The Journal of the Legal Profession

Volume 35, 2010
The University of Alabama School of Law

CAREER SERVICES

The University of Alabama School of Law maintains a Career Services Office to assist employers interested in hiring the qualified students and graduates of the School of Law. The Career Services Office is available to assist law firms, judges, businesses, individual practitioners, government agencies, and other prospective employers in hiring for permanent, part-time, summer, or clerkship positions.

Employers are encouraged to contact the Career Services Office and take advantage of the efficient means of interviewing students at the School of Law. The Career Services Office will also collect and forward resumes for the consideration of employers unable to visit the School of Law.

Information concerning these and other services is available by calling or writing:

Tom Ksobiech
Assistant Dean for Career Services
The University of Alabama School of Law
Box 870382
Tuscaloosa, Alabama 35487-0382
Telephone: (205) 348-6479
Facsimile: (205) 348-0738

The Journal of the Legal Profession

VOLUME 35, 2010

TABLE OF CONTENTS

The University of Alabama School of Law

Administrative Officers

Malcolm Portera, B.A., M.A., Ph.D.; Chancellor, The University of Alabama System.
Robert E. Witt, B.S., M.B.A., Ph.D.; President, The University of Alabama.
Judith L. Bonner, B.S., M.S., Ph.D.; Provost, The University of Alabama.
Kenneth C. Randall, B.A., J.D., LL.M., LL.M., J.S.D.; Dean; Thomas E. McMillan Professor of Law; Special Counsel to the President.
William S. Brewbaker III, B.A., J.D., LL.M.; Associate Dean for Special Programs; William Alfred Rose Professor of Law.
J. Noah Funderburg, B.A., J.D.; Associate Dean for Administration; Acting Director of CLE; Professor of Clinical Legal Instruction.
Anne Sikes Hornsby, B.A., M.B.A., J.D.; Associate Dean for Clinical Programs; Assistant Professor of Clinical Legal Instruction.
Jenelle Mims Marsh, B.S., J.D.; Associate Dean for Students/Academic Services.
Claude R. Arrington, B.A., J.D.; Associate Dean for Admissions.
Brooke Jones Bacak, B.A., J.D.; Assistant Dean for Advancement.
Thomas C. Ksobiech, B.A., J.D.; Assistant Dean for Career Services.
Vandana Nakka Peterson, B.A., J.D.; Assistant Dean for Public Interest Law.
Daniel C. Powell, B.A., M.A., J.D.; Assistant Dean for Graduate Law Programs.

Faculty

The date following the title indicates the year of first appointment to the Faculty of Law.

William L. Andreen, B.A. (College of Wooster), J.D. (Columbia); Edgar L. Clarkson Professor of Law, 1983.

Carol Rice Andrews, B.S., J.D. (Illinois); Douglas Arant Professor of Law, 1995.

Talitha Powers Bailey, B.A. (UAB), J.D. (Cumberland); Director, Capital Defense Law Clinic; Staff Attorney, Community Development Law Clinic, 2007.

Kimberly Keefer Boone, B.A. (Huntingdon College), J.D. (Alabama); Director of Legal Writing, 2000.

William S. Brewbaker III, B.A. (Vanderbilt), J.D. (Virginia), LL.M. (Duke); William Alfred Rose Professor of Law, Associate Dean for Special Programs, 1993.

James D. Bryce, B.A., J.D., LL.M. (New York University); Joseph D. Peeler Professor of Law, 1978.

Montre D. Carodine, B.A. (Louisiana Tech), J.D. (Tulane); Associate Professor of Law, 2007.

Joseph A Colquitt, B.S., J.D. (Alabama), M.J.S. (Nevada-Reno); Jere L. Beasley Professor of Law, 1991.

John Shahar Dillbary, B.A., LL.B. (Bar Ilan University), LL.M., J.S.D. (Chicago); Associate Professor of Law, 2007.

Alan L. Durham, B.A. (Pomona College), J.D. (Berkeley); Judge Robert S. Vance Professor of Law, 1998.

Heather Elliott, B.A. (Duke), M.A (Yale), J.D. (Berkeley); Associate Professor of Law, 2008.

Steven C. Emens, B.S. (North Alabama), M.B.A., J.D. (Alabama); Professor of Clinical Legal Instruction, 1980.

J. Scott England, B.A. (Truman State), J.D. (Northwestern); Legal Writing Lecturer, 2003.

Bryan Keith Fair, B.A. (Duke), J.D. (UCLA); Thomas E. Skinner Professor of Law, 1991.

Tony Allan Freyer, A.B. (San Diego State University), M.A, Ph.D. (Indiana University); University Research Professor of History and Law, 1984.

J. Noah Funderburg, B.A. (Auburn), J.D. (Alabama); Associate Dean for Administration; Acting Director of CLE; Professor of Clinical Legal Instruction, 1982.

Charles W. Gamble, B.S. (Jacksonville State), J.D. (Alabama), LL.M. (Harvard); Henry Upson Sims Professor Emeritus of Law, 1982.

Susan Pace Hamill, B.A. (Emory), J.D. (Tulane), LL.M. (New York University), M.T.S. (Samford); Professor of Law, 1994.

William H. Henning, B.A. (Tennessee-Chattanooga), J.D. (Tennessee), LL.M. (Illinois); Distinguished Professor of Law, 2003.

Steven H. Hobbs, B.A. (Harvard), J.D. (Pennsylvania); Tom Bevill Chairholder of Law, 1997.

Timothy Hoff, A.B., J.D. (Tulane), LL.M. (Harvard); Gordon Rosen Professor Emeritus of Law, 1970.

Jerome A. Hoffman, A.B., J.D. (Nebraska); Elton B. Stephens Professor Emeritus of Law, 1971.

Wythe Holt, B.A. (Amherst), J.D., Ph.D. (Virginia); University Research Professor Emeritus of Law, 1966.

Harry Hopkins, B.A. (Southern Mississippi), LL.B. (Tulane); Distinguished Visiting Professor of Law, 2001.

Anne Sikes Hornsby, B.A., M.B.A., J.D. (Alabama); Associate Dean for Clinical Programs; Assistant Professor of Clinical Legal Instruction, 2006.

Paul Horwitz, B.A. (McGill University), M.S., LL.M. (Columbia), LL.B. (University of Toronto); Gordon Rosen Professor of Law, 2007.

Thomas L. Jones, B.S., J.D. (Kentucky), LL.M. (Michigan); Alumni (Class of '36) Professor Emeritus of Law, 1962.

Daniel Joyner, B.A. (Brigham Young University), M.A. (Georgia), J.D. (Duke), Ph.D. (Warwick); Associate Professor of Law, 2007.

Ronald J. Krotoszynski, Jr., B.A., M.A. (Emory), J.D., LL.M. (Duke); John S. Stone Chairholder of Law; Professor of Law; Director of Faculty Research, 2008.

Mary M. Ksobiech, B.A. (Truman State), J.D. (Iowa); Legal Writing Lecturer, 2006.

Grace Lee, B.A. (Williams College), M.A. (Chicago), J.D. (Northwestern); Assistant Professor of Law, 2008.

Hugh Lee, B.A. (Davidson College), J.D. (Florida State); Director, Elder Law Clinic, 1996.

James B. Leonard, B.A., M.S., J.D. (North Carolina at Chapel Hill); Associate Dean for Legal Information Services; James M. Kidd, Sr. Professor Emeritus of Law, 1997.

Gene A. Marsh, B.S., M.S. (Ohio State), J.D. (Washington and Lee); James M. Kidd, Sr., Professor Emeritus of Law, 1991.

Martha I. Morgan, B.S. (Alabama), J.D. (George Washington); Robert S. Vance Professor Emerita of Law, 1979.

Andrew P. Morriss, A.B. (Princeton), J.D., M.Pub.Aff. (Texas at Austin), Ph.D. (MIT); D. Paul Jones, Jr. & Charlene Angelich Jones Chairholder of Law, 2010.

Michael S. Pardo, B.A. (Illinois Wesleyan), J.D. (Northwestern); Henry Upson Sims Professor of Law, 2005.

David Patton, B.A., J.D. (Virginia); Director of the Criminal Defense Clinic; Assistant Professor of Law, 2008.

Pamela Bucy Pierson, B.A. (Austin College), J.D. (Washington University); Bainbridge-Mims Professor of Law, 1987.

Daniel C. Powell, B.A. (Vanderbilt), M.A. (Virginia), J.D. (Alabama); Assistant Dean for Graduate Law Programs, 2000.

Kenneth C. Randall, B.A. (Adelphi), J.D. (Hofstra), LL.M. (Yale), LL.M., J.S.D. (Columbia); Dean; Thomas E. McMillan Professor of Law; Special Counsel to the President, 1985.

Susan Lyons Randall, B.A. (North Carolina at Chapel Hill), J.D. (Columbia); Ira Drayton Pruitt, Sr. Professor of Law, 1992.

Meredith Render, B.A. (Boston College), J.D. (Georgetown); Assistant Professor of Law, 2007.

Kenneth M. Rosen, B.S. (Cornell), J.D. (Yale), LL.M. (University of London); Associate Professor of Law, 2003.

Norman J. Singer, B.S. (Pennsylvania), J.D. (Boston University), S.J.D. (Harvard); Charles O. Stokes Professor of Law and Professor of Anthropology, 1971.

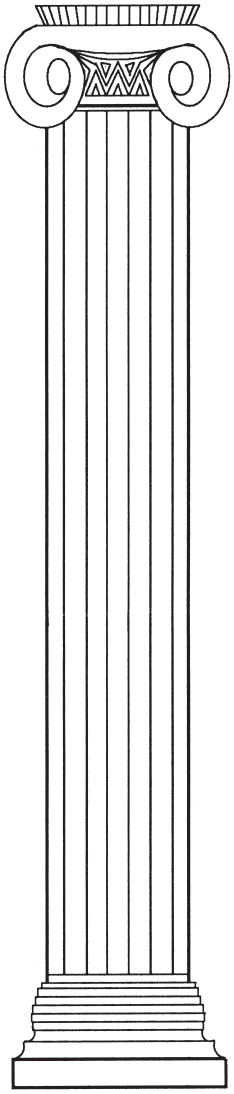
Norman P. Stein, B.A. (New College), J.D. (Duke); Douglas Arant Professor of Law, 1984.

Gary E. Sullivan, B.A. (Huntingdon College), M.B.A., J.D. (Alabama); Legal Writing Lecturer, 2010.

Fredrick E. Vars, A.B. (Princeton), J.D. (Yale); Assistant Professor of Law, 2008.

The Journal of the Legal Profession

The University of Alabama School of Law



Volume 35 2010

THE JOURNAL OF THE LEGAL PROFESSION

Volume 35 Fall 2010 Number 1

WHAT JUSTICE BRANDEIS TAUGHT US ABOUT CONFLICTS OF INTEREST

Katherine A. Helm[1]

INTRODUCTION

Louis Dembitz Brandeis, as a Justice of the Supreme Court, is a god-like, mythic figure in the pantheon of American jurisprudence. As such a figure, though, he was not born of other gods without the flaws or perceived flaws of humankind. As in the case of many Justices, Brandeis was first a practicing attorney; a professional who confronted the daily nuances of conflict that inhere in one's legal practice. Brandeis's legacy as a visionary legal mind rests not only on his celebrated judicial works but also his reputed skill in both his corporate law and litigation practice. He was a real world lawyer who managed practical legal and business affairs on a day-to-day basis for several decades before becoming a jurist. This article examines the ethical bounds of his practice regarding client conflicts. More broadly, it reflects upon how the world looks at the role of lawyers, and how true legal statesmen can rise above the billable hour business for the public good, as did Louis Brandeis.

Throughout his life, Brandeis was a devoted American who took his civic duties seriously and who chose to use his status in, and his knowledge of, the law to promote social change. Brandeis had no theoretical perch from which he spoke; his words were powerful and commanded respect because of their pragmatic grounding. As such, he labored with

1. Katherine A. Helm, J.D., Ph.D., is an associate at Simpson Thacher & Bartlett in New York. She is a former law clerk to a U.S. Court of Appeals judge and a U.S. District Court judge. She is also a columnist for Law.com, where she writes on a variety of legal and ethics topics.
Inspiration for this article, and most of the historical accounting on Brandeis's ethics, came from the following four sources: A.L. TODD, JUSTICE ON TRIAL: THE CASE OF LOUIS D. BRANDEIS (1964); MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE (2009); John P. Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683 (1965); and Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 YALE L.J. 1445 (1996).

the overlay of occasionally having publicly promoted policy and governance not always symmetrical with his clients' causes and the litigative stances he took on their behalf. Brandeis was, in many ways, a paradox: a statesman who guided legal and legislative reform in the public interest, while at the same time advocating for independence from the state in matters where the vindication of his clients' individual rights and interests were concerned.

The trajectory of Brandeis's life as a lawyer made him an uncommon force for change, but still he was a lawyer who both the business elite and the middle class wanted for corporate America at a time of great social unrest. The turn of the 20th century brought with it the second American industrial revolution and the rise of the Progressive Era, when people sought out government regulation of business practices to replace the laissez-faire mantra of the Gilded Age.[2] Brandeis embraced the reformist energies of the time and lauded the rise of industrial capitalism and protective legislation for the good of the people. For his own part, Brandeis progressed naturally from being a brilliant corporate litigator into his famed role as "The People's Attorney" as he gained notoriety in advocating social, political and legal upbuilding to fortify individual freedom and progress. To his profession he gave his best talents, being an active and aggressive practitioner, a tireless legal scholar and ultimately a Supreme Court jurist. He was a man ever true to himself and, critically here, always an independent contractor, never bowing as a slave to either a cause or a client. He led by example and was a provocative figure indeed.

BRANDEIS'S SUPREME COURT NOMINATION

On January 28, 1916, President Woodrow Wilson nominated Brandeis to the nation's highest court. It has been said that few episodes in American history shed as much light in their era as that nomination.[3] The unanimity of support for Brandeis by independent progressives was matched only by the unanimity with which financial capitalists and conservative non-reformists opposed the nomination. Both sides recognized the struggle that was upon them, and they viewed it as nothing less than a battle for the "soul of the Supreme Court."[4] Thus, when it came to his confirmation by the United States Senate, Louis Brandeis faced an unparalleled uproar from his opponents in the legislature. This was hardly surprising, given his intertwining role as an advocate for and against both industrial expansion, in the form of "Big Business," and political constituents with deep

2. For a relevant synopsis of this turbulent age, *see* JACKSON LEARS, REBIRTH OF A NATION: THE MAKING OF MODERN AMERICA 1877-1920, at 1-12 (2009).

3. *See* UROFSKY, *supra* note 1, at 437.

4. *Id.* at 438.

pockets. Indeed, Brandeis's fiercely independent and freewheeling nature commanded nothing less.

The political opposition did not primarily aim its arrows at the socio-legal (and potentially partisan) agenda that Brandeis might choose to advocate once on the Court, as has become the standard practice with contentious judicial nominations since the days of Robert Bork.[5] Rather, in Brandeis's case, opposition leaders from both sides of the political aisle focused on problematic ethical quandaries that confronted Brandeis during the course of his legal career, both in the clients and causes on whose behalf he advocated.

