics governing lawyers simply did not exist.[31] Any regulation of lawyers came from judges exercising their authority to admit lawyers to practice in their courts;[32] these judges could forbid lawyers to appear, sanction them for

their legal education in London in the Inns of Court"); *cf.* David D. Garner, Comment, *The Continuing Vitality of the Case Method in the Twenty-First Century*, 2000 BYU EDUC. & L.J. 307, 309 (discussing the English training of lawyers in colonial times, but noting that "after the Revolution, legal education by this method steadily declined in popularity in favor of the increasingly available and less expensive domestic alternatives").

29. *See* MARIAN C. MCKENNA, TAPPING REEVE AND THE LITCHFIELD LAW SCHOOL 1, 9 (1986) (discussing the practice of apprenticeships in the early American legal profession); Daniel R. Coquillette, *The Legal Education of a Patriot: Josiah Quincy Jr.'s Law Commonplace (1763)*, 39 ARIZ. ST. L.J. 317, 319–21 (2007) (identifying apprenticeships chronicled by noted early-American lawyers); Charles R. McKirdy, *The Lawyer as Apprentice: Legal Education in Eighteenth Century Massachusetts*, 28 J. LEGAL EDUC. 124, 125 (1977) (discussing the early apprenticeship process); *cf.* POUND, *supra* note 27, at 178 (noting that "a large number of the older and stronger lawyers were loyalists and left the country or ceased to practice," leaving legal practice "in the hands of lawyers of a lower type and of less ability and training").

30. *See, e.g.*, Paul D. Carrington, *The Revolutionary Idea of University Legal Education*, 31 WM. & MARY L. REV. 527, 527 (1990) (discussing Thomas Jefferson's institution of a chair in "Law and Police" at William and Mary in 1779). The first full university law school was Harvard, which was established in 1817, but its fortunes promptly declined. *See* Coquillette, *supra* note 29, at 323; *see also* John H. Langbein, *Blackstone, Litchfield, and Yale: The Founding of Yale Law School*, *in* HISTORY OF THE YALE LAW SCHOOL 17, 17–36 (Anthony T. Kronman ed., 2004) (discussing the evolution of Yale Law School from its origins as a proprietary institution to its formal association with Yale in the 1820s).

31. *See* POUND, *supra* note 27, at 201–15, 223–32, 243 (discussing the earliest, often unsuccessful, bar associations and concluding that "[n]one of the associations listed as organized before 1850 left permanent records and they all seem to have had only a temporary existence"); Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800 Year Evolution*, 57 SMU L. REV. 1385, 1420 (2004) ("[B]ar associations themselves were rare and their rules related only marginally to substantive practice standards.").

32. *See, e.g.*, 2 CHROUST, *supra* note 28, at 250 (noting that the New York State Constitution of 1777 required "'all attorneys . . . be appointed by the court . . . and be regulated by the rules and orders of the said courts'" (quoting N.Y. CONST. of 1777, art. XXVII (1802))); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 53 (1986) [hereinafter WOLFRAM, MODERN ETHICS] ("[D]isciplinary control was dispersed among local courts."); Charles W. Wolfram, *Towards a History of the Legalization of American Legal Ethics—I. Origins*, 8 U. CHI. L. SCH. ROUNDTABLE 469, 474 (2001) (discussing the history and procedure of judicial regulation of lawyers).

litigation misconduct, or punish them in more indirect ways.[33] No formal or uniform standards governing lawyer behavior or judicial evaluation of lawyer practice were evident.

Thus, in the post-revolutionary period of the United States, law truly was a self-regulated profession. Faced with a vacuum of regulatory institutions and standards of conduct, it was natural that informal norms of practice developed. Lawyers talked to each other, visited in groups at local inns and eating clubs, and depended on each other for reciprocal courtesy that made the practice of law dignified, civil, and relatively efficient.[34] Collegial assumptions about the profession developed, such as the fact that lawyers should act as gentlemen and that gentlemen should not betray their clients' secrets.[35]

In the middle of the nineteenth century, the profession's internal debate about how it should behave blossomed. Proponents of Henry Lord Brougham's view of an ultra-aggressive adversary system[36] clashed with adherents to David Hoffman's

33. *See, e.g.*, *Ex Parte* Steinman & Hensel, 95 Pa. 220, 237 (1880) ("We entertain no doubt that a court has jurisdiction . . . to strike the name of an attorney from the roll in a proper case."); Andrews, *supra* note 31, at 1417 (noting several early statutes "providing for judicial disbarment of lawyers in cases of deceit or malpractice"); *cf.* POUND, *supra* note 27, at 185 ("Discipline by the courts was invoked only in rare and extreme cases.").

34. *See, e.g.*, WOLFRAM, MODERN ETHICS, *supra* note 32, at 34 (describing the evolution of bar associations from local eating clubs); Hopkins, *supra* note 18, at 862 n.87 ("[T]he country's earliest bar associations . . . were primarily established as avenues for fellowship.").

35. *See* James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 FORDHAM L. REV. 2395, 2400 (2003) ("[T]he Canons were animated by the vision of a self-regulating profession in which lawyers engaged in their professional activities as gentlemen."); William T. Gallagher, *Ideologies of Professionalism and the Politics of Self-Regulation in the California State Bar*, 22 PEPP. L. REV. 485, 510 (1995) ("Drawing on the model of an idealized English gentlemanly class, the legal profession attempted to create a public image of lawyers as a class of gentlemen."); Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1070 (1978) ("[S]ome of the early cases express the idea that the privilege was that of the lawyer (a gentleman does not give away matters confided to him)."); Russell G. Pearce, *The Legal Profession as a Blue State: Reflections on Public Philosophy, Jurisprudence, and Legal Ethics*, 75 FORDHAM L. REV. 1339, 1348 (2006) ("Americans transformed the English notion of lawyers as gentlemen by class into a conception of lawyers as gentlemen as a moral badge of their ability to rise above self-interest, whatever their class origin.").

36. *See* 2 TRIAL OF QUEEN CAROLINE 8 (Joseph Nightingale ed., J. Robins & Co. Albion Press 1821) (reporting Lord Brougham's famous statement: "An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client").

Fifty Resolutions of Professional Deportment,[37] which emphasized moral considerations over client orientation.[38] Courts, continuing to provide the only formal regulation, tended to take a middle-ground position in the debate about lawyers' ethics, but only in the context of individual cases.[39] Lawyers, for the most part, were left to formulate their own views regarding appropriate behavior.[40]

Three developments in the late nineteenth and early twentieth centuries began to give structure to the profession and professional norms. First, professional law schools, which opened in fits and starts throughout the nineteenth century, took hold and began to impart a shared experience to larger numbers of the bar.[41] Second, around the turn of the twentieth century, central bar examining boards became more common, creating a mandate of education that helped regularize prac-

37. *See* DAVID HOFFMAN, *Fifty Resolutions in Regard to Professional Deportment*, *in* A COURSE OF LEGAL STUDY 751, 752–75 (2d ed. 1836), *reprinted in* HENRY S. DRINKER, LEGAL ETHICS 338–51 (2d prtg. 1954).

38. *See, e.g.*, *id.* at 338 (Resolution I) ("I will never permit professional zeal to carry me beyond the limits of sobriety and decorum."); *id.* (Resolution II) ("I will espouse no man's cause out of envy hatred, or malice toward his antagonist."); *id.* at 339 (Resolution X) ("Should my client be disposed to insist on captious requisitions, or frivolous and vexatious defenses, they shall be neither enforced nor countenanced by me."); *id.* at 340 (Resolution XIV) ("My client's conscience and my own are distinct entities."); *id.* at 346 (Resolution XXXIII) ("What is morally wrong cannot be professionally right."). For a discussion of the Brougham-Hoffman debate and the surrounding historical context, see Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 2–4, 24–30 (2005).

39. *See* Zacharias & Green, *supra* note 38, at 30–35 (discussing one nineteenth-century court's analysis of the responsibilities and regulation of lawyers' conduct).

40. *See* Pearce, *supra* note 35, at 1349–50 (discussing the nineteenth-century debate about the ethical obligations of lawyers).

41. *See* ALBERT P. BLAUSTEIN & CHARLES O. PORTER, THE AMERICAN LAWYER: A SUMMARY OF THE SURVEY OF THE LEGAL PROFESSION 167–70 (1954) (discussing the introduction of the case method into legal education); ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 73–84 (1983) (discussing the rise of American law schools); Coquillette, *supra* note 29, at 324 (discussing the development of the Harvard curriculum in the 1870s and arguing that its influence on the "intellectual development of modern American lawyers has been profound. 'Thinking like a lawyer' has been defined by this educational experience for a century."); Gallagher, *supra* note 35, at 512 ("[B]y the mid-nineteenth century bar associations were eclipsed in many respects by the development of the modern law school.").

tice.[42] Third, and most importantly, bar associations began to develop[43]—partly in reaction to the uncertainty spawned by the ongoing debate regarding the role of lawyers and partly as an effort by elite lawyers to raise the economic and social status of the bar organizations' members.[44]

42. *See* Michael Bard & Barbara A. Bamford, *The Bar: Professional Association or Medieval Guild?*, 19 CATH. U. L. REV. 393, 395 (1970) (noting that between 1870 and 1920, most states created central examination boards).

In the early period, judges sometimes administered oral examinations as a prerequisite to practice. *See* ALFRED ZANTZINGER REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 101 (1921) (finding that by 1870, twenty-nine jurisdictions had courts, judges, or ad hoc committees conducting oral examinations); Paul T. Hayden, *Putting Ethics to the (National Standardized) Test: Tracing the Origins of the MPRE*, 71 FORDHAM L. REV. 1299, 1315 (2003) (noting that oral exams were required in New Jersey as early as 1755). Many states, however, offered admission to practice without proof of skills or knowledge. *See* MICHAEL BURRAGE, REVOLUTION AND THE MAKING OF THE CONTEMPORARY LEGAL PROFESSION 153 (2006) (noting a movement in the early nineteenth century "to reduce, and then eliminate altogether, the requirements that had formerly governed admission to the bar"); Hayden, *supra* at 1314–15 (citing Indiana's pre-1932 constitutional provision that "Every person of good moral character, being a voter, shall be entitled to admission to practice law in all courts of justice"); *see also* POUND, *supra* note 27, at 182 ("All states made admission easy with a minimum of qualification."); Francis L. Wellman, *Admission to the Bar*, 15 AM. L. REV 295, 298 (1881) (finding that by 1870 "[a] mass of persons had been admitted to the profession without any liberal education, with barely the rudiments of English grammar, sometimes without being able to pronounce the language, and with such a smattering of law as could be gained by reading Blackstone a few months"). In 1855, Massachusetts became the first state to administer a written bar examination, but this effort apparently was short-lived. *See* 2 CHROUST, *supra* note 28, at 231–32 (discussing the loosening of standards for admission to the Massachusetts bar); REED, *supra* at 101 n.3 (concluding that the Massachusetts' requirement lasted only until 1859); WOLFRAM, MODERN ETHICS, *supra* note 32, at 198 (noting Massachusetts' original bar exam). New York adopted an examination involving both written and oral components in 1877. Robert M. Jarvis, *An Anecdotal History of the Bar Exam*, 9 GEO. J. LEGAL ETHICS 359, 374 (1996) (noting New York's adoption of the examination). Soon thereafter, Idaho and Nevada began experimenting with written tests. *Id.* Many states adopted such tests in the late nineteenth and early twentieth centuries. *See* Hayden, *supra* at 1317 (discussing the development of written bar examinations).

