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Public Law and Legal Theory Research Paper Series

September 2004

Understanding Recent Trends in Federal Regulation of Lawyers

Fred C. Zacharias

UNDERSTANDING RECENT TRENDS IN FEDERAL REGULATION OF LAWYERS

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This essay was written in connection with a panel discussion entitled "The Layering of Ethics Rules: The Federal Government's Increasing Regulation of a Lawyer's Activities."[1] The premise of the panel – a correct premise – was that federal lawmakers increasingly have taken actions that contradict, interfere with, or preempt state regulation of lawyers. Most of the commentary regarding the recent federal actions has focused on whether individual regulations are substantively justified. This essay takes a more global look at the phenomenon of increasing federal regulation and asks whether it is symptomatic of changing views of appropriate professional regulation. Stated differently, the essay will consider how the new trend relates to general themes in professional regulation as a whole.

I. FEDERAL REGULATION OF LAWYER ACTIVITY

Federal laws always have governed the practice of law. Criminal prohibitions, for example, apply to lawyers in the same way that they apply to private citizens.[2] Lawyers are bound by securities regulation,[3] money laundering statutes,[4]

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[1] The panel took place at the A.B.A.'s 29th National Conference on Professional Responsibility. *See* A.B.A. CENTER FOR PROFESSIONAL RESPONSIBILITY, COURSEBOOK FOR 29TH NATIONAL CONFERENCE ON PROFESSIONAL RESPONSIBILITY 667 (Chicago, May 31, 2003) [hereinafter COURSEBOOK].

[2] *See generally* Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 FORDHAM L. REV. 327, 330-52 (1998) (discussing the criminal law's applicability to lawyers and its interaction with professional regulation); Charles W. Wolfram, *Lawyer Crimes: Beyond the Law?*, 36 VAL. U. L. REV. 73, 79-91 (2001) (analyzing when, if ever, lawyers' professional activities are "beyond the law").

[3] *See, e.g.,* S.E.C. v. National Student Marketing Corp., 457 F.Supp. 682, 700 (D.D.C. 1978) (charging lawyers with securities law violations for issuing opinion letters that bolstered their clients' S.E.C. filings); *see also* DAVID WEISBURD, ET AL, CRIMES OF THE MIDDLE CLASS 53-58 (1991) (sample study revealing 14 instances of securities law prosecutions of attorneys); Kenneth F. Krach, *The Client-Fraud Dilemma: A Need for Consensus,* 46 MD. L. REV. 436, 461 (1987) (discussing further securities cases filed against lawyers after *National*

aiding and abetting and conspiracy laws,[5] and others.[6]

Student Marketing).

[4] *See, e.g.,* Racketeer Influenced Corrupt Organizations Act of (RICO) 18 U.S.C. §§1961-68 (making it unlawful for any person to use income derived from racketeering in any activity that affects interstate commerce); 21 U.S.C. §853(c) (rendering property involved in or generated by the commission of a crime and subsequently transferred to a third party – including a lawyer – subject to a special verdict of forfeiture); 18 U.S.C. §982 (providing for forfeiture of assets derived by money laundering under 18 U.S.C. §§1956, 1957, 1960); *id.* (requiring reporting of specified financial transactions); United States v. Sindel, 53 F.3d 874 (8th Cir. 1995) (upholding a lawyer's conviction for failure to report cash payments under federal money-laundering statute); s*ee also* United States v. Monsanto, 491 U.S. 600 (1989) (upholding the constitutionality of a statute authorizing freezing and forfeiture of assets transferred to any person, including lawyers); Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989) (same).

[5] *See, e.g.*, 18 U.S.C. §2 (imposing principal liability on aiders and abettors); 18 U.S.C. §371 (criminalizing conspiracies to commit an offense); United States v. Arrington, 719 F. 2d 701 (4th Cir. 1983) (upholding conviction of attorney for aiding and abetting conspiracy to receive and sell stolen property in interstate commerce); United States v. Kaplan, 832 F. 2d 676 (1st Cir. 1987) (upholding attorney's conviction for aiding and abetting mail fraud); United States v. Feaster, 1988 WL 33814 (6th Cir. 1988) (upholding a lawyer's conviction for aiding an undercover agent in preparing a false tax return); United States v. Cueto, 151 F.3d 620 (7th Cir. 1998) (upholding a lawyer's conviction for conspiracy to defraud the government).

[6] *See, e.g.,* United States v. Zeman, 1992 U.S.App. Lexis 29842 (6th Cir. 1992) (upholding a lawyer's conviction for witness tampering); United States v. Bronson, 658 F.2d 920, 922 (2d Cir. 1981)(upholding a lawyer's conviction for mail fraud); United States v. Zicchettello, 208 F.3d 72 (2d Cir. 2000)(upholding a lawyer's conviction for a criminal RICO violation); United States v. Cintolo, 818 F.2d 980 (1st Cir. 1987) (upholding a lawyer's conviction for obstruction of

Traditionally, however, the specific regulation of law practice has been the prerogative of the states.[7] Professional codes are state creations.[8] Although federal district courts have assumed some leeway to adopt their own rules of practice for federal litigation,[9] even they for the most part have followed the rules governing lawyers in the states within their jurisdictions.[10]

Efforts by federal agencies to exert control over state professional mandates therefore are a relatively new phenomenon.[11] There have been numerous significant developments

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justice).

[7] In Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335 (1994), I analyze whether that history should be abandoned, in favor of a federalized code of professional responsibility.

[8] The history of state regulation of lawyers is detailed in Fred C. Zacharias, *Reconciling Professionalism and Client Interests,* 36 WM. & MARY L. REV. 1303, 1315-16 (1995).

[9] Federal court regulation may or may not be endorsed by Congress. *See* Fred C. Zacharias and Bruce A. Green, *Federal Court Regulation of Lawyers: A Practice in Search of a Theory,* ___ VAND. L. REV. ___, ___ (2003) (identifying and analyzing the assertion of power by federal courts to regulate lawyers' professional conduct); *see also* Fed R. Civ. P. Rule 11 (imposing duties on lawyers in federal civil matters that parallel, but to some extent conflict with, state professional rules); 28 U.S.C. §1927 (2003) (authorizing federal courts to order payment of fees and costs by lawyers who "unreasonably and vexatiously" prolong federal proceedings).

[10] *See authorities* cited in Zacharias and Green, *supra* note 9 at ___.

[11] Some long-standing federal regulation of lawyer practice exists, including federal regulation of the patent, trademark, and bankruptcy bars. More recently, other federal agencies – including the Veterans Administration, Department of Interior, Department of Health and Human Services, and Treasury Department – also have adopted general rules regulating lawyers who appear before them. Some of the pertinent regulations are collected in COURSEBOOK, *supra* note 1,

on this front in the last two decades alone – ranging from narrow efforts to impose specific obligations upon lawyers that arguably are consistent with existing legal ethics codes to broader efforts to supplant state rules altogether.

One of the first developments involved the Office of Thrift Supervision's application to lawyers of regulations governing mandatory submissions to the agency by banking institutions.[12] Under these regulations, banking institutions were required to submit "nonmisleading information."[13] After lawyers for the Kaye, Scholer law firm, in typical advocate's fashion, filed papers on behalf of a regulated client that stretched the truth, O.T.S. sought a recovery from the law firm on the grounds that it had acted as the client's agent (and was therefore bound by requirements governing the client) and that it had aided and abetted the client in violating the regulation.[14] In a complicated set of events that will not be

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at 669-708.

[12] The details of O.T.S.'s implementation of these regulations against the Kaye Scholer law firm can be found in Joyce A. Hughes, *Law Firm Kaye, Scholer, Lincoln S&L and the OTS*, 7 NOTRE DAME J. OF L., ETHICS, & PUB. POL. 177 (1993); *see also* authorities cited *infra* notes 14-16.

[13] 12 C.F.R. §563.18(b) (1988) (currently 12 C.F.R. §563.180(b)(1)) (providing that no affiliated person shall knowingly "[m]ake any written or oral statement to the Office or to an agent, representative or employee of the Office that is false or misleading with respect to any material fact or omits to state a material fact concerning any matter within the jurisdiction of the Office"). The Financial Institution Reform, Recovery and Enforcement Act of 1989, Pub. L. 101-73, 103 Stat. 183, which followed *Kaye, Scholer,* expressly amended the definition of affiliated person to include lawyers. 12 U.S.C. §1813(u)(4).

[14] *Attorneys Can't Claim Privilege as Agents of Their Clients, OTS' Chief Counsel Argues*, BANKING ATT'Y (BNA), May 25, 1992, at 5; *OTS Chief General Counsel Defends Action Against Kaye, Scholer*, 8 ABA/BNA LAWS. MAN. ON PROF. CONDUCT 77 (Apr. 8, 1992); *see also* Dennis E. Curtis, *Old Knights and New Champions: Kaye, Scholer, the Office of Thrift Supervision, and the Pursuit of the Dollar*, 66 S.C. L. REV. 985, 991-96

detailed here, the case ultimately was settled.[15] The important point for our purposes is that O.T.S. succeeded in imposing responsibilities on banking lawyers that differed from, and in some respects seemed inconsistent with, their responsibilities under traditional state codes.[16]

(1993)(discussing O.T.S.'s claims); Peter C. Kostant, *When Zeal Boils Over: Disclosure Obligations and the Duty of Candor of Legal Counsel in Regulatory Proceedings after the Kaye Scholer Settlement*, 25 ARIZ. ST. L.J. 487, 521-27 (1993) (highlighting the government's perspective); James Podgers, *Kaye Scholer: The Tremors Continue Part II: Changing the Rules*, 78 A.B.A. J. 53 (1992)(describing O.T.S.'s position); Charles R. Zubrzycki, Note, *The Kaye, Scholer Case: Attorneys' Ethical Duties To Third Parties In Regulatory Situations*, 6 GEO. J. LEGAL ETHICS 977, 978-80 (1993)(outlining the government's charges).