By all accounts, the opposition to President Wilson's nomination of Brandeis took on a life of its own, even by modern-day measures. At the time of his nomination, it was not the practice of the Senate or its committees to hear testimony from Supreme Court nominees.[6] For Brandeis, a subcommittee of the Senate Judiciary Committee chose to conduct its own investigations, often in executive session and with scant record of their deliberations. The committee's Brandeis Hearings, as they came to be called, began on February 9, 1916 and went on for an unprecedented four long months. During that time, numerous witnesses were called for and against the nominee, but Brandeis himself was not permitted to testify at or even attend the hearings before the committee that was investigating his fitness for appointment to the Supreme Court. At least on some level, Brandeis was still able to keep up with and "influence" the committee's deliberations, by sending telephone and telegraph messages to the witnesses appearing on his behalf "in an effort to rebut the staunch opposition to his nomination."[7] It was not until June 1, 1916 that Brandeis was finally confirmed by the Senate, in a 47 to 22 vote, pushed through by Democrats who eventually voted along party lines.

Some might argue that the Senate's investigating committee scrutinized Brandeis so severely by not because the issues raised against him

---

5. In the candid words of Sen. Ted Kaufman (D-Del.), member of the Senate Judiciary Committee, during a June 26, 2009 interview, "[t]he big difference was, after [Robert] Bork, the process became like the Super Bowl." *See* David Ingram, *Inside the Supreme Court Confirmation Process: Q&A With Sen. Ted Kaufman*, NAT. LAW JOURNAL, June 29, 2009, *available at* http://www.law.com/jsp/article.jsp?id=1202431824633. Further, Sen. Orrin Hatch (R-Utah) stated that "[j]udicial appointments have become increasingly contentious." *See The Nomination of Judge Sonia Sotomayor to be an Associate Justice of the Supreme Court of the United States: Hearing before the S. Comm. on the* Judiciary, 111th Cong. (2009) (statement of Sen. Orrin Hatch, Member, S. comm. On the Judiciary), http://judiciary.senate.gov/hearings/testimony.cfm?id=3959&wit_id=51. Brandeis's confirmation hearings may represent the one exception to this otherwise generally true statement.

6. *See* History of the Senate Committee on the Judiciary, *available at* http://judiciary.senate.gov/about/history/index.cfm.

7. *Id.* Brandeis also sent long letters to his law partner Edward McClennen, who appeared before the Committee as the "field manager" of the confirmation process, explaining his actions in particular matters. *See generally* UROFSKY, *supra* note 1, at 443-44.

were meritorious, but rather because these issues were mere smokescreens fomented by the anti-Semitism of the day. The nomination of the first Jew to the Supreme Court no doubt innerved prejudices in some. Others might opine that the senatorial displeasure of Brandeis was more the product of powerful political ties and undue friendships with the interests of Wall Street, which were by then generally anti-Brandeis. Notably, though, scholars generally agree that President Woodrow Wilson nominated Brandeis not because of his religion or politics but because of Wilson's deep respect for Brandeis's intellect and independence of thought. President Wilson was a staunch supporter of judicial independence and once wrote the government "keeps its promises, or does not keep them, in its courts. For the individual, therefore, who stands at the centre of every definition of liberty, the struggle for constitutional government is a struggle for good laws, indeed, but also for intelligent, independent, and impartial courts."[8]

Nonetheless, and irrespective of whether a religious or socio-economic bias caused the Senate's "strict scrutiny" (to use the language of today) into Brandeis's past, the raw fact is that his conduct as an attorney did indeed raise nettlesome ethical questions deserving of analysis. These questions are considered not in an attempt to unfairly and ahistorically judge Brandeis, but rather to learn from this great man through introspection and debate. Brandeis himself would likely have approved of such an effort, given his penchant and lifelong spirit for provoking thought and promoting dialogue. In reflecting upon Brandeis's views on free speech, which ultimately proved seminal in advancing First Amendment jurisprudence, a leading Brandeis scholar opined that Brandeis's goal was always to spark debate. Brandeis approved of open discourse to make people with radical ideas challenge the mainstream and to make people think about why they held dear the values they did and to not be complacent about them.[9] The following represents an attempt to do just that.

To soften the perceived motives of his attackers and focus on the "lessons learned," this article sets aside the issue of whether the scrutiny of Brandeis was politically or religiously motivated and considers solely whether his legal conduct addressed during the hearings would be objectionable through the prism of today's ethical mores and professional codes of conduct. Did Brandeis behave ethically as a practicing attorney with ongoing duties to his clients? Would his behavior be challenged as being professionally irresponsible or unethical by today's standards? It is not the intent of the author to retrospectively imbue the lionized Justice with any maladroitness. Instead, this article seeks to consider how we as lawyers

8. WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 17 (1911).
9. UROFSKY, *supra* note 1, at 637-38.

(including those of us who do not aspire to a judicial appointment) can learn from and modify our conduct as legal advocates when faced with the conflicts that faced Brandeis. The issue of questioning the ethical bounds of our behavior is a perennial one for lawyers, as a self-governing bar that both creates and enforces our own code of ethics for and against ourselves as a whole. Stated more eloquently, in the words of Scripture, "[f]or in the same way you judge others, you will be judged, and with the measure you use, it will be measured to you."[10] The piece proceeds in this vein and with the goal of learning from Justice Louis Brandeis's experiences, both good and bad.

There were several attacks made about Brandeis's legal ethics in the course of his legal practice during his confirmation hearings. This article focuses on the one that consumed the most time and focus of the Senate committee: the issue of former clients and what we now term "situational" conflicts of interest. This issue involves potential breaches of client confidence and, as such, implicates myriad quintessential ethical considerations.

THE TALK OF THE TOWN: THE BRANDEIS HEARINGS

The issue of client conflicts dominated Brandeis's confirmation hearings throughout the spring of 1916. Prior to his nomination by President Wilson, Brandeis had been a named founder of a New England law partnership with his law school classmate, Samuel Warren, for thirty-seven years. Brandeis successfully positioned himself as an expert legal strategist on commercial matters at a time of great turbulence for American business. When the "great merger wave" created megacorporations in industries ranging from steel to petroleum to tobacco, Brandeis remained circumspect about the nationalistic fervor for bigness.[11] In the midst of cataclysmic social change, he ventured to reconnoiter the emerging business and legal landscape for himself, by keeping apace of complex industry developments and by publicly expatiating on the ways in which the law needed to adapt to keep up. As a result, corporate clients valued Brandeis's precociously judicious spirit and relied on him for sage business advice as well as legal counsel.

Brandeis had an innate sense of enterprise that served him well in practice, yet was considered distasteful to some politically influential Boston Brahmins during that tumultuous period of reform. Perhaps because of the inescapable plaiting of public and private issues that occurred as Brandeis advanced contrasting social policy and client positions in public

10. *Matthew* 7:2.

11. *See* JACK BEATTY, AGE OF BETRAYAL: THE TRIUMPH OF MONEY IN AMERICA 1865-1900, at 22-24 (2008).

fora, he faced fierce accusations in his confirmation hearings that he had violated legal ethics in his law practice. Of all the ethical fitness issues the investigating committee considered, the two largest debates focused on former client conflicts of interest; the one that consumed the most committee floor time was the matter of United Shoe Machinery Company—one of Brandeis's largest former clients.

The United Shoe Machinery Company ("United") was formed at the end of the 19th century by a consolidation of several smaller companies. One of the groups that became a large shareholder in United was Brandeis's client. Brandeis subsequently became a director of United and also served United as legal counsel. The fact that Brandeis had to buy some shares of common stock in United to become a director was the first, and perhaps only, time Brandeis violated his own cardinal rule not to invest in a client. One Brandeis historian viewed this action itself as the single largest lapse of judgment on Brandeis's part that incited the most acrimony at the hearings; it was the proverbial yanking of one piece of string that began the whole ball's unraveling.[12] On this view, everything that Brandeis did subsequently was done with the personal knowledge he gained about United (and its putatively monopolistic business practices) from having sat on the company's board. The grave implications of this fact will soon become clear.

United held several patents on shoe-manufacturing equipment. Prior to the enactment of the Sherman Anti-Trust Act, which Congress passed in 1890 "to protect trade and commerce against unlawful restraints and monopolies,"[13] United and its predecessors had been leasing their patented shoe machinery for use by shoe manufacturers. The lease agreements contained "tying" clauses, which required a lessee to use the patented machinery only in conjunction with other patented machinery. This gave the lessor considerable market advantage and control.

At first blush, United's practice of precluding its customers (the shoe manufacturers) from using third-party machinery—or put another way, United's practice of forcing shoe manufacturers to use only United products, if they used any—seems plainly anticompetitive. However, it is important to consider the prevailing law at the time. In 1895, the Supreme Court refused to apply the Sherman Act to the American Sugar Refining Company, which controlled a majority of the manufactories of refined sugar in the United States and had a "practical monopoly" of the business,

---

12. *See* UROFSKY, *supra* note 1, at 310, 451 (noting that Brandeis's allies "understood from the beginning" that the United matter would be the most damaging of all the ethical charges leveled against Brandeis in his confirmation hearings); *accord* TODD, *supra* note 1, at 151 (noting that Brandeis's camp recognized the United matter "as the stickiest part of the combined campaign to defeat the nomination").

13. Sherman Anti-Trust Act, ch. 647, 26 Stat. 209, 209 (1890) (current version at 15 U.S.C. § 12(a) (2002)).

on the grounds that Congress had the ability to regulate commerce but not manufacturing.[14] In fact, the conservative Court opined that Congress's power to regulate commerce did not extend to the regulation of manufacturing in a host of cases throughout the late 1800s and early 1900s. It would be years before the Court shifted and, in the dawning of the New Deal era, recognized that the effects of many kinds of intrastate activity upon interstate commerce made them a proper subject of federal regulation. The Commerce Clause was, in the early 1900s, a mere shadow of its current self.

Against that backdrop, United operated its lease system relatively safely under the Supreme Court's narrow reading of the antitrust laws at the time Brandeis served as its counsel. The issue was not without debate in the legislatures, however. In 1906, a bill was introduced in the Massachusetts Legislature to do what the Sherman Act was not accomplishing and to restrict tying clauses. At United's request, Brandeis reluctantly agreed to appear before the legislature and seek the defeat of the bill that would have outlawed the tying clauses in United's contracts with shoe manufacturers.[15] In his appearance, Brandeis identified himself as both a director and shareholder of United. He also billed the client and received payment as counsel for his appearance and for submitting a brief on the matter.

At the time of his testimony, Brandeis was also counsel to a number of shoe manufacturers. The conflict between his advocacy for United and his representation of the other shoe companies—all licensees of United—had been "waived." Indeed, the shoe manufacturers had consented to the dual representation as part of their agreement with United that they would not support the legislation in exchange for receiving a favorable rate on United's products should the contracts remain enforceable. Setting aside the voluntary nature and reasonableness of that waiver, Brandeis's decision to appear before the Massachusetts legislature in defense of practices that placed significant restraints on both the manufacturers and competing shoe machineries' right to do business was both legally and ethically debatable.

This was not the issue, however, that got Brandeis into trouble with the Senate's investigating committee. After Brandeis appeared before the Massachusetts legislature for United, and helped prevent the state legislation from becoming law, he continued to monitor the developing jurisprudence and became doubtful about the legality of United's tying arrangements after reading a case that cogently laid out the grounds by which the

14. Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 238 (1899); *see* United States v. E. C. Knight Co., 156 U.S. 1 (1895).

15. For a discussion and first-hand sources relating to the United matter, see ALPHEUS THOMAS MASON, BRANDEIS: A FREE MAN'S LIFE 215-224 (1946).

enforcement of patents could constitute an unlawful restraint of trade.[16] Brandeis called this opinion to the attention of United counsel, expounded his concern on the issue, and later that same year tendered his resignation, first as a director and then as counsel for United. Notwithstanding Brandeis's resignation and his expressed opinion, United and its successor corporation continued to employ various tying arrangements in its business.[17]

Meanwhile, in 1907, shortly after Brandeis had ceased working for United, the Massachusetts Legislature enacted a law making such leases and tying clauses illegal. Brandeis had no role in that legislation and for some years thereafter he refused—on ethical grounds—requests by his remaining shoe manufacturer clients to assist them in opposing United's increasingly sophisticated leasing practices. Indeed, in 1908, Brandeis was quoted as saying he still believed that the operations of United were "on the whole beneficial to the trade," while alluding that his reservations with the company's practices had to do with their effect in the future.[18]

In 1910, after the Supreme Court had begun to embrace a broader reading of the Sherman Act, Brandeis advised another shoe machinery manufacturer that tying clauses were illegal. Brandeis's opinion was based on the 1909 Supreme Court holding that a combination of wallpaper companies had violated the Sherman Act by forcing exclusive patronage to the conglomerate and by raising wholesaler and consumer prices, which was detrimental to the public interest.[19] Small wonder this reasoning spoke to Brandeis—ever the statesman—who felt a strong duty to advocate for whatever he believed to be in the public's best interest.

The following year, Brandeis undertook the representation of the Shoe Manufacturers' Alliance, a consortium of shoe manufacturers opposed to United's market strategies and control. The federal government then commenced an antitrust prosecution of United, in which Brandeis had no direct role. However, between 1911 and 1913, at the request of his client Shoe Manufacturers' Alliance, Brandeis testified before several congressional committees and federal agencies in support of legislation that later became the Clayton Act. In his appearances, Brandeis cited United's continued oppressive behavior and coercive market practices as evidence of the need for changes in the antitrust laws.[20] He reasoned that United's practices were hindering the Shoe Manufacturers' Alliance from passing

16. *See* Ind. Mfg. Co. v. J. I. Case Threshing Mach. Co., 148 F. 21 (E.D. Wis. 1906), *rev'd*, 154 F. 365 (7th Cir. 1907).

17. These eventually formed part of the landmark antitrust decision, United States v. United Shoe Mach. Co., 110 F. Supp. 295 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954) (per curiam).

18. *See* UROFSKY, *supra* note 1, at 312.

19. *See* Cont'l Wall Paper Co. v. Louis Voight & Sons Co., 212 U.S. 227 (1909).

20. A colorful historical anecdote illustrates the glacial rate of acceptance of such change by corporate America. In 1912, Andrew Carnegie made the following breezy statement to a congressional committee that was investigating U.S. Steel: "Nobody ever mentioned the Sherman Act to me, that I can remember." *See* BEATTY, *supra* note 11, at 220.

on to the consumer some of the price savings that could be realized once competition was properly restored. That sequence of events—first counseling United to the legality of its practices and then acting for United's competitors in challenging United's practices—is what inspired the harshest attacks on Brandeis's character by Republican senators during his nomination debacle.