43. *See* JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 286 (1950) (reporting that eight city and eight state bar associations formed between the foundation of the New York city bar in 1870 and the establishment of the American Bar Association in 1878); Philip J. Wickser, *Bar Associations*, 15 CORNELL L.Q. 390, 396 (1930) ("Almost all bar associations, as we know them today, have been organized since 1870.").

44. *See, e.g.*, Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 7 GEO. J. LEGAL ETHICS 911, 918 (1994) (finding that the elimination of formal training requirements during the era of

Bar associations represented the modern form of lawyer self-regulation. Local bar organizations reflecting loose associations of lawyers had existed for a long time.[45] A few of these exercised some control over local admission of lawyers to practice, but most did not.[46] The first major bar association, the Bar of the City of New York, came into being in 1870,[47] soon followed in 1878 by the ABA,[48] a purportedly national bar organization with the avowed purpose of elevating the image of the profession.[49] State bar associations subsequently continued to develop,[50] usually consisting of successful, like-minded lawyers who hoped to influence the way society viewed and regulated the profession.[51] They were a natural reaction to the development of bar examinations and increasing judicial regulation.

Legal ethics codes became the primary mechanism by which these private organizations of lawyers could have input into what courts were saying about the lawyer's role. The first formal code was adopted in Alabama in 1887.[52] The first ABA

Jacksonian democracy created concerns over a lack of professional control and, ultimately, led to the formation of local bar associations in the 1870s).

45. A few bar associations existed during the colonial period, but most of these disbanded by the early nineteenth century. *See* BURRAGE, *supra* note 42, at 257 ("Every existing bar association except one collapsed."); Andrews, *supra* note 31, at 1434 ("Local bar associations formed sporadically during the colonial period, but they disbanded by the early nineteenth century."); Elizabeth Chambliss, *Professional Responsibility: Lawyers, a Case Study*, 69 FORDHAM L. REV. 817, 829 (2000) (finding that the "colonial bar associations, having lost their de facto control over admission, eventually 'crumbled and disappeared'" after the Revolutionary War (citation omitted)); Devlin, *supra* note 44, at 918 (noting hostility to the bar as a group that began in the 1830s and lasted to the end of the Civil War).

46. *See, e.g.*, Gallagher, *supra* note 35, at 512–13 (discussing the early pre- and post-Revolutionary War bar associations and their attempts to control admission to the profession); Wickser, *supra* note 43, at 393–94 (describing hostile reactions to early bar associations' attempts to regulate the legal profession).

47. Wickser, *supra* note 43, at 396.

48. WOLFRAM, MODERN ETHICS, *supra* note 32, at 34.

49. *See* HURST, *supra* note 43, at 287 (noting that the ABA sought to raise the economic and social status of lawyers, especially its members).

50. *See id.* (finding that twenty state or territorial bar associations had established by 1890; forty by 1900; forty-eight by 1916; and all states and territories had some sort of association by 1925); Wickser, *supra* note 43, at 400 (discussing the existence of more than 650 state and local bar associations nationwide, in practically every state, by 1916).

51. *See, e.g.*, Wickser, *supra* note 43, at 396 (noting that the New York Bar's purpose was, according to its constitution, "to maintain the honor and dignity of the profession").

52. ALA. STATE BAR ASS'N, CODE OF ETHICS (1887), *reprinted in* 2 ALA.

model code, the Canons of Ethics, was adopted in 1908.[53] Although these codes had no legal force, they were intended to guide lawyers and influence judges about the content of lawyer responsibilities.[54] Over time, courts increasingly looked to the Canons as establishing norms for the profession.[55]

These developments emboldened the leaders of the legal profession and led to an effort in the early twentieth century to formalize lawyer self-regulation. Local bar associations grew, increasing their political clout, and eventually sought to exercise legal control over the profession.[56] In the 1920s, a movement began to produce court rules or statutes requiring all practicing lawyers to belong to state bar organizations.[57] This allowed the organizations to collect fees, control (and limit) admission to the bar, and participate in the discipline of lawyers.[58] Some states developed deferential practices by which

LAW. 245, 259 (1941); *see also* Carol Rice Andrews, *The Lasting Legacy of the 1887 Code of Ethics of the Alabama State Bar Association*, *in* GILDED AGE LEGAL ETHICS: ESSAYS ON THOMAS GOODE JONES' 1887 CODE AND THE REGULATION OF THE PROFESSION 7, 7 (Carol Rice Andrews et al. eds., 2003) (identifying the Alabama code as "the first code of its kind").

53. AM. BAR ASS'N, CANONS OF PROFESSIONAL ETHICS (1908).

54. *See* Jacob M. Dickinson, *Address of the President*, 33 A.B.A. REP. 341, 356 (1908) (statement of the ABA president expressing his hope that states would adopt and enforce the 1908 canons).

55. *See* Altman, *supra* note 35, at 2395–96 (cataloguing state adoptions of the Canons and noting their hegemony); Peter A. Joy, *Making Ethics Opinions Meaningful*: *Toward More Effective Regulation of Lawyers' Conduct*, 15 GEO. J. LEGAL ETHICS 313, 327 (2002) (noting that state courts often deferred to local bar associations for both ethical standards and their enforcement).

56. *See* Gallagher, *supra* note 35, at 517–21 (discussing the "[i]nstitutionalization of [c]ollegial [c]ontrol" in the early twentieth century); Joy, *supra* note 55, at 327 (discussing the increasing role of bar associations around the turn of the century).

57. *See* HURST, *supra* note 43, at 292 (discussing the movement towards integrated bars); WOLFRAM, MODERN ETHICS, *supra* note 32, at 36 n.6 ("North Dakota's was the first bar integrated, by legislation, in 1921.").

58. *See* HURST, *supra* note 43, at 292 (suggesting that the model of an "enforced, all inclusive membership of lawyers in one organization" sought to replace voluntary bar organizations' historical lack of authority over laypersons and inability to set norms for the profession). By 1930, seven states had mandatory bars and within three years that number rose to eighteen. Barton, *supra* note 19, at 432 n.77. By 1954, twenty-five states had integrated bars. *Id.* (citing BLAUSTEIN & PORTER, *supra* 41, at 240–41). As of 2007, thirty-three American jurisdictions (including the District of Columbia) are integrated. UNIFIED BARS, ISSUES UPDATE 1 (2007), http://www.abanet.org/barserv/issuesupdate/updates07/unifiedbars.pdf.

they placed at least the initial stage of professional discipline directly in the hands of state and local bar associations.[59]

Bar organizations increasingly focused their mission on elevating the status of law as a profession, partly in the hope that self-regulation of the profession would prevent outside regulators from treating lawyers as ordinary businessmen.[60] These efforts culminated in the promulgation of the ABA's Code of Professional Responsibility in 1969,[61] which replaced the vague Canons of Ethics with a set of relatively precise norms that looked more like enforceable regulatory constraints on lawyer behavior.[62] Virtually all of the states adopted the Code as law and began to use it as a disciplinary mechanism.[63]

Thus developed the model for modern self-regulation. The profession itself established the norms governing lawyers. Although the professional codes were enforced through state disciplinary mechanisms, the state supreme courts (and in some cases the legislatures) adopted the bar-promulgated norms unquestioningly and, in some instances, used local bar associa-

59. *See, e.g.*, Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1, 14 (2007) ("By the early 1930s, the courts or legislatures in many states had conferred on bar associations express authority to investigate complaints, subpoena power to conduct investigations, and the authority to impose certain types of discipline sanctions." (footnotes omitted)); *see also* Joy, *supra* note 55, at 327 (suggesting that between 1908 and 1969, "the regulation of lawyers was essentially the sole domain of bar associations").

In 1909, Illinois became the first jurisdiction officially recognizing the bar's duty to supervise and discipline members of the bar, with California following suit twelve years later. ORIE L. PHILLIPS & PHILBRICK MCCOY, CONDUCT OF JUDGES AND LAWYERS 96, 104–05 (1952). The California Supreme Court eventually recognized the bar as an administrative agency of the court, overturning bar decisions only in cases involving an honest difference of opinion. *Id.* at 100. For the next forty years, it was typical for bar organizations to be the first to handle lawyer disciplinary complaints despite the fact that courts usually retained "the exclusive power to suspend or disbar." Levin, *supra* at 15–16.

60. *See* Gallagher, *supra* note 35, at 529 (discussing how self-regulation privileges lawyers over other professions that are often regulated by the legislature).

61. AM. BAR ASS'N, CODE OF PROF'L RESPONSIBILITY (1969).

62. *See* Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1251 (1991) ("[W]hereas the Canons and the Ethical Considerations represented fraternal understandings that memorialized a shared group discourse, the DR's functioned as a statute defining the legal contours of a vocation whose practitioners were connected primarily by having been licensed to practice law.").

63. *See* WOLFRAM, MODERN ETHICS, *supra* note 32, at 56 (stating that by 1972 all but three jurisdictions had adopted the code).

tions and private volunteers to enforce those norms.[64] Moreover, because of limited resources, instances of professional discipline were relatively rare and unpublicized.[65] To this point, other forms of lawyer regulation, such as malpractice liability, were muted or altogether non-existent.[66]

II. CHANGES IN LAWYER SELF-REGULATION AND THE ROAD TO THE STATUS QUO

It is beyond the scope of this Article to discuss all the changes that affected the legal profession in the late twentieth century, or the reasons for those changes.[67] The most significant include the due process revolution,[68] the changing demographics of the bar[69] and economics of legal practice (including the growth of corporate firms),[70] and the development of the

64. *See* Vincent R. Johnson, *Justice Tom C. Clark's Legacy in the Field of Legal Ethics*, 29 J. LEGAL PROF. 33, 49 (2005) (discussing the use of volunteer prosecutors to enforce attorney discipline in the mid-twentieth century); *see also* AM. BAR ASS'N SPECIAL COMM. ON THE EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 19 (1970) (final draft) [hereinafter CLARK REPORT] (criticizing the use of volunteer attorneys).

65. *See* ABEL, *supra* note 19, at 146–51 (describing the absence of effective discipline through the early 1980s); Levin, *supra* note 59, at 14 ("When bar associations became involved in lawyer discipline, the discipline process and the sanctions imposed became considerably more private."); Janine C. Ogando, Note, *Sanctioning Unfit Lawyers: The Need for Public Protection*, 5 GEO. J. LEGAL ETHICS 459, 468 (1991) ("Statistical information was almost impossible to get because either no records were kept, or the quality and extent of the records were inconsistent.").

66. *Cf.* ABEL, *supra* note 19, at 150–51 (discussing successful claimants' difficulty in getting damages because their only recourse was against attorneys who would often claim bankruptcy to avoid paying damages).

67. *See* Fischer, *supra* note 1, at 96 (offering explanations for the "sea of change in attitudes toward the regulation of lawyers" that occurred in the latter half of the twentieth century); Gallagher, *supra* note 35, at 504–07 (discussing the theoretical explanations for the "progression from a 'gentlemanly' to a modern elite profession").

