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### Ethics in the Legal Industry

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# ETHICS IN THE LEGAL INDUSTRY

MICHAEL ARIENS†

## I. INTRODUCTION

A brief item in the *Hearsay* section of the June 2017 *ABA Journal* was headlined “2%.” This number indicated an increase in the percentage of lawyers, from 2012 to 2016, “who worked remotely within the legal industry.”<sup>1</sup> Making one’s “office” a location other than the physical space leased or owned by oneself or by an employer is hardly news, even as applied to the work of lawyers. Lawyers know as well as anyone that technology allows one to work almost anywhere and, unfortunately, almost any time. What is striking in this brief news item is the use by the flagship magazine of the American Bar Association (“ABA”) of the phrase “legal industry.”

Characterizing the work of lawyers as part of an industry is relatively new, particularly in legal publications. No definition of “legal industry” is found in the tenth edition of *Black’s Law Dictionary*, published in 2014, nor is one found in the latest (2012) edition of the *Bouvier Law Dictionary*.<sup>2</sup> Only one published case, issued in 2012, has used “legal industry” as a synonym for legal practice or legal profession. That decision was written by the New York Supreme Court, a state trial court, on the issue of a claim of fraud in the published employment data of the defendant law school’s graduates.<sup>3</sup> Outside of a 1976 law review article,<sup>4</sup> references in law reviews to the work of lawyers as part of an “industry” rather than a profession, a service, or a practice are rare before the turn of the millennium.

The phrase “legal industry” was used in bar journals and law management and practice publications during the 1990s in two related ways: first, it was used as a catchphrase to discuss a particular

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1. *Hearsay*, ABA J., June 2017, at 15.

2. BLACK’S LAW DICTIONARY (10th ed. 2014); BOUVIER LAW DICTIONARY (2012).

3. *Gomez-Jimenez v. New York Law School*, 943 N.Y.S.2d 834, 856 (N.Y. Sup. Ct. 2012). “[I]t is this court’s fervent hope that all the heat generated around this issue over this last year will be replaced with a renewed sense of responsibility to prospective applicants and students, starting at the law school level, and extending to the entire legal industry[.]” *Id.* The only other use in court opinions is the unpublished opinion in *Jin Soo Lee v. Gyoungtech United States Inc.*, No. 16-0334-KD-B, 2017 U.S. Dist. Lexis 68526, at \*16-17 (S.D. Ala. Apr. 17, 2017) (assessing whether party’s claim of attorney fees was “reasonable considering . . . the legal industry in general”).

4. Nancy K. Olmsted, *Law as a Business: The Impact of Title VII on the Legal “Industry”*, 10 VAL. U. L. REV. 479 (1976). The quotation marks may explain the author’s cognizance of its unusual use.

subset of consumers of computer equipment and related products and services.<sup>5</sup> Its second use was by those engaged in law firm management and staffing, as shorthand when discussing the business of operating a private law practice.<sup>6</sup>

Referring to the work of lawyers, especially private practice lawyers, as part of a "legal industry," became more prevalent upon the turn of the millennium. The magic of the year 2000 offered lawyers (and others) the opportunity to speculate about the future, usually in light of the recent past. One example is *Into the New Millennium*, a symposium sponsored by the State Bar of Texas and published in the *Texas Bar Journal*.<sup>7</sup> One of the contributions offered a sober assessment of the future: "The practice of law is not an island—it is very much a part of a changing business world. *Change has become the norm in business, and the legal industry is not immune to it.*"<sup>8</sup>

The constant of change was not new among American lawyers in 2000.<sup>9</sup> Significant changes in the economics of the practice of law had been the norm for many lawyers since the 1970s.<sup>10</sup> During the 1970s, the profession as a whole faced both governmental and market-based threats to the claims of exclusivity in the practice of law.<sup>11</sup> Lawyers increasingly sold their services to corporations at the expense of indi-

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5. See, e.g., John A. Anthes, Jr., *How to Use RFPs . . . and Other Tips from a Legal Industry Supplier*, 7 LEGAL ADMIN. 38 (1988) (on selling "law office systems").

6. See David Margolick, *A Trendmeister for Law Firms Finds his Counsel is Highly Coveted as Times Turn Tough*, N.Y. TIMES, Nov. 30, 1990, at B5 (discussing state of legal industry); Don Samuelson & Marilyn Giblin, *A Little Legal History Should Teach Us a Lot*, 9 LEGAL MGMT. 12, 13 (1990) (noting "the American legal industry resembles the American automobile industry" in focusing on producer interests rather than the needs of consumers). See generally U.S. DEP'T OF COM. BUREAU OF ECON. ANALYSIS, <https://www.bea.gov> (last visited February 28, 2018) (using "legal services industry" in discussing the economic contribution of private legal services when accounting for the components of gross domestic product).

7. See *Into the New Millennium*, 63 TEX. B.J. 18 *et seq.* (2000).

8. Michael M. Boone & Terry W. Conner, *Change, Change, and More Change: The Challenge Facing Law Firms*, 63 TEX. B.J. 18, 18 (2000).

9. See ABA COMM'N ON RESEARCH ABOUT THE FUTURE OF THE LEGAL PROFESSION, WORKING NOTES: DELIBERATIONS ON THE CURRENT STATUS OF THE LEGAL PROFESSION (August 31, 2001).

10. See Richard Sander & E. Douglass Williams, *Why Are There So Many Lawyers? Perspectives on a Turbulent Market*, 14 LAW & SOC. INQUIRY 431, 448 (1989) (noting the income decline during the 1970s); RICHARD L. ABEL, AMERICAN LAWYERS 160 (1989) (noting surveys by several state bars indicating income of lawyers had stalled or declined both during early 1970s and in latter half of decade).

11. See *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). The Antitrust Division of the Department of Justice entered into an agreement with the ABA to change its Code of Professional Responsibility to the Model Code of Professional Responsibility in 1976, and the Supreme Court held factual commercial speech by lawyers was protected by the Free Speech Clause of the First Amendment, making the Code's ban on lawyer advertisements unconstitutional.

vidual clients.<sup>12</sup> During the 1980s, large law firms began replacing lockstep partner compensation based on length of firm service with “eat what you kill” compensation systems, in part to stem the departure of rainmakers.<sup>13</sup> Lawyers of all types were increasingly sorted into specialized practice compartments.<sup>14</sup> Further, a continued increase in the size of the American legal profession relative to population increased competition among lawyers. As always, some practice areas grew and others shriveled. One satisfying constant was the continued growth of legal services as a share of Gross Domestic Product, rising from .4% in 1978 to 1.8% in 2003.<sup>15</sup>

This overall economic success failed to cheer up many lawyers, as the race for ever-increasing profits per partner became the focus of many law firms.<sup>16</sup> By the end of the twentieth century it was commonplace to declare that lawyers were part of an unhealthy and unethical profession,<sup>17</sup> and to complain, as Chief Justice Warren Burger did, that the “standing of the legal profession is perhaps at its lowest ebb in this century—and perhaps at its lowest in history.”<sup>18</sup>

The *Texas Bar Journal* authors accurately predicted that the norm of change would substantially affect the work performed by lawyers. The same norm that reconfigured the economics of law practice also triggered a transformation of the language used by lawyers to describe their purpose and practice in the early twenty-first century. In the aftermath of the Great Recession of 2007-2009,<sup>19</sup> the increased

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12. See Marc Galanter, *Planet of the APs: Reflections on the Scale of Law and Its Users*, 53 *BUFF. L. REV.* 1369 (2006).

13. See generally KIM ISAAC EISLER, *SHARK TANK: GREED, POLITICS, AND THE COLLAPSE OF FINLEY KUMBLE, ONE OF AMERICA'S LARGEST LAW FIRMS* (1990) (tracing rise and fall of firm that grew and crumbled in the 1980s by hiring lateral partners); MILTON C. REGAN JR., *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* 44-49 (2005).

14. See Michael Ariens, *Know the Law: A History of Legal Specialization*, 45 *S.C. L. REV.* 1003 (1994); Michael Ariens, *Sorting: Legal Specialization and the Privatization of the American Legal Profession*, 29 *GEO. J. LEGAL ETHICS* 579 (2016). The pioneering work on the two hemispheres of legal practice was done by JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* (1982) and followed up in John P. Heinz, Edward O. Laumann, Robert L. Nelson & Ethan Michelson, *The Changing Character of Lawyers' Work: Chicago in 1975 and 1995*, 32 *LAW & SOC'Y REV.* 751 (1998) and JOHN P. HEINZ, ROBERT L. NELSON, REBECCA L. SANDEFUR & ETHAN MICHELSON, *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR* (2005).

15. Marc Galanter, *supra* note 12, at 1378. As Galanter notes, this does not include the contribution to GDP by lawyers employed by corporations or by the government.

16. See William D. Henderson, *Rise and Fall*, *AM. LAW.*, June 2014, at 56.

17. Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 *EMORY L.J.* 871 (1999).

18. Warren E. Burger, *The Decline of Professionalism*, 63 *FORDHAM L. REV.* 949, 950 (1995).

19. The Great Recession officially began in last quarter of 2007 and ended in June 2009. See *When Did It End?*, *THE ECONOMIST* (Apr. 15, 2010), <https://www.economist.com/node/15911334>. See Eli Wald, *Foreword: The Great Recession and the Legal Pro-*

use of the phrase “legal industry” by the *New York Times* (the “*Times*”) further demonstrates this transformation of language. The *Times*’ weekly column *At the Bar* discussed the “legal industry” in a profile of the owner of a legal recruiting firm in 1990.<sup>20</sup> The *Times* began using the phrase more often after the turn of the millennium, especially beginning in 2009.<sup>21</sup>

The use of this language by the *Times* reflected a greater attachment to adopting the appellation in publications written for and by lawyers. Monthly general interest bar association journals rarely defined the *work* of lawyers as an act of a legal industry before the Great Recession.<sup>22</sup> Law reviews embraced the term less often than bar journals. However, like bar journal authors, those writing for law reviews discussed the “legal industry” more often after the Great Recession than before.<sup>23</sup> Further, the phrase has been used recurrently in recent online internet publications, often in reference to claims about future technological innovations and changes which are predicted to disrupt the traditional work of lawyers.<sup>24</sup> Relatedly, one large law firm consultant and former lawyer offered a measured and lengthy assessment of the legal industry online in the aftermath of the Great Recession. When his ideas were later published in 2013 in book form, the *Foreword*, which was written by a large law firm Chairman and

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*fession*, 78 FORDHAM L. REV. 2051 (2010) (offering early assessment of “devastating” effects of the Great Recession on American legal profession).

20. Margolick, *supra* note 6, at B5. This column is reprinted in DAVID MARGOLICK, *AT THE BAR: THE PASSIONS AND PECCADILLOES OF AMERICAN LAWYERS* 79 (1995).

21. My thanks to Jacob Cox, a member of the Law Dean’s Research Fellows, who compiled a list of articles in the *New York Times* using the term “legal industry” from 1990 through 2014. “Legal industry” was used about once a year until 2000, two to three times per year from 2000-08, and reached a peak of eighteen uses in 2012. See *Memorandum from Jacob Cox to Michael Ariens* (on file with author). See also Sara Randazzo, *Pair of Law Firms to Merge, Adding to Industry Trend*, WALL ST. J., Sept. 6, 2017, at B3 (noting mergers “are among the largest in the legal industry this year”).

22. One perceptive article published just before the Great Recession using “industry” is Paul Burton, *Sowing the Seeds of Success*, OR. ST. B. BULL., July 2007, at 38 (noting long-developing trends that mean “young lawyers are faced with a more competitive, less supportive, crowded industry across a larger geographic landscape that is more focused on financial results than developmental prospects”).

23. See Michael Callier & Achim Reeb, *The Industrial Age of Law: Operationalizing Legal Practice Through Process Improvement*, 93 OR. L. REV. 853, 855 (2015) (titling one section “The Legal Industry at a Glance: The New Normal”). See also David Katz, *Quantitative Legal Prediction—Or—How I Stopped Worrying and Began to Prepare for the Data-Driven Future of the Legal Services Industry*, 62 EMORY L. J. 909 (2013).

24. See, e.g., Sally Kane, *10 Trends Reshaping the Legal Industry*, available at [www.thebalance.com/trends-reshaping-legal-industry-2164337](http://www.thebalance.com/trends-reshaping-legal-industry-2164337) (last visited February 28, 2018); *The Future of the Legal Industry*, FORBES (Nov. 10, 2016, 8:00 AM), [www.forbes.com/sites/forbeslegalcouncil/2016/11/10/the-future-of-the-legal-industry/2/#174e5e412c2c](http://www.forbes.com/sites/forbeslegalcouncil/2016/11/10/the-future-of-the-legal-industry/2/#174e5e412c2c); Sarah Eshlwan, *Four Trends that are Shaping Legal Industry in 2018*, MARTINDALE (Jan. 17, 2018), [www.martindale.com/marketyourfirm/blog/four-trends-in-the-legal-industry/](http://www.martindale.com/marketyourfirm/blog/four-trends-in-the-legal-industry/).

Chief Executive, used “legal industry” 5 times in just 1,000 words.<sup>25</sup> Finally, Google’s Ngram Viewer shows the increasing use of “legal industry” over the past quarter-century; unfortunately though, the Ngram Viewer’s data ends in 2008.<sup>26</sup>

The thesis of this essay is that this new nomenclature reflects a lasting reframing of the ethical foundations of American lawyers. Although applied most often to the work and sales opportunities sought by large law firms, the industry model is not limited in application to such firms. It is rare for any private practice lawyer to forego marketing her skills to prospective clients (or to lawyers with clients who need her particular legal skills). Changes in technology affect all private practice lawyers.

