Making the Modern American Legal Profession, 1969–Present

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ESSAY

MAKING THE MODERN AMERICAN LEGAL PROFESSION, 1969–PRESENT

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I. INTRODUCTION

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

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671
years, finally presenting a tentative draft to 550 lawyers in October 1968 and
a proposed draft to 20,000 lawyers in January 1969. The responses to those
drafts brought some relatively minor changes to the Code, changes
sufficient to make it possible for the ABA House of Delegates to adopt it
as presented.

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

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

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

3. See Michael Ariens, American Legal Ethics in an Age of Anxiety, 40 ST. MARY’S L.J. 343, 433–43
(2008) (discussing the history of the Code drafted by the Wright Committee and its adoption by states).
4. Id. at 439.
5. Id.
lawyer involvement in Watergate); James D. Fellers, President’s Page, 61 A.B.A. J. 529, 529 (1975) (noting
“Watergate was characterized as a lawyer’s scandal”); see also Ariens, supra note 6, at 174–77 (discussing
the impact of Watergate on the legal profession).
Insofar as lawyers acknowledged this widespread criticism, they often blamed an overcrowding of the profession, which made underemployed lawyers willing to engage in unethical behavior. There was a small truth in the “overcrowding” thesis. Lawyers had captured significant surplus value in the 1960s and early 1970s, and their incomes rose accordingly. The profession increased by over 50% during the 1970s, and the median real income (that is, adjusted for inflation) of lawyers dropped significantly. This decline in real income affected more than those attorneys in the bottom half. A study of large law firm partners found a decline in real income from the mid-1970s through the mid-1980s. Economic conditions continued to affect the income of lawyers as the recession of the early 1980s led to layoffs and diminished job prospects for lawyers.

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

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10. See Reece Smith, Jr., Report of the Task Force on Utilization, 97 A.B.A. ANN. REP. 818, 819 (1972) (reporting ABA charge to task force was to alleviate lawyer worries about “the increase in the number of new entrants into the profession”); see also Special Report, The Job Gap for College Graduates in the ’70s, BUS. WK., Sept. 23, 1972, at 48, 51 (concluding the outlook for lawyers is grim).
12. Id. at 67 (“The rise in new admissions since 1963 is a response to the rise of the legal earnings above long-run equilibrium earnings.”).
15. See Marc Galanter & Thomas Palay, Tournament of Lawyers 52–53 (1991) (commenting on the shift within law firms as more profit-oriented though working more hours does not automatically result in an increased income).
17. See Marc Galanter, Planet of the AEs: Reflections on the Scale of Law and Its Users, 53 BUFF. L. REV. 1369, 1378 (2006) (“[T]he legal services industry . . . grew from about four-tenths (0.4%) of one percent of the Gross Domestic Product (GDP) in 1978 to about one and eight-tenths percent (1.8%) in 2003.”).
the distribution of this added income was uneven at best and distorted at worst. From the 1970s on, private practice lawyers were increasingly sorted into starkly different income categories, often based on the clients they served.18 Those lawyers serving corporate clients drew an ever-increasing share of all legal services. When adjusted for inflation to the value of a dollar in 2000, the amount lawyers received from business entities increased from $8.64 billion in 1967 to $79.61 billion in 2002.19 That overall prosperity continued until the economic devastation of the Great Recession in 2008, during which demand for legal services cratered and thousands of lawyers were fired.20

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

The compounded demand for legal services by corporations from the late 1960s was fueled by the adoption of ever-more complex laws, which applied to ever greater social domains. The generation of new legal problems in applying the law to the actions of private actors often required innovative
solutions. This demand-side need led law firms, particularly those serving corporations, to open new practice areas and lawyers to define more narrowly their particular expertise. Large law firms concluded they needed to grow at a quickened pace in order to meet the needs of their present and future corporate clients. Scale was thus intended in part to solve the problem of increased demand for legal services by corporate clients. Scale, in terms of size and specialty, was also intended to provide firms a competitive edge in an era of increased competition among legal service providers.21 Thus, size mattered. A competitive advantage would offer some protection in law firm pricing, and thus in lawyer-partner profits and income. A firm marketing its expertise specific to the needs of a prospective client might claim the likelihood of excellent results at an efficient cost. This idea was not new in the early 1970s.22 However, the increased demand for an ever-widening array of legal services has led lawyers and firms to claim more particular specialties.23 The scale of specialization has also affected how lawyers signal their particular expertise.24