68. For a discussion of the effect of the due-process revolution on the legal profession and its approach to professional norms, see Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1318–22 (1995).

69. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 538 (3d ed. 2005) (discussing the changing numbers of women and minorities entering the bar after the 1960s); JOHN P. HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 315–19 (2005) (discussing the growth of the legal profession and changing demographics of Chicago lawyers between 1975 and 1995).

70. *See* AM. BAR ASS'N, SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, TEACHING AND LEARNING PROFESSIONALISM 3–4 (1996) (noting that

regulatory state.[71] What is significant, for our purposes, is that by the time the ABA attended to its next model code, the Model Rules, the world of law practice had been transformed. Outside regulators—especially the courts—had begun to question the profession's practices and to think of law as simply another business potentially needing regulation.[72]

Against this background, the drafters of the Model Rules clung to the hope of its self-regulatory model; namely, that the development of carefully crafted but voluntary professional codes would fend off outside regulation of the bar.[73] The ABA's expectations, however, were short-lived. The process of drafting the Model Rules drew far more media attention than any past attempt at self-regulation.[74] The Model Rules were publicly debated and produced substantial disagreement.[75] Because of the

"[c]hanges in economics of the practice of law" have "converted law practice from a profession to a business"); John M. Conley, *How Bad Is It out There?: Teaching and Learning About the State of the Legal Profession in North Carolina*, 82 N.C. L. Rev. 1943, 1966–67 (2004) (discussing the "evolution of private-firm practice . . . from 1960 to 1995 . . . including the growth in law firm size; the changing economics of law practice, . . . and the consequent difficulty of balancing personal and professional lives." (citing MICHAEL TROTTER, PROFIT AND THE PRACTICE OF LAW: WHAT'S HAPPENED TO THE LEGAL PROFESSION 81–100 (1997))); Robert A. Stein, *The Future of the Legal Profession*, 91 MINN. L. REV. 1, 5 (2006) ("The management and economics of law practice have also changed dramatically [in the late twentieth century].").

71. Presumably, as the federal and state governments increased regulatory oversight of the overall American economy, the business of law became fairer game as well. *See* Thomas McInerney, *Putting Regulation Before Responsibility: Towards Binding Norms of Corporate Responsibility*, 40 CORNELL INT'L L.J. 171, 177 n.24 (2007) (noting that more than fifty-five new federal agencies were created between the 1960s and the 1980s).

72. The United States Supreme Court, for example, applied antitrust doctrines to bar regulations. *See* Goldfarb v. Va. State Bar, 421 U.S. 773, 793 (1975). The Court also protected legal advertising. *See* Bates v. State Bar of Ariz., 433 U.S. 350, 383 (1977). Pressed by organizations, such as the Consumers Union, that sought to demystify the profession by gathering and publishing information about legal practice, lower courts questioned professional rules that maintained the guild. *See, e.g.*, Consumers Union of U.S., Inc. v. Am. Bar Ass'n, 505 F. Supp. 822, 823–24 (E.D. Va. 1981), *aff'd in part*, *rev'd in part on other grounds*, 688 F.2d 218 (4th Cir. 1982) (upholding a claim, in theory, that a bar rule forbidding publication of an attorney directory was unconstitutional).

73. *See* MODEL RULES OF PROF'L CONDUCT pmbl.; *see also* ABEL, *supra* note 19, at 142 ("Self-regulation . . . helped stave off state regulation.").

74. *See, e.g.*, Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677, 695–701, 734 (1989) (describing public attention focused on the adoption of the Model Rules).

75. *See, e.g.*, Stephen Gillers, *What We Talked About When We Talked*

dissent, as states began to consider the new code, they took their role in adopting (or refusing to adopt) its provisions more seriously.[76] Unlike with the Model Code, which was adopted promptly and almost unanimously,[77] the various American jurisdictions split sharply in their approaches to the Model Rules.[78] Some accepted the proposed rules wholesale, some tinkered with the new provisions, and others retained—in part or completely—the older Model Code.[79]

This new regulatory independence was not superficial. In the past, states had failed to take the supervision of lawyers seriously in several ways.[80] Not only did they accept the ABA's substantive proposals unquestioningly, but they also devoted extremely limited resources to enforcement of the rules.[81] Personnel friendly to the bar dominated disciplinary prosecutions.[82] Reports regarding discipline, which might have provided a common law defining appropriate behavior of lawyers, were virtually absent.[83] This all changed after the adoption of the Model Rules, with its surrounding publicity.[84]

About Ethics: A Critical View of the Model Rules, 46 OHIO ST. L.J. 243, 243–44 (1985) (discussing the controversy surrounding the proposed Model Rules).

76. *See id.* at 243.

77. *See supra* text accompanying note 63.

78. *See, e.g.*, Michael H. Rubin, *Uniform Rules, Non-Uniform Solutions*, 49 LA. B.J. 362, 362 ("Noticeably absent from the move towards uniformity, however, is the treatment by states of the ABA's Model Rules of Professional Conduct.").

79. *See id.*

80. *See generally* Marks & Cathcart, *supra* note 22 (reporting inadequacies in the processes used by pre-1974 disciplinary agencies).

81. *See* CLARK REPORT, *supra* note 64, at 19–23. The deficiencies in the early disciplinary processes were first noted by an ABA committee chaired by retired Supreme Court Justice Tom C. Clark. *See generally id.*

82. *See id.* at 24 (criticizing the existing disciplinary processes of agencies whose "members . . . are required to pass judgment on the conduct of attorneys with whom they are personally acquainted"); Devlin, *supra* note 44, at 920 (asserting that the "'bar police[d] its own ranks'" (quoting GLENN R. WINTERS, BAR ASSOCIATION ORGANIZATION AND ACTIVITIES: A HANDBOOK FOR BAR ASSOCIATION OFFICERS 6 (1954)) (alteration in original)); Marks & Cathcart, *supra* note 22, at 224 (reporting a 1974 study of disciplinary agencies, criticizing the lack of resources in many, and concluding that "the presence of professional staff in a disciplinary agency increases the probability that the staff will perceive its constituency as broader than the agency, or even broader than the bar"); Steele & Nimmer, *supra* note 24, at 924 ("Most professional discipline, however, is conducted by part-time volunteer committees of local lawyers working out of their own offices.").

83. *See, e.g.*, AM. BAR ASS'N, COMM'N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, LAWYER REGULATION FOR A NEW CENTURY 34 (1992) [hereinafter MCKAY REPORT] (finding that prior to the Clark Report, most jurisdic-

Spurred in part by the ABA's Clark Report,[85] states began to treat the discipline of lawyers as a significant enterprise.[86] State supreme courts took control of the disciplinary process in almost all of the states.[87] Enforcement resources increased.[88]

tions kept all proceedings secret until the state high court issued an order finding misconduct and that even thereafter records could usually be sealed by complainants or respondents who sought a protective order); Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 238 n.45 (1993) ("Until recently, opinions of the bar and bar disciplinary committees were extremely difficult to identify. Few states collected or indexed decisions in a published format."); *cf.* Sandra L. DeGraw & Bruce W. Burton, *Lawyer Discipline and "Disclosure Advertising": Towards a New Ethos*, 72 N.C. L. REV 351, 358 (1994) ("[C]urrent practices of disseminating the names and details of lawyer discipline range from nonexistent to thoroughly systematic to randomly hit-or-miss."); Levin, *supra* note 59, at 2 ("[E]ven today, much of the lawyer discipline process in many states remains secret.").

84. *See* Tanina Rostain, *Ethics Lost: Limitations of Current Approaches to Lawyer Regulation*, 71 S. CAL. L. REV. 1273, 1280 (1998) ("The transition from Code to Rules marked a fundamental shift in expectations for legal ethics. . . . [T]he organized bar relinquished the ambition of articulating a unified statement of professional ideals in favor of clearly stating the enforceable legal obligations of lawyers. . . . [B]y forsaking professional aspirations in favor of the 'law of lawyering,' the bar accelerated the demise of self-regulation, opening the door wide to regulatory forays by outside governmental agencies.").

85. CLARK REPORT, *supra* note 64.

86. *See, e.g.*, Gallagher, *supra* note 35, at 490 (noting that the California legislature, in the mid-1980s and early 1990s, "criticized the Bar for having a discipline system that was perceived to be slow, unresponsive, and overly protective of the interests of lawyers rather than the public interest[,]" which "culminated in a threat by the Legislature to divest the Bar of its self-regulatory powers").

87. *See* Joy, *supra* note 55, at 374 ("In the last thirty years, there has been a slow but significant change in lawyer disciplinary systems as a growing number of state supreme courts have taken exclusive control of the disciplinary process."); Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1, 3 (1998) ("Since the Clark Report, the ultimate responsibility for the administration of lawyer discipline in most states has moved, at least nominally, from the state bars to the state courts."); Ted Schneyer, *Legal Process Scholarship and the Regulation of Lawyers*, 65 FORDHAM L. REV. 33, 37 n.24 (1996) ("[I]n some states . . . state or local bar associations have lost administrative control of the disciplinary system in favor of boards established by the state supreme court.").

88. *See* Johnson, *supra* note 64, at 70 (finding that the "deplorable" condition in attorney discipline found by the Clark Commission no longer exists due, in part, to increased funding); Carol M. Langford & David M. M. Bell, *Finding a Voice: The Legal Ethics Committee*, 30 HOFSTRA L. REV. 855, 867 (2002) ("[A]s a result of the groundbreaking recommendations of the Clark Committee and McKay Commission . . . state disciplinary systems are significantly more professionalized, with increased funding and full-time professional staff."); Levin, *supra* note 87, at 4 ("Lawyer discipline systems are better

Disciplinary prosecution offices were reorganized and bolstered.[89] States revised their disciplinary procedures, in some instances introducing lay participation in the process[90] and, in one case, establishing separate, independent courts as overseers.[91] Most importantly, although the disciplinary processes in most instances remained confidential, decisions involving discipline became somewhat more accessible; decisions were reported in court reporters, bar journals, and legal newspapers in ways that made them easier to locate, categorize, and compile.[92]

The attraction of regulating lawyers was not confined to the disciplinary implementation of the professional rules. As medical malpractice liability expanded, the door opened to in-

funded . . . than they used to be."). Of course, one can argue that disciplinary resources remain insufficient to be effective, but they are a far cry from the previous threshold. *Cf.* DEBORAH RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 158–60 (2000) (arguing that the inadequate resources devoted to discipline, among other problems, continue to undermine the project of self-regulation through discipline).

89. *See, e.g.*, MCKAY REPORT, *supra* note 83, at xiv (stating that by 1992 "almost all states" had a "professional disciplinary staff with statewide jurisdiction"); Gallagher, *supra* note 35, at 491 ("The resources expended on the discipline system [in California] were increased substantially, and the lawyer discipline bureaucracy was better staffed and organized.").