This essay begins by discussing the legal profession’s traditional declaration of the lawyer’s purpose. Lawyers served two masters, their clients and the courts, and they were required to serve each faithfully. This section explains the tension lawyers faced in attempting to achieve an impossible task. The essay then turns to the ten years from 1973 to 1983, when the American legal profession underwent dramatic changes. This section evaluates the economic and ideological shifts that affected the status and income of lawyers. Section IV then looks at the post-1983 history of American lawyers. It specifically focuses on the long-running “debate” between those who embraced the business of private law practice and those who sought to emphasize the public profession of the law, particularly through the

25. Peter J. Kalis, *Foreword*, in BRUCE MACÉWEN, *GROWTH IS DEAD: NOW WHAT?* i-iv (2013).

26. GOOGLE BOOKS NGRAM VIEWER, [https://books.google.com/ngrams/graph?content=legal+industry%2Clegal+profession%2Clegal+work&year\\_start=1800&year\\_end=2014&corpus=15&smoothing=3&share=&direct\\_url=t1%3B%2Clegal%20industry%3B%2Cc0%3B.t1%3B%2Clegal%20profession%3B%2Cc0%3B.t1%3B%2Clegal%20work%3B%2Cc0](https://books.google.com/ngrams/graph?content=legal+industry%2Clegal+profession%2Clegal+work&year_start=1800&year_end=2014&corpus=15&smoothing=3&share=&direct_url=t1%3B%2Clegal%20industry%3B%2Cc0%3B.t1%3B%2Clegal%20profession%3B%2Cc0%3B.t1%3B%2Clegal%20work%3B%2Cc0) (last visited February 28, 2018).

Although “legal industry” pales in comparison with uses of “legal profession,” it has made up ground on “health care industry.” Health care industry was used thirty-five times more than “legal industry” in 1999, but just fourteen times more than legal industry in 2008. See GOOGLE BOOKS NGRAM VIEWER, [https://books.google.com/ngrams/graph?content=health+care+industry%2Cknowledge+industry%2Clegal+industry&case\\_sensitive=on&year\\_start=1800&year\\_end=2015&corpus=15&smoothing=3&share=&direct\\_url=t4%3B%2Chealth%20care%20industry%3B%2Cc0%3B%2Cs0%3B%3Bhealth%20care%20industry%3B%2Cc0%3B%3Bhealth%20care%20industry%3B%2Cc0%3B%3BHEALTH%20CARE%20INDUSTRY%3B%2Cc0%3B.t4%3B%2Cknowledge%20industry%3B%2Cc0%3B%2Cs0%3B%3BKnowledge%20Industry%3B%2Cc0%3B%3Bknowledge%20industry%3B%2Cc0%3B%3BKNOWLEDGE%20INDUSTRY%3B%2Cc0%3B%3Bknowledge%20industry%3B%2Cc0%3B.t4%3B%2Clegal%20industry%3B%2Cc0%3B%2Cs0%3B%3Blegal%20industry%3B%2Cc0%3B%3BLegal%20Industry%3B%2Cc0](https://books.google.com/ngrams/graph?content=health+care+industry%2Cknowledge+industry%2Clegal+industry&case_sensitive=on&year_start=1800&year_end=2015&corpus=15&smoothing=3&share=&direct_url=t4%3B%2Chealth%20care%20industry%3B%2Cc0%3B%2Cs0%3B%3Bhealth%20care%20industry%3B%2Cc0%3B%3Bhealth%20care%20industry%3B%2Cc0%3B%3BHEALTH%20CARE%20INDUSTRY%3B%2Cc0%3B.t4%3B%2Cknowledge%20industry%3B%2Cc0%3B%2Cs0%3B%3BKnowledge%20Industry%3B%2Cc0%3B%3Bknowledge%20industry%3B%2Cc0%3B%3BKNOWLEDGE%20INDUSTRY%3B%2Cc0%3B%3Bknowledge%20industry%3B%2Cc0%3B.t4%3B%2Clegal%20industry%3B%2Cc0%3B%2Cs0%3B%3Blegal%20industry%3B%2Cc0%3B%3BLegal%20Industry%3B%2Cc0) (last visited February 28, 2018). The phrase “knowledge industry” is used more than twice as often as “legal industry” in 2008, and more than thirty-five times as often during the peak use of “knowledge industry” in 1985. *Id.*

professionalism movement. The interest and attention paid by the ABA and other bar organizations in inculcating professionalism was a consequence of those shocks to lawyers during the 1970s and early 1980s. These challenges sharpened the disagreement among lawyers and lawyer organizations of the fundamental duties of the working lawyer.<sup>27</sup>

Those fundamental disagreements occasionally arose in the late 1990s and early 2000s. However, during much of these bookend decades an economic boom made it easier for many lawyers to paper over their differences.<sup>28</sup> Like a receding tide, the 2007-2009 Great Recession bared those differences. Large law firms fired, laid off, or rescinded offers to over 5,000 lawyers and more non-lawyer employees, in an effort to maintain profit margins as client work, and thus billings, declined.<sup>29</sup> Nearly a dozen large law firms went bankrupt when revenue fell and the large amount of debt taken on to pay their partners went unpaid.<sup>30</sup> The New York law firm of Dewey & Leboeuf managed the dubious distinction of both becoming the largest law firm to file for bankruptcy and having several of its executives indicted on charges of fraud.<sup>31</sup> The Great Recession increased the pace at which

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27. See Michael Ariens, *The Last Hurrah: The Kutak Commission and the End of Optimism*, 49 CREIGHTON L. REV. 689, 736-41 (2016) (discussing impact of debates on final version of Model Rules of Professional Conduct adopted in 1983).

28. New law graduates found jobs at a low rate from 1991-1995, during and after the recession of 1991-1992, but between 1996 and 2010 the employment rate nine months after graduation was always higher than 88%. See *Class of 2010 Graduates Faced Worst Job Market Since 1990s: Longstanding Employment Patterns Interrupted*, NALP (June 1, 2010), [www.nalp.org/2010selectedfindingsrelease](http://www.nalp.org/2010selectedfindingsrelease). See also James G. Leopold, *The Stories Behind the Numbers: Jobs for New Grads Over More Than Two Decades* NALP (Dec. 2016), <http://www.nalp.org/1216research> (listing data on employment of new law graduates from 1994).

29. See Eli Wald, *Foreword: The Great Recession and the Legal Profession*, 78 FORDHAM L. REV. 2051, 2051 n.3 (2010) (citing internet site Law Shucks that 5,632 lawyers and 8,715 staff were let go from large law firms between January 1, 2008 and January 31, 2010). As noted in Bernard A. Burk & David McGowan, *Big But Brittle: Economic Perspectives on the Future of the Law Firm in the New Economy*, 2011 COLUM. BUS. L. REV. 1, 29 (2011), the staff category included "staff attorneys and contract attorneys as well as nonlawyer staff." The lawshucks.com website is no longer available, and searches take one to abovethelaw.com. See STEVEN J. HARPER, *THE LAWYER BUBBLE: A PROFESSION IN CRISIS* 99-132 (2013) (discussing efforts of law firms to maintain profit margins at this time); Deborah Jones Merritt, *What Happened to the Class of 2010? Empirical Evidence of Structural Change in the Legal Profession*, 2015 MICH. ST. L. REV. 1043 (2015) (noting the concussive effect of the Great Recession on newly-admitted lawyers).

30. See *Concurrent Session: Law Firm Insolvencies from Finley to Dewey: What Have We Learned?*, 2013 AM. BANKR. INST. 109 (listing bankruptcies of law firms from 1986-2012, including 18 from 2008-2012).

31. See HARPER, *supra* note 29, 133-54. See Matthew Goldstein, *Mistrial is Declared in Dewey & Leboeuf Case*, N.Y. TIMES, Oct. 15, 2015 at B1 (reporting details regarding acquittal of most charges for executives, the deadlocked jury, and the court's declaration of a mistrial).

law firms, particularly large firms, sorted themselves.<sup>32</sup> It also generated substantial efforts to further use technology to provide legal services faster and cheaper.<sup>33</sup> Most importantly, the Great Recession made visible that the omnipresent purpose of many large law firms was the same as other industries: maximizing profits.

The Great Recession did not cause some private practice lawyers to think of themselves and their work as part of an industry. Instead, it provided an impetus for them to make more public an argument for an even more focused fidelity to clients. Expansive claims by lawyers of the duty to remain faithful to serving the interests and needs of their paying clients also benefitted the financial interests of lawyers. These claims justified minimizing the talk of any competing duty owed by lawyers to third parties, the public, and the legal system. The contours of the debate concerning the duties owed by a lawyer are centuries-old: what are private practice lawyers forbidden to do for their paying clients?<sup>34</sup> A long-standing and central conception of the lawyer was as a public professional. The private practice lawyer served the public by both representing clients in need of legal services and by maintaining and improving the American legal system. If the practice of law was defined explicitly as an industry, lawyers were more readily able to argue the claims of client were the predominant or even exclusive standard by which lawyers' behavior was judged.

Lawyer-futurists predict a transformation of the legal profession in Western societies.<sup>35</sup> This transformation, some argue, will reorder the practice of law. One traditional idea that may be swept away is that of lawyers as professionals. Private practice lawyers have arguably differed from other merchants because the former are constrained by the legal profession's oath and its rules of ethics, which are limits inapplicable to merchants. Those limits are a substantial part of what allows lawyers to declare the practice of law is a profession. These

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32. See, e.g., Aric Press, *The Super Rich Get Richer*, AM. LAW., May 2014, at 130 (discussing 2013 financial results of Am Law 100); Chris Johnson, *Rich and Richer*, AM. LAW., May 2015, at 98.

33. See John O. McGinnis & Russell G. Pearce, *The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services*, 82 *FORDHAM. L. REV.* 3041 (2014); Callier & Reeb, *supra* note 24, at 858-64.

34. I have discussed this in Michael Ariens, *The Rise and Fall of Social Trustee Professionalism*, 2016 *PROF. LAW.* 49.

35. See RICHARD SUSSKIND, *TOMORROW'S LAWYERS* vii (2013) ("We are, I have no doubt, on the brink of fundamental change in the world of law."); *id.* at xiii (predicting work of lawyers will change "more radically over the next two decades" than in previous two centuries); THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* 3 (2010) ("The premise of this book is that lawyers are facing fundamental changes in both what they will be asked to do and whether the work they once did will continue to be done by lawyers at all."); BRUCE MACEWEN, *TOMORROWLAND: SCENARIOS FOR LAW FIRMS BEYOND THE HORIZON* (2017); MITCHELL KOWALSKI, *AVOIDING EXTINCTION: REIMAGINING LEGAL SERVICES FOR THE 21ST CENTURY* (2012).



limits may constrain lawyer behavior, but also permit lawyers to ring off the provision of legal services by non-lawyers offering the same at a lower price. A re-definition of the private practice of law linked to an industry model has emerged as a rising ideology of the purpose of private practice lawyers, which is a purpose that may have eclipsed the ideology of the public profession of the law. This essay concludes by arguing that, if lawyers are wholly in the market, then consumers of legal services should reap the benefits of such a market.

## II. THE LAWYER'S TWO MASTERS

An oath of admission to the bar used by several American colonies required the declarant in part to swear, "you shall use yourself in the office of an attorney within the court according to the best of your learning and discretion, and with all good fidelity as well to the courts as to your clients."<sup>36</sup> Samuel Johnson's 1755 *Dictionary of the English Language* defined "fidelity" as "1. Honesty; veracity. 2. Faithful adherence."<sup>37</sup> Noah Webster's 1828 *Dictionary of American English* defined "fidelity" as "Faithfulness; careful and exact observance of duty, or performance of obligations."<sup>38</sup> The lawyer's oath divided his faithful adherence to and exact observance of duty between client and court. Though he was (ordinarily) paid by his client to undertake the client's cause to the best of his ability, the lawyer also swore an oath to "use yourself" with that same fidelity to the court.

Since most American lawyers through all of American history have practiced law to earn a living, they have a strong incentive to incline to their client's desires in case of a conflict of fidelity. A revolutionary era quip may have declared what the public believed was the likely result of this incentive: "Anoint the lawyer, grease him in the Fist, And he will plead for thee, even what thou list."<sup>39</sup> A lawyer who pleaded whatever his paying client wished was unfaithful to the court. Such pleadings might mislead the court into issuing an unjust decision or into wrongly delaying resolution of the matter, causing a denial of justice by delaying it. The dilemma created by this oath of office was in giving lawyers two masters, client and court. How then,

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36. See, e.g., JOSIAH HENRY BENTON, *THE LAWYER'S OFFICIAL OATH AND OFFICE* 71 (1909) (quoting 1714 New Hampshire oath); CHARLES WARREN, *A HISTORY OF THE AMERICAN BAR* 71 (1911); Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 *SMU L. Rev.* 1385 (2004) (providing a detailed study of the history of the oath of admission of lawyers).

37. 1 SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* n.p. (Arno Press 1967) (1755).

38. 1 NOAH WEBSTER, *A DICTIONARY OF AMERICAN ENGLISH* n.p. (Johnson Reprint Co. 1970) (1828).

39. EVARTS BOUTELLE GREENE, *THE REVOLUTIONARY GENERATION: 1763-1790* at 86 (1943) (late colonial era doggerel).

could this dilemma be resolved? More particularly, American private practice lawyers needed to answer the question, whom does a lawyer serve?

One brief and very early solution was to eliminate this conflict of duties by eliminating from the courts lawyers who worked for the fees they received. A seventeenth century Virginia law looked to reduce the lawyers' conflict of fidelity by prohibiting "mercenary" attorneys from representing clients in court. Eleven years later it was clear that the absence of paid attorneys from the courts meant an absence of nearly all attorneys, as well as an inefficient system of justice. This law was repealed.<sup>40</sup>

As legislatures accepted the presence of the mercenary attorney, a second approach, taken in the late colonial and early national periods, to resolve the problem of serving two masters was to adopt stringent rules of admission to the bar. For example, the would-be lawyer in New York in the late eighteenth century was required to spend seven years in training before he was eligible for admission to the bar.<sup>41</sup> Until 1831, Maryland required those seeking admission to the bar to undertake three years of legal study and to satisfy examiners assessing the applicant's fitness to practice law. One commentator believed these standards "may have helped keep the bar's reputation intact" in the early national era.<sup>42</sup> These standards effectively equated time with money, assuming that any applicant financially able to expend three years (or more) of time learning the law would be less likely to grasp for fees when doing so compromised the lawyer's fidelity to the court. Whether this was empirically so is unknown. By the 1830s, this approach was abandoned as standards for admission to the bar were lessened by most states.<sup>43</sup> It was not until the end of the nineteenth century that more stringent standards were reinstated in a number of states.