The Senate's investigating committee viewed Brandeis's behavior as bedeviled by conflicts. The gravamen of the charge was that Brandeis acted against his former client United, having previously acted for that client in a related matter. The president of United, Sidney Winslow, took the witness stand before the committee for over five hours and virtually crucified Brandeis. Winslow testified that Brandeis helped devise the company's business practices, abandoned his client, and, finally, used his inside knowledge of his former client's business to attack it. He accused Brandeis of "unprofessional conduct and of conduct not becoming an honorable man" and excoriated him for having "attacked as illegal and criminal the very acts and system of business in which he participated, which he assisted to create, and which he advised were legal . . . ." He further accused Brandeis of making false and misleading statements regarding United's business and stated that "[t]he lease system which he has attacked is the same lease system which he previously approved of so heartily . . . ."[21]

Unwilling to disclose confidential client information, Brandeis defended his position in tightly conscribed written statements. Brandeis framed his retort in largely conceptual and ideological terms. No doubt some saw this as equivocating. In his writings put forth by proxy, Brandeis addressed the inherent difficulties of the "independent lawyer" struggling to break free of a former client's coercion. Those doing moral bookkeeping at the Brandeis hearings might well have believed by that point, if not earlier, that Brandeis was speaking out of both sides of his mouth about concepts of free market competition and industrial injustice as it best suited his client du jour.

Later, when the floor became open to witnesses supporting the nominee, some Brandeis advocates tried to spin the situation for the better. Numerous witnesses, including former clients, defended Brandeis's unorthodox litigation practices. They argued that his ability to be flexible and amend his views with changing circumstances was a judicious virtue deserving of approbation, not condemnation, particularly in the context of consideration for a judicial appointment. For example, one witness testified: "If there is one characteristic of Mr. Brandeis'[s] thinking, it is his capacity to see both sides; it is his capacity not only for judicial statement,

21. *See* TODD, *supra* note 1, at 111.

but for judicial thought."[22] Other testimony echoed these sentiments and argued that Brandeis's adaptability of mind would help apply the law to the ever-changing realities of modern industrial democracy.

The unsympathetic objectors at the Brandeis Hearings constructed some fairly tendentious arguments in an attempt to sustain their objections to his appointment. As the *Wall Street Journal* stated, "[e]very technical legal safeguard has been thrown around Brandeis'[s] character at the hearings . . . It is as though he were on trial for some offense and his life or liberty were at stake."[23] Because so many of the criticisms weren't tethered to any enforceable regulation or rule of professional conduct *per se*, they simply took aim at the general unseemliness of Brandeis's behavior. But despite what shrill polemicists were saying about his legal ethics, the truth is that the seismic shift in the law between the time when Brandeis represented United in 1906 and when he opposed United in 1911-1913 would seem to have effectively precluded any actual and direct conflict with a former client. Legitimate questions remained though, about whether the matters on which Brandeis switched sides and views were still substantially related, at least in spirit, so as to mar Brandeis's credibility in acting against United's interest in the context of its Brandeis-advised licensing practices.

If Brandeis was to be reprimanded for providing legal representation on antitrust issues to the Shoe Manufacturers' Alliance, what message were the senators sending him, as a practicing member of the legal profession? Must lawyers refuse to embroil themselves in any representation that could even potentially conflict with an earlier representation, in the broadest terms possible and irrespective of a volte-face change in the law? That hardly seems reasonable. So what is one to do with this set of facts; what can lawyers learn from the United matter, to better understand their ongoing ethical obligations to former clients? This article provides a brief overview of this area of law as it stands today, not to judge Brandeis's legal ethics under modern day scholarship, but rather to facilitate the analysis and takeaway considerations of Brandeis's dilemma for current practitioners.

ETHICAL OBLIGATIONS TO FORMER CLIENTS

As any attorney with his or her own book of business knows, perhaps the most vexing part of law firm practice is the inevitable problem of client conflicts of interest. Whether a lawyer can take on a new client de-

22. *Id.* at 153 (quoting testimony from Henry Moskowitz, Clerk of the Board of Arbitration covering the New York garment industry, which had benefited from Brandeis's arbitration system).

23. *Brandeis Losing Votes for Supreme Court Justice*, WALL ST. J., Mar. 8, 1916, at p. 7.

pends on what work that lawyer and other lawyers in the firm are doing and have done in the past.

The prevailing wisdom is that a conflict of interest arises when a lawyer's professional judgment is compromised, or appears to be compromised, due to contrary influences or diverging interests between clients. A conflict can also arise when there are competing interests between the lawyer and the client, e.g., if the lawyer has a financial interest that could affect his client loyalties.[24] Legal ethics rules governing conflicts of interest apply to individual clients and corporate clients alike and are very general, *e.g.,* American Bar Association ("ABA")'s Model Rules of Professional Conduct 1.7 (for concurrent conflicts); 1.8 (for specific conflicts); 1.9 (for successive conflicts); and 1.10 (for imputation of conflicts). These rules aim to provide workable guidelines to help lawyers establish a system for siphoning out clear conflicts and for recognizing when conflicts may be permitted after appropriate disclosure and voluntary client waiver of any objection.

Practitioners are often frustrated by the open-ended nature of these Model Rules. The Rules seem to lend themselves more to academic study by than to actual practical application to assist and benefit practicing lawyers and their clients in the quotidian environs of the law. In the deadpan words of today's Chief Justice Roberts: "…the law professors aren't the ones who deal with this question on a day-to-day basis and have to worry about going to jail."[25] This article considers the tension between an important client conflict rule's intent and its practical implications, as exemplified in the controversy involving Justice Brandeis.

The basic law is that after one client relationship terminates, a lawyer has continuing fiduciary duties with respect to confidentiality, loyalty, disclosure and acting in the former client's best interests within the scope of certain matters that cannot be rescinded on behalf of a new client. At the same time, a lawyer has the duty to offer a prospective client legal representation unfettered by conflicts from the lawyer's prior representation of clients with interests in matters adverse to the prospective client and prospective matter.

Rule 1.9 of the ABA Model Rules deals with a lawyer's professional obligations to former clients. It sets forth the legal standard under which a practicing attorney should operate. The Rule states that a lawyer "who has *formerly represented a client* in a matter shall not thereafter represent

---

24. *See, e.g.*, United States v. Schwarz, 283 F.3d 76 (2d Cir. 2002) (lawyer was disqualified due to an interest in another client's retainer, which created an actual conflict of interest and violated the defendant's Sixth Amendment right to effective assistance of counsel). A conflict could also arise when the lawyer has some form of ownership interest in the client being represented, e.g., recall when Brandeis was both counsel for and a director of United.

25. *See* Transcript of Oral Argument at 39:7-10, Mohawk Indus. Inc. v. Carpenter, 130 S. Ct. 599 (2009) (No. 08-678).

another person in the same or a *substantially related matter* in which that person's interests are *materially adverse* to the interests of the former client" unless the former client consents.[26] The italicized language highlights the three questions for representation (or disqualification): Is there a former client; is the new matter substantially related; and are the former client's interests materially adverse to the prospective client's interests.[27] All three of these questions must be answered in the negative before the lawyer can bring the new client and matter in the door.

The "substantial relationship test" in Model Rule 1.9 also appears in several counterpart state ethics rules governing former client conflicts. Generally, the test serves as a proxy for court inspection.[28] Most courts now recognize that conducting a factual inquiry into whether confidences had actually been revealed should be avoided whenever the rule's presumption can be utilized due to the unsatisfactory nature of the potential evidence.[29] The inference behind the rule boils down to a question of whether the lawyer could have obtained confidential information in the first representation that would have been relevant in the second representation. If the answer is yes, the lawyer or law firm cannot represent the second client, in the matter in question, unless the former, affected client gives informed written consent. It is of no moment whether the lawyer or law firm would or could use the information. In the candid words of Judge Posner, "[f]or a law firm to represent one client today, and the client's adversary tomorrow in a closely related matter, creates an unsavory appearance of conflict of interest that is difficult to dispel in the eyes of the lay public—or for that matter the bench and bar—by… denying that improper communication has taken place or will take place…."[30]

While a lawyer's conflicts are ordinarily imputed to the lawyer's firm, based on the presumption that "associated" attorneys share client confidences, there is an exception to this presumption. The ABA now permits the presumption that confidences were revealed to be rebutted in some circumstances through the use of certain institutional mechanisms at law

---

26. MODEL RULES OF PROF'L CONDUCT R. 1.9 (2009) (emphasis added) (consent must be informed and confirmed in writing).

27. The origin of the "substantial relationship" test is generally credited to Judge Weinfeld's opinion in T.C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265 (S.D.N.Y. 1953) (explaining the policy reasons why a substantial relationship test exists for former clients but not current clients).

28. The test was formulated so that the court need not make the inappropriate inquiry into whether actual confidences were disclosed. *See id.* at 269 ("To compel the client to show, in addition to establishing that the subject of the present adverse representation is related to the former, the actual confidential matters previously entrusted to the attorney and their possible value to the present client would tear aside the protective cloak drawn about the lawyer-client relationship.").

29. *See, e.g.*, Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263, 1269 (7th Cir. 1983) (noting that the only witnesses would be the lawyers whose interest "in denying a serious breach of professional ethics might outweigh any felt obligation to 'come clean.'").

30. *Analytica, Inc.*, 708 F.2d at 1269.

firms—like screens and ethical walls. This is limited though, and generally only applies when a lawyer switches firms and an adversary of a client of that lawyer or his former firm then retains the new firm. The new firm can avoid disqualification by imputation, under ABA Model Rule 1.10, by showing that protective steps were taken to prevent confidences from being received by lawyers in the new firm handling the new matter. However, not all states permit the uses of screens, while other states recognize screening mechanisms only to avoid disqualification but not as an ethical matter.[31] This ethical wall exception is therefore limited and would not have applied in Brandeis's situation, i.e., it could not have saved Brandeis from the allegation that he himself used his former client's privileged information against that client in a substantially related matter, i.e., the business and licensing practices of United.

The nature of legal practice today bespeaks the need for law firms to deal with client conflict issues prospectively and long before anything rears its ugly head in a courtroom. Nowadays, most large firms require that their clients sign waivers upon retention; these waivers seek to avoid future conflicts by having the client waive certain of their rights in advance. While these sorts of prospective or advance conflict waivers were once rarities, they are now commonplace.[32] An advance waiver should identify the potential opposing party or industry, the nature of the likely subject matter in dispute, and permit the client to appreciate the potential effect of the waiver.[33]

Most clients are familiar with the process whereby once they express interest in retaining a law firm, they receive an engagement letter detailing some of the basic terms upon which the firm will provide legal services. While some clients or lawyers might prefer less formal methods of confirming the terms of the lawyer-client relationship, it is considered good ethical practice and is infinitely useful to have a letter that lays out the terms of engagement—both to the lawyer and to the client—prior to beginning work on the matter. Moreover, the law in some states now requires such engagement or retention letters before beginning a client representation.[34]

---

31. *See, e.g.*, Hempstead Video, Inc. v. Inc. Vill. of Valley Stream, 409 F.3d 127, 132 (2d Cir. 2005) (explaining that not every violation of a disciplinary rule requires disqualification because disqualification is only warranted where "an attorney's conduct tends to taint the underlying trial," while ethical violations can be left to federal and state disciplinary mechanisms. (quoting Bd. of Educ. v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979)).

32. Both the ABA and the American Law Institute have formally approved the use of advance waivers. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 372 (1993); RESTATEMENT (THIRD) OF THE LAW GOVERNING *Lawyers*, § 122, cmt. d (2000).

33. *See* City of Kalamazoo v. Mich. Disposal Serv. Corp., 125 F. Supp. 2d 219, 243 (W.D. Mich. 2000).

34. In New York, for example, engagement letters are required as an ethical matter under New York Rule of Professional Conduct 1.5, and that rule in turn makes reference to a state rule that makes

Typical language in a client engagement letter grants written permission for the law firm to be adverse to that client in all but the same, or substantially the same, matter. Some waiver language may grant permission for the firm to represent future clients adverse to present clients in related areas under certain conditions but usually excludes direct litigation against the current or former client. Other waiver language may grant permission for the firm to represent future clients in substantially related areas only after the present client matter is completed. The enforceability of some of the more extensive contractual provisions is often temporally limited and may be either expressly or inherently limited in the context of binding large corporate families. Courts have generally held that the permissibility of advance waivers depends on how specific the waiver is in terms of what it covers and the sophistication of the client.[35] The danger of broad and unlimited waiver language is that it may not be sufficient to establish that full disclosure was made, and that the client made an informed waiver at the time. This form of misstep can come back to bite counsel by resulting in the disqualification of an attorney or an entire law firm in a future representation of an adversary of a client in a different matter.[36]

Clearly, advance waivers are not panaceas as the contractual language can vary from client to client, and some clients may refuse to waive any rights in advance.[37] Whether the law firm will still agree to act for the client, if the client refuses to sign its "standard" waiver provisions, depends on a host of factors that includes the amount of business the client brings to the firm and the history of the client's relationship with the firm. Moreover, corporate clients have their own ways of "conflicting out" law firms by spreading work around to a myriad of outside counsel so as to prevent them from taking on future work against that client.[38]

---

most fee arrangements subject to a writing requirement. *See* N.Y. COMP. CODES R. & REGS. Tit. 22, § 1215.1.

35. For example, the court in Elonex I.P. Holdings, Ltd. v. Apple Computer, Inc., 142 F. Supp. 2d 579, 582-84 (D. Del. 2001) found that Apple was sufficiently informed about the conflict in granting a full waiver and not merely a transactional waiver, based on the extent and nature of high-level discussions the firm had with Apple's in-house counsel.

36. *See, e.g.*, Concat LP v. Unilever, PLC, 350 F.Supp.2d 796, 820 (N.D. Cal. 2004) (holding that blanket waiver language in an engagement letter was not adequate to demonstrate advance informed consent, noting that: "(1) the terms of the waiver are extremely broad and were evidently intended to cover almost any eventuality; (2) its temporal scope is likewise unlimited; (3) the record contains no evidence of any discussion of the waiver; (4) the waiver lacks specificity as to the conflicts that it covers and effectively awards [the law firm] an almost blank check . . .").

37. *See, e.g.*, Zusha Elinson, *Wet Blankets: GCs Don't Waiver*, THE RECORDER, June 9, 2008 (discussing the trend of Silicon Valley technology companies to balk at engagement letters by outside counsel requesting up-front, blanket unconditional waivers of future conflicts of interest).

38. In the related "self-help" of interviewing many law firms, the ABA Model Rules provide a screening mechanism worth noting. Model Rule 1.18 permits lawyers or law firms who have received certain "disqualifying information" from a client seeking representation to still represent a client with interests materially adverse to the prospective client in a substantially related matter under certain

Notwithstanding this somewhat aggressive and "self-help" form of pushback, tacit concerns remain about adhesive waivers and the associated risk of breaching an attorney's duty of loyalty to the original client. If litigation is war, veteran lawyers know to think of former client conflicts as tripwire grenades on the battlefield.

It is hardly surprising that even the best of lawyers can find themselves muddling these ethical obligations when trying to be a good rainmaker and get new clients in the door. None of us is immune to the temptation to just fix the problem (if hope against hope it arises) later and then to ask for forgiveness instead of seeking permission. As global law firms continue to increase in size, many attorneys view the practice of securing advance waivers in engagement letters as a virtual *sine qua non* for bringing in new business. With potential conflicts arising from former clients in particular, the enticement to gloss over ties to past relationships to present oneself or one's firm as being available for future opportunities can be hard to resist. In the workaday business that the legal profession has become, we may wonder how effective our Model Rules of Professional Conduct have been in providing actual, rather than just aspirational, guidance to avoid ethical lapses in attorney conduct of the sort that faced Brandeis.[39]

LESSONS LEARNED FROM BRANDEIS'S BEHAVIOR

Bringing the issue back to Brandeis, what was he to do when faced with acting against United's interests and supporting the antitrust regulations that were coming of age? Should he have had the improbable "foresight" to have refused to represent United in its initial dispute with the shoe manufacturers, or should he have not accepted the written conflict waiver by the shoe manufacturers and instead refused them as a client? Hindsight is a powerful analytic tool to wield, and what may seem ill-founded after the fact might well have seemed laudably sagacious at the time. If it is possible to parse apart the politics from the facts, was the Senate committee voicing a valid ethical objection to the arguably aggressive legal practice of taking on clients whose interests are nonaligned with former clients? While modern ethics rules can inform the question, they may fall far short of providing any "right" or even satisfying answer.

