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## Foreword: The New Era- Quo Vadis?

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## FOREWORD: THE NEW ERA – QUO VADIS?<sup>1</sup>

*Jack P. Sahl\**

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1. “Quo Vadis” is Latin for “Wither goest thou?” *The Pocket Oxford Dictionary* 115, 145 (James Morwood ed., 1994, Oxford University Press); See *Twenty-Five Legal Stories That Defined the Decade*, NAT’L. L.J., 2009, at 3, 6-28 [hereinafter *The Top 25*] (highlighting technological changes and globalization as two of the top twenty-five “events of a remarkable decade for the law and the profession”). See also *infra* note 2. (discussing a remarkable period of new developments).

## I. INTRODUCTION

The increase in multijurisdictional practice (MJP)—both domestic and international—and advances in technology continue to affect the legal profession dramatically.<sup>2</sup> American Bar Association President Carolyn B. Lamm’s recent appointment of the ABA Commission on Ethics 20/20 (the 20/20 Commission) may best underscore the importance of these two developments.

President Lamm charged the 20/20 Commission to take a “fresh look at legal ethics and the regulation of the profession in light of globalization and technological changes.”<sup>3</sup> Her charge poses a significant challenge to the profession, particularly given the fact that it undertook a major review of its ethical code less than a decade ago.<sup>4</sup>

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2. *The Top 25*, *supra* note 1, at 11-13 (writing that “[t]ech advances [have] redesigned the shape of legal practice during the past decade” and that “[a] law office in every port” reflects the impact of globalization of the legal services market). *See also* Trippe S. Fried, *Licensing Lawyers in the Modern Economy*, 31 CAMPBELL L. REV. 51 (2008) (reporting profound changes in the last twenty years in the American and international economies and that service providers, such as lawyers, in the new millennium will be forced to adapt quickly given the “realities of modern transactions”); Sara J. Lewis, Note, *Charting the “Middle” Way: Liberalizing Multijurisdictional Practice Rules for Lawyers Representing Sophisticated Clients*, 22 GEO. J. LEGAL ETHICS 641, 642 (2009) (noting a period of dramatic changes in the legal profession because of the “increasing nationalization and globalization of the legal profession” and new technologies); Steven I. Platt, *Flattened World Spells Changes for Judiciary*, THE DAILY RECORD, Oct. 23, 2009 (commenting that Thomas L. Friedman, in his book *The World is Flat*, argued that “it was around the year 2000 that we entered a whole new era: globalization 3.0” where the world became smaller and individuals collaborated and competed globally; also suggesting that in light of this development the judicial branch should consider specialization and multidisciplinary collaboration as a way to increase access to justice); Anne Kniffen, *Office Designs in Changing Times*, 28 LEGAL MGMT. 28 (2009) (underscoring that “[l]aw firm operations have transformed dramatically during the past decade, with new technologies, a greater focus on efficiency, and cultural changes all impacting this evolution”).

3. Pamela Atkins, *ABA Launches New Initiative to Revamp Lawyer Ethics Rules*, 25 LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) at 418 (Aug. 5, 2009). The newly elected ABA President announced the creation of the 20/20 Commission to the House of Delegates, the governing body of the ABA, at its 2009 Annual Meeting. *Id.* The Task Force is co-chaired by former deputy attorney general Jamie S. Gorelick and Michael Traynor, former President of the American Law Institute. *Id.* The 20/20 Commission has fifteen members, four liaisons, a reporter, and counsel. <http://www.abanet.org/ethics2020abutus.html> (last visited on Jan.13, 2010).

4. That review culminated in the 2001 Report of the ABA Ethics 2000 Commission. *See* STEPHEN GILLERS, ROY D. SIMON & ANDREW M. PERLMAN, REGULATION OF LAWYERS: STATUTES AND STANDARDS, xix (2010) (reporting that: “43 jurisdictions have significantly revised their rules . . . ; 5 states have circulated proposed rules that remain pending . . . ; and 3 states have appointed review committees that have not yet issued their reports” since the Ethics 2000 Commission’s Report in 2001 and the ABA’s amendments to Rules 1.6 and 1.13 in 2003). The nine-year interval between the 2001 Report and the appointment of the Ethics 20/20 Commission is not an especially long period and underscores, in part, the dramatic changes occurring in the legal services market. While the ABA has often amended its ethics rules, some commentators suggest that there are three

Although the Miller-Becker Institute for Professional Responsibility (the MBI) planned its Inaugural Symposium before the creation of the 20/20 Commission,<sup>5</sup> the Symposium brought together twenty-six national and international experts to examine the consequences of globalization, rapid technological change, and more.<sup>6</sup> The experts included a broad and diverse group of scholars, practitioners, and in-house counsel, as well as a federal judge.<sup>7</sup> The

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generations of ethical codes. *Id.* at 4. The first generation was the 1908 ABA Canons of Professional Ethics; the second generation was the 1969 Code of Professional Responsibility; and the third generation was the ABA's adoption of the Model Rules of Professional Conduct in 1983. *Id.* The Ethics 2000 Commission's Report, if not a fourth generation, represented a "comprehensive study and evaluation of the ethical and professionalism precepts of the legal profession." *Id.* at 5 (quoting ABA ETHICS 2000 COMMISSION'S MISSION STATEMENT). *Cf.* Steven Krane, *Regulating Attorney Conduct: Past, Present, and Future*, 29 HOFSTRA L. REV. 247, 258 (2000) (asserting that the Ethics 2000 Commission study was somewhat disappointing because it did not take a "fresh look at the fundamental nature of the rules governing attorney conduct" and stating: "[the Commission did] nothing more than tinker and fine tune the existing platform."). *See generally* ELIOT FREIDSON, PROFESSIONAL POWERS: A STUDY OF THE INSTITUTIONALIZATION OF FORMAL KNOWLEDGE 187 (1986) (reporting that a great many professional associations, like law, have a formal code of ethics but by and large focus more on providing services to its members rather than "exercis[ing] control over their ethical or technical work behavior").

5. The Miller-Becker Institute for Professional Responsibility Advisory Board approved the symposium topics in October 2008. The ABA created the 20/20 Commission in August 2009. The MBI was founded in 1993 as the Miller Institute for Professional Responsibility in honor of Akron Attorney Joseph G. Miller. *See* Miller-Becker Institute for Professional Responsibility Mission Statement <http://www.uakron.edu/law/millerbecker/about.dot> (providing a list of MBI sponsored programs, guest speakers, and speaking engagements for MBI staff). University of Akron School of Law Professor William C. Becker served as the Miller Institute's first director. *Id.* The Institute was renamed to include Professor Becker's name. *Id.* "The [MBI] is dedicated to enhancing public trust and confidence in the legal profession and the judicial system." *Id.* Its efforts include: sponsoring a broad variety of programs to increase the ethical awareness of attorneys, judges, and law teachers, "advocating for the enhancement of professionalism" in the bar, and studying the disciplinary systems for lawyers and judges. *Id.* On Oct. 8, 2009 the MBI Advisory Board approved a recommendation to rename the MBI as the Miller-Becker Center for Professional Responsibility in part because of its interdisciplinary work. This Introduction and the other articles use the Center's old name, MBI, since it was in effect at the time of the Symposium.

6. The "Lawyers Beyond Borders" part of the Symposium considered both domestic and international multijurisdictional practice whereas President Lamm's primary focus seems to be on international cross-border practice.

7. The participants included: Associate Professor & MBI Fellow, Sarah Cravens (The University of Akron School of Law), Professor Xiangshun Ding (School of Law Renmin University of China), Professor David S. Caudill (Villanova University School of Law), Professor Nathan M. Crystal (Charleston School of Law), Professor John S. Dzienkowski (The University of Texas School of Law), Art Garwin (ABA Center for Professional Responsibility), Professor Stephen Gillers (New York University School of Law), Professor Arthur Greenbaum (The Ohio State University School of Law), The Honorable James Gwyn (U.S. District Court for the Northern District of Ohio), Donald Hilliker (McDermott Will Emery LLP), William Manson (Lubrizol, Inc.), Janet Green Marbley (Clients' Security Fund, Supreme Court of Ohio), Professor Judith McMorro (Boston College Law School), Professor James E. Moliterno (Washington & Lee University School of Law), Professor Carol Needham (St. Louis University School of Law), Professor Paul Paton

ABA Center for Professional Responsibility co-sponsored the two-day conference, which attracted over 100 attendees and significant national media attention.<sup>8</sup>

## II. LAWYERS BEYOND BORDERS

National and international multijurisdictional practice continues to attract much attention for a variety of reasons.<sup>9</sup> Ease of mobility, new technology, national and transnational markets, and developments in the lawyer-regulatory regimes of states and nations have all contributed to the ever-increasing nationalization and internationalization of the legal services market.<sup>10</sup> MJP is expected to keep growing, as will its effects on the training, licensing, regulating, and disciplining of lawyers. Those effects include, for example, changes in the regulation of the unauthorized practice of law (UPL).<sup>11</sup> Impermissible MJP generally violates UPL rules and exposes the transgressing lawyer or firm to significant sanctions.<sup>12</sup> Disciplinary bodies have shown increased interest in enforcing UPL prohibitions, with some notable successes.<sup>13</sup>

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(McGeorge School of Law, University of the Pacific), Professor Andrew Perlman (Suffolk University School of Law), Professor Margaret Raymond (University of Iowa), Professor Jack P. Sahl (University of Akron School of Law); Professor Carole Silver (Georgetown University Law Center), Professor Laurel Terry (Penn State Dickinson School of Law), Brian F. Toohey (Jones Day), Mark Tuft (Cooper, White & Cooper), Donald Wochna (Vestige, Ltd.) and Associate Dean Stephen Yandle (Peking University, School of Transnational Law).

8. The MBI's Inaugural Symposium occurred on Oct. 8-9, 2009, at the University of Akron.

9. See *infra* note 35. See also Mark J. Fucile, *20 Important Choices: Choice of Law under Model Rule 8.5(b)*, 19 PROF. LAW. 20, 22 (2009) (noting that lawyers are increasingly practicing across state lines and discussing choice of law analysis under MR 8.5(b)). See generally, John C. Coffee Jr., *High Court and Congress on a Collision Course*, NAT. L. J., Jan. 18, 2010, at 20 (discussing the reasons for the increase in global class actions in federal courts and warning that "Congress and the United States Supreme Court are on course for a train wreck" over proposed legislation extending the extraterritorial jurisdiction of U.S. courts).

10. See Carole Silver, *What We Don't Know Can Hurt Us: The Need for Empirical Research in Regulating Lawyers and Legal Services in the Global Economy*, 43 AKRON L. REV. 1009 (2010).

11. Cross border practice or MJP also implicates MR 8.5's choice-of-law provisions as lawyers may be subject to the regulatory authority of multiple states. MODEL RULES OF PROF'L CONDUCT R. 8.5(b)(2008); ABA State Implementation of ABA Model Rule 8.5 (Disciplinary Authority; Choice of Law), [http://www.abanet.org/cpr/mjp/quick-guide\\_8.5.pdf](http://www.abanet.org/cpr/mjp/quick-guide_8.5.pdf) (as of Oct. 26, 2009). See e.g., *Kentucky Bar Association v. Yocum*, 294 S.W.3d 437, 440 (Ky. 2009) (applying Kentucky's choice of law rule, SCR 3.130-8.5(a), to discipline a lawyer who was not admitted in Kentucky but who provided legal services in the state); *Sisk v. Transylvania Community Hospital, Inc.*, 670 S.E.2d 352, 355 (N.C. 2009) (holding that North Carolina's Rule 8.5 precluded North Carolina from revoking a lawyer's *pro hac vice* status for conduct that occurred in Kentucky and that had been held permissible under that state's rules).