A third approach taken by lawyers in disparate eras was to appeal to the ideal of a legal profession as distinct from a business. A legal professional was distinguished from a merchant in the manner in which the legal professional sold his services in the market. A

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40. See BENTON, *supra* note 36, at 103-04.

41. 2 ANTON-HERMAN CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* 164 (1965).

42. Dennis R. Nolan, *The Effect of the Revolution on the Bar: The Maryland Experience*, 62 VA. L. REV. 969, 993 (1976) (noting additionally reduction to two years in 1831). The act easing admission to the bar is Ch. 268, § 2, *Laws of Maryland—1831*, at 1032. See 2 CHROUST, *supra*, note 42 at 259 (noting change in admissions standards in Maryland).

43. For an unhappy telling of this change, see ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 223-49 (1953) (calling era from 1830s through the end of the Civil War "The Era of Decadence").

merchant entered into a transaction with another bound by the conditions demanded by the customer. A merchant could refuse to do business with a customer because the demands were too great, but any demands to which the merchant consented were part of the transaction. In most transactions in which the merchant was selling services, the law of principal and agent required the merchant-agent to perform the duties demanded by the customer-principal. In this sense, the merchant was dependent upon the customer. In providing legal services to customer-clients, the lawyer declared independence from both the paying client and the public. As to the former, in the words of Justice Robert H. Jackson, the lawyer was "no mere hired hand."<sup>44</sup> Regarding the latter, the lawyer claimed independence from the passions of the public when representing the ostracized client. John Adams recounted, in his unpublished autobiography, his reasons for defending Captain Thomas Preston in what became known as the Boston Massacre.<sup>45</sup> Adams wrote (possibly for posterity's sake) that he "had no hesitation in" defending Preston. Counsel "ought to be the very last thing that an accused Person should want in a free Country. That the Bar ought in my opinion to be independent and impartial at all Times And in every Circumstance."<sup>46</sup> In his reminiscence, Adams then noted he was accused of taking Preston's defense for "great fees," and after refuting that assertion, he stated that he was "hazarding a Popularity and very hardly earned: and for incurring a Clamour and popular Suspicions and prejudices, which are not yet worn out and never will be forgotten as long as History of the Period is read."<sup>47</sup>

A lawyer who was dependent on a client or influenced by the passions of the public lacked an essential attribute of professional identity. Such a lawyer was a mere servant, a hired hand. The particular claim of independence from the clients employing the lawyers led lawyers to argue that service, not income, was their ultimate purpose. The lawyers incidentally received fees after providing competent service, but income was not their principal aim. This claim was made across the centuries. For example, when John Adams was sworn in as an attorney in 1758, his sponsor Jeremiah Gridley advised him, "[P]ursue the Study of the Law rather than the Gain of it. Pursue the Gain of it enough to keep out of the Briars, but give your main Atten-

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44. Robert H. Jackson, *The County-Seat Lawyer*, 36 A.B.A. J. 497, 497 (1950). See generally Ariens, *supra* note 14.

45. See HILLER B. ZOBEL, *THE BOSTON MASSACRE* (1970); ERIC HINDERAKER, *BOSTON'S MASSACRE* (2017).

46. 3 JOHN ADAMS, *DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS* 293 (4 vols., L. H. Butterfield ed., 1961).

47. 3 ADAMS, *supra* note 46, at 293-94.

tion to the study of it."<sup>48</sup> In an 1868 memorial to New York City lawyer Daniel Lord, elite lawyer William Evarts extolled Lord because "[h]e never overlooked the fact that the profession of the law, in and of itself, was not the pursuit of gain," but "its rewards were in the service of the public."<sup>49</sup> Nearly a century later, former Harvard Law School Dean Roscoe Pound defined profession. Pound claimed that "[h]istorically, there are three ideas involved in a profession: organization, learning, and a spirit of public service. These are essential. The remaining idea, that of gaining a livelihood, is incidental."<sup>50</sup> Finally, Warren Burger, in decrying the end of professionalism within the legal profession in the mid-1990s, declared, "[t]he law is not and never has been a 'business.'"<sup>51</sup>

The emphases on public service and independence were intended to dull the public perception that the fees paid to lawyers by their clients made them corruptible to the siren song of wealth. Over time, lawyers slightly altered this argument: their independence in representing private clients itself constituted public service. This assertion developed in several stages. First, a lawyer represented a party with a questionable legal case to ensure proper application of the rule of law. Second, the lawyer represented the client with a "bad cause" because the lawyer's job was not to pre-judge a client's case, but to make the client's claim as strongly as possible.<sup>52</sup> The lawyer then left to the judge and jury the decision of whether the lawyer had in fact advocated a bad cause. Later, and more controversially, the lawyer demonstrated his commitment to public service by representing with "warm zeal" the "guilty client," the social outcast, in spite of the outraged passions of the community.<sup>53</sup> A lawyer's decision to represent a client despised by the community eventually served as the best and highest example of public service. The lawyer did so because this service embraced the ideal that all persons, even the most contemptible, should be tried and punished according to the rule of law, and not by the community's passions. The lawyer's independence of judgment and position from both client and public was, lawyers argued, the funda-

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48. 1 ADAMS, *supra* note 46, at 55.

49. William M. Evarts, *Address of Hon. William M. Evarts in MEMORIAL OF DANIEL LORD* 63, 74 (New York, D. Appleton & Co. 1869).

50. Roscoe Pound, *What Is a Profession? The Rise of the Legal Profession in Antiquity*, 19 NOTRE DAME L. REV. 203, 204 (1944). ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953) Pound slightly modified the definition of profession. *Id.*

51. Burger, *supra* note 18, at 949.

52. Timothy Walker, *Ways and Means of Professional Success: Being the Substance of a Valedictory Address to the Graduates of the Law Class, in the Cincinnati College*, 1 W. L.J. 542, 547 (1844).

53. See GEORGE SHARSWOOD, *A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW* 24 (Philadelphia, T. & J. W. Johnson 1854).

mental reason why lawyers were crucial to the success of a republic.<sup>54</sup> The requirements in the codes of ethics that the lawyer serve clients diligently and zealously protected the advocate from the community's passions. Ethical limits on the lawyer's behavior thus protected both clients and the public.<sup>55</sup>

Lawyers have used the codes of ethics more broadly to reinforce their understanding of how to serve two masters. These codes demanded that lawyers serve both client and the public. Implicit arguments concerning the restraints created by ethics code were (1) no gentleman would practice law without regard to the precepts of the codes, and (2) no rational lawyer would risk losing his license to practice law by violating the standards of attorney conduct. Both of these arguments were found wanting by lawyers critical of the actions of other members of the bar. The first argument foundered on the discovery that many lawyers were not gentlemen subject to a standard of honorable behavior. The second argument, as critics noted time and again during much of the twentieth century, assumed an unproven fact: that any system of lawyer discipline tempered the actions of the lawyer willing to serve any needs of the client. A prominent Boston lawyer declared in an 1896 speech to the ABA, "I know of no Bar in the country which attempts to purge itself with any thoroughness."<sup>56</sup> Three-quarters of a century later, Justice Tom Clark's report for the ABA on the status of state bar disciplinary programs concluded discipline of lawyers for unprofessional or even criminal behavior was "practically nonexistent."<sup>57</sup>

Ethics codes also brought a related difficulty to a resolution: even if no conflict existed between the client's needs and the public's interest, how did both client and public know that the lawyer would not put his own interests ahead of all others? The codes told lawyers not to do so. The duty of the lawyer was to place the client's interests before the lawyer's contrary self-interests. Canon 6 of the ABA's 1908 Canons of Professional Ethics declared, "[t]he obligation to represent the client with undivided fidelity" forbade the lawyer from aiding himself by serving other paying clients whose interests were adverse to the initial client.<sup>58</sup> Disciplinary Rule 5-101(A) of the 1969 Code barred the

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54. See generally PAUL D. CARRINGTON, *STEWARDS OF DEMOCRACY: LAW AS A PUBLIC PROFESSION* (1999).

55. See 1 CHROUST, *supra* note 41, at 90 (noting a similar set of reasons).

56. Joseph B. Warner, *The Responsibilities of the Lawyer*, 19 A.B.A. REP. 319, 339 (1896).

57. ABA SPEC. COMM'N ON EVAL. OF DISCIPLINARY ENFORCEMENT, *PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT I* (1970) (Clark Report). See also Ariens, *supra* note 16, at 86 (noting recurring twentieth century complaint that bar disciplinary system was wanting).

58. CANONS OF PROF'L ETHICS Canon 6 (AM. BAR. ASS'N 1908).

lawyer from accepting employment if the lawyer's "professional judgment" "may be affected by his own financial, business, property, or personal interests."<sup>59</sup> Model Rule 1.7(a)(2) barred a lawyer from representing a client if "there is a significant risk that the representation . . . will be materially limited by the . . . personal interest of the lawyer."<sup>60</sup>

Lawyers believe that together, these declarations and measures created, an unusual but defensible approach to easing the tension found in trying faithfully to serve two masters. As noted in a footnote to the preamble and preliminary statement of the 1969 code:

The grounds for the lawyer's peculiar obligations are to be found in the nature of his calling. The lawyer who seeks a clear understanding of his duties will be led to reflect on the special services his profession renders to society and the services it might render if its full capacities were realized.<sup>61</sup>

This was an optimistic statement delivered at a generally optimistic time among American lawyers.<sup>62</sup>

Despite the repeated assertions that lawyers limited their appetite for monetary gain, the claim that law has been reduced to nothing more than a "business" has had a long shelf life. For example, New York lawyer Theron Strong complained in his 1914 memoir of a shift in the practice of New York lawyers from the 1870s. To him, it appeared that lawyers working for "important business interests" had become "little more than a paid employee, bound hand and foot to the service of his employer."<sup>63</sup> Such lawyers lacked independence from their clients, and it appeared they were "almost completely deprived of free moral agency and . . . virtually owned and controlled by the client . . . ." John Dos Passos made a similar argument in his 1907 assessment of American lawyers. He accused lawyers of the early twentieth century of failing to follow their predecessors' path by seeking wealth rather than performing service.<sup>64</sup> A number of lawyers writing at this time agreed with Strong and Dos Passos; law had devolved from a profession to a business.<sup>65</sup>

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59. MODEL CODE OF PROF'L RESPONSIBILITY DR 5-101(A) (AM. BAR. ASS'N 1969).

60. MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(2) (AM. BAR. ASS'N 2015).

61. *Preamble and Preliminary Statement*, MODEL CODE OF PROF'L RESPONSIBILITY r.7 (AM. BAR. ASS'N 1969) (quoting *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1159 (1958)).

62. See Michael Ariens, *The Agony of Modern Legal Ethics, 1970-1985*, 5 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 134, 159-71 (2014) (discussing discontent among "movement" lawyers during late 1960s).

63. THERON G. STRONG, LANDMARKS OF A LAWYER'S LIFETIME 354 (1914).

64. JOHN DOS PASSOS, THE AMERICAN LAWYER—AS HE WAS—AS HE IS—AS HE CAN BE (1907).

65. JULIUS HENRY COHEN, THE LAW: BUSINESS OR PROFESSION? (1916); Robert Treat Platt, *The Decadence of Law as a Profession and its Growth as a Business*, 12

When the ABA adopted its Model Rules of Professional Conduct ("Model Rules") in 1983, the Preamble was titled *A Lawyer's Responsibilities*, and the first paragraph declared, "A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."<sup>66</sup> The Model Rules thus traditionally framed the lawyer's duties: the lawyer represented clients and served the interests of the legal system and the public.

This statement of the lawyer's multiple responsibilities was found in the initial discussion draft of January 1980, the second discussion draft, and the Proposed Final Draft. In each of those drafts, however, the order of the first two of the lawyer's duties was different. The language in the drafts stated, "[a] lawyer is an officer of the legal system, a representative of clients, and a public citizen having special responsibility for the quality of justice."<sup>67</sup> This reversal of order was intentional. The Kutak Commission that drafted the Model Rules, and the House of Delegates of the ABA that enjoyed the authority to adopt, amend, or reject the Rules, possessed sharply different views of the priority of the lawyer's duties to each master. For the members of the Kutak Commission, an overarching goal of the Model Rules was to elevate the work of lawyers as members of a public profession.<sup>68</sup> For many of the bar entities represented in the House of Delegates, the Model Rules were supposed to recognize the overriding interest of lawyers in representing their clients.

When the debate ended, the House won. The lawyer's duties to client were emphasized at the expense of the lawyer's duties to third parties, to the public, and to the legal system. This debate was transformative, ending one era and introducing another, one in which many providers of legal services did well economically but also one in which many in the profession were anxiety-ridden, unsure of their status, and unhealthy and unhappy.

The following section attempts to explain why this transformation happened.

### III. ECONOMIC AND IDEOLOGICAL HEADWINDS, 1973-1983

In *An Extraordinary Time*, author Marc Levinson pinpoints the end of exceptional economic growth in the post-World War II era de-

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YALE L. J. 441 (1903); George F. Shelton, *Law as a Business*, 10 YALE L. J. 275 (1901); Henry Laurens Clinton, 10 GREEN BAG 133 (1898).

66. *Preamble: A Lawyer's Responsibilities*, MODEL RULES OF PROF'L CONDUCT (AM. BAR. ASS'N. 1983).

67. See, e.g., *Preamble: A Lawyer's Responsibilities*, MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N, Discussion Draft Jan. 30, 1980).

68. See Ariens, *supra* note 27, at 701-06 (discussing ethos of Commission).

veloped world as October 1973, when the Arab oil embargo began.<sup>69</sup> The embargo was imposed against the United States, among others, two weeks after the onset of the Yom Kippur War on October 6, when Syria and Egypt made a surprise attack on Israel.