[15] Office of Thrift Supervision, *OTS, Kaye Scholer Agree to Settle all Charges*, OTS NEWS 92-95 (Mar. 8, 1992).

[16] Numerous commentators have described O.T.S.'s regulation as undermining lawyers' traditional duties to maintain client confidences and to advocate their client's positions in a partisan fashion. *See, e.g.,* Anthony E. Davis, *The Long Term Implications of the Kaye Scholer Case for Law Firm Management – Risk Management Comes of Age*, 35 S. TEX. L. REV. 677, 682 (1994) (discussing the implications of O.T.S.'s actions); Howell E. Jackson, *Reflections on Kaye Scholer: Enlisting Lawyers to Improve the Regulation of Financial Institutions*, 66 S.C. L. REV. 1019, 1049 (1993)(analyzing the effect of O.T.S.'s approach in designating lawyers as gatekeepers against client misconduct); W. Frank Newton, *A Lawyer's Duty to the Legal System and to a Client Drawing the Line*, 35 S. TEX. L. REV. 701, 705 (1994) (criticizing the government's position); Nancy J. Valerio, *Developments in Banking Law, 1993: Professional Responsibility*, 13 ANN. REV. BANKING L. 11, 19-20 (1994) (reporting the opposition of an A.B.A. working group to O.T.S.'s position); *cf.* George C. Harris, *Taking the Entity Theory Seriously: Lawyer Liability for Failure to Prevent Harm to Organizational Clients through Disclosures of Constituent Wrongdoing*, 11 GEO. J. LEGAL ETHICS 597, 619 (1998) (discussing the implications of the *Kaye,*

After the highly publicized Kaye, Scholer settlement, other federal agencies adopted and enforced similar regulations.[17] Commentators have suggested that more will

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Scholer case in light of the limited case law defining the role lawyers must adopt). That is not to say the O.T.S. position was wrong. The Kaye, Scholer lawyers were acting as their client's agents in submitting filings to the agency. The claims of critics notwithstanding, nothing in state professional codes authorizes lawyers to commit illegal acts or to enable clients to commit illegal acts simply by acting in the clients' place. *See, e.g.,* William H. Simon, *The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology,* 23 LAW & SOC. INQ. 243, 251 (1998) (arguing that commentators critical of the O.T.S. position have failed to analyze it fairly); David B. Wilkins, *Making Context Count: Regulating Lawyers after Kaye, Scholer*, 66 S.C. L. REV. 1145, 1150 (1993)(arguing for a contextual approach to legal ethics); Fred C. Zacharias, *The Restatement and Confidentiality*, 46 OKLA. L. REV. 73, 85 (1993) ("The bank's choice of a lawyer to represent it in making legally required responses may justify the government in viewing the lawyer more as the bank's alter ego than its legal advocate".

[17] *See* Edward Adams, *Thrift Litigation Fallout; Suits Increasing; Firm Grip on Lawyers Sought*, N.Y. L.J. (June 18, 1992), at 5 (referring to *Kaye, Scholer*-type lawsuits brought by the Resolution Trust Corporation and Federal Deposit Insurance Corporation against law firms in five states).

Under authority granted by 31 U.S.C. §5318(g), the Financial Crimes Enforcement Network of the Department of the Treasury (FinCEN) adopted reporting requirements that obligate financial institutions to report any suspicious transaction possibly related to a violation of law or regulation. 61 Fed. Reg. 4326 (February 5, 1996); 61 Fed. Reg. 4338 (February 5, 1996); 61 Fed. Reg. 4332 (February 5, 1996); 61 Fed. Reg. 6095 (February 16, 1996); 61 Fed. Reg. 6100 February 16, 1996); 61 Fed. Reg. 11526 (March 21, 1996). In partnership with FinCEN, several banking regulators adopted the suspicious activity reporting requirements into their own regulations. *See* 12 C.F.R. §563.180(d) (2003) (O.T.S. regulations requiring savings associations and service corporations under specified circumstances to file suspicious activity reports with the appropriate Federal law enforcement agencies and the

follow.[18]

The Internal Revenue Service has promulgated a different form of regulation that focuses even more directly on the lawyer's role as advocate. The regulation limits the positions lawyers may take when appearing before the I.R.S. to those that have "a realistic possibility of being sustained on [their] merits,"[19] even when other positions would be deemed non-frivolous for purposes of traditional professional rules. Although this and other aspects of I.R.S. regulations governing the practice of tax attorneys[20] seem like a dramatic preemption of state ethics codes, they have never been highly publicized except among tax practitioners and professional responsibility scholars – probably because the regulations apply to such a narrow field of practice.

Far more controversial have been the severely criticized attempts by the American Bar Association and state regulators to adopt or apply rules restricting prosecutors' ability to subpoena attorneys[21] and to communicate with represented

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Department of the Treasury by sending a completed report to FinCEN); *accord* 12 C.F.R. §208.62 (2003) (Federal Reserve regulations); 12 C.F.R. §21.11 (2003) (Office of the Comptroller of the Currency regulations); 12 C.F.R. §353.3 (2003) (F.D.I.C. regulations); 12 C.F.R. §748.1 (2003) (National Credit Union Administration regulations). These regulations extend the reporting duty to affiliated individuals defined in 12 U.S.C. §1813(u)(4), including lawyers.

[18] *See, e.g.,* 8 C.F.R. §292.3(a)(3) (Immigration and Naturalization Service regulation forbidding lawyers to mislead or deceive an officer of the Department of Justice); *see also* Jill Evans, *The Lawyer as Enlightened Citizen: Towards A New Regulatory Model in Environmental Law*, 24 VT. L. REV. 229, 230-31 (2000) (arguing that environmental statutes give the E.P.A. authority to adopt regulations that will turn lawyers into gatekeepers for their client's environmental activities).

[19] 31 C.F.R. §10.34(a) (1994).

[20] *See generally* 31 C.F.R. pt. 10 (2003).

[21] *E.g.,* AMERICAN BAR ASSOCIATION, MODEL RULES OF PROF'L CONDUCT, Rule 3.8(f) (1990) (subsequently amended in 1995) [hereinafter

parties,[22] and the equally severely criticized response by the

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"Model Rules". *See generally* Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. Rev. 1389, 1399-1401 (1992) (discussing the controversy over Model Rule 3.8(f) and arguing that the controversy reflected the bar's normative vision of how the law should apply to lawyers). The A.B.A. first suggested reform in 1986 and 1988. *See* ABA, *Resolution on Attorney Subpoenas* (Feb. 1988) [hereinafter 1988 A.B.A. *Resolution*], *reprinted in* Max D. Stern & David Hoffman, *Privileged informers: The Attorney Subpoena Problem and a Proposal for Reform*, 136 U. Pa. L. Rev. 1783, 1853-54 (1988); ABA, *Resolution on Subpoenaing Attorneys Before the Grand Jury* (Feb. 1986) [hereinafter 1986 A.B.A. *Resolution*], *reprinted in* Stern & Hoffman, *supra*, at 1852. The 1988 Resolution strengthened the 1986 Resolution and expanded the rule's application to all prosecutorial attempts to obtain lawyer testimony relating to representation of a client's affairs, before grand juries or elsewhere. A version of Model Rule 3.8(f) tracking the 1988 proposal was adopted in 1990 but, after litigation, negotiation, and further deliberation, was amended in 1995 so as to delete the requirement that prosecutors obtain "prior judicial approval after an opportunity for an adversarial hearing" before issuing attorney-subpoenas.

[22] *E.g.*, Model Rules, Rule 4.2 (1983); American Bar Association, Model Code of Prof'l Responsibility, DR 7-104 (1969); *see* Neals-Erik W. Delker, *Comment, Ethics and the Federal Prosecutor: The Continuing Conflict over the Application of Model Rule 4.2 to Federal Attorneys*, 44 Am. U. L. Rev. 855, 858-59 (1995)(noting disagreement about the appropriate scope of professional no-contact rules); Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?,* 64 Geo. Wash. L. Rev. 460, 470-72 (1996) (discussing the history of no-contact regulation); *cf.* Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 Notre Dame L. Rev. 223, 269 n.134 (1993) (citing commentary that assumes that prosecutors are, and should be, bound to the same rules as other lawyers).

federal Department of Justice.[23] During the first Bush administration, in the so-called "Thornburgh Memorandum," the Department of Justice[24] purported to preempt the application of all state professional rules to federal attorneys.[25] The Clinton Administration moderated this approach, acknowledging in formal regulations that most state rules should apply.[26] But it reserved the right to preempt particular rules that interfere with federal law enforcement.[27] These regulations, known as the "Reno Rule", specifically excepted D.O.J.