12. See *Birbrower, Montalbano, Condon, & Frank, P.C. v. Superior Court of Santa Clara County*, 949 P.2d 1 (Cal. 1998). See Quintin Johnstone, *Unauthorized Practice of Law and the Power of State Courts: Difficult Problems and Their Resolutions*, 39 WILLAMETTE L. REV. 795, 807

There is a general consensus that there has been an increase in both national and international MJP.<sup>14</sup> An Illinois state bar committee recommended the adoption of ABA Model Rule 5.5 in 2008 partly because “the reality [of] modern [law] practice . . . frequently necessitates crossing state lines.”<sup>15</sup> “[A] growing number of lawyers regularly represent clients in connection with transactions and litigation that take place in jurisdictions where the lawyer may not be admitted.”<sup>16</sup> Although there is scant information regarding the growth and size of MJP within the United States, some recent developments support the consensus. For example, over 75 percent of all U.S. jurisdictions have modified their ethics rules to permit some types of MJP, with Illinois

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(2003) (writing that what constitutes a violation of a state’s MJP’s rules is “highly ambiguous, uncertain, and often unclear”).

13. See *infra* notes 35-49 and accompanying text. Ohio has attracted significant attention in the UPL field with two large UPL judgments. *Columbus Bar Assn. v. Am. Family Prepaid Legal Corp.*, 916 N.E.2d 784, 800 (Ohio 2009) (awarding \$6.4 million civil penalty with an additional fine of \$25,000 per day fine for not timely disclosing its customer list in a UPL trust mill case); *Cleveland Bar Assn. v. Sharpe Estate Services, Inc.* 837 N.E.2d 1183, 1188 (Ohio 2005) (holding that the marketing and selling of living trusts and estate plans constituted UPL and imposing a \$1,027,260 fine).

14. See Helen W. Gunnarsson, *A Proposed Makeover for the Rules of Professional Conduct*, 96 ILL. B. J. 128, 129 (2008) (quoting Richard A. Redmond, the Chair of Illinois Supreme Court’s Committee on Professional Responsibility, in a letter transmitting proposing MJP and other rule changes. “[B]ecause of the increase in multijurisdictional practice . . . “[l]aw practice is no longer local.”” *Id.* Raymond J. Werner, *Licensed in One State, but Practicing in Another: Multijurisdictional Practice*, 17 PROB. & PROP. L.J. 6 (2003) (stating it is common for a lawyer licensed in one state to be involved in a transaction that has some connection to another jurisdiction where the lawyer may not be admitted); Mark Hansen, *MJP Picks Up Steam*, A.B.A. J., Jan. 1, 2010 (noting early interest by states in MR 5.5’s more tolerant approach to MJP—that 5.5 is “making it easier for lawyers to practice temporarily in states where they are not licensed”); Laurel S. Terry, Carole Silver, Ellyn Rosen, Carol Needham, Robert E. Lutz, & Peter D. Ehrenhaft, *Transnational Legal Practice*, 42 INT’L LAW. 833, 834 (2008) (stating that “[l]aw practice continues to expand across borders,” albeit in a transnational context, but this cross-border practice phenomenon is not limited to national borders); See also James R. Faulconbridge, Jonathan V. Beaverstock, Daniel Muzio & Peter J. Taylor, *Global Law Firms: Globalization and Organizational Spaces of Cross-Border Legal Work*, 28 NW. INT’L L. & BUS. 455, 457 (2007-08) (using “[t]hree empirical barometers [that] aptly illustrate the unprecedented rates of globalization of the legal profession and firms in the 1980s” and emphasizing that “there has been a remarkable increase in international trade in legal services involving the two most significant countries in the world economy, the United States and the United Kingdom.” *Id.* at 457). See generally Rachel M. Zahorsky, *Several States Move Closer to National Bar Exam*, A.B.A. J., Nov. 23, 2009 (indicating that increased costs associated with multijurisdictional litigation and greater job mobility is leading Missouri and other states to consider offering a national bar exam) (last visited on Jan. 14, 2009).

15. Gunnarsson, *supra* note 14, at 131.

16. *Id.* at 129 (internal quotation omitted).

and Tennessee more recently permitting some limited practice by attorneys not admitted in their jurisdictions.<sup>17</sup>

Additionally, a substantial number of lawyers are licensed in multiple jurisdictions. An Illinois state bar committee recommended recent changes to its lawyer-ethics rules, recognizing that about one-third of the 82,520 registered lawyers in the state in 2007 were also licensed in another jurisdiction.<sup>18</sup> Moreover, 13,981 of those lawyers listed their principal business address outside Illinois.<sup>19</sup>

There is little reliable information concerning the magnitude of international MJP.<sup>20</sup> The information that is available, however, provides an indication of the extent of the international legal services market.<sup>21</sup> For example, the United States Department of Commerce Bureau of Economic Analysis has reported that the United States earned \$4.3 billion from the exportation of legal services in 2005, a probable underestimation of the “real value” of the services.<sup>22</sup> In that same year, the United States imported \$914 million in legal services.<sup>23</sup> By 2007, U.S. exports of legal services had grown to \$6.4 billion—a \$2.1 billion

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17. See State Implementation of ABA MJP Policies, ABAnet.org, [www.abanet.org/cpr/mjp/recommendations.pdf](http://www.abanet.org/cpr/mjp/recommendations.pdf) (providing a report titled “State Implementation of ABA MJP Policies”) (last visited May 5, 2010); MARK TUFT, PRACTISING LAW INSTITUTE LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES LITIGATION 195 (Dec. 2009) (noting that Virginia Rule 5.5 exceeds the scope of ABA MR 5.5 because it “extends MJP privileges to lawyers licensed in other countries as well as other states.”); *Briefs*, 45 TENN. BAR J. 5 (Dec. 2009) (reporting Tennessee’s new Rule 5.5 is effective Jan. 1, 2010).

18. Gunnarsson, *supra* note 14, at 129. Illinois’ new Rule 5.5 went into effect on Jan. 10, 2010. ILL. RULES OF PROF. CONDUCT R. 5.5 (2010).

19. Gunnarsson, *supra* note 14, at 129. In California, 42,738 members of the bar (or 18.86 percent) live outside the state. Member Demographics, State Bar of California, <http://members.calbar.ca.gov/search/demographics.aspx> (last visited May 5, 2010). See Gunnarsson, *supra* note 14, at 129 (reporting that, for purposes of promoting uniformity and consistency with other states, Illinois should change its MJP rule because “many thousands of lawyers admitted in Illinois are admitted in one or more states as well.” *Id.* at 129 (quoting Chicago Bar Association Joint ISBA/CBA Committee on Ethics 2000 Report (2004)).

20. “Neither the number of lawyers and law firms working in the international legal services market nor the revenues generated from internationally related work are readily and reliably available.” Terry et al., *supra* note 14, at 833.

21. *Id.* at 834.

22. *Id.* The real value is probably greater because the figure is based on international cash remittances for transnational legal services and the figure fails to capture “significant sums paid and used within a country without remittance to or from the United States.” *Id.* at 834 n.4. See John Leubsdorf, *Legal Ethics Falls Apart*, 57 BUFF. L. REV. 959, 1049 n.517 (2009). The United Kingdom Department of Constitutional Affairs reported that British firms exported £1.9 billion and imported £1.5 billion in legal services in 2003. Terry et al., *supra* note 14, at 834.

23. See Terry et al., *supra* note 14, at 834.

increase.<sup>24</sup> The same period saw a \$786 million increase in imports.<sup>25</sup> U.S. exports are broad based, as every state except Hawaii exported more than \$1 million in legal services.<sup>26</sup>

The size of the international legal services market may be reflected also in a study reporting that about sixty large U.S. law firms had 8000 lawyers working in 375 overseas offices.<sup>27</sup> Another indication is the *American Lawyer* list of the top 100 Global Firms which included eight United States-based firms with more than a quarter of its lawyers working in overseas offices.<sup>28</sup> This list grew to eleven in 2008 and twelve in 2009.<sup>29</sup> Worldwide revenue in the global legal services market was estimated at \$458.2 billion in 2007, and the United States trade in legal services produced a \$5 billion surplus in 2008.<sup>30</sup>

The demand for international legal services is likely to remain strong, given that there are \$20 trillion in foreign-owned assets in the United States and \$17.6 trillion in United States-owned assets abroad.<sup>31</sup> The United States Census Bureau has reported that every state had at least a 19 percent increase in its foreign-born population between 1990 and 2000, and recent immigrants may need domestic and foreign lawyers to facilitate interactions with family and others in their countries of origin.<sup>32</sup>

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24. ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, REPORT OF THE SPECIAL COMMITTEE ON INTERNATIONAL ISSUES 7 (July 2009) [hereinafter ABA INTERNATIONAL ISSUES REPORT].

25. *Id.* (reporting that this is the most recent data available and citing, in part, a U.S. Department of Commerce (USDOC) Bureau of Economic Analysis Report). International Economic Accounts, U.S. International Services: Cross-border Trade 1986-2007, and Services Supplied Through Affiliates, 1986-2006. "Table 7: Business, Professional, and Technical Services." 2001-05, 2006-07. The 2007 statistics do not include international legal services trade by affiliates, sometimes called GATS Mode 3. *Id.* "Thus, in 2006, U.S. law firms' foreign offices provided \$2.7 billion in legal services; in 2004, foreign firms' U.S. offices provided \$28 million in legal services." *Id.*

26. *Id.* (showing Texas as the largest state exporter of legal services with \$192.1 billion followed respectively by California and New York with \$144.8 billion and \$79.6 billion).

27. Terry et al., *supra* note 14, at 833. Whereas this information focuses on the scope of outbound legal services, there is unfortunately no single source of information about the scope of inbound legal services. *Id.* at 834.

28. *The Global 100: Most Lawyers*, 29 AM. LAW. 145 (2007).

29. *Cf. The Global 100: Most Lawyers*, 30 AM. LAW. 171 (2008).

30. Silver, *supra* note 10, at 1022.

31. ABA INTERNATIONAL ISSUES REPORT, *supra* note 24, at 6-7.

32. *Id.* at 8.



A. *The Brave New World of MJP – An Interim Assessment*

In 2002, the ABA amended MR 5.5 to address MJP<sup>33</sup>—a longstanding but increasingly troublesome aspect of the delivery of legal services.<sup>34</sup> Professor Arthur Greenbaum and his fellow panelists, Professor Carol Needham and Deputy General Counsel William Manson, assessed the progress of MJP and the problems it has generated. Needham<sup>35</sup> and Manson<sup>36</sup> discussed national and international MJP primarily from the perspective of in-house counsel. Greenbaum addresses the progress and problems of MJP for lawyers who are not in-house counsel and who are working in the U.S. market.<sup>37</sup>

Professor Arthur Greenbaum's article provides a comprehensive and scholarly examination of the influence of MR 5.5 on the law of MJP. Greenbaum does not revisit the debate about "what lines should be drawn, if any, to control MJP."<sup>38</sup> Instead he examines MR 5.5's impact on the uniformity of MJP in states and whether state variations

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33. The ABA appointed the Commission on Multijurisdictional Practice in 2000 to study the problem of cross border practice. GILLERS ET AL., *supra* note 4, at 366. Its report contained nine recommendations, one of which proposed an amendment to MR 5.5 and another to MR 8.5. Arthur F. Greenbaum, *Multijurisdictional Practice and the Influence of Model Rule of Professional Conduct 5.5 – An Interim Assessment*, 43 AKRON L. REV. 729 (2010). The ABA House of Delegates adopted both amendments. *Id.*

34. Multijurisdictional practice has been a longstanding and controversial part of the delivery of legal services in the United States. See Fried, *supra* note 2, at 53 (positing that "[t]he debate over the propriety of multijurisdictional practice goes to the core of that quintessential American political issue: how should power be distributed between the federal and state governments?"). See also, Pamela A. McManus, *Have Law License: Will Travel*, 15 GEO. J. LEGAL ETHICS 527, 537 (2002) (arguing in favor of a more permissive approach to MJP and quoting an ABA president who acknowledged that states have erected "fences against out-of-states lawyers . . . primarily to protect their own lawyers from professional competition").

35. Carol Needham, *Enhancing a Law Department's Flexibility to Respond to Unexpected Challenges: Multijurisdictional Practice and the In-House Lawyer*, 43 AKRON L. REV. 985 (2010).

36. William D. Manson is Deputy General Counsel of the Lubrizol Corporation where he is extensively involved in resolving patent and other disputes, counseling his global business clients on contracts and other matters, and advising Lubrizol regarding its ethics and compliance programs. Before joining Lubrizol, Manson worked in the litigation section of Jones Day Reavis and Pogue. To listen to Manson's remarks, please access the MBI webpage for Lawyers Beyond Borders and Practicing Law in the Electronic Age (2009) at <http://www.uakron.edu/law/video/miller-becker-symposium-2009.dot> (discussing a variety of MJP challenges facing in-house counsel and his or her many responsibilities including managing lawyers working for a foreign subsidiary, protecting confidential client communications, supervising international litigation in foreign venues, and promoting client interests in a foreign governmental and cultural context).