---

conditions. *See* MODEL RULES OF PROF'L CONDUCT R. 1.18(d)(2) (2009). The intent of this rule is to allow a client to gain enough information to screen for conflicts before taking on the new matter, but it can also help guard against client attempts to conflict out law firms prematurely. *See also* Rule 1.0(k) (requirements for screening procedures). Many states recognize this screen.

39. On this note, one Brandeis biographer opined that the ABA's ongoing attempts to provide guidance on client conflicts have failed because: "[a] profession used to seeing its members primarily as advocates for their clients' interests has trouble defining a practice that seeks fairness for all parties." *See* UROFSKY, *supra* note 1, at 68.

A lawyer must not act against a former client when the lawyer has relevant confidential information about that client or the matter from an earlier retainer that may be used against the former client. It does not matter whether the information is used or not. The appearance of impropriety is sufficient to bar the future representation, unless the former client consents. Even if the lawyer didn't actually obtain any relevant or confidential information, the fiduciary duty of loyalty to the former client extends the lawyer's prohibition to not act in the *same or a substantially related matter* adversely to the former client, again absent consent or a waiver in writing.

That said, a lawyer cannot realistically be forever bound by the interests of a former client for all public and private matters of interest to the lawyer. Life is long, information inevitably gets disseminated, and the legal scope of substantially related matters can ebb and flow over time in a way that would make it unfair to bind a lawyer to a "conflict" for the duration of a legal career. Brandeis argued, somewhat cagily by sending telephone and telegraph messages to the witnesses appearing at the investigative hearings on his behalf, that he supported the Clayton Act on a personal level and that he represented himself whenever he acted to advance the public interests. In support of this contention was the fact that he took no fee from (actually, he donated his fee back to) the Shoe Manufacturers' Alliance. Yet, this didn't fully exculpate Brandeis from his ongoing obligations to his former client United.

Brandeis garnered some support from senators in propounding the notion that a lawyer's opinion on matters of public interest should not be circumscribed by client preferences so long as the lawyer does not violate client confidences in expounding his own views. Lawyers are not their clients. Indeed, it is often acknowledged that it is a mistake to judge a lawyer by the clients he or she represents. Lawyers often find themselves accepting legal work on behalf of a client in whose activities the lawyer does not personally believe. Many criminal defense attorneys would be out of work if they did not have the freedom to separate their personal convictions from their professional representations. In concurrence with one author who defended Brandeis, it would be tough to practice law indeed if a lawyer was required to underwrite the character of each of his clients.[40]

A temporary incursion on a lawyer's time and life by a pressing client matter, or by confidences disclosed to the lawyer by the client, is an unenviable but wholly expected and acceptable part of legal practice. A permanent incursion, however, is not. Legal ethics do not require a practicing attorney to become a minion to a client merely because, at one time,

40. *See* Frank, *supra* note 1, at 686.

she subordinated her own interests or defined her public persona principally by her client's goals. ABA Model Rule 1.9 recognizes that the "substantial relationship" test does not persist *ad infinitum*. Confidential information that was or could have been gained in the course of a former client relationship can be rendered innocuous and obsolete by the passage of time or if the information has been disclosed to the public.[41]

The transition of private to public knowledge is, in fact, a fundamental part of legal ethics that allows lawyers to maintain confidences and abide by the other fiduciary duties to their past and current clients, whilst also maintaining a functioning life in public society. A lawyer has the right to engage in public debate, take seriously their civic duties and get involved in political and social justice causes, as do all citizens. Lawyers just have to remember to parse out "public" questions from "private" questions insofar as they concern client confidences. Particularly in the case of former client conflicts, confidences can be construed ambiguously. How much information, knowledge and wisdom a lawyer gains from a prior representation that can ethically be construed as a client confidence is a vexatious question. What is the provenance of a lawyer's sapience? The issue is existential in nature. Brandeis recognized this and refused to unduly fetter his public opinions on behalf of his private clients. Legal ethics should find a way to embrace, rather than shun, this ethos.

Brandeis's response to the senators' upbraiding is emblematic of his character, for two reasons. First of all, Brandeis brought a moral dimension to his legal practice: He regularly engaged in informal *pro bono* practice, refusing compensation for legal work that he believed was in the public interest. Indeed, he reputedly refused to take on paying cases in whose justness he did not believe, and he sternly counseled clients against taking positions in their legal disputes that adopted unfavorable social policy. Secondly, Brandeis brought an autonomous lawyering ethic to his practice that was antithetical to the New England "clubbiness" mores of legal practice. Brandeis rejected any close alliances with any group, political party, cause, or client. He was, in many ways, an outsider and proud of it.

Brandeis's craftsman-like approach to legal practice epitomized his aversion to acting as a mere representative for an anterior interest and his desire to retain self-direction in his legal counseling. His work ethic demanded that every matter be a do-it-yourself project; if some of his methods appeared homespun, that was Brandeis's antidote to the formulaic and increasingly commercialized practice of law in the early 20th century. Brandeis frequently spoke out against law as a service-industry and counseled young lawyers and law students to think critically about why the law

41. *See* MODEL RULES OF PROF'L CONDUCT R. 1.9 cmt. 3 (2009).

is what it is. It was apparent that Brandeis felt isolated and alienated from the changes that were sweeping through the legal profession at times, and he often came across as a *vox clamantis in deserto*, against the rise of law as a business instead of as a vehicle for social change.

It may well have been this aloofness, this isolation from others, this entrepreneurial spirit, combined with a view that every matter was new and unrelated to what went before, that caused Brandeis to lose sight of "normative" legal ethics in carrying out his own ideas and his own ideals. That Brandeis did not always work the way the others members of the profession did was grist for some testimony against him by members of the Boston bar during the hearings.[42] Perhaps, Brandeis erred by not staying grounded to the ideals of the profession as the informal bar saw them in its opposition to Brandeis. Indeed, only the informal bar opposed Brandeis. No bar association made any formal protest or resistance to Brandeis.[43] Nor could the bar associations, because there were no formal ethics standards governing lawyer's conduct in place. The standards were just "in the air." Still, it is hard to dispute that Brandeis's reliance on his own internal compass produced disconcerting results at times, at least in the minds of those who mattered when it came to his Supreme Court confirmation.

Another politicizing factor was that many of Brandeis's legal representations involved advocacy in the legislature, on a variety of social policy issues. As an advocate, Brandeis mobilized a stridently nonpartisan voice for the public interest that he strongly believed was needed to compete with hard-charging interest groups and political power at the dawning of an age of increased legislation and regulation. That Brandeis prided himself on being a detached, autonomous counselor, free of client dictation, is what led him to craft the now-infamous language that he was "counsel for the situation." When this personal depiction of Brandeis's view of his legal compass came before the Senate's investigating committee, it could hardly be considered anything other than a blunder of epic proportions, which served Brandeis none too well in extricating himself from the alleged client conflicts at hand.

Nonetheless, Brandeis's commitment to seek moral justice outside the conventional confines of the strict adversarial system of law, which is only now governed by a Model Code of Professional Responsibility, can hardly been viewed as reprobate. Brandeis was an advocate of several public

---

42. *See, e.g.*, TODD, *supra* note 1, at 118 (quoting testimony by Boston lawyer Sherman Whipple: ". . . I think if Mr. Brandeis had been a different sort of man, not so aloof, not so isolated, with more of the camaraderie of the bar, gave his confidence to more men, and took their confidence . . . and talked it over with them, you would not have heard the things you have heard in regard to him.")

43. *Id.* at 129, 158 (noting that no bar association opposed Brandeis' nomination, although some former ABA presidents had signed a protest letter in their individual capacities).

causes and was insightful enough to recognize the benefits of legislative democracy over litigation. That is, Brandeis may have had the power as an active litigant to make law, or rather, to get law made for his clients and for himself. But in some cases he respectfully chose to support the legislative process, imperfect as it may be, to express his political views and to incorporate deliberation and compromise into the law-making process. We can hardly fault Brandeis for embracing the democratic political system in this manner. Brandeis did not try to legislate through lawsuits. It is almost ironic that his policy-making endeavors, properly aimed at the legislative branch, ended up almost sidelining his chances for a career in the judicial branch.

Certainly, we cannot judge Brandeis for failing to adhere to contemporaneous standards of behavior in the then absence of a professional code of conduct. Nor can we deem immoral his methods without apt respect for the then zeitgeist—the spirit of the times—and the manner in which his legal contemporaries comported themselves. Brandeis's actions reflected the attitudes of the culture in which he lived and the values with which he had been raised. In many ways he was a luminary for the legal profession. It would be a mistake to sanctimoniously deride his professional actions as being unaligned with current day thinking, just as it would be wrong to cast judgment based on the fact that he at one time spoke out against women's suffrage and later supported it, or that he married his second cousin.[44] The ethical and moral standards by which we live are not immutable. We must not retrofit today's standards onto yesterday's practices.

Giving fair value to the objections of the Senate committee members, however, we can still consider the following: Was Brandeis's alleged shirking of his ethical duties something we should dismiss as dated behavior but also disparage as not being a best practice for a lawyer nowadays, in the context of being accountable to their former and successive clients? The applicable legal ethics rule, indeed even now, is hardly a paragon of clarity. To what extent must lawyers subordinate their own views on policy to persuasive advocacy on behalf of not even a current but a former client's interest? Must every lawyer be so scrupulously cautious at the outset when engaging a new client to have prospectively considered and rejected the possibility that such representation might lead the lawyer to make arguments that could compromise their credibility on all other public issues of personal interest?

---

44. *See* UROFSKY, *supra* note 1, at 85-86 (noting a talk Brandeis gave in 1884 in opposition to giving women the vote); 363-64 (describing suffrage as a privilege men earned through performance of duties like military service); and 105 (noting that Alice Goldmark, later to become Brandeis's wife, was his second cousin). Brandeis later came to strongly endorse women's suffrage and the Nineteenth Amendment giving women the vote. *See id.* at 86, 116, 223.

If so, what does that say about how we want lawyers to behave today—to stop thinking independently once we retain our first client, to give up all of our outside interests, and to slavishly serve our clients forevermore? Indeed, the "sweatshop" culture at some of the BigLaw firms suggests as much. But on an ideological level, do our Model Rules serve to promote and foster milquetoast lawyers who toe the line and act as mouthpieces for unchallenged client preferences—even when those clients are former clients? If so, we need to seriously think about reevaluating the balance of interests in the lawyer–client relationship. Some of our aspirational ethics standards may not provide sufficient distinction between a lawyer's public and private life to allow a practicing attorney to maintain both public autonomy and lawyerly zeal in the context of the lawyer-client relationship. Particularly in this day and age of strong and powerful corporate clients, where zealous representation is the industry standard, lawyers should reconsider their practice of advertising themselves as single-minded pursuers of a client's interest. It would be what Brandeis wanted. More importantly, without due circumspection, they may not know just what they are getting themselves into.

CONCLUSION

This article summarized Brandeis's attempts to be his own man, and while he ran up against some resistance in so doing, he forged on. He never sacrificed his beliefs that idealism itself can have pragmatic benefits. He reached for a *modus vivendi* that was workable for him. Brandeis relied on his own internal moral compass to guide him in times when he had no benefit of a rulebook or ethical lodestar in the form of Model Rules. He worked with what he had. He recognized that the law is not about the bottom line but the process and reductive logic must fail if it does not comport with the law or his own perception of appropriate legal ethics.

Perhaps the most important thing Justice Brandeis taught us from his days as a practicing attorney is that overall, the law should be viewed as an instrument of freedom, not a meaningless series of edicts that constrain or coerce. Brandeis lived by example and made both the law and freedom central in his own life. The law should instill people with freedom in choice and action, for its purpose is not only to maintain peace and order but also to bring the public administration of justice into touch with changing moral and political conditions so as to promote progress in society.[45] Legal statesmanship must have its place in our society. Brandeis's career should serve to guide lawyers today who wish not only to do good for society while also doing well in their own careers and for their clients.

---

45. *See* Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 Sup. Ct. Rev. 299, 314 (1985).

The role of the lawyer has greatly changed since Brandeis's day. Unfortunately, we can no longer act as counsel for the situation, though some others, like Attorney General Elliot Richardson during Watergate, have since tried to do so by being lawyers who find solutions to problems in the arguments and needs of the counterparty. Nowadays, law practices are too large, academic ethicists too commonplace and clients all too willing to challenge or second guess the tactics proposed by their lawyers. When a client's company is at stake, it is their prerogative not to want Brandeis's kind of "situation" lawyer; a lawyer actually willing to straddle both sides of an issue, either consecutively or concurrently, to effectuate a semblance of balance among competing interests. Maybe this is a good thing, especially when such tactics can ultimately result in making or agreeing to compromises on behalf of the client. In modern-day "bet the company" litigation, a lawyer who communicates a willingness to see the other side's merits and offer concessions is hardly desirable (if he ever was) to the side he purports to represent.

And so the client today, it seems, wants only gladiators and not statesmen. But is that really the best-tempered response to a rejection of the situational lawyer? By scattershot we have accomplished what might have been fixed with a scalpel. The statesmanlike lawyer, notwithstanding the macro merits of his moral judgment, has become an outlier at best (a fugitive, at worst) because too many lawyers aren't willing to risk a business or ethical conflict, or a loss of client loyalty, to enable meritorious efforts at situational resolution to allow meaningful social betterment.

The vexing situation in which we find ourselves, therefore, is one where a lawyer who truly sees shortcomings in the positions he advocates for his clients must hold his tongue even when the court day is over, lest the value he brings to his client, either in the courtroom or at the settlement table, be reduced to worthlessness. An antitrust lawyer, for example, would be hard pressed to truly question publicly the tactics that the antitrust bar pursues daily in the courtroom. Likewise, a plaintiff class action lawyer would have trouble publicly arguing for reform of the professional industry he daily purports to represent in courtroom skirmishes. Further still, a prosecutor who must enforce a death penalty statute would best avoid publicly decrying or even trying, in a positive fashion, to tinker with the machinery of death that they are sworn to uphold in their officialdom.

In some ways, the law is not only a jealous mistress but also a fickle lover. Those lawyers who truly come to love the law, inevitably also come to recognize that while the law denotes freedom and equal justice for all, it also binds lawyers in unique ways. At times, lawyers may feel as though they are relegated to automaton status, being forced to battle without engaging their professional wisdom (that they possess more than anyone) to challenge the norm, to serve the greater good, and to be instigators

of social change, at least without compromising their "zealous representation" obligations that may trump all their other duties at the bar combined. In other situations, most relevant to the Brandeis issues presented herein, the Model Rules may also enjoin lawyers from representing a competitor, supplier, or customer of another client. And even if it ends up not being a conflict forbidden by the ethics rules, it could still be a business conflict (whose ties bind as tightly) if it hinges on the unwillingness of an important client to allow the firm to represent another. The increasing size of law firms nowadays, with their increasingly sophisticated client relationship management and conflict procedures, serves only to reinforce this mentality.