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[23] The controversy is described in detail in Fred C. Zacharias, *Who Can Best Regulate the Ethics of Federal Prosecutors; Or, Who Should Regulate the Regulators?*, 65 FORDHAM L. REV. 429, 429-30 (1996); *see also* Corinna B. Lain, *Prosecutorial Ethics Under the Reno Rule: Authorized by Law?*, 14 CRIM. JUST. ETHICS 17, 22-24 (1995) (criticizing the Reno Rule Rule's impact on prosecutorial ethics as having "the fox guarding the chicken coop"); Amy R. Mashburn, *A Clockwork Orange Approach to Legal Ethics: A Conflicts Perspective on the Regulation of Lawyers by Federal Courts*, 8 GEO. J. LEGAL ETHICS 473, 494 (1995) (noting that "the DOJ's new rule takes the concept of attorney self-regulation to the most extreme manifestation imaginable").

[24] Hereinafter, the Department of Justice sometimes is referred to as "D.O.J.".

[25] Richard L. Thornburgh, "Memorandum from Attorney General to all Justice Department Litigators" 1 (June 8, 1989), *reprinted in* Matter of Doe, 801 F.Supp. 478, 489 (D.N.M. 1992). The Justice Department's decision to claim authority to preempt state regulation stemmed from the D.O.J.'s reaction to the rules governing attorney subpoenas and contacts with represented persons that, in effect, limited the investigative power of federal prosecutors.

[26] 28 C.F.R. §§ 77.1-77.2 (1995). The history of the D.O.J. Regulations is discussed in Zacharias, *supra* note 23, at 429 nns. 1-2.

[27] 59 Fed. Reg. 10,086, 10,088 (March 3, 1994)("Department attorneys continue to be subject to state bar ethical rules where they are licensed to practice, except in the limited circumstances where state ethical rules clearly conflict with lawful federal procedures and practices").

attorneys from the application of state no-contact provisions.[28] The Reno Rule subsequently was superceded by the McDade Amendment.[29]

More recently, pursuant to federal legislation adopted after the Enron and WorldCom scandals,[30] the S.E.C. promulgated a series of regulations governing securities attorneys. The initially-proposed regulations emphasized the role of lawyers as gatekeepers of client misconduct. They required securities lawyers to take remedial steps upon learning of potential wrongdoing by clients and required the lawyers to withdraw and report to the S.E.C when clients decline to respond to the remedial measures in a satisfactory manner.[31] The bar – led by the A.B.A. and state bar organizations – responded vociferously that these proposed regulations undermined both attorney-client confidentiality and the traditional role of lawyers under state professional codes.[32] In a gesture of

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[28] 28 C.F.R. §§ 77.12 (1995).

[29] *See* Citizens Protection Act, 28 U.S.C. §530B (1998) (applying state ethics rules to federal attorneys); 28 C.F.R. §§77.1-77.3 (2003) (implementing the McDade Amendment).

[30] Sarbanes-Oxley Act of 2002, Pub. L. 107-204, §307, 116 Stat. 745 (2002).

[31] Implementation of Standards of Professional Conduct for Attorneys, No. S7-45-02, Securities Act Release No. 33-8150, Exchange Act Release No. 34-46868 (Nov. 21, 2002) ("Outside attorneys who . . . have not received an appropriate response and who reasonably believe that the reported material violation is ongoing or is about to occur and is likely to result in substantial injury to the financial interest of the issuer or of investors are required to withdraw from the representation, notify the Commission of their withdrawal, and disaffirm any submission to the Commission that they have participated in preparing which is tainted by the violation. In-house attorneys . . . are required to disaffirm any tainted submission they have participated in preparing, but are not required to resign.") [hereinafter "Proposed Rule"].

[32] Comments submitted to the S.E.C. that fitted this mold included: Comments of Gerald S. Backman, Chairman, Securities Regulation Comm., Bus. Law Section, N.Y.S. Bar Ass'n, at http://www.sec.gov/rules/proposed/s74502/gesbackman1.htm (Dec.

compromise, the S.E.C. ultimately adopted somewhat less forceful regulations – still requiring remedial measures by some securities attorneys in some circumstances, but postponing for future consideration the "noisy withdrawal" proposal.[33]

One final set of federal rules that might interfere with traditional state regulation is currently being considered. In an effort to fight terrorism in the wake of the September 11 attacks, Congress adopted measures to counteract money

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18, 2002) (voicing concern the proposed rules would undermine the attorney-client relationship and chill attorney-client communications); Comments of Jennifer T. Nijman, Pres., Chicago Bar Ass'n, at http://www.sec.gov/rules/proposed/ s74502/ jtnijman1.htm (Dec. 18, 2002) (arguing that the proposals would erode client confidence in their attorneys and that would make attorneys reluctant to learn about their client's activities); Comments of Alfred P. Carlton, Jr., A.B.A. Pres., at http://www.sec.gov/rules/proposed/s74502/apcarlton1.htm (Dec. 18, 2002) (arguing that the proposals create a conflict between the attorney's interest and the client's); *see also* Implementation of Standards of Professional Conduct for Attorneys, No. S7-45-02, Securities Act Releases No. 33-8186, 34-47282 (Jan. 29, 2003) (discussing critical comments submitted to the S.E.C.); Brian P. Kane, *The Sarbanes-Oxley Act of 2002: Something For Everyone to Worry About*, 45 ADVOCATE 16 (2002) (concluding that "Congress crossed the Rubicon with the American Bar Association by taking a direct swipe at the revered attorney-client privilege); Tamara Loomis, *77 Big Firms Attack SEC Bid to Force Revealing Client Secrets*, 113 FULTON CTY. DAILY REP. NO. 246 (12/20/02) (reporting critical comments filed by 77 law firms concerning the Sarbanes-Oxley regulations); *see also* Letter dated April 7, 2003, from American Corporate Counsel Association to the S.E.C., http://www.acca.com/advocacy/ 307comments2.pdf, p.2.(arguing that the S.E.C. reporting requirements "may cause currently healthy lawyer-client relationships irreparable harm").

[33] Implementation of Standards of Professional Conduct for Attorneys, No. S7-45-02, Securities Act Release No. 33-8185, Exchange Act Release No. 34-47276, at *1-2 (Jan. 29, 2003) (noting deferral of implementation and stating "We are still considering the 'noisy withdrawal' provisions of our original proposal under section 307") [hereinafter "Final Rule].

laundering by requiring financial institutions to report particular transactions and to take other preventive measures.[34] Except for lawyers who are members of such institutions, neither this legislation nor regulations adopted to date specifically target lawyers.[35] However, lawyers probably are responsible for avoiding any aiding or abetting of violations of the Act.[36]

More significantly, FATF[37], an international policymaking body, is studying a proposal that lawyers and other professionals be enlisted as "gatekeepers" against client money-laundering activity – the so-called "Gatekeeper Initiative."[38] FATF is expected to issue its recommendations and the U.S. Government is expected to "craft a formal position on the gatekeeper responsibilities for lawyers" within the year.[39] The A.B.A. has established a task force that

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[34] U.S.A. Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001).

[35] The Act does specify "persons engaging in real estate closings and settlements," but the pertinent regulatory bodies have delayed defining that term. *See* Kevin L. Shepherd, *USA Patriot Act and the Gatekeeper Initiative: Surprising Implications for Transactional Lawyers*, 16 PROB. & PROP. 26, 30 (2002) (describing developments relating to the Gatekeeper Initiative).

[36] *Cf.* Bruce Zagaris, *Gatekeepers Initiative: Seeking Middle Ground between Client and Government,* 16 CRIM. JUST. 26, 30 (2002) (discussing obligations that may arise for accountants and lawyers in assisting clients in performing "due diligence").

[37] *I.e.*, the Financial Action Task Force.

[38] Shepherd, *supra* note 35, at 27 (describing FATF's work).

[39] *ABA Delegates Vote Opposition to Proposals to Make Attorneys Report Shady Transactions*, 19 ABA/BNA LAWS. MAN. ON PROF. CONDUCT 99 (Feb. 12, 2003); *see also* Zagaris, *supra* note 36, at 29 (noting that "the chief of the asset forfeiture and money-laundering section of the Department of Justice is reviewing the professional responsibilities of attorneys and accountants with regard to money laundering and will make

has already taken a position opposing any proposals that would require lawyers to disclose confidential information to the government or otherwise "compromise the lawyer client relationship or the independence of the bar."[40]

Two conclusions seem clear from these developments. First, the recent federal regulations are historically distinctive. They reflect a growing willingness on the part of federal actors to invade what previously was viewed as a state regulatory prerogative. Second, none of the federal initiatives reflects a broad attempt to supplant state regulation across the board. Even the Thornburgh memorandum limited itself to the regulation of specific activities of a limited number of federal attorneys.[41] The other initiatives focused narrowly on a particular, confined aspect of legal practice.[42]

The remainder of this essay considers how these developments interact with, and what they signify for, broad themes in lawyer regulation. It leaves the normative issues aside – whether each of the federal regulations is justified or not, whether it is legally authorized, and whether it properly invades state power. Instead, the essay focuses on the larger questions of whether and how the increase in federal regulation as a whole might be explained in light of traditional ways of looking at professional regulation.

II. FEDERALISM

At one level, the new efforts to regulate lawyers with respect to federal activities – that is, representation before federal agencies – may simply reflect a developing vision of

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recommendations as needed") and authorities cited therein.

[40] *Id.*

[41] The Thornburgh memorandum focused only on the applicability of state professional codes to federal Department of Justice attorneys engaged in their official prosecutorial duties. *See* Thornburgh, *supra* note 25.

[42] Thus, for example, the the O.T.S. regulations focused on lawyers filing banking statements, the Sarbanes-Oxley regulations focus on the specific activities of securities lawyers practicing before the S.E.C., and the Gatekeeper Initiative focuses on lawyers' participation in money laundering and terrorist activities.

federalism: federal agencies regulate federal practice, states regulate local practice.[43] That vision explains the Office of Thrift Supervision's limited requirements governing lawyer submission of filings to the agency. Likewise, it accounts fully for the I.R.S.'s insistence that tax lawyers screen the positions they take before the Service.