37. Greenbaum, *supra* note 33, at 732 (excluding from the scope of his paper lawyers who work in-house for an organizational client).

38. *Id.*

from MR 5.5 reflect “stress points” in the rule.<sup>39</sup> He also highlights “traps for the unwary in this new golden age of [MJP].”<sup>40</sup>

Some commentators hoped that MR 5.5 would promote uniformity in state regulation of MJP.<sup>41</sup> Yet MJP regulations govern only the practice of law, and states vary in how they define the practice of law. Greenbaum contends that the definitional variation has limited MR 5.5’s effectiveness in promoting uniformity.<sup>42</sup>

Greenbaum notes several consequences of MR 5.5’s more accommodating MJP rule. Under the new rule, for example, a lawyer can no longer avoid UPL by simply affiliating with a local lawyer.<sup>43</sup> MR 5.5 requires that the non-admitted lawyer’s work be “temporary” and that the admitted or anchor lawyer actively participate in the matter with the unlicensed lawyer.<sup>44</sup> Whereas MR 5.5’s “temporary activity” and “active participation” requirements might restrict the use of local affiliations as a way to engage in MJP, MR 5.5 permits lawyers to avoid local affiliation altogether.<sup>45</sup> The new rule permits cross-border practice without local affiliation, including matters related to a pending or potential proceeding before a tribunal if the lawyer reasonably expects to be authorized by law or order to appear in such proceeding.<sup>46</sup>

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39. *Id.* at 737.

40. *Id.* at 732.

41. *Id.* at 732-36; *see* Gunnarsson, *supra* note 14.

42. Greenbaum, *supra* note 33, at 732.

43. *Id.* at 743 (describing the circumstance where a firm has an anchor lawyer in a state to facilitate the firm having other non-admitted lawyers enter the same state to practice law).

44. MODEL RULES OF PROF’L CONDUCT R. 5.5(c)(1) cmt. 8. Active participation only means involvement and is less burdensome on MJP than some state rules that require the licensed lawyer to supervise the unlicensed lawyer. *See* Charles W. Wolfram, *Sneaking Around in the Legal Profession Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 665, 677 (1995) (declaring it fictional to think that the licensed, in-state lawyer is supervising the unlicensed, out-of-state lawyer). Wolfram asserts that:

It is preposterous to think that when one of the gurus of the mergers and acquisitions bar, Joseph Flom or Martin Lipton, emerges from an airplane . . . far from New York City that they modestly submit themselves to the ‘supervision’ of whatever locally-admitted lawyer their firms hypothetically might have engaged in an effort to comply with local restrictions on unauthorized practice.

*Id.* at 678. *Cf.* Greenbaum, *supra* note 33, at 761 n.175 (noting a state rule with a more onerous burden for the host lawyer than just supervising the non-admitted lawyer: “if an out-of-state firm lawyer conducts work in the Nevada office, [t]he members of the firm who are admitted to practice in Nevada shall be responsible for and actively participate as a principal or lead lawyer in all work performed for the Nevada clients . . . .” (citing NEV. RULES OF PROF’L CONDUCT R. 7.5A(j) (2009))).

45. Greenbaum, *supra* note 33, at 749.

46. MODEL RULES OF PROF’L CONDUCT R. 5.5.

Another consequence of MR 5.5 is the prospect for enhanced enforcement of state UPL laws.<sup>47</sup> Before states adopted MR 5.5, UPL enforcement was left to the disciplinary authorities under murky rules.<sup>48</sup> According to Greenbaum, “[t]he game has changed.”<sup>49</sup> MR 5.5’s permissive MJP standards are not murky.<sup>50</sup> “To the extent [it is] easier for lawyers to join another bar because of increasingly relaxed admissions standards without having to take the bar examination of the host state or incur other impediments, the need to be lenient about [MJP] declines.”<sup>51</sup> Greenbaum believes that UPL prosecutions increased even before the economic decline, which may lead to a further increase.<sup>52</sup> MR 5.5, which “reflects the modern public policy position on [MJP],” will play an influential role in the prosecution of UPL and affect how courts decide related issues.<sup>53</sup>

Greenbaum describes state adoptions of MJP rules as a “grand experiment.”<sup>54</sup> He notes that several states have already examined the results of their adoptions, finding that “for the most part, [the results] are quite positive.”<sup>55</sup> Greenbaum concludes by predicting that the impetus for MJP will accelerate and that probably “the permissible scope of multijurisdictional practice also will broaden.”<sup>56</sup>

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47. Greenbaum, *supra* note 33, at Section IV(b).

48. *Id.* at 763.

49. *Id.*

50. *Id.*

51. *Id.* Enhanced enforcement of UPL may be undermined by monitoring or reporting difficulties. *Id.* at 764 (noting that conduct undertaken in the host state in support of litigation elsewhere and transactional work is more difficult to monitor than litigation).

52. Greenbaum, *supra* note 33, at 764 n.200. See also OHIO STATE BAR ASSOCIATION (OSBA) FUTURE OF THE LEGAL PROFESSION ADVISORY COMMITTEE, 2007 OSBA FUTURE OF THE LEGAL PROFESSION REPORT 40-41 (recommending, in part, that the OSBA enhance its membership “services by considering the employment of at least one additional full-time person [for the] investigation and prosecution of instances of the unauthorized practice of law and adopt such other measures that are appropriate to provide efficient and effective efforts to deter the unauthorized practice of law.”) [hereinafter FUTURE OF THE LEGAL PROFESSION].

53. *Id.* at 766 (questioning whether a court would enforce a fee agreement for MJP if the agreement is inconsistent with MR 5.5’s policy).

54. *Id.*

55. *Id.* at 767 (citing REPORT OF THE FLORIDA BAR RE: RULES REGARDING THE MULTIJURISDICTIONAL PRACTICE OF LAW (2007) (conducting a court-mandated review of the state’s MJP rule and finding that its implementation “had generally ‘gone smoothly.’”). Several states that adopted an MJP rule also ordered a reassessment of MJP within several years. *Id.* at 766-67 (citing in part, N.J. RULES OF PROF’L CONDUCT R. 5.5 official cmt. (2009) (directing MJP Committee to report back to state Supreme Court in three years if any modifications are necessary to MJP Rule)). Greenbaum further states: “[C]oncerns that have arisen [about MJP have] focus[ed] more on peripheral issues, like the registration of out-of state lawyers, than [a concern about] multijurisdictional practice itself.” *Id.* at 767.

56. *Id.*

Professor Carol Needham's essay examines the ability of in-house lawyers engaged in transactional work to move to a new jurisdiction and continue to provide legal services.<sup>57</sup> Like her fellow panelists, Needham notes that the MJP landscape varies significantly because of state variations in definitions of the practice of law. The variations require in-house counsel to analyze MJP and UPL laws on a state-by-state basis when planning to work in jurisdictions where they are not licensed.<sup>58</sup> In-house legal departments should have one person responsible for knowledge of jurisdictional licensing requirements and possible avenues for practice, such as filing for *pro hac vice* status.<sup>59</sup> Needham notes that state MJP rules are increasingly authorizing in-house counsel practice across jurisdictional boundaries.<sup>60</sup>

MR 5.5(d)(1) authorizes practice in a host state, and MR 5.5(c)(4) permits both in-house and outside counsel to practice on a temporary basis.<sup>61</sup> Sixteen states have adopted language identical to that of MR 5.5(d)(1), which does not require that in-house counsel practice in a host state be temporary.<sup>62</sup> MR 5.5(d)(1) requires, however, that the work be performed for the lawyer's entity-employer or its organizational affiliates and that the type of work not require *pro hac vice* admission.<sup>63</sup>

In addition to state ethical rules permitting MJP, some states authorize the limited admission of in-house counsel.<sup>64</sup> This approach also presents some challenges for in-house counsel. For example, in-house lawyers undergo a time-consuming character and fitness review and pay a high registration fee.<sup>65</sup> Limited admission rules also do not permit in-house lawyers to practice in court.<sup>66</sup> Nevertheless, Needham notes that there is some renewed interest by states in authorizing limited admission.<sup>67</sup>

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57. Needham, *supra* note 35.

58. *Id.* at 985-86.

59. *Id.* at 1007.

60. *Id.* at 990 (recognizing two important categories of MJP rules authorizing in-house counsel practice—one permitting only in-house counsel to provide legal services for a client-entity and a second category that permitting both in-house and outside counsel to provide such services).

61. MODEL RULES PROF'L CONDUCT R. 5.5(d)(1) and 5.5(c)(4).

62. Needham, *supra* note 35, at 991.

63. *Id.*; MODEL RULES PROF'L CONDUCT R. 5.5(d)(1) and 5.5(d)(1). A number of states have adopted MJP standards that do not precisely track MR 5.5(d)(1), and the different standards may significantly affect in-house counsel. Needham, *supra* note 35, at 993-97.

64. *Id.* at 997-1001.

65. *Id.* at 998.

66. *Id.* at 1000.

67. *Id.* at 999.

Needham suggests an analytical framework to help lawyers decide whether they can provide legal services for their entity-clients in a new state.<sup>68</sup> First, if a state has adopted MR 5.5(d)(1), then an in-house lawyer can represent only his or her entity-employer in the jurisdiction.<sup>69</sup> Second, if a state has not adopted MR 5.5(d)(1), then a lawyer's work is governed by MR 5.5(c)(4).<sup>70</sup> In that situation, in-house and outside lawyers' services must be temporary.<sup>71</sup> Their work must also arise out of, or be reasonably related to, the lawyer's work in a jurisdiction in which the lawyer is admitted.<sup>72</sup>

Needham warns that it is easy for busy lawyers to provide legal services in a state where they are not admitted or, phrased differently, to commit UPL.<sup>73</sup> In-house lawyers need to appreciate the risks of UPL whenever they are reassigned to an office in a new jurisdiction or are representing a client in a jurisdiction where they are not licensed.<sup>74</sup> Needham identifies ways to help in-house lawyers plan for possibilities involving work in jurisdictions where they are not licensed to practice.<sup>75</sup> She notes that delay is dangerous to law departments and lawyers.<sup>76</sup> They should take action to ensure eligibility well in advance of any possibly unauthorized activity.<sup>77</sup>

*B. Global Corporate Practice, Local Protectionism, and the Export of American Legal Ethics*

Professors James Moliterno, John Dzienkowski, and Paul Paton address systemic problems—both cultural and institutional—facing MJP. Dzienkowski spoke about ethical rules and fees that burden

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68. Needham, *supra* note 35, at 1001.

69. MODEL RULES PROF'L CONDUCT R. 5.5(d)(1).

70. Needham, *supra* note 35, at 1001.

71. *Id.*

72. *Id.* at 1002. Some states require a greater nexus between the lawyer's work in the new or host state and the lawyer's work for the entity client in the state in which he or she is licensed to practice law. *See id.* at 1003 (citing Nevada's practice as a state that requires a greater nexus between the relationship of what the lawyer is doing for the entity client in Nevada and the lawyer's work for that entity client in the jurisdiction in which the lawyer is admitted).

73. *Id.* at 1007.

74. *Id.*

75. Needham, *supra* note 35, at 1005. For example, once licensed in a jurisdiction, in-house or outside lawyers who no longer practice in that jurisdiction should maintain their licenses on an "inactive status" rather than let them lapse. This provides themselves and their employers with options for future relocation since lawyers need only reactivate their licenses to deliver legal services. *See id.* at 1006-07.

76. *Id.* at 1004-06.

77. *Id.* at 1007.

MJP,<sup>78</sup> while Paton discussed the dangers of increased regulatory control of lawyers by government agencies.<sup>79</sup> Moliterno's thought-provoking article provides an important dose of reality for those who believe that the adoption of United States' legal models represents a quick fix for other nations' legal and other problems.

