



ST. MARY'S
UNIVERSITY

St. Mary's Law Journal

Volume 50 | Number 2

Article 4

8-2019

Making the Modern American Legal Profession, 1969–Present

Michael Ariens
St. Mary's University

Follow this and additional works at: <https://commons.stmarytx.edu/thestmaryslawjournal>

 Part of the [Law and Society Commons](#), [Legal Ethics and Professional Responsibility Commons](#), [Legal History Commons](#), and the [Legal Profession Commons](#)

Recommended Citation

Michael Ariens, *Making the Modern American Legal Profession, 1969–Present*, 50 ST. MARY'S L.J. 671 (2019).
Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol50/iss2/4>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Law Journal by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact jllloyd@stmarytx.edu.

ESSAY

MAKING THE MODERN AMERICAN LEGAL PROFESSION, 1969–PRESENT

MICHAEL ARIENS*

I.	Introduction.....	671
II.	The Road to Modernity.....	682
III.	Modern Times	686
	A. Economics and Structure	686
	B. Modern Litigation	697
	C. The Bureaucratization of Legal Ethics	704
IV.	Conclusion	709

I. INTRODUCTION

The adoption, without amendment or dissent, of the proposed Code of Professional Responsibility (Code) by the American Bar Association (ABA) at its annual meeting in August 1969 may symbolize a high water mark in the profession’s sense of its social worth.¹ A Special Committee on Evaluation of Professional Standards was created in mid-1964 by then-ABA President Lewis F. Powell, Jr.² The Committee worked in secret for four

* Professor, St. Mary’s University School of Law.

1. *Proceedings of the 1969 Annual Meeting of the House of Delegates*, 94 A.B.A. ANN. REP. 378, 389–92 (1969).

2. *Proceedings of the 1964 Annual Meeting of the House of Delegates*, 89 A.B.A. ANN. REP. 365, 381–83 (1964).

years, finally presenting a tentative draft to 550 lawyers in October 1968 and a proposed draft to 20,000 lawyers in January 1969.³ The responses to those drafts brought some relatively minor changes to the Code, changes sufficient to make it possible for the ABA House of Delegates to adopt it as presented.

The Code was structured to reinforce the positive, social good private practice lawyers might, and did, accomplish in representing their clients. The private lawyer's duty to represent clients diligently and zealously was at the forefront of the Code's ideology, though that duty was couched in terms of its social utility.

The Code was shaped as a tripartite structure: it consisted of nine broadly phrased Canons. In each Canon, a series of statements called Ethical Considerations emphasized what a lawyer might consider (and choose to do) to serve both client and society. These Considerations were "aspirational in character."⁴ Only after stating those Ethical Considerations did the Code list a number of Disciplinary Rules—standards that all lawyers were required to meet or be subject to discipline. The Disciplinary Rules were thus "mandatory in character."⁵

This era of contentment⁶ continued for a few years. Most state supreme courts and state bar associations adopted the Code as law, usually with few substantive amendments.⁷ The era of discontent arrived during the lawyers' scandal of Watergate⁸ in 1973 and 1974. Lawyers were attacked from all corners for serving the interests of their clients to the exclusion of the public. Lawyers offered both a *mea culpa* and a story that contradicted this narrative: lawyers were imperfect but did their best to improve society. In particular, legal elites refuted the suggestion that lawyers acted simply as

3. See Michael Ariens, *American Legal Ethics in an Age of Anxiety*, 40 ST. MARY'S L.J. 343, 433–43 (2008) (discussing the history of the Code drafted by the Wright Committee and its adoption by states).

4. *Id.* at 439.

5. *Id.*

6. See Michael Ariens, *The Agony of Modern Legal Ethics, 1970–1985*, 5 ST. MARY'S J. LEGAL MAL. & ETHICS 135, 159–71 (2014) (presenting a study of those discontented at the time).

7. By 1972, forty-three states, as well as the District of Columbia, adopted the Code as law. Another four state bar associations adopted the Code as applicable to members. Earl F. Morris, *Report of Special Committee to Secure Adoption of the Code of Professional Responsibility*, 97 A.B.A. ANN. REP. 740, 741 (1972).

8. See Richard B. Allen, *Watergate—A Lawyers' Scandal*, 60 A.B.A. J. 1257, 1257 (1974) (decrying lawyer involvement in Watergate); James D. Fellers, *President's Page*, 61 A.B.A. J. 529, 529 (1975) (noting "Watergate was characterized as a lawyer's scandal"); see also Ariens, *supra* note 6, at 174–77 (discussing the impact of Watergate on the legal profession).

their clients' hired guns.⁹ Insofar as lawyers acknowledged this widespread criticism, they often blamed an overcrowding of the profession, which made underemployed lawyers willing to engage in unethical behavior.¹⁰

There was a small truth in the “overcrowding” thesis. Lawyers had captured significant surplus value in the 1960s and early 1970s,¹¹ and their incomes rose accordingly.¹² The profession increased by over 50% during the 1970s,¹³ and the median real income (that is, adjusted for inflation) of lawyers dropped significantly.¹⁴ This decline in real income affected more than those attorneys in the bottom half. A study of large law firm partners found a decline in real income from the mid-1970s through the mid-1980s.¹⁵ Economic conditions continued to affect the income of lawyers as the recession of the early 1980s led to layoffs and diminished job prospects for lawyers.¹⁶

When the economy turned positive after this recession, the profession as a whole enjoyed great economic success. Legal services continued to take an increasing percentage of Gross Domestic Product (GDP).¹⁷ However,

9. See Michael Ariens, *Sorting: Legal Specialization and the Privatization of the American Legal Profession*, 29 GEO. J. LEGAL ETHICS 579, 591 (2016) (discussing legal elite response to Watergate).

10. See Reece Smith, Jr., *Report of the Task Force on Utilization*, 97 A.B.A. ANN. REP. 818, 819 (1972) (reporting ABA charge to task force was to alleviate lawyer worries about “the increase in the number of new entrants into the profession”); see also *Special Report, The Job Gap for College Graduates in the '70s*, BUS. WK., Sept. 23, 1972, at 48, 51 (concluding the outlook for lawyers is grim).

11. B. Peter Pashigian, *The Number and Earnings of Lawyers: Some Recent Findings*, 1978 AM. B. FOUND. RES. J. 51, 62–63 (1978).

12. *Id.* at 67 (“The rise in new admissions since 1963 is a response to the rise of the legal earnings above long-run equilibrium earnings.”).

13. See BARBARA A. CURRAN ET AL., *THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE UNITED STATES LEGAL PROFESSION IN THE 1980S* 4 (Am. Bar Found., 1985) (noting an increase from 355,242 in 1970 to 542,205 in 1980).

14. See Richard H. Sander & E. Douglass Williams, *Why Are There So Many Lawyers?: Perspectives on a Turbulent Market*, 14 L. & SOC. INQUIRY 431, 448 (1989) (showing the lawyer’s median income greatly dropped during the 1970s).

15. See MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS* 52–53 (1991) (commenting on the shift within law firms as more profit-oriented though working more hours does not automatically result in an increased income).

16. See Peter W. Bernstein, *Profit Pressures on the Big Law Firms*, FORBES, Apr. 19, 1982, at 86–87 (commenting on the 1980s recession and its direct correlation to diminished job prospects); *The Big-Law Business*, NEWSWEEK, Apr. 16, 1984, at 87 (discussing the changing climate of the 1980s for lawyers and big firms).

17. See Marc Galanter, *Planet of the APs: Reflections on the Scale of Law and Its Users*, 53 BUFF. L. REV. 1369, 1378 (2006) (“[T]he legal services industry . . . grew from about four-tenths (0.4%) of one percent of the Gross Domestic Product (GDP) in 1978 to about one and eight-tenths percent (1.8%) in 2003.”).

the distribution of this added income was uneven at best and distorted at worst. From the 1970s on, private practice lawyers were increasingly sorted into starkly different income categories, often based on the clients they served.¹⁸ Those lawyers serving corporate clients drew an ever-increasing share of all legal services. When adjusted for inflation to the value of a dollar in 2000, the amount lawyers received from business entities increased from \$8.64 billion in 1967 to \$79.61 billion in 2002.¹⁹ That overall prosperity continued until the economic devastation of the Great Recession in 2008, during which demand for legal services cratered and thousands of lawyers were fired.²⁰

This essay argues that the modern American legal profession began in the aftermath of the ABA's adoption of the Code of Professional Responsibility. Of course, much of the work of lawyers has remained unchanged for well over a century. Lawyers continue to represent clients in trials as zealous advocates in civil and criminal cases. Lawyers prepare documents to facilitate real estate transactions, draft wills and trust documents, organize and counsel corporations or other business entities, spearhead re-organization efforts in bankruptcy courts, and assist clients before administrative agencies. What has changed in the American legal profession over the past half-century is best summarized as the solution and problem of "scale."

The compounded demand for legal services by corporations from the late 1960s was fueled by the adoption of ever-more complex laws, which applied to ever greater social domains. The generation of new legal problems in applying the law to the actions of private actors often required innovative

18. See BENJAMIN H. BARTON, *GLASS HALF FULL: THE DECLINE AND REBIRTH OF THE LEGAL PROFESSION* 5–6 (2015) (noting divergence since the 1960s in income pattern for law firm partners and sole practitioners); JOHN P. HEINZ ET AL., *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR* 160 (2005) (observing correlation of lawyer's clients with lawyer income); Don J. DeBenedictis, *Firings to Continue*, *ABA J.*, Mar. 1992, at 24, 24 (reporting firing of associates and partners during recession of 1991–1992); see generally Michael Ariens, *Ethics in the Legal Industry*, 51 *CREIGHTON L. REV.* 673 (2018) (discussing economics of the legal profession from the 1980s to the Great Recession).

19. See Galanter, *supra* note 17, at 1383 (charting the increasing amounts lawyers receive from business entities).

20. See Eli Wald, *Foreword: The Great Recession and the Legal Profession*, 78 *FORDHAM L. REV.* 2051, 2051 n.3 (2010) (noting 5,632 lawyers and 8,715 staff members fired from large law firms from 2008 through January 2010); see also Bernard A. Burk & David McGowan, *Big But Brittle: Economic Perspectives on the Future of the Law Firm in the New Economy*, 2011 *COLUM. BUS. L. REV.* 1, 29 (noting many fired "staff" included lawyers as well as nonlawyers).

solutions. This demand-side need led law firms, particularly those serving corporations, to open new practice areas and lawyers to define more narrowly their particular expertise. Large law firms concluded they needed to grow at a quickened pace in order to meet the needs of their present and future corporate clients. Scale was thus intended in part to solve the problem of increased demand for legal services by corporate clients. Scale, in terms of size and specialty, was also intended to provide firms a competitive edge in an era of increased competition among legal service providers.²¹ Thus, size mattered. A competitive advantage would offer some protection in law firm pricing, and thus in lawyer-partner profits and income. A firm marketing its expertise specific to the needs of a prospective client might claim the likelihood of excellent results at an efficient cost. This idea was not new in the early 1970s.²² However, the increased demand for an ever-widening array of legal services has led lawyers and firms to claim more particular specialties.²³ The scale of specialization has also affected how lawyers signal their particular expertise.²⁴

The solution of scale has generated unintended problems. For example, specialization frayed the already loose ties among lawyers in firms (especially large firms) and strengthened the bonds between lawyers and clients.²⁵ The corporate need for often-mutating, specialized legal services has led large law firms to grow much more quickly than the profession overall, and to see growth as the solution to competition.²⁶ The intense focus on growth to protect profits per partner reoriented the way in which lawyers understood

21. See Michael Ariens, *Know the Law: A History of Legal Specialization*, 45 S.C. L. REV. 1003, 1058 n.313 (1994) (noting increased competition among law firms).

22. See *id.* at 1009 (“In the 1960s, the pressure to permit recognition of specialties intensified By the end of the 1970s, the ABA adopted a *Model Plan of Specialization* . . .”).

23. See *id.* at 1038 (“[T]he most significant fact about the modern metropolitan bar was that it had moved mass-wise out of court work, out of a general practice akin to that of the family doctor, into highly paid specialization in the service of large corporations.” (quoting K.N. Llewellyn, *The Bar Specializes—With What Results?*, 167 ANNALS AM. ACAD. POL. & SOC. SCI. 177, 177 (1933))).

24. One example is the 2018 *Best Lawyers* Texas survey, an annual special advertising supplement to the *Dallas Morning News* and the *Houston Chronicle*, which recognizes peer-evaluated experts in 145 practice areas, including “Energy Regulatory Law,” a category distinct from “Energy Law,” “Biotechnology and Life Sciences Practice,” and “Corporate Governance and Compliance Law.” 2018 *Survey Results Texas*, BEST LAW., May 31, 2018, at 8, 8–12.

25. See Ariens, *supra* note 21, at 1038 (contemplating the observation of Adolf A. Berle, Jr. that specialization turned the lawyer from a public-minded actor to one whose “private stock in trade [could] be exploited for his private benefit” (quoting A.A. Berle, Jr., *Modern Legal Profession*, in 9 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 340, 344 (Edwin R.A. Seligman et al. eds., 1933))).