There are both practical and philosophical reasons, however, why the federalism divide is problematic as an explanation for when federal regulations are justified and when they are not. One can separate federal from state practice only at a very elemental level. Direct presentations to federal agencies, such as federal filings and appearances in federal proceedings, seem federal rather than state in nature. But the giving of legal advice preceding these actions is not so easily classified. Indeed, when lawyers represent clients with respect to conduct that is regulated by both state and federal agencies or with respect to legal action that can be filed in both state and federal venues, the lawyers may not always be able to identify which kind of practice they are engaging in at a particular moment.

More significantly, to the extent that the federal and state regulation of lawyers prescribe different roles for lawyers and different attorney-client relationships, one set of regulations can undermine the other. Rightly or wrongly, for example, the Office of Thrift Supervision rule was criticized as undermining the lawyer's sense of identity as a zealous advocate.[44] Arguably, a professional code of conduct needs to establish a single role that lawyers and clients can understand and implement across the board.[45]

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[43] *Cf.* E. Norman Veasey, *Issues of Federalism in Light of the SEC Final Rules Under Section 307 of the Sarbanes-Oxley Act*, 14 PROF'L LAWY. 26 (2002) (noting "interesting questions of sweep, breadth, and federalism" raised by the Sarbanes-Oxley rules).

[44] *See* authorities cited *supra* note 16 (discussing critics and defenders of the O.T.S. approach).

[45] As noted in Fred C. Zacharias, *The Future Structure and Regulation of Law Practice: Confronting Lies, Fictions, and False Paradigms in Legal Ethics Regulation*, 44 ARIZ. L. REV.829, 831 n.6 (2002), however, identifying a single role for lawyers may be more important at times when lawyers have no common conception of their functions, but may be less

The practical difficulty of separating state and federal practice is best highlighted by the controversy surrounding the application to federal prosecutors of state rules against communicating with represented persons.[46] The activity of criminal suspects that might be subject to undercover investigation often violates both state and federal law. On occasion, such suspects are investigated jointly by state and federal law enforcement teams. The application of no-contact rules based on which agency ultimately prosecutes is thus often impractical, because who will prosecute may not be clear until the investigation is complete.[47] Moreover, if one views professional regulation through the lens of federalism, the application of a state rule adopted with the support of the local defense bar does seem to impinge on federal sovereignty. This contradiction accounts both for the adoption of the Thornburgh memorandum and the heated response by state regulators.[48]

Interestingly, both the insistence of state regulators that state no-contact rules should apply to federal prosecutorial practice[49] and the ultimate federal response,

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important when all lawyers share a general approach to representation.

[46] It is these rules that the D.O.J. purported to preempt in the Thornburgh memorandum and then, in more muted form, in the Reno Rule. *See* text accompanying note 25.

[47] Admittedly, one can craft evidentiary rules that exclude tainted evidence, or not, based on whether a prosecution is state or federal. But that does not eliminate the dilemma of how the state and federal lawyers directing the investigating team should structure the joint federal-state investigation. The decisions of state officials may taint those of federal officials, and vice versa.

[48] *See* Fred C. Zacharias, *supra* note 23, at 448-62 (discussing the interplay among the D.O.J., the A.B.A., and state regulators).

[49] *See, e.g.,* Whitehouse v. United States Dist. Court, 53 F.3d 1349 (1st Cir. 1995) (upholding a local federal court rule applying a state no-contact provision against federal prosecutors); United States v. Klubock, 832 F.2d 664, 667 (1st Cir. 1987) (en banc) (holding that the Supremacy Clause does

agreeing in part,[50] belie the existence of a developing federalism approach to professional regulation. State regulators and most commentators[51] showed no inclination whatsoever to cede the right of federal agencies to control federal legal practice. Likewise, by agreeing that ordinarily state rules should govern[52], the Department of Justice seemed to recognize that a clear state/federal divide is unworkable.[53]

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not bar enforcement of local federal court rules to federal attorneys); *see also* Conference of Chief Justices, Resolution XII, Proposed Rule Relating to Communications with Represented Persons (Aug. 4, 1994) (opposing the Thornburgh Memorandum), *quoted and discussed in* Daniel R. Coquillette, *Report on Local Rules Regulating Attorney Conduct in the Federal Courts in* COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE ADMIN. OFFICE OF THE U.S. COURTS, SPECIAL STUDIES OF FEDERAL RULES GOVERNING ATTORNEY CONDUCT 1, 35-36 (1997) and Carl A. Pierce, *Variations on a Basic Theme: Revisiting the ABA's Revision of Model Rule 4.2*, 70 TENN. L. REV. 121, 125 n.7 (2002).

[50] *See* text accompanying note 27.

[51] *See, e.g.,* Alafair S.R. Burke, *Note, Reconciling Professional Ethics and Prosecutorial Power: The No-Contact Rule Debate*, 46 STAN. L. REV. 1635, 1660-61 (1994) (arguing that "the [federal] regulations intrude upon the attorney-client relationship in ways unwarranted by the needs of effective law enforcement"); Lain, *supra* note 23, at 17 (arguing against D.O.J.'s preemptive authority); Rory Little, *Who Should Regulate the Ethics of Federal Prosecutors?,* 65 FORDHAM L. REV. 355, 362-63 & n.30 (1996) (noting "outraged bar officials"); Jocelyn Lupert, *Note, The Department of Justice Rule Governing Communications with Represented Persons*, 46 SYRACUSE L. REV. 1119, 1144-45 (1996) (cataloging the hostility to the Reno Rule); Mashburn, *supra* note 23, at 495 (arguing that the D.O.J. position lacked support in the case law or in statutory authority).

[52] *See supra* note 27.

[53] Of course, the Department of Justice concessions, in part, were politically driven. It is impossible to tell how much politics or theoretical concerns drove the agency's conclusions.

The recently proposed, partially-adopted, and still open Sarbanes-Oxley regulation of securities lawyers highlights both the practical and philosophical weaknesses of the federalism analysis. In their initial form,[54] the S.E.C. regulations proposed pursuant to the Sarbanes-Oxley Act applied to all lawyers who conduct business before the S.E.C..[55] This broad definition encompassed such lawyers even though their work in the specific case at issue might not, itself, be presented to the federal agency. The reason for the

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[54] The Sarbanes-Oxley Act was federal legislation that required the S.E.C. to promulgate regulations to establish "minimum standards of professional conduct for attorneys who appear and practice before the Commission" and to require attorneys to report evidence of law violations, at least within their corporations. Sarbanes-Oxley Act of 2002, Pub. L. 107-204, §307, 116 Stat. 745 (2002). The S.E.C. initially proposed regulations that contained a broad definition of which lawyer activities were covered and called for significant changes in the role of securities lawyers as gatekeepers of client misconduct. *See* Proposed Rule, *supra* note 31, at *25 ("[T]he proposed rule would adopt an expansive view of who is appearing and practicing before the Commission . . . . In addition to a rigorous "up the ladder" reporting requirement, the proposed rule incorporates several corollary provisions that are not explicitly required by Section 307 . . . . Under certain circumstances, these provisions permit or require attorneys to effect so-called 'noisy withdrawal' and to notify the Commission that they have done so and permit attorneys to report evidence of material violations to the Commission . . . "). Following a heated comment period, the S.E.C. adopted a significantly weaker version of the original, holding for further comment and consideration a requirement that lawyers "noisily withdraw", effectively informing the S.E.C., when clients refuse to follow the lawyers' insistence that they comply more clearly with S.E.C. rules. *See* Final Rule, *supra* note 33, at *5-7 ("[T]he final rule we adopt today has been significantly modified in light of these comments and suggestions").

[55] Proposed Rule, *supra* note 31, at *4 ("The purpose of this release is to solicit comments on proposed Part 205, which prescribes Standards of Professional Conduct for Attorneys who appear and practice before the Commission in any way in the representation of issuers").

broad definition was clear: the ultimate presentation or use of legal advice cannot always be determined at the time the advice is given, so the agency chose to overinclude. Yet in employing the broad definition, the proposed regulation encompassed legal practice that would fall within the state side of the federalism divide.

More significant was the Sarbanes-Oxley requirement that lawyers sometimes report corporate wrongdoing[56] and the proposed regulatory requirement, currently held in abeyance, that lawyers sometimes "noisily withdraw" from the representation.[57] These are inconsistent with most state rules in two respects. First, state professional codes typically phrase any reporting requirement governing corporate counsel in permissive, rather than mandatory, terms.[58] Second, absent an actual misuse of a lawyer's name, state codes typically emphasize the preservation of client confidences over the lawyer's right or obligation to highlight the reasons for her

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[56] *Id.* at §205.3(b), at *75-76 ("If, in appearing and practicing before the Commission . . . an attorney becomes aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer, the attorney shall report any evidence of a material violation to the issuer's chief legal officer . . . or to both the issuer's chief legal officer and its chief executive officer").

[57] *See Id.* §205.3(d), at *125-126 ("Where an attorney . . . does not receive an appropriate response . . . [he] shall [w]ithdraw forthwith from representing the issuer . . . and [w]ithin one business day of withdrawing, give written notice to the Commission of the attorney's withdrawal. . . and [p]romptly disaffirm to the Commission any opinion . . . or the like in a document filed with or submitted to the Commission. . . that the attorney has prepared. . . and that the attorney reasonably believes is or may be materially false or misleading") and Final Rule, *supra* note 33, at *1-2 (Jan. 29, 2003) (noting deferral the noisy withdrawal requirement for further consideration).