Professor Moliterno's article addresses the "massive exportation" of United States legal ethics programs abroad.<sup>80</sup> That exportation is largely in the form of ABA Rule of Law programs and is "tinged with cultural imperialism."<sup>81</sup> Although Moliterno recognizes that the programs do some excellent work, they sometimes pay insufficient attention to local culture and produce bad results.<sup>82</sup> For example, a new judicial ethics law based on the ABA Model Code of Judicial Conduct is being used as a vehicle for government control of the judiciary in Tbilisi, Georgia. Moliterno asserts that the bad results stem both from weaknesses in the regulatory models for United States lawyers and judges and from the fact that the United States models "have no real relationship with lawyer culture outside the United States."<sup>83</sup>

Moliterno notes the advantages of a worldwide system of lawyer regulation. He points out, however, that harmonization of nations' lawyer codes does not make harmonization of nations' legal cultures.<sup>84</sup> He closes with the sobering thought that United States' banking and securities regulations were "'sold' abroad as the gold standard."<sup>85</sup> The

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78. To listen to Professor Diezenkowski's remarks, please access the MBI Webpage for Lawyers Beyond Borders and Practicing Law in the Electronic Age (2009) at <http://www.uakron.edu/law/video/miller-becker-symposium-2009.dot> (providing a thoughtful discussion about anti-competitive barriers to MJP with a focus on *pro hac vice* appearances, limitations on lawyer fees for Alternative Dispute Resolution work, and registration fees for corporate in-house counsel).

79. To listen to Professor Paton's remarks, please access the MBI Webpage for Lawyers Beyond Borders and Practicing Law in the Electronic Age (2009) at <http://www.uakron.edu/law/video/miller-becker-symposium-2009.dot> (discussing the ever-expanding influence of federal regulatory authorities overseeing the conduct of lawyers, in part because of a public perception that the profession is not capable or is unwilling to engage in self-regulation, and expressing concerns about the ability of security regulators to regulate lawyer conduct).

80. James Moliterno, *Exporting American Legal Ethics*, 43 AKRON L. REV. 769 (2010)

81. *Id.* at 770.

82. *Id.* Moliterno highlights ABA Rule of Law projects that have successfully established ABA-like lawyer associations and promoted the adoption of ABA-like lawyer and judicial codes, and American-styled dispute resolution. *Id.* at 770-75. The successes range from Albania and Armenia to Romania and Jordan. *Id.* He states "U.S. lawyer ethics and regulation is experiencing enormous success as models in emerging democracies abroad." *Id.* at 775.

83. *Id.* at 770.

84. *Id.* at 777.

85. *Id.* at 784.

systems governed by those regulations have crashed, and he warns that a similar crash of confidence could occur with the United States lawyer regulation system that has been “sold” abroad.<sup>86</sup>

C. *Viewing Professional Responsibility through the Chinese Prism*

Professors Judith McMorro<sup>87</sup>, Xiangshun Ding,<sup>88</sup> and Associate Dean Stephen Yandle<sup>89</sup> explored developments and challenges facing the Chinese legal profession and legal education. All three panelists have taught in law programs in China and have significant firsthand experience with a growing legal system and a rapidly expanding legal educational system and legal profession. McMorro examined the challenges in developing concepts of legal ethics and professional norms,<sup>90</sup> and Ding provided an interdisciplinary analysis of the development and current state of China’s legal educational system and legal profession.<sup>91</sup> Yandle discussed some of the challenges in operating a new Chinese law school, Peking University School of Transnational Law.<sup>92</sup> The school has largely adopted the United States model of legal education, but with some significant differences.

Professor Judith McMorro’s article explores the “tremendous challenges facing the Chinese legal culture in building a coherent model of lawyering that can serve as the foundation of a system of legal ethics.”<sup>93</sup> One significant challenge is the lack of professional education

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86. Moliterno, *supra* note 80, at 784.

87. Judith McMorro, *Professional Responsibility in an Uncertain Profession: Legal Ethics in China*, 43 AKRON L. REV. 1081 (2010) (examining the development of the Chinese rule of law, the legal profession and legal education).

88. To listen to Professor Ding’s remarks, please access the MBI Webpage for Lawyers Beyond Borders and Practicing Law in the Electronic Age (2009) at <http://www.uakron.edu/law/video/miller-becker-symposium-2009.dot> (providing an interdisciplinary analysis of the various forces that have changed lawyer ethics in China, including the change in status for lawyers from being a state legal worker affiliated with the state-owned Office of Legal Advisor to being a legal practitioner authorized by clients or assigned by institutes to represent them; and reporting an increase in loyalty to the client in the Chinese legal profession).

89. To listen to Associate Dean Yandle’s remarks, please access the MBI Webpage for Lawyers Beyond Borders and Practicing Law in the Electronic Age (2009) at <http://www.uakron.edu/law/video/miller-becker-symposium-2009.dot> (offering, in part, a comparative discussion about Chinese and American law students, legal education, and legal systems; describing innovative programs, for example having courses taught in English and predominantly by American professors; and noting the law school’s plans to seek ABA accreditation).

90. *See* McMorro, *supra* note 87.

91. *See supra* note 88.

92. *See supra* note 89.

93. McMorro, *supra* note 87, at 1082.

for law. Law is largely an undergraduate major in China, where the lecture format prevails and there is little attention paid to legal ethics and learning about the practice of law.<sup>94</sup> In McMorrow's view, the lack of professional education hinders the development of a professional ethos and an interest in legal ethics.<sup>95</sup> There is a "disconnect between legal education and legal practice."<sup>96</sup>

In addition to the lack of a professional education, there is the pressure of finding employment in a very limited job market—a pressure that distracts the 150,000 annual law graduates from the subject of ethics.<sup>97</sup> Ethics is not a field of study that promises employment.

Another hindrance in developing a legal ethics system is the informal network of relationships—known as *guanxi*—which are an integral part of practicing law.<sup>98</sup> An important aspect of lawyering success in China is offering clients influence through these relationships. The inability to put the "law" above "relationships" makes it difficult to build a system of ethics.<sup>99</sup> Perhaps the most imposing obstacle to developing a system of legal ethics is China's inability to allow for the rule of law independent of state control.<sup>100</sup>

According to McMorrow, the Chinese experience provides a number of important lessons for those involved in legal ethics in the United States.<sup>101</sup> For example, she notes that China and the United States share an interest in teaching lawyering skills, and she concludes

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94. The creation of the Juris Masters (JM) program in 1995 may allow for a more professional focus. *Id.* at 1087. Clinical and skills training is increasing, in part, because of the efforts of the Ford Foundation and the collaborative efforts of U.S. and Chinese law schools. *Id.* at 1087-88.

95. *Id.* at 1103. Another hindrance is the lack of a common law process of judge-made rules in China that actively involves lawyers in the development of law and this obscures the "organic nature" of the law. *Id.* See generally Antony Dapiran, *China Investment: From Opening Up to Going Out* 31 AM. LAW 82 (2009) (cautioning that "[t]he Chinese legal system is characterized by vague rules, which are often mutually conflicting, and inconsistently applied.").

96. McMorrow, *supra* note 87, at 1088.

97. *Id.* at 1084.

98. *Id.* at 1095. McMorrow notes that these relationships are important in gaining access to government officials for approval. *Id.* See generally Dapiran, *supra* note 95 (advising sellers of companies to China "to acquaint themselves with the approval and regulatory process to which their Chinese purchasers will be subject" and warning that this process "can significantly influence any deal, as well as its outcome").

99. McMorrow, *supra* note 87, at 1095-96.

100. "When local officials have as a dominant obligation the need to maintain social order, even if the central government gives lip service to the lawyer's role, local officials have strong incentives to control troublesome lawyers." McMorrow, *supra* note 87, at 1101. See also Dapiran, *supra* note 95 (emphasizing that the role of the PRC government in transactions remains pervasive and is "concerned with maintaining social stability and ensuring that the interests [of] other state-owned business, communities and the local governments themselves, are safeguarded.").

101. McMorrow, *supra* note 87, at 1102-05.



that shared conversations about this and other matters will be beneficial to both countries.

*D. Dotted the Legal Landscape – International Lawyers, Law Students and Trade Agreements*

Professors Carole Silver,<sup>102</sup> Laurel Terry,<sup>103</sup> and David Caudill<sup>104</sup> write about various problems associated with increasing cross-border practice. They all agree that the increasing internationalization of legal services poses significant challenges to the existing regulatory frameworks governing lawyers.<sup>105</sup>

Professor Silver's article looks at globalization and notes some criticisms of the existing lawyer regulatory framework.<sup>106</sup> She raises the question of whether the globalization of legal services will cause a restructuring of the existing framework.<sup>107</sup> She suggests that any changes in the framework may depend on perceptions of how existing regulators respond to the challenges of globalization.<sup>108</sup> Silver writes that "globalization is a slippery concept, and its force creates ripples that can be difficult to discern; regulating in a global context challenges the jurisdiction and authority of regulators."<sup>109</sup>

Silver argues that any changes to the existing regulatory framework should be based on empirical evidence. Empirical evidence provides important information for rulemaking and promotes an understanding of the "complexities brought about by globalization."<sup>110</sup> According to Silver, use of empirical evidence increases the likelihood that new

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102. Silver, *supra* note 10.

103. Laurel S. Terry, *From GATS to APEC: The Impact of Trade Agreements on Legal Services*, 43 AKRON L. REV. 875 (2010).

104. David S. Caudill, *Sports and Entertainment Agents and Agent-Attorneys: Discourses and Conventions Concerning Crossing Jurisdictional and Professional Borders*, 43 AKRON L. REV. 697 (2010).

105. See Silver, *supra* note 10; Terry, *supra* note 103; Caudill, *supra* note 104.

106. Silver, *supra* note 10.

107. *Id.* at 1020. Silver reports that there is an effort in the United States and elsewhere to reconsider the regulation of lawyers in the global marketplace, in part, because of pressure from foreign lawyers, law schools, and developments in the regulation of lawyers overseas. *Id.* at 1013-14.

108. *Id.* at 1014. Silver states that her "goal . . . is not to directly challenge the framework of lawyer regulation" but "[i]nstead . . . to suggest an 'adjustment' to the existing regulatory regime, setting aside, at least for the moment, any challenge to the merits of the system itself." *Id.*

109. *Id.*

110. *Id.*

rulemaking will be effective because it will be grounded in the realities of the marketplace.<sup>111</sup>

Silver suggests that current lawyer regulation may not fit the realities of the marketplace and achieve its regulatory goals. For example, some regulators assume that foreign law graduates who are licensed to work in the United States as foreign legal consultants will undertake activities that exceed the narrow scope of that license and commit UPL.<sup>112</sup> Silver notes that there is little information known about the work of foreign legal consultants in the United States.<sup>113</sup> Thus, regulations governing foreign legal consultants may be overly broad given the risks they aim to prevent, and may ignore areas of potential harm.<sup>114</sup>

Silver's work is a clarion call to law schools, regulators, and especially legal scholars and others in the academy studying professions to collaborate and generate a comprehensive understanding of the activities and actors that comprise the legal profession in a global context.<sup>115</sup> She highlights diverse areas for possible empirical research based on informational voids in our regulatory understanding.<sup>116</sup>

Silver provides a roadmap for creating the empirical foundation necessary for effective lawyer regulation.<sup>117</sup> Much relevant information necessary for a comprehensive understanding of globalization and regulation does not yet exist.<sup>118</sup> Existing empirical information is diffused in various sources, for example, state licensing authorities and law schools, and it needs to be coordinated.<sup>119</sup> She suggests that the American Bar Foundation is the obvious choice to house the research activity, but that it might take place under the sponsorship of a single law school or a consortium of law schools.<sup>120</sup>

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111. Silver, *supra* note 10, at 1014.

112. *Id.* at 1018. Still other regulators assume that a foreign law graduate's application to sit for the state bar examination indicates an intention to establish a permanent residence. As with foreign legal consultants, there is little known about the intention of foreign law graduates in applying to sit for the bar examination. *Id.* at 1019.

113. *Id.*

114. *Id.* at 1020.

115. *Id.* at 1076.

116. She offers outlines for empirical research for various targeted groups, for example law firms. *Id.* at 1060-69.

117. *See, e.g., id.* Silver's article is rich with creative ideas about how to update the information, and where to seek funding. *See e.g., id.*

118. *Id.* at 1073.