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

22. See id. at 1009 (“In the 1960s, the pressure to permit recognition of specialties intensified . . . . By the end of the 1970s, the ABA adopted a Model Plan of Specialization . . . .”).
23. See id. at 1038 (“[T]he most significant fact about the modern metropolitan bar was that it had moved mass-wise out of court work, out of a general practice akin to that of the family doctor, into highly paid specialization in the service of large corporations.” (quoting K.N. Llewellyn, The Bar Specializes—With What Results?, 167 ANNALS AM. ACAD. POL. & SOC. SCI. 177, 177 (1933))).
24. One example is the 2018 Best Lawyers Texas survey, an annual special advertising supplement to the Dallas Morning News and the Houston Chronicle, which recognizes peer-evaluated experts in 145 practice areas, including “Energy Regulatory Law,” a category distinct from “Energy Law,” “Biotechnology and Life Sciences Practice,” and “Corporate Governance and Compliance Law.” 2018 Survey Results Texas, BEST LAW., May 31, 2018, at 8, 8–12.
25. See Ariens, supra note 21, at 1038 (contemplating the observation of Adolf A. Berle, Jr. that specialization turned the lawyer from a public-minded actor to one whose “private stock in trade [could] be exploited for his private benefit” (quoting A.A. Berle, Jr., Modern Legal Profession, in 9 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 340, 344 (Edwin R.A. Seligman et al. eds., 1933))).
26. See id. at 1035 (observing the swift growth of firms due to the evolution of specialization).
the purpose of their work. Lawyers have turned from the view that the practice of law embeds ideals of professionalism to the view that the practice of law is just another industry in which profits are to be maximized. The former emphasizes the limits of the market on the actions of lawyers. The latter focuses relentlessly on competitive economic advantages. The focus on competitive advantage has led law firms to embrace scale. It is also why growth among large law firms over the past forty years has become an end in and of itself. Size allows law firms to present to corporate clients the claim that they can perform any legal (and law-related) task.

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

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

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


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


32. See id. (noting value and attention given to young new hires over older partners); Paul Hoffman, Lions in the Street: The Inside Story of the Great Wall Street Law Firms 59 (1973) (“As the client becomes institutionalized, he’s less subject to the control of one man, and as a firm grows, the rainmaker’s value is reduced.”).

33. See Burk & McGowan, supra note 20, at 20–21 (noting new associate pay over time).
strength by matching the highest salary offer made to any new associate.\textsuperscript{34} Increased costs meant higher bills for clients. Both hourly billing rates and minimum annual billable hour requirements rose to pay for a more expensive cost structure.\textsuperscript{35} That rise meant less time for partners or other experienced lawyers to mentor new and junior associates (and less time for the associates to be mentored). Increased costs also meant increased borrowing by large law firms. When the economy would sour, indebted law firms went broke. When the economy really soured in 2008, more firms dissolved. Over two dozen law firms went bankrupt from the mid-1980s to the present, including eighteen from 2008–2012.\textsuperscript{36}

Scale remains the dominant response to competition in the modern era. Watergate affected the psychology of the legal profession, and had some effect concerning the manner in which lawyers perceived their duties to clients and to society.\textsuperscript{37} It was not, however, the catalyst of modernization. Modernization was nourished by a turn to maximizing lawyer income, in light of the economically challenging times after Watergate through about 1983.\textsuperscript{38} Economically challenging times drew lawyers closer to their clients and away from the idea that they acted as social trustees as well as private sellers of legal services.\textsuperscript{39} This appears especially the case for lawyers and law firms that represent corporations, who are the clear economic winners in the modern legal profession.

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

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

\textsuperscript{35} See Burk & McGowan, \textit{supra} note 20, at 24 (highlighting pressure on partners to bill more).


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


\textsuperscript{39} See generally Michael Ariens, \textit{The Rise and Fall of Social Trustee Professionalism}, 2016 J. PROF. LAW. 49, 88 (tracing the history of the private lawyer perception of duty to serve both client and society).
acknowledgment of, the legal profession’s duty to act as professionals, as engaged in more than a business.\textsuperscript{40} The professionalism movement was triggered in 1983\textsuperscript{41} and continues through the present. The movement serves as a modest, but helpful, check on the dominant view that the only metric that counts is profits. A second segment of the profession rejected the privatization model altogether; though a small part of the legal profession, public interest lawyers who worked in government and non-profit law firms, used purpose, not profits, as their metric of success. They have outperformed their numbers in achieving success.\textsuperscript{42} Public interest lawyers, though splintered in defining the interest of the public, have proliferated and are now a presence in many cases requiring interpretation of the Constitution and major legislation. They are an integral part of the rights revolution, which began in the 1960s but flowered during the next decade.

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

\textsuperscript{40} See Joseph L. Rauh, Jr., \textit{The Lawyer’s Obligation to the Public Interest}, in \textit{The Lawyer’s Professional Independence: An Ideal Revisited} 11 (John B. Davidson ed., 1985) (making the argument for lawyers to practice law as public servants); see generally \textit{Tort & Ins. Practice Section, Am. Bar Ass’n, The Lawyer’s Professional Independence: Present Threats/Future Challenges} (John B. Davidson ed., 1985) (presenting articles from the 1983 Annual Meeting of the ABA’s Tort and Insurance Practice Section attacking commercialism in the practice of law).

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

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

\textsuperscript{43} See 2018 Survey Results Texas, supra note 24, at 8–12 (categorizing Texas’s top lawyers into 145 specialized practice areas, such as “Eminent Domain and Condemnation Law,” “Information Technology Law,” and “Railroad Law”).
the structure of private law firms. Those signals to current and prospective clients have lessened the ties of a number of large law firms to traditional professional norms. One consequence of this greater attention to signaling clients is that fewer lawyers at such firms have taken leadership roles in mandatory and voluntary bar associations and other legal institutions since the late 1970s. The fragmenting of professional institutional ties also made the efforts to attract and keep clients ever more business-like. The competition for lucrative legal work helped further privatize the work of private practice lawyers, and to make lawyers less inclined to perceive their work as possessing a social component.

This de-professionalization change largely occurred in the relationship between lawyers and sophisticated clients.