Brandeis stood out against the ties that bind. His legacy stands for freedom and the eternal struggle against the notion that the law is immutable and unwilling to embrace lawyers as being skilled advocates for their clients, while also being high-minded advocates who can bring about social change in the law.[46] He continued to embrace the law's vast capacity for change while on the Supreme Court bench, stating that the law requires the continuous "capacity of adaptation to a changing world."[47] True to his nonconformist spirit, Brandeis espoused both judicial restraint and the concept of the living law as jurisprudential philosophies.

In Supreme Court confirmation hearings nearly a century after his own, now Justice Sotomayor echoed the view of Justice Brandeis that precedent is not an "inexorable command" [48] and that the law can be reexamined under circumstances the Court itself has outlined.[49] Other prominent jurists have also expressed such Brandeisian views, such as Seventh Circuit Judge Richard Posner who argued the constitution is "not a suicide pact," and that the law must adjust to necessity in a pragmatic but rational manner.[50] So the legacy of Brandeis lives on.

In seeking to provide some context into the struggles that faced one of our most brilliant and consequential legal minds throughout his career, we come to learn how a strong sense of self can give lawyers the courage to take on the critical and controversial issues of the day. While not every

---

46. President Woodrow Wilson once described this struggle, as one where a lawyer "cannot be both a learned lawyer and a profound and public-spirited statesman, if he must plunge into practice and make the law a means of support." *See* Melvin I. Urofsky, *Wilson, Brandeis, and the Supreme Court Nomination*. 28 J. OF SUP. CT HISTORY 145, 150 (2003). The author went on to suggest that Wilson was drawn to Brandeis for his ability to achieve both of these seemingly irreconcilable goals. *Id.* at 151-52.

47. Olmstead v. United States, 277 U.S. 438, 472 (1928) (Brandeis, J., dissenting).

48. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 447 (1932) (Brandeis, J., dissenting).

49. *See* Responses of Judge Sonia Sotomayor to the Written Questions of Senator Jeff Sessions, Before the U.S. Senate Committee on the Judiciary, July 20, 2009, *available at* http://www.gpoaccess.gov/congress/senate/judiciary/sh111-503/633-680.pdf

50. *See generally*, Richard A. Posner, *Not a Suicide Pact. The Constitution in a Time of National Emergency* (Oxford University Press, 2006).

lawyer will display Brandeis's breathtaking intuition and forecasting ability, a timely commemorative to Brandeis can remind us of our own abilities to be progressive and effect change by dint of hard work. Brandeis's career as a lawyer should help energize the professional introspection required to revisit the critical questions of legal practice. Questions that were raised so fundamentally in the storied career of one lawyer and jurist persist today. Brandeis' name, despite the public controversies that surrounded him over his own career as a lawyer, will shine on the entablatures of justice, judgment and wisdom forever.

PERESTROIKA OR JUST PERFUNCTORY? THE SCOPE AND SIGNIFICANCE OF RUSSIA'S NEW LEGAL ETHICS LAWS

Katerina P. Lewinbuk[1]

One must rule the advocate with an iron hand and keep him in a state of siege, for this intellectual scum often plays dirty.[2]

Vladimir I. Lenin

I place particular importance on the fundamental role of the law, which is the cornerstone of our state and our civil society. We must ensure true respect for the law and overcome the legal nihilism that is such a serious hindrance to modern development.[3]

President Dmitry Medvedev

---

1. Associate Professor of Law, South Texas College of Law, Houston. This Article, along with all of my academic work, is dedicated to the precious memory of my father, Dr. Vladimir Z. Parton, who will always remain my inspiration. Special thanks go to my husband Dan, to my children, Alexandra and Michael, and to my mother for their endless love and support. I also would like to acknowledge my lifetime friend, Olga Wagner, who spent endless hours discussing the topic of this article with me. I am truly grateful to Dean James Alfini and Professors Val Ricks and Dru Stevenson of the South Texas College of Law for their mentoring, encouragement, and support of my scholarly projects. I also would like to express my appreciation to Professor James Klebba of Loyola-New Orleans for his thoughtful comments on the earlier versions of this article and to Professor Adam Gershowitz of the University of Houston Law Center for his willingness to share ideas and offer feedback. Finally, I would like to express my deep gratitude to my outstanding research assistants, Kristen Ellis and Brian Tiller, for their invaluable assistance in preparation of this article—I was truly fortunate to have their help.

2. Eugene Huskey, *The Russian Bar and Consolidation of Soviet Power*, 43 RUSSIAN REVIEW No. 2 115, fn 9 (1984) *available at* http://www.jstor.org/stable/129749?origin=JSTOR-pdf.

3. President Dmitry Medvedev, Inauguration Address (May 7, 2008).

4. GORDON SMITH, REFORMING THE RUSSIAN LEGAL SYSTEM 1 (1996). Somewhat more recent Russian articles comment that advocates under the Soviet system were known for "play[ing] dirty." Simona Pipko & Roman Pipko, *Inside the Soviet Bar: A View from the Outside*, 21 INT'L LAW. 853, 854 (1987). As one author explains, "[s]uch comments in a Soviet journal hardly offend[ed] many readers and apparently easily pass[ed] the censorship of the editors because the status of an advocate in the USSR generate[d] mistrust and suspicion of both the government and its subjects." *Id.* Feelings of animosity may also have resulted from the higher level of advocates' wages and the fact that, in the past, advocates' names were predominately Jewish. *Id.*

I. INTRODUCTION

Democratic political spheres and evolving capitalist markets require the security of both individual personal and property rights. This is accomplished through laws, enforcement mechanisms, and lawyers who advise their clients how to navigate within these laws to ensure sustainability of enterprises and protection of civil rights. However, following and using the law for such security is not automatic; it requires a proper legal culture and trust in the legal profession. Professional ethics provide a foundation for such trust and are molded to regulate and guide the legal field, ensuring client and societal trust in the legal profession. In order to trace, understand, and explain the development of legal ethics in a given country, it is critical to analyze the issue not by just looking purely at the newly-enacted attorney regulations, but rather by approaching it from the historic, socio-economic, and moral perspective since professional ethics very much reflect the current values, state of development, and moral principles of a given society. Specifically, today's status of ethical guidelines for the legal profession in Russia is greatly a reflection of the country's rich and fascinating history with its changing political regimes, economic structure, and societal values.

The legal profession has "not traditionally been accorded much power or status in Russia"[4] and has undergone many changes in the past. This article outlines three major periods in the profession's development: first, from 1864-1917; second, from 1917-1991; and third, from 1991 to the present time. The first period is marked by the abolishment of serfdom and accompanying legal reforms; the second one begins with the Great October Socialist Revolution of 1917 and the enactment of the Soviet state; finally, the last period was started by Perestroika and the fall of the Soviet Union in 1991, and it is still in progress today as the legal profession in Russia continues to grow closer to its western counterparts.

This article will introduce into legal scholarship for the first time a discussion and analysis of rules that were laid down in Spring 2002 in a federal law *On Work as an Attorneyand the Legal Profession in the Russian Federation*[5] (hereinafter On Work)–and in the *Code of Professional Ethics for the Attorney* (Code), that was adopted in 2003 and later amended in 2007.[6] Since then, that law and the Code together constitute the basis for the ethical practice of law in Russia. These laws were trans-

5. Ob advokatskoi deyatelnosti i advokature v Rossi'skoi Federatsii [On Work as an Attorney and the Legal Profession in the Russian Federation] 2002, No. 63-FZ [hereinafter On Work], *translated in* STATUTES & DECISIONS: LAWS OF USSR & ITS SUCCESSOR STATES, May-June 2008, at 10, 10-54 [hereinafter STATUTES & DECISIONS May-June 2008].

6. KODEKS PROFESSIONALNOY ETIKI ADVOKATA [hereinafter KPEA] [Code of Professional Ethics for the Attorney] (Russ.), *translated in* STATUTES & DECISIONS May-June 2008, *supra* note 5, at 55-78.

lated and became available in English. Although these new laws represent a significant step toward the development, independence, and uniformity of the legal profession in Russia, one of the biggest challenges lies in the fact that they only apply to a certain part of the profession—members of the "advokatura" or advocates—with jurists remaining unregulated. A failed attempt to impose that type of regulation on jurists definitely shows that the idea of ethical regulation of lawyers aimed at establishing their independence of judgment is still new and fragile in Russia.

This article further examines the current structure, status, and regulation of the legal profession in Russia by providing a comparative analysis of selected rules and applicable provisions of the Model Rules of Professional Conduct[7] enacted by the American Bar Association (ABA Model Rules) and the Code of Conduct of European Lawyers (CCBE Code)[8] adopted at the CCBE Plenary Session.[9] The gist of this analysis attempts to compare the purpose and affect of enforcing attorney ethics rules in Russia, Europe, and the United States with a focus on looking at lawyering through the prism of either a standard business venture or an independent profession.

An added challenge to any analysis of Russian law or resulting legal system discussed in this article is the country's "historic distrust and disrespect for the law that was typical during Soviet times and continues into the current legal framework."[10] In fact, one scholar believes that an old Russian saying: "[t]he law is like the shaft of a wagon, it goes wherever you turn, [and] … remains firmly embedded in the public conscious-

---

7. MODEL RULES OF PROF'L CONDUCT (2010).

8. CODE OF CONDUCT FOR EUROPEAN LAWYERS [hereinafter CCBE CODE], *available at* http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/2006_code_enpdf1_1228293527.pdf.

9. Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code, Part I: An Analysis of the CCBE Code of Conduct*, 7 GEO. J. LEGAL ETHICS 1, 9 (1993-94).

10. Katerina Lewinbuk, *Russia's Labor Pains: The Slow Creation of a Culture of Enforcement*, 32 FORDHAM INT'L L.J. 846, 848 (2009).

A philosophical question of why people choose to follow the law does not have a simple answer. One way to look at this dilemma is not to assume that human behavior responds primarily to punishment and reward, but rather to recognize that human behavior is likely affected by the "legitimacy of legal authorities and the morality of the law."

Id. at 886 (quoting THOMAS R. TYLER, WHY PEOPLE OBEY THE LAW 168 (2002)).

An argument can be made that the cultural lack of faith in the law is currently undergoing a transformation in Russia although this transition will still take time to develop. The society's appreciation of the rule of law will continue to develop along with all its economic changes and it will eventually become a part of the Russian society, although it may still differ from what is most familiar to a Westerner. In reality, such changes often begin with the government's endorsement of the idea and this appears to be now happening in the Russian Federation.

Id. However, it is important to note that these feelings of distrust toward the Russian legal profession exist and will need to be eliminated in other countries as well. *See* Glenn P. Hendrix, *Business Litigation and Arbitration in Russia*, 31 INT'L LAW. 1075 (1997) (discussing a particular instance in which an American company was afraid its representatives would be killed if they litigated a case in Russia).

ness."[11] Accordingly, the existing enforcement mechanisms for any Russian law are sometimes unworkable, and the laws of attorney ethics similarly present predictable challenges in terms of enforcement. In fact, the Fourth All-Russian Congress of Attorneys that took place in 2009 openly stated that "year after year, contrary to the law, attorneys are asked to testify as witnesses in criminal cases against their clients; attorneys' offices are searched; attorneys are not permitted to meet detained clients; and attorneys are not provided with the documents necessary for the provision of legal assistance."[12]

To conclude, this article attempts to predict upcoming steps in the development of the ethical framework for the legal profession in Russia and offers anticipated benefits and downsides to these new developments.

II. HISTORICAL OVERVIEW OF THE LEGAL PROFESSION IN RUSSIA

In Russia, the legal profession and its regulation have gone through many changes. Specifically, there are three main periods in the development of the Russian legal profession: the first stage from the Tsarist years of 1864 through the Communist Revolution in 1917;[13] the second period from the Communist Revolution of 1917 through the collapse of the Soviet Union in 1991;[14] and the third, current stage, spanning from the 1991 collapse of the Soviet Union through the present transitional free market economy and its in-progress democracy.[15] Throughout these three periods, Russia has remained a country governed by civil law.[16]

---

11. VASILY VLASIHIN, THE BROOKINGS INSTITUTION, LAW & DEMOCRACY IN NEW RUSSIA 46 (Bruce Smith & Gennady Danilenko eds.,1993).

12. Alexei Trochev, *Guest Editor's Introduction – Russia's Attorneys Under Pressure: Courts to the Rescue?*, STATUTES & DECISIONS: LAWS OF USSR & ITS SUCCESSOR STATES, Nov.-Dec. 2008, at 5 (citation omitted).

13. *See* NICHOLAS V. RIASANOVSKY & MARK D. STEINBERG, A HISTORY OF RUSSIA 369-371 (6th ed. 2000 (discussing the judicial reforms which took place at the end of 1864).

14. *See id.* at 451-607 (discussing the rise and fall of the Soviet system).

15. *See id.* at 609-65 (detailing the political, social, and cultural changes that have taken place in Russia since the end of Communism)

16. WILLIAM BURNHAM ET AL., LAW AND LEGAL SYSTEM OF THE RUSSIAN FEDERATION 3 (3d ed. 2004) ("[S]ystematic reception of Roman and civil law became possible … during the 18th, 19th and early 20th century …. Although it came late and by an indirect route, the civil law tradition in Russia was well established by the time of the Revolution of 1917."). Moreover, until the recent phase, it has clearly been an inquisitorial system of justice in criminal cases, rather than one that includes a number of adversarial components. Note that, under Putin, one of the "critically important changes in the [Criminal Procedure] Code [was] the adoption of adversarial principles." Jeffrey Kahn, *Vladimir Putin and the Rule of Law in Russia,* 36 GA. J. INT'L & COMP. L. 511, 545 (2008). "The replacement of the judge-dominated mixed court by the jury was meant to eliminate the judiciary from the task of deciding guilt, replacing them with a group of citizens who were not caught in the web of dependence in which Russian judges found themselves." Stephen C. Thaman, *Jury Trial and Adversary Procedure in Russia: Reform of Soviet Inquisitorial Procedure or Democratic Window-Dressing?*, *in* RUSSIA AND ITS CONSTITUTION 141, 142 (Gordon B. Smith & Robert Sharlet eds., 2008).