90. *See* Devlin, *supra* note 44, at 928 ("By 1982, thirty-two states plus the District of Columbia had public members serving on their disciplinary agencies."); *cf.* ARIZ. STATE SENATE, FACT SHEET FOR S.C.R. 1005: PRACTICE OF LAW, REGULATION (1997), http://www.azleg.state.az.us/legtext/43leg/1r/summary/s.1005scr.grf.htm (proposing a constitutional amendment to establish a State Legal Professions Board authorized to regulate the practice of law in Arizona and consisting of a majority of nonattorney members).

91. *See* Gallagher, *supra* note 35, at 590–93 (describing the evolution of the California State Bar Court and its various features); The State Bar Court of California, http://www.calbar.ca.gov/state/calbar/sbc_generic.jsp?cid=13469 (last visited Mar. 11, 2009) ("California is the only state in the nation with independent professional judges dedicated to ruling on attorney discipline cases.").

92. Thirty to forty years ago, disciplinary decisions were virtually impossible to locate, other than the few abstracted in never-updated books. Over the ensuing decades, disciplinary decision-making has remained relatively private, but many jurisdictions at least include abbreviated reports in local bar periodicals. *See* DeGraw & Burton, *supra* note 83, at 357–58 (noting that "most lawyer discipline has been invisible, although some slight movement toward openness has occurred in recent years" and describing how states currently report disciplinary decisions); Fred C. Zacharias, *What Lawyers Do When Nobody's Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules*, 87 IOWA L. REV. 971, 1010 n.171 (2002) (discussing ways in which disciplinary decisions are reported today).

creased legal malpractice litigation.[93] Courts soon found themselves presiding over a significant regime of common law regulation of the bar, including malpractice, breach of fiduciary duty, and contract law.[94]

Trial court supervision of lawyers in the course of litigation, which was recognized even in the early periods of the American legal profession,[95] increased during this period as well. Part of the reason was the dramatic expansion of scorched-earth legal practices by corporate law firms able to devote time and resources to satellite litigation that highlighted lawyer misbehavior—including motions to disqualify[96] and motions for sanctions under Rule 11[97] and similar statutes.[98]

93. *See* Gary A. Munneke & Theresa E. Loscalzo, *The Lawyer's Duty to Keep Clients Informed: Establishing a Standard of Care in Professional Liability Actions*, 9 PACE L. REV. 391, 405 (1989) ("[D]evelopments in the field of legal malpractice parallel changes in medical malpractice law."); Manuel R. Ramos, *Legal Malpractice: Reforming Lawyers and Law Professors*, 70 TUL. L. REV. 2583, 2590 (1996) (arguing that legal malpractice law should be reformed in ways similar to medical malpractice law).

94. *See* ABEL, *supra* note 19, at 154 (noting a dramatic increase in liability claims against lawyers starting in the late 1970s); George M. Cohen, *Legal Malpractice Insurance and Loss Prevention: A Comparative Analysis of Economic Institutions*, 4 CONN. INS. L.J. 305, 346, 350 (1997) (noting that breach of fiduciary obligations serves as a predicate for liability); Leubsdorf, *supra* note 1, at 102 ("The time has come to consider legal malpractice law as part of the system of lawyer regulation."); *see also id.* at 153 n.213 (providing an example of lawyer liability based on breach of contract).

95. *See* Andrews, *supra* note 52, at 11 ("Courts retained their 'inherent authority' to discipline or disbar lawyers for misconduct."); Zacharias & Green, *supra* note 38, at 32–36 (discussing judicial regulation of attorney conduct in the nineteenth century).

96. James Lindgren, *Toward a New Standard of Attorney Disqualification*, 1982 AM. B. FOUND. RES. J. 419, 432–33 (discussing tactical disqualification motions); Ted Schneyer, *Nostalgia in the Fifth Circuit: Holding the Line on Litigation Conflicts Through Federal Common Law*, 16 REV. LITIG. 537, 542 (1997) ("[I]t has become common for federal litigators to be charged with improper conflicts.").

97. *See* FED. R. CIV. P. 11(c) (authorizing the imposition of sanctions upon lawyers for various misconduct in filing pleadings); *see also* Lonnie T. Brown, Jr., *Ending Illegitimate Advocacy: Reinvigorating Rule 11 Through Enhancement of the Ethical Duty to Report*, 62 OHIO ST. L.J. 1555, 1567 (2001) ("Empirical studies of the impact of Rule 11 following the 1983 changes invariably reveal that the revisions spawned a veritable explosion of satellite litigation."); Bruce H. Kobayashi & Jeffrey S. Parker, *No Armistice at 11: A Commentary on the Supreme Court's 1993 Amendment to Rule 11 of the Federal Rules of Civil Procedure*, 3 SUP. CT. ECON. REV. 93, 107 (1993) ("[I]n the first nine years of practice under the 1983 Amendment [to Rule 11], there were some 6,000 reported decisions under the rule, including 600 decisions by courts of appeals and four decisions by the Supreme Court."); Lawrence C. Marshall et

Criminal prosecutors, particularly federal prosecutors, increasingly targeted lawyers, thus producing yet another form of regulation.[99] Lawyers no longer were perceived as immune from prosecution for acts committed while representing their clients.[100] Recognizing that communications with clients in furtherance of criminal acts might not be privileged,[101] lawyers were called to testify about their activities,[102] opening the door to further prosecutions.

At some point in this process, the conduct of lawyers became a political issue. In his presidential campaign, for example, George W. Bush blamed many of the country's woes, including high medical costs, corporate fraud, and economic stagnation, on misbehavior by trial lawyers.[103] It therefore

al., *The Use and Impact of Rule 11*, 86 NW. U. L. REV. 943, 949–55 (1992) (surveying districts in the Fifth, Seventh, and Ninth Circuits and showing the frequency of sanction motions after the 1983 amendments expanding Rule 11).

98. *See* RONALD E. MALLEN & JEFFREY M. SMITH, 1 LEGAL MALPRACTICE § 10.13, at 708 & n.3 (4th ed. 1996) (listing state statutes directed at litigation abuses); *see also* Cohen, *supra* note 94, at 350 ("[T]he expansion of third party liability, fiduciary obligation, disqualification motions, and Rule 11, to name a few, have turned professional responsibility from a quaint sideline to a business necessity.").

99. *See, e.g.*, William J. Genego, *The New Adversary*, 54 BROOK. L. REV. 781, 873 (1988) (noting that criminal defense attorneys are being prosecuted with increasing frequency); Paul F. Rothstein, *"Anything You Say May Be Used Against You": A Proposed Seminar on the Lawyer's Duty to Warn of Confidentiality's Limits in Today's Post-Enron World*, 76 FORDHAM L. REV. 1745, 1749 n.16 (2007) ("[T]here seems to be an increasing tendency to prosecute lawyers in connection with their client's crimes . . . ."); Aviva Abramovsky, Comment, *Traitors in Our Midst: Attorneys Who Inform on their Clients*, 2 U. PA. J. CONST. L. 676, 686–89 (2000) (discussing the increased targeting of attorneys for potential federal prosecution and the attendant rise in attorney informants).

100. *See generally* Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 FORDHAM L. REV. 327 (1998) (discussing the different approaches adopted by courts in cases in which lawyers were prosecuted and/or disciplined for criminal behavior).

101. *See* Fred C. Zacharias, *The Fallacy That Attorney-Client Privilege Has Been Eroded: Ramifications and Lessons for the Bar*, PROF. LAW., 1999 Symposium Issue, at 39, 41 ("The subpoenas typically seek unprivileged information—often information excepted from privilege through the crime-fraud exclusion.").

102. *See, e.g.*, Max D. Stern & David Hoffman, *Privileged Informers: The Attorney Subpoena Problem and a Proposal for Reform*, 136 U. PA. L. REV. 1783, 1789 (1988) (noting the increasing number of attorney-subpoena cases); Fred C. Zacharias, *A Critical Look at Rules Governing Grand Jury Subpoenas of Attorneys*, 76 MINN. L. REV. 917, 919 & n.5 (1992) ("Over the past decade, prosecutors increasingly have resorted to the tactic of subpoenaing lawyers to appear as witnesses before the grand jury.").

103. *See, e.g.*, Ron Hutcheson, *Trial Lawyers Get Bashed at Bush Economic*

should come as no surprise that federal and state legislatures joined the regulatory frenzy. Many jurisdictions adopted laws directly regulating lawyer trust accounts.[104] Congress approved a stronger Rule 11 designed to counteract excessive zeal by lawyers[105] as well as specific legislation mandating rules of professional behavior independent of the professional codes.[106]

Perhaps most prominently, federal agencies imposed their own regulations on lawyers who appeared before them. During the banking crises of the 1970s and 1980s, the Office of Thrift Supervision (OTS) targeted law firms for their behavior in representing banking institutions ultimately found wanting under federal law, forcing many to pay large administrative fines.[107] But OTS was not alone; numerous agencies adopted rules setting standards for legal practice that did not always match the standards anticipated by the ABA in its self-regulatory rules.[108] That trend has continued with the SEC's recent promulgation of rules under the Sarbanes-Oxley Act, which the ABA contested fiercely.[109]

Conference, PHILA. INQUIRER, Dec. 16, 2004, at A02 ("A White House conference on the economy turned into a forum for bashing trial lawyers yesterday as President Bush and his allies demanded congressional action to limit lawsuits.").

104. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.15 (establishing rules for the safekeeping of client and third-party property); Philip F. Downey, Comment, *Attorneys' Trust Accounts: The Bar's Role in the Preservation of Client Property*, 49 OHIO ST. L.J. 275, 279 n.32 (1988) ("As of June, 1986, nearly all states had adopted an IOLTA [Interest on Lawyers Trust Accounts] program, and several states had decided that compliance with the IOLTA requirements would be mandatory (Arizona, California, Iowa, Minnesota, Ohio, Washington, and Wisconsin).").

105. *Compare* FED. R. CIV. P. 11 (1983), *with* FED. R. CIV. P. 11 (1993) (amended to limit what was perceived to be an overexpansion of sanctions under the 1983 amendments).

106. *See, e.g.*, Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7245 (2006) (requiring regulations governing securities lawyers).

107. *See, e.g.*, Joyce A. Hughes, *Law Firm Kaye, Scholer, Lincoln S&L and the OTS*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 177 (1993) (detailing the OTS campaign); Office of Thrift Supervision, *OTS, Kaye Scholer Agree to Settle All Charges*, OTS NEWS, Mar. 8, 1992, at 92–95 (describing the settlement secured from the law firm Kaye Scholer LLP).

108. *See* Zacharias, *supra* note 6, at 18–22 (citing a range of federal regulations); *see also* ABEL, *supra* note 19, at 154 ("[H]alf the proceedings against lawyers initiated by the SEC between 1935 and 1980 were begun after 1975.").

109. *See, e.g.*, Letter from Alfred P. Carlton, Jr., President, Am. Bar Ass'n, to Sec. & Exch. Comm'n (Dec. 18, 2002), *available at* http://www.sec.gov/rules/proposed/s74502/apcarlton1.htm (challenging rules proposed by the SEC pursuant to the Sarbanes-Oxley Act that limited a lawyer's discretion when confronted by a client corporation's misconduct).