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

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

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

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

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

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

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

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

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

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

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

52. See generally Ray Worthy Campbell, Rethinking Regulation and Innovation in the U.S. Legal Services Market, 9 N.Y.U. J.L. & BUS. 1, 59 (2012) (“Recent years have seen franchise-level lawyers depart large firms to create new firms with alternative billing and organizational models.”).
53. See MITCHELL KOWALSKI, AVOIDING EXTINCTION: REIMAGINING LEGAL SERVICES FOR THE 21ST CENTURY 132 (2012) (opting to use the term “value-based billing” instead of “alternative billing” because the former conveys to clients that “charges are based on value”); Campbell, supra note 52, at 59–61 (discussing the emergence of alternative billing structures in corporate law firms).
54. See Sander & Williams, supra note 14, at 474 (identifying specialty firms as signaling eliteness to clients).
55. See Burk & McGowan, supra note 20, at 5–7 (noting how a leaner cost structure enables boutique firms to claim specialty skills and knowledge at a lower client cost).
57. Id. at 382–83.
expertise to prospective clients through specialization certification programs, or through free media when their cases made news. Personal injury lawyers took marketing to new levels, moving from advertisements in the body of the Yellow Pages, to buying its back cover, to radio and television commercials, to today’s massive digital marketing campaigns. This scaling generated an institutionalization of personal injury law firms, in terms of increasing lawyer and nonlawyer staff, in opening branches across a state, and in longevity, as some personal injury firms have survived their founder’s death.

Scale also touched on segments of personal injury law in the increased use of the class action lawsuit, the rise of mass tort litigation, and third-party party litigation financing.

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

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


62. See Anthony J. Sebok, What Do We Talk About When We Talk About Control, 82 FORDHAM L. REV. 2939, 2939 (2014) (noting “a marked increase in frivolous and/or socially unproductive litigation” due to plaintiffs’ attorneys view of litigation as an investment). The most well-known and controversial case of third-party financing is Bollea v. Gawker Media, LLC, in which Peter Thiel secretly funded Terry Bollea’s (more popularly known as “Hulk Hogan’s”) invasion of privacy lawsuit against Gawker when the latter posted parts of a sex tape involving Bollea, made without Bollea’s knowledge. See Bollea v. Gawker Media, LLC, 913 F. Supp. 2d 1325, 1326–27 (M.D. Fla. 2012) (denying injunctive relief for copyright infringement based on the release of Terry Bollea’s sex tape); see also RYAN HOLIDAY, CONSPIRACY: PETER THIEL, HULK HOGAN, GAWKER, AND THE ANATOMY OF INTRIGUE 195 (2018) (highlighting the high costs associated with the litigation).
Technology has also created an informational scaling that has altered the profession. From LexisNexis and Westlaw to HeinOnline, Fastcase and other legal information providers, cases, statutes, regulations, and other legal information are now available to lawyers at a relatively low price. The knowledge premium once enjoyed by large law firms with in-house libraries (and librarians) is dissipated, if not extinct. Technological advances have disproportionately benefited the small-firm lawyer. Legal tools available from Internet-based sites, such as Rocket Lawyer and LegalZoom, may adversely affect the economic prospects of the solo practitioner and small-firm lawyer, though that is yet unproven. The lower cost of legal information may benefit both lawyers and their prospective clients. However, the challenge in providing such services to a broader segment of society continues, and it is not yet clear how such services may be provided at a price that is profitable and affordable.

II. THE ROAD TO MODERNITY

During the two decades between the end of World War II and Lewis Powell’s 1964 proposal to modernize the code of legal ethics, the American legal profession consolidated and gained considerable strength and distinctive status. This was a marked change from the 1930s, when lawyers, like many others, suffered during the Great Depression. By 1940, under the guise of improving the stature of the profession, many bar associations had worked assiduously to make admission to the bar more difficult. Most states had adopted the requirement of three years of full-time undergraduate education to be eligible to take the bar examination.
This minimized the incentive to choose an apprenticeship rather than law school.69 The bar examination also became more difficult to pass. This delayed entry into the profession, as it both shifted many from shorter apprenticeships to the three years it took to complete law school, and meant those failing the bar exam were delayed in entering the practice of law.70 Even so, lawyers in the pre-World War II era made regular claims that the bar was overcrowded, causing lawyer income to stagnate.71 It was not until after the attack on Pearl Harbor on December 7, 1941 that the profession’s claims of an overcrowded bar ended as law schools emptied.72

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

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

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70. See Ariens, supra note 3, at 415 (noting decline in bar passage during the Great Depression).
it difficult to obtain legal representation when they were fired from their jobs or were otherwise subjected to legal harm.\textsuperscript{78} A faction of elite law firm lawyers responded to McCarthy’s Red-baiting by managing to get the ABA to create a Special Committee on Individual Rights as Affected by National Security.\textsuperscript{79} The elite Association of the Bar of the City of New York also joined in defending lawyers who represented those accused of having ties to Communists.\textsuperscript{80} This elite group then promoted the rule of law ideal that every accused person enjoyed the right to the assistance of counsel.\textsuperscript{81} Those lawyers also managed to get a reluctant ABA House of Delegates to approve a resolution declaring “the duty of the bar to provide such aid [representing persons accused of crimes] even to the most unpopular defendants.”\textsuperscript{82}

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

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

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

\textsuperscript{80} Ariens, supra note 39, at 61.