119. *Id.*

120. *Id.* at 1074.

Silver concludes that globalization offers a great opportunity to rethink lawyer regulation.<sup>121</sup> Empirical evidence—as opposed to speculation or an institutional fear of a loss of control over lawyer regulation—should provide the cornerstone for possible adjustments to the lawyer regulatory framework.<sup>122</sup> “The best way to generate such [evidence] is to go to the experts, who can advise on a research design, coordinate the use of diverse sources of information, and interpret data collected as well as research offered by other scholars.”<sup>123</sup>

Professor Laurel Terry’s work provides a comprehensive overview of the General Agreement on Trade in Services (GATS) and other international trade agreements and their potential impact on the United States legal service market.<sup>124</sup> Terry reports that the United States has negotiated fifteen bilateral and regional trade agreements that apply to legal services, with the 1992 NAFTA agreement perhaps being the best known example.<sup>125</sup>

Terry notes that professional services constitute a significant portion of the U.S. economy and provide the United States with a trade advantage.<sup>126</sup> Legal services are among the fastest growing sectors of professional services.<sup>127</sup> A study in 2009 reported that United States legal services accounted for 54 percent of global revenue in the international legal services market and “75 out of the top 100 global firms ranked by revenue” in 2007.<sup>128</sup>

Terry uses GATS as an analytical model for explaining the structure commonly found in international trade agreements.<sup>129</sup> She also highlights significant differences between GATS and NAFTA, such as NAFTA having a professional services appendix or “annex.”<sup>130</sup>

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121. *Id.* at 1078.

122. Silver, *supra* note 10, at 1078.

123. *Id.* at 1079.

124. Terry, *supra* note 103.

125. *Id.* at 877.

126. *Id.* at 880.

127. *Id.* (citing the United States International Trade Commission, RECENT TRENDS IN U. S. SERVICES TRADE, 2009 ANNUAL REPORT, Publication 4084, at xi (July 2009), available at <http://www.usitc.gov/publications/332/pub4084.pdf> [hereinafter 2009 RECENT TRENDS]).

128. *Id.* (citing 2009 RECENT TRENDS, *supra* note 127).

129. Terry, *supra* note 103, at 899.

130. *Id.* at 921. These professional services annexes are generally five paragraphs long. The first paragraph requires “the signatory governments to *encourage* the relevant bodies ‘to develop mutually acceptable standards and criteria for licensing or certification’ of foreign service providers and to ‘provide recommendations on mutual recognition’ to a Joint Committee created by the FTA (Free Trade Agreement).” *Id.* at 928-29.

The impact of international trade agreements on legal service providers has been significant. First, Terry believes that GATS “contributed to the creation of a new *Service Providers’ Paradigm* that applies to lawyer regulation.”<sup>131</sup> The shift to a service provider’s paradigm has changed who regulates lawyers and how they are regulated.<sup>132</sup> “[M]any lawyers believe, and ABA policy still states, that lawyers should be primarily regulated by the state judicial branch,” but other entities are increasingly playing that role.<sup>133</sup>

In addition, a variety of U.S. organizations, such as the ABA Task Force on International Trade in Legal Services (ITILS), actively monitor GATS developments and provide commentary to the United States Trade Representative (USTR).<sup>134</sup> The ITILS receives support and participation from the Conference of Chief Justices, the ABA Section on Legal Education and Admission to the Bar, and the ABA Center for Professional Responsibility.<sup>135</sup>

Terry concludes that:

[O]ne cannot talk about lawyers and globalization without considering the impact of international trade agreements on any given issue. While the agreements may not ultimately apply, they . . . are an integral part of the regulatory landscape that must be considered. In short, these agreements reflect fundamental changes in the way we must approach lawyer regulation issues.<sup>136</sup>

International trade agreements are now “an integral part of the regulatory landscape,” as well as U.S. lawyer regulation, and these trade agreements will help shape future regulatory reform.<sup>137</sup>

Professor David Caudill’s essay examines the ever-growing and controversial phenomenon of cross-border practice by sports and entertainment agents.<sup>138</sup> Caudill discusses the work of both non-attorney

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131. *Id.* at 972.

132. *Id.* at 972.

133. *Id.* at 973 (contending that the most recent illustration of the services providers paradigm is the FTC’s recent “red flags” rule, subsequently and successfully challenged by the ABA as an unnecessary intrusion on the legal profession’s independence).

134. *Id.* at 979.

135. Terry, *supra* note 102, at 979.

136. *Id.* at 983.

137. *Id.*

138. Caudill, *supra* note 104.

and attorney agents.<sup>139</sup> He notes that one distinguishing factor between the two competing classes of agents is that attorney-agents are governed by professional ethical codes—a factor that may place them at a competitive disadvantage.<sup>140</sup> For example, attorney-agents are more restricted in soliciting clients because of their ethical codes than are non-attorney agents.<sup>141</sup>

Caudill addresses the pedagogy of teaching sports law and examines several course books.<sup>142</sup> He concludes that some books consider the ethical dilemmas of attorney agents more comprehensively than others.<sup>143</sup> He discusses key ethical principles, consideration of which can promote a better understanding of some of the possible ethical dilemmas confronting both non-attorney and attorney-agents. For example, an attorney-agent is generally not permitted to disavow his or her attorney status—to take off his or her “attorney hat”—when offering non-legal services, such as accounting and business planning advice.<sup>144</sup>

Caudill also identifies a larger question raised by some authors in the sports field but left unanswered: whether non-attorney agents are practicing law when they negotiate contracts.<sup>145</sup> Caudill believes that answering that question may provide a “realistic solution” to questions he has raised earlier about competition between non-attorney and attorney-agents.<sup>146</sup>

According to Caudill, there are three possible solutions for resolving some of the problems in the sports and entertainment agency business. They are: (i) more and better regulation of non-attorney agents, ii) relaxation of ethical standards for attorneys so they can better compete with non-attorney agents, and (iii) requiring all agents to be law

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139. *Id.* See generally Jack P. Sahl, *Entertainment law – The Specter of Malpractice Claims and Disciplinary Actions*, 20 MARQ. SPORTS L.J. 71 (2010) (discussing some of the ethical problems and possible solutions for attorneys and attorney-agents practicing in the entertainment and sports industries).

140. Caudill, *supra* note 104 at 703 (recognizing that sports book authors, Kenneth Shropshire and Timothy Davis, argue that the standards governing non-attorney agents and attorney agents are not that different (citing SHROPSHIRE & DAVIS, *THE BUSINESS OF SPORTS AGENTS* 97-98 (2d ed. 2008))). See generally ELIOT FREIDSON, *PROFESSIONAL POWERS* 113 (1986) (arguing that professions’ private codes of ethics have been used to “restrict[] destructive competition among colleagues within the profession”).

141. Caudill, *supra* note 104, at 698.

142. *Id.* at 699-705.

143. *Id.*

144. *Id.* at 705. “Numerous legal authorities suggest that attorneys offering services that are related to the practice of law will be judged under the rules of professional conduct.” *Id.* (citing SHROPSHIRE & DAVIS, *supra* note 140, at 100-01 (2d ed. 2008)).

145. *Id.* at 709.

146. Caudill, *supra* note 104, at 705.

school graduates.<sup>147</sup> Caudill ultimately concludes that any solution should focus on the conventional idea of preventing the unauthorized practice of law by non-attorney agents.<sup>148</sup> He believes that there is a strong analogy to be made between the treatment of real estate agents in some states and the appropriate treatment of non-attorney sports agents.<sup>149</sup> Like real estate agents, non-attorney agents should be permitted to complete form documents such as standard NFL team-player contracts, but they should not be permitted to draft legal documents or give legal advice.<sup>150</sup>

### III. WAITING FOR GOOD DOUGH: LITIGATION FUNDING COMES TO LAW

The keynote speaker, Professor Stephen Gillers, examined *Rancman v. Interim Settlement Funding Corp.*,<sup>151</sup> a case that made his list of the worst court decisions in the area of lawyer regulation.<sup>152</sup> *Rancman* involved a non-recourse advance from a litigation funding company and the Ohio Supreme Court's "myopic" treatment of the champerty issue.<sup>153</sup>

Gillers' article about *Rancman* touches upon a more fundamental and global concern involving all professions, namely safeguarding its monopoly on delivery of services.<sup>154</sup> Sociologists studying professions have long recognized the pressures of self-preservation and their influence on codes of professional ethics.<sup>155</sup> Professionals rely on their ethical codes to justify their interest in, and right to, self-regulation to one degree or another—and to avoid outside interference. Excluding

147. *Id.* at 714-14. In his conclusion, Caudill suggests but does not elaborate on a fourth possibility: the complete deregulation of the sports agent business. *Id.* at 714.

148. *Id.* at 699.

149. *Id.* at 710-13.

150. *Id.* at 712.

151. 789 N.E.2d 217 (Ohio 2003)

152. Stephen Gillers, *Waiting for Good Dough: Litigation Funding Comes to Law*, 43 AKRON L. REV. 677 (2010).

153. *Rancman*, 789 N.E.2d at 218; Gillers, *supra* note 151, at 678.

154. Gillers, *supra* note 151, at 679. See Terry, *supra* note 103, at 972 (noting that one of the significant impacts of international trade agreements is the shift to a "service provider paradigm" where the legal profession's privileged position in the marketplace and tradition of self-regulation are no longer sacrosanct). The legal profession is increasingly regulated by various outside actors or agencies. See also Leubsdorf, *supra* note 22, at 961-62 (arguing that the increased fragmentation of lawyer regulation poses challenges to the legal profession's traditional values).

155. FREIDSON, *supra* note 140, at 113-19, 129. One of the foremost authorities on the sociology of professions, Professor Freidson writes: "Some of the most important methods of controlling relationships with occupational competitors and of restricting divisive and potentially destructive competition among colleagues within the profession have been advanced as part of the professions' private code of ethics rather than as a body of law." *Id.* at 113.

competition from service providers who are not governed by the same ethical code or who do not share in the profession's culture is important to preserving the profession's control and status.<sup>156</sup> As eloquently stated by Gillers, the "specter of a stranger in our midst" is problematic to professions and is a topic that deserves its own symposium.<sup>157</sup>

Gillers argues that the litigation funding company's conduct in *Rancman* constituted non-lawyer peripheral participation in an enterprise—a lawsuit—that is reserved to only lawyers.<sup>158</sup> He explains that the "specter of a stranger in our midst"—that the recognition that a non-lawyer has "invaded our turf"—produces some "anxiety" for the profession.<sup>159</sup> Regulators and others in the profession tend to view non-lawyer participation in legal services as a threat and to issue dire predictions of harm.<sup>160</sup>

Like Professor Silver, Gillers prefers that such harmful predictions be based on empirical evidence.<sup>161</sup> He observes that the profession will proscribe certain behavior where there is a risk of harm to the profession based on its understanding of human nature or intuition but that "often [it] overlook[s] similar situations where [it] tolerate[s] the same risk without a second thought."<sup>162</sup> Gillers offers several examples in which the profession accepts the risks of non-lawyers "hover[ing] around the work of lawyers, the context for *Rancman*."<sup>163</sup>

In *Rancman*, two litigation funding companies advanced \$7,000 in exchange for Rancman's promise to pay them a sum when she recovered money from the defendant, State Farm.<sup>164</sup> The amount owed by Rancman increased depending on how long it took for her to recover

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156. *Id.* at 129. Professions "are organizations or corporate bodies with institutions that shelter them in the political economy to a degree and kind that vary from one to another but that in a broad way distinguish all professions from other occupations." *Id.*

157. Gillers, *supra* note 152, at 679. It is worth noting that the privileged position of lawyers in our political economy is under substantial stress as other regulators outside the profession increasingly govern the conduct of lawyers. See Leubsdorf, *supra* note 22, at 1051. Professor Terry argues that a shift to a service providers paradigm for the regulation of lawyers partly explains this increase in outside regulation and the concomitant stress to the profession. Terry, *supra* note 103, at 972-73.

158. See Gillers, *supra* note 152, at 678. In addition to *Rancman*, Gillers' list of worst decisions concerning the area of lawyer regulation includes another non-lawyer involvement decision. *Id.* (citing Professional Adjusters, Inc. v. Tandon, 433 N.E.2d 779 (Ind. 1982)).