A. Prior to 1917

Prior to 1861, Russian society, along with its values and perspectives, was formed by the system of serfdom and its attached dependency on the master and lack of personal freedoms, which became a substantial obstacle in the country's economic development. Having existed under the dominance of a serfdom regime for a number of centuries,[17] the Russian population became oppressed and was lacking initiative.[18] In fact, that time in Russia can \ be characterized as troubled by bureaucracy, corruption, lawlessness, and dependency on the decision maker who had almost absolute control over other individuals.[19] The country's environment did not allow for proper application or affect of any types of rules or laws, and law enforcement mechanisms were virtually nonexistent. Unable to keep up with the rapid growth of the West European economies, which were accelerated by industrial revolution, sea trade, and colonialism, Russia was facing the pressure of social and economic changes to preserve its status in the world community.[20] Accordingly, a major agrarian reform took place in 1861.[21]

Pursuant to that reform, all serfs were freed. According to Tsar Aleksandr II, "it was better to liberate the peasants from above than to wait until they freed themselves, from below."[22] Serfdom's abolition, how-

---

17. *See* SMITH, *supra* note 4, at 12-13 (discussing the spread of serfdom and its consequences throughout the sixteenth and seventeenth centuries). Serfdom did not become part of the formal law until the early seventeenth century. RICHARD CHARQUES, A SHORT HISTORY OF RUSSIA 46 (1956). However, "in a great variety of forms regulated by custom the practical condition of serfdom was widespread in the fifteenth century or even earlier." *Id.* at 46. In the period leading up to reform, serfs represented nearly forty-five percent of the population. RIASANOVSKY & STEINBERG, *supra,* note 13, at 369.

18. RIASANOVSKY & STEINBERG, *supra,* note 13, at 369 (describing the serfs as "oppressed and exasperated beyond endurance").

19. The serfs themselves were a large source of the lawlessness that occurred during this time. *See id.* According to a Russian historian, there were 1467 peasant uprisings during the nineteenth century prior to abolition. *Id.* Over time, the uprisings became more violent, and lives were lost after the military became involved to restore order. *Id.* In addition to the uprisings, serfs often tried to escape their masters by simply running away or attempting to join the army to fight in the Crimean War. *Id.* at 370. The military also became involved in situations where the peasants tried to flee, due to the fact that they would sometimes attempt to leave in groups of hundreds or thousands. RIASANOVSKY & STEINBERG, *supra,* note 13, at 369.

20. Moral grounds played an important role in the reforms surrounding serfdom. *Id.* Leading up to the emancipation of the serfs, "virtually no one defended [the] institution[.]" *Id.* Most of the opposition to emancipation was based on fear of the dangers that come with such a major change in society. *Id.* This can be contrasted with the opposition toward abolition of slavery in the United States which was often based on people's strong support of the institution itself. *Id.*

21. RIASANOVSKY & STEINBERG, *supra,* note 13, at 371 ("Alexander II signed the emancipation manifesto on March 3, 1861....").

22. DAVID M. CROWE, A HISTORY OF THE GYPSIES OF EASTERN EUROPE AND RUSSIA 161 (2007). The government issued sixteen decrees which resulted in freedom for over forty million peasants working on state-owned lands, private estates, and estates belonging to the imperial family. CHARQUES, *supra* note 17, at 156. It is interesting to compare this with the abolition of slavery in the United States. As just discussed, the Soviet emancipation was achieved via legislative grounds. *Id.*

ever, was accomplished on ruthless terms for the peasants and led to intensification of revolutionary movements.[23] The overall situation in the country required a substantial transformation of the role of the rule of law in society, and the "pressures to reform the tradition-laden, cumbersome, and antiquated legal system in Russia had grown."[24] It called for the triumph of laws over corruption and for making society believe in the power of these laws.[25] Although the Russian tsars issued "countless decrees on the necessity of reforming the administration of justice"[26] in the past, those attempts were insufficient to accomplish any visible results. They were based on the tsars' perception of a legal system that followed an established German model, which viewed laws "as means to induce officials to implement the legislative enactments of the supreme power."[27] However, finally in 1864, Tsar Aleksandr II took steps to establish a number of legal reforms to strengthen and professionalize the legal profession[28] with the goal of engendering a "new respect for law in the population."[29]

These reforms included the creation of an overseeing body for Russia's lawyers (the "advokatura" or "advocacy") and setting professional criteria for judges and lawyers–such as the requirement of a degree.[30]

However, the freedom of about four million slaves in the United States was only achieved after a devastating Civil War. RIASANOVSKY & STEINBERG, *supra,* note 13, at 346.

23. *See* SMITH, *supra* note 4, at 14 (discussing reforming the Russian legal system was mandated by "dramatic changes on the domestic scene"); *see also* CHARQUES, *supra* note 17, at 161 ("Freedom for the peasantry was won only on terms which substituted a new form of economic servitude ... and perpetuated their isolation from the rest of society."). A particular area in which the emancipated peasants suffered inequality was civil rights. CHARQUES, *supra* note 17, at 157. The peasants were still required to pay a poll-tax and were not permitted to leave the area in search of employment due to the "internal passport system." *Id.* Even more ruthless was the fact the peasants could still be administered corporal punishment. *Id.*

A less extreme example of the continuing oppression pertains to land ownership. After abolition, the freed peasants were given the ability to purchase land on credit. *Id.* at 156. However, the land was over-valued, and "holdings were cut down to an average of half of what the peasant had formally cultivated...." *Id.* Furthermore, the peasants did not hold the land as private property—possession was instead vested in the peasant commune. *Id.* at 157.

24. SMITH, *supra* note 4, at 12.

25. Because the legal system specifically "reflected the gross inequities of Russian society," a substantial legal reform was needed. *Id.*

26. Richard Wortman, *Russian Monarchy and the Rule of Law: New Considerations of the Court Reform of 1864*, 6 KRITIKA: EXPLORATION IN RUSS. & EUR. HIST. 145, 149 (2005), *available at* http://muse.jhu.edu/journals/kritika/v006/6.1wortman.html.

27. *Id.*

28. *Id.* at 145 ("The court reform of 1864 stands out as an exceptional event, a moment when the government accepted a judicial system that embodied the very principles that the rulers and officials of the Russian state had long repudiated as alien and pernicious."); s*ee also* PAMELA JORDAN, DEFENDING RIGHTS IN RUSSIA 20-21 (2005). Prior to 1864, lawyers frequently had no professional education and were often "disreputable, and were not supervised by any professional organizations." JORDAN, *supra*, at 20. These reformations also helped to improve perception of the profession by introducing public trials in the country for the first time. Peter H. Solomon, Jr., *Threats of Judicial Counterreform in Putin's Russia*, 13 DEMOKRATIZATSIYA 325, 327 (2005).

29. SMITH, *supra* note 4, at 18.

30. Peter Roudik, *Vladimir Spasovich and the Development of the Legal Profession in Russia,* 32 INT'L J. LEGAL INFO. 593, 594 (2004).

Uniform legal standards began to be established across Russia, and the ethics and philosophy behind the standards were given serious thought and implemented into professional regulation.[31] "Progressive and highly educated lawyers replaced ignorant and careless so-called 'legal midwifes.' The main characteristics of this new generation of lawyers were their desire to establish a professional organization and a strong adherence to the law."[32] Even though a lawyer's primary obligation was to the Tsar and his established overseeing body, the lawyer's goal was to help the client insofar as these two obligations did not conflict.[33] At that time, legal education of Russian lawyers offered "vast legal knowledge, scientific approach, and oratorical skills,"[34] and lawyers often used foreign sources in their legal research and exchanged ideas with foreign lawyers.[35] In fact, emerging Russian laws were frequently compared to French, Austrian, and German codes.[36]

It is important to note, however, that because Russia was an absolute monarchy, its legal environment was fully influenced by the personality and political approach of each individual tsar.[37] A number of obstacles stood in the way of successful progress and development of the legal environment in Russia, such as, the movement of nihilism, which denied the existence of law and became especially popular in the 1860s.[38]

---

31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 596.
35. Roudik, *supra* note 30, at 600.
36. *Id.*
37. For example, Alexander III ruled as tsar from 1881-94 and rejected many reforms which his predecessor initiated. RIASANOVSKY & STEINBERG, *supra* note 13, at 362. Many of his ideas came from Constantine Pobedonostsev, who served first as Alexander III's tutor and later his supporter and a key reactionary. *Id.* at 363. Pobedonostsev stressed the "danger of human reason," and thus Alexander III's main concern became the preservation of autocracy. *Id.* His "counterreforms" were also aimed at maintaining the class system, and he tightened control over Russian peasants. *Id.* at 364-65. During Alexander III's reign, non-Orthodox denominations experienced discrimination and many restrictions on religious practice. *Id.* at 365. Nicholas II (Alexander III's son) took over as tsar in 1894. RIASANOVSKY & STEINBERG, *supra* note 13, at 367. He strongly believed the autocratic power of the tsar was the only way Russia could survive and progress. *Id.* Although there were expectations Nicholas II would relax his father's restrictive policies and institute reforms, he vowed to "preserve the principles of autocracy as firmly and unswervingly as did [his] late father." *Id.* at 369. However, due to building societal pressures, Nicholas II was forced to relinquish some of this concentrated power. *Id.* His 1905 October Manifesto created the Duma and gave it the power to reject or confirm all proposed laws. *Id.* at 381. It also guaranteed civil liberties to Russian citizens. *Id.* However, Nicholas II regretted relinquishing his power and attempted to regain it in later years. *Id.* at 383.

38. Nihilism is explored in IVAN TURGENEV'S, FATHERS AND SONS (George Reavey trans., Signet Classics 2005) (1862). The word comes from the Latin *nihil*, meaning "nothing." *Id.* at 30. The text describes a nihilist as "a man who admits no established authorities, who takes no principles for granted, however much they may be respected." *Id.* The movement represented a "fundamental rebellion against accepted values and standards: against abstract thought and family control, against lyric poetry and school discipline, against religion and rhetoric." RIASANOVSKY & STEINBERG, *supra* note 13, at 354. Furthermore, nihilists' actions were "governed by utility." TURGENEV, *supra,* at 57. "Fathers" referred to the generation of the 1840's, while "sons" referred to 1860's generation.

B. The Soviet Times

In 1917, all these developments were quickly abrogated, however, with the tremendous changes that took place following the Great October Socialist Revolution of 1917. The Revolution totally dismantled the concept of the rule of law[39] as the "Marxist-Leninist ideology dictated an extreme and unvarying instrumentalism towards all legal institutions."[40] In fact, Vladimir I. Lenin, the leader of the Bolsheviks, was quick to issue a decree to abolish and suspend all tsarist courts when he came to power.[41] The First Constitution of the Soviet State,[42] which came into effect during this time, contained a number of misleading provisions that appeared to protect the interests of the people. These same provisions, however, offered plenty of room for various interpretations, which always resulted in favoring the interests of the party and State. To that end, Andrei Ya. Vyshinsky, Stalin's procurator-general, specifically stated a few years later: "The formal law is subordinate to the law of the Revolution. There might be collisions and discrepancies between the formal commands of laws and those of the proletarian revolution … This collision must be solved only

---

RIASANOVSKY & STEINBERG, *supra* note 13, at 353-54. The fathers believed in ideas of romanticism "with its emphasis on the metaphysical, religious, aesthetic, and historical approaches to reality" which clashed with the sons' nihilistic beliefs. *Id.* at 354.

After Turgenev's novel, nihilism became an important theme throughout Russian literature. *See, e.g.*, FYODOR DOSTOYEVSKY, CRIME AND PUNISHMENT (David McDuff trans., Penguin Group 1996) (1866). Dostoyevsky's CRIME AND PUNISHMENT depicts an extreme nihilist (Raskolnikoff) whose denial of nearly everything, including human emotion, leads him to murder for money. *See id.* The novel shows the powerful negative effects the nihilist movement was capable of producing. *See id.* However, Raskolnikoff is ultimately consumed with "sincere sorrow" about the murder. *Id.* at 416. These feelings cause Raskolnikoff to turn himself in and confess to his role in the murders. *Id.* at 421. His remorse and the love he develops for a young woman, which also encourages his confession, seem to suggest triumph over nihilism.

39. *See* Jeffrey Kahn, *The Search for Rule of Law in Russia*, 37 GEO. J. INT'L L. 353, 380 (2006).

40. *Id.*

41. *Id.* (citing SAMUEL KUCHEROV, THE ORGANS OF SOVIET ADMINISTRATION OF JUSTICE: THEIR HISTORY AND OPERATION 22-24 (Leiden: E.J. Brill, 1970)). The decree was issued on December 5, 1917. *Id.* Marxism taught that law and jurists would no longer be necessary under a dictatorship. William D. Meyer, *Facing the Post-Communist Reality: Lawyers in Private Practice in Central and Eastern Europe and the Republics of the Former Soviet Union*, 26 LAW & POL'Y INT'L BUS. 1019, 1022 (1995) (citation omitted).

42. The Soviet Union adopted 3 different versions of the Constitution. The Russian Soviet Federated Socialist Republic initially adopted its constitution, which "established the fulfillment of socialism as the immediate goal," in 1918. SMITH, *supra* note 4, at 80. However, the formal establishment of the Soviet Union in 1922 created the need for a new constitution. *Id.* The first constitution of the Soviet Union was ratified in 1924, and its focus was to specify the powers of federal bodies and constituent republics. *Id.* The second constitution of the Soviet Union was adopted under Stalin in 1936 and clearly set forth the state's powers and the Soviet citizens' duties and called for new criminal and civil codes that "reestablished the individual as a 'juridicial person' with the capacity to enter into legal relationships." *Id.* at 34. The 1977 Constitution ("Brezhnev Constitution") was not dramatically different from previous constitutions. *Id.* at 81. In fact, some observers believed the new constitution was promulgated to promote Brezhnev's image as "the Law Giver" rather than to fix inadequacies of the previous constitution. SMITH, *supra* note 4, at 80.

by the subordination of the formal commands of law to those of party policy."[43]

For example, the law contained a vague and catchall provision subjecting individuals to punishment for behavior that did not uphold the high status of a Soviet citizen.[44] Violation of this provision was considered a crime punishable by jail time and other types of sentencing.[45] It was frequently cited during the punishment of those who opposed various aspects of the Soviet regime, and many dissidents were forced into exile, psychiatric hospitalizations and subjected to other penalties under this provision.[46]

---

43. SMITH, *supra* note 4, at 27 (quoting ANDREI YA. VYSHINSKY, SUDOUSTROISTVO V SSSR 32 (Yuridicheskaya literatura 2d ed. 1935) (1935)).

44. Many laws during this time were intentionally vague so that state prosecutors had great flexibility in convicting people they considered enemies. SMITH, *supra* note 4, at 35. The doctrine of analogy also emerged at this time which allowed punishment for an act that was not itself expressly prohibited but was analogous to an act which the criminal code did expressly prohibit. *Id.* For example, Article 58 of the code allowed punishment for "anti-Soviet agitation" and "sabotage" among other things. *Id.*

45. *See* SMITH, *supra* note 4, at 35 (discussing that the power to administer punishment was given to special boards within the Ministry of Internal Affairs which did not have to follow normal judicial procedure and had the authority to exile or imprison anyone they considered to be "socially dangerous" for up to five years). An example of how widespread punishment was can be seen by examining the city of Moscow. Between 1936 and 1938, the Supreme Court tried and convicted thirty thousand defendants, all of which were punished with death by firing squad. Jonathan D. Greenberg, *The Kremlin's Eye: The 21st Century Prokuratura in the Russian Authoritarian Tradition*, 45 STAN. J. INT'L L. 1, 7 (2009).