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


\textsuperscript{83} See Ariens, supra note 6, at 142–45 (commenting on the “lionization” of lawyers in the media during the 1950s and 1960s).

\textsuperscript{84} E DWARD BENNETT WILLIAMS, ONE MAN’S FREEDOM 3–4, 11 (1962).

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

Society’s relatively positive view of lawyers was eventually accompanied by a rise in lawyer income, as the demand for legal services outstripped the supply of lawyers. In the late 1950s, the ABA began a successful campaign to add to its membership. One important interest of those new members was to increase their income. ABA leadership highlighted the “problem” of stagnant lawyer income, initially, by printing and widely distributing a pamphlet entitled The 1958 Lawyer and His 1938 Dollar. The ABA followed with additional pamphlets suggesting approaches to increasing income. It also created a Special Committee on Economics of Law Practice with “the duty of laying the groundwork for the development of practical suggestions to lawyers designed to improve their economic status[].” This Committee was sufficiently important to become an ABA Standing Committee in 1961. In the mid-1960s, the ABA Journal began publishing an annual column discussing the federal government’s report on lawyer income. These columns showed steady, better-than-inflation increases

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


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

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

III. MODERN TIMES

A. Economics and Structure

In August 1963, then-former Vice President and failed presidential and gubernatorial candidate Richard M. Nixon joined the New York law firm of Mudge, Rose, Guthrie & Alexander, becoming its lead named partner in early 1964.\textsuperscript{101} The firm immediately prospered. Its partners increased their billing hours from 857 hours in 1963 (down from 929 hours in 1962) to 1,119 in 1964 and 1,251 in 1965.\textsuperscript{102} Its revenues rose 25% in 1964, from...
$2.6 million to $3.5 million. Revenues rose another 8% in 1965, to $3.8 million.103

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

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

103. Li, supra note 101, at 47.
105. Id. at 2–3.
106. Id. at 3.
107. Id. at 19–20.
108. Michael H. Trotter, Profit and the Practice of Law: What Happened to the Legal Profession 6 (1997). Trotter also noted that lawyers “routinely” worked “eight to nine hours a day, five days a week and half a day or more on Saturday,” and their families complained they were never home. Id. at 5.
109. See Henry M. Hart, Jr., Forward: The Time Chart of the Justices, 73 Harv. L. Rev. 84, 84 (1959) (“[T]he Court has more work to do than it is able to do in the way in which the work ought to be done.”).
110. Id. at 86.
111. See Ross, supra note 104, at 19 (exploring the debate surrounding the appropriate method of billing by lawyers in the early 1970s).
result accomplished, became the basis for the bill to the client.\textsuperscript{112} The metric of the billable hour, initially proposed to aid both clients and lawyers, was used more for the financial benefit of lawyers than their clients. Severing the fee from the client’s goal provided an incentive for lawyers to bill as many hours as the client would be willing to bear.

Once lawyers (and clients) agreed to measure the fee by the number of hours worked, lawyers reconsidered how many hours a lawyer could work on client matters. By the 1980s, many if not most law firms with corporate clients had steadily raised the number of hours a lawyer was required to bill. In the early 1980s, the standard annual billing requirement in Washington, D.C. was 1,800 hours. This increased to 1,900 hours in 1986.\textsuperscript{113} By the mid-1990s, the number of hours billed by law firm associates and partners had risen in large metropolitan areas from 1,649 (Boston) to 1,907 (Atlanta) for the former, and from 1,513 (Indianapolis) to 1,847 (Houston) for the latter.\textsuperscript{114} In 2007, just before the Great Recession, the average number of billable hours worked by all lawyers was 1,608.\textsuperscript{115}

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

In 2009, when over 5,000 lawyers were shed from large law firms, Baker & McKenzie remained the largest law firm in the \textit{National Law Journal’s} NLJ

\begin{itemize}
\item \textsuperscript{112} See \textit{id.} (discussing the economic pressures motivating the shift to detailed accounting of all time worked by attorneys).
\item \textsuperscript{113} This was my experience as an associate in a Washington, D.C. law firm. In 1986, the New York firm of Cravath, Swaine & Moore increased the starting pay of associates from $48,000 to $65,000. In order to come within range of that figure (and corresponding amounts for associates with greater experience), the number of billable hours was raised. In other words, associates paid for their own raise.
\item \textsuperscript{114} See \textit{ROSS, supra note 104, at 3.}
\item \textsuperscript{115} See generally \textit{GEORGETOWN LAW CTR. FOR THE STUDY OF THE LEGAL PROFESSION, supra note 50, at 6 (noting in Chart 5 a slight reduction of thirteen billable hours between 2007 and 2017).}
\item \textsuperscript{116} See \textit{LI, supra note 101, at 291–316 (detailing how various post-Mudge, Rose staffers filled in Nixon’s administration).}
\item \textsuperscript{117} Alexis de Tocqueville, \textit{Money Talks: Why It Shouts to Some Lawyers and Whispers to Others}, 2 JURIS DOCTOR, Jan. 1972, at 55, 56.
\item \textsuperscript{118} Id.
\end{itemize}
250, with 3,949 lawyers. The smallest of the NLJ 250 counted 164 lawyers, nearly 50 lawyers less than reported by the now-defunct Mudge, Rose. The number of American lawyers rose from 358,520 in 1972 to 1,180,386 in 2009, about a 230% increase. Baker & McKenzie grew 1,600%. Large law firms have grown exponentially in the modern era. As early as 1987, the median number of lawyers in the largest law firms was 460.