For Americans, especially American lawyers, October 1973 was both an extraordinary and consequential month for additional reasons. Vice President Spiro Agnew, a lawyer, resigned from office after pleading no contest to a charge of tax evasion.<sup>70</sup> Agnew had taken bribes from public contractors as Governor of Maryland. He continued to do so as Vice President. Agnew failed to report receiving those monies on his tax return, thus evading a required tax on that illegal income.<sup>71</sup> Even more important to lawyers was President Nixon's reaction to the developments in the investigation of the June 1972 burglary of the Democratic National Committee headquarters in the Watergate complex. This constitutional crisis, which became known simply as Watergate, gave rise to two significant events: the creation of a Senate Select Committee on Presidential Campaign Activities and Attorney General Elliot Richardson's appointment of a special prosecutor, Harvard Law School Professor Archibald Cox.<sup>72</sup> On Saturday, October 20, President Richard Nixon ordered the firing of Cox. Richardson and Deputy Attorney General William Ruckelshaus resigned instead of agreeing to execute Nixon's order. Solicitor General Robert Bork, the third ranking officer of the Department of Justice, fired Cox.<sup>73</sup> Eventually, the actions of twenty-nine lawyers were called to account in the aftermath of the Watergate affair.<sup>74</sup>

Though the Watergate affair would soon be declared by ABA leaders to have been a "lawyer's scandal,"<sup>75</sup> October 1973 also appeared to be the best of times for lawyers. From the late 1950s through the mid-1960s, the ABA made assiduous efforts to increase the income of law-

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69. MARC LEVINSON, *AN EXTRAORDINARY TIME: THE END OF THE POSTWAR BOOM AND THE RETURN OF THE ORDINARY ECONOMY* 1-3 (2016). Levinson offers an economic history of the 1970s describing the end of extraordinary growth throughout the developed world beginning in 1973-1974. *Id.*

70. STANLEY I. KUTLER, *THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON* 397-98 (1990).

71. JAMES PATTERSON, *GRAND EXPECTATIONS: THE UNITED STATES, 1945-1974* 776 (1996); KUTLER, *supra* note 70, at 391-98 (noting that "[m]oney making, before, during, and after his tenure as Vice President—seemed to be the thing that excited Agnew most.").

72. See KEN GORMLEY, *ARCHIBALD COX: CONSCIENCE OF A NATION* 232-43 (1997).

73. *Id.* at 338-58; KUTLER, *supra* note 70, at 407-08.

74. *N.O.B.C. Reports on Results of Watergate-Related Charges Against Twenty-nine Lawyers*, 62 A.B.A. J. 1337, 1337 (1976).

75. James D. Fellers, *President's Page*, 61 A.B.A. J. 529, 529 (1975) (blaming affair on lawyers by ABA President); Richard B. Allen *et al.*, *Editorial, Watergate—A Lawyers' Scandal*, 60 A.B.A. J. 1257 (1974).



yers.<sup>76</sup> To make it clear that lawyers were ill paid, one ABA pamphlet offered the title *The 1958 Lawyer and His 1938 Dollar*.<sup>77</sup> The ABA's efforts occurred while the percentage of lawyers among the population fell,<sup>78</sup> the work of lawyers expanded, and the nation's economic output shifted more to the production of services instead of manufacturing.<sup>79</sup>

Beginning in the mid-1960s lawyer incomes jumped. In 1968, the New York law firm of Cravath, Swaine, & Moore raised the pay of new associates from \$10,500 to \$15,000.<sup>80</sup> Large law firms, in desperate need of new associates, advertised the opportunity for associates to work in the firms' newly-created *pro bono* programs.<sup>81</sup> By 1969, median lawyer income, measured in 1983 dollars, was \$47,638.<sup>82</sup> That same year, the ABA House of Delegates adopted, without amendment, a Model Code of Professional Responsibility ("Code") replacing the 1908 Canons of Professional Ethics.<sup>83</sup>

The ABA increasingly promoted American lawyers as important social leaders. The Code was intended, in part, to justify the increasingly public role of the lawyer; the Preamble to the Code began by connecting democratic society to "justice based on the rule of law," and continued with the assertion that "Lawyers as guardians of the law, play a vital role in the preservation of society."<sup>84</sup>

This vital role was also an active role. The ABA promoted the creation of a federal program providing legal services to the poor in early 1965,<sup>85</sup> defended the program against efforts to abolish it,<sup>86</sup> and successfully urged Congress to form the Legal Services Corporation in 1974. The following year the ABA House of Delegates adopted the

76. See Ariens, *supra* note 34, at 63-68 (discussing work of Special Committee on Economics of Law Practice).

77. ABA SPEC. COMM'N ON ECON. OF L. PRAC., *THE 1958 LAWYER AND HIS 1938 DOLLAR* (1958 REPR. 1959).

78. ABEL, *supra* note 10, at 280 table 22 (noting change in number of lawyers compared with change in population in period from 1940-1963).

79. See BILL BISHOP, *THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART* 214 n.\* (2008) (citing June 28, 1965, New York Times article reporting shift from an "industrial economy" to a "service economy"). See generally DANIEL BELL, *THE COMING OF POST-INDUSTRIAL SOCIETY: A VENTURE IN SOCIAL FORECASTING* (1973).

80. MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 24 (1991).

81. See Ariens, *supra* note 34, at 75 (noting creation of *pro bono* programs by large law firms to entice new lawyers to join).

82. Sander & Williams, *supra* note 10, at 448.

83. See *Proceedings of the 1969 Annual Meeting of the House of Delegates*, 94 A.B.A. REP. 378, 389-92 (1969).

84. *Preamble*, MODEL CODE OF PROF'L RESPONSIBILITY (AM. BAR ASS'N 1969).

85. See *House of Delegates Proceedings*, 90 A.B.A. REP. 95, 110-11 (1965).

86. See John D. Robb, *Controversial Cases and the Legal Services Program*, 56 A.B.A. J. 329, 329 (1970) (making second successful argument for its continued existence).

conclusion of a Special Committee on Public Interest Practice that it was “a basic responsibility of each lawyer engaged in the practice of law to provide public interest services.”<sup>87</sup>

The belief that lawyers were well positioned to protect the public’s interest was the foundation for the conclusion of a 1973 study of large New York City law firms. The author called for elite lawyers to take a greater role in protecting the public good. Such lawyers should become “more detached, more independent, someone paid by the client but responsible to the general public.”<sup>88</sup>

The extent of the ABA’s influence on legal ethics may be demonstrated by the Code’s adoption by states. The ABA created a special committee to promote the adoption of the Code. Less than three years after its approval by the ABA, the Code had been adopted as law in forty-three jurisdictions.<sup>89</sup> Further, four other state bar associations adopted the Code as applicable to their members.<sup>90</sup> When adopting the Code of Professional Responsibility most states or state bar associations made few amendments to the ABA Code. None of those amendments, the special committee reported, were “fundamental.”<sup>91</sup>

Another sign of good times for the legal profession was the extraordinary increase in law students. The baby boom, beginning in 1946, offered a massive number of young adults as prospective law students. Social changes joined this demographic wave to aid in filling law school seats. The women’s liberation movement helped generate an increase in the number of women attending law school, from 1,064 first-year female law students in Fall 1965, to 2,103 in Fall 1969, to 7,464 in Fall 1973.<sup>92</sup> Educational opportunities and affirmative action helped increase the number of racial and ethnic minority students in law schools, increasing from 4.3% of all law students in 1969, to 7.5% in 1974, which was an absolute increase of minority students of over 5,100.<sup>93</sup> Some men sought refuge from serving in the armed

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87. See *House of Delegates Proceedings*, 100 A.B.A. REP. 642, 684 (1975).

88. PAUL HOFFMAN, *LIONS IN THE STREET* 227 (1973).

89. *Report of the Special Committee to Secure Adoption of the Code of Professional Responsibility*, 97 A.B.A. REP. 740, 741 (1972).

90. *Report of Special Committee to Secure Adoption of the Code of Professional Responsibility*, 97 A.B.A. REP. 740, 741 (1972).

91. See, e.g., *Report of the Special Committee to Secure Adoption of the Code of Professional Responsibility*, 96 A.B.A. REP. 676, 676 (1971).

92. ABEL, *supra* note 10, at 285 (listing number of women in law schools from 1940-86). See also *Statistics*, AMERICAN BAR ASSOCIATION, [https://www.americanbar.org/groups/legal\\_education/resources/statistics.html](https://www.americanbar.org/groups/legal_education/resources/statistics.html) (last visited February 28, 2018) (listing Enrollment and other data in ABA-approved law schools from 1963 to 2012-2013).

93. ABEL, *supra* note 10, at 288 (listing number of minority law students from 1969-85). The number of law students in 1969 was 64,416; 4.3% of that is 2,770. *Id.* The number of law students in 1974 was 105,708, and 7.5% of that is 7,928, a difference of 5,158. *Id.*

forces during the Vietnam War by enrolling in law school. Finally, the civil rights movement of the 1960s was supported by regular references to law and justice in light of the American commitment to the rule of law, which were claims often supported by the Supreme Court of the United States.<sup>94</sup> All contributed to a dramatic increase in the number of law students. In fall 1972, the number of law students exceeded 100,000 for the first time.<sup>95</sup> The following year all available seats for entering law students were filled for the first time, and in 1974 “only one law school reported ‘unfilled seats’ in its entering class.”<sup>96</sup> This occurred even as the number of ABA-approved law schools increased from 135 in 1966-67 to 157 in Fall 1974.<sup>97</sup> Law school enrollment effectively doubled between 1964 and 1973.<sup>98</sup>

It may be that the best of times is also always the worst of times. In addition to the lawyer’s scandal of Watergate, lawyers once again feared economic calamity. In the fall of 1972, the ABA created a Task Force of Professional Utilization (“Task Force”).<sup>99</sup> The Task Force was charged with easing the concerns of lawyers who worried about “the increase in the number of new entrants into the profession.”<sup>100</sup> Shortly thereafter, *Business Week* magazine declared that “the outlook for lawyers is grim.”<sup>101</sup> The Department of Labor projected that the approximate 30,000 new law graduates in 1974 would find fewer than half (14,500) that number of jobs awaiting them. Lawyer income did drop during the 1970s, as shown in studies in Michigan, Maryland, and Illinois during different periods of the decade.<sup>102</sup> By 1979, lawyer median income had declined to \$36,716 in constant 1983 dollars, a 22.5% decrease in real income in one decade.<sup>103</sup>

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94. See LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* Pt. III (2000).

95. ABEL, *supra* note 10, at 279. See also *Statistics*, AMERICAN BAR ASSOCIATION, [https://www.americanbar.org/groups/legal\\_education/resources/statistics.html](https://www.americanbar.org/groups/legal_education/resources/statistics.html) (last visited February 28, 2018).

96. James P. White, *Is that Burgeoning Law School Enrollment Ending?*, 61 A.B.A. J. 202, 202 (1975).

97. See *Statistics*, AMERICAN BAR ASSOCIATION, [https://www.americanbar.org/groups/legal\\_education/resources/statistics.html](https://www.americanbar.org/groups/legal_education/resources/statistics.html) (last visited February 28, 2018) (listing 51,079 students in 1964-65 and 101,675 in 1973-1974).

98. ABEL, *supra* note 10, at 279. See *Statistics*, AMERICAN BAR ASSOCIATION, [https://www.americanbar.org/groups/legal\\_education/resources/statistics.html](https://www.americanbar.org/groups/legal_education/resources/statistics.html) (last visited February 28, 2018).

99. See *Report of the Task Force on Professional Utilization*, 97 A.B.A. REP. 818, 819 (1972).

100. *Id.* at 819.

101. *Special Report, The Job Gap for College Graduates in the '70s*, BUS. WK., Sept. 23, 1972, at 48, 51.

102. ABEL, *supra* note 10, at 160 (noting studies).

103. Sander & Williams, *supra* note 10, at 448. The number of lawyers increased from 355,242 in 1971 to 542,205 in 1980, a 53% increase, which also depressed lawyer

Additional threats to the economic standing of lawyers included antitrust actions filed by the Department of Justice against the ABA<sup>104</sup> and the Supreme Court's decision holding the Virginia State Bar Association's minimum fee schedules violated antitrust law.<sup>105</sup> In 1977, the Supreme Court held unconstitutional a ban on lawyer advertisements,<sup>106</sup> and the Federal Trade Commission joined the earlier Department of Justice investigations by announcing its inquiry into the American legal profession, including its possible regulation by the FTC.<sup>107</sup>

In the aftermath of the Watergate mess, separate polls by Harris and Gallup found only a quarter of the public was confident in lawyers as a group or rated them highly in honesty and ethical standards.<sup>108</sup> Lawyers were also attacked from a number of ideological perspectives. Jerold Auerbach's critical history of the American legal profession claimed the Code of Professional Responsibility favored the economic self-interest of lawyers rather than the "undisputed existence of a vast neglected public for whom legal services were unavailable."<sup>109</sup> Others also castigated the ABA and broader profession for issuing an ethics code that protected lawyers and offered platitudes instead of substance.<sup>110</sup>

Despite the public's low opinion of lawyers, during the 1970s lawyers acted in ways that signaled self-interest and the interests of clients ranked ahead of the interests of the public or third parties. One

median income. *Id.* See SUPPLEMENT TO THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2005 2 (Clara N. Carson with Jeeyoon Park eds., 2012).

104. See *Justice Department and Other Views on Prepaid Legal Services Plans Get an Airing Before the Tunney Subcommittee*, 60 A.B.A. J. 791, 792-93 (1974); Lawrence E. Walsh, *The Annual Report of the President of the American Bar Association*, 62 A.B.A. J. 1119, 1120 (1976) (reporting second antitrust complaint filed against ABA).

105. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

106. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). The Court held the Arizona ban based on a prohibition found in the Model Code of Professional Responsibility was unconstitutional. *Id.*

107. See *F.T.C. Goes Public on Lawyer Probe*, 64 A.B.A. J. 959, 959 (1978).

108. Michael Asimow, *Lawyers, Popular Perception of*, in OXFORD COMPANION TO AMERICAN LAW 495 (Kermit L. Hall et al., eds., 2002) (Harris Poll); *Honesty/Ethics in the Professions*, GALLUP, <http://news.gallup.com/poll/1654/honesty-ethics-professions.aspx> (last visited February 28, 2018) (offering data from June 1976 through December 2017 and indicating number is slightly worse in 2017).

109. JEROLD AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 286 (1976).

110. See Jay M. Smyser, *In-House Corporate Counsel: The Erosion of Independence*, in VERDICTS ON LAWYERS 208, 215 (Ralph Nader & Mark Green eds., 1976) (calling Code a "monument to the profession's self-interest"); JETHRO LIEBERMAN, *CRISIS AT THE BAR* 65, 216-17 (1978) (concluding replacement of Canons by Code "was more of form than of substance" and urging ethics code be drawn by independent body); Eric Schnapper, *The Myth of Legal Ethics*, 64 A.B.A. J. 202, 203 (1978) (stating "[t]he Code of Professional Responsibility, as the Canons of Professional Ethics before it, is a treasure trove of moral platitudes").

example was the reticence of lawyers to require disclosure of confidences made by a client who committed a past crime or fraud when represented by the lawyer. The Code initially declared:

A lawyer who receives information clearly establishing that:  
 (1) his client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal.<sup>111</sup>

The lawyer thus owed a duty to disclose a past fraud to others even absent client consent. One difficulty with this provision was that the lawyer possessed no mandatory duty to disclose a future crime, which would include nearly all acts of fraud.<sup>112</sup>

The mandatory duty to rectify past acts of fraud was found in the Disciplinary Rules in Canon 7 and the permissive authority to disclose client statements concerning a future crime was found in the Disciplinary Rules in Canon 4. Both Canons addressed the duties of the lawyer to the client. Canon 7 required the lawyer "represent a client zealously within the bounds of the law."<sup>113</sup> Canon 4 was titled "A Lawyer Should Preserve the Confidences and Secrets of a Client."<sup>114</sup>

This incongruity could have been smoothed by requiring lawyers to disclose confidences relating to the commission of future crimes. Additionally, the Code could have required the lawyer to disclose all confidences of the client while using the lawyer's services to commit a future act of fraud, or it could have defined future crimes only in terms of crimes of physical violence.

Each of these resolutions required the ABA to decide which policy was optimal as a substantive matter. Some critics would have disagreed with any proposed solution. The debate, however, would have been open, and the ABA's justifications transparent.

The ABA chose instead a solution that was the least transparent and most protective of lawyers' clients, especially corporate clients. The ABA decided to amend DR 7-102(B)(1) by adding a concluding clause, "except when the information is protected as a privileged communication."<sup>115</sup> Thus, a lawyer who learned a client used the lawyer's services to perpetrate a past fraud through a "privileged communica-

111. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(B)(1) (AM. BAR. ASS'N 1969).

112. MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101(C)(3) (AM. BAR. ASS'N 1969). "A lawyer may reveal: . . . (3) The intention of his client to commit a crime and the information necessary to prevent the crime." *Id.*

113. MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (AM. BAR. ASS'N 1969).

114. MODEL CODE OF PROF'L RESPONSIBILITY Canon 4 (AM. BAR. ASS'N 1969).

115. See *Report of the Standing Committee on Ethics and Professional Responsibility*, 99 A.B.A. REP. 262, 265 (1974). See *House of Delegates Proceedings*, 99 A.B.A. REP. 166 (1974) (approving the amendment without debate).

tion” was not permitted to disclose this information without consent of the client. What was worse was that the Standing Committee on Ethics and Professional Responsibility treated this as a “housekeeping” amendment and did not debate it as a policy matter.<sup>116</sup> While the absence of transparency may have been related to the desire to protect clients, the amendment to DR 7-102(B)(1) was also a response to a scandal involving a suit brought by the Securities and Exchange Commission alleging law firms possessed a duty to disclose fraud committed by their clients.<sup>117</sup>

The ABA Standing Committee on Ethics and Professional Responsibility then used that amendment to opine in 1975, in Formal Opinion 341, that a lawyer was prohibited from disclosing an act of fraud both when learned through a privileged communication, and when learned otherwise in the lawyer-client relationship.<sup>118</sup> The text of the “excepting” clause was limited to “privileged communications.” Learning of acts of fraud other than through such a communication made that clause inapplicable. Formal Opinion 341 failed to acknowledge this distinction.

Since the “excepting” clause and other amendments to the Code were brought to the House of Delegates as housekeeping amendments, they were adopted without debate. The “excepting” clause to DR 7-102(B) protected the client at the expense of the victim of the fraud or the public. Formal Opinion 341 exacerbated that social cost by broadening the effect of the exception. It also did so by focusing on the risks to lawyers in such cases without ever assessing the risks of harm to the public and third parties.

This protection of the “bad” client, often a corporate client, generated little impact on public consciousness. However, the defense of an individual accused of barbaric crimes at the same time made larger headlines.<sup>119</sup> Robert Garrow was charged with a brutal murder, and

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116. I discuss this at length in Michael Ariens, “*Playing Chicken*”: An Instant History of the Battle over Exceptions to Client Confidences, 33 J. LEGAL PROF. 239, 246-50 (2009).

117. The scandal involved National Student Marketing and its merger partner Interstate National Corporation. See Sec. & Exch. Comm’n v. Nat’l Student Mktg. Corp., 457 F. Supp. 682 (D.D.C. 1978) (holding lawyers “were required to speak out at the closing concerning the obvious materiality of the information,” and their “silence was not only a breach of this duty to speak, but in addition lent the appearance of legitimacy to the closing”). See James M. McCauley, *Corporate Responsibility and the Regulation of Corporate Lawyers*, 3 RICH. J. GLOBAL L. & BUS. 15, 24 (2003) (noting the fines paid by the two law firms were \$1.95 million and \$1.3 million).

118. ABA Comm’n on Ethics and Prof’l Responsibility, Formal Op. 341 (1975). This was, in the language of the Code, a “secret,” information about the client learned not directly from a client communication but from the representation. *Id.*

119. See RICHARD ZITRIN & CAROL M. LANGFORD, *THE MORAL COMPASS OF THE AMERICAN LAWYER* 7-26 (1999) (discussing case); TOM ALIBRANDI & FRANK H. ARMANI, *PRIVI-*

suspected of several others. Garrow's lawyers learned from him that he had killed several missing persons and where their bodies lay. The lawyers verified this information by visiting the locations Garrow directed them to. The lawyers claimed Garrow was insane, and at trial he testified and admitted to committing other murders. The lawyers held a press conference and said that they had known for a year of the location of the bodies of those missing. The lawyers indicated that they had not told anyone of their knowledge, including law enforcement and the fathers of the two missing women who asked them if they knew anything about their missing children.<sup>120</sup>

In the Garrow case, the lawyers had committed no crime. The Appellate Division thus affirmed the dismissal of the criminal charge against Garrow's lawyers. Though the lawyers had not violated any rule of ethics, and though the ethical behavior was not before the court in the criminal appeal, the New York Appellate Division considered it sufficiently important to acknowledge the public's claim on lawyers: lawyers "also must observe basic human standards of decency, having due regard to the need that the legal system accord justice to the interests of society and its individual members."<sup>121</sup>

Whether lawyers aided the legal system in providing justice to society was in doubt by some of the public in the late 1970s. The Buried Bodies Case, as the Garrow affair became known, exemplified the understanding of zealous advocacy at that time: the lawyer was primarily a zealous advocate for his client. Garrow's lawyers considered their duty of zeal to include finding the bodies of missing persons and telling no one. However, the lawyer is also an officer of the court, which generated some unspecified duties as a member of a public profession. The tension existed in the modifier. Although Monroe Freedman willingly staked out a position of utmost zeal for one's client,<sup>122</sup> most of those discussing the extent of the lawyer's duty of zealous representation, like the New York Appellate Division, found zeal bound by "basic standards of decency." The basic standards of decency in representing clients were nearly always left unsaid. The Code recognized but did not resolve this tension.

In 1977, less than a decade after it adopted the Code of Professional Responsibility, ABA President William Spann appointed a Commission on Evaluation of Professional Standards. This became known as the Kutak Commission after its chairman, Robert Kutak.

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LEGED INFORMATION (1984) (first-person account by one of the lawyers for Garrow); *People v. Belge*, 372 N.Y.S. 2d 798 (Onondaga Cnty. Ct. 1975).

120. Zitrin & Langford, *supra* note 119, at 11-13.

121. *People v. Belge*, 376 N.Y.S. 2d 771, 772 (N.Y. App. Div. 1975), *aff'd* 359 N.E.2d 377 (N.Y. 1976).

122. MONROE H. FREEDMAN, *ETHICS IN AN ADVERSARY SYSTEM* 9-24 (1975).

Spann's call to the Kutak Commission was to review "all facets of legal ethics."<sup>123</sup> It did so, creating an entirely new code, the Model Rules of Professional Conduct ("Model Rules").<sup>124</sup>

A significant number of the members of the Kutak Commission favored drafting rules of ethics emphasizing the lawyer's duty to serve the public as well as the client. In December 1977, at one of its initial meetings, Commission members were asked to describe their vision of the work of the private practice lawyer. One unnamed respondent urged that the rules of ethics require such lawyers to act in light of "a determinable public interest."<sup>125</sup> Further, the Commission also went out of its way to avoid using the word zeal. It was not found in either the "leaked" Working Draft of August 1979 or the Discussion Draft of January 1980. This was due to the Commission's suspicion of the word: "Zealous,' it seems, has curiously come to mean 'overzealous.' Strong sentiment was found around the table for dropping 'zeal' altogether as a descriptive term with ethical consequences. It carries with it simply too much baggage."<sup>126</sup>

The Kutak Commission forged ahead with the idea that the lawyer owed duties both to client and public; the rules should reflect the existence of two masters.<sup>127</sup> Its members considered the Code a failure in part due to its thoroughgoing adoption of the "basic posture of 'my client, first, last and always,' [which] allowed little room for development of the attorney's role as an officer of the court."<sup>128</sup>

By the time the Model Rules were adopted by the ABA House of Delegates in August 1983, the ideal of the lawyer as public professional had been routed. One small but telling example is found in the initial paragraph of the Model Rules, the *Preamble: A Lawyer's Responsibilities*. As adopted, it began with the declaration that a lawyer "is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."<sup>129</sup> Until the final version, the first two duties were in reverse order. The lawyer "is an officer of the legal system, a representative of clients,

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123. William B. Spann, Jr., *The Legal Profession Needs a New Code of Ethics*, BAR LEADER, at 2-3 (Nov./Dec. 1977).

124. On the history of the Kutak Commission's efforts, see Ariens, *supra* note 27, at 700-21.

125. COMMISSION ON EVALUATION OF ETHICAL STANDARDS JOURNALS, N.Y.C., N.Y., DECEMBER 16-17, 1977, at 14 (copy on file with author) [hereinafter JOURNALS].

126. JOURNALS, RESEARCH TRIANGLE PARK, N.C., Feb. 23-24, 1979, at 19-20 (copy on file with author).

127. See Ariens, *supra* note 27, at 706.

128. JOURNALS, SEATTLE, WASH., JUNE 29-30, 1979, at 16 (quoting Reporter Geoffrey Hazard).

129. *Preamble: A Lawyer's Responsibilities*, MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 1983)



and a public citizen having special responsibility for the quality of justice."<sup>130</sup>

That modest change symbolized larger shifts in the legal profession. By the time the Commission's proposed final draft was issued in May 1981, the profession's understanding of "zealous" behavior had moved decisively in favor of the "basic posture:" the client is right first, last, and always. This change was swift. In a 1976 Conference on Popular Dissatisfaction with the Administration of Justice,<sup>131</sup> none of the discussants raised any general concerns about discovery abuse.<sup>132</sup> By 1980, the profession regularly bemoaned discovery abuse in the everyday civil case. That year an ABA Special Committee for the Study of Discovery Abuse issued its *Report*, "there is serious and widespread abuse of discovery."<sup>133</sup>

Another early warning sign of change in the legal profession was the publication in May 1978 of a profile of the Los Angeles lawyer Marshall Manley, who was a partner at that time in the firm of Manatt Phelps. Manley told reporter Steven Brill, "I have no qualms about stealing away lawyers and clients from other firms. It's the keystone of our program."<sup>134</sup> In February 1979, Brill published the first issue of *American Lawyer* magazine, a monthly that had as "its ongoing focus: the money that partners at big law firms made."<sup>135</sup> As William Henderson noted in 2012, the initial issue "managed to compare (envy) lawyers and law firms (pride) on the metric of money (greed)."<sup>136</sup> *American Lawyer* doubled down on this strategy in 1985, presenting the American Lawyer 50, a listing of the fifty most profitable large firms on a per partner basis.<sup>137</sup>

Beginning with the ABA Presidency of Lewis F. Powell, Jr. in 1964-1965, the ABA had worked to join the private and public interests of lawyers. It seems no mistake that Powell created the Special

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130. MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N, PROPOSED FINAL DRAFT 1981). See also *Model Rules of Prof'l Conduct, Proposed Final Draft*, 107 A.B.A. REP. 833 (1982).

131. See *Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 79 (1976) (publishing papers of conference). The title was, of course, a nod to Roscoe Pound's speech to the ABA seventy years earlier. See Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395 (1906).

132. One later noted such a concern, but that applied to a small subset of federal cases. See William H. Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277, 288 (1977).

133. Philip H. Corboy, *Second Report of the Special Committee for the Study of Discovery Abuse (January 1980)*, LITIG. NEWS, Apr. 1980, at 9, 10.

134. Steven K. Brill, *Building a Law Firm—Fast*, ESQUIRE, May 23, 1978, at 10, 11.

135. HARPER, *supra* note 29, at 71.

136. Henderson, *supra* note 16, at 56.

137. HARPER, *supra* note 29, at 72. The number has varied but for some time has been marketed as the Am Law 100 survey, which is an annual survey.