In short, the professional codes adopted by the ABA no longer are sufficient to foreclose other regulation and, indeed, do not represent self-regulation even in their own disciplinary enforcement. A variety of regulators external to the ABA—including the courts—interpret, adjust, and enforce the rules and provide their own regulations when the prevailing professional code seems inadequate.[110] At best, the codes are a form of co-regulation. More realistically, they are the profession's initial suggestions for partial standards that apply when other considerations and external regulation do not trump.

III. CONSEQUENCES OF PERPETUATING THE MYTH OF SELF-REGULATION

This Article has already suggested that, despite the reality that law is a heavily regulated industry, commentators and courts cling to the view that the profession is self-regulated.[111] Of course, lawyers are heavily involved in all aspects of regulation. It is natural that lawyers should contribute to the drafting of ethics rules because lawyers are the people most familiar with law practice. Lawyers also participate in litigation involving lawyers because someone must present and defend the cases. Judges and high-ranking employees of administrative agencies that regulate lawyers tend to be members of the bar because legal training qualifies them for those positions.

The involvement of members of the profession in all aspects of the regulatory process thus, in a limited sense, differentiates law from other regulated professions. Doctors, for instance, may have a hand in peer review mechanisms and state certification boards but cannot control judicial or legislative oversight. The more powerful position of lawyers in regulation is inevitable because legislating and implementing legal rules are at their core legal functions; it is lawyers who are trained for these enterprises and have the requisite expertise. Although

110. In a forthcoming piece, John Leubsdorf notes:

> [M]ore and more regulators have sought to regulate the bar. If once the American Bar Association's codes dominated the field, now courts have become increasingly unwilling to defer to them, and legislators and administrators have become increasingly unwilling to defer to either bar associations or courts. We are witnessing the decline of the ideal of professional self-regulation at the same time that the ideal has been almost entirely demolished in England.

John Leubsdorf, *Legal Ethics Fall Apart*, 56 BUFF. L. REV (forthcoming 2009) (manuscript at 2), *available at* http://ssrn.com/abstract=1320302.

111. *See supra* notes 9–10.

society could include more lay participants in the lawyer regulatory process, regulators would find themselves at significant substantive and tactical disadvantages if they avoided all reliance on persons with legal training.[112]

The presence of persons with legal training among the regulators, however, does not automatically mean that the regulators tilt the law in lawyers' favor.[113] It simply means that the regulators have knowledge about what lawyers do. Some commentators have questioned the good faith of the personnel who draft the professional codes,[114] but the consensus is that lawyer-regulators in other contexts—particularly judges and modern disciplinary prosecutors—implement their functions relatively objectively.[115] Bemoaning as "self-regulatory" any lawyer involvement in the enforcement of standards governing lawyers therefore seems both tautological and of little substantive import.

Moreover, use of the term "self-regulation" to refer both to the establishment of norms governing lawyers and lawyer-judges' control of disciplinary processes can cause confusion in thinking about lawyer regulation. Maintaining the presence of lawyers throughout the regulatory process is not what many commentators who support self-regulation have in mind when referring to the importance of self-regulation.[116] Rather, they

112. *Cf.* Burnele V. Powell, *Creating Space for Lawyers To Be Ethical: Driving Towards an Ethic of Transparency*, 34 HOFSTRA L. REV. 1093, 1108 (2006) (noting the "populist view" that lawyer regulation should be reorganized "to assure that any organized voice for lawyers be subordinated to regulators who are neither lawyers nor brought to the process by (or on behalf of) lawyers").

113. *See* Fox, *supra* note 16, at 1549 ("Lawyers only really self-regulate to the extent that state supreme courts and other members of the judiciary choose to delegate that authority to the profession.").

114. *See, e.g.*, Gillers, *supra* note 75, at 245, 255–56 (characterizing the Model Rules as self-serving); Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689, 710–12 (1981) (describing particular code provisions as self-serving).

115. One notable exception among the commentators is Benjamin Barton. *See* Barton, *supra* note 24, at 454–55 ("[I]f there is a clear advantage or disadvantage to the legal profession in any given question of law, the cases are easy to predict: judges will choose the route (within the bounds of precedent and seemliness) that benefits the profession as a whole."). Barton does not go so far as to impugn the judiciary's good faith, but suggests that the tilt in favor of lawyers' interests is objectively verifiable. *See id.* at 456–57, 503 ("It may be that while judges treat lawyers differently—and better—this treatment is justified.").

116. Some commentators do equate self-regulation with the fact that the professional codes are enforced by judges who themselves are lawyers. *See, e.g.*, Lee, *supra* note 17, at 73 ("[A]lthough the judiciary is a branch of govern-

envision a situation in which lawyers unilaterally implement worthwhile rules[117] and adhere to them voluntarily, so as to obviate the need for outside interference with legal practice.[118] Proponents also often imagine that lawyers will contribute to the self-regulating process by reporting violations of the professional standards to disciplinary authorities.[119]

ment, it is a branch made up of lawyers."); Rentz, *supra* note 23, at 307 (criticizing the performance of disciplinary judges).

117. *See* David J. Beck, *The Legal Profession at the Crossroads: Who Will Write the Future Rules Governing the Conduct of Lawyers Representing Public Corporations?*, 34 ST. MARY'S L.J. 873, 906–07 (2003) ("[T]he legal profession is essentially a self-regulated profession . . . . [T]he rules governing the professional and ethical conduct of attorneys are primarily written, revised, and promulgated by members of the legal profession."); Fischer, *supra* note 1, at 95 ("[D]irect judicial regulation of the bar has been relaxed and distant. The judiciary, while retaining nominal power, has largely delegated responsibility for professional control to the bar."); Kevin E. Mohr, *California's Duty of Confidentiality: Is It Time for a Life-Threatening Criminal Act Exception?*, 39 SAN DIEGO L. REV. 307, 312 n.9 (2002) ("The legal profession is self-regulated, primarily through the various codes of professional conduct the states have adopted during this century."); Milton C. Regan, Jr., *Corporate Norms and Contemporary Law Firm Practice*, 70 GEO. WASH. L. REV. 931, 937–38 (2002) ("The ostensibly unique nature of legal services has been invoked for more than a century to justify self-regulation—the claim that the legal profession should have authority to determine for itself the nature of its ethical obligations."); *cf.* Barton, *supra* note 17, at 1186–210 (arguing that bar code drafters largely control decisions of the state supreme courts deciding whether to adopt proposed codes); Macey, *supra* note 10, at 1081 (positing that "the practice of law is still self-regulated" and that "[c]ensure by a bar association [today] does not carry much of a social stigma when the bar itself is not viewed with respect").

118. *See, e.g.*, Bruce A. Green, *Bar Association Ethics Committees: Are They Broken?*, 30 HOFSTRA L. REV. 731, 733 (2002) ("This is one sense in which the legal profession is partly . . . self-regulating: Lawyers have a personal responsibility to act in conformity with professional norms; . . . lawyers are presumably capable of figuring out what is expected of them, at least most of the time.").

William Gallagher characterizes the traditional argument in favor of self-regulation as follows:

> [L]awyers, and other specialized professions, possess complex and esoteric knowledge and skills; therefore, they should be allowed to self-regulate because they alone have the specialized knowledge to understand the unique nature of their profession's problems and hence, to apply effective cures. Outside interference in this process, commentators argue, would undermine the profession's public orientation and subject it to regulation that is harmful to both the profession and the public.

Gallagher, *supra* note 35, at 489; *see also* Pearce, *supra* note 35, at 1359–60 (discussing the relationship between self-regulation and professionalism that is marked by an absence of self-interest).

119. *See* MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 12 ("A lawyer should also aid in securing . . . observance [of the rules] by other lawyers."); *id.* R. 8.3

The following pages discuss the consequences of relying on the idealized image of lawyers as self-monitoring and self-policing. The persistence of this self-regulation paradigm has adverse effects on state supreme courts, trial courts supervising litigation, bar regulators, lawyers, and laypersons dealing with, or observing, the bar.

A. CONSEQUENCES FOR STATE SUPREME COURTS

State supreme courts are intimately involved in lawyer regulation in three ways. First, they are responsible for promulgating their jurisdictions' codes of professional responsibility, a task they usually accomplish after reviewing and sometimes amending (or rejecting) proposals that come from local bar committees. Second, they oversee the disciplinary process by serving as courts of last resort after findings of discipline are made. Third, they preside as the ultimate courts of appeal over the development of substantive common law governing lawyers (*e.g.,* malpractice law) and lower-court supervisory authority.

In one respect, it is odd that the notion of lawyer self-regulation persists when supreme courts, rather than the bar, actually promulgate the prevailing professional codes. The notion survives, in part, because state supreme courts sometimes fail to take an active role in the code-development process. They may accept bar proposals unquestioningly and avoid serious inquiry into the substance. When state supreme courts defer in this way, the best explanation is the concept of lawyer self-regulation; the justices retain a sense that constraining

(implementing a limited reporting requirement); Arthur F. Greenbaum, *The Attorney's Duty to Report Professional Misconduct: A Roadmap for Reform*, 16 GEO. J. LEGAL ETHICS 259, 261–62 (2003) (characterizing the lawyer reporting rule as "a rule at the heart of the bar's claim to self-regulation"); Stanton Hazlett, *Duty to Report Attorney Misconduct*, J. KAN. B. ASS'N, Oct. 2004, at 11, 12 ("In Kansas the legal profession is self-regulated. As lawyers, we must ensure that self-regulation continues by reporting lawyer misconduct when we have knowledge of it."); Carole R. Richelieu, *Ethics & Issues*, HAW. B.J., Dec. 2004, at 18, 18 ("Why do attorneys have a duty to 'squeal?' The simple answer is because the legal profession is self-regulating."). Most observers, however, note that the reporting obligation has been honored mostly in the breach. *See, e.g.*, Barnhizer, *supra* note 19, at 258 ("[L]awyers rarely report delinquent behavior . . . ."); Zacharias, *supra* note 92, at 999 ("While violations of these provisions are prosecuted occasionally, the reporting requirements typically are honored in the breach."); Julie L. Hussey, Comment, *Reporting Another Attorney for Violating the Rules of Professional Conduct: The Current Status of the Law in the States Which Have Adopted the Model Rules of Professional Conduct*, 23 J. LEGAL PROF. 265, 266–67 (1999) (identifying only two cases in which attorneys were disciplined for violating reporting rules).

lawyer behavior is a project for the bar and that the courts should get involved only, or mainly, when specific disputes involving particular misconduct arise.

Benjamin Barton[120] and others[121] have highlighted practical reasons why, quite separate from judges' identity as lawyers, state supreme courts might give in to the self-regulation paradigm despite their clear authority and responsibility for setting the professional rules. Supreme court justices are not used to developing law in the abstract, preferring instead to respond to concrete cases.[122] They do not have resources for conducting legislative-type hearings.[123] And they do not like to issue prospective or advisory decisions regarding the appropriateness or legality of conduct.[124]

The consequences of abdication, however, are significant. Abdication allows the supreme courts, and their law-making authority, to be captured by the bar.[125] The failure to delve deeply into reform proposals may enable the bar to incorporate self-serving provisions into the codes.[126] For these reasons, I and others have encouraged state supreme courts to take their code-promulgation responsibility more seriously.[127]

120. Barton, *supra* note 17, at 1196.

121. *See, e.g.*, Zacharias & Green, *supra* note 4 (discussing the functions and tendencies of state supreme courts when promulgating professional codes).