Large law firm partners have also noted that their income rises as the ratio of associates to partners increases. This scaling has been combined with another form of scaling: these firms have reduced the percentage of associates in favor of using “a greater proportion of lower-cost temporary/contract lawyers and permanent, non-partner track lawyers.”

The 1972 survey of the largest law firms showed that, outside of New York City-based law firms, the ratio of associates to partners averaged about 1.5 to 1. Indeed, two firms listed more partners than associates. The 2018 national ratio (which is always less than the ratio of the largest law firms) has been about 2.2 to 1 for the past decade.

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

[https://perma.cc/BQZ5-3BE2].


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

123. ABEL, supra note 88, at 311.


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

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

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

Additionally, it is rare for a large law firm to exist in one location, as firms merge and as lateral partners are added. For example, the venerable Houston, Texas law firm of Fulbright & Jaworski\textsuperscript{129} merged with the London-based firm Norton Rose to form Norton Rose Fulbright in 2013.\textsuperscript{130} The firm then merged with New York-based Chadbourne & Parke in 2017, creating a firm of about 4,000 lawyers.\textsuperscript{131} Those lawyers are scattered across about fifty cities across the globe.

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

\textsuperscript{128}. Id. at 12.
\textsuperscript{131}. Id.
\textsuperscript{133}. See Fortney, Seeking Shelter, supra note 132, at 718–20 (articulating the fallout from the “savings and loan debacle” on law firms and attorneys).
\textsuperscript{134}. See id. at 725 (noting the creation of limited liability law firm partnerships in Texas; see also id. at 725 n.36 (“Within two years of the enactment of the Texas LLP legislation, 569 Texas firms elected LLP status.”).
from vicarious liability for contract claims.\textsuperscript{135}

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

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

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

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

\textsuperscript{136} See \textit{id.} at 729 n.54 (noting Texas LLP provisions required at least $100,000 of liability insurance (citing \textsc{Tex. Rev. Civ. Stat. Ann.} Art. 6132b–45–C(1) (West Supp. 1997))).

\textsuperscript{137} See \textit{id.} at 724–25 (quoting \textsc{Alan R. Bromberg & Larry E. Ribstein, Bromberg and Ribstein on Limited Liability Partnerships and the Revised Uniform Partnership Act 3 (1995)} (noting the creation of limited liability law firm partnerships in Texas).

\textsuperscript{138} See Michael S. Ariens, \textit{A Uniform Rule Governing the Admission and Practice of Attorneys Before United States District Courts}, 35 \textsc{DePaul L. Rev.} 649, 660 (1986) (“\textsc{National} legal publications in 1985 found that 181 of the 250 largest law firms maintained offices in more than one state, and 271 of the 499 largest law firms maintained interstate offices.” (footnote omitted)).

\textsuperscript{139} \textit{Id.}

\textsuperscript{140} See \textit{id.} at 652–54 (explaining the rules on admission to practice law in federal district courts).

\textsuperscript{141} \textsc{Model Rules of Prof’l Conduct R. 5.5 (b)(1)–(2)} (\textsc{Am. Bar Ass’n} 1983).
decade, a trend that became clearer soon after the ABA’s 1983 adoption of
the Model Rules.142

In 1998, the California Supreme Court held, in Birbrower v. Superior Court of Santa Clara County,143 that a New York law firm was not allowed to collect a fee for much of its work for its client.144 The client was a New York entity with a California subsidiary. The legal work undertaken by the law firm was representing its client in California in an arbitration that involved matters of both New York and California law.145 The Court affirmed the conclusion that the Birbrower firm had engaged in the unauthorized practice of law, for none of its lawyers were licensed in California.146 In response, the ABA created in 2000 a Commission on Multijurisdictional Practice.147

The Commission concluded that the ABA should recommend the status quo on licensure with some adjustments to admission to practice temporarily in a court or in a jurisdiction in which the lawyer was not licensed.148 That is, it kept the tie between geography and licensure, even as technology was making geography less relevant for many (though not all) lawyers.

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

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


144. Id. at 12–13.

145. Id. at 3.

146. Id. at 13.


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

constitutional law. The MBE was the initial effort to nationalize the bar examination. The Watergate affair led both to the requirement that law schools teach legal ethics and to the creation by the NCBE of the Multistate Professional Responsibility Examination (MPRE).\footnote{150} Both the MBE and the MPRE were adopted for use by the vast majority of state boards of law examiners.\footnote{151} The NCBE then created the Multistate Essay Examination in 1988.\footnote{152} It was not as widely adopted. In 2009, the NCBE crafted the Uniform Bar Examination (UBE). The UBE has been adopted by thirty-two states, the District of Columbia, and the Virgin Islands as of October 2018.\footnote{153} Those jurisdictions that adopt the UBE agree to admit to the bar any person who has obtained the state’s required passing score.\footnote{154}

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

The multijurisdictional practice debate was indirectly related to another effort to transform law firm structure and practice: multidisciplinary practice (MDP) by law firms—the idea that nonlawyers could own some part of an entity in which the practice of law and other activities (e.g., lobbying, compliance, accounting) may occur.\footnote{156} Rule 5.4 of the ABA’s 1983 Model Rules banned ownership of an entity through which the practice of law took
place by anyone other than a lawyer. In the late 1990s, lawyers became acutely aware that the largest accounting firms (then the “Big Five,” now the “Big Four”) employed thousands of lawyers. In 1998, the ABA created a Commission on Multidisciplinary Practice to assess whether Model Rule 5.4 should be amended to allow entities that engaged in the practice of law and other activities could be owned in part or whole by non-lawyers. The Commission’s recommendations in support of MDPs were made available in time for the ABA’s August 1999 annual meeting. A final report supporting MDPs was filed the following year. Though the ABA House of Delegates rejected the Commission’s proposal that MDPs be allowed, forty-four state bar associations and the District of Columbia Bar Association created committees to assess MDPs. By July 2001, twelve of those task forces had favorably reported amendments to the lawyer-only ownership rule of professional conduct.