26. See *id.* at 1035 (observing the swift growth of firms due to the evolution of specialization).

the purpose of their work. Lawyers have turned from the view that the practice of law embeds ideals of professionalism to the view that the practice of law is just another industry in which profits are to be maximized.²⁷ The former emphasizes the limits of the market on the actions of lawyers. The latter focuses relentlessly on competitive economic advantages. The focus on competitive advantage has led law firms to embrace scale. It is also why growth among large law firms over the past forty years has become an end in and of itself. Size allows law firms to present to corporate clients the claim that they can perform any legal (and law-related) task.

The emphasis on growth has had its own concussive effects. Finding lawyers who possess expertise demanded by clients has fostered the rise of law firm mergers²⁸ and lateral hiring,²⁹ particularly of “rainmaker” partners.³⁰ Rainmakers demanded massive pay packages. Those income guarantees must be paid by someone, and often that someone was a partner who was less economically valuable to the firm.³¹ Those valued less were shown the door, made income-only partners, or had their income slashed. The rise of the rainmaker era of the 1970s and 1980s was a drastic change from the 1960s.³² And as large law firms competed against one another exclusively on the metric of profits per partner, associates looked to obtain their share in the form of higher pay.³³ Because growth was tied to strength, and strength to firm value to the client, large firms showed their financial

27. See William D. Henderson, *Rise and Fall*, AM. LAW., June 2014, at 56 (noting sole metric of success in large law firms has been profit-maximization); see also Ariens, *supra* note 18 (discussing economics of the legal profession from the 1980s to the Great Recession).

28. See Leslie A. Gordon, *Make Me a Match*, ABA J., June 2017, at 49, 50 (discussing law firm mergers).

29. An early example is explored in Steven K. Brill, *Building a Law Firm—Fast*, ESQUIRE, May 23, 1978, at 10, 11. See also KIM ISAAC EISLER, SHARK TANK: GREED, POLITICS, AND THE COLLAPSE OF FINLEY KUMBLE, ONE OF AMERICA'S LARGEST LAW FIRMS 192 (1990) (recounting rise and fall of large firm built on hiring lateral partners).

30. *Rainmaker*, BLACK'S LAW DICTIONARY (10th ed. 2014) (“A lawyer who generates a large amount of business for a law firm”). The word is traced to 1971. *Id.*

31. See ERWIN O. SMIGEL, THE WALL STREET LAWYER 58 (1964) (noting challenges that arise when incorporating new legal talent).

32. See *id.* (noting value and attention given to young new hires over older partners); PAUL HOFFMAN, LIONS IN THE STREET: THE INSIDE STORY OF THE GREAT WALL STREET LAW FIRMS 59 (1973) (“As the client becomes institutionalized, he's less subject to the control of one man, and as a firm grows, the rainmaker's value is reduced.”).

33. See Burk & McGowan, *supra* note 20, at 20–21 (noting new associate pay over time).

strength by matching the highest salary offer made to any new associate.³⁴ Increased costs meant higher bills for clients. Both hourly billing rates and minimum annual billable hour requirements rose to pay for a more expensive cost structure.³⁵ That rise meant less time for partners or other experienced lawyers to mentor new and junior associates (and less time for the associates to be mentored). Increased costs also meant increased borrowing by large law firms. When the economy would sour, indebted law firms went broke. When the economy really soured in 2008, more firms dissolved. Over two dozen law firms went bankrupt from the mid-1980s to the present, including eighteen from 2008–2012.³⁶

Scale remains the dominant response to competition in the modern era. Watergate affected the psychology of the legal profession, and had some effect concerning the manner in which lawyers perceived their duties to clients and to society.³⁷ It was not, however, the catalyst of modernization. Modernization was nourished by a turn to maximizing lawyer income, in light of the economically challenging times after Watergate through about 1983.³⁸ Economically challenging times drew lawyers closer to their clients and away from the idea that they acted as social trustees as well as private sellers of legal services.³⁹ This appears especially the case for lawyers and law firms that represent corporations, who are the clear economic winners in the modern legal profession.

The larger profession's desire to maximize income has been a dominant but not uniform theme among modern lawyers. Many lawyers and judges have attacked the privatization model with a call for a return to, or

34. See *id.* at 20 (explaining a continuing pattern of large firms matching the highest salary offer made to new associates); Sara Randazzo, *Starting Law Firm Associate Salaries Hit \$190,000*, WALL ST. J. (June 12, 2018, 10:20 AM), <https://www.wsj.com/articles/starting-law-firm-associate-salaries-hit-190-000-1528813210?mod=searchresults&page=1&pos=4> [<https://perma.cc/6UJM-EDTV>].

35. See Burk & McGowan, *supra* note 20, at 24 (highlighting pressure on partners to bill more).

36. See Richard L. Wynne et al., 21st Annual Bankruptcy Battleground West: Concurrent Session: Law Firm Insolvencies from Finley to Dewey: What Have We Learned? (Am. Bankr. Inst. Mar. 22, 2013) (listing notable law firms that underwent dissolution or insolvency from 1996–2012).

37. See Ariens, *supra* note 9, at 591 (describing a shared sense of shame among establishment lawyers post-Watergate and the resulting confusion lawyers faced in balancing their client's interest with public interest).

38. Michael Ariens, *The Last Hurrah: The Kutak Commission and the End of Optimism*, 49 CREIGHTON L. REV. 689, 735 (2016).

39. See generally Michael Ariens, *The Rise and Fall of Social Trustee Professionalism*, 2016 J. PROF. LAW. 49, 88 (tracing the history of the private lawyer perception of duty to serve both client and society).

acknowledgment of, the legal profession's duty to act as professionals, as engaged in more than a business.⁴⁰ The professionalism movement was triggered in 1983⁴¹ and continues through the present. The movement serves as a modest, but helpful, check on the dominant view that the only metric that counts is profits. A second segment of the profession rejected the privatization model altogether; though a small part of the legal profession, public interest lawyers who worked in government and non-profit law firms, used purpose, not profits, as their metric of success. They have outperformed their numbers in achieving success.⁴² Public interest lawyers, though splintered in defining the interest of the public, have proliferated and are now a presence in many cases requiring interpretation of the Constitution and major legislation. They are an integral part of the rights revolution, which began in the 1960s but flowered during the next decade.

These modern times are marked by both a greater professionalization and de-professionalization among lawyers. American legal institutions have emphasized the ideological duty and economic necessity of lawyers to continue to develop their professional skills. Many lawyers demonstrate technical excellence in an extraordinary range of legal subjects.⁴³ This excellence in lawyering has come at an unusual cost: a shift in power from lawyer to client in fields in which excellence is demanded. The increasing number of superbly skilled lawyers has expanded clients' options in employing legal counsel. To make themselves attractive to such clients, these lawyers need to signal their effectiveness as much if not more so than their expertise. Over the past forty years, lawyers have positioned themselves in the legal services market in ways that have generated shifts in

40. See Joseph L. Rauh, Jr., *The Lawyer's Obligation to the Public Interest*, in *THE LAWYER'S PROFESSIONAL INDEPENDENCE: AN IDEAL REVISITED* 11 (John B. Davidson ed., 1985) (making the argument for lawyers to practice law as public servants); see generally *TORT & INS. PRACTICE SECTION, AM. BAR ASS'N, THE LAWYER'S PROFESSIONAL INDEPENDENCE: PRESENT THREATS/FUTURE CHALLENGES* (John B. Davidson ed., 1985) (presenting articles from the 1983 Annual Meeting of the ABA's Tort and Insurance Practice Section attacking commercialism in the practice of law).

41. See Ariens, *supra* note 39, at 49–52 (tracing the history of the professionalism movement).

42. See Ariens, *supra* note 9, at 597 (identifying public interest lawyers as a “distinctive subsets of the lawyer population” that served outside the private realm).

43. See *2018 Survey Results Texas*, *supra* note 24, at 8–12 (categorizing Texas's top lawyers into 145 specialized practice areas, such as “Eminent Domain and Condemnation Law,” “Information Technology Law,” and “Railroad Law”).

the structure of private law firms.⁴⁴ Those signals to current and prospective clients have lessened the ties of a number of large law firms to traditional professional norms. One consequence of this greater attention to signaling clients is that fewer lawyers at such firms have taken leadership roles in mandatory and voluntary bar associations and other legal institutions since the late 1970s.⁴⁵ The fragmenting of professional institutional ties also made the efforts to attract and keep clients ever more business-like. The competition for lucrative legal work helped further privatize the work of private practice lawyers, and to make lawyers less inclined to perceive their work as possessing a social component.⁴⁶ This de-professionalization change largely occurred in the relationship between lawyers and sophisticated clients.

Lawyers representing individuals have also found an economic need to enhance their superior legal skills.⁴⁷ This is particularly important in high-value personal injury matters and among those engaged in major felony criminal defense cases. The emphasis on technical expertise is also found in much of the public interest pro bono sector, as litigation success can be used to assist fundraising.⁴⁸

A continued failure among American lawyers is in using scale to provide legal services to the broad middle class.⁴⁹ The cost of legal services continues to rise;⁵⁰ technological advances have not given those of modest

44. See Ariens, *supra* note 9, at 581 (“Finally, it suggests how the confluence of both material and ideological concerns in the American legal profession in the 1970s privatized the public mission of private practice lawyers.”).

45. See Ariens, *supra* note 39, at 88 (identifying “well-connected, large firm lawyers” were no longer “at the top of the ABA” once the profession began to shift toward privatization).

46. See *id.* (“The profession’s negative reaction to the proposals of the Kutak Commission made it clear that social trustee professionalism no longer commanded even the formal or symbolic deference of a large number of lawyers.”); Ariens, *supra* note 9, at 594–97 (pointing to a precarious economic climate as the reason many private practice lawyers found “it difficult to pledge fidelity to the ideal that law was a public profession and they were social engineers or officers of the court”).

47. See Ariens, *supra* note 9, at 597 (identifying specialization “as essential to the public mission of lawyers, especially those serving individuals”).

48. See Ariens, *supra* note 38, at 732–33 (noting liberal public interest groups “are, in fact, *special interest* groups and no different from . . . attempts to lobby public opinion and garner governmental support for a particular cause”).

49. See BARTON, *supra* note 18, at 7 (discussing the financial difficulty both middle- and low-income Americans have in retaining an attorney).

50. See GEORGETOWN LAW CTR. FOR THE STUDY OF THE LEGAL PROFESSION, 2018 REPORT ON THE STATE OF THE LEGAL MARKET 7 chart 6 (2018) (noting the increase in billable rates from 2007 through November 2017).

means sufficient access to estate planning, family law, and representation in civil cases unrelated to personal injuries. Further, the profession has failed to reach its professional ideals in the vast majority of cases in which lawyers represent indigent families and those accused of crimes.⁵¹

Scale has also affected the structure of smaller corporate law firms. One approach taken by these firms was to opt out of the growth paradigm by serving clients at a lower price point.⁵² A second was to shift from billable hour fee arrangements to alternative fee structures (sometimes called value billing) designed for the mutual benefit of the client and firm.⁵³ These approaches might mean giving any surplus value to clients, leaving the law firm partners with lower profits or paying less to associates than the largest law firms. It often meant both. Smaller firms might justify these responses as signaling a cultural advantage in the market for lawyers. The signals might also include making partners of a higher percentage of associates, particularly profit-participating partners, lessening the length of time necessary to achieve partner status, or by giving associates a richer, more qualitatively valuable experience serving corporate clients. A third approach was to signal expertise to clients by stringently limiting the firm's claim.⁵⁴ These boutique firms claimed equivalent or higher skills and knowledge at a lower cost to clients, in part due to a leaner cost structure.⁵⁵

Scale also affected personal injury firms. Before the Supreme Court held in 1977, in *Bates v. State Bar of Arizona*,⁵⁶ that truthful commercial advertising by lawyers was constitutionally protected,⁵⁷ lawyers could ethically signal their

51. See Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 *FORDHAM L. REV.* 227, 227 (1973) (addressing "the need for skilled courtroom advocacy with a special emphasis on the administration of criminal justice").

52. See generally Ray Worthy Campbell, *Rethinking Regulation and Innovation in the U.S. Legal Services Market*, 9 *N.Y.U. J.L. & BUS.* 1, 59 (2012) ("Recent years have seen franchise-level lawyers depart large firms to create new firms with alternative billing and organizational models.").

53. See MITCHELL KOWALSKI, *AVOIDING EXTINCTION: REIMAGINING LEGAL SERVICES FOR THE 21ST CENTURY* 132 (2012) (opting to use the term "value-based billing" instead of "alternative billing" because the former conveys to clients that "charges are based on value"); Campbell, *supra* note 52, at 59–61 (discussing the emergence of alternative billing structures in corporate law firms).

54. See Sander & Williams, *supra* note 14, at 474 (identifying specialty firms as signaling eliteness to clients).

55. See Burk & McGowan, *supra* note 20, at 5–7 (noting how a leaner cost structure enables boutique firms to claim specialty skills and knowledge at a lower client cost).