Committee that drafted the Code of Professional Responsibility and managed to gain House of Delegates approval of a federal program for legal services to the poor. The creation of the Code of Professional Responsibility was an effort to provide lawyers a better understanding of the ethical standards to which they were bound. Support for a federal initiative to provide civil legal services to the poor was an acknowledgment by the ABA that lawyers needed to do more to alleviate that problem than they had in the 1950s. Both of these projects were part of the lawyer's public responsibilities. The Kutak Commission worked to continue in the Model Rules the idea that the lawyer is a private and public actor. Unlike Powell, when seeking the support of the broader membership, the Kutak Commission failed.<sup>138</sup>

A decade after writing a study of the influence and power of the large New York law firm, author Paul Hoffman returned for an update. These legal "lions" remained in power, but the author no longer considered it possible for privately-paid lawyers to exercise power on behalf of the interests of the public. Hoffman was instead worried about the turn to profit made by New York "legal powerhouses" over the past decade:

The Canons of Ethics may be filled with pious pronouncements about an attorney's duty to his clients, to the court, to the law of the land, and to the concept of justice, but the legal powerhouses on Wall Street and in midtown Manhattan exist, not to chase the elusive butterflies of abstract ideals, but to make money.<sup>139</sup>

This was not only true of Manhattan-based law firms, but firms across the country. The idea, as floated by Hoffman in 1973, that lawyers in those firms might serve "less a lackey and more of an 'expert,' more detached, more independent, someone paid by the client but responsible to the general public," seemed like an echo from a distant, not recent, past.<sup>140</sup>

The adoption of the Model Rules in 1983 sowed significant doubt on the idea that private practice lawyers acted in light of "a determinable public interest."<sup>141</sup> In debating the Proposed Final Draft of the Model Rules, the House of Delegates was regularly faced with choosing between a client-centered zeal and a duty of fidelity to the public; it usually chose the former. The House did not do so overwhelmingly, much less unanimously. A number of the votes were relatively close, but it appeared a tipping point had been reached. Some remnants of

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138. The details of this failure are found in Ariens, *supra* note 27, at 736-41.

139. PAUL HOFFMAN, *LIONS OF THE EIGHTIES* 38 (1982).

140. HOFFMAN, *supra* note 88, at 227.

141. JOURNALS, N.Y.C., N.Y., DECEMBER 16-17, 1977, at 14 (copy on file with author).

the officer of the legal system model remained, and some lawyers adopted that model in their practice. Whether those remnants constituted enough to form a governing ethos for private practice lawyers was doubtful.

#### IV. CRISIS AND OPPORTUNITY

Speaking to the Torts and Insurance Practice Section ("TIPS") at the 1984 Annual Meeting of the ABA, Professor Roger Cramton spoke of the "paradox"<sup>142</sup> of professional independence: "The lawyer is loyal to his client, providing a vigorous and fearless presentation of the client's cause. But his zeal for the client is tempered by the lawyer's duties to the court, to adversaries and third persons, and to the public."<sup>143</sup> The professional norms applicable to the lawyer made the lawyer responsible both to client and to the public, "a minister of justice as well as a champion."<sup>144</sup> This bifurcated role generated two models that explained the power exercised by lawyers: "the public-interest model and the market model."<sup>145</sup>

Cramton was well aware of the attractions of the market model. It had always been easier for the private practice lawyer to do what the paying client wanted done. Such a bias was usually a more profitable and less difficult path to take.<sup>146</sup> That model also reduced the tension found in the lawyer's role by ignoring the traditional duty of fidelity owed by the lawyer to the public.

Between 1972 and 1987, the revenues of the largest law firms in the United States "increased, in real dollars, an average of ten percent per year . . . more than double the rate of growth in the legal services field generally."<sup>147</sup> In just the five years between 1977 and 1982, receipts of private practice lawyers doubled to thirty-four billion dol-

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142. See Roger C. Cramton, *The Lawyer's Professional Independence: Memories, Aspirations, and Realities*, in *THE LAWYER'S PROFESSIONAL INDEPENDENCE: AN IDEAL REVISITED* 49, 50 (John B. Davidson, ed. 1985); *TIPS Notes*, 14 *THE BRIEF*, Fall 1984, at 2, 2-3.

143. Cramton, *supra* note 142, at 50.

144. *Id.* at 51.

145. *Id.*

146. See *Can an In-House Lawyer Say 'No' to His Boss*, *BUS. WK.*, Apr. 7, 1984, at 70 (quoting Thomas Barr of Cravath, Swaine and Moore when declaring that on occasion his job is to say no to the client).

147. Richard Sander & E. Douglass Williams, *A Little Theorizing about the Big Law Firm: Galanter, Palay, and the Economics of Growth*, 17 *LAW & SOC. INQUIRY* 391, 392 n.4 (1992). This was not true for many lawyers during this time, who saw their real income decline during this time due to high inflation and unemployment. See ALLEN J. MATUSOW, *NIXON'S ECONOMY: BOOMS, BUSTS, DOLLARS, & VOTES 214-40* (1998) (titling post-1972 election period "The Great Inflation"); W. CARL BIVEN, *JIMMY CARTER'S ECONOMY: POLICY IN AN AGE OF LIMITS 185-208* (2002) (titling chapter on period from 1978 on "The Worsening Inflation"); RICHARD A. POSNER, *OVERCOMING LAW 57* (1995) (noting in real dollars price of legal services fell between 1970 and 1985).

lars,<sup>148</sup> with much of that increase coming from businesses. Marc Galanter found that businesses purchased 39% of legal services nationally in 1967, and 47.4% in 2002.<sup>149</sup> In constant 2000 dollars, lawyers received from businesses \$8.64 billion in 1967 and \$79.61 billion in 2002, a 900% increase.<sup>150</sup> Not surprisingly, the growth of corporate law firms during this time was extraordinary. In early 1968, the largest law firm was Shearman and Sterling, with 169 lawyers.<sup>151</sup> The three firms tied for eighteenth each had 106 lawyers. In 1972, the twenty-five largest law firms ranged in size from 110 to 240 lawyers.<sup>152</sup> Seven years later, the twenty largest law firms had a median of 235 lawyers, with the largest consisting of 512. By 1985, the median number of lawyers in those firms was 395, which rose to 460 just two years later.<sup>153</sup>

Though claims were made in the early 1980s that such firms were under profit pressures,<sup>154</sup> large law firms doubled their market share of legal services between 1972 and 1986.<sup>155</sup> Further, beginning large firm lawyers saw their salaries rapidly increase. In 1973, *Texas Monthly* unfavorably compared the pay of new large firm lawyers in Texas (\$15,500) with that of plumbers.<sup>156</sup> By 1985, those lawyers were paid \$47,000, just slightly less than the starting pay of New York-based lawyers.<sup>157</sup> The following year starting salaries in New York were increased to \$65,000. That salary reached \$160,000 when the Great Recession arrived.<sup>158</sup>

Lawyers continued during the 1980s to sort themselves into two hemispheres: those representing individuals and those representing corporations.<sup>159</sup> Within those hemispheres was a further sorting of lawyers. For those lawyers representing individuals, only the top

148. Cramtom, *supra* note 142, at 49.

149. Galanter, *supra* note 12, at 1382.

150. *Id.* at 1383.

151. See *Why Law is a Growth Industry*, BUS. WK., Jan. 13, 1968, at 78, 79 (listing top twenty firms in size and including number of partners and associates).

152. Alexis de Tocqueville, *Money Talks: Why It Shouts to Some Lawyers and Whispers to Others*, 2 JURIS DOCTOR, Jan. 1972, at 54 (listing twentieth largest firm as having 122 lawyers).

153. ABEL, *supra* note 10, at 311.

154. See Peter W. Bernstein, *Profit Pressures on the Big Law Firms*, FORBES, Apr. 19, 1982, at 84; *The Big-Law Business*, NEWSWEEK, Apr. 16, 1984, at 87.

155. See GALANTER & PALAY, *supra* note 80, at 41.

156. Griffin Smith, Jr., *Empires of Paper*, TEXAS MONTHLY, Nov. 1973, at 53, 63.

157. See MICHAEL S. ARIENS, *LONE STAR LAW: A LEGAL HISTORY OF TEXAS* 191 (2011).

158. See Burk & McGowan, *supra* note 29, at 21 (listing increases in starting pay for large law firm associates in New York from the late 1960s).

159. Compare HEINZ & LAUMANN, *supra* note 15, 140-58 (finding law firm lawyers as of 1975 are sorted into two hemispheres of practice, those who represent individuals and small businesses and those who represent large businesses), with HEINZ, NELSON, SANDEFUR & LAUMANN, 29-47 (finding greater sorting by 1995).

strata of personal injury lawyers prospered beyond ordinary economic growth.<sup>160</sup> For the latter, significant lateral partner hiring<sup>161</sup> and “eat what you kill”<sup>162</sup> compensation systems were joined by increases in the consumption of legal services.<sup>163</sup>

Lawyers representing organizations succeeded during the recession of 1991. Large firm managers were aghast that during the recession revenue *growth* dipped to 3% per lawyer from 9% in 1990.<sup>164</sup> The latter percentage itself had been a disappointment to such firms. The recession did, however, provide an opportunity for large firms to fire both partners and associates. Hildebrandt Inc., a law consultancy, surveyed 105 large firms, 59% of which “terminated partners,” and 93.4% of which fired associates.<sup>165</sup> Further, “[c]lose to two-thirds of the firms that have already fired some partners expect to fire more in the next 18 months.”<sup>166</sup>

The relatively modest recessions of 1991 and 2001 were just slight interruptions to overall economic growth between 1983 and the Great Recession in late 2007. For corporate lawyers, and particularly large firm corporate lawyers, economic growth was superb. Writing soon after the end of the Great Recession, former large firm lawyer Steven Harper declared, “[a]ll attorneys in big law firms are making far more money than they would have earned thirty years ago.”<sup>167</sup> Harper noted that the top equity partners “earned three times more than their lowest-paid fellow equity partner[.]” in 1985, and “more than ten” times that in 2011.<sup>168</sup> This “winner-take-all” approach mimicked compensation models at large publicly-traded companies, and further emphasized that success in large firms was marked by increases in

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160. *The Best-Paid Trial Lawyers*, FORBES, Oct. 16, 1989, at 204; Brigid McMennamin, *The Best Paid Lawyers*, FORBES, Nov. 6, 1995, at 145. See also Ariens, *supra* note 62, at 172 (discussing success of personal injury lawyers in 1970s). See STEPHEN DANIELS & JOANNE MARTIN, TORT REFORM, PLAINTIFFS’ LAWYERS, AND ACCESS TO JUSTICE (2015) (reporting incomes of ordinary personal injury lawyers in Texas).

161. Burk & McGowan, *supra* note 29, at 15. “By 1988, over a quarter of the 500 largest U.S. firms had acquired more than half their new partners from outside the firm.” *Id.*

162. See HEINZ & LAUMANN, *supra* note 14, at xvii (quoting partner in Chicago law firm, “[i]n this firm, you eat what you kill”); PETER MEGARGEE BROWN, RASCALS: THE SELLING OF THE LEGAL PROFESSION, 63 (1989) (noting large firm criticized in late 1980s for failing “to follow the fashion at this time that you only eat what you kill”).

163. See Galanter, *supra* note 12, at 1378-79.

164. See *The Legal Profession*, THE ECONOMIST, July 18, 1992, at 3, 5.

165. See Don J. DeBenedictis, *Firings to Continue*, A.B.A. J., Mar. 1992, at 24.

166. *Id.*

167. HARPER, *supra* note 29, at 97.

168. *Id.* This is confirmed in Michael D. Goldhaber, *The Great Class Divide*, AM. LAW., May 2014, at 150, 150 (noting that in 1994 “most Am Law 100 firms were equity-only partnerships,” which by 2014 were down to seventeen firms); GEO. U. L. CTR., CTR. FOR THE STUDY OF THE LEGAL PROF., 2013 REP. ON THE ST. OF THE LEGAL MKT. 10 (2013) (noting 169 of Am Law 200 reported having two-tiered partnerships).

profits, and thus income. Such success intimately tied these lawyers to the clients who generously contributed to their income.

Overall, the growth in legal services as a percentage of gross domestic product grew remarkably from the late 1960s through 2002. Expenditures on private practice legal services grew from .4% of GDP in 1967 to 1.8% by 2002.<sup>169</sup> Growth in legal services expenditures did not end until the Great Recession.<sup>170</sup>

By the time *American Lawyer* began listing profits per (equity) partner in 1985, large law firm partners were already aware of that metric. For the next twenty years, that metric moved in one direction. The Great Recession meant layoffs for associates, staff attorneys, and staff, and a more fervent “de-equitization” of partners. It also meant a continued rise in profits per partner for those who found and kept well-paying clients.

The push to measure success by income (profits) was met with the pull of what became known as the professionalism movement.

The initial call for lawyers to return to the tradition of independence from both client and society began at the ABA’s Annual Meeting in 1983.<sup>171</sup> TIPS organized a program that year titled *The Lawyer’s Professional Independence*.<sup>172</sup> The program was given Presidential Showcase status and was warmly greeted, particularly within TIPS. The incoming chairman of TIPS for the 1983-1984 year was L. S. Carsey, who made the topic of professional independence the subject of his chairmanship.<sup>173</sup> TIPS held a seminar on the Professional Indepen-

169. See Galanter, *supra* note 12, at 1378-79. Cf. ROBERT H. FRANK & PHILIP J. COOK, *THE WINNER-TAKE-ALL SOCIETY: WHY THE FEW AT THE TOP GET SO MUCH MORE THAN THE REST OF US* 219 (1995) (“Legal services, which accounted for only 0.6 percent of gross domestic product in 1960, accounted for 1.39 percent in 1987.”).