46. Greenberg, *supra* note 45, at 9 (citation omitted). For example, the famous exile of academician Andrei Sakharov to Gorky took place at that time. Sakharov was a nuclear physicist known for making the Soviets' first hydrogen bomb. News.bbc.co.uk, On this Day January 22 1980: Soviet Dissident Sakharov Banished, http://news.bbc.co.uk/onthisday/hi/dates/stories/january/22/newsid_2506000/2506763.stm (last visited Sept. 14, 2010). Despite Sakharov's contributions, he was a well-known dissident for more than thirteen years. *Id.* He later campaigned for disarmament and then won the Nobel Peace Prize in 1975 for his work focusing on respect for human rights. *Id.* The events leading up to his seizure included an interview on American television during which he stated Soviet troops should be removed from Afghanistan, voiced his support for boycotting the Olympics in Moscow, and stated he agreed with sanctions ordered by U.S. President Carter. *Id.* The Soviet state did not tolerate Sakharov's outspoken disagreement – he and his wife, Yelena Bonner, were exiled to Gorky (250 miles away from Moscow), a city foreign reporters were not allowed to enter. *Id.* During the almost seven years he was in exile, Sakharov continued his work for human rights, including staging three hunger strikes. *Id.* Bonner was charged with "slander against the Soviet state" when she tried to fly to the U.S. in 1983, and there is speculation the charges were brought merely to force her back into exile. *Id.* Sakharov and other dissidents were released in the late 1980's when Gorbachev relaxed censorship and gave people more freedom to offer criticism and insight on how problems could be resolved. RIASANOVSKY & STEINBERG, *supra* note 13, at 589.

The treatment of academics such as Sakharov and Bonner is explored in ALEKSANDR SOLZHENITSYN, IN THE FIRST CIRCLE (Harry T. Willetts trans., Harper Perennial 2009) (1968). Solzhenitsyn himself spent eight years in a prison research institute (called the Gulag) prior to writing the novel. Edward E. Ericson, Jr., *Foreword to id.*, at xiii. The first version released of this novel was shortened from ninety-six chapters down to eighty-seven so that it would pass censorship requirements. *Id.* at xiv. The title references Dante's *Inferno* in which philosophers and other various pagans were kept in the first circle of Hell versus the lower circles where torment intensified. *Id.* at xvii. The prisoners' sole purpose is to work on projects for the state, and they are given "luxuries" not afforded to labor camp prisoners to keep up their morale, such as tobacco and adequate food. *Id.* Despite this, many prisoners still struggle with the moral aspect of aiding the effort with which they strongly disagree. *See* SOLZHENITSYN , *supra*. Some even cease to cooperate with the system al-

The main job or task for attorneys at that time became merely to argue and provide support for the legality of the described provisions and the actions of the State.

Many attorneys were morally and professionally corrupt at that time in history. They received different government privileges and went out of their way to assist the State with punishing individuals for anti-state views, religious affiliations, etc.[47] Under the leadership of the Soviet State, it was typical to practice what Russians called the "telephone law," meaning judges would receive a phone call from a top party member or bureaucrat telling him what he needed to do in his case, and the lawyer had to abide by such instructions.[48] Obviously, there was no point in discussing any ethical aspects of the legal profession in general because judges, and consequently lawyers, simply represented a weapon in the hands of the party and State and had to remain obedient in order to preserve their lives, jobs, and status.

The whole concept of lawyering was barely in existence at that time, because attorneys often had to prioritize the best interests of the party and State above the interests of their clients.[49] More specifically, party orders were the law.[50] In fact, the establishment of the Soviet State brought with it a very different role and image of lawyers when it prohibited private law

---

though they are subjected to harsher treatment as a result. *See id.* The feeling of internal conflict is set in the opening chapter as a Ministry of Foreign Affairs officials ponders the question "[i]f we live in a state of constant fear, can we remain human?" *Id.* at 3.

47. *See* SMITH, *supra* note 4, at 45 (discussing that advocates and other officials in the legal system were required to make periodic reports on the cases in which they were involved and that failure to fill quotas was not looked upon favorably by authorities). *But see* G.M. Shafor, *General Characteristics of the Modern Russian Bar*, *available at* http://abc.vvsu.ru/Brooks/paravov_regulir-_advoc_dejat/page0002.asp (offering stories of Soviet lawyers that "showed considerable civil courage.").

48. *See* John Reitze, Symposium, *Export Rule of Law*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 429. N. 19 (2003) (citation omitted) ("It has been widely documented that Communist Party officials have instructed judges in communist countries how to rule in politically sensitive cases, often by telephone.");*see generally*Kathryn Hendley, *'Telephone Law' and the 'Rule of law': The Russian Case,* 1 HAGUE J. ON RULE L. 241, 241 (2009) (explaining that the recent Yukos case shows that the concept of "telephone law" is alive and powerful in Russia today). For additional discussion of the Yukos case, see Kahn, *supra* note 39, at 404-07.

49. "The position of the Soviet lawyer is complicated. We have seen that he is often considered as an aid to the court and not merely as a representative of the interests of his client." Samuel Kucherov, *The Legal Profession in Pre- and Post-Revolutionary Russia*, 5 AM. J. COMP. L. 443, 466 (1956). During Stalin's time, for example, the "power of the state was used to stamp out all opposition to Stalin and his regime. This included the widespread use of legally sanctioned terror against Soviet citizens." SMITH, *supra* note 4, at 34. As such, lawyers had to be on board with the state if they wanted to keep their jobs.

In fact, this alliance with the state was taught from the very beginning of Soviet lawyers' journey into the legal profession. Meyer, *supra* note 41, at 1031 ("The Communists did not design legal education to train lawyers to solve problems or represent clients; rather, they sought to train politically reliable professionals to operate the state-run system."). Law graduates typically had state-assigned employment for up to three years after completing school and then shifted to a position in the planned economy. WILLIAM E. BUTLER, RUSSIAN LAW 140 (1999).

50. Kahn, *supra* note 39, at 386 n.113 (citation omitted).

firms altogether.[51] It was the "Ministry of Justice, not the bar or individual members," that oversaw the legal profession, including the establishment of the "fee structure for legal services."[52] Thus, the lawyer was ethically obligated to do what was advantageous to the State, rather than focusing on his client or the legal profession. For example, if the lawyer knew that his client was trying to overthrow the State, then he had to relay that information to the judge. Because private enterprise no longer existed, many lawyers became paper-pushers or plain bureaucrats at best, ensuring that the bureaucracy of the system worked. Attorneys practiced in "juridical consultations," also referred to as "legal consultation bureux," which were typically located in the same buildings as courts.[53] Enterprises neither sued each other, nor were they sued by individuals. Furthermore, the procuracy[54] served as the primary legal branch — prosecuting criminals and any other types of offenders. People were not generally entitled to legal protection, and there were very few legal safeguards in place. Primarily, lawyers would often go to the procuracy or find other ways to assist the State, go to the academia to write about other countries' laws and constitutions, or go to the industry to become bureaucrats.[55] This period in Russian history substantially lacked lawyering—a concept which was already a permanent part of culture and society in the United States and Western Europe.

III. THE LEGAL PROFESSION IN RUSSIA TODAY

During "perestroika," one of the major goals was to seriously change the core of existing mentality and to transition from totalitarianism to a "law abiding state,"[56] which was necessary in order to successfully evolve from a dictatorship to a democracy. To accomplish this tremendously ambitious goal, it was crucial not only to revise old laws and enact new

---

51. Kathryn Hendley et al., *Agents of Change or Unchanging Agents? The Role of Lawyers within Russian Industrial Enterprises*, 26 LAW & SOC. INQUIRY 685, 689 (2001).

52. ROBERT RAND, COMRADE LAWYER: INSIDE SOVIET JUSTICE IN AN ERA OF REFORM 12 (1991).

53. DMITRY SHABELNIKOV, PUB. INTEREST LAW INST., THE LEGAL PROFESSION IN THE RUSSIAN FEDERATION 3 (2008).

54. Peter the Great established the procuracy in 1722. Mary Chaffin, *Inside the Russian "Bar": An Oregon Lawyer Takes a Look at the Russian Legal Profession*, 56 OR. ST. B. BULL. 23, 24 n.4 (1996). The procuracy served as the "supreme supervisory power" over the Russian legal and administrative system and guaranteed compliance with legal norms. *Id.* Additionally, it was in charge of criminal prosecution and oversaw criminal investigations. *Id.* For a detailed history of the procuracy and a discussion of its function over time, see Greenberg, *supra* note 45.

55. The number of full-time advocates fell from 13,000 in 1917 to 650 in 1921. Meyer, *supra* note 41, at 1023 (citing EUGENE HUSKEY, RUSSIAN LAWYERS AND THE SOVIET STATE 12 (1986)).

56. *See* RIASANOVSKY & STEINBERG, *supra* note 13, at 584-91 (discussing the reforms that took place under Gorbachev). "Gorbachev…acknowledged the widespread withdrawal from public life, the spread of alcoholism and drug addiction, the growth of crime…and cynicism." *Id.* at 586. He pronounced the Soviet Union was in need of a "structural and spiritual reconstruction (perestroika)." *Id.*

ones but also to create mechanisms that would ensure enforcement of the new laws by their proponents, including members of the legal profession such as lawyers, judges, and prosecutors. To do so, it became critical to rebuild trust in the legal profession. Professional ethics builds a foundation for client and societal trust in the legal profession by providing regulation and guidance for the legal field. Thus, the work to develop a strong, lasting foundation and ethical framework for the legal profession started at that time and is still in progress today.

It is important to note that Russian society is generally known to be rather closed to change and slow in action.[57] Ongoing discussions of ambitious goals coupled with reluctance to take action and fear of consequences can be traced back to Russia's early history, including the centuries of serfdom and suppression of personal rights and liberties during communism; which are just single links in the chain of Russia's long and complicated past. As one reformer stated: "The worst legacy we have from the Stalin Era is the way we think. And we cannot obtain new thinking on credit."[58] As such, Russia's attempts to reform and regulate the legal profession have long represented a difficult path and will take years to fully implement.

During the transitional years of 1989-1991, when Russia undertook the effort of mass privatization of state property, western scholars, as well as Russian reformers, believed that a "constituency for the rule of law" would result.[59] The result, instead, was that "corruption, a weak state, and ineffective laws made private ownership close to irrelevant."[60] In fact, one scholar argues:

---

57. That tendency of Russian people to slowly process changes had been illustrated in Russian classical literature. For an example of this, see ANTON CHEKHOV, *The Cherry Orchard*, *in* CHEKHOV FOR THE STAGE 187 (Milton Ehre trans. 1992). The main character in Chekhov's play fails to accept that she is in danger of losing her estate due to her financial demise. *Id.* She constantly brings up memories of her young son who drowned several years earlier and reminisces about a previous relationship with a man in Paris. *Id.* She clings to the way her life used to be and fails to rectify her present problems. *Id.* Her desire to hold on to the past ultimately causes her to lose her home and uproot her family. *Id.*

58. SMITH, *supra* note 4, at 191 (quoting MALACHI MARTIN, THE KEYS OF THIS BLOOD (1990)).

59. Karla Hoff & Joseph E. Stiglitz, *After the Big Bang? Obstacles on the Emergence of the Rule of Law in Post-Communist Societies* 1-2 (Nat'l Bureau of Econ. Research, Working Paper No. 9282, 2002), *available at* http://www.nber.org/papers.w9282.pdf.

60. *Id.* at 2-3 (citing CHRYSTIA FREELAND, SALE OF THE CENTURY: RUSSIA'S RIDE FROM COMMUNISM TO CAPITALISM 344 (2000)).

> [T]he Russian reformers essentially did three things. First, they drafted a great volume of laws, and surprisingly many of them have been promulgated. Second, they instituted a great number of new legal and judicial institutions and tried to reform the existing ones. Third, they carried out a very fast privatization. While Russia does have a legal system, it is still widely seen as ineffective.

Anders Aslund, *Law in Russia*, 8 E. EURO. CONSTITUTIONAL REV. 96, 97 (1999), *available at* http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=413.

> Ten years later, Russia is, arguably, worse off than it was under the Soviets. Instead of a democratic, free-market society governed by a rule of law, Russia is astonishingly corrupt, a society which one observer has aptly described as 'robber capitalism.' The grossly uneven economic effects of 'robber capitalism' are evident. A few individuals have amassed obscene wealth, generally through illegal or sweetheart deals with the government.[61]

Despite that position, during the period of 1987-1997, the number of all cases filed in court (including criminal, civil, and administrative proceedings) more than doubled, which provides a "hopeful sign of a growth of public confidence in the courts."[62]

In the 1980s and 1990s, the demand for legal services rapidly increased, and the profession was liberated from the strong influence and control of the Ministry of Justice.[63] During that time, the legal profession in Russia was described as being in "turmoil," and numerous "alternative" institutions that failed to comply with any established educational or professional standards struggled to become established.[64] These challenges were resolved with the adoption of a new law titled "On Legal Practice and the Bar" in 2002.[65] That law established a uniform standard for joining the Bar, as well as an advocate's role and responsibilities.[66] It also established that each region in the Russian Federation should have a single bar body called Bar Chambers.[67] In order to obtain the status of advocate, one must belong to a Bar Chamber.[68] The members of each Bar Chamber are responsible for governing the organization and electing a council to manage the Chamber.[69]

In the last ten years, Russia has been working especially hard on reshaping its legal profession into a self-regulated system and arguably allowing its attorneys to achieve independence of judgment.[70] To that end,

---

61. John M. Burman, *The Role of Clinical Legal Education in Developing the Rule of Law in Russia*, 2 WYO. L. REV. 89, 99 (2002).

62. PETER H. SOLOMON, JR. & TODD S. FOGLESONG, COURTS AND TRANSITION IN RUSSIA: THE CHALLENGE OF JUDICIAL REFORM 114 (2000).

63. SHABELNIKOV, *supra* note 53, at 3.

64. *Id.*

65. *Id.* at 4.

66. *Id.*

67. *Id.* at 5.