56. *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

57. *Id.* at 382–83.

expertise to prospective clients through specialization certification programs,⁵⁸ or through free media when their cases made news. Personal injury lawyers took marketing to new levels, moving from advertisements in the body of the Yellow Pages, to buying its back cover, to radio and television commercials, to today's massive digital marketing campaigns. This scaling generated an institutionalization of personal injury law firms, in terms of increasing lawyer and nonlawyer staff, in opening branches across a state, and in longevity, as some personal injury firms have survived their founder's death.⁵⁹ Scale also touched on segments of personal injury law in the increased use of the class action lawsuit,⁶⁰ the rise of mass tort litigation,⁶¹ and third-party litigation financing.⁶²

58. See Ariens, *supra* note 21, at 1054 (“Both [California’s and Texas’s lawyer specialization programs] were premised on the assumption that certification of specialists protected the public interest by ensuring the competence of lawyers.”).

59. See WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* 5 (1991) (“Personal injury litigation, long one of the more marginal and ethically problematic areas of legal practice, was first to be transformed. The rags-to-riches story of malpractice lawsuits is by now familiar.”).

60. See Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 736–39 (2013) (characterizing courts’ increasing receptiveness in the mid-1980s to upholding class actions under Rule 23 as a necessary response intended to unclog their dockets of mass torts and personal injury cases); see generally Brian T. Fitzpatrick, *The Ironic History of Rule 23*, SOC. SCI. RES. NETWORK (Aug. 10, 2017), <https://ssrn.com/abstract=3020306> [<https://perma.cc/L64W-8HZJ>] (discussing the history of class actions after the 1966 passage of modern Rule 23).

61. See PATRICK DILLON & CARL M. CANNON, *CIRCLE OF GREED: THE SPECTACULAR RISE AND FALL OF THE LAWYER WHO BROUGHT CORPORATE AMERICA TO ITS KNEES* 3 (2010) (describing one lawyer’s contribution to mass tort litigation); ALAN LANGE & TOM DAWSON, *KINGS OF TORT: THE TRUE STORY OF DICKIE SCRUGGS, PAUL MINOR, AND TWO DECADES OF POLITICAL AND LEGAL MANIPULATION IN MISSISSIPPI* 27 (2010) (describing how a personal injury lawyer consolidated thousands of asbestos-related claims in a state that did not authorize class-action lawsuits); CURTIS WILKIE, *THE FALL OF THE HOUSE OF ZEUS: THE RISE AND RUIN OF AMERICA’S MOST POWERFUL TRIAL LAWYER* 45 (2010) (discussing an attorney’s ability to bring hundreds of asbestos claims to court).

62. See Anthony J. Sebok, *What Do We Talk About When We Talk About Control*, 82 FORDHAM L. REV. 2939, 2939 (2014) (noting “a marked increase in frivolous and/or socially unproductive litigation” due to plaintiffs’ attorneys view of litigation as an investment). The most well-known and controversial case of third-party financing is *Bollea v. Gawker Media, LLC*, in which Peter Thiel secretly funded Terry Bollea’s (more popularly known as “Hulk Hogan’s”) invasion of privacy lawsuit against Gawker when the latter posted parts of a sex tape involving Bollea, made without Bollea’s knowledge. See *Bollea v. Gawker Media, LLC*, 913 F. Supp. 2d 1325, 1326–27 (M.D. Fla. 2012) (denying injunctive relief for copyright infringement based on the release of Terry Bollea’s sex tape); see also RYAN HOLIDAY, *CONSPIRACY: PETER THIEL, HULK HOGAN, GAWKER, AND THE ANATOMY OF INTRIGUE* 195 (2018) (highlighting the high costs associated with the litigation).

Technology has also created an informational scaling that has altered the profession. From LexisNexis and Westlaw to HeinOnline, Fastcase and other legal information providers, cases, statutes, regulations, and other legal information are now available to lawyers at a relatively low price. The knowledge premium once enjoyed by large law firms with in-house libraries (and librarians) is dissipated, if not extinct.⁶³ Technological advances have disproportionately benefited the small-firm lawyer. Legal tools available from Internet-based sites, such as Rocket Lawyer and LegalZoom, may adversely affect the economic prospects of the solo practitioner and small-firm lawyer, though that is yet unproven. The lower cost of legal information may benefit both lawyers and their prospective clients. However, the challenge in providing such services to a broader segment of society continues, and it is not yet clear how such services may be provided at a price that is profitable and affordable.⁶⁴

II. THE ROAD TO MODERNITY

During the two decades between the end of World War II and Lewis Powell's 1964 proposal to modernize the code of legal ethics, the American legal profession consolidated and gained considerable strength and distinctive status.⁶⁵ This was a marked change from the 1930s, when lawyers, like many others, suffered during the Great Depression.⁶⁶ By 1940, under the guise of improving the stature of the profession, many bar associations had worked assiduously to make admission to the bar more difficult.⁶⁷ Most states had adopted the requirement of three years of full-time undergraduate education to be eligible to take the bar examination.⁶⁸

63. See BARTON, *supra* note 18, at 7 (“An American with a smartphone now has easier access to legal sources than most lawyers did in the 1980s . . .”).

64. See *id.* at 25 (noting legal work moves from “bespoke” or tailored work through “systematized” and finally work that has become “commoditized”).

65. See Ariens, *supra* note 3, at 418–19 (“Lawyers were confident that they had a leading role to play in American society, and others told them so.”).

66. See Ariens, *supra* note 21, at 1040 (noting the Great Depression’s impact on the nonelite lawyer).

67. See Ariens, *supra* note 3, at 415 (“By successfully attacking the diploma privilege and reducing the passing rate for bar examinees, the annual absolute number of new members of the profession declined from 9,860 in 1930 to 7,942 in 1940 . . .”).

68. John Kirkland Clark, *Standards of Bar Admission*, 9 N.Y. ST. B. ASS’N BULL. 177, 178 (1937); see also *Report of the Special Committee to the Section of Legal Education and Admissions to the Bar of the American Bar Association*, 44 A.B.A. ANN. REP. 679, 684 (1921) (noting most states’ requirement of three years of undergraduate education to be eligible to sit for the bar examination).

This minimized the incentive to choose an apprenticeship rather than law school.⁶⁹ The bar examination also became more difficult to pass. This delayed entry into the profession, as it both shifted many from shorter apprenticeships to the three years it took to complete law school, and meant those failing the bar exam were delayed in entering the practice of law.⁷⁰ Even so, lawyers in the pre-World War II era made regular claims that the bar was overcrowded, causing lawyer income to stagnate.⁷¹ It was not until after the attack on Pearl Harbor on December 7, 1941 that the profession's claims of an overcrowded bar ended as law schools emptied.⁷²

Bar elites reassessed the position of lawyers in American society shortly after the end of World War II. In 1946 the ABA approved a *Survey of the Legal Profession*.⁷³ By the early 1950s, the *Survey* had produced over 150 reports,⁷⁴ some critical, but mostly positive, concerning the benefits lawyers offered in fostering the American democratic experiment.⁷⁵ One prominent example of this view was a 1952 speech praising the work of lawyers by the renowned sociologist Talcott Parsons.⁷⁶

One challenge to this more favorable view of lawyers in the early 1950s was Red-baiting. Wisconsin Senator Joseph McCarthy claimed that Communists had invaded crucial government positions.⁷⁷ Those accused of joining, or harboring sympathy toward the Communist Party, often found

69. By 1947, fifteen jurisdictions prohibited apprenticeships. ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 217 n.9 (1983).

70. See Ariens, *supra* note 3, at 415 (noting decline in bar passage during the Great Depression).

71. The Special Committee on the Economic Condition of the Bar of the ABA was created in 1937. It was disbanded by the ABA in 1945. *Proceedings of the House of Delegates*, 70 A.B.A. ANN. REP. 101, 119 (1945).

72. See *Statistical Information on Enrollments*, 1944 A.A.L.S. PROC. 105, 105 (highlighting law school enrollment decline from 18,011 in 1940 to 3,663 in 1943).

73. *Proceedings of the 1946 Annual Meeting of the House of Delegates*, 71 A.B.A. ANN. REP. 307, 308 (1946).

74. Reginald Heber Smith, *Survey of the Legal Profession: Its Scope, Methods and Objectives*, 39 A.B.A. J. 548, 550 (1953).

75. Compare Robert T. McCracken, *Report of Observance by the Bar of Stated Professional Standards*, 37 VA. L. REV. 399, 425 (1951) (concluding lawyers have adopted “a strict observance of the ethics standards”), with ORIE L. PHILLIPS & PHILBRICK MCCOY, *CONDUCT OF JUDGES AND LAWYERS: A STUDY OF PROFESSIONAL ETHICS, DISCIPLINE AND DISBARMENT* 20 (1952) (suggesting a re-affirmation of Canons of Ethics to emphasize its “significance”).

76. Talcott Parsons, *A Sociologist Looks at the Legal Profession*, in *ESSAYS IN SOCIOLOGICAL THEORY* 371–72 (3d ed. 1963) (reprinting Parsons’ December 4, 1952 speech given at the University of Chicago).

77. See WILLIAM MANCHESTER, *THE GLORY AND THE DREAM: A NARRATIVE HISTORY OF AMERICA, 1932–1972*, at 868, 877 (1974) (offering a popular history of the Army-McCarthy hearings).

it difficult to obtain legal representation when they were fired from their jobs or were otherwise subjected to legal harm.⁷⁸ A faction of elite law firm lawyers responded to McCarthy's Red-baiting by managing to get the ABA to create a Special Committee on Individual Rights as Affected by National Security.⁷⁹ The elite Association of the Bar of the City of New York also joined in defending lawyers who represented those accused of having ties to Communists.⁸⁰ This elite group then promoted the rule of law ideal that every accused person enjoyed the right to the assistance of counsel.⁸¹ Those lawyers also managed to get a reluctant ABA House of Delegates to approve a resolution declaring "the duty of the bar to provide such aid [representing persons accused of crimes] even to the most unpopular defendants."⁸²

The ideal view of the lawyer—as a public guardian who resolutely defended the oppressed and the outcast—burst forth in nonfiction, fiction, plays, and movies in the late 1950s and early 1960s.⁸³ For example, in mid-1962, the lawyer Edward Bennett Williams, known for his representation of Mafiosi, a Communist spy, and even Joe McCarthy, published *One Man's Freedom*,⁸⁴ a relatively dry account of American legal values as demonstrated by his representation of persons across the political spectrum and even those who rejected or otherwise tried to subvert the American system of government. *One Man's Freedom* made the weekly *New York Times* bestseller list for four months.⁸⁵ Other efforts to centralize the law, and thus lawyers, to the operation of civil society included the ABA's successful 1958 effort

78. See Ariens, *supra* note 39, at 58–61 (discussing the unavailability of counsel to those accused of having Communist ties and the potential economic ruin of lawyers willing to represent Communists).

79. See *Proceedings of the 1953 Annual Meeting of the House of Delegates*, 78 A.B.A. ANN. REP. 118, 133 (1953) (adopting the resolution of the Special Committee on Individual Rights as Affected by National Security, thereby reaffirming the duty of the bar to represent even the most unpopular defendants in response to Red-baiting); see also Ariens, *supra* note 6, at 166–67 ("Working as a 'lawyer for hire' was . . . how legal elites justified defending committed Communists during the 1950s Red Scare.").

80. Ariens, *supra* note 39, at 61.

81. See *Report of the Board of Governors*, 77 A.B.A. ANN. REP. 459, 463 (1952) (stating the Board's request that the House of Delegates approve the Special Committee).

82. *Proceedings of the 1953 Annual Meeting of the House of Delegates*, 78 A.B.A. ANN. REP. 118, 133 (1953).

83. See Ariens, *supra* note 6, at 142–45 (commenting on the "lionization" of lawyers in the media during the 1950s and 1960s).

84. EDWARD BENNETT WILLIAMS, *ONE MAN'S FREEDOM* 3–4, 11 (1962).

85. *New York Times Best Sellers List*, HAWES PUBLICATIONS, (Oct. 28, 1962), <http://hawes.com/1962/1962-10-28.pdf> [<https://perma.cc/V2KV-RNMZ>].

making May 1 “Law Day” in the United States.⁸⁶ A similar effort was the ABA’s promotion of World Peace Through Law.⁸⁷

Society’s relatively positive view of lawyers was eventually accompanied by a rise in lawyer income, as the demand for legal services outstripped the supply of lawyers.⁸⁸ In the late 1950s, the ABA began a successful campaign to add to its membership.⁸⁹ One important interest of those new members was to increase their income.⁹⁰ ABA leadership highlighted the “problem” of stagnant lawyer income, initially, by printing and widely distributing a pamphlet entitled *The 1958 Lawyer and His 1938 Dollar*.⁹¹ The ABA followed with additional pamphlets suggesting approaches to increasing income. It also created a Special Committee on Economics of Law Practice with “the duty of laying the groundwork for the development of practical suggestions to lawyers designed to improve their economic status[.]”⁹² This Committee was sufficiently important to become an ABA Standing Committee in 1961.⁹³ In the mid-1960s, the *ABA Journal* began publishing an annual column discussing the federal government’s report on lawyer income.⁹⁴ These columns showed steady, better-than-inflation increases

86. Law Day was created by the ABA and first promulgated by President Dwight D. Eisenhower in 1958. *See The President’s Proclamation*, 44 A.B.A. J. 343, 343 (1958) (approving May 1st as Law Day); *see also* Jason Krause, *Charlie Rhyne’s Big Idea*, ABA J., May 2008, at 65, 65 (crediting ABA President Charlie Rhyne with creating Law Day); *Law Day*, in OXFORD COMPANION TO AMERICAN LAW 491 (Kermit L. Hall et al. eds., 2002) (accounting how Law Day was established in the United States).