170. See Aric Press, *The Century Thus Far*, AM. LAW., May 2006, at 123, 125 (“Since 2000, the average PPP [profits per partner] has increased 44 percent, to \$1.06 million”); Aric Press & John O’Connor, *Lessons of the Am Law 100*, AM. LAW., May 2007, at 127 (noting change from previous year showed, “Gross revenue up 11.4 percent, profits per partner up 13.4 percent, revenue per lawyer up 7.3 percent”); Aric Press & John O’Connor, *Lessons of the Am. Law 100*, AM. LAW., May 2008, at 131 (noting in 2007, “[f]or the first time, the [largest 100] firms showed five consecutive years of better-than-average growth in both revenue per lawyer, the key measure of law firm financial success, and profits per partner”). The decline and slow improvement of the market for legal services since the Great Recession is found in *Industry Data*, U.S. DEPT OF COM. BUREAU OF ECON. ANALYSIS, [https://bea.gov/iTable/iTable.cfm?reqid=51&step=51&isuri=1&5114=a&5102=1](https://bea.gov/iTable/iTable.cfm?reqid=51&step=51&isuri=1&5114=a&5102=1#reqid=51&step=51&isuri=1&5114=a&5102=1) (last visited February 28, 2018).

171. See Ariens, *supra* note 34, at 50-52.

172. *THE LAWYER’S PROFESSIONAL INDEPENDENCE: PRESENT THREATS/FUTURE CHALLENGES* (John B. Davidson ed., 1984) (reprinting talks).

173. See L. S. Carsey, *Dealing with Change*, 13 *THE BRIEF*, Nov. 1983, at 2 (noting lawyer independence must be justified in light of the “public interest, not the private interest of lawyers, individually or as a group”); L. S. Carsey, *Acting Like Professionals*, 13 *THE BRIEF*, Feb. 1984, at 2 (differentiating a business and a profession on the ground

dence of the Lawyer in April 1984, and a second Presidential Showcase program on professional independence at the 1984 ABA Annual Meeting.<sup>174</sup> This focus on professional independence was why Roger Cramton was speaking at the annual TIPS luncheon in August 1984. The professionalism movement was goosed by Chief Justice Warren Burger's speech to the ABA decrying commercialism in the practice of law at its February 1984 Midyear Meeting.<sup>175</sup>

One of Burger's recommendations was that the ABA create a body to "study the question of professionalism."<sup>176</sup> As a result, a Special Commission on Professionalism was created by ABA Board of Governors in December 1984. The Commission was charged in part with responding to claims that "the Bar might be moving away from the principles of professionalism and that it was so perceived by the public."<sup>177</sup> The Commission's report, published as "*In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism*,"<sup>178</sup> was widely reported. Among its conclusions were, "[t]he Bar should place increasing emphasis on the role of lawyers as officers of the court, or more broadly, as officers of the system of justice,"<sup>179</sup> and that lawyers not representing clients before legislatures "should support legislation that is in the public interest."<sup>180</sup> Two of the seven "in general" recommendations are relevant here. First, the bar was to "preserve and develop . . . integrity, competence, fairness, independence, courage and a devotion to the public interest."<sup>181</sup> Second, lawyers were to "[r]esist the temptation to make the acquisition of wealth a primary goal of law practice."<sup>182</sup>

It is not too strong to suggest that the publication of the Special Commission's report ushered in a crusade by some influential lawyers to re-establish professionalism within the profession. In 1988, TIPS

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that only lawyers must serve "the general public interest"); L. S. Carsey, *Basic Questions*, 13 THE BRIEF, May 1984, at 2 (noting activity of TIPS Committee on the Professional Independence of the Lawyer); L. S. Carsey, *Plenty to Worry About*, 13 THE BRIEF, Aug. 1984, at 2 ("The erosion of professionalism and independence is worth plenty of worrying about . . . because the public good requires an independent profession of the law, not a business of the law."). Carsey was a partner in the large Houston law firm of Fulbright and Jaworski.

174. THE LAWYER'S PROFESSIONAL INDEPENDENCE: AN IDEAL REVISITED (John B. Davidson ed., 1985).

175. Warren E. Burger, *The State of Justice*, A.B.A. J., at 62 (Apr. 1984).

176. ABA Comm'n on Professionalism, *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism*, 112 F.R.D. 243 (1986).

177. *Report of the Commission on Professionalism*, 111(2) A.B.A. ANN. REP. 369, 373 (1986).

178. See *supra* note 177.

179. *Id.* at 13.

180. *Id.*

181. *Id.* at 15.

182. *Id.*

encouraged state and local bar associations to “adopt a lawyers’ Creed of Professionalism.”<sup>183</sup> A professionalism creed was intended to castigate those lawyers willing to do whatever their clients wished. A creed was to re-instill the idea that an “excessive zeal, a ‘win at any cost’ mentality, ‘scorched earth’ tactics and the apotheosizing of ‘playing hard ball’”<sup>184</sup> were impermissible abuses. The ABA was joined by the American Bar Foundation<sup>185</sup> and by courts and bar association in sponsoring symposia and conferences on the subject.<sup>186</sup>

During this same time, senior lawyers and law professors wrote declaring a crisis in the legal profession. In the 1988 keynote address at the celebration of the centennial of Cornell Law School, Sol Linowitz claimed, “[w]e have become a business dominated by “Bottom Line” perspectives.”<sup>187</sup> The following year Peter Megargee Brown, an early advocate of a return to professionalism, wrote *Rascals: The Selling of the Legal Profession*, the title of which he took from a letter to him from Chief Justice Burger.<sup>188</sup> Brown spoke of a transformation of the profession in just twelve years. Though some lawyers had always perceived the work of lawyers as a trade “and ignored professional standards, the *immense* shift to the business ethos of growing giant firms has been extraordinary—and harmful to society.”<sup>189</sup> Linowitz returned to the subject of his Cornell keynote address with a book titled *The Betrayed Profession*.<sup>190</sup> “Too many in my profession have

183. *Rep. No. 2 of the Section of Tort and Insurance Practice*, 113:2 ABA REP. 589, 589 (1988).

184. *Id.*

185. LAWYERS’ IDEALS/LAWYERS’ PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION, at ix (Robert L. Nelson *et al.*, eds., 1992) (noting September 1988 program).

186. *See The Texas Lawyer’s Creed—A Mandate for Professionalism* (promulgated and adopted by the Supreme Court of Texas and the Texas Court of Criminal Appeals Nov. 7, 1989), reprinted in Thomas M. Reavley, *Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics*, 17 PEPP. L. REV. 637, 657-62 (1990); Spec. Comm’n on Professionalism, Illinois St. B. Ass’n, *The Bar, the Bench and Professionalism in Illinois*, 76 ILL. B.J. 441 (1988); Philip A. Lacovara, *Lawyers and Professionalism*, WASH. LAWYER, Sept.-Oct. 1988, at 6 (noting “[t]hese days it is impossible to convene a meeting of lawyers without discussing professionalism”); Nathan M. Crystal & Gregory B. Adams, *Introductory Remarks to the Conference on the Commercialization of the Legal Profession*, 45 S.C. L. REV. 883 (1994). My research assistant found 123 bar associations and courts have promulgated professionalism creeds (copy on file with author).

187. Sol Linowitz, *Keynote Address*, 73 CORNELL L. REV. 1255, 1256 (1988). *See also* Arnold I. Burns, *Disquieting and Disturbing Developments in Our Discipline*, 18 CORNELL L. FORUM 9, 9 (1991) (noting many lawyers “hell-bent on acting like, being treated like, and being perceived as tradesmen, rather than as members of a noble and time-honored profession”).

188. BROWN, *supra* note 162, at 9. Brown was an influential member of the first TIPS Professionalism panel in 1983. *See* Ariens, *supra* note 35, at 50.

189. BROWN, *supra* note 162, at 64.

190. SOL M. LINOWITZ WITH MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* (1994).



taken a calling that sought the good society and twisted it into an occupation that seems intent primarily on seeking a good income."<sup>191</sup> Harvard Law School Professor Mary Ann Glendon's *A Nation Under Lawyers*<sup>192</sup> detailed the relationship between the "crisis" in the profession and its impact on society. Yale Law School Professor (and soon Dean) Anthony Kronman wrote *The Lost Lawyer*,<sup>193</sup> which lamented the loss of ideals among lawyers.

In the two decades after the collapse of the Kutak Commission's efforts to instill greater lawyer fidelity to the public in the Model Rules, three other items of note took place. The first item was a regular eruption of corporate frauds. These instances appeared to have in common the failure of lawyers to grasp any understanding of duty other than a very narrow duty of loyalty to the corporate client, or more accurately, those corporate executives who spoke as the client's representative. The savings and loan crisis of the mid-1980s led not only to recriminations regarding lawyer behavior, but fines and settlements totaling over \$400 million.<sup>194</sup> Close on the heels of S&L failures was the indictment in 1992 of the Bank of Commerce and Credit International and two of its lawyers, Clark Clifford and Robert Altman.<sup>195</sup> In late 2001, Enron imploded. Enron's failure was quickly followed by the resignations of the CEOs of WorldCom, Adelphia, and Tyco (and later bankruptcies and criminal or civil charges), and the conviction of the Arthur Andersen accounting firm for its actions concerning Enron.<sup>196</sup> This third round of corporate frauds suggested to one former large law firm partner, "[t]he problem is that corporate and legal culture has lost all sense of right and wrong."<sup>197</sup>

The second item of note was the apparent increase in unhappiness and depression among lawyers. Several Sections of the ABA

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191. LINOWITZ, *supra* note 190, at 22.

192. MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* (1994).

193. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

194. Steve France, *Unhappy Pioneers: S&L Lawyers Discover a "New World" of Liability*, 7 GEO. J. LEGAL ETHICS 725, 726 (1994) (noting further that "[a]t least twenty-two of the largest 200 law firms in the country . . . have been sued for malpractice by the federal banking agencies in connection with services provided to failed banks and thrifts). See also Roger C. Cramton, *Enron and the Corporate Lawyer: A Primer on Legal and Ethical Issues*, 58 BUS. LAW. 143, 143 n.3 (2002) (noting administrative fines levied on law firms of \$24 and \$41 million for actions in representing Lincoln Savings and Loan); Harris Weinstein, *Attorney Liability in the Savings and Loan Crisis*, 1993 U. ILL. L. REV. 53 (noting "over 1000 criminal cases and nearly 2000 civil suits arising from the savings and loan crisis," including "more than ninety civil cases brought against lawyers").

195. See Ariens, *supra* note 116, at 266-67.

196. See *id.* at 295-300 (offering timeline).

197. William H. Widen, *Enron at the Margins*, 58 BUS. LAW. 961, 962-63 (2003).

sponsored a conference in 1991 on *The Emerging Crisis in the Quality of Lawyers' Health and Lives—Its Impact on Law Firms and Client Services*.<sup>198</sup> The ABA Young Lawyers Division had sponsored a survey of lawyers in 1984 regarding dissatisfaction in the practice of law. That survey was repeated in 1990. Both suggested an “emerging crisis [that] already affects private practitioners in significant numbers.”<sup>199</sup> The 1990 survey indicated an increasing dissatisfaction in the practice of law. For example, the percentage of lawyers who were very satisfied with their work dropped by 20% (from 41% to 33%).<sup>200</sup> Without explaining why, the 1991 Breaking Point Conference concluded that the problem was not due to the “conflict between the practice of law as a business rather than as a profession,” but to the adoption of “management principles that are not only antithetical to the conduct of the practice of law as a profession, but also unsound under modern business management theory.”<sup>201</sup> In 1999, Patrick Schiltz offered a depressing assessment of the emotional health of lawyers. Lawyers “seem to be among the most depressed people in America.”<sup>202</sup> Lawyers also “appear to be prodigious drinkers,”<sup>203</sup> and possess rates of “anxiety, hostility, and paranoia” higher than society.<sup>204</sup>

One additional conclusion of the Breaking Point conference was the problem arising “when the common good as the driving factor is replaced by the desire for wealth, when money is not just incidental to the practice, but at its core.”<sup>205</sup> Despite this warning, the desire for wealth did not diminish during the 1990s. Schiltz noted at the end of the decade that the legal profession “is absolutely obsessed with money.”<sup>206</sup> It was certainly the case that the legal services pie contin-

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198. AM. BAR ASS'N, *THE REPORT OF AT THE BREAKING POINT: A NATIONAL CONFERENCE ON THE EMERGING CRISIS IN THE QUALITY OF LAWYERS' HEALTH AND LIVES—ITS IMPACT ON LAW FIRMS AND CLIENT SERVICES* (1991).

199. *Id.* at 29.

200. *Id.* at 9.

201. *Id.* at 12.

202. Schiltz, *supra* note 17, at 874. See also NANCY LEVIT & DOUGLAS O. LINDER, *THE HAPPY LAWYER: MAKING A GOOD LIFE IN THE LAW* 6 (2010) (noting “exceptionally high rates of depression, alcoholism, and suicide” among lawyers).

203. Schiltz, *supra* note 17, at 876.

204. See *id.* at 876. But see Jerome M. Organ, *What do We Know about the Satisfaction/Dissatisfaction of Lawyers—A Meta-Analysis of Research on Lawyer Satisfaction and Well-Being*, 8 U. ST. THOMAS L. REV. 225, 237 table 1 (2011) (listing surveys showing much greater lawyer satisfaction regarding their work from late 1980s through 1990s than indicated by Schiltz). See also LEVIT & LINDER, *supra* note 202, at 7 (stating “we are inclined to conclude that most lawyers fall somewhere near the middle of the happiness continuum”).

205. See *supra* note 198, at 12.

206. Schiltz, *supra* note 17, at 903.

ued to expand from the end of the 1991 recession past the recession of 2001. That quickly ended with the Great Recession.