159. Gillers, *supra* note 152, at 679.

160. *Id.* See *supra* notes 110-23 and accompanying text (discussing Silver's call for empirical research to inform the regulatory framework for lawyers).

161. *Id.*

162. *Id.* at 680.

163. *Id.*

164. *Rancman*, 789 N.E.2d at 221.

money from the defendant.<sup>165</sup> Rancman was obligated to pay the companies only if she recovered money from State Farm.<sup>166</sup> She settled for \$100,000 within twelve months and then sued the two funding companies, asking the court to find that she need not repay the funds.<sup>167</sup>

The Ohio Supreme Court ruled that the contract was void because the companies were guilty of champerty and maintenance—issues that neither party had raised below.<sup>168</sup> Gillers criticizes the court's decision and its reasoning. He begins by explaining the benefits of non-recourse advances in litigation.<sup>169</sup> He then challenges the court's concerns that litigation funding investments provided Rancman "a disincentive to settle her case" and that the litigation funding companies would reap a "handsome profit [by] speculating in a lawsuit."<sup>170</sup>

Gillers concedes that there might be a disincentive to settle but argues that it would be unfair to "squeeze plaintiffs without financial reserves" into an "early, unjust settlement, especially when defendants can use procedural strategies to buy delay."<sup>171</sup> Gillers asks critically, "Why can't the [profits of the litigation funding companies] be handsome?"<sup>172</sup> The handsome profit recognizes the risk of non-recovery—the same risk that Rancman's lawyer incurred when he "'bought' an interest," or took a contingent fee—"in [Rancman's] claim in exchange for work."<sup>173</sup> For Gillers, "[i]t is no answer to say that lawyers who work on contingency perform a valuable service for the justice system."<sup>174</sup>

Five years after *Rancman*, Ohio enacted a law permitting and regulating non-recourse civil litigation advances.<sup>175</sup> Gillers hopes that the Ohio Supreme Court will defer to the legislature, permit the advances rather than strike down the law under the Court's inherent authority to regulate the practice of law and welcome this "stranger in our midst."<sup>176</sup>

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165. *Id.* at 218-219.

166. *Id.* at 219.

167. *Id.* at 219. *See also* Gillers, *supra* note 152, at 684.

168. Gillers, *supra* note 152, at 684.

169. *Id.* at 689.

170. *Id.* at 687.

171. *Id.* at 691.

172. *Id.* at 687.

173. Gillers, *supra* note 152, at 687.

174. *Id.*

175. *Id.* at 688.

176. *Id.* at 694-95.



## IV. PRACTICING LAW IN THE ELECTRONIC AGE

In its second half, the Symposium turned from MJP to the controversial topic of new technologies and their far-reaching effect on the practice of law and lawyer regulation. New technologies have radically changed the profession, and “with each new technological innovation or cutting-edge practice strategy,” there is an increased risk of ethical violations for uninformed lawyers.<sup>177</sup> In this “brave new world” there are benefits and costs associated with technology.<sup>178</sup> One cost concerns the increased pressure on lawyers to provide clients with almost instant advice in a more specialized world of laws.<sup>179</sup> Some benefits of the changes include the more efficient production and review of information and the use of technology to better inform and persuade jurors about a case.<sup>180</sup> To be sure, technology is ever-changing, expensive, and important to the successful delivery of legal services and

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177. John Hocter, *Ethics in the Electronic Age*, 24 OHIO LAWYER 9 (2010); Ohio State Bar Association (OSBA), Future of the Legal Profession Advisory Committee, 2007 OSBA FUTURE OF THE LEGAL PROFESSION REPORT 8 (noting that association executives believe technology “will have a far-reaching effect on the practice of law.”). See also Silver, *supra* note 10, at 1063 (commenting that “[t]echnology also allows lawyers to experiment with new ways to organize their work relationships”).

178. Hocter, *supra* note 177, at 9 (quoting MBI panelist Donald Wochna). See generally Renee M. Jackson, *Social Media Permeate the Employment Life Cycle*, NAT’L L.J., Jan. 11, 2010, at 16 (explaining the benefits and risks of using social media including, for example, the websites Facebook and MySpace, and the video-sharing website YouTube, in the workplace).

179. See ANTHONY KRONMAN, *THE LOST LAWYER* 275-77, 283-91 (1993) (providing an interdisciplinary examination of the legal profession; emphasizing that the “demand for greater specialization is pervasive in the law today, and one sees its effect at every level and in every institutional setting”; and discussing the costs and benefits of increased specialization in legal services and suggesting that it results in a narrowing work experience that is inconsistent with the development of the “lawyer-statesman ideal”). Justice Judith Lanziger of the Ohio Supreme Court recently addressed a group of lawyers, professors, and law students at the University of Akron School of Law. (U. of Akron School of Law Address to the Women in the Law Section of the Akron Bar and Jan. 25, 2010). One of her comments arguably reflected the concern about technology and its negative impact on lawyers’ lives. She stated: “We’re in the wild, wild West when it comes to the internet.” Telephone Interview with Justice Judith Lanziger (Jan. 28, 2010). This statement referred to lawyers having the opportunity to help develop the law concerning the internet and that it might also add pressure to lawyers’ lives in delivering legal services.

180. See Robert Aronson & Jacqueline McMurtrie, *The Ethical Limitations on Prosecutors When Preparing and Presenting Evidence: The Use and Misuse of High-Technology by Prosecutors: Ethical and Evidentiary Issues*, 76 FORDHAM L. REV. 1453, 1460 (2007) (recognizing that technology facilitates juror understanding of complex concepts, interactive multimedia courtroom presentations can be very persuasive, and that jurors may well expect such presentations). See generally KRONMAN, *supra* note 179, at 302 (acknowledging that the introduction of computers have resulted in “a sharp reduction in the time that lawyers need to wait for the production and revision of legal documents, and that in turn has made it possible for them to work uninterrupted for longer periods . . .”).

the regulation of lawyers.<sup>181</sup> New technology may also compel changes in lawyer regulation.

A. *Panel Five: The Legal Services Market: Strategies and Efficiencies to Deliver More for Less*

Professor Margaret Raymond<sup>182</sup> and her two colleagues, Donald Wochna<sup>183</sup> and Mark Tuft,<sup>184</sup> consider how new technologies can be marshaled to improve delivery of legal services to consumers. Raymond examines the role of technology in the marketing of legal services across borders and the ways in which states are attempting to regulate that marketing.<sup>185</sup> Wochna writes about the ethical challenges associated with searching for electronic data and contends that some searches require expert assistance to comply with MR 1.1's competency standards.<sup>186</sup> Tuft explores the complicated relationship between technology and legal ethics in the context of offshore outsourcing.<sup>187</sup>

Attorney Donald Wochna is a former partner in a large national law firm and an equity owner in Vestige, Ltd., an electronic information company. He writes about the "Perfect Storm"—the confluence of "[r]ecent case law, changes in civil procedure rules and the dramatic increase in the volume of electronically stored information"—that has created a malpractice trap for unwary lawyers.<sup>188</sup> The sheer cost of reviewing and producing enormous amounts of electronically stored information is forcing lawyers to "use computers and not just

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181. Hocter, *supra* note 177, at 9 (quoting Tuft: "Technology is becoming such a big part of . . . law practice that if we don't have it, we had better have some people on board who can help us meet those responsibilities"). See also Silver, *supra* note 10, at 1074 (discussing the dynamic role of technology in the delivery of legal services, indicating the ever-changing nature of technology and the challenges this presents to regulators by stating: "Of course, technology also plays an enormous role in innovations in law practice, and we cannot anticipate the changes that will occur in the short term, much less over the next few decades.").

182. Margaret Raymond, *Inside, Outside: Cross-Border Enforcement of Attorney Advertising Restrictions*, 43 AKRON L. REV. 801 (2010).

183. Donald Wochna, *Electronic Data, Electronic Searching, Inadvertent Production of Privileged Data: A Perfect Storm – Why Attorneys are Being Forced to Recognize that Searching Electronically Stored Data is an Expert Function*, 43 AKRON L. REV. 847 (2010).

184. Mark Tuft, *Supervising Offshore Outsourcing of Legal Services in a Global Environment*, 43 AKRON L. REV. 825 (2010).

185. Raymond, *supra* note 182.

186. Wochna, *supra* note 183.

187. Tuft, *supra* note 184.

188. Wochna, *supra* note 183, at 847-48.

associates, contract lawyers, or outsourced offshore workers to search [client data].”<sup>189</sup>

Lawyers need to search client data to protect information from disclosure under the attorney-client and work-product privileges and to produce relevant non-privileged information. Wochna discusses the few cases that have attempted to define the “nature of electronic searching and the minimum competency necessary to defend [the] results” of a search.<sup>190</sup> He argues, in part based on these cases, that lawyers who have to defend the competency of their search and retrieval tools will be forced to recognize that electronic searching is an expert process.<sup>191</sup> He concludes that electronic searching should be treated as an expert function “consistent with the requirements of Evidence Rule 702.”<sup>192</sup>

Attorney Mark Tuft reports in his piece that the law firm business model is being challenged by increasing pressure to manage efficiencies and reduce costs, especially in this economic downturn.<sup>193</sup> He notes several forces that are reshaping the firm model including advances in technology, the outside investment in overseas law firms, and the outsourcing of legal and administrative services.<sup>194</sup>

A series of favorable ethical opinions, including ABA Formal Opinion 08-451, have facilitated the outsourcing of legal and other services.<sup>195</sup> The opinions uniformly note the risks associated with outsourcing: disclosure of client confidences, conflicts of interest, billing clients inappropriately, and failure to disclose the outsourcing and to obtain client consent where appropriate.<sup>196</sup> There is a consensus that these risks are manageable if the outsourcing lawyer supervises the

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189. *Id.* at 854 (citing George L. Paul and Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. 10, 21 (2007)).

190. Wochna, *supra* note 183, at 855.

191. *Id.* at 865.

192. *Id.* at 848-49.

193. Tuft, *supra* note 184, at 826. See generally Alex Williams, *No Longer Their Golden Ticket*, N.Y. TIMES, Jan. 15, 2010, at ST1 (reporting that the law business model no longer guarantees lawyers a “life of comfort, security and social esteem.” “[I]nternal pressures to perform [are] rising” [a]s the “[law] profession lurches through its worst slump in decades.” *Id.*

194. Tuft, *supra* note 184, at 826.

195. *Id.* at 826-27. Some potential clients in select firms now want them to identify what services they outsource and to whom. Tuft discusses the following opinions: ABA Stand. Comm. On Ethics & Prof'l Responsibility, Form. Op. 08-451 (2008); N.C. State Bar Form. Op. 12 (2008); Florida State Bar Ass'n Comm. On Prof'l Ethics, Form. Op. 07-2 (2008); San Diego Co. Bar Ass'n Legal Ethics Comm., Form. Op. 2007-01 (2007); The Ass'n of the Bar of the City of N. Y. Comm. On Prof'l & Judicial Ethics, Form. Op. 2006-3 (2006); Los Angeles Co. Bar Ass'n Prof'l Responsibility & Ethics Comm., Form. Op. 518 (2006). *Id.* at 827, n.6.

196. *Id.* at 835.

outsourcing arrangement and assumes responsibility for the work.<sup>197</sup> Tuft points out, however, that the opinions differ with respect to the nature of the requisite supervision.<sup>198</sup>

In order to avoid assisting in the unauthorized practice of law, some ethical opinions suggest that firms should treat foreign lawyers as non-lawyer assistants.<sup>199</sup> This treatment “typically requires more extensive and detailed supervision than the supervision of lawyers.”<sup>200</sup> Tuft warns that “a lawyer who delegates work [to non-lawyers] without continuous scrutiny and oversight does so at the lawyer’s peril.”<sup>201</sup> He asks whether the distinction between supervision of domestic lawyers and supervision of foreign lawyers is valid in a changing and more global context and whether the current rules for supervising others in a law firm are viable when applied to offshore outsourcing.<sup>202</sup>

Tuft highlights several problems in the current approach to supervising services outsourced abroad.<sup>203</sup> He believes that the current view of outsourcing does not adequately account for emerging technologies and the globalization of the practice of law.<sup>204</sup> In particular, he argues that the duty of supervision for partners, managers, and supervisory lawyers needs to be re-examined in light of changes to the traditional law firm model.<sup>205</sup> Tuft also wonders whether law firms should be subject to the same regulation as individual lawyers.<sup>206</sup>

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197. *Id.* at 840-41.