87. The ABA’s World Peace Through Law initiative was also created in 1958. Charles S. Rhyne, *World Peace Through Law*, 83 A.B.A. ANN. REP. 624, 638 (1958).

88. *See* RICHARD L. ABEL, AMERICAN LAWYERS 160 (1989) (discussing the history of the economic status of American lawyers).

89. William C. Farrer, *Our Younger Lawyers*, 42 A.B.A. J. 575, 575 (1956).

90. *See Report of the Special Committee on Economics of Law Practice*, 83 A.B.A. ANN. REP. 434, 435 (1958) (highlighting data compiled through a survey of state bar associations).

91. SPECIAL COMM. ON ECON. OF LAW PRACTICE, AM. BAR ASS’N, *THE 1958 LAWYER AND HIS 1938 DOLLAR* (1958).

92. *Report of the Special Committee on Economics of Law Practice*, 83 A.B.A. ANN. REP. 434, 435 (1958).

93. *See Proceedings of the 1961 Annual Meeting of the House of Delegates*, 86 A.B.A. ANN. REP. 351, 362–63 (1961) (noting The Economics of Law Practice Committee’s ascension to Standing Committee). Its Chairman for the 1961–62 year was Lewis F. Powell, Jr. *Id.* at 383.

94. John D. Conner & N. S. Clifton, *Income of Lawyers, 1961–1962*, 51 A.B.A. J. 753, 753 (1965); Cullen Smith & N. S. Clifton, *Income of Lawyers, 1962–1963*, 52 A.B.A. J. 1043, 1043 (1966).

for lawyers.⁹⁵ Again, the increase in demand for legal services outstripped supply during the 1950s and 1960s.⁹⁶ By the time Lewis F. Powell called for a new code of legal ethics, lawyer income was a diminishing issue among ABA members. In 1969, the median income of lawyers had risen to \$47,638 (in 1983 dollars), a doubling in real income in twenty years.⁹⁷

These salad days quickly ended as the economy slowed in the 1970s, and lawyers by 1973 once again complained about an overcrowded profession and an absence of jobs for new lawyers to fill.⁹⁸ These complaints occurred even as law schools set attendance records.⁹⁹ The ABA's consultant on legal education noted that during the fall of 1973, "[F]or the first time, there was not a single 'unfilled seat' in the first-year class of any approved law school."¹⁰⁰

III. MODERN TIMES

A. *Economics and Structure*

In August 1963, then-former Vice President and failed presidential and gubernatorial candidate Richard M. Nixon joined the New York law firm of Mudge, Rose, Guthrie & Alexander, becoming its lead named partner in early 1964.¹⁰¹ The firm immediately prospered. Its partners increased their billing hours from 857 hours in 1963 (down from 929 hours in 1962) to 1,119 in 1964 and 1,251 in 1965.¹⁰² Its revenues rose 25% in 1964, from

95. See B. Peter Pashigian, *The Number and Earnings of Lawyers: Some Recent Findings*, 1978 AM. B. FOUND. RES. J. 51, 63–64 (noting lawyers' actual earnings were greater than expected in the 1960s and early 1970s).

96. *Id.* at 72; see ABEL, *supra* note 88, at 160 (discussing economics of legal profession in post-World War II era).

97. Sander & Williams, *supra* note 14, at 448–49.

98. See *Report of the Task Force on Professional Utilization*, 97 A.B.A. ANN REP. 818, 819 (1972) ("The American Bar Association's Task Force on Professional Utilization was formed . . . to review data with respect to the increase in the number of new entrants into the profession . . .") (quoting the Board of Governors); see also ABEL, *supra* note 88, at 160 (noting declining job prospects and pay for lawyers during the early 1970s due to expansion of the profession in the face of a recession).

99. See James P. White, *Is That Burgeoning Law School Enrollment Ending?*, 61 A.B.A. J. 202, 202 (1975) (observing an increase in law school enrollment between 1973 and 1974).

100. *Id.* White also noted that first-year fall 1974 enrollment indicated "only one law school reported 'unfilled seats' in its entering class." *Id.*

101. VICTOR LI, NIXON IN NEW YORK: HOW WALL STREET HELPED RICHARD NIXON WIN THE WHITE HOUSE 75 (2018); Victor Li, *Nixon in New York*, ABA J., May 2018, at 47, 47.

102. LI, *supra* note 101, at 75; Li, *supra* note 101, at 47.

\$2.6 million to \$3.5 million. Revenues rose another 8% in 1965, to \$3.8 million.¹⁰³

Price Waterhouse, the accounting firm that provided the above information to Richard Nixon, undertook a larger study for the ABA's Standing Committee on Economics of Law Practice.¹⁰⁴ The study found that the range of collectible billable hours for associates was between 1,400 and 1,600 hours, or twenty-eight to thirty-two hours per week stretched across fifty weeks.¹⁰⁵ The billable hour range for law firm partners was 1,200 to 1,400.¹⁰⁶ This work schedule was common. A late 1950s study concluded that the most hours a lawyer could bill was between 1,200 and 1,500.¹⁰⁷ A memoir by an Atlanta lawyer notes that, as an associate of a corporate law firm, he billed 1,300 hours in 1964, and that many “partners under the age of sixty billed fewer than one thousand hours a year, and some only a few hundred. In fact, no one was counting.”¹⁰⁸ A well-known 1959 article by Harvard Law School Professor Henry Hart declared that the members of the Supreme Court were unable to take on any more cases because they lacked the time.¹⁰⁹ He calculated the Justices could give 1,728 hours annually to the matters before the Court.¹¹⁰

The ABA's entreaty to lawyers that they log the number of hours spent on their clients' matters in order to increase their income led to an emphasis by the early 1970s on collecting fees through the billable hour.¹¹¹ Many private practice lawyers then began to rely solely on the number of billable hours expended to justify their fee. That is, the number of hours, not the

103. Li, *supra* note 101, at 47.

104. See WILLIAM G. ROSS, *THE HONEST HOUR: THE ETHICS OF TIME-BASED BILLING BY ATTORNEYS* 2 (1996) (analyzing “[a] study prepared for the ABA by two Price Waterhouse accountants”).

105. *Id.* at 2–3.

106. *Id.* at 3.

107. *Id.* at 19–20.

108. MICHAEL H. TROTTER, *PROFIT AND THE PRACTICE OF LAW: WHAT HAPPENED TO THE LEGAL PROFESSION* 6 (1997). Trotter also noted that lawyers “routinely” worked “eight to nine hours a day, five days a week and half a day or more on Saturday,” and their families complained they were never home. *Id.* at 5.

109. See Henry M. Hart, Jr., *Forward: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 84 (1959) (“[T]he Court has more work to do than it is able to do in the way in which the work ought to be done.”).

110. *Id.* at 86.

111. See ROSS, *supra* note 104, at 19 (exploring the debate surrounding the appropriate method of billing by lawyers in the early 1970s).

result accomplished, became the basis for the bill to the client.¹¹² The metric of the billable hour, initially proposed to aid both clients and lawyers, was used more for the financial benefit of lawyers than their clients. Severing the fee from the client's goal provided an incentive for lawyers to bill as many hours as the client would be willing to bear.

Once lawyers (and clients) agreed to measure the fee by the number of hours worked, lawyers reconsidered how many hours a lawyer could work on client matters. By the 1980s, many if not most law firms with corporate clients had steadily raised the number of hours a lawyer was required to bill. In the early 1980s, the standard annual billing requirement in Washington, D.C. was 1,800 hours. This increased to 1,900 hours in 1986.¹¹³ By the mid-1990s, the number of hours billed by law firm associates and partners had risen in large metropolitan areas from 1,649 (Boston) to 1,907 (Atlanta) for the former, and from 1,513 (Indianapolis) to 1,847 (Houston) for the latter.¹¹⁴ In 2007, just before the Great Recession, the average number of billable hours worked by all lawyers was 1,608.¹¹⁵

In 1972, President Richard Nixon won re-election in a landslide. One of the beneficiaries of Nixon's victories in 1968 and 1972 was his former law firm—Mudge, Rose.¹¹⁶ A survey of the largest law firms in the United States published in January 1972 listed Mudge, Rose as the twenty-first largest law firm in the United States, with 118 lawyers, divided between 39 partners and 79 associates.¹¹⁷ The largest American law firm was Baker & McKenzie, with 240 lawyers.¹¹⁸

In 2009, when over 5,000 lawyers were shed from large law firms, Baker & McKenzie remained the largest law firm in the *National Law Journal's* NLJ

112. *See id.* (discussing the economic pressures motivating the shift to detailed accounting of all time worked by attorneys).

113. This was my experience as an associate in a Washington, D.C. law firm. In 1986, the New York firm of Cravath, Swaine & Moore increased the starting pay of associates from \$48,000 to \$65,000. In order to come within range of that figure (and corresponding amounts for associates with greater experience), the number of billable hours was raised. In other words, associates paid for their own raise.

114. ROSS, *supra* note 104, at 3.

115. *See generally* GEORGETOWN LAW CTR. FOR THE STUDY OF THE LEGAL PROFESSION, *supra* note 50, at 6 (noting in Chart 5 a slight reduction of thirteen billable hours between 2007 and 2017).

116. *See LI, supra* note 101, at 291–316 (detailing how various post-Mudge, Rose staffers filled in Nixon's administration).

117. Alexis de Tocqueville, *Money Talks: Why It Shouts to Some Lawyers and Whispers to Others*, 2 JURIS DOCTOR, Jan. 1972, at 55, 56.

118. *Id.*

250, with 3,949 lawyers.¹¹⁹ The smallest of the NLJ 250 counted 164 lawyers, nearly 50 lawyers less than reported by the now-defunct Mudge, Rose.¹²⁰ The number of American lawyers rose from 358,520 in 1972 to 1,180,386 in 2009, about a 230% increase.¹²¹ Baker & McKenzie grew 1,600%.¹²² Large law firms have grown exponentially in the modern era. As early as 1987, the median number of lawyers in the largest law firms was 460.¹²³

Large law firm partners have also noted that their income rises as the ratio of associates to partners increases. This scaling has been combined with another form of scaling: these firms have reduced the percentage of associates in favor of using “a greater proportion of lower-cost temporary/contract lawyers and permanent, non-partner track lawyers.”¹²⁴ The 1972 survey of the largest law firms showed that, outside of New York City-based law firms, the ratio of associates to partners averaged about 1.5 to 1.¹²⁵ Indeed, two firms listed more partners than associates.¹²⁶ The 2018 national ratio (which is always less than the ratio of the largest law firms) has been about 2.2 to 1 for the past decade.¹²⁷

Scaling has also distinguished the most profitable firms and highest-revenue generating firms from all others. The 2017 *American Lawyer* AmLaw 100 survey reported the three largest firms accounted for 10% of

119. Leigh Jones, *So Long, Farewell; There's No Sugar Coating It: This Was the Worst Year Ever for Lawyer Headcount*, NAT'L L.J., Nov. 9, 2009, at S-4, <https://advance.lexis.com/api/permalink/65e55239-18ff-4358-a5cd-2ec41dfb7649/?context=1000516> [https://perma.cc/BQZ5-3BE2].

120. *Id.*; cf. Carey Goldberg, *The Mudge Rose Firm Enters the Tar Pit of Legal History*, N.Y. TIMES (Oct. 1, 1995), <https://www.nytimes.com/1995/10/01/nyregion/the-mudge-rose-firm-enters-the-tar-pit-of-legal-history.html> [https://perma.cc/SU46-4TYK].

121. *ABA National Lawyer Population Survey*, ABA, https://www.americanbar.org/content/dam/aba/administrative/market_research/Total_National_Lawyer_Population_1878-2018.authcheckdam.pdf [https://perma.cc/UZ6K-XNZT].

122. De Tocqueville, *supra* note 117, at 55, 56; Jones, *supra* note 119.

123. ABEL, *supra* note 88, at 311.

124. HILDEBRANDT CONSULTING LLC & CITI PRIVATE BANK, 2017 CLIENT ADVISORY 3 (2017), http://www.hildebrandtconsult.com/uploads/2017_Citi_Hildebrandt_Client_Advisory.pdf [https://perma.cc/362W-WMCT].

125. De Tocqueville, *supra* note 117, at 56.

126. *See id.* (noting associate-to-partner ratios).

127. GEORGETOWN LAW CTR. FOR THE STUDY OF THE LEGAL PROFESSION, *supra* note 50, at 10.

the revenue of all 100 firms, and the 9 largest firms accounted for 25% of all revenue.¹²⁸

Additionally, it is rare for a large law firm to exist in one location, as firms merge and as lateral partners are added. For example, the venerable Houston, Texas law firm of Fulbright & Jaworski¹²⁹ merged with the London-based firm Norton Rose to form Norton Rose Fulbright in 2013.¹³⁰ The firm then merged with New York-based Chadbourne & Parke in 2017, creating a firm of about 4,000 lawyers.¹³¹ Those lawyers are scattered across about fifty cities across the globe.