The third item of interest struck close to the perceived exceptional nature of the work of lawyers. When the traditional Milbank Tweed firm decided to re-invent itself in the late 1980s, it surveyed prospective corporate clients about what they wanted in their lawyers. To the firm's surprise, survey respondents "were not looking for 'quality and integrity' when choosing their counselors."<sup>207</sup> Even more surprising, "[s]uperior work product could no longer be used as an effective selling point."<sup>208</sup>

The Young Division Lawyers of the ABA surveyed its members about job satisfaction on several occasions. In its 2000 version, 69.1% of the 800 respondents found the expectations and experiences regarding the intellectual challenge of the job satisfaction converged "very well," with another 28.4% finding "somewhat" of a convergence.<sup>209</sup> Overall, 97.3% agreed that their work was challenging.<sup>210</sup>

The intellectual challenge of law work required craftsmanship. Craftsmanship meant the exercise of skill in the absence of standardization. That skill demonstrated technical expertise, but also might demonstrate a detachment from the client. That detachment might be used to serve the higher values of the legal system (as perhaps, when representing the outcast) or might show an absence of values in the practice of law.<sup>211</sup>

The appeal to craftsmanship had been made in the early 1950s in defense of a strongly client-centered ethic of advocacy: "A lawyer may have to treat the practice of law as if it were a game, but if he can rely on craftsmanship, it may become an art, and 'Art, being bartender, is never drunk; and Magic that believes itself, must die.'"<sup>212</sup> Boston lawyer Charles P. Curtis suggested lawyers adopt the ethic of craftsmanship as an art, as an aesthetic approach to the practice of law. This approach would diminish the lawyer's duty to the public, and reduce the concerns of conscience in the practice of law. This solution

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207. ELLEN JOAN POLLOCK, *TURKS AND BRAHMINS: UPHEAVAL AT MILBANK, TWEED: WALL STREET'S GENTLEMEN TAKE OFF THEIR GLOVES* 264 (1990).

208. *Id.* at 264 (noting view of leading partner that it was "a revolutionary conclusion").

209. ABA YOUNG LAWYERS DIVISION SURVEY: CAREER SATISFACTION 20 (2000), <http://liblog.law.stanford.edu/wp-content/uploads/2012/10/ABA-YLD-2000-Career-Satisfaction-Survey.pdf>. The numbers for the 1995 survey were 67.9% and 30.2%, respectively. *See id.*

210. *Id.* at 22. The level of agreement was 57.2% "very," and 40.1% "somewhat." *Id.*  
211. *See* A. Leon Higginbotham, Jr., *The Life of the Law: Value, Commitment, and Craftsmanship*, 100 HARV. L. REV. 795, 816 (1987) (distinguishing the "technical expert, detached and indifferent" from the lawyer who "will care enough to make a difference").

212. Charles P. Curtis, Jr., *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 22 (1951) (quoting PETER VIREECK, *TERROR AND DECORUM* 53 (1948)).

might fit the profession as long as lawyers convinced themselves they were doing their jobs well.

The problem confronted by Milbank Tweed is one more lawyers currently face, as Curtis's solution to the dilemma of two masters has faded in the past several decades. One reason for the rise of a legal industry is that lawyers increasingly hawk standardized products, even in sophisticated legal fields. Products in an industrial setting are sufficiently standardized, so that the art of the craftsman is neither needed nor wanted. The Great Recession suggested the same might be true for lawyers.<sup>213</sup>

One result of these disparate events was that prospects for lawyers were both enthralling and chilling. The salaries for new lawyers continued to rise from 2000 to 2007, as did the profits per partner in the largest law firms. One concern was that this growth was unsustainable. Once it ended, what would happen?

In addition to its professionalism work, the ABA made several efforts to stem the perceived threat of commercialism. One example was from the ABA Section of Litigation. It created a task force in the mid-1990s to examine why "far too many examples of lawyer lapses were being reported."<sup>214</sup> Whether such lawyers engaged in such ethical lapses because they were willing to do anything for the fee their clients were paying was unclear. What was clear from the task force was that protestations of lawyer professionalism were often rejected by corporate clients, including in-house counsel. One client representative chastised lawyers for "hanging on to an outmode ethos of professionalism instead of embracing a business ethos."<sup>215</sup> This view correctly understood the rhetoric of professionalism: it constrained the adoption by lawyers of the ethos of the market. Business clients disliked that constraint.

A second effort was by an ABA Committee on Research About the Future of the Legal Profession. It printed its Working Notes on the Current Status of the Legal Profession on August 31, 2001.<sup>216</sup> The Committee began by declaring the immensity of the stakes: "We are in the midst of the biggest transformation of civilization since the caveman began bartering."<sup>217</sup> That transformation included both the legal system and its lawyers. Any such transformation, however, ne-

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213. See MITCHELL KOWALSKI, *THE GREAT LEGAL REFORMATION*, 111-12 (2017) (noting "quality legal expertise is fast becoming nothing more than table stakes").

214. Lawrence J. Fox, Nancy McCreedy Higgins & Donald B. Hilliker, *Report: Ethics: Beyond the Rules: Historical Preface*, 67 *FORDHAM L. REV.* 691, 691 (1998).

215. Austin Sarat, *Enactments of Professionalism: A Study of Judges' and Lawyers' Accounts of Ethics and Civility in Litigation*, 67 *FORDHAM L. REV.* 809, 829 (1998).

216. See *supra* note 9.

217. *Id.* at 2.

cessitated an independent bar to “recreate ourselves with a culture and a regulatory structure that preserves our core principles, protects our clients, and maintains our relevance.”<sup>218</sup>

The Committee left unstated what the core principles of the profession were. It did note, “[o]ur greatest peril is that if we cannot survive as an ‘industry’ and as a profession, then the underlying core principles and the Rule of Law are themselves at risk.”<sup>219</sup> It also noted, “the law is not just another business or industry.”<sup>220</sup> Law was the basis for our system of self-governance, and that system needed lawyers to ensure justice was served.

Section III of the *Working Notes* discussed “The Changing Face of Private Law Practice.”<sup>221</sup> It reads as working notes, a section cobbled together from different committee members given different tasks. It discusses both the likely impact of technological change on small firms and the rapid growth in large firm revenues. It did not offer any thoughts on transformative changes to the practice that either such lawyer engaged in. The section also failed to offer any core principles that needed to be preserved. Though the Committee noted its work was continuing, no further report was ever made.

The most significant effort of the ABA at this time was Ethics 2000, the creation of a commission to re-assess the 1983 Model Rules.<sup>222</sup> The Ethics 2000 Commission was formed in 1997. It was charged by the ABA Board of Governors with undertaking a “comprehensive review and some revision” of the Model Rules.<sup>223</sup> The commission completed its work in time for discussion and vote in the ABA House of Delegates at the annual meeting in August 2001.

The most important amendment proposed by Ethics 2000 regarding serving both the client and the public was adding several exceptions to Rule 1.6. The Commission suggested some limits on the lawyer’s duty not to disclose confidential information from and regarding a client. The ABA House of Delegates had been down this road before in 1982 when it had markedly trimmed the proposed exceptions to client confidences during its lengthy discussion of the Model Rules.<sup>224</sup> At its August 2001 annual meeting, the ABA House of Delegates refused to include the following exceptions to the rule on client

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218. *Id.*

219. *Id.* at 4.

220. *Id.*

221. *Id.* at 36.

222. See Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441 (2002) (recounting origins and work of commission).

223. *Id.* at 441 n.1 (quoting E. Norman Veasey, chair of the Ethics 2000 Commission).

224. See Ariens, *supra* note 27, at 739-41.

confidences: (1) to prevent the client from committing a crime or fraud in which the lawyer's services had or were being used; or (2) to allow a lawyer to disclose a client confidence to rectify a past fraud in which the client used the lawyer's services.<sup>225</sup> The result of this action was that lawyers were prohibited from disclosing a client confidence related to a past or future fraud under the Model Rules.

Then Enron collapsed. A task force on corporate responsibility was created by the ABA, and it preliminarily suggested that lawyers owed a duty to others to report past or future frauds, including disclosing confidences made by clients.<sup>226</sup> That is, not only was the lawyer no longer prohibited from disclosing such confidences, the task force's preliminary proposal required lawyers to do so.

With this proposal, the ABA hoped to avoid regulation of lawyers by the SEC. When SEC regulations arrived with an impact less significant than feared by corporate lawyers, the task force on corporate responsibility altered its course. In its final report, issued in March 2003, the task force suggested amending the rules on client confidences to permit, but not require, lawyers to disclose confidences to rectify past frauds and to prevent future frauds.<sup>227</sup>

Though the increasing demands made by clients, particularly corporate clients, were known by ABA leaders and officers, and though ABA leaders knew of the problems generated by such demands, the ABA followed its traditional path. The ABA spoke of the duty of lawyers faithfully to protect their clients and the public, to act as professionals and not mere merchants. It then wrote rules that tipped the balance in favor of clients.

Alexander Forger, the managing partner of the New York firm of Milbank Tweed during the late 1980s, may have expressed best the end of the lawyer as social trustee acting for the public as well as clients.<sup>228</sup> As the firm reacted to the shifts in business of law in the late 1980s, Forger declared to his partners, "[w]e are not a trade or business. We are a profession." But Forger himself called this declaration "a hysterical note from the past."<sup>229</sup>

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225. See *House of Delegates Proceedings*, 126:2 ABA REP. 1, 37 (2001).

226. *Preliminary Report of the American Bar Association Task Force on Corporate Responsibility*, 58 BUS. LAW. 189, 206 (2002).

227. *Report of the American Bar Association Task Force on Corporate Responsibility*, 59 BUS. LAW. 145, 174 (2003). The SEC's proposed rules used the permissive "may," which the task force then adopted. *Id.*; see *Implementation of Standards of Professional Conduct for Attorneys*, 67 FED. REG. 71760, 71762 (Dec. 2, 2002).

228. See Ariens, *supra* note 34, at 52 (describing end of social trustee professionalism). See generally STEVEN BRINT, *IN AN AGE OF EXPERTS: THE CHANGING ROLE OF PROFESSIONALS IN POLITICS AND PROFESSIONAL LIFE* (1994) (tracing broader history of social trustee professionalism).

229. ELLEN S. POLLOCK, *supra* note 207, at 266.

Lawyers during the past three decades have faced both crises and opportunities. The crises were, as is often the case, brief spells in which the authority of lawyers to exercise power was challenged. But these challenges never became threats. The monopoly granted to those licensed to practice law remains largely unquestioned.

Opportunities, particularly economic opportunities, were found in longer stretches of time. Lawyers succeeded in generating work in good times and bad times, and whether political leaders pursued smaller or larger government. One institutional opportunity foregone was an examination of the public purposes of lawyers' work. The task was not to resolve an age-old dilemma; it was simply to reconsider the manner in which lawyers were to be bound. A client-centered approach to the practice of law may surely be justified, but doing so requires lawyers to agree to let others sell in the same market. If lawyers are better described as part of a legal industry, the monopoly granted lawyers harms industry consumers.

## V. CONCLUSION

In the midst of rigorously re-orienting large law firm partners on the need to re-structure their firms after changes wrought the legal industry by the Great Recession, consultant and author Bruce MacEwen quotes the late Simon Rifkind,<sup>230</sup> one of the named partners in the New York law firm Paul, Weiss, Rifkind, Wharton and Garrison. In particular, MacEwen quotes in part Rifkind's 1963 Statement of Firm Principles. Rifkind declared the firm's goal was:

[T]o achieve the highest order of excellence in the practice of the art, the science and the profession of the law; through such practice to earn a living and to derive the stimulation and pleasure of worthwhile adventure; and in all things to govern ourselves as members of a free democratic society with responsibilities both to our profession and our country.<sup>231</sup>

MacEwen quotes Rifkind's statement in a chapter declaring that large law firm success in the post-Great Recession era requires firm leaders to change their mindset.<sup>232</sup> The second mindset change suggested by MacEwen is, "[t]reat your business like a business."<sup>233</sup> Rifkind's statement of firm principles is specifically not about law as a

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230. See Leslie Gordon Fagen, *Rifkind, Simon H.*, in *THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW* 459 (Roger K. Newiman ed., 2009).

231. MACEWEN, at 62; see also *Statement of Firm Principles*, PAUL WEISS, <https://www.paulweiss.com/about-the-firm/principles> (last visited Feb. 28, 2018).

232. MACEWEN, *supra* note 25, 55-64.

233. *Id.* at 57. In another section MacEwen counsels, "[i]t better not be all about the money." *Id.* at 18.

business. Of course one objective in the practice of law is to earn a living. That has always been a central aspect of the practice of law in the United States. It is also the reason for the public's fear that lawyers will do anything to serve their client's interests. Rifkind's declaration is that earning a living is best accomplished through excellence in the "art, the science and the profession of the law." And a lawyer achieved excellence while acknowledging responsibilities not only to the client, but "both to our profession and our country."

MacEwen did not quote all of Rifkind's statement of firm principles. Some of Rifkind's unquoted assertions do not fit comfortably with the ethos of the legal industry. One example is Rifkind's conclusion: "Finally, we are committed to achieving our objectives without wearing any client's collar or any political party's livery."<sup>234</sup>

Rifkind's firm principles are reminders that the joint ideals of independence from and fidelity to both client and society were embedded in the notion of a profession of law. These ideals were never to be grasped, much less captured. Lawyers were, however, to pursue them while knowing the chase was bound to fail. The effort to abide by an oath to serve with "all good fidelity" the clients and the court or public reminded the lawyer of the duty to serve others rather than self. It also reminded the lawyer that no one can serve two demanding and conflicting masters.

The legal industry offers its customers extraordinary technical skills, but it shies from offering those customers anything else. In part, the legal industry may so act because its customers want only those skills. It may also do so because the ideals of professionalism barely exist. A significant part of the legal industry is simply a business, and it seems time to acknowledge this is so. Before the ideals that distinguished law from a business are extinct, lawyers may wish to reacquaint themselves with Karl Llewellyn's warning over eighty years ago: "Ideals without technique are a mess. But technique without ideals is a menace."<sup>235</sup>

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234. See *Statement of Firm Principles*, PAUL WEISS, <https://www.paulweiss.com/about-the-firm/principles> (last visited Feb. 28, 2018).

235. Karl N. Llewellyn, *On What is Wrong with So-Called Legal Education*, 35 COLUM. L. REV. 651, 662 (1935).