[58] *See, e.g.,* Model Rules, Rule 1.13(b) (requiring a lawyer for an organization to take remedial measures under some circumstances, but giving the lawyer discretion as to which measures are appropriate).

withdrawal.[59]

In mandating its new lawyer obligations, the Sarbanes-Oxley proposals effectively called for a change in the relationship between lawyers and clients – or at least a dramatic expansion in the lawyer's gatekeeper role.[60] When lawyers have information that fits within the proposed regulation's ambit, they may – and sometime even must – use it to blackmail clients into complying with the lawyers' view of appropriate conduct.[61] This, in turn, creates new incentives for clients not to share information with their lawyers.

This essay need not detail how directly this framework contradicts the traditional state view of lawyer partisanship and the importance of confidentiality. The S.E.C. and state models cannot happily co-exist, at least with respect to corporate and securities lawyers. The new approach clients take to their securities lawyers may affect their approaches to their lawyers in other aspects of practice as well – both state and federal in nature.

III. THE TREND TOWARD FEDERALIZATION

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[59] *See, e.g., id.* cmt. ("this rule does not limit or expand the lawyer's responsibility under Rule 1.6 [requiring confidentiality]"; CAL. R. PROF. CONDUCT, Rule 3-600(B),(C) (emphasizing the corporate lawyer's duty to protect "all confidential information" and limiting her response to the "right [or duty] to resign").

[60] Model Rule 3.3(b), which requires lawyers to disclose confidential information when necessary to rectify certain client frauds upon tribunals, does require lawyers to exercise similar gatekeeping functions. The proposed Sarbanes-Oxley regulations, however, extend the ability to blackmail the client into complying with the lawyer's directives to a far broader array of advice and non-litigation contexts than the Model Rules. *cf.* Model Rules, Rule 1.13(b) (requiring corporate lawyers to maintain confidentiality in the face of potential corporate wrongdoing).

[61] Under the proposed rules, if a lawyer is not satisfied by the client's response to her determination that the client is acting improperly, the lawyer must withdraw and report that withdrawal to the S.E.C.. Faced with the threat of noisy withdrawal, clients are likely to accede to the lawyer's demands.

At a simpler level, the new federal regulations may simply represent one aspect of a developing struggle for power over professional regulation (*i.e.*, as a whole) between states and the federal government. The rationale for deference to state regulation is largely historical in nature; states traditionally have provided the laboring oar in regulating lawyers.[62] Arguably, local rules can be tailored to the demographics of the local bar[63] and states should be allowed to experiment with differing rules as a means of avoiding stagnant, uniform regulation.[64]

Changes in legal practice over the past several decades, however, militate in favor of increasing federalization of professional regulation. As I have detailed elsewhere, practice has become more nationalized – both in the sense of lawyers practicing in multiple jurisdictions and in the sense of legal matters crossing state borders.[65] It is becoming ever more difficult for lawyers to understand and follow the requirements of multiple jurisdictions[66] and for individual

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[62] *See* Bruce A. Green and Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381, 390-400, 418-23 (describing the historical preference and reasons for state regulation of even federal lawyers).

[63] *See* Zacharias, *supra* note 7, at 375 (discussing the argument that local professional regulation of lawyers "accounts for local characteristics and concerns") and authorities cited therein.

[64] *See id.* at 373 (analyzing the argument that respecting state professional regulation "enables the states to serve as laboratories for novel approaches") and authorities cited therein.

[65] *Id.* 345-57. Indeed, the globalization of practice may create additional pressures for federal regulation, because in some instances only the federal government can adopt the type of regulation (*e.g.*, by treaty) that responds to international concerns. This, for example, helps explain federal participation in regulations relating to lawyer participation in money laundering that potentially facilitates international terrorism. *See supra* text accompanying note 34.

[66] A single lawyer may be governed by the professional rules in the state or states in which they are licensed,

states to regulate particular instances of practice.[67] These changes support the adoption of a uniform body of professional regulation.

At first glance, the recent federal regulations simply seem like a first step in that direction. With the possible exception of the Sarbanes-Oxley regulations, however, they are a peculiar first step if their goal is to unify and nationalize the regulation of the profession as a whole. Each of the regulations is confined to an extremely narrow and specific aspect of legal practice. They leave the general role of lawyers and the control of state professional rules intact with respect to most legal representation. Indeed, with the exception of the federal response to state no-contact rules,[68] none of the federal regulations directly overrules state rules or attempts to moderate the effect of inconsistent approaches by different jurisdictions.[69]

IV. DISTINCTIONS BETWEEN THE CIVIL AND CRIMINAL CONTEXTS OR AMONG SPECIALIZED AREAS OF PRACTICE

One can conceptualize many of the recent regulatory

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states in which they consult with clients, a state in which a case is filed, and separate states in which a case requires them to engage in legal activities.

[67] For example, states must take into account the requirements of other states that have an interest in a lawyer's activities. Because of the nationalization of practice, an increased number of lawyers not licensed by a particular state also are likely to engage in practice activities within the jurisdiction, making detection and enforcement of code violations problematic.

[68] *See supra* text accompanying note 25. It is important to note that even the Thornburgh memorandum limited its preemptive claim to the activities of federal prosecutors. It did not address traditional regulation of civil lawyers or state prosecutors.

[69] For example, the requirements of the Sarbanes-Oxley regulation affects the requirements of state rules like Model Rule 1.3 and state confidentiality rules as they apply in the securities context. But the regulations do not purport to establish a national standard governing these issues outside the securities context.

changes as outgrowths of one of two emerging views of professional responsibility regulation: (1) that traditional regulation based on the paradigm of unsophisticated individual criminal defense clients should be tempered in civil representation;[70] and (2) that legal ethics codes are flawed in their failure to include nuanced professional rules that target issues arising in particular specialized areas of practice.[71]

Consider, for example, the federal efforts to modify traditional state regulation regarding practice in the criminal context. The states' traditions, of course, are to emphasize loyalty and fierce partisanship on the part of criminal defense attorneys and to impose limits on prosecutors' ability to interfere with defendants' attorney-client relationships. These traditions are borne, in part, of constitutional concerns.[72] The strength of commentators'

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[70] Commentators frequently have noted the paradigm of the criminal lawyer. *See, e.g.,* Murray L. Schwartz, *The Zeal of the Civil Advocate*, 1983 AM. B. FOUND. RES. J. 543, 548 ("the [criminal] defense lawyer is commonly regarded as the archetype of the advocate in the adversary system"). Some commentators have suggested that civil attorneys should be regulated, or should practice, differently. *See, e.g.,* Robert Gordon, *The Independence of Lawyers,* 88 B.U. L. REV. 1, 11 (1988) (suggesting that the consensus in favor of civil lawyering that follows the criminal paradigm has evaporated); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 Hum. Rts. 1, 12 (1975) (accepting different behavior from criminal defense lawyers because of the "special needs of the accused"); *cf.* Fred C. Zacharias, *The Civil-Criminal Distinction in Professional Responsibility*, 7 J. CONTEMP. LEGAL ISSUES 165, 166 (1996) (questioning the criminal paradigm) and authorities cited at 166 nns. 5-7.

[71] *See, e.g.,* Fred C. Zacharias, *Reconceptualizing Ethical Roles*, 65 GEO. WASH. L. REV. 169, 186-209 (analyzing the possibility of writing professional rules targeted to particular types of representation) and authorities cited therein.

[72] *See, e.g.,* MONROE H. FREEDMAN AND ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 68 (2d ed. 2002) (noting the "constitutional dimensions" of client autonomy and attorney-client

support for traditional state rules typically has varied proportionally to whether the commentators have focused on the criminal or civil contexts.[73]

Of all the modern federal reforms, the efforts of the U.S. Department of Justice to preempt protections for criminal defendants' attorney-clients relationships have met the most effective resistance. The Thornburgh memorandum was reviled.[74]

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confidentiality).

[73] *See, e.g.,* DAVID LUBAN, LAWYERS AND JUSTICE 202-05 (1988) (noting the claim that superaggressive lawyer practice is justified primarily in the criminal context); Jay S. Silver, *Professionalism and the Hidden Assault on the Adversarial Process*, 55 OHIO ST. L.J. 855, 863-67 (1994) (justifying superaggressive lawyer behavior, but arguing that one must distinguish the criminal and civil contexts); William Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703 (1993) (suggesting that even proponents of less partisan lawyering "concede that the standard adversary ethic may be viable" in the criminal context).