With 4,000 lawyers it is impossible to know your partners, much less what they are doing. This makes unenviable the general partnership business model, given every partner's unlimited liability for the professional harms caused and debts contracted by every other partner. The modern solution, arising "out of the ashes of the savings and loan debacle" of the 1980s, was the adoption by state legislatures of limited liability entities for law firms.¹³² The debacle included fraud lawsuits filed by the federal government against lawyers who represented savings and loan clients.¹³³ The partners of those lawyers were, under general partnership law, also subject to liability. In 1991, Texas adopted the first limited liability law partnership statute.¹³⁴ This protected law firm partners from malpractice claims. Other states extended the liability protections available to law firm partners in a limited liability partnership (LLP). Many states broadened the vicarious liability protection given partners in LLPs from tort claims by adding protection

128. *Id.* at 12.

129. JOHN H. CROOKER, JR. & GIBSON GAYLE, *FULBRIGHT & JAWORSKI: 75 YEARS (1919–1974)* (1994).

130. *Our History*, NORTON ROSE FULBRIGHT, <http://www.nortonrosefulbright.com/history/> [<https://perma.cc/K432-SRAM>].

131. *Id.*

132. Susan Saab Fortney, *Professional Responsibility and Liability Issues Related to Limited Liability Law Partnerships*, 39 S. TEX. L. REV. 399, 400 (1998); *see also* Susan Saab Fortney, *Seeking Shelter in the Minefield of Unintended Consequences—The Traps of Limited Liability Law Firms*, 54 WASH. & LEE L. REV. 717, 720 (1997) [hereinafter Fortney, *Seeking Shelter*] (discussing the rush by law firms to limit liability by organizing as LLCs).

133. *See* Fortney, *Seeking Shelter*, *supra* note 132, at 718–20 (articulating the fallout from the "savings and loan debacle" on law firms and attorneys).

134. *See id.* at 725 (noting the creation of limited liability law firm partnerships in Texas; *see also id.* at 725 n.36 ("Within two years of the enactment of the Texas LLP legislation, 569 Texas firms elected LLP status.")).

from vicarious liability for contract claims.¹³⁵

The limited liability entity protected lawyers from bearing the financial consequences of the misdeeds of their fellow “partners.” The nagging question was, what benefit from these entities did the clients of the law firm receive? Although the Texas statute provided that LLPs must obtain liability insurance,¹³⁶ the agreed-upon amount was “an arbitrary and admittedly often inadequate amount of \$100,000.”¹³⁷ That question nagged because every answer seemed to begin with “less than before.”

The rise of limited liability law partnerships implicitly acknowledged not only the immense growth of law firms but the spread of such firms to a number of states (and nations).¹³⁸ The multijurisdictional practice of law presented several issues concerning place and the practice of law.¹³⁹ American lawyers, of course, receive a license to practice law in a state. They are assumed to know all of the law of that state. By virtue of obtaining a license to practice law in a state, lawyers are eligible to obtain a license to practice law in the United States courts with jurisdiction in that state.¹⁴⁰ And those lawyers practicing only federal law (securities, immigration) may do so in any location. Practicing the law of a state outside of a jurisdiction from which the lawyer has received a license to practice law is the unauthorized practice of law. Rule 5.5 of the 1983 ABA Model Rules of Professional Conduct made it a disciplinary violation for lawyers to practice law where unlicensed.¹⁴¹

Though the nationalization and internationalization of the practice of law existed before the 1970s (indeed, some lawyers did so in the 1870s), few lawyers practicing law in the early 1970s engaged in the practice of law beyond the jurisdiction licensing them. This began to change during that

135. *See id.* at 727 (differentiating between LLPs and LLCs and discussing state legislatures’ subsequent elimination of the distinction between the two entities).

136. *See id.* at 729 n.54 (noting Texas LLP provisions required at least \$100,000 of liability insurance (citing TEX. REV. CIV. STAT. ANN. Art. 6132b–45–C(1) (West Supp. 1997))).

137. *See id.* at 724–25 (quoting ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG AND RIBSTEIN ON LIMITED LIABILITY PARTNERSHIPS AND THE REVISED UNIFORM PARTNERSHIP ACT 3 (1995)) (noting the creation of limited liability law firm partnerships in Texas).

138. *See* Michael S. Ariens, *A Uniform Rule Governing the Admission and Practice of Attorneys Before United States District Courts*, 35 DEPAUL L. REV. 649, 650 (1986) (“[N]ational legal publications in 1985 found that 181 of the 250 largest law firms maintained offices in more than one state, and 271 of the 499 largest law firms maintained interstate offices.” (footnote omitted)).

139. *Id.*

140. *See id.* at 652–54 (explaining the rules on admission to practice law in federal district courts).

141. MODEL RULES OF PROF’L CONDUCT R. 5.5 (b)(1)–(2) (AM. BAR. ASS’N 1983).

decade, a trend that became clearer soon after the ABA's 1983 adoption of the Model Rules.¹⁴²

In 1998, the California Supreme Court held, in *Birbrower v. Superior Court of Santa Clara County*,¹⁴³ that a New York law firm was not allowed to collect a fee for much of its work for its client.¹⁴⁴ The client was a New York entity with a California subsidiary. The legal work undertaken by the law firm was representing its client in California in an arbitration that involved matters of both New York and California law.¹⁴⁵ The Court affirmed the conclusion that the Birbrower firm had engaged in the unauthorized practice of law, for none of its lawyers were licensed in California.¹⁴⁶ In response, the ABA created in 2000 a Commission on Multijurisdictional Practice.¹⁴⁷ The Commission concluded that the ABA should recommend the status quo on licensure with some adjustments to admission to practice temporarily in a court or in a jurisdiction in which the lawyer was not licensed.¹⁴⁸ That is, it kept the tie between geography and licensure, even as technology was making geography less relevant for many (though not all) lawyers.

The retention of state-based licensing of lawyers is in some tension with changes to the bar examination made by many states in the past fifty years. In 1972, the Multistate Bar Examination (MBE), created by the National Conference of Bar Examiners (NCBE), was first administered.¹⁴⁹ The MBE did not test examinees on the law of any state. Instead, it tested the “majority” view of common law subjects, the common law of crimes, and

142. See *id.* R. 5.5(c)–(d) (permitting lawyers to practice law in jurisdictions absent a license under certain limitations).

143. *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court of Santa Clara Cty.*, 949 P.2d 1, 13 (Cal. 1998).

144. *Id.* at 12–13.

145. *Id.* at 3.

146. *Id.* at 13.

147. See *Report No. 1 of the Commission on Multijurisdictional Practice*, 127 A.B.A. ANN. REP. 267, 267 (2002) (presenting the first report of the Commission advocating for state judicial regulation surrounding the practice of law). The Commission made a total of nine reports to the ABA House of Delegates in 2002. See *id.* at 267–319 (detailing the recommendations made in the nine reports of the ABA Commission on Multijurisdictional Practice).

148. See *id.* at 270–71 (“[T]he judicial branch of government in each state should identify these particular interstate practices, comparable to *pro hac vice* representation . . .”).

149. Michael Ariens, *The Ethics of Copyrighting Ethics Rules*, 36 U. TOL. L. REV. 235, 249–50 (2005); Robert M. Jarvis, *An Anecdotal History of the Bar Examination*, 9 GEO. J. LEGAL ETHICS 359, 380 (1996).

constitutional law. The MBE was the initial effort to nationalize the bar examination. The Watergate affair led both to the requirement that law schools teach legal ethics and to the creation by the NCBE of the Multistate Professional Responsibility Examination (MPRE).¹⁵⁰ Both the MBE and the MPRE were adopted for use by the vast majority of state boards of law examiners.¹⁵¹ The NCBE then created the Multistate Essay Examination in 1988.¹⁵² It was not as widely adopted. In 2009, the NCBE crafted the Uniform Bar Examination (UBE). The UBE has been adopted by thirty-two states, the District of Columbia, and the Virgin Islands as of October 2018.¹⁵³ Those jurisdictions that adopt the UBE agree to admit to the bar any person who has obtained the state's required passing score.¹⁵⁴

Though each state board of law examiners chooses its own passing score on the UBE, by adopting it that state no longer believes it necessary to test its applicants on its actual law.¹⁵⁵ Whether passing a state's bar examination actually demonstrated the examinee's mastery of that state's law was never clearly proven. However, adoption of the UBE signals the end of any link between bar exam success and the examinee's knowledge of that state's law. The UBE is the equivalent of a national bar examination; testing an idea of the law, but not the law as such.

The multijurisdictional practice debate was indirectly related to another effort to transform law firm structure and practice: multidisciplinary practice (MDP) by law firms—the idea that nonlawyers could own some part of an entity in which the practice of law and other activities (e.g., lobbying, compliance, accounting) may occur.¹⁵⁶ Rule 5.4 of the ABA's 1983 Model Rules banned ownership of an entity through which the practice of law took

150. See Ariens, *supra* note 149, at 240 (analyzing the negative impact of the Watergate scandal on the legal community).

151. *Id.* at 251.

152. Jarvis, *supra* note 149, at 383–84.

153. *Adoption of the Uniform Bar Examination*, NAT'L CONF. B. EXAMINERS (Aug. 22, 2018), <http://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F196> [<https://perma.cc/8W2L-UQF2>]. Several of the thirty-four jurisdictions will administer the UBE for the first time in 2019. *Id.*

154. *Jurisdictions That Have Adopted the UBE*, NAT'L CONF. B. EXAMINERS, <http://www.ncbex.org/exams/ube/> [<https://perma.cc/W5A9-83FB>].

155. States are permitted to “assess candidate knowledge of jurisdiction-specific content[.]” *Id.* However, any effort to use such an assessment to hinder out-of-state candidates would violate the UBE's premise of the exam's portability.

156. Sherwin P. Simmons, *Report of the Commission on Multidisciplinary Practice*, 125 A.B.A. ANN. REP. 183, 183–84 (2000).

place by anyone other than a lawyer.¹⁵⁷ In the late 1990s, lawyers became acutely aware that the largest accounting firms (then the “Big Five,” now the “Big Four”) employed thousands of lawyers.¹⁵⁸ In 1998, the ABA created a Commission on Multidisciplinary Practice to assess whether Model Rule 5.4 should be amended to allow entities that engaged in the practice of law and other activities could be owned in part or whole by non-lawyers. The Commission’s recommendations in support of MDPs were made available in time for the ABA’s August 1999 annual meeting.¹⁵⁹ A final report supporting MDPs was filed the following year.¹⁶⁰ Though the ABA House of Delegates rejected the Commission’s proposal that MDPs be allowed,¹⁶¹ forty-four state bar associations and the District of Columbia Bar Association created committees to assess MDPs.¹⁶² By July 2001, twelve of those task forces had favorably reported amendments to the lawyer-only ownership rule of professional conduct.¹⁶³

And then Enron collapsed.¹⁶⁴ Enron’s auditor Arthur Andersen (one of the “Big Five”) was indicted, convicted, and dissolved by the end of 2002.¹⁶⁵ Other corporate and accounting scandals in 2001–2002 dissipated the interest in allowing MDPs.¹⁶⁶ The District of Columbia Bar

157. See MODEL RULES OF PROF'L CONDUCT R. 5.4 (AM. BAR ASS'N 1983) (permitting, however, a lawyer to “include nonlawyer employees in a compensation or retirement plan, even though the plan is based in . . . a profit-sharing arrangement”).

158. See Laurel S. Terry, *A Primer on MDPS: Should the “No” Rule Become a New Rule?*, 72 TEMPLE L. REV. 869, 878–79 (1999) (noting 6,362 lawyers—excluding tax lawyers—worked for Big Five firms, making three of the Big Five among the ten largest law firms in the world).

159. Sherwin P. Simmons et al., *Report of the Commission on Multidisciplinary Practice*, 124 A.B.A. ANN. REP. 223, 225 (1999).

160. Simmons, *supra* note 156, at 183–84.

161. *Proceedings for the Annual Meetings of the House of Delegates*, 125 A.B.A. ANN. REP. 1, 25 (2000).

162. George C. Nnona, *Situating Multidisciplinary Practice Within Social History: A Systemic Analysis of Inter-Professional Competition*, 80 ST. JOHN'S L. REV. 849, 857 n.21 (2006).

163. *Id.*

164. See BETHANY MCLEAN & PETER ELKIND, *THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON* 131 (2004) (“Every one of them was written up [in value] . . . Still: \$400 million! Even for Enron, that was a big hole, not easily papered over.” (alteration in original)).