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

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


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


163. Id.

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

165. See id. at 143 (“There is a sad irony in the fact that Arthur Andersen was brought down by the Enron scandal.”). On those scandals, see Michael Ariens, “Playing Chicken”: An Instant History of the Battle Over Exceptions to Client Confidences, 33 J. LEGAL PROF. 239, 296–97 (2009), listing corporate and accounting scandals in the Appendix; Lawrence J. Fox, MDPs Done Gone: The Silver Lining in the Very Black Enron Cloud, 44 ARIZ. L. REV. 547, 548 (2002), linking the collapse of Enron to a reduced desire for MDPs.
Association was the only jurisdiction to amend its Rule 5.4 and allow MDPs.\footnote{167}{D.C. RULES OF PROF’L CONDUCT R. 5.4(b) (1996).}

The setback for those supportive of MDPs, often though not exclusively lawyers in large national and multi-national law firms, was allayed by the continued growth in corporate legal services during the early twenty-first century. The share of legal services in Gross Domestic Product (GDP) of the United States continued to increase. Most of that increase was attributable to corporate clients.\footnote{168}{Galanter, supra note 17, at 1378–79.}

The end of the sweet (economic) life occurred with the Great Recession in 2008. A 2013 study listed eighteen law firms that went bankrupt between 2008 and 2012.\footnote{169}{See Wynne et al., supra note 36 (indicating that five of the eighteen firms operated for more than a century before going bankrupt).}

Many that survived continued to acquire lateral partners and their respective practice groups. The largest and most profitable firms became ever larger and more profitable. The focus of large firms on growth has continued during the past decade, even as the overall market for legal services has stalled.

The emphasis on adding rainmakers as partners reduces the need or desire to promote associates to partner. Those associates who are offered a partnership share are often given limited profit participation until they can demonstrate their economic value to the firm. The relatively dim long-term prospect in becoming a partner for large law firm associates is one reason why those firms have increased the starting pay of law school graduates to $190,000 in 2018.\footnote{170}{See Randazzo, supra note 34 (stating large law firms are offering higher starting salaries to attract top law students).}

Further, the apparent inexorable increase in the complexity of law has forced corporate lawyers to find a legal niche that is both deep enough to avoid most competitive pressures and wide enough to serve a sufficiently broad clientele. When specialization works, it creates a virtuous circle. Clients receive efficient legal service. The lawyers who complete the legal services obtain greater expertise and enhance their future employment prospects. The law firm employer may be better able to increase the hourly billing rate of those lawyers. On the other hand, when the particular subspecialty disappears, the lawyer expert is often cast off, whether designated a “partner,” counsel, or associate.
Legal specialization applies as well to lawyers who largely serve individual clients. One marker of the modern legal profession is the recognition that all lawyers are incompetent in many areas. This is not a matter of lacking the time to get “up to speed.” It is a recognition of the increasing complexity of all of law. Though the ABA began recognizing the need of lawyers to specialize by the early 1950s, the first states to recognize legal specialists were California in 1973, and Texas a year later. Those states began certifying lawyers as specialists in areas of law such as personal injury, criminal defense, family law, and other topics of interest to individual clients.

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

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

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

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

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


175. Id. at 384.


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

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

B. Modern Litigation

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

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


182. Id. at 188.


184. Id.

185. See Ariens, supra note 138, at 663 (noting the King Committee’s recommendations).
Chief Justice Burger’s recommendations occurred as lawyers perceived an increase in litigation, particularly civil litigation.\footnote{186} Whether the United States suffered from a civil “litigation explosion” remains a contentious issue.\footnote{187} Federal district court case filings between 1970 and 1990 increased by 50% in tort matters and 180% in commercial matters.\footnote{188} As one perceptive historian noted, “Though evidence of a ‘litigation explosion’ is slim, there is plenty of evidence of what we might call a ‘liability explosion[].’”\footnote{189} The explosion of tort liability is traceable both to the adoption of strict liability in tort and the end of types of status immunities (such as husband-wife and parent-child). Civil liability expanded in the 1960s; that expansion accelerated during the 1970s and 1980s.\footnote{190}

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

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

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

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

\footnote{189. Friedman, supra note 187, at 176.