[74] *See e.g.,* Tom Watson, *Thornburgh Memo Has Defense Bar Up in Arms,* MANHATTAN LAWYER, Oct. 3, 1989, at 4 (noting a defense lawyer's characterization of the Thornburgh memorandum as a "declaration of war on the defense bar"); Monroe Freedman, *Dirty Pool in the Prosecutor's Office*, TEXAS LAWYER, Oct. 1, 1990, at 26 (citing approvingly an A.B.A. resolution that "opposes any attempt by the Department of Justice unilaterally to exempt its attorneys from the ethical rules that apply to all attorneys"); Fred Strasser, *Thornburgh Exemption Is Rebuked; Direct Contact*, THE NATIONAL LAW JOURNAL, June 10, 1991, at 3 (noting defense attorneys' criticism of the "arrogance of the U.S. government"); *Judge Raps AG for "Arrogation of Power*," LEGAL TIMES, June 10, 1991, at 1 (citing a federal district court's characterization of the Thornburgh memorandum as "nothing less than a frontal assault on the legitimate powers of the court" and "a serious threat to the integrity of criminal justice proceedings in federal courts"); Daniel Klaidman, *Clinton Is Asked To Intervene on Rules Regarding Suspect Interviews; ABA, Defense Bar Want Delay in Codifying 'Thornburgh Memo',* THE RECORDER, Dec. 23, 1992, at 1 ((quoting New Mexico district judge Burciaga's statement that "[b]ecause this memorandum invites continuing unethical

The Reno Rule backtracked significantly from the federal government's initial position.[75] Advocates of state regulation ultimately won the day through adoption of the McDade Amendment.[76] And courts have resisted subsequent efforts by federal prosecutors to avoid state ethics requirements.[77]

The federal reform efforts on the civil side, in contrast, have met less resistance – at least less successful resistance. The Kaye Scholer law firm ultimately caved to the

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behavior, it must not be tolerated"); Marianne LaVelle, *Prosecutors' Plan To Bypass Counsel Fans Corporate Ire*, THE NATIONAL LAW JOURNAL, Oct. 11, 1993, at 17 (noting claims by members of the defense bar that the Reno Rule constituted "poorly conceived regulations" which failed to implement "respect for the rule of law").

[75] The Thornburgh memorandum sought to preempt all state professional rules governing D.O.J. attorneys and the Reno Rule initially proposed a regulation establishing a virtually unlimited pre-indictment right of D.O.J. lawyers to contact unrepresented parties. *See* Proposed Justice Department Rule on Communications with Represented Persons, 58 Fed. Reg. 39,976 (July 26, 1993) (detailing the early history of the proposed rule). The Justice Department subsequently withdrew the proposed regulation to allow for a more open comment period. *See* Proposed Justice Department Rule on Communications with Represented Persons, 59 Fed. Reg. 10,086 (March 3, 1994) (detailing the history of the proposal). It then adopted a more moderate regulation that reiterated its authority to preempt state ethics rules but limited the situations in which it would do so. *See supra* text accompanying note 27; *see also* Burke, *supra* note 51, at 1650-61 (arguing that the final Reno Rule represents a "compromise" concerning the exercise of D.O.J. authority).

[76] The McDade Amendment, formally known as the Citizens Protection Act, 28 U.S.C. §530B (2000), provided that attorneys for the federal government are subject to ethical standards in state "laws and rules."

[77] In *In re* Gatti, 8 P.3d 966 (Or. 2000), for example, federal prosecutors in Oregon unsuccessfully argued that they were exempt from state rules forbidding lawyers to engage in "deceit", despite the mandate of the McDade Amendment.

Office of Thrift Supervision regulation,[78] and that regulation and other regulations modeled after it have largely been accepted as well-founded.[79] The I.R.S. regulations and the core regulations promulgated through the Sarbanes-Oxley Act have quickly become entrenched. Arguably, the difference in the response to the changes in the criminal sphere reflect a recognition that the criminal paradigm emphasized by state codes deserves less deference in civil matters. Similarly, the content of the civil regulations may be evaluated more sympathetically because observers already have internalized a notion that extreme partisanship arguably appropriate in criminal representation[80] is less appropriate – and has sometimes already been modified[81] – in the civil context.

Alternatively, one can view the various recent federal regulations as implementing a broader notion that the states' unitary model of professional regulation is too monolithic. In other words, it fails to take into account important differences inherent in particular areas of practice – not just the differences between civil and criminal practice. The work of banking lawyers, tax lawyers, and securities lawyers, for example, may have peculiar attributes that justify imposing a higher responsibility to the public on these lawyers, at least when they are engaged in producing public

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[78] *See supra* text accompanying note 15.

[79] *See* William H. Simon, *Further Thoughts on Kaye Scholer*, 23 LAW & SOC. INQ. 365 (1998) (noting that other participants in a panel analyzing the government's regulation in the *Kaye, Scholer* case avoided disputing Simon's justifications because of their "agreement" that the government's position was "plausible prima facie and supported (though not unanimously) by authority"). The government's position that lawyers assume client duty of candor when acting as clients' agents in providing information has proven compatible with the lawyer's traditional advocate's role in other contexts.

[80] For example, because of constitutional guarantees applicable only to criminal defendants.

[81] For example, through broad discovery rules, requirements of candor to tribunals, and previous regulatory requirements that impose gatekeeper functions on lawyers.

filings.[82] Likewise, criminal prosecutors may be unique practitioners who should be governed by specialized rules.[83]

These two theoretical perspectives can account for some of the recent changes, but they are not perfect explanations for what has transpired in recent years. For example, the civil-criminal distinction would cause one to have predicted greater success for state efforts to protect attorney-client relationships by confining the exercise of federal prosecutorial subpoena power.[84] Yet these efforts, for the most part, failed.

Likewise, if the recent federal efforts to regulate conduct within particular fields of practice were based on an intention to create nuanced rules governing different specialties, one would have expected the changes to be implemented carefully, with a view to how the changes would affect the outlook and role of lawyers in other fields. That has not been the case.[85] Indeed, the rhetoric supporting reforms such as Sarbanes-Oxley has flowed in a relatively angry way against lawyers as a whole. It has not expressed a narrow view that limited sub-specialties of practice raise unusual issues.[86]

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[82] *See* Simon, *supra* note 16, at 255 ("the maximal duty [of disclosure] seems defensible in the banking context").

[83] *See generally* Fred C. Zacharias and Bruce A. Green, *The Uniqueness of Federal Prosecutors,* 88 GEO. L.J. 207 (2000) (arguing that federal prosecutors are unique in important respects relevant to professional regulation).

[84] For a history of the efforts to enforce rules modeled after Model Rule 3.8(f), *see, e.g.,* Fred C. Zacharias, *A Critical Look at Rules Governing Grand Jury Subpoenas of Attorneys*, 76 MINN. L. REV. 917, 917-25 (1992) and Zacharias, *supra* note 23, at 458-61.

[85] *See supra* text accompanying note 55.

[86] *See, e.g.,* the remarks by: Senator Michael Enzi, 148 Cong. Rec. S6556 (July 10, 2002) (" After Enron, it is clear we need some hard and fast rules, and not just an arcane honor code rarely adhered to, so the necessary measure of client duty is placed into the hearts and minds of the legal profession"); Senator Jon Corzine, 148 Cong. Rec. S6556 (July 10, 2002) ("The bottom line is this. Lawyers can and should

Thus, it probably goes too far to identify either the civil-criminal distinction or the desire for better nuancing among specializations of law as the root cause of the modern federal reforms. The reforms and the responses to the reforms do suggest a wavering, but perhaps growing, taste on the part of federal rulemakers for the notion that not all areas of practice should be regulated identically. But this stands in marked contrast to the impetus for the McDade Amendment, which in essence reaffirms the authority of states to act as prime regulators in the more general professional responsibility field.

V. THE FAILURE OF STATE REGULATION

There may be a far broader, and more significant, interpretation of recent developments. In adopting model ethics codes for adoption by the states, the American Bar Association membership expressly sought to reserve for lawyers the process of drafting professional regulation.[87] There are two explanations for this effort – one cynical, one less so. On the one hand, the A.B.A. may simply have been protecting the guild. More likely, the code drafters may genuinely have believed that lawyers best understand how attorneys operate and need to operate for the system to work efficiently. The A.B.A. therefore may have taken the position that a body of lawyers is in the best position to write the rules. Whatever the reason, the A.B.A. unashamedly expressed its hope that adoption and implementation of the model codes would fend off efforts by non-bar affiliated regulatory institutions to regulate the practice of law.

For a long time, this view has prevailed, though

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play an important role in preventing and addressing corporate fraud"); Senator John Edwards, 148 Cong. Rec. S5652 (June 18, 2002) (noting that lawyers' responsibilities to clients are bounded by the limits of the law, but that some lawyers are forgetting those limits).

[87] *See, e.g.,* Model Rules, Preamble ("To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated"). Of course, the adoption and administration of state codes ordinarily are supervised by state supreme courts. However, the courts typically rely, almost exclusively, on the work of state bar organizations.

imperfectly.[88] Arguably, however, the recent developments reflect a broad perception that traditional state regulation of lawyers is failing and that nontraditional regulators should enter the field. Support for this conclusion is found in the Sarbanes-Oxley Act. The legislation simply noted Congress's displeasure with the inadequacy of existing regulation of securities lawyers and instructed the S.E.C. to identify and adopt appropriate regulations.[89] The Act, in short, represented a statement that Congress wished the federal government to step in to fill a regulatory void.[90] The innovations of the Office of Thrift Supervision, I.R.S., and Department of Justice can similarly be viewed as the actions of individual federal agencies that observed the same failure of state regulation within their narrow spheres.

Of course, it is too early in the cycle of federal regulation to determine whether the recent developments are symptomatic of a broad belief that state professional regulation, as a whole, has failed. Examples of limited federal regulation of lawyers have long existed, without leading to an overall invasion of traditional state

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[88] As discussed *supra* text accompanying note 2, federal laws always have regulated lawyers' professional activities to some extent. *See also* Green, *supra* note 2 (discussing how criminal law regulates lawyers in their professional activities and affects professional norms).

[89] *See supra* note 54.