122. *See* Barton, *supra* note 17, at 1204 ("Courts are not natural legislators. It cuts against the grain of their institutional mission and self-image.").

123. *See id.* at 1207 ("Given that judges are faced with a scarcity of resources . . . something has to give. . . . [T]he abdication of their regulatory responsibilities is a convenient solution." (footnote omitted)).

124. *See generally* Robert J. Pushaw, Jr., *Why the Supreme Court Never Gets Any "Dear John" Letters: Advisory Opinions in Historical Perspective*, 87 GEO. L.J. 473 *passim* (1998) (discussing the historical reluctance of courts to issue advisory opinions).

125. *See* Barton, *supra* note 17, at 1186 (arguing that state supreme courts have a propensity for being captured by the bar); *cf.* Lawrence W. Kessler, *The Unchanging Face of Legal Malpractice: How the "Captured" Regulators of the Bar Protect Attorneys*, 86 MARQ. L. REV. 457, 465–66 (2002) (arguing that all the legal regulators of lawyers have been captured).

126. *See* Green & Zacharias, *supra* note 26, at 320 (arguing that state supreme courts should avoid rubber-stamping permissive rules because they are particularly prone to being self-serving).

127. *See id.*; Fred C. Zacharias, *Are Evidence-Related Ethics Provisions "Law?,"* 76 FORDHAM L. REV. 1315, 1334 (2007) ("The more state supreme courts actively participate in the formulation of the professional rules . . . the likelier it is that the discrepancies between ethics and evidence law . . . will disappear.").

What is significant for purposes of this Article, however, is that the myth of lawyers as self-regulators has consequences for how state supreme courts act. Initially, thinking about professional standards in terms of self-regulation may encourage the courts to avoid taking a strong position on the substance of the codes. Thereafter, it often prevents the courts from conducting fully independent review of bar committee findings. The notion of self-regulation (in its most negative sense) thus becomes a self-fulfilling prophecy: lawyer-judges do not adequately exercise their authority to constrain the bar's excesses.

Perhaps more disappointing, however, is that thinking in terms of self-regulation also prevents state supreme courts from exercising functions that are exclusively within their purview. Standards in the professional codes often cover the same conduct as other legal standards governing lawyers, including civil law and judge-made supervisory decisions.[128] Courts implementing the latter standards sometimes look to the professional codes for guidance but also often treat the codes as irrelevant, thus leading to inconsistent behavioral requirements for lawyers.[129] Because the state supreme courts have the power to review lower courts' decisions, they are in a unique position to harmonize the decisions with the professional codes or to explain when divergence from the codes is justified.

In other words, state supreme courts have the wherewithal to reconcile the professional codes with substantive law and supervisory standards in two ways. First, when promulgating the codes, they can predict in forward-looking fashion the direction the substantive law (*e.g.,* malpractice law) will take because it is they who will have the power to adjust the substantive law. Supreme courts taking their code-promulgation role seriously therefore can adopt professional rules that take account of lawyers' potential liability under the substantive law or judge-made supervisory requirements.[130] Second, in reviewing lower courts' supervisory and substantive law decisions on appeal, supreme courts can, in backward-looking fashion, harmonize those decisions with the professional codes' standards;

128. *See* Zacharias & Green, *supra* note 4 (manuscript at 28–29); *see also infra* note 133 and accompanying text (discussing these forms of regulation).

129. *See* Zacharias, *supra* note 127, at 1334 ("[C]ourts sometimes reject the codes' pronouncements on evidence law, sometimes defer to them (usually through adoption of parallel common law), and sometimes agree with them but do not treat them as legal gospel.").

130. *See* Zacharias & Green, *supra* note 4 (manuscript at 65) (discussing state supreme courts' "predictive function").

they can make clear when and why lower courts are justified in departing from the codes' standards governing lawyer behavior.[131] To the extent that supreme courts continue to rely on the notion of self-regulation to avoid active development of the overall law governing lawyers, their misguided notion contributes to inconsistencies in the law and creates a regime in which lawyers often have difficulty accurately assessing their own responsibilities.

B. CONSEQUENCES FOR LOWER, SUPERVISORY COURTS

The converse also is true. Because lower courts persist in perceiving the professional codes as a form of bar self-regulation, the courts often do not attach sufficient significance to the codes *as governing law*. Lower court judges rarely would disobey a recent supreme court opinion setting forth a legal doctrine. Yet, in issuing supervisory rulings and presiding over cases involving civil or criminal law regulating lawyers, the trial bench routinely treats the adoption of the professional code as less relevant, or less binding, than other supreme court legal decisions.[132]

In treating the professional codes as, at most, a weak form of law, the lower courts assume that the codes deserve minimal respect. That assumption must stem from one of three beliefs: (1) that the governing supreme court in fact has not established the law inherent in the adopted professional code, deferring instead to bar self-regulation; (2) that the supreme court's own sense of the code as an aspect of self-regulation renders the code less valuable or authoritative; or (3) that the code is full law, but that the supreme court does not intend it to apply outside the disciplinary context.

These three possible beliefs all have the same impact. They discourage lower courts from making a serious effort to determine how supervisory regimes, substantive law, and disciplinary standards interrelate and should be reconciled. This, in turn, produces inconsistent decision making among judges who have varying levels of respect for professional self-regulation, ultimately leading to inconsistent standards for lawyer behavior. Lawyers are left unable to rely on the professional codes

131. *See id.* (discussing state supreme courts' coordinating function).

132. *See id.* (manuscript at 82–83) (describing lower courts' reactions to professional standards).

as guidance for their behavior because even compliant behavior may leave them subject to civil liability or judicial sanction.[133]

In substance, a lower court's belief that the code is not intended as controlling law, even in situations in which its terms seem to apply, justifies the court in downplaying the normative force of the rules. Particularly where the professional rules delegate matters to lawyer discretion, the court may assume that the bar's "self-regulating" code drafters have accorded discretion either for self-serving reasons or because the drafters could not achieve consensus regarding the merits.[134] In fact, grants of discretion may be based on legitimate substantive reasons, including lawyers' superior expertise in making particular decisions or the reality that flexibility is needed in order to address fact-sensitive issues that are likely to arise.[135]

Consider, for example, a permissive exception to attorney-client confidentiality that allows disclosure to prevent harm to third parties. A trial judge crafting parallel attorney-client privilege law might take the normative suggestions of the confidentiality exception into account, but only if the judge perceives that the confidentiality exception reflects the supreme court's view of the appropriate balance between attorney-client secrecy and courts' need to obtain relevant evidence. In contrast, if the judge perceives the confidentiality rule to be merely the bar's self-regulation—readily accepted by the state supreme court without serious consideration—he is more likely to treat the permissive exception as an effort by the bar to insulate lawyers from sanction when they fail to disclose what they should.[136]

The belief of some lower courts that supreme court oversight is a form of self-regulation, *right or wrong*, therefore interferes with a reasoned assessment of how the continuing work of regulating lawyers should be distributed. Trial judges

133. *See, e.g.*, Green v. Nevers, 111 F.3d 1295, 1302 (11th Cir. 1997) (stating that an attorney's agreed-upon fees are subject to judicial reduction even if the fees are not "so 'clearly excessive' as to justify a finding of breach of ethical rules" governing the reasonableness of fees (quoting McKenzie Constr., Inc. v. Maynard, 758 F.2d 97, 100 (3d Cir. 1985))).

134. *See* Green & Zacharias, *supra* note 26, at 312–14 (noting that permissive rules have greater risk of being self-serving).

135. *See id.* at 298–312 (discussing potentially legitimate interests underlying permissive rules).

136. *See, e.g.*, Fred C. Zacharias, *Harmonizing Privilege and Confidentiality*, 41 S. TEX. L. REV. 69, 72–74 (1999) (discussing similar justifications that underlie attorney-client privilege law and attorney-client confidentiality rules but noting the courts' hesitation to harmonize the doctrines because of a sense that they reflect distinct visions of what is appropriate).

who do not trust supreme court professional regulation (or assume that the governing supreme court does not intend the code to be treated as full law) will not defer to the supreme court's standards even when, in fact, they represent the supreme court's considered opinion.[137] Nor will the lower courts attempt to harmonize their regulatory decisions with the codes and disciplinary law.

C. CONSEQUENCES FOR BAR CODE-DRAFTERS

From the bar's perspective, the notion of self-regulation stems from the perception that, because lawyers are most familiar with legal practice, lawyers themselves can best understand the demands upon them and are therefore best qualified to write the rules governing their conduct. Many commentators suggest that the bar, through the codes, attempts to press its separate vision of law and the role of lawyers—one that often is at odds with the vision of the courts and the state.[138] Sometimes the inconsistent professional rules are designed to encourage changes in external law,[139] sometimes they are meant simply to operate in an independent sphere (*i.e.*, professional discipline),[140] and sometimes they reflect pronouncements of defiance by the bar.[141]

To the extent that the commentators are correct in their assessment of the purposes of the code,[142] there are a variety of costs associated with professional rule making that challenges external law. First, it undermines the function of providing

137. *See* Zacharias & Green, *supra* note 4 (manuscript at 58).

138. For a comprehensive discussion of this view, see Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1391 (1992).

139. *See, e.g.*, Zacharias, *supra* note 83, at 274–78 (discussing the codes' function of influencing judicial standards); *cf.* Green & Zacharias, *supra* note 26, at 308 (discussing the codes' function of filling in "gaps in the law").

140. Thus, for example, professional rules governing attorney-client confidentiality can coexist with judicial evidentiary law governing attorney-client privilege because the two concepts operate in different spheres—general secrecy versus secrecy in litigation. *See* Zacharias, *supra* note 136, at 73–74 (discussing the context and development of the secrecy principles governing attorneys). Nevertheless, the two concepts place very different emphases on the relative importance of maintaining confidentiality in the attorney-client relationship and the corresponding importance of obtaining evidence that will aid the truth-seeking process. *See id.*

141. *See* Koniak, *supra* note 138, at 1401 (describing competition between the bar and the state in their views of the law).

142. *But see* Zacharias & Green, *supra* note 38, at 57–60 (offering an alternative to the view that the codes are continually at odds with external law because of the bar's independent substantive vision).

lawyers with guidance about how they should act; if the codes encourage conduct inconsistent with the letter or spirit of judicially enforced rules, lawyers follow the codes at their peril. Second, rule making that challenges external law undermines faith in the legitimacy of the rules.[143] Third, it makes the rules less important because it effectively confines their applicability to the narrow areas in which the codes alone govern.

Because of the process through which the model codes are adopted, it is difficult to generalize about, or prove the actual intentions of, the drafters. Although new rules typically are proposed by a committee, ultimately the whole body of ABA delegates vote on the proposals, and thus many different approaches inevitably are at play. It is likely, however, that at least some portion of the approving body typically thinks of the codes as reflecting the bar's special insights and hopes to press, or seek implementation of, the bar's separate, superior expertise.[144]

A significant consequence of this approach to self-regulation is that it perpetuates the view that external regulation is an evil to be prevented or minimized. The persistence of this mindset is evident in the Preamble to the Model Rules.[145] Rather than attempting to mesh the professional rules and external law or attempting to build upon external law, the code drafters remain willing to adopt rules inconsistent with external law, which lawyers then attempt to use as a defense, immunity, or for other personal benefit.