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


\footnote{193. See JEFFERSON DECKER, THE OTHER RIGHTS REVOLUTION: CONSERVATIVE LAWYERS AND THE REMAKING OF THE AMERICAN GOVERNMENT 8 (2016) (asserting conservative public interest groups were created to fight back against liberal public interest groups that challenged the government’s authority); STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT 62 (2008) (discussing the need for conservative public interest groups to expand in the 1970s to work in the new legal regime).}
individual rights claims, though different types of rights claims. Both liberal and conservative public interest law firms routinely used litigation as a tool for social and political reform. Many of these nonprofit entities prospered, and their work expanded to policy making outside of the courthouse, including legislative policy proposals.194

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

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


195. Id. at 1256–58.

196. Id. at 1258–59.

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


199. Id. at 295 fig.2.


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

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

²⁰³. See id. at 1 (“The United States Sentencing Commission received information on 71,184 federal criminal cases in which the offender was sentenced in fiscal year 2015.” (footnote omitted)).
²⁰⁴. See McCoy v. Louisiana, 138 S. Ct. 1500, 1512 (2018) (holding the defendant had a constitutional right to assert an absence of guilt even in the face of overwhelming evidence against him when his counsel tactically admitted his guilt in an attempt to avoid the death penalty).
²⁰⁶. See Just the Facts: U.S. Courts of Appeals, U.S. CTS. (Dec. 20, 2016) http://www.uscourts.gov/news/2016/12/20/just-facts-us-courts-appeals [https://perma.cc/5KS3-V57B ] (noting in Table 2 that the reversal rate by courts of appeals from 2011–2015 was between 5.8%–6.9% in criminal cases and 10.4%–14.2% in private civil cases).
A zealous civil defense lawyer did not have to make a frivolous argument to make it more difficult for a plaintiff to obtain a monetary settlement or judgment. The lawyer simply made it more costly for the plaintiff to recover through extensive, and then more extensive, discovery. A primary defense strategy of tobacco companies in personal injury claims was to make litigation as costly as possible. For a long time that approach successfully shielded them from liability. That template has been followed by many. A recent example is the invasion of privacy suit brought by Terry Bollea (Hulk Hogan) against Gawker Media. It appears part of Gawker’s litigation goal was to force Bollea to spend until he exhausted all of his funds. The contentiousness of the discovery process required the Florida state trial court to use a special magistrate to assess evidentiary claims, on whom “[n]early a million dollars” were spent. In Conspiracy, Ryan Holiday notes the “[l]egal filings alone amounted to some 25,000 pages[,]” including “hundreds of motions and responses and motions in response to responses to motions.” Holiday further explains the parties argued at “at least fifty in-person hearings” before trial. Although no final accounting is given, it appears that Peter Thiel, who secretly financed Bollea’s case from the beginning, may have spent more than $10 million.

Lawyers for plaintiffs can give as well as they get in discovery, as happened in Bollea v. Gawker. However, the financial incentive to delay by extending discovery is generally with defense lawyers, who ordinarily bill by the hour, and defendants, who may wish to delay any payment. Plaintiffs and their lawyers have a contrary incentive. The disparities in financing led to innovations in how cases were managed by plaintiffs’ lawyers. Two early
examples were asbestos\textsuperscript{217} and tobacco litigation,\textsuperscript{218} in which plaintiffs’ lawyers joined to share information and costs.\textsuperscript{219} Soon plaintiffs’ personal injury lawyers also joined together to file class action lawsuits.\textsuperscript{220} More recently, several litigation-finance companies have been created, which finance lawsuits in exchange for a percentage of any future award.\textsuperscript{221}

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

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

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

\textsuperscript{219.} Id.

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


\textsuperscript{222.} See Michael S. Ariens, \textit{Lone Star Law: A Legal History of Texas} 274 (2011) (questioning whether the Texas Supreme court was corrupt based on the astronomical amount of money plaintiff lawyer Joe Jamail earned).


\textsuperscript{224.} \textit{See generally} Lester Brickman, \textit{Lawyer Barons: What Their Contingency Fees Really Cost America} 35–36 (2011) (considering the potential for contingency fees to lend to extremely high hourly rates and asserting that the collection of such enormous fees implicates a public interest). \textit{See, e.g.,} Dillon & Cannon, \textit{supra} note 61, at 2–3 (discussing how plaintiff securities litigation lawyer William “Bill” Lerach and the firm in which he was a partner won damages totaling $45 billion, receiving a fee of up to 30% of the amount).
good living, but rarely became wealthy in the practice of law.225

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

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

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


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


231. *See* Ariens, *supra* note 9, at 580 (discussing the traditional aspects of lawyer professionalism).
had led to a greater interest among lawyers to say “yes” to their clients.232 One perceived example of this desire was the rise of Rambo-style lawyering in litigation.233 This was the type of overzealous advocacy on behalf of clients that many lawyers (and some of the public) decried.

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

C. The Bureaucratization of Legal Ethics

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

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

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

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

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

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

237. See ARIZ. R. SUP. CT. 31 (stating lawyers “will conduct [themselves] in accordance with the . . . Creed of Professionalism when dealing with . . . clients[,] opposing parties, their counsel, tribunals[,] and the general public”); In re Code for resolving Professionalism Complaints, 116 So. 3d 280, 282 (Fla. 2013) (ordering the adoption of the Code for Resolving Professionalism Complaints, which is the basis for imposing discipline for violations); In re White, 707 S.E.2d 411, 416 (S.C. 2011) (upholding a lawyer’s definite ninety-day suspension from practice for “blatant incivility and lack of decorum”).
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topsoil. The slings and arrows suffered by the Code were mercifully ended
when the ABA created a new Special Commission on Evaluation of Ethical
Standards in 1977.238