165. See *id.* at 143 (“There is a sad irony in the fact that Arthur Andersen was brought down by the Enron scandal.”).

166. On those scandals, see Michael Ariens, “*Playing Chicken*”: *An Instant History of the Battle Over Exceptions to Client Confidences*, 33 J. LEGAL PROF. 239, 296–97 (2009), listing corporate and accounting scandals in the Appendix; Lawrence J. Fox, *MDPs Done Gone: The Silver Lining in the Very Black Enron Cloud*, 44 ARIZ. L. REV. 547, 548 (2002), linking the collapse of Enron to a reduced desire for MDPs).

Association was the only jurisdiction to amend its Rule 5.4 and allow MDPs.¹⁶⁷

The setback for those supportive of MDPs, often though not exclusively lawyers in large national and multi-national law firms, was allayed by the continued growth in corporate legal services during the early twenty-first century. The share of legal services in Gross Domestic Product (GDP) of the United States continued to increase. Most of that increase was attributable to corporate clients.¹⁶⁸

The end of the sweet (economic) life occurred with the Great Recession in 2008. A 2013 study listed eighteen law firms that went bankrupt between 2008 and 2012.¹⁶⁹ Many that survived continued to acquire lateral partners and their respective practice groups. The largest and most profitable firms became ever larger and more profitable. The focus of large firms on growth has continued during the past decade, even as the overall market for legal services has stalled.

The emphasis on adding rainmakers as partners reduces the need or desire to promote associates to partner. Those associates who are offered a partnership share are often given limited profit participation until they can demonstrate their economic value to the firm. The relatively dim long-term prospect in becoming a partner for large law firm associates is one reason why those firms have increased the starting pay of law school graduates to \$190,000 in 2018.¹⁷⁰

Further, the apparent inexorable increase in the complexity of law has forced corporate lawyers to find a legal niche that is both deep enough to avoid most competitive pressures and wide enough to serve a sufficiently broad clientele. When specialization works, it creates a virtuous circle. Clients receive efficient legal service. The lawyers who complete the legal services obtain greater expertise and enhance their future employment prospects. The law firm employer may be better able to increase the hourly billing rate of those lawyers. On the other hand, when the particular subspecialty disappears, the lawyer expert is often cast off, whether designated a “partner,” counsel, or associate.

167. D.C. RULES OF PROF'L CONDUCT R. 5.4(b) (1996).

168. Galanter, *supra* note 17, at 1378–79.

169. *See* Wynne et al., *supra* note 36 (indicating that five of the eighteen firms operated for more than a century before going bankrupt).

170. *See* Randazzo, *supra* note 34 (stating large law firms are offering higher starting salaries to attract top law students).

Legal specialization applies as well to lawyers who largely serve individual clients. One marker of the modern legal profession is the recognition that all lawyers are incompetent in many areas. This is not a matter of lacking the time to get “up to speed.” It is a recognition of the increasing complexity of all of law. Though the ABA began recognizing the need of lawyers to specialize by the early 1950s,¹⁷¹ the first states to recognize legal specialists were California in 1973,¹⁷² and Texas a year later.¹⁷³ Those states began certifying lawyers as specialists in areas of law such as personal injury, criminal defense, family law, and other topics of interest to individual clients.

The adoption by state bar associations of specialization certification allowed such lawyers to signal their expertise to prospective clients. That signaling effect was muted by the Supreme Court's decision in *Bates v. State Bar of Arizona*.¹⁷⁴ *Bates* held bans on truthful lawyer advertising were unconstitutional.¹⁷⁵ This negated the ABA's 1969 Code of Professional Responsibility provision absolutely banning lawyer advertising, a provision taken from its 1908 Canons of Professional Ethics.¹⁷⁶ After *Bates*, some state bar associations attempted to limit a lawyer's advertising of particular expertise.¹⁷⁷ One of these limits was to restrict such claims to those legal fields officially recognized by the bar. That limitation was held unconstitutional by the Supreme Court.¹⁷⁸

Law firms seeking to attract individual clients, particularly those suffering personal injuries, have saturated old and new media. This is due both to increased competition for injured clients, as personal injury law has changed

171. See Ariens, *supra* note 21, at 1042–51 (describing the rise of legal specializations in the second half of the twentieth century); see also Eugene C. Gerhart, *Organization for the Practice of Law: How Lawyers Conduct Their Practice*, 37 A.B.A. J. 729, 730 (1951) (“[S]pecialization not only in the nature and class of questions dealt with, but also specialization in the character of clientele.”).

172. See *Standards for Specialization Announced*, 48 CAL. ST. B.J. 63, 80–87 (1973) (stating the standards for certification in different areas of law).

173. See Richard Wells, *Certification in Texas: Increasing Lawyer Competence and Aiding the Public in Lawyer Selection*, 30 BAYLOR L. REV. 689, 689 n.1 (1978) (noting the creation of specialization certification programs by the executive director of the Texas Board of Legal Specialization).

174. *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

175. *Id.* at 384.

176. MODEL CODE OF PROF'L RESPONSIBILITY DR 2-101 (AM. BAR ASS'N 1969); MODEL CODE OF PROF'L ETHICS Canon 27 (AM. BAR ASS'N 1908).

177. See, e.g., David L. Hudson, Jr., *A Net Loss: Firm Challenges Florida Bar Over Website Ad Limits*, ABA J., Mar. 2014, at 22, 23 (stating lawyers have challenged the Florida Bar, “which prohibited lawyers from calling themselves specialists or experts unless they have achieved certain certification programs by the state bar or a national organization whose certification program has been approved by the bar”).

178. *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 104–06 (1990).

in the past several decades, and to structural changes in such firms. Personal injury law firms traditionally lacked the institutional base to survive the loss of their founders. In part, this was due to the fact that personal injury law firms, and most firms serving individual clients, were small in size. This is no longer true. Indeed, some personal injury firms tout their size (and various skills) as a reason to choose them.¹⁷⁹ Marketing personal legal services in a digital age requires significant initial and continuing investments. The size of such investments makes scale an effective competitive tool.

B. *Modern Litigation*

In a 1973 lecture at Fordham University School of Law, Chief Justice Warren E. Burger bemoaned the state of trial advocacy and urged the creation of certification standards for advocates.¹⁸⁰ Soon thereafter, the Judicial Council of the Second Circuit created a committee to make recommendations concerning admission to practice in United States District Courts in the Second Circuit.¹⁸¹ That committee, informally known as the Clare Committee, suggested a lawyer demonstrate participation in, or attendance at, four merits proceedings, including two in federal district court.¹⁸² A second approach—taken at the end of the 1970s by the Devitt Committee¹⁸³—urged greater emphasis in law schools on trial advocacy alongside other recommendations. One of the Devitt Committee’s additional recommendations was the creation of a pilot program to be assessed by a newly-crafted committee, known as the King Committee.¹⁸⁴ The King Committee recommended those who wished to try cases in federal district courts demonstrate a knowledge of federal procedure and evidence, as shown by passing a test, as well as proof that the applicant possessed some trial experience.¹⁸⁵

179. *Attorneys*, THOMAS J. HENRY, <https://thomasjhenrylaw.com/attorneys> [<https://perma.cc/J7XD-SAPL>] (claiming the firm “employs more than 100 highly skilled attorneys” in five cities in Texas and is “one of the leading personal injury firms in the nation”).

180. Burger, *supra* note 51, at 227.

181. Qualifications for Practice Before the United States Courts in the Second Circuit, 67 F.R.D. 159, 161 (1975).

182. *Id.* at 188.

183. Final Report of the Committee to Consider Standards for Admission to Practice in the Federal Courts to the Judicial Conference of the United States, 83 F.R.D. 215, 215 (1979).

184. *Id.*

185. See Ariens, *supra* note 138, at 663 (noting the King Committee’s recommendations).

Chief Justice Burger's recommendations occurred as lawyers perceived an increase in litigation, particularly civil litigation.¹⁸⁶ Whether the United States suffered from a civil "litigation explosion" remains a contentious issue.¹⁸⁷ Federal district court case filings between 1970 and 1990 increased by 50% in tort matters and 180% in commercial matters.¹⁸⁸ As one perceptive historian noted, "Though evidence of a 'litigation explosion' is slim, there is plenty of evidence of what we might call a 'liability explosion[.]'"¹⁸⁹ The explosion of tort liability is traceable both to the adoption of strict liability in tort and the end of types of status immunities (such as husband-wife and parent-child). Civil liability expanded in the 1960s; that expansion accelerated during the 1970s and 1980s.¹⁹⁰

The expansion of civil liability was part of a broader "rights" revolution, which emphasized the effectuation of individual rights.¹⁹¹ The liability explosion was a product of both private practice and public interest lawyers. The latter largely consisted of politically liberal law firms by the mid-1970s.¹⁹² Conservative public interest law firms then formed during the second half of the 1970s.¹⁹³ Like their forebears, they too focused on

186. See Burger, *supra* note 51, at 234 ("The trial of a 'serious' case . . . calls for the kind of special skills and experience that insurance companies, for example, seek out to defend damage claims.").

187. OLSON, *supra* note 59, at 1. But see Lawrence M. Friedman, *The Litigation Revolution*, in 3 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 175, 176–77 (Michael Grossberg & Christopher Tomlins eds., 2008) (stating evidence of the litigation explosion is slim).

188. See Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 STAN. L. REV. 1275, 1288–89 (2005) (noting population increase at the same time was 25% and increase in GDP was 90%).

189. Friedman, *supra* note 187, at 176.

190. See OLSON, *supra* note 59, at 1 ("The trend proceeded gradually over decades and then quite suddenly moved into high gear in the late 1960s and 1970s . . .").

191. See CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND THE SUPREME COURTS IN COMPARATIVE PERSPECTIVE* 2 (1998) (noting the rise of the rights revolution).

192. About ninety politically liberal public interest law firms existed in 1975. ANN SOUTHWORTH, *LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION* 12 (John M. Conley & Lynn Mather eds. 2008); see also BURTON A. WEISBROD ET AL., *PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS* 50–51 (1978) (counting eighty-six politically liberal public interest law firms).

193. See JEFFERSON DECKER, *THE OTHER RIGHTS REVOLUTION: CONSERVATIVE LAWYERS AND THE REMAKING OF THE AMERICAN GOVERNMENT* 8 (2016) (asserting conservative public interest groups were created to fight back against liberal public interest groups that challenged the government's authority); STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* 62 (2008) (discussing the need for conservative public interest groups to expand in the 1970s to work in the new legal regime).

individual rights claims, though different types of rights claims. Both liberal and conservative public interest law firms routinely used litigation as a tool for social and political reform. Many of these nonprofit entities prospered, and their work expanded to policy making outside of the courthouse, including legislative policy proposals.¹⁹⁴

Despite (or possibly because of) the liability explosion, the number of cases that ended during or after trial continued a century-long decline.¹⁹⁵ In federal courts, the percentage of civil cases that ended during or after trial was 19.9% in 1938, 12.1% in 1952, and 1.7% in 2003.¹⁹⁶ A recent review of the “vanishing”¹⁹⁷ American trial showed that the absolute number of civil trials in federal district courts has declined since its peak in 1985.¹⁹⁸ In 2016, the percentage of civil cases disposed of during or after trial reached a record low of 1.03%.¹⁹⁹ A similar story was found in state court dispositions from the mid-1970s through 2002.²⁰⁰

The record in criminal matters is similar. The 2016 annual study of the United States Sentencing Commission reported that 97.3% of federal offenders pled guilty, a percentage that “has been consistent for more than 15 years.”²⁰¹ The high plea rate may be due to the fact that half of those pleading guilty receive a sentence below the sentencing guideline range.²⁰² In cases in which the government possesses overwhelming evidence of guilt, the possibility of a lower sentence may be a sufficient incentive to plead guilty. The caseload carried by prosecutors may also give them the incentive

194. See Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1272–73 (2005) (discussing the use of ADR and non-trial adjudication by public interest law firms).

195. *Id.* at 1256–58.

196. *Id.* at 1258–59.

197. See Patricia Lee Refo, *The Vanishing Trial*, 1 J. EMPIRICAL LEGAL STUD. v, v (2004) (discussing the creation of the ABA Section of Litigation’s Vanishing Trial Project).

198. Graham K. Bryant & Kristopher R. McClellan, *The Disappearing Civil Trial: Implications for the Future of Law Practice*, 30 REGENT U. L. REV. 287, 294 fig.1 (2018).

199. *Id.* at 295 fig.2.

200. Brian J. Ostrom et al., *Examining Trial Trends in State Courts: 1976–2002*, 1 J. EMPIRICAL LEGAL STUD. 755, 773 (2004).

201. Compare U.S. SENTENCING COMM’N, OVERVIEW OF FEDERAL CRIMINAL CASES—FISCAL YEAR 2016, at 4 (2017) (highlighting the minimal change in guilty plea rates from 2015 to 2016), with U.S. SENTENCING COMM’N, OVERVIEW OF FEDERAL CRIMINAL CASES—FISCAL YEAR 2015, at 4 (2016) [hereinafter U.S. SENTENCING COMM’N FY 2015] (reporting 97.1% of offenders plead guilty during fiscal year 2015).