198. *Id.* at 842.

199. Tuft, *supra* note 184, at 842.

200. *Id.* at 831. MR 5.3(b) governs the supervision of non-lawyers and requires a responsible lawyer to undertake reasonable measures to ensure that the non-lawyer’s conduct is compatible with the lawyer’s ethical obligations. This means providing adequate instructions, monitoring progress, and reviewing the final product. *Id.* at 830. MR 5.1(a) requires the responsible lawyer to have reasonable measures to ensure that only the lawyer’s conduct in the firms comports with the lawyer’s ethical obligations. *Id.* at 828 n.15.

201. Tuft, *supra* note 184, at 831 (discussing MR 5.3(b), which governs the supervision of non-lawyers, and citing supporting cases that lawyers need to supervise work delegated to non-lawyers, e.g., Mahoning Co. Bar Ass’n v. Lavelle, 836 N.E.2d 1214 (Ohio 2005)).

202. Tuft, *supra* note 184, at 844.

203. *See id.* The “overarching ethical concern,” however, is assisting the providers of outsourced services in UPL. *Id.* at 841. What complicates this concern is that there is no standard definition of what constitutes the practice of law for purposes of guiding firms in deciding what services can be outsourced. *Id.* at 842 (noting that several commentators have criticized that lack of coherence in UPL jurisprudence). It is important to avoid having a foreign lawyer or other person perform even temporary legal work for a firm’s client. *Id.* at 845.

204. *Id.* at 842.

205. *Id.* at 826 (Tuft writes: “Firms are under increasing pressure to reduce internal costs of performing routine legal services not only in the current economic downturn but also as a means of surviving in the long term.”).

206. *Id.* at 844.

Professor Margaret Raymond's work examines one of the more "puzzling" problems involving cross-border practice by lawyers—the enforcement of lawyer advertising regulations.<sup>207</sup> Raymond reports that states are tending to restrict advertising more aggressively.<sup>208</sup> Iowa is one state that aggressively restricts lawyer television advertising.<sup>209</sup> Few Iowa lawyers advertise on television, yet lawyers from outside the state advertise routinely on a national cable channel that is seen in Iowa.<sup>210</sup> This scenario raised three questions for Raymond: "whether states can regulate this type of cross-border advertising, whether they do, and whether they should."<sup>211</sup>

Raymond reviews state regulatory regimes concerning lawyer television advertising and sorts them into three categories: low-regulatory, middle-regulatory, and high-regulatory. States whose schemes are in the third category impose stringent content-based regulation that lawyers cannot circumvent by the use of disclaimers.<sup>212</sup>

Regarding her first question about whether it is possible for high-regulatory states to discipline out-of-state lawyers for violating their advertising rules, Raymond believes that states that have adopted MR 8.5 should not have any difficulty.<sup>213</sup> MR 8.5 provides that "[a] lawyer not admitted in this jurisdiction *is also subject to the authority of this jurisdiction if the lawyer provides or offers to provide any legal services in the jurisdiction.*"<sup>214</sup>

Raymond examines reported disciplinary cases in high-regulatory states to learn the answer to her second question: Do states enforce their advertising rules aggressively against out-of-state lawyers? She finds few cases and concludes that there appears to be a policy of non-enforcement.<sup>215</sup>

Raymond next considers the meaning of non-enforcement in answering her final question: whether states should enforce their

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207. Raymond, *supra* note 182.

208. *Id.* at 802.

209. *Id.*

210. *Id.*

211. *Id.* at 803. Raymond focuses on ethical rules that govern only television advertising.

212. Raymond, *supra* note 182, at 805.

213. *Id.* at 810.

214. *Id.* (emphasis added). Raymond recognizes an ambiguity under a Rule 8.5 approach to regulating out-of-state lawyer advertising. "Is it the offer that must occur in the jurisdiction, or is it the ultimate services that are being offered that must be provided in the jurisdiction? This could become an issue if the lawyer's work would not require the 'practice of law' within the jurisdiction." *Id.* at n.41.

215. *Id.* at 815.

advertising rules against out-of-state lawyers.<sup>216</sup> Raymond examines the interests high-regulatory states have asserted in defending their rules against constitutional challenges under the Supreme Court's *Central Hudson* commercial speech doctrine.<sup>217</sup> She also considers information accompanying the courts' adoption of their advertising rules for possible insights into the reasons for the rules.<sup>218</sup> The most frequently stated reasons were the need to protect the public from false or misleading advertising, the need for accurate information to assist with lawyer selection, and the need to safeguard the bar's reputation.<sup>219</sup>

Given the interests the states have asserted, Raymond believes enforcement would be warranted against both in-state and out-of-state lawyers.<sup>220</sup> She recognizes that the enforcement issue is multi-faceted, observing that non-enforcement, for example, may reflect limited resources and the state's decision to pursue more harmful conduct such as theft.<sup>221</sup> She concludes, however, that there are significant costs to non-enforcement, which reduces compliance and respect for the law and also places in-state lawyers at a competitive disadvantage in marketing their services.<sup>222</sup> "[T]he costs of regulatory failure [are imposed] on those lawyers trying most assiduously to obey the rules."<sup>223</sup>

*B. Lawyering and Judging in the Digital Age: Ethics and Access to Justice*

Panelists in the final group explored different facets of technology and their implications for lawyers, judges, and the administration of justice. United States District Court Judge James Gwin discussed the advantages of new technologies, especially the benefits of electronic filing.<sup>224</sup> Professor Andrew M. Perlman considered the ethics of mining

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216. *Id.* at 818.

217. Raymond, *supra* note 182, at 818 (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980)).

218. *Id.* at 818-19.

219. *Id.* at 820.

220. *Id.* at 821.

221. *Id.* at 821-22.

222. Raymond, *supra* note 182, at 822-23.

223. *Id.* at 823.

224. James Gwin is a United States District Judge in the Northern District of Ohio. To listen to Judge Gwin's remarks, please access the MBI Webpage for Lawyers Beyond Borders and Practicing Law in the Electronic Age, (2009) at <http://www.uakron.edu/law/millerbecker/symposium2009.dot> (describing new technology and some of its advantages in federal litigation and sharing some of his experiences with new technology as a judge).

metadata,<sup>225</sup> while Professor Nathan M. Crystal wrote about the increasing importance of litigation holds in the context of electronically stored information.<sup>226</sup> One common theme that emerges from their presentations is the significant role that technology plays in the delivery of good and cost-effective legal services. A lawyer's ability to provide competent representation under MR 1.1 may depend on his or her understanding and use of technology.

Professor Perlman examines the practice of "metadata mining" and the controversial question of whether it should be permitted.<sup>227</sup> Metadata mining refers to the review of hidden data in an electronic document, such as a word processing file or a spreadsheet.<sup>228</sup> Perlman presents three hypothetical scenarios, two in a transactional setting and the other in a litigation setting, to highlight the ease—only a click of the "undo" button away—of obtaining metadata.<sup>229</sup>

Perlman reports that fourteen bar associations have issued ethics opinions addressing the question, and the opinions are not uniform.<sup>230</sup> He discusses the scope of and rationale for some of these opinions and notes that they essentially fall into three categories: one in which metadata mining is always impermissible, another in which it is always permissible, and a third in which it is conditionally permissible.<sup>231</sup>

Perlman disagrees with some other noteworthy experts in the field and finds that the reasons for permitting metadata mining are persuasive.<sup>232</sup> He argues that flat bans on the practice are overbroad because they do not distinguish between metadata that is obviously

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225. Andrew M. Perlman, *The Legal Ethics of Metadata Mining*, 43 AKRON L. REV. 785 (2010).

226. Nathan M. Crystal, *Ethical Responsibility and Legal Liability of Lawyers for Failure to Institute or Monitor Litigation Holds*, 43 AKRON L. REV. 715 (2010). "A litigation hold is a suspension of a party's normal document retention and destruction procedures in order to preserve evidence." *Id.* at 717.

227. "The most controversial question, which can arise in both the transactional and litigation contexts, is whether the recipient of electronic documents can look at the metadata without first getting permission to do so." Perlman, *supra* note 225, at 787.

228. *Id.* at 786. Metadata includes a wide variety of information, for example, the name of the original author of the document, the date of the document's creation, the dates and contents of previous edits, and the name of the editors. *Id.*

229. *Id.* at 787.

230. *Id.* at 788.

231. *Id.*

232. *Id.* at 792. Professor David Hricik believes that the nonconsensual mining of metadata is unethical and favors flat bans on the practice. *Id.* (citing David Hricik, *Mining for Embedded Data: Is it Ethical to Take Advantage of Other People's Failures?*, 8 N.C. J.L. & TECH 231, 241 (2007)).

confidential and metadata that is not protected by the attorney-client privilege or the work-product doctrine.<sup>233</sup>

Lawyers may have legitimate purposes for mining unprivileged metadata.<sup>234</sup> For example, Perlman notes that a lawyer's due diligence in a transaction may legitimately require him to examine electronic documents to learn who edited a memorandum about a company's financial status or projected sales.<sup>235</sup> If the memorandum was not created by or for attorneys, there is no reason to believe that the embedded information is confidential or protected.<sup>236</sup>

Perlman also rejects the argument that metadata mining will add to the cost of litigation.<sup>237</sup> He notes that the cost of a privilege review of documents is considerable and that "the additional cost of reviewing the metadata is often negligible."<sup>238</sup> Finally, if parties are really concerned about cost, they can agree in advance not to mine metadata.<sup>239</sup>

Perlman also addresses the reaction of some to whom metadata mining seems like "snooping in someone's briefcase."<sup>240</sup> It is inaccurate and unreasonable to assume that, just because information is not visible in an electronic document, it is privileged or even confidential.<sup>241</sup> The practice is not deceitful because all lawyers should know that electronic documents contain metadata.<sup>242</sup> Metadata mining is simply the process of looking at the entire document—tantamount to an inspection of all the contents of an open briefcase.<sup>243</sup>

Perlman concludes that the best framework for considering metadata mining is the law of inadvertent disclosures.<sup>244</sup> In some states, the law permits a lawyer to review privileged information in an errant fax or email on the theory that the privilege has been waived, while in other states such review is impermissible if the errant item likely contains privileged information.<sup>245</sup> Perlman explains why metadata should be accorded similar treatment no matter which approach a

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233. Perlman, *supra* note 225, at 793-94.

234. *Id.* at 792.

235. *Id.*

236. *Id.*

237. *Id.* at 794-95.

238. Perlman, *supra* note 225, at 795.

239. *Id.* at 795 & n.36 (citing FED. R. CIV. P. 26).

240. *Id.* at 794.

241. *Id.*

242. *Id.*

243. Perlman, *supra* note 225, at 794.

244. *Id.* at 795.

245. *Id.* at 795-97.



jurisdiction takes to regulating inadvertent disclosure.<sup>246</sup> He emphasizes that much metadata is unprivileged.<sup>247</sup> As a result, lawyers should be free to mine metadata even in those jurisdictions that prohibit review if the lawyer has reason to know that it is not privileged.<sup>248</sup>

Professor Crystal contends that there is a new model emerging for winning in litigation—a model in which a lawyer obtains sanctions against the opposing side for its discovery abuse.<sup>249</sup> There are multiple and devastating sanctions for such abuse, including the granting of a default judgment.<sup>250</sup> The vast quantities of electronically stored information (ESI) dramatically increase the potential for discovery abuse.<sup>251</sup>

Against this backdrop of contemporary litigation, Crystal examines the “litigation hold.”<sup>252</sup> A litigation hold is the suspension of a party’s normal document retention/destruction procedures in order to preserve evidence.<sup>253</sup> The duty to institute a hold arises when one reasonably anticipates litigation, and it represents an early point of exposure for sanctions for the mishandling of ESI.<sup>254</sup>

Crystal artfully raises important questions about the timing, the scope, and counsel’s obligations regarding litigation holds.<sup>255</sup> He then answers these questions, citing leading cases like *Zubulake v. UBS Warburg LLC*.<sup>256</sup>

Crystal concludes that counsel’s failure to institute a proper litigation hold subjects counsel to potential discipline and civil liability for malpractice.<sup>257</sup> For example, MR 3.4(a) prohibits a lawyer from “unlawfully obstruct[ing] another party’s access to evidence or unlawfully alter[ing], destroy[ing], or conceal[ing] a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.”<sup>258</sup> Comment 2 elaborates

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246. *Id.* at 798-99.