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

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

238. Ariens, supra note 38, at 689–90.
239. See Ariens, supra note 39, at 77 (emphasizing the change in the legal profession and clash
with the goals of the Kutak Commission).
240. Id.
241. See Ariens, supra note 38, at 706 (discussing the extreme negative reactions to the Kutak
Commission’s “Working Draft”).
242. Id. n.117 (“[T]he Commission’s limited release demonstrated a lack of transparency.”).
243. Id. at 712.
244. See id. at 706–09 (“[T]here were particular concern[s] with the Commission’s decisions
concerning the limits of the lawyer’s duty of confidentiality.”).
245. Id. at 709–18.
246. Id. at 710–14, 718; Annual Report of the Commission on Evaluation of Professional Standards,
248. Id. at 739.
Delegates, reflecting the broader legal profession, reached opposing conclusions about what it meant to be an American lawyer. For example, what were the limits on advising a client who might then engage in fraudulent or criminal action? The Kutak Commission believed a lawyer was constrained if the lawyer “reasonably should know” the conduct was fraudulent or criminal. The House allowed the lawyer to counsel a client, or assist a client in conduct, provided the lawyer did not “know” of the unlawful nature of the client’s activities. The fracture within the profession was shown by the narrowness of the vote, 158 to 144.

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

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

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

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

251. Id. at 293.


253. Id.

254. Id. at 693.


257. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (AM. LAW INST. 2000).
another effort regarding rules of ethics: the Ethics 2000 Commission.\textsuperscript{258}

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

And again, there was the Enron scandal. Within two years, the ABA House of Delegates had agreed that lawyers may disclose confidences to prevent future frauds and rectify certain past frauds.\textsuperscript{264} The division seen in 1983 remained in existence in 2003: the vote in favor of the amendments to Model Rule 1.6 was by the narrow margin of 218–201.\textsuperscript{265} By doing so, the ABA successfully derailed a federal effort to regulate the conduct of lawyers.\textsuperscript{266} But it did so by acceding ever so slightly to the demands of those who perceived the rules of ethics as made for the interests of lawyers and their clients—not the public. ABA members had not covered themselves in glory and seemed willing to limit their affection for their clients only to the extent it was necessary to meet the public outcry. They retained the idea that ethics was merely about what one could not do.

The ABA recently engaged in another ethics effort called Ethics

\begin{itemize}
  \item \textsuperscript{259} Proceedings for the Annual Meeting of the House of Delegates, 126 A.B.A. ANN. REP. 1, 7 (2001).
  \item \textsuperscript{260} Ariens, supra note 38, at 740.
  \item \textsuperscript{261} Proceedings for the Annual Meeting of the House of Delegates, supra note 259, at 34–35. Relatedly, lawyers were not permitted to disclose a past fraud committed by a client who did so in part using, unwittingly, the lawyer’s services. Ariens, supra note 38, at 740.
  \item \textsuperscript{262} Proceedings for the Annual Meeting of the House of Delegates, supra note 259, at 35–37.
  \item \textsuperscript{263} See id. (adopting amendment to strike Rule 1.6(b)(2) from Ethics 2000 proposals due to its contradiction with core values of the legal profession).
  \item \textsuperscript{264} See Proceedings of the 2003 Annual Meeting of the ABA House of Delegates, 128 A.B.A. ANN. REP. 1, 14–18 (2003) (highlighting the House’s prior refusal to adopt client fraud disclosure rules).
  \item \textsuperscript{265} Compare Proceedings of the 1983 Midyear Meeting of the House of Delegates, supra note 249, at 298 (describing the narrow vote of 207 to 129 to approve the proposed amendments to Model Rule 1.6(b)), with Proceedings of the 2003 Annual Meeting of the House of Delegates, supra note 264, at 18–19 (noting the close vote to amend Rule 1.6 in 2003).
  \item \textsuperscript{266} Ariens, supra note 166, at 275, 278–81.
\end{itemize}
The Ethics 20/20 Commission, created in the wake of the Great Recession, offered the same justifications as past ABA Commissions for its creation: a transformed legal profession. Though the pace of technological change was given as one reason for the creation of the Ethics 2000 Commission, the Ethics 20/20 Commission claimed such change was taking place even more rapidly. The need for amendments to the ethical rules guiding lawyers was necessary because “[t]echnology and globalization [had] transformed the practice of law in ways the profession could not anticipate in 2002.”

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

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

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

268. Id.
269. Id. at 2.
270. See MODEL RULES OF PROF’L CONDUCT R. 1.6(c) cmt. 19 (AM. BAR ASS’N 2018) (“[T]he lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures . . . .”).
271. ABA COMM’N ON ETHICS 20/20, supra note 267, at 13.
the public interest.”272 All good things, and the Commission well knew that rules of ethics would have little if any impact on those developments within the profession. In its second overall recommendation, the Commission urged the bar to “abide by higher standards of conduct than the minimum required by the Code of Professional Responsibility and the Model Rules of Professional Conduct.”273 That ideal remains tantalizingly just out of reach.

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

IV. CONCLUSION

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

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

273. Id.
274. Patrick R. Krill et al., The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys, 10 J. ADDICTION MED. 46, 46 (2016).
275. Id.
276. Id.
stress, and an abundance of stress may lead to anxiety. One way to alleviate anxiety is through self-medication and abuse of harmful substances.

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

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