[90] *See, e.g.,* Kane, *note* 32, at 17 (arguing that the "latent message [of the Sarbanes-Oxley Act] seems to be: 'If you cannot regulate yourselves and abide by the rules you have crafted, then we (Congress) will do it for you'"); Abraham C. Reich and Michelle T. Wirtner, *What Do You Do When Confronted with Client Fraud,* 12 BUS. L. TODAY 39 (Sept./Oct. 2002) (discussing Sarbanes-Oxley and stating "Let us be frank about the situation: the legal profession is in danger of losing its right of self-governance"); Stephanie R.E. Patterson, Note, *Section 307 of the Sarbanes-Oxley Act: Eroding the Legal Profession's System of Self-Governance?,* 7 N.C. BANKING INST. 155, 175 (2003) (concluding from Sarbanes-Oxley that "the legal profession could be in danger of losing its privilege of self-regulation").

prerogatives.[91] At least one recent federal statute undermines the claim that the local control needs replacement (or supplementation). In overruling federal agency attempts to supplant state regulation, the McDade Amendment directly recognized and enhanced the authority of existing state codes.

VI. THE LIMITED FAILURE OF STATE REGULATION

The recent trends might be explained through a related, but narrower view of the failure of state regulation. Arguably, proponents of federal regulation remain willing to accept the general viability of state professional regulation, but perceive that state regulators have a fundamentally flawed approach to limited aspects of regulation. Thus, for example, federal regulators may believe that states overemphasize the notion of partisanship by lawyers or the importance of attorney-client confidentiality, but that states deserve deference with respect to most other foci of professional regulation. Under this view, federal institutions should be prepared to supplant or supplement state regulation within the narrow areas in which state regulators fail, but should leave the bulk of state regulation intact.

This approach helps explain such developments as the Sarbanes-Oxley, Office of Thrift Supervision, and Justice Department regulations. Each of these reflects a sense that state regulation overemphasizes lawyer alliance with client interests in a way that fails to acknowledge countervailing societal interests: accurate disclosures in the securities and banking fields, and criminal law enforcement. The federal regulations, however, are tailored to that failing, rather than attempting to supplant state regulation as a whole.

In one sense, this explanation seems unsatisfying. The federal regulations in question actually do little to correct the alleged flaw in state approaches, because the regulations limit themselves to conduct by federal lawyers engaging in narrow aspects of federal practice. They do not address the underlying deficiency in the state approach – for example, an overemphasis on partisanship – as it applies to lawyer practice more generally. Thus, it seems unfair to characterize the actions of the federal agencies as implementing a conclusion that outside regulation is necessary to remedy an institutional failing of state control of lawyers.

On the other hand, the limitations of the actions which the federal agencies have taken do flow naturally from the

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[91] *See supra* text accompanying note 9.

limitations on the agencies' own authority to act. Presumably, Congress could adopt broad legislation preempting particular aspects of state professional regulation,[92] but individual federal agencies cannot. By exercising the legitimate authority that they do have, the federal agencies arguably are using their regulatory power as a bully pulpit. As more federal regulations focus on the same aspects of lawyer practice and preempt the traditional state approaches to those aspects of practice in limited spheres, states may need to revisit their general approaches. Alternatively, to the extent state regulators decline to do so, lawyers practicing in the fields of the federal regulations will need to internalize and reconcile the multiple roles prescribed for them. The difficulty in doing so may, in and of itself, induce pressures for reform at the state level.

VII. NO CHANGE AT ALL

The simplest explanation for the modern federal developments is that they reflect nothing significant. In other words, no global changes in professional regulation or in the interaction between state and federal institutions has occurred,
or is occurring. The bar has overreacted to routine, limited federal regulation and incorrectly has perceived it to be symptomatic of some broad trend.

The Sarbanes-Oxley proposals, for example, can be viewed as very modest. They simply adopt typical state rules governing corporate counsel in the federal arena[93] and give them slightly more teeth by elevating lawyers' duty to take remedial measures from permissive to mandatory. Had the S.E.C. adopted the noisy withdrawal proposal, that might have been a significant change, but the S.E.C. did not.

There are other examples in which commentators may have exaggerated the extent of federal changes. Had the Thornburgh memorandum been implemented fully, for example, it might have had a dramatic effect on traditional state regulation. But, like the Sarbanes-Oxley proposals, it too was moderated. More poignantly, the Office of Thrift Supervision regulation that

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[92] *See* Zacharias, *supra* note 7, at 337 (noting that Congress has constitutional authority to nationalize professional regulation governing lawyers).

[93] That is, state rules governing lawyers for corporations modeled after Model Rule 1.13.

gave rise to the *Kaye, Scholer* case arguably was entirely consistent with traditional state regulation. Nothing in state codes eliminates the status of lawyers as client agents, charged with the clients' responsibilities when they act in the clients' stead.[94] Finally, if the McDade Amendment proves nothing else, it establishes that strong sentiment in favor of traditional state regulation continues to exist among federal regulators.

VIII. A PROCESS OF NEGOTIATION

The best explanation for the recent events may be an amalgam of the different explanations offered above. The federal developments have changed traditional professional regulation in limited ways. They suggest perceived flaws in both narrow and broad aspects of the role that state regulation prescribes for lawyers. And they do emphasize the existence of federal power in the legal ethics arena and the need for more particularized regulation. Yet in avoiding wholesale revamping of traditional regulation, the federal actions seem more like an invitation to negotiate about professional responsibility regulation than an effort to supplant the existing regime.

Negotiation, of course, can take many forms other than direct talks about a specific course of conduct. It may consist of lobbying in the context of proposed legislation or regulation. It may reflect action, counter-action, and compromise. It may involve submitting a dispute to a neutral arbitrator, such as the courts. Or it may simply take the form of parallel proceedings by governmental and bar institutions that serve to mutually educate the institutions.[95]

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[94] In hindsight, what proved most problematic about the *Kaye, Scholer* case was not O.T.S.'s regulation itself, but rather the heavy-handed way in which O.T.S. enforced it. *See, e.g.,* Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1122, 1189 n.36 (noting the pressure exerted by the government that induced settlement in *Kaye, Scholer*); Simon, *supra* note 79, at 365, 367-68 (noting that "obsession" of commentators on the freezing of assets in the *Kaye, Scholer* case).

[95] Thus, for example, the Sarbanes-Oxley Act and the FATF proposals alerted the bar to deep public concerns about continuing lawyer involvement in client wrongdoing. The response of the A.B.A. Task Force on Gatekeeper Regulation and

The Department of Justice's response to A.B.A. and state efforts to adopt attorney-subpoena and no-contact rules,[96] for example, produced heated public dialogue,[97] followed by judicial and legislative intervention,[98] followed by

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the Profession, stating strong advance opposition to "any law or regulation that . . . [would] compromise the lawyer-client relationship or the independence of the bar," highlighted the bar's concerns. A.B.A. TASK FORCE ON GATEKEEPER REGULATION AND THE PROFESSION, REPORT TO THE HOUSE OF DELEGATES (approved by the A.B.A. House of Delegates, Feb. 2003). Having alerted one another to, and educated one another about, the underlying differences in outlook, the relevant actors, if they wish, are now in a position to reduce the conflict and to address both sets of concerns constructively.

[96] Thornburgh memorandum, *supra* note 25.

[97] *See, e.g.,* 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, 311-15, 333-57, 371-85 (1992) (discussing undervalued prosecutorial interests underlying the no-contacts and grand jury subpoena rules and criticizing the bar's position); Green, *supra* note 22 (questioning the D.O.J.'s "confrontational attitude" with respect to Model Rule 4.2); Nancy J. Moore, *Intra-Professional Warfare Between Prosecutors and Defense Attorneys: A Plea for an End to the Current Hostilities*, 53 U. PITT. L. REV. 515 (1992) (discussing and criticizing "warfare" between the D.O.J. and the A.B.A. regarding Rules 3.8(f) and 4.2); Zacharias, *supra* note 84, at 944-51 (criticizing the Bar's unilateral position in 3.8(f) and identifying possible alternative reforms); Zacharias, *supra* note 22, at 289-91 (questioning both sides' one-sided positions with respect to 3.8(f)).

[98] *See, e.g.,* United States v. Ferrara, 54 F.3d 825 (D.C. Cir. 1995) (holding that the Thornburgh Memorandum did not constitute preemptive federal "law"); Whitehouse v. United States District Court, 53 F. 3d 1349 (1st Cir. 1995) (upholding a federal district court's adoption of a state anti-subpoena rule with respect to trial subpoenas but not with respect to grand jury subpoenas); United States v. Lopez, 4 F.3d 1455, 1461 (9th Cir. 1993), *aff'd*, 106 F.3d 309, (9th

compromises by the A.B.A. in its drafting process (to give prosecutors a voice)[99] and compromises by the Department in its

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Cir. Cal. 1997) (requiring prosecutorial compliance with California's no-contacts rule); Baylson v. Disciplinary Bd., 975 F.2d 102, 105 (3d Cir. 1992) (rejecting a district court's authority to adopt a state rule limiting grand jury subpoenas), *cert. denied*, 507 U.S. 984 (1993); United States v. Ryans, 903 F.2d 731, 739 (10th Cir.) (interpreting the no-contacts rule as not applying to investigative stages), *cert. denied,* 498 U.S. 855 (1990); Kolibash v. Committee on Legal Ethics, 872 F.2d 571, 575 (4th Cir. 1989) (noting that the Supremacy Clause may bar state enforcement of state's anti-subpoena rule against federal prosecutors); *In re* Doe, 801 F. Supp. 478, 485 (D.N.M. 1992) (rejecting a prosecutor's Supremacy Clause argument). The cases were followed by Congress's adoption of the McDade amendment, which ratified the application of state rules to professional prosecutors. Citizens Protection Act, 28 U.S.C. §530B (2000); *see also* Subcomm. on Gov't Information, Justice, Agriculture, House Comm. on Gov't Operations, *Federal Prosecutorial Authority in a Changing Legal Environment: More Attention Required*, H.R. Rep. No. 986, 101st Cong., 2d Sess. at 32 (1990) ("We disagree with the Attorney General's attempts to exempt departmental attorneys from compliance with the ethical requirements adopted by the State bars to which they belong and in the rules of the Federal Courts before which they appear").