247. *Id.* at 798.

248. Perlman, *supra* note 225, at 798-99.

249. Crystal, *supra* note 226, at 716.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.* at 717 (citing *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D. N.Y. 2003)).

254. Crystal, *supra* note 226, at 717.

255. *Id.* at 717-21.

256. *Id.* (citing *Zubulake*, 220 F.R.D. at 218).

257. *Id.* at 726.

258. *Id.* at 721.

on this obligation and “refers to law prohibiting destruction of evidence.”<sup>259</sup>

Crystal argues that under MR 3.4, if a lawyer knows that a litigation hold is needed but fails to institute one, with the result that ESI is lost, then the harm is the same as if the lawyer actively destroyed the evidence.<sup>260</sup> In addition to violating MR 3.4 for failing to institute a hold, the lawyer violated MR 1.1, which requires competence.<sup>261</sup> If a lawyer is not aware of the need for a litigation hold, the lawyer is probably guilty of incompetence.<sup>262</sup>

ABA Civil Discovery Standards mandate that when a lawyer learns that litigation is probable, the lawyer should inform the client of its duty to preserve potentially relevant documents in its custody.<sup>263</sup> The lawyer’s failure to advise the client of the obligation, or the lawyer’s failure to act competently to help the client fulfill the obligation, could subject the client to sanctions.<sup>264</sup> “In an extreme case, in which a court entered a default judgment against a client because of the client’s failure, caused by its own counsel, to preserve evidence, the client could seek to recover the entire amount of the judgment in a malpractice action.”<sup>265</sup>

Crystal reports that he is unaware of any cases in which lawyers have been subjected to discipline or liability either to clients or third parties.<sup>266</sup> The cases will not be long in coming, however, as the new approach to winning litigation through discovery abuse continues to develop.<sup>267</sup>

## V. CONCLUSION

The Inaugural MBI Symposium’s twenty-six participants highlight many important developments and challenges caused by MJM and new technologies. Their assessments and suggestions provide a helpful roadmap for lawyers and regulators to negotiate the increasingly complex, fast-paced, and ethically risky landscape for delivering legal services. Several panelists suggested regulatory reforms that range from

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259. Crystal, *supra* note 226, at 721. See MODEL RULES OF PROF’L CONDUCT R. 3.4 cmt. 2.

260. *Id.* at 721.

261. *Id.* at 722.

262. *Id.*

263. *Id.* at 723 n.58 (citing ABA CIVIL DISCOVERY STANDARDS, STANDARD 10, PRESERVATION OF DOCUMENTS).

264. Crystal, *supra* note 226, at 725-26.

265. *Id.* at 724.

266. *Id.* at 725-26.

267. *Id.* at 726-27.

the creation of a regulatory framework for lawyers engaged in cross-border practice to the creation of standards for the supervision of offshore outsourced legal services<sup>268</sup> and the mining of metadata.<sup>269</sup> Some of the panelists' suggestions and reforms are especially important given the "high [financial] stakes" involved in the international legal services market, where an almost irresistible siren promises to lure more lawyers, who will run the risk of crashing on the shoals of an increasingly fragmented regulatory framework.<sup>270</sup>

The increase in MJP, especially in a more globalized setting, and the risks attending new technologies highlight the need for a more unified and collaborative approach to professional regulation. The ABA's creation of the 20/20 Commission represents a timely and significant response by the organized bar to these developments. The profession needs to better educate lawyers about developments involving the globalization of the legal services market and their ethical significance. Education is the key to alerting lawyers to outside regulation by government agencies and others that may threaten traditional values and practices in the delivery of legal services. Simply put, it is in the profession's self-interest to remain informed of outside regulation that may limit counsel's effectiveness in representing clients.<sup>271</sup>

If the profession fails to rise to the challenges the panelists have highlighted, its inaction may produce unintended consequences, including encouraging others outside the profession to take action that may affect lawyers negatively.<sup>272</sup> For example, the government may

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268. Raymond, *supra* note 182.

269. Perlman, *supra* note 225.

270. Silver, *supra* note 10, at 1022. See generally Leubsdorf, *supra* note 22, (providing a comprehensive discussion of the fragmentation of the rules governing lawyers and identifying "five trends [that] stand out" as products of this fragmentation).

271. Michael Stern, *Change or Die: Big Firms Should Reflect on the Fate of Big Newspapers*, 133 THE RECORDER 205, (July 31, 2009) (discussing technological progress, especially online communication, and arguing that unless the profession "fundamentally change[s] how [it does] business, it won't – and [doesn't] deserve to—survive"; and recommending that the profession "get[s] on with either inventing a future [it] is a part of or risk[] being left out of the alternative").

272. See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002). See also ABA Section of Real Property, Trust and Estate Law 19th Annual Symposia, *Guardian at the Gate: Update on the Gatekeeper Initiative* (May 1-2, 2008) (reporting that "[l]awyers certainly have had regulations imposed upon them by the federal government," including Circular 230 and the Sarbanes Oxley Act, "requiring an attorney to report a violation of securities law"). See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, §307 (2002). See also Paula Schaefer, *Overcoming Economic Barriers to Loyal Disclosure*, 44 AM. BUS. L.J. 417, 418 (2007) (providing attorneys with a framework for evaluating the issue of "loyal disclosure"—disclosing a

enter into an international trade agreement that limits the scope of the attorney-client privilege as it is understood in the United States.<sup>273</sup> Currently, there is legislation in the United States Senate preventing corporations and limited liability companies from engaging in money laundering and the financing of terrorism and includes lawyers within its scope.<sup>274</sup> The Incorporation Transparency and Law Enforcement Assistance Act would, among other things, enable the Treasury Department “to impose suspicious-activity report requirements upon lawyers.”<sup>275</sup>

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communication by a constituent of the entity—to protect the entity and offering tools to meet the Act’s requirements). Another possible unintended consequence of being uninformed or disengaged from regulatory matters is that lawyers may simply ignore and violate ethical proscriptions. This is a serious consequence because it may corrode public confidence in the profession’s ability to self-regulate, breed disrespect among the bar for its ethical rules, and promote a greater number of rule violations. See Sheryl B. Shapiro, *Current Development 2006-2007: American Bar Association’s Response to Unauthorized Practice Problems Following Hurricane Katrina: Optimal or Merely Adequate?*, 20 GEO. J. LEGAL ETHICS 905, 909 (2007) (noting that the appointment of the ABA Commission on MJP occurred because many lawyers were not observing existing MJP rules because they “were out of step with modern communications, travel technology, and the needs of both lawyers and clients”).

273. See generally Leubsdorf, *supra* note 22, at 1048-49 (recognizing that lawyers have to navigate between different and sometimes incompatible sets of ethical rules and providing examples of incompatibility in a transnational context where, unlike in the United States, “disclosures to corporate house counsel are not protected by an evidentiary privilege or lawyers may not interview potential witnesses”).

274. See Marcia Coyle, *Cough Up the Info: Feds Want More Corporate Data*, NAT. L.J., Jan. 12, 2010, at 1, 4. The United States Treasury and Justice Department want states to collect more information about the owners of corporations and limited liability companies to better combat money laundering and the financing of terrorism. *Id.* at 1. A United States Senate bill, the Incorporation Transparency and Law Enforcement Assistance Act, would enable the Treasury Department to require lawyers to report “suspicious activity.” *Id.* (reporting also that lawyers would have to “designate a compliance officer” for their entity clients “and develop an on-going employee-training program and an independent audit function.” *Id.* The ABA is collaborating with other state organizations in opposing this bill. *Id.*

275. Coyle, *supra* note 274, at 4. The ABA has long opposed such reporting “because it would create inherent conflicts between lawyers and clients.” *Id.* Lawyers would be in the awkward position of being retained by clients to advise about and facilitate the formation of corporations and at the same time be legally forced to reveal information (possibly confidential) to governmental authorities that would subvert their client’s intentions. In addition, lawyers might find themselves in a similar awkward situation with their clients under the Financial Action Task Force (FATF), a global intergovernmental effort aimed at preventing money laundering and the financing of terrorism. See Bruce Zagaris, *Gatekeepers Initiative Lawyers and the Bar Ignore It at Their Peril*, 23 CRIM. JUST. 28, 30-1, 34 (2008-2009) (discussing the Financial Action Task Force (FATF) and urging bar associations to become proactive regarding FATF standards that require lawyers and others to file suspicious activity reports); American Association of Law Schools (AALS) Section on Professional Responsibility Program, *The Transformative Effect of International Initiatives on Lawyer Practice and Regulation: A Case Study Focusing on FATF and its 2008 Lawyer Guidance*, AALS ANNUAL MEETING PROGRAM, TRANSFORMATIVE LAW 46 (Jan. 8, 2010) (examining, in part, recent FATF actions and its transformative effect on lawyer practice and regulation as FATF “will

MJP and new technologies are changing traditional notions of how lawyers work and how they are viewed.<sup>276</sup> It is much more common today for lawyers to represent clients whom they have never personally met or to routinely outsource work offshore to lawyers.<sup>277</sup> Lawyers need to be ever mindful of the ethical considerations involved in cross-border practice and the use of new technologies.

Devising and implementing new regulatory reforms promises to be difficult and costly.<sup>278</sup> The process will require an ongoing educational effort concerning the increase in MJP and new technologies and their effect on practice. Law schools and the ABA Center for Professional Responsibility should collaborate in taking the lead in these educational endeavors.

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affect a broad swath of U.S. Lawyers who help their clients buy or sell real estate [or] create, buy, sell or manage corporations”).

276. See Dan Black, *Technology Rapidly Reshapes the Legal Profession*, 52 THE ADVOCATE 30 (2009) (asserting that “[a]ll is not gloom” and that “technology will empower clients and small firms” to undertake new complex litigation because they will “collaborat[e] and shar[e] digital information”). See also Mary C. Daly and Carole Silver, *Flattening the World of Legal Services? The Ethical and Liability Minefields of Offshoring Legal and Law-Related Services*, 38 GEO. J. INT’L L. 401, 405-06 (2007) (noting that offshore outsourcing is “headline news” and that it “has shifted from outsourcing back-office, administrative and support functions for law firms and legal departments to outsourcing legal and law-related services themselves”).

277. See generally Posting of Ashby Jones, *On the Isolation of Legal Practice and Suicide*, to WSJ Law Blog, <http://blogs.wsj.com/law/2010/01/22/> (Jan. 1, 2010) (reporting that Attorney Frederick C. Ury, a member of the 20/20 Commission, believes that technology is partly responsible for lawyers becoming increasingly isolated and quoting him: “[u]nless you attend court on a regular basis or participate in bar association events, you no longer interact face-to-face with your fellow attorneys.”) Face-to-face communication has given way to “e-mail [and] text messaging. . . .” *Id.*

278. There are a number of articles discussing regulatory reforms. See e.g., Leubsdorf, *supra* note 22, at 1054 (suggesting that a Legal Services Board like the one in England might be useful in conducting research and planning for the future of the legal profession and that, as a national body, it might even be empowered to regulate lawyers; and predicting that the growth in multistate and transnational practice will ultimately promote a uniformity of professional standards); Fried, *supra* note 2, at 64 (emphasizing that the profession is changing at “breakneck speed” and that the profession needs to adapt to new economic realities; suggesting that the “legal community as a whole” develop a “protocol for licensing that removes unnecessary barriers to [MJP]” and that is based on a “universal set of norms to which all practitioners would be required to adhere”); Lewis, *supra* note 2, at 637 (2009) (proposing a system that “liberalize[s] MJP rules only with regard to lawyers representing sophisticated clients”). See generally David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 470 (1990) (examining competing interests in different legal ethics models and arguing that “ethical rules should [not] apply to all lawyers in all contexts” and instead recommending a “mid-level approach that tailors ethical rules designed to foster a public-spirited view of lawyering to relevant differences in legal practice”).