One example was the ABA's fairly recent promulgation of rules designed to prevent prosecutors from subpoenaing attorneys to the grand jury.[146] The ABA opposed attorney subpoenas on the basis that they are inconsistent with the bar's broad conception of attorney-client confidentiality and the importance of maintaining attorney-client relationships;[147] the subpoe-

143. *See* Green & Zacharias, *supra* note 26, at 315–18 (suggesting that external lawmakers' responses to the professional rules reasonably depend on their view of the purposes of the rules).

144. *See, e.g.*, Thomas G. Bost, *Corporate Lawyers After the Big Quake: The Conceptual Fault Line in the Professional Duty of Confidentiality*, 19 GEO. J. LEGAL ETHICS 1089, 1110–12 (2006) (describing efforts by the ABA to "sidetrack" threatened federal regulation under the Sarbanes-Oxley Act).

145. *See supra* text accompanying note 15.

146. *See generally* Stern & Hoffman, *supra* note 102, at 1789–95, 1820–24 (describing the ABA rule and the surrounding controversy).

147. *See* Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies over the Anti-Contact and Subpoena Rules*, 53 U. PITT. L. REV. 291, 364–67 (1992) (discussing the history of Model Rule

naing of a defense attorney to testify against his client can chill the client's trust in his attorney.[148] The reality, however, is that under common substantive law definitions of attorney-client privilege, prosecutors often are perfectly justified in subpoenaing attorneys, because information provided by clients for the purpose of obtaining assistance in criminal activity is legally unprivileged.[149] By pressing its vision in the subpoena rules rather than accepting privilege law as a given, the ABA forfeited the opportunity to promulgate different regulations or legislative initiatives that might have accommodated the legitimate rights of defendants.[150] In the end, the bar's actual proposals were doomed to failure because they were inconsistent with external law and courts were unwilling to enforce them.[151]

This example suggests that viewing professional regulation as self- rather than co-regulation encourages the bar to act too independently in its rule making. An explicit effort to mesh the codes and external law would guide lawyers better, make the codes more acceptable to external authorities, and harmonize the law. More importantly, it would help the bar assess the rules and their potential effect more realistically.

Addressing the rules as co-regulation would also enhance the efficiency of the codes. One recurring issue is whether and when maintaining ethics provisions make sense in the absence of active disciplinary enforcement.[152] If the underlying substance of a particular unenforced rule is enforced through pa-

3.8(f)); Koniak, *supra* note 138, at 1398–401 (discussing the bar's justifications for proposing Model Rule 3.8(f)).

148. *See, e.g.*, Genego, *supra* note 99, at 874–75 (cataloguing adverse effects of attorney subpoenas).

149. Zacharias, *supra* note 102, at 930 ("[T]he mere existence of ideals and standards of conduct in the codes is not a basis for refusing disclosure of information in court.").

150. *See id.* at 944–54 (identifying a change to grand jury secrecy rules that would have accommodated both the bar's and prosecutors' concerns).

151. *See* AM. BAR ASS'N, STANDING COMM. ON ETHICS & PROF'L RESPONSIBILITY, REPORT WITH RECOMMENDATION TO THE HOUSE OF DELEGATES 7 (1995), *reprinted in* STEPHEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS: STATUTES AND STANDARDS 249–50 (1996) (successfully proposing deletion of the judicial supervision requirement in Model Rule 3.8(f) and noting that numerous states' bars and courts rejected the requirement). The ABA report proposing deletion noted that the record on Model Rule 3.8(f) "reflects a fundamental and widespread doubt about the suitability of Rule 3.8(f) in its current form as a rule of ethics, a doubt that the Standing Committee has come to share." *Id.* at 250.

152. For a full discussion of this issue, see Zacharias, *supra* note 92, at 1005–12.

rallel external law, that might speak to elimination of the rule absent an independent reason to keep it;[153] ordinarily, perpetuating unenforced provisions undermines their force and lawyers' respect for the codes.[154] Conversely, identifying the guidance provided by external law would inform the bar about when professional regulation is necessary to fill gaps.

Perhaps more importantly, the misguided perception that external regulation should be fended off through the promulgation of self-regulatory codes misleads the bar into focusing its resources inefficiently. There are some aspects of regulation that bar organizations understand best and do well, others that the bar might better leave to other institutions. For example, ethics codes and professional disciplinary processes probably are not particularly effective mechanisms for regulating illegal conduct by lawyers; code provisions governing illegality tend to be unspecific and disciplinary officials typically do not have the resources required for criminal investigations.[155] There is no legitimate theoretical reason for the bar to discourage or attempt to forestall criminal prosecutions[156] because unlawful conduct is prohibited under the codes as well.

In contrast, the bar *is* in a relatively good position to establish programs providing assistance for lawyers who engage in substance abuse. The bar can understand the pressures of a legal career and make itself aware of the extent of the substance abuse problem in the particular jurisdiction. It can also offer peer support. Nevertheless, difficulties arise when the bar simultaneously takes upon itself the project of "self-regulating" the adverse consequences of the behavior of addicted lawyers in order to fend off outside regulation; regulating those conse-

153. *See* Macey, *supra* note 10, at 1082 ("[T]he legal profession and clients would benefit from abandoning [self-regulation] for a private contracting model that treats clients as investors to whom lawyers owe standard fiduciary duties of care, loyalty, good faith, and disclosure.").

154. *See* Zacharias, *supra* note 92, at 1016. *But see* Fred C. Zacharias, *Integrity Ethics* (forthcoming 2009) (manuscript at 7, 23, 44–47, on file with author) (discussing situations in which unenforced rules may play a meaningful role).

155. For example, disciplinary prosecutors may not have access to investigators, grand jury mechanisms, or even subpoena power. *See* Stern & Hoffman, *supra* note 102, at 1820–22.

156. *Cf.* Macey, *supra* note 10, at 1085 ("[L]awyers benefit from self-governance, and thus are loathe to take actions that would make the existence of unprofessional conduct salient to any administrative authority, as focusing on incivility could lead to criticism of the very status quo regulatory structure from which lawyers benefit.").

quences for the benefit of clients can be inconsistent with providing assistance to the regulated lawyers. It might be preferable for the bar to accept external regulation—even, for example, to the extent of encouraging criminal prosecutors to prosecute addicted lawyers who abuse their clients' trust accounts—and to itself focus on serving the assistance, rather than the regulatory, function.[157]

Recognizing the interrelationship between professional codes and external law can also lead the bar to engage in cooperative endeavors that will help lawyers comply with external law in a way disciplinary codes cannot. For example, analyzing the S&L scandals of the 1980s, Ted Schneyer finds that the unspecific nature of many ethics provisions applicable to banking lawyers, while justifiable as encouraging lawyer introspection, provided neither a basis for discipline nor adequate guidance concerning how to act.[158] At the same time, their ambiguity opened the door to aggressive agency regulation of lawyers.[159] Schneyer suggests that a realistic assessment of the interrelationship between the codes and external law should prompt the bar to participate in developing protocols independent of the codes in order to guide future banking lawyers' behavior; this would best enable banking lawyers to comport with the obligations of external regulation while acting in a professional manner.[160] Such an approach is only possible, however, if the bar recognizes the limitations of the ethics codes, the functions alternative to code-drafting that the bar can serve, and the value of acting cooperatively as a co-regulator with courts, agencies, and legislatures.

In short, perceiving the role of the professional codes unrealistically as a regulatory regime that should operate in the place of external regulation can cause the bar to err in the rules it includes, the way it writes its rules, and the focus of its operations. Conversely, recognizing the professional codes as co-

157. *See* Zacharias, *supra* note 26, at 28 ("[T]he bar may need to withdraw somewhat from regulating and disciplining lawyers with respect to human vices, concentrate on education and treatment efforts, and emphasize nonprofessional remedies for clients who are injured by the behavior of affected lawyers.").

158. *See* Schneyer, *supra* note 16, at 650–51, 666–68.

159. *See id.* at 666 ("[T]he bar's vague ethics rules have proven to have huge and unexpected *in terrorem* effects.").

160. *See id.* at 672–73; *cf.* Deborah L. Rhode & Paul D. Paton, *Lawyers, Ethics, and Enron*, 8 STAN. J.L. BUS. & FIN. 9, 33 (2002) (urging the bar to regulate "cooperatively").

regulation would help the bar tailor its regulatory endeavors to gaps in the law and to forms of behavior that the bar, and the professional disciplinary process, is particularly well-suited to regulating. Overall, meshing the codes with external law can lead to a clearer regulatory regime and better guidance for lawyers. It also would maximize the bar's resources by avoiding duplicative regulation.

D. CONSEQUENCES FOR LAWYERS

This Article has already noted the main consequence of the persistent image of self-regulation for lawyers themselves.[161] Self-regulation creates questions about the nature of the professional codes as binding law, thereby undermining the value of the codes in providing guidance.[162] At one level, if lawyers conceptualize the codes as self-regulation, they may feel freer to disagree or disobey the codes, particularly when the drafters have expressed their vision of appropriate conduct through hortatory or discretionary rules.[163] After all, the drafters of the self-regulatory provisions are simply lawyers whose opinion regarding appropriate conduct seems to have no more validity than the individual lawyers' own.[164]

More significantly, to the extent that conceptualizing the codes as self-regulation encourages supervisory courts to depart from the standards in the codes,[165] lawyers are left in the dark concerning how they may behave.[166] Sometimes the judicial departures simply reflect a refusal to enforce the codes, but leave the behavioral mandates in the code intact.[167] On other occa-

161. *See, e.g.*, *supra* note 133 and accompanying text.

162. *See supra* text accompanying note 132.

163. A grant of discretion in the professional code can, of course, mean many things ranging from a suggestion that equally legitimate options exist to a requirement that lawyers act in accordance with the spirit of the rule. *See* Green & Zacharias, *supra* note 26, at 276–87 (discussing competing interpretations of permissive rules).

164. As discussed in Zacharias, *supra* note 92, at 1005–06, lawyers seem willing to depart from the mandates of professional rules that they do not believe will be enforced against them. The willingness to depart suggests that lawyers have a latent readiness to substitute their own calculus for that of the rule makers.

165. *See* Zacharias & Green, *supra* note 4 (manuscript at 80–84) (discussing supervisory courts' willingness to depart from the code standards).

166. *See* Leubsdorf, *supra* note 110 (manuscript at 3) ("The fragmentation of the law of the legal profession . . . complicates the lives of lawyers.").

167. *See, e.g.*, Sealed Party v. Sealed Party, No. H-04-2229, 2006 U.S. Dist. LEXIS 28392, at *68 (S.D. Tex. Apr. 28, 2006) (rejecting a breach of fiduciary

sions, however, the judicial mandates may be stricter—as, for example, when a court disqualifies a lawyer with a conflict of interest despite the fact that the lawyer obtained consent that, under the prevailing code, seems to authorize the representation.[168] The lawyer is left unable to know when he can rely on the code's provisions and when he cannot.