202. U.S. SENTENCING COMM’N FY 2015, *supra* note 201, at 4.

to agree to a plea and a relatively low sentence.²⁰³ Trial may be necessary when public interest exists due to the notorious nature of the alleged crime. But those cases are relatively few and far between. And a defendant may refuse to plead guilty if the proposed bargain lacks the muster promised. Finally, some accused may demand a trial because they believe even a minuscule chance for an acquittal is better than the sentence issued after a plea.²⁰⁴

The reasons for the decline in civil trials are unclear. The opportunities for pre-trial discovery expanded in the 1970s, especially for those defending against liability, lengthening the period between the filing of the complaint and trial. Further, damage awards in a number of cases increased in the 1970s, possibly making defendants more cautious about trying a case. The Federal Rules of Evidence, which applied to federal cases beginning in 1975, and which were adopted with relatively few changes by more than half of the states, emphasized the broad authority of trial courts to make discretionary decisions on evidentiary disputes.²⁰⁵ This enhanced the risks for both parties, as it made appeals from the loser at trial less likely to succeed.²⁰⁶ Beginning in the late 1970s and continuing through the early 1980s, lawyers and judges made ever more claims of discovery abuse and overzealous advocacy.²⁰⁷ Part of the reason for claims of discovery abuse may relate to efforts by parties to increase the costs of a case in order to create a more favorable environment for settlement. By the early 1980s, the Federal Rules of Civil Procedure were amended twice to counteract such abuse, including allowing sanctions for frivolous claims and arguments.²⁰⁸ This had relatively little impact on lawyer behavior.

203. See *id.* at 1 (“The United States Sentencing Commission received information on 71,184 federal criminal cases in which the offender was sentenced in fiscal year 2015.” (footnote omitted)).

204. See *McCoy v. Louisiana*, 138 S. Ct. 1500, 1512 (2018) (holding the defendant had a constitutional right to assert an absence of guilt even in the face of overwhelming evidence against him when his counsel tactically admitted his guilt in an attempt to avoid the death penalty).

205. See Michael Ariens, *Progress Is Our Only Product: Legal Reform and the Codification of Evidence*, 17 L. & SOC. INQUIRY 213, 252–53 (1992) (noting the Federal Rules of Evidence was premised on the authority of trial judges to make discretionary decisions on admission of evidence).

206. See *Just the Facts: U.S. Courts of Appeals*, U.S. CTS. (Dec. 20, 2016) <http://www.uscourts.gov/news/2016/12/20/just-facts-us-courts-appeals> [https://perma.cc/5KS3-V57B] (noting in Table 2 that the reversal rate by courts of appeals from 2011–2015 was between 5.8%–6.9% in criminal cases and 10.4%–14.2% in private civil cases).

207. Ariens, *supra* note 38, at 721–23.

208. Amendments to the Federal Rules of Civil Procedure, 85 F.R.D. 521, 532–34 (1980); Federal Rules of Civil Procedure, 97 F.R.D. 165, 167 (1983).

A zealous civil defense lawyer did not have to make a frivolous argument to make it more difficult for a plaintiff to obtain a monetary settlement or judgment. The lawyer simply made it more costly for the plaintiff to recover through extensive, and then more extensive, discovery. A primary defense strategy of tobacco companies in personal injury claims was to make litigation as costly as possible.²⁰⁹ For a long time that approach successfully shielded them from liability. That template has been followed by many. A recent example is the invasion of privacy suit brought by Terry Bollea (Hulk Hogan) against Gawker Media.²¹⁰ It appears part of Gawker’s litigation goal was to force Bollea to spend until he exhausted all of his funds.²¹¹ The contentiousness of the discovery process required the Florida state trial court to use a special magistrate to assess evidentiary claims, on whom “[n]early a million dollars” were spent.²¹² In *Conspiracy*, Ryan Holiday notes the “[l]egal filings alone amounted to some 25,000 pages[,]” including “hundreds of motions and responses and motions in response to responses to motions.”²¹³ Holiday further explains the parties argued at “at least fifty in-person hearings” before trial.²¹⁴ Although no final accounting is given, it appears that Peter Thiel, who secretly financed Bollea’s case from the beginning, may have spent more than \$10 million.²¹⁵

Lawyers for plaintiffs can give as well as they get in discovery, as happened in *Bollea v. Gawker*.²¹⁶ However, the financial incentive to delay by extending discovery is generally with defense lawyers, who ordinarily bill by the hour, and defendants, who may wish to delay any payment. Plaintiffs and their lawyers have a contrary incentive. The disparities in financing led to innovations in how cases were managed by plaintiffs’ lawyers. Two early

209. See MICHAEL OREY, *ASSUMING THE RISK: THE MAVERICKS, THE LAWYERS, AND THE WHISTLE-BLOWERS WHO BEAT BIG TOBACCO* 355–56 (1999) (discussing discovery disputes in an early victory in tobacco litigation in Mississippi).

210. See HOLIDAY, *supra* note 62, at 194–95 (describing how both parties manipulated the discovery process to increase cost and drag out the litigation).

211. See *id.* at 195 (“One Gawker motion contain[ed] sixty-two exhibits, and from the seemingly endless coffers of Peter Thiel some \$70,000 is drawn with which to respond and defend against that motion.”).

212. *Id.* at 194.

213. *Id.* at 194–95.

214. *Id.* at 195.

215. *Id.* at 226.

216. *Bollea v. Gawker Media, LLC*, 913 F. Supp. 2d 1325 (M.D. Fla. 2012).

examples were asbestos²¹⁷ and tobacco litigation,²¹⁸ in which plaintiffs' lawyers joined to share information and costs.²¹⁹ Soon plaintiffs' personal injury lawyers also joined together to file class action lawsuits.²²⁰ More recently, several litigation-finance companies have been created, which finance lawsuits in exchange for a percentage of any future award.²²¹

The scale of the earnings of the most successful plaintiffs was astounding from the 1970s on. The most famous example was the fee Texas lawyer Joe Jamail earned in the late 1980s representing Pennzoil in its lawsuit against Texaco. It was variously reported as between \$300 and \$420 million.²²² That began Jamail's stay at the top of intermittent lawyer income stories. The lawyers involved in the tobacco litigation settled in the late 1990s—earning several billion dollars.²²³ Other plaintiffs' lawyers have also made an extraordinary amount of money.²²⁴ But most personal injury lawyers did not win million-dollar judgments or settlements. They have made a

217. See WILKIE, *supra* note 61, at 46 (referring to the joining of attorneys Richard “Dickie” Scruggs and Roberts Wilson, creating the enterprise Asbestos Group, to handle claims against the industry).

218. See *id.* at 56 (recounting how Richard Scruggs was aided by Don Barrett in the litigation against Brown and Williamson Tobacco Corporation).

219. *Id.*

220. See *id.* at 108 (stating numerous class actions across the country were led by Richard Scruggs).

221. See Sara Randazzo, *The New Hot Law Job: Litigation Finance*, WALL ST. J. (July 5, 2018, 5:30 AM), <https://www.wsj.com/articles/the-new-hot-law-job-litigation-finance-1530783000> [<https://perma.cc/DG32-8BSG>] (reporting Longford Capital Management LP raised \$566.5 million since 2011, “committing \$330.3 million to 38 investments, including portfolios with multiple lawsuits”); see also LEGALIST, LITIGATION FINANCE GUIDE 3 (2017), <https://www.legalist.com/guides/guide-to-litigation-finance/> [<https://perma.cc/UC5R-V7HH>] (“Litigation financing is the practice where a third party provides capital to a plaintiff involved in litigation in return for some financial recovery from the lawsuit.”).

222. See MICHAEL S. ARIENS, LONE STAR LAW: A LEGAL HISTORY OF TEXAS 274 (2011) (questioning whether the Texas Supreme court was corrupt based on the astronomical amount of money plaintiff lawyer Joe Jamail earned).

223. See Daniel J. Capra et al., *The Tobacco Litigation and Attorneys' Fees*, 67 FORDHAM L. REV. 2827, 2827–28 (1999) (noting lawyers shared several billion dollars in fees).

224. See generally LESTER BRICKMAN, LAWYER BARONS: WHAT THEIR CONTINGENCY FEES REALLY COST AMERICA 35–36 (2011) (considering the potential for contingency fees to lend to extremely high hourly rates and asserting that the collection of such enormous fees implicates a public interest). See, e.g., DILLON & CANNON, *supra* note 61, at 2–3 (discussing how plaintiff securities litigation lawyer William “Bill” Lerach and the firm in which he was a partner won damages totaling \$45 billion, receiving a fee of up to 30% of the amount).

good living, but rarely became wealthy in the practice of law.²²⁵

The ordinary does not become news; extraordinary monetary verdicts, on the other hand, gain national attention. The extraordinary was that settlements and verdicts in personal injury cases had skyrocketed. The most-referenced example is *Liebeck v. McDonald's Restaurants*.²²⁶ A woman purchased coffee from the drive-through lane at a McDonald's. She spilled it on her lap, causing her third-degree burns. She was awarded nearly \$2.9 million in actual and punitive damages by a jury (later reduced by the court to \$640,000).²²⁷ Though the actions of the jury, and Liebeck, were defended ably, the newsmakers used the case to urge tort reform.²²⁸ They succeeded.

One example of such tort reform was in Texas in 2003. The legislature's actions made "it much harder for [plaintiffs' lawyers] to pursue their chosen specialty profitably."²²⁹ Soon thereafter, federal district judge Janis Jack, seated in Corpus Christi, issued an opinion declaring a diagnoses of silicosis unreliable and misjoinder of 10,000 plaintiffs in a mass tort matter.²³⁰ Her opinion served as a loud signal that the heyday of mass tort cases was over. Such cases still exist, but no longer draw significant attention from the general media.

Another consequence of the changes in litigation over the past fifty years is the professionalism debate. To what extent are lawyers different from others who sell their services? The traditional answer was that lawyers were professionals, and as such, lawyers were required to remain independent of their clients.²³¹ That is, they were required to say "no" to some of their clients' desires. By 1983, the effects of the long economic slog of the 1970s

225. See STEPHEN DANIELS & JOANNE MARTIN, TORT REFORM, PLAINTIFFS' LAWYERS, AND ACCESS TO JUSTICE 138–39 (2015) (explaining the tactics plaintiffs' lawyer use to get clients and how expensive advertising can be).

226. *Liebeck v. McDonald's Restaurants, P.T.S., Inc.*, CV-93-02419, 1995 WL 360309 (N.M. Ct. App. Aug. 18, 1994).

227. See WILLIAM HALTOM & MICHAEL MCCANN, DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS 193–95 (2004) (recounting the history of the case and how newspapers interpreted it).

228. See *id.* at 195–96 ("[F]ragmentary accounts and misleading factoids would facilitate intercessions by reform-oriented and reform-influenced commentators to spin the case as another instance of frivolous litigation.").

229. DANIELS & MARTIN, *supra* note 225, at 31.

230. *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563 (S.D. Tex. 2005).

231. See Ariens, *supra* note 9, at 580 (discussing the traditional aspects of lawyer professionalism).

had led to a greater interest among lawyers to say “yes” to their clients.²³² One perceived example of this desire was the rise of Rambo-style lawyering in litigation.²³³ This was the type of overzealous advocacy on behalf of clients that many lawyers (and some of the public) decried.

The ABA created a Special Commission on Professionalism that urged a return to the principles of professionalism and away from utter commercialism.²³⁴ That Commission's well-publicized report was followed by a suggestion from the ABA Section on Torts and Insurance Practice that bar associations adopt a professionalism creed—an explicit statement of those professionalism principles.²³⁵ Over a quarter-century later, 123 civility or professionalism codes have been adopted by state and local bar associations and courts.²³⁶ Further, Arizona, Florida, and South Carolina have made lawyer's repeated violations of the creed grounds for discipline.²³⁷

C. *The Bureaucratization of Legal Ethics*

The ABA's 1969 Code of Professional Responsibility was extraordinarily popular. The vast majority of state bar associations adopted the Code with few, if any, revisions. Yet that popularity was no deeper than the thinnest

232. See *id.* at 587–88 (“The ‘lawyer as hired gun’ metaphor rose as the ideal of the lawyer as independent of her client fell. This shift was in significant part due to a several-fold sorting within the legal profession that accelerated between 1970 and 1984.”).

233. See Thomas M. Reavley, *Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics*, 17 PEPP. L. REV. 637, 637 (1990) (addressing the “‘Rambo,’ ‘take no prisoners’ attitude” many lawyers possess when using unfair tactics and intimidation); see also Robert N. Saylor, *Rambo Litigation: Why Hardball Tactics Don't Work*, ABA J., Mar. 1988, at 79, 79 (discussing the characteristics of Rambo-style lawyering).

234. See Ariens, *supra* note 39, at 51 (tracing the history of the Special Commission on Professionalism).

235. See *id.* at 51 (detailing how the report's title, *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism*, indicated the Special Commission's opinions of professionalism in the American legal profession).

236. See *id.* at 51 n.17 (noting the count of civility and/or professionalism codes compiled by the author's then-research assistant Sumner Macdaniel).