[99] The A.B.A. Standing Committee on Ethics and Professional Responsibility removed its proposal to clarify Model Rule 4.2 from the calendar of the A.B.A. House of Delegates' August 1994 calendar meeting because the U.S. Department of Justice asked to comment on the proposal. *Proposal to Amend Rule 4.2 is Taken Off ABA Calendar,* 10 ABA/BNA LAWS. MAN. ON PROF'L CONDUCT 161 (June 15, 1994). The Committee subsequently amended its proposed comment to Rule 4.2 to address the concerns that D.O.J. raised. *ABA Groups Submit Proposals to Change Three Model Rules,* 11 ABA/BNA LAWS. MAN. ON PROF'L CONDUCT 149-150 (May 31, 1995). In later years, a D.O.J. attorney was appointed to the ABA's Ethics 2000 Committee, which was charged with deciding whether substantial changes should be made to the Model Rules. *Model Rules – "Ethics 2000"Committee,* 13 ABA/BNA LAWS. MAN. ON PROF'L CONDUCT 168 (June 11, 1997). The Ethics Committee and the Ethics 2000

position.[100] Likewise, the Sarbanes-Oxley regulations began with an extreme proposal[101] that prompted comment, public outcry, and then a compromise by the S.E.C. that invited further comment and dialogue in anticipation of further rulemaking by both the S.E.C. and the states.[102]

A more interesting example is the Office of Thrift

Commission both held extensive discussions with D.O.J. before recommending substantial amendments to the text and comment of Model Rule 4.2. *Model Rules: ABA Ethics Groups Recommend Changes to Model Rule on Ex Parte Communications,* 15 ABA/BNA LAWS. MAN. ON PROF. CONDUCT 347 (July 21, 1999). Proposed amendments to Model Rule 4.2 were withdrawn specifically in response to the Department's objections to the original wording. ABA Annual Meeting, *Regulation of Bar: ABA Refuses to Change Ethics Rules Unless Studies of MDPs Dispel Concerns,* 15 ABA/BNA LAWS. MAN. ON PROF. CONDUCT 399 (August 18, 1999).

The State Conference of Chief Justices and the D.O.J. also engaged in separate, direct talks. *See* Pierce, *supra* note 49, at 125 n.6 ("The Chief Justices' Discussion Draft was the result of negotiations between the Chief Justices' Special Committee on Rule 4.2 of the Model Rules of Professional Conduct . . . and the D.O.J.") (citing Memorandum from Special Comm. on Rule 4.2 of the Model Rules of Prof'l Conduct to Members of the Conference of Chief Justices (Dec. 19, 1997)).

[100] In addition to compromising on the general preemption issues and the scope of D.O.J.'s preemption of state no-contact rules, *see supra* note 75, the Reno Rule appeared to accept the A.B.A.'s 1995 moderation of the attorney-subpoena rules. *See supra* note 21. The D.O.J. subsequently has worked with the A.B.A., the Conference of Chief Justices, and the Federal Judicial Conference in exploring regulatory and legislative solutions to its concerns about the substance of individual rules and about the effect of disuniformity in state professional regulation upon federal prosecutors.

[101] *See* Proposed Rule, *supra* note 31, discussed *supra* text accompanying note 30-33.

[102] *See, e.g.,* Final Rule*, supra* note 33, Executive Summary at *7 ("Accordingly, we are extending the comment period on the 'noisy withdrawal' and related provisions of the proposed rule and are issuing a separate release soliciting comment on this issue").

Supervision's conduct in the *Kaye Scholer* case. After the public outcry and O.T.S.'s success in recouping a substantial sum from the *Kaye Scholer* law firm, one might have expected two results: (1) that O.T.S. would pursue other firms vigorously, and (2) that firms would seek to litigate O.T.S.'s authority to force them to adopt roles antagonistic to their clients. What actually has occurred is a form of equipoise. Few, if any, enforcement actions or challenges have been publicized. Lawyers appear to have incorporated the specialized rules into the more general partisan role that they continue to implement in other contexts. In exchange, O.T.S. appears to have recognized the dangers of overemphasizing its power to make and enforce its rules.

What these examples suggest is that the sky is not falling, but neither is the status quo unchanged. The force of traditional state regulation continues, but lawyers and state regulators have had to recognize limits to the traditions. Similarly, the federal government has identified areas requiring change, but has not done so in an unyielding fashion. As the number of federal reforms increases, the invitation to state regulators to reconsider and negotiate traditional approaches inevitably will become more significant.

IX. CONCLUSION

Whenever the bar or other commentators criticize developments in professional regulation, it is important to place those criticisms in context. The tendency of critics is to decry any change in the status quo as undermining tradition.[103] Reforms typically are characterized as precursors

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[103] A.B.A. Standing Comm. on Ethics and Prof. Resp. and Section of Criminal Justice, *Report to the House of Delegates* 5 (Feb. 1990) (arguing that attorney subpoenas "pos[e] 'one of the single greatest threats to the defense bar and to defendants' ability to obtain criminal representation'"), quoting ASS'N OF THE BAR OF THE CITY OF NEW YORK, REPORT ON THE ISSUANCE OF SUBPOENAS IN CRIMINAL CASES BY STATE AND FEDERAL PROSECUTORS 1 (July 1985)); Bettina Lawton Alexander, *et al., Protecting Yourself and Your Firm in the Representation of Insured Depository Institutions: Lessons to be Learned from the Kaye, Scholer Case*, C873 ALI-ABA 299, 310 (1993) ("One of the most disturbing things about the Kaye, Scholer C&D is the fact that certain of its terms seem to impose duties and standards that

of dramatic upheaval in professional regulation as a whole.[104]

The recent federal reforms have been somewhat unusual in their number. With the benefit of the calm that accompanies hindsight, it is fair to conclude that none of the reforms, individually, eviscerate states' traditional ability to regulate the practice of law. Taken together, however, they may signify trends that will continue in the future.

This essay has attempted to identify the list of possible trends which the recent reforms might represent. Commentators – mostly academics – have presented theories about core issues in professional regulation and predictions about the future of

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are inconsistent with, and in some cases perhaps contradictory to, the established ethical obligations of lawyers"); Lawrence G. Baxter, *Fiduciary Duties in Federal Banking Regulation*, 56 LAW & CONTEMP. PROBS. 7 (1993) (arguing that the O.T.S. in *Kaye, Scholer* introduced a "novel" fiduciary duty); Anthony E. Davis, *Professional Responsibility: Who Should Regulate Lawyers?,* N.Y.L.J., Sept. 9, 2002, at 3 (arguing that the proposed S.E.C. Rule would "undermine state regulation"); Keith R. Fisher, *Neither Evaders nor Apologists: A Reply to Professor Simon*, 23 L. & SOC. INQUIRY 341, 344 (1998) ("[O.T.S.]seemed to be announcing, albeit in a rather indirect fashion, new standards of attorney conduct and responsibility that constituted a significant departure from professional norms theretofore (and, for the most part, still) extant"); Guy Harrison, *Protecting Our Profession*, 65 TEX. B.J. 678 (2002) (arguing that the Sarbanes-Oxley Act threatens "bedrock principles" of the legal profession).

[104] Keith R. Fisher, *Nibbling on the Chancellor's Toesies: A "Roguish" Concurrence with Professor Baxter*, L534 ALI-ABA 397, 400, 407-410 (1993) (arguing that O.T.S.'s standards undermine effective lawyering); William J. Genego, *The New Adversary,* 54 BROOK. L. REV. 781, 816-17 (1988) (arguing that the threat of attorney subpoenas by prosecutors might well drive criminal defense lawyers from practice); Loomis, *supra* note 32, at 1 (reporting the claim that the S.E.C. is "bound and determined to take advantage of a windfall opportunity to make marionettes out of the lawyers"); *cf.* John C. Coffee, *Myth & Reality: SEC's Proposed Attorney Standards*, N.Y.L.J., Jan. 16, 2003, p.5 (characterizing bar association criticisms of the Sarbanes-Oxley Act as showing "Chicken Little has never been more adamant that the sky is falling").

professional regulation which some or all of the federal reforms fit. Only by placing the federal reforms in the context of these broader themes can we begin to evaluate their actual and potential significance.

This essay has concluded that no single explanation for the reforms is possible. The reforms do not neatly fit a uniform pattern that reflects an overarching change in regulatory approaches or in society's attitudes towards the relative merits of state and federal regulation. They do, however, suggest a series of questions about traditional regulation that the federal actors have opened for discussion. The best view of recent events is that they have begun a process of negotiation with respect to particular substantive issues, potential new approaches, and the relative competence of different institutions to regulate different aspects of legal practice. Federal regulators are only likely to impose their will in unilateral fashion if the bar and state regulators limit themselves to wringing their hands about recent events and ignore the invitation to sit at the negotiating table.