This is not to gainsay the salutary effects that the notion of self-regulation can have. To this point, this Article has alluded mainly to the potential function of self-regulation in fending off external oversight of the profession. Self-regulation can, however, be beneficial over a range of practice situations by encouraging lawyers to think about what constitutes appropriate behavior and to rein in their worst inclinations. Unfortunately, not all lawyers—some would argue few lawyers—are capable of such self-control in the face of economic incentives to act for personal benefit.[169] Emphasizing the self-regulatory nature of professional mandates frees lawyers who disavow introspection and restraint to read the codes narrowly and to seek loopholes that authorize self-interested behavior.[170]

E. CONSEQUENCES FOR LAYPERSONS

For laypersons, the primary consequence of the myth that lawyers control their own regulation is one of perception. Laypersons assume that the bar self-regulates in a self-serving way.[171] Likewise, they assume that rules which produce super-

claim arising from a lawyer's disclosure of client confidences because the client was not damaged by the disclosure).

168. *See, e.g.*, State v. Arguelles, 63 P.3d 731, 755 (Utah 2003) (noting criminal court judges' authority to reject clients' waivers of conflicts of interest and to disqualify clients' choice of counsel).

169. Jonathan Macey argues that with the decline of the bar's monopoly power, self-regulation by the bar has become "an idea whose time has gone." Macey, *supra* note 10, at 1094, 1096. Macey suggests that, because sanctions are ineffective, lawyers no longer fear enforcement of the bar's standards, and that acting in self-interested and unprofessional ways therefore has become an efficient approach. *See id.* at 1094–96.

170. *Cf.* David McGowan, *Why Not Try the Carrot? A Modest Proposal to Grant Immunity to Lawyers Who Disclose Client Financial Misconduct*, 92 CAL. L. REV. 1825, 1825 n.1 (2004) (suggesting that lawyers will universally apply discretionary confidentiality exceptions in the way that maximizes their self-interest).

171. *See* Fred C. Zacharias, *The Purposes of Lawyer Discipline*, 45 WM. & MARY L. REV. 675, 715 (2003) ("Excusing rule violations, even well-intended rule violations, . . . risks sending the public a message that the professional standards will not be enforced when an accused lawyer offers an arguable excuse for a violation." (footnote omitted)).

ficially unpleasant results for society—including rules requiring zealous representation of guilty defendants and the maintenance of unpleasant confidences—do so because lawyers derive a benefit therefrom, rather than because the rules serve important systemic functions.[172]

Equally important, the perception that the profession is self-regulated through bar associations, rather than co-regulated, causes laypersons to ascribe either too much or the wrong significance to the disciplinary process. Professional discipline serves many functions, of which punishment of the lawyer may be the least important.[173] Particularly when a lawyer is punished for bad conduct through alternative means—for example criminal or civil liability—disciplinary authorities may focus on the licensing function: determining whether the lawyer is able to represent future clients well.[174] Laypersons who perceive discipline as the sum total of lawyer regulation become discouraged when conduct that may be inappropriate in one sense does not lead to professional sanctions.[175] This in turn can produce distrust in the legal system and in the integrity of the bar as a whole.[176]

Perhaps the best example of the dilemma for disciplinary regulators is, again, the issue of substance abuse by attorneys. Consider an attorney who, because of an addiction, has served past clients poorly. But assume further that the lawyer has undergone treatment, is fully rehabilitated, and poses no further threat of inadequate representation. A disciplinary board judging whether this lawyer is fit to practice law in the future might well decide that he is. Lay observers, however, would perceive this decision as reflecting lawyers protecting their own. Only if the disciplinary authorities can plausibly point to other forms of regulation that punish or remedy the lawyer's past misconduct—including malpractice, breach of fiduciary

172. *See id.* at 725–26, 726 n.186.

173. *See* Marks & Cathcart, *supra* note 22, at 232 ("What is needed is to remove the fault notion from the process of professional self-regulation."); Zacharias, *supra* note 171, 680, 680–82 (discussing the various goals of professional discipline, including punishment).

174. *See* Zacharias, *supra* note 171, at 684.

175. *See* Marks & Cathcart, *supra* note 22, at 234–35 ("The present disciplinary approach fosters a belief on the part of the public that incompetent lawyers are weeded out and that lawyers who remain certified are competent. . . . [T]he implication of self-regulation without the reality of self-regulation has unfortunate consequences.").

176. *See id.*

duty, or criminal[177] law—can the authorities hope to persuade lay observers of the integrity of the disciplinary system. The regulators must be able to make clear that the lawyer regulatory regime is one of co- rather than self-regulation.

IV. A PROPOSAL TO AMEND THE MODEL RULES

The upshot of this Article's analysis is that all parts of the American legal profession should embrace the notion that professional standards of behavior are only one aspect of a multi-pronged scheme of lawyer regulation. A prudent first step towards acknowledging this reality would be an amendment to the portion of the Preamble to the ABA's Model Rules that equates the codes to self-regulation. The amendment should exorcize all reference to self-regulation and, in place of that notion, should emphasize the role of the professional code in the broader regulatory regime.

Paragraphs ten, eleven, and the first half of twelve of the Preamble therefore might be replaced with the following statement:

> The legal profession is heavily regulated. It is regulated simultaneously by state supreme courts promulgating and administering disciplinary rules, courts supervising lawyers in individual cases, administrative agencies setting standards for lawyers appearing before them, and civil and criminal law. Law sometimes is referred to as a self-regulating profession, but that is primarily because lawyers participate in the process of setting the governing standards through their involvement in professional committees and as litigating attorneys who raise ethical issues about their adversaries.
>
> The fact that the regulation of lawyers is shared among several regulators has consequences. In their practices, lawyers should not assume that one form of regulation is exclusive. Lawyers should act with respect for their roles as advocates for clients and as participants in the legal system, but should also be prepared to follow universal principals of law and morality when the special requirements of their roles do not mandate different conduct. The mandates of the professional code often are also interrelated with the mandates of external law; lawyers, code drafters, courts, and other regulators should attempt to reconcile those mandates where possible. To the extent that lawyers simultaneously meet the obligations of their profession as defined in the disciplinary rules, other legal requirements, and moral imperatives, the occasion for increased regulation will be obviated.

These paragraphs, for the first time in the professional codes, would highlight the existence of external law regulating

177. In the substance abuse context, for example, criminal law might apply if the lawyer misappropriated client funds to pay for his addiction. *See* Zacharias, *supra* note 171, at 678, 680–81.

lawyers and acknowledge the interrelationship between the various forms of regulation. They are designed to guide lawyers by dispelling the misperception that obedience to the code immunizes behavior from sanction and by encouraging lawyers to look to universal principles of morality and external law.

The Model Rules are directed primarily at attorneys. The proposed amendment to the Preamble is designed to make clear to the bar the importance of understanding external regulation. One sentence of the proposal, however, is directed at the regulators, urging them to confront the interrelationship of external law and the codes and to attempt to harmonize them when possible. As discussed above, many of the adverse consequences arising from the myth of self-regulation result from the failure of the regulators to acknowledge the fact that the codes, when adopted, become law. The proposal encourages a change in this practice.

The proposal does not attempt to identify the precise functions bar regulators should serve, or subjects they should avoid addressing, when promulgating professional rules. Previously, this Article concluded that the drafters might fruitfully eliminate professional mandates in at least some situations in which external regulation exists or represents a superior approach to the targeted conduct.[178] Simultaneously, the Article suggested that the bar should focus its resources on projects for which it is well suited and should encourage external regulators to act in those areas which fit their expertise.[179] These approaches should develop by themselves as soon as the bar and external regulators come to grips with the interrelationship of the codes and external law. The above proposal therefore confines itself to a limited change that will help bring this recognition about.

CONCLUSION

Whatever its actual meaning, the term "self-regulation" produces an image of lawyers unilaterally controlling the behavior of their peers. That image is patently false. At best, the bar sets standards for its members that sometimes are followed and sometimes are enforced. At worst, the standards fail to address key issues and are honored in the breach. In reality, consumers of legal services who are injured, or potentially injured, by lawyer misconduct have recourse to civil remedies, statutory

178. *See supra* text accompanying note 153.

179. *See supra* notes 155–57 and accompanying text.

protections, and judicial regulation of lawyers that may mesh with, but often set standards that go well beyond, the mandates of professional codes.

As this Article has discussed, however, the persistence of the image of self-regulation and the continued use of the term has consequences for the way lawyers, external regulators, and consumers perceive the bar and implement alternative regulation. The ABA's purported goals of self-regulation—fostering a complete regime of appropriate lawyer behavior and forestalling external regulation—have proven unrealistic. Pursuing these goals arguably has undermined the effectiveness of the ABA's and state bar organizations' code-drafting projects and the readiness of bar organizations to welcome external regulation in a way that would allow them to attend to other functions that only they can accomplish.

To some extent, the problems this Article has addressed are prompted by the semantic issue of how code-drafting efforts of the bar and disciplinary processes should be characterized, or thought about.[180] No one would suggest that efforts by the bar to adopt standards of conduct or to encourage moral introspection on the part of lawyers are a bad thing. Nor would even the most critical observers be inclined to eliminate professional discipline as a possible consequence for misbehaving lawyers; the potential for sanctions, including suspension or disbarment, needs to be inherent in any state-sanctioned regime that licenses professionals and thereby creates barriers to entry into the profession. And, to the extent that the bar, state supreme courts, or lawyer-judges implement standards that tilt unfairly in the direction of lawyer self-interest, criticism of their regulation is justified.

Continued use of the misleading term "self-regulation," however, muddies the conceptual dividing line between lawyer self-restraint, professional codes that guide and monitor lawyers, and judicially controlled discipline of the bar. It may well be, as some have suggested, that existing disciplinary processes are ineffective, misguided, or inadequately staffed and supported.[181] If so, that should prompt direct inquiry into those is-

180. The semantic issue is discussed in Fred C. Zacharias, *The "Self-Regulation" Misnomer*, *in* REAFFIRMING LEGAL ETHICS: TAKING STOCK AND NEW IDEAS (Reid Mortensen et al. eds.) (forthcoming 2009) (on file with author).

181. *See generally* CLARK REPORT, *supra* note 64, at 19, 24, 67, 97 (discussing the problems in disciplinary agencies); RHODE, *supra* note 88, at 158–61 (describing disciplinary enforcement problems including inefficiencies, secre-

sues, together with consideration of whether judicial control of the disciplinary process should be replaced with alternative mechanisms of lawyer regulation. Those issues become secondary when conceived as aspects of lawyer self-regulation, because lawyers *as a group* neither control the process nor are the cause of the failings that may be present.

This Article therefore has proposed an appropriate semantic solution. It encourages all participants in the lawyer-regulatory process to abandon the misnomer "self-regulation," and to replace the term with honest substitutes, such as "co-regulation." The proposed amendment to the Model Rules would be a first, symbolic change in this direction. The hard work that must follow—eliminating misguided or inherently self-serving regulation where it exists, distributing the work of regulating lawyers, and harmonizing and fleshing out the various forms of co-regulation to produce an effective regulatory regime—are projects for another day.

tiveness, and inadequate punishment); Marks & Cathcart, *supra* note 22, at 193–96, 206–21 (discussing the existing disciplinary problems with self-regulation).