237. See ARIZ. R. SUP. CT. 31 (stating lawyers “will conduct [themselves] in accordance with the . . . Creed of Professionalism when dealing with . . . client[s], opposing parties, their counsel, tribunals[,] and the general public”); *In re* Code for Resolving Professionalism Complaints, 116 So. 3d 280, 282 (Fla. 2013) (ordering the adoption of the Code for Resolving Professionalism Complaints, which is the basis for imposing discipline for violations); *In re* White, 707 S.E.2d 411, 416 (S.C. 2011) (upholding a lawyer's definite ninety-day suspension from practice for “blatant incivility and lack of decorum”).

topsoil. The slings and arrows suffered by the Code were mercifully ended when the ABA created a new Special Commission on Evaluation of Ethical Standards in 1977.²³⁸

This Special Commission, known as the Kutak Commission, worked in a transformed environment.²³⁹ The Special Committee drafting the Code worked out of sight, hearing from few and reporting little for four years.²⁴⁰ The Kutak Commission brought in experts to assist them, and reported publicly its “Working Draft” less than two years after its formation, in time for discussion at the August 1979 ABA Annual Meeting.²⁴¹ But the Kutak Commission was working after Watergate in a time in which “transparency” was both a watchword and a cudgel.²⁴² Critics disparaged the Commission’s work as done in secret and failing to meet the needs of the clients of private practice lawyers, whether corporations, criminals, or both.²⁴³ The Kutak Commission’s earliest efforts placed limits on the lawyer’s duty of loyalty to the client, including the duty to keep client confidences.²⁴⁴ When the Discussion Draft was publicly issued on January 30, 1980, the Commission had softened some of this limiting language. Critics remained unconvinced.²⁴⁵ The Proposed Final Draft was published in May 1981. Many of the same critics made many of the same criticisms, and this was true when the Final Draft was distributed a year later.²⁴⁶

The discussion in the ABA House of Delegates in August 1982 was disastrous for the Kutak Commission.²⁴⁷ The House failed to address most of the Final Draft, and the Kutak Commission barely escaped dismissal.²⁴⁸ The February 1983 Midyear Meeting was just as eventful. The House of

238. Ariens, *supra* note 38, at 689–90.

239. See Ariens, *supra* note 39, at 77 (emphasizing the change in the legal profession and clash with the goals of the Kutak Commission).

240. *Id.*

241. See Ariens, *supra* note 38, at 706 (discussing the extreme negative reactions to the Kutak Commission’s “Working Draft”).

242. *Id.* n.117 (“[T]he Commission’s limited release demonstrated a lack of transparency.”).

243. *Id.* at 712.

244. See *id.* at 706–09 (“[There] were particular concern[s] with the Commission’s decisions concerning the limits of the lawyer’s duty of confidentiality.”).

245. *Id.* at 709–18.

246. *Id.* at 710–14, 718; *Annual Report of the Commission on Evaluation of Professional Standards*, 107 A.B.A. ANN. REP. 828, 920–21 ex. D (1982).

247. Ariens, *supra* note 38, at 738–39 n.370.

248. *Id.* at 739.

Delegates, reflecting the broader legal profession, reached opposing conclusions about what it meant to be an American lawyer. For example, what were the limits on advising a client who might then engage in fraudulent or criminal action? The Kutak Commission believed a lawyer was constrained if the lawyer “reasonably should know” the conduct was fraudulent or criminal. The House allowed the lawyer to counsel a client, or assist a client in conduct, provided the lawyer did not “know” of the unlawful nature of the client’s activities.²⁴⁹ The fracture within the profession was shown by the narrowness of the vote,²⁵⁰ 158 to 144.²⁵¹

This pattern continued. A broad understanding of the lawyer’s duties beyond those to his client was rejected in favor of emphasizing the lawyer-client bond.²⁵² The resulting Model Rules of Professional Conduct thus became based on the idea that the lawyer’s most important duty was client loyalty.²⁵³ This was not what the Kutak Commission had in mind. Further, by adopting a Restatement-like rules approach, the impression received by lawyers was that standards of ethics were solely about avoiding breaking the rules. These were rules presented in the negative, as “thou shalt nots.”

The fracture among lawyers concerning ethical behavior continued in the adoption process.²⁵⁴ Most state bar associations eventually adopted the Model Rules, but they did so more haltingly and less straightforwardly.

The Kutak Commission’s Reporter, Geoffrey C. Hazard, Jr., was named Director of the American Law Institute (ALI) the year after adoption of the Model Rules by the ABA.²⁵⁵ Hazard promoted the drafting of the Restatement (Third) of the Law Governing Lawyers, in part to respond to the approach to legal ethics taken by the House of Delegates.²⁵⁶ In 1999, the ALI adopted this Restatement.²⁵⁷ By then, the ABA had initiated

249. See *Proceedings of the 1983 Midyear Meeting of the House of Delegates*, 108 A.B.A. ANN. REP. 289, 292–93 (1983) (approving proposed amended to Final Draft language which reflected the accepted standards of counsel).

250. See *id.* (approving a proposed amendment to the Final Draft language, which reflected the accepted standards of counsel).

251. *Id.* at 293.

252. Ariens, *supra* note 38, at 691–92.

253. *Id.*

254. *Id.* at 693.

255. Herbert Wechsler, *Report of the Director*, 60 A.L.I. ANN. REP. 5, 14 (1983).

256. See Lawrence J. Latta, *The Restatement of the Law Governing Lawyers: A View from the Trenches*, 26 HOFSTRA L. REV. 697, 727–28 (1998) (discussing the basis of the Restatement (Third) of the Law Governing Lawyers).

257. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (AM. LAW INST. 2000).

another effort regarding rules of ethics: the Ethics 2000 Commission.²⁵⁸

The Ethics 2000 Commission refreshed the issue of the extent of the lawyer's duty to keep client confidences.²⁵⁹ In 1983, the House of Delegates rejected limits on this duty.²⁶⁰ Not only was a lawyer not required to disclose a client confidence to prevent a future fraud upon a third party, the lawyer was not permitted to do so in the ABA's Model Rules.²⁶¹ This policy was rejected by a number of states.²⁶² The Ethics 2000 Commission tried again. And it failed again. At the ABA's August 2001 Annual Meeting, the House of Delegates rejected giving a lawyer discretion to disclose a client confidence in such circumstances.²⁶³

And again, there was the Enron scandal. Within two years, the ABA House of Delegates had agreed that lawyers may disclose confidences to prevent future frauds and rectify certain past frauds.²⁶⁴ The division seen in 1983 remained in existence in 2003: the vote in favor of the amendments to Model Rule 1.6 was by the narrow margin of 218–201.²⁶⁵ By doing so, the ABA successfully derailed a federal effort to regulate the conduct of lawyers.²⁶⁶ But it did so by acceding ever so slightly to the demands of those who perceived the rules of ethics as made for the interests of lawyers and their clients—not the public. ABA members had not covered themselves in glory and seemed willing to limit their affection for their clients only to the extent it was necessary to meet the public outcry. They retained the idea that ethics was merely about what one could not do.

The ABA recently engaged in another ethics effort called Ethics

258. *Report of the President*, 122 A.B.A. ANN. REP. 755, 755–56 (1997).

259. *Proceedings for the Annual Meeting of the House of Delegates*, 126 A.B.A. ANN. REP. 1, 7 (2001).

260. Ariens, *supra* note 38, at 740.

261. *Proceedings for the Annual Meeting of the House of Delegates*, *supra* note 259, at 34–35. Relatedly, lawyers were not permitted to disclose a past fraud committed by a client who did so in part using, unwittingly, the lawyer's services. Ariens, *supra* note 38, at 740.

262. *Proceedings for the Annual Meeting of the House of Delegates*, *supra* note 259, at 35–37.

263. *See id.* (adopting amendment to strike Rule 1.6(b)(2) from Ethics 2000 proposals due to its contradiction with core values of the legal profession).

264. *See Proceedings of the 2003 Annual Meeting of the ABA House of Delegates*, 128 A.B.A. ANN. REP. 1, 14–18 (2003) (highlighting the House's prior refusal to adopt client fraud disclosure rules).

265. *Compare Proceedings of the 1983 Midyear Meeting of the House of Delegates*, *supra* note 249, at 298 (describing the narrow vote of 207 to 129 to approve the proposed amendments to Model Rule 1.6(b)), *with Proceedings of the 2003 Annual Meeting of the House of Delegates*, *supra* note 264, at 18–19 (noting the close vote to amend Rule 1.6 in 2003).

266. Ariens, *supra* note 166, at 275, 278–81.

20/20.²⁶⁷ The Ethics 20/20 Commission, created in the wake of the Great Recession, offered the same justifications as past ABA Commissions for its creation: a transformed legal profession. Though the pace of technological change was given as one reason for the creation of the Ethics 2000 Commission, the Ethics 20/20 Commission claimed such change was taking place even more rapidly. The need for amendments to the ethical rules guiding lawyers was necessary because “[t]echnology and globalization [had] transformed the practice of law in ways the profession could not anticipate in 2002.”²⁶⁸

Despite the allegedly increasing pace of change, the Ethics 20/20 Commission did “not recommend changes to [ABA] basic regulatory construct.”²⁶⁹ Likewise, Model Rule 1.6 on confidences was amended to require lawyers to make “reasonable” efforts to prevent the theft of client information stored in the cloud or otherwise possibly available to cyber thieves.²⁷⁰ A couple of other changes were proposed, but none were striking.

The Commission concluded its goal was to make recommendations “that respond to a rapidly changing legal marketplace while preserving the legal profession’s core values.”²⁷¹ The Commission assumed, rather than explained, what those “core values” were. This has been a persistent problem in both ABA Commissions and Task Forces, and in the wider profession. The over-arching question for lawyers remains: What, if anything, does it mean to be a lawyer?

When the ABA Special Commission on Professionalism issued its final report in 1987, it spoke of the lawyer’s duty to promote and develop “integrity, competence, fairness, independence, courage and a devotion to

267. ABA COMM’N ON ETHICS 20/20, AM. BAR ASS’N, INTRODUCTION AND OVERVIEW 1 (2012), https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_hod_introduction_and_overview_report.authcheckdam.pdf [<https://perma.cc/L6RA-GUKJ>].

268. *Id.*

269. *Id.* at 2.

270. *See* MODEL RULES OF PROF’L CONDUCT R. 1.6(c) cmt. 19 (AM. BAR ASS’N 2018) (“[T]he lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures . . .”).

271. ABA COMM’N ON ETHICS 20/20, *supra* note 267, at 13.

the public interest.”²⁷² All good things, and the Commission well knew that rules of ethics would have little if any impact on those developments within the profession. In its second overall recommendation, the Commission urged the bar to “abide by higher standards of conduct than the minimum required by the Code of Professional Responsibility and the Model Rules of Professional Conduct.”²⁷³ That ideal remains tantalizingly just out of reach.

The problem is, of course, that the ABA is chasing up-to-date legal ethics rules as a greyhound tracks a mechanical rabbit. It is futile for the ABA to believe it can ever meet the challenges to the meaning of professional behavior by use of rules of ethics, and the Ethics 20/20 Commission’s reiteration of the rapidity of change suggests it understands this. Even in legal ethics, the emphasis on the scale of technological change, not what ethics has to do with the practice of law, indicates the immensity of the transformation of the legal profession.

IV. CONCLUSION

The pressure on lawyers over the past half century, intensified by the desire for scale, has taken its toll on the legal profession. In 2016, a study of substance abuse among 12,825 practicing American lawyers was published.²⁷⁴ Among the participants, “20.6% screen[ed] positive for hazardous, harmful, and potentially alcohol-dependent drinking.”²⁷⁵ The authors concluded that “[a]ttorneys experience problematic drinking . . . consistent with alcohol use disorders at a higher rate than other professional populations.”²⁷⁶ A study of law students reached similar results: “[R]oughly one-quarter to one-third of respondents reported frequent binge drinking or misuse of drugs, and/or reported mental health challenges.”²⁷⁷

It is unclear whether these numbers (if replicated) reflect a new trend in the legal profession and in legal education. Change, of course, can add

272. JUSTIN A. STANLEY, AM. BAR ASS’N, ABA COMM’N ON PROFESSIONALISM, ‘. . . IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM (1986), reprinted in 112 F.R.D. 243, 265 (1987).

273. *Id.*

274. Patrick R. Krill et al., *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICTION MED. 46, 46 (2016).

275. *Id.*

276. *Id.*

277. Jerome M. Organ et al., *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*, 66 J. LEGAL EDUC. 116, 116 (2016).

stress, and an abundance of stress may lead to anxiety. One way to alleviate anxiety is through self-medication and abuse of harmful substances.

Lawyers have always faced significant stress in their professional lives. Modern times are no different. Despite suggestions to the contrary, lawyers from every era have worked at a time of rapid change. Whether such change comes from society or its technological marvels is unimportant. To work as a lawyer requires resilience in the face of professional stress. To work as a private practice lawyer requires a willingness to accept risk, to work without a net in front of a crowd.

Keeping that anxiety at bay requires lawyers to remind themselves that their clients need their services. And for those just beginning the practice of law, there are millions of people with legal needs who cannot (or believe they cannot) afford legal services. These are challenging times. Yet, many who study the legal services market have concluded that these are also opportunistic times. The pressure to use scale to compete will continue to build, but so will the opportunity to meet those legal needs long unserved. As noted a long time ago, it is always the best of times and the worst of times.