68. SHABELNIKOV, *supra* note 53, at 5.

69. *Id.*

70. *But see* JORDAN, *supra* note 28 (providing a thorough analysis of the history and stages of development of the legal profession in Russia and arguing that the advocacy remains overall weak and plays a limited role in the life of Russian society). However, since 2007, an attorney's (or advocate's, considering the law only applies to members of the "advokatura") independence has been guaranteed in writing. The new law, articulated in "On Work as an Attorney and the Legal Profession in the Russian Federation," contains an article titled "Guarantees of the Independence of the Attorney," which specifically offers a number of "[g]uarantees of the [i]ndependence of the [a]ttorney." *See* On

relevant corporate bodies, such as Chambers of Attorneys, have now been set up on both a regional and federal level. There are eighty-seven regional Bar Chambers plus the Federal Bar Chamber, which has its headquarters in Moscow.[71] The Federal Bar represents an association of all regional Chambers, which are required to be members.[72]

The rules for the operations of these bodies were laid down in Spring 2002 in a federal law—On Work as an Attorney and the Legal Profession in the Russian Federation[73] (hereinafter "On Work"). In January 2003, the first all-Russian Congress of Attorneys adopted a Code of Professional Ethics for the Attorney ("Code").[74] Subsequently, in 2004, an amendment to the aforementioned law made observance of the Code obligatory.[75] A number of additional amendments were approved in 2007.[76] Since then, the law and the Code together constitute the basis for the ethical practice of law in Russia. The Code was translated and made available in English.[77] Overall, both "On Work" and the Code (together "Attorney Regulations") address many topics that are typically covered by attorney ethics rules in the West, such as confidentiality, conflict of interest, attorney-client relations, and appropriate fees. However, the attorney regulations also contain a number of provisions that are specific to Russia and incon-

---

Work, *supra* note 5, art. 18. Among other assurances, it provides that "[i]nterfering in work of an attorney . . . shall be prohibited" and an "attorney shall not be held liable in any way . . . for an opinion that he has expressed in the course of work as an attorney. . . ." *Id.*

71. SHABELNIKOV, *supra* note 53, at 6.

72. *Id.*

73. *See* On Work, *supra* note 5. An examination of violations of this federal law a year after it was adopted shows "it is no rarity for attorneys to violate the norms of professional ethics." A.S. Taran, *O narushenii advokatami norm professional'noi etiki (po materialam distsiplinarnoi praktiki palaty advokatov Samarskoi oblasti)* [*On Attorneys' Violation of the Norms of Professional Ethics (Based on Records of the Disciplinary Practice of the Chamber of Attorneys of Samara Oblast)*], 2 IURDICHESKII ANALITICHESKII ZHURNAL 89 (2006), *translated in* STATUTES & DECISIONS: LAWS OF USSR & ITS SUCCESSOR STATES, July-Aug. 2008, at 34, 35 [hereinafter STATUTES & DECISIONS July-Aug. 2008]. As an example, thirty-five attorneys just under the local Samara Oblast Chamber were determined to have violated the above-stated ethical standards in 2003. *Id.* As discipline for their violations, six advocates were given a warning, nine a severe reprimand, and sixteen were given a reprimand. *Id.* Seven advocates received the most severe form of discipline – "termination of the status as attorney." *Id.* Most commonly, violations involved advocates' "inadequate performance of their duties to clients." *Id.* In 2007, 273 attorneys in total were issued disciplinary penalties, and sixty-five had their "status as attorneys" terminated, i.e. disbarred. Iu.Ia Shutilkin, *Chest' i dostoinstvo, prisushchie professii: obobshchenie distsipliarnoi praktiki za vtoroe polugodie 2007 goda* [*The Honor and Dignity Intrinsic to the Profession: A Summary of Disciplinary Practice in the Second Half of 2007*], 1 VESTNIK ADVOKATSKOI PALATY SANKT-PETERBURGA 55 (2008), *translated in* STATUTES & DECISIONS July-Aug. 2008, *supra*, at 15. Complaints are submitted to the qualification commission whose consultants conduct a preliminary check during which the accused advocate is given the opportunity to provide an explanation/response to the allegation. *Id.* at 13. Interestingly, over sixty percent of cases do not make it past this preliminary check because consultants find no grounds for discipline. *Id.*

74. *See* KPEA, *supra* note 6.

75. *Id.* art. 1.

76. *See* STATUTES & DECISIONS May-June 2008, *supra* note 5, at 55.

77. *Id.*

sistent with what a Western lawyer would expect to have imposed on him. For example, the Code views lawyering as "not entrepreneurial activity"[78] and restricts advocates from any business-related employment other than "academic, teaching, or other creative activities."[79]

Although these attorney regulations should be viewed as a significant step toward the supervision and uniformity of the legal profession in Russia, the biggest challenge lies in the fact that they only regulate certain members of the profession. Today, Russian attorneys can be divided into two major groups: advocates—members of the organized bar, "advokatura"—and other jurists–unregulated lawyers who are not members of any organized Bar.[80] As of January 2008, the total number of advocates practicing in Russia amounted to 61,422[81] with the total population of Russia being approximately 142 million people.[82] It is hard to obtain an accurate number for jurists, but the available statistics say that there are 430,000 of them in the whole country of Russia, which results in the ratio of one advocate per 2,300 people and one jurist per 330 people.[83] Interestingly, a potential benefit of being an advocate is that only advocates are allowed to represent clients in criminal cases, while jurists' practice is limited to civil matters and administrative proceedings.[84] In addition, the procuracy,[85] notaries,[86] and judges[87] are also a part of the legal system in

78. On Work, *supra* note 5, art. 1(2) para. 2. It is interesting to note how many ethical regulations of advocates and proper lawyering are deeply rooted in the Russian legal culture. In particular, commercial activities have been long considered inappropriate for lawyers to engage in. As an example, as early as 1873, the St. Petersburg Council of Sworn Attorneys specifically "prohibited attorneys from receiving commission from business transactions and they were also forbidden from participation in any kind of commercial activities." Roudik, *supra* note 30, at 599.

79. On Work, *supra* note 5, art. 2(1) para. 1.

80. SHABELNIKOV, *supra* note 53, at 4. "Jurist" is a term that can be used for any person who has a legal education and works in a legal specialty. BUTLER, *supra* note 49, at 109.

81. SHABELNIKOV, *supra* note 53, at 4. The numbers differ substantially depending on the location. *Id.* For example, the number of advocates in the city of Moscow amounted to 7500, while the Nenetsky Autonomous District, which has a population of 35,000 people, has only twelve advocates. *Id.*

82. *Id.* at 5.

83. *Id.*

84. SHABELNIKOV, *supra* note 53, at 4. "Moreover, the only method used for legal aid in criminal cases is *ex officio* appointment." *Id.* at 13.

85. BURNHAM ET AL., *supra* note 16, at 131. The 1995 law entitled "On the Procuracy of the Russian Federation" defines the procuracy's powers and organization, stating that the procuracy is a "unified and centralized system of federal bodies charged with supervision over the observance of laws on the entire territory of the country." *Id.* at 137-38. The procuracy is designated three major functions. *Id.* at 140. First, it should supervise execution of laws by state bodies, organizations and bodies of local self-government. *Id.* Second, the procuracy is responsible for criminal investigation and prosecution of cases, and third, it is also responsible for participation in civil proceedings. *Id.* In addition, procurators also serve a "legal aid" function, including taking complaints from private citizens. BURNHAM ET AL., *supra* note 16, at 131. The Procurator General is appointed for a five-year term with that appointment being incredibly politicized because of the enormous powers that accompany the position. *Id.* at 138. The Procurator General reports to the Federal Assembly and the President of the Russian Federation, and he appoints all members of lower procuracy. *Id.*

Russia and can be described as "several separate professions."[88] However, because the ethical regulations described above only apply to advocates or members of the "advokatura," there are some other legal professionals who remain substantially unregulated and lack detailed ethical guidelines for their practice.[89]

IV. NEW CODE OF PROFESSIONAL ETHICS FOR ADVOCATES

Overall, the creation of a code of ethics enacted to regulate the legal profession is an exciting development in Russia's legal practice. The purpose of the Code is to set forth a uniform set of guidelines for members of the "advokatura" to follow.[90] According to Article 4.1. of "On Work," these newly enacted attorney regulations are based on the Constitution of the Russian Federation[91] and were approved by the Duma in 2002.[92] Like their western counterpart, "On Work" and the Code, which is a bit more detailed than "On Work," provide guidelines for a wide range of topics impacting the attorney and his work, including schooling and requirements for admission to the profession or "advokatura," qualifications for joining the Chambers of Attorneys, regulations and discipline, the attorney-client relationship, types of permitted law practice by advocates, conflicts of

---

86. *Id.* at 131. To become a notary, one must have a legal education similar to what is required of advocates, judges, and procurators and complete an apprenticeship for a minimum of one year. *Id.* at 160. There are two different categories of notaries – state and private – but their activities are essentially the same. BURNHAM ET AL., *supra* note 16, at 160.. In civil law countries, notaries commonly perform duties which would be reserved for lawyers in the United States. *Id.* One of their most important duties is "certification of legal transactions that the legislature has determined need stricter formal requirements in order to be valid." *Id.* In addition, they certify wills, give legal advice, and hold some "quasi-judicial power." *Id.* at 161. Notaries' fees can be relatively high, and they are paid well in comparison to other legal professionals. *Id.* at 162.

87. BURNHAM ET AL., *supra* note 16, at 131. For a discussion of the selection process, qualifications, tenure, and other information related to the judicial office, see *id.* at 162-66.

88. *Id.* at 131.

89. *See* SHABELNIKOV, *supra* note 53, at 4. There has, however, been some effort to guarantee judges will act in an ethical manner as well. Russia's Code of Judicial Ethics was approved in 2004. *See* CODE IN RUSSIAN [Code of Judicial Ethics] (Russ.), *translated at* http://translate.google.com/translate?js=y&prev=_t&hl=en&ie=UTF-8&layout=1&eotf=1&u=http%3A%2F%2Fwww.ssrf.ru%2Fprint_page.php%3Fid%3D13&sl=ru&tl=en. However, the judicial code is comprised of only thirteen articles and is less detailed than the comparable code for advocates. *See id.* (stating guidelines for general conduct, conduct in the implementation of professional activities, off-duty conduct, disciplinary action against judges, and applicability of the code). Additionally, there are several other laws that regulate the professions of judge and notary. *See* Burnham et al., *supra* note 16, at 160-66 (discussing that notaries are governed by the "Fundamental Principles of Legislation on the *Notariat*" and that judges' activities are guided by laws such as "On the Status of Judges", "On the Constitutional Court", and "On the Judicial System" which set forth qualifications and requirements for judicial selection and tenure).

90. *See* On Work, *supra* note 3, art. 4(1).

91. *Id.*

92. *Id.* at 10.

interest, legal aid, and issues of client confidentiality.[93] Below is an overview of major topics covered.

A. Admission to the Profession & Schooling Requirements

The new attorney regulations set forth specific schooling and experience requirements for obtaining the status of advocate[94] throughout the territory of the Russian Federation. Article 9 specifically states that a candidate needs to have obtained a higher legal education from a state-accredited institution or academic degree in the area of law.[95] In addition, a two-year period of legal experience or intenship in a legal practice is required.[96] Further, individuals who are fully or partially incompetent, as well as those who have "prior undischarged or uncleared [c]onvictions for

---

93. *See generally* KPEA, *supra* note 6.

94. Although the English translation of the "On Work" uses the term "attorney," this article will use "advocate" instead as it will further emphasize that these requirements are applicable to members or prospective members of the "advokatura"/advocacy only.

95. On Work, *supra* note 5, art. 9(1) ("A person who has a higher legal education obtained in a state-accredited educational institution of higher professional education or who has an academic degree in a legal specialism shall have the right to acquire the status of attorney in the Russian Federation."). Russia's system of legal education is largely based on the "Germano-Roman civil law tradition." BURNHAM ET AL., *supra* note 16, at 131. There are four different types of law schools that students attend – law faculties, state law academies, specialized institutes, and private law schools. *Id.* at 131-32. Law faculties, which are departments of law within universities, are the most common. *Id.* The schools' curriculum is set by the Ministry of Education in collaboration with deans of the top law schools. *Id.* at 131. A student can receive a bachelor's in law after four years of study, a specialist degree after five years, and a master's degree after six years. *Id.* at 132. The specialist degree is preferred, and the procurator's office and the courts will not hire someone with only a bachelor's. BURNHAM ET AL., *supra* note 16, at 132-33. However, it is common for lawyers to complete eight years of study plus write a dissertation to earn a candidate's degree – which is required if the lawyer intends to work in academia. *Id.* at 132.

96. On Work, *supra* note 5, art. 9(1).

The period of work in a legal specialism necessary for acquisition of the status of attorney shall include work:

(1) as a judge;

(2) in state positions requiring a higher legal education in federal bodies of state power, in bodies of state power of subjects of the Russian Federation, or in other state bodies;

(3) in positions that required a higher legal education in state bodies of the USSR, RSFSR, or Russian Federation that existed on the territory of the Russian Federation prior to the adoption of the current Constitution of the Russian Federation;

(4) in municipal positions requiring a higher legal education;

(5) in positions requiring a higher legal education in bodies of the Judicial Department of the Supreme Court of the Russian Federation;

(6) in positions requiring a higher legal education in the legal services of organizations;

(7) in positions requiring a higher legal education in scientific research institutions;

(8) as a lecturer in legal disciplines in institutions of middle professional, higher professional, and graduate professional education;

(9) as an attorney;

(10) as an attorney's assistant;

(11) as a notary.

Id. art. 9(4).

committing an intentional crime" are not eligible to apply to become an advocate.[97]

Furthermore, one needs to successfully pass a qualifying examination, which consists of oral and written questions.[98] A special commission, consisting of thirteen members who serve two-year terms, must be created in order to "hold qualifying examinations" for applicants and to respond to complaints against advocates.[99] In case of failure, the exam may be retaken.[100] The decisions on filed applications are made within three months, and candidates that fulfill the stated criteria and pass the examination cannot be denied admission to the "advokatura" or advocacy.[101] After passing the examination, each applicant must take an oath.[102] Successful applicants join the Chamber of Attorneys, a non-state, non-commercial organization created for the purpose of ensuring the rendering of "legal aid."[103] Advocate members are required to pay monthly dues.[104]

---

97. *Id.* art. 9(2).

98. *Id.* arts. 10, 11. The examination passing rate varies greatly depending on a specific location. For example, there was a sixty percent passing rate in Novorsibirsk Oblast from 2004 – 2006. SHABELNIKOV, *supra* note 53, at 10 (citation omitted). However, from 2005 – 2006, there was only a thirty percent passing rate in the Republic of Chuvashia. *Id.* (citation omitted). This may be due to a number of different factors such as lack of objectivity in the bar exam, varying education levels in each region, or the "attitude of a particular qualification board." *Id.*

99. On Work, *supra* note 5, art. 33. The commissions include two judges, two representatives from the Ministry of Justice and the regional legislature, respectively, as well as seven advocates. BURNHAM ET AL., *supra* note 16, at 144 n.35. Members of the commission who are practicing lawyers may combine their service on the commission with their legal work. On Work, *supra* note 5, art. 33.

100. On Work, *supra* note 5, arts. 10, 11.

101. *Id.* art. 12.

102. *Id.* art. 13(1). The oath states "I solemnly swear honestly and conscientiously to perform the duties of an attorney and to defend the rights, freedoms, and interests of clients, under the guidance of the Constitution of the Russian Federation, the law, and the Code of Professional Ethics for the Attorney." *Id.*

103. *Id.* art. 29 ("legal aid" essentially refers to what would mean "legal services" or "legal assistance" using legal English). If a Chamber of Attorneys contains more than 300 members, its supreme overseeing body is the conference of attorneys. *Id.* art. 30(1). The council of a Chamber of Attorneys is the "collegial executive body of the Chamber of Attorneys." *Id.* art. 31(1). The Council is elected from the members of the Chambers and it then elects from its members a President of the Chambers. *Id.* art. 31(2)-(3)(1). Among its responsibilities, the Council ensures the accessibility of legal aid, maintains the register, and provides guidance for advocates upon request. *Id.* art. 31(3). On a federal level, the council of Federal Chamber of Attorneys is charged with assisting in raising the professional level of advocates and defending their social and professional rights. *Id.* art. 37(3)(5)-(3)(6). The All-Russia Congress of Attorneys is the supreme body of the Federal Chamber of Attorneys. *Id.* art. 36(1). Among other important functions, it will adopt the Federal Chamber's charter, Code of Ethics for Attorney and necessary amendments or additions to it, as well as its own regulations. *Id.* art. 36(2).

104. *Id.* art. 7(1)(5). Membership dues are different for each subject chamber. BURNHAM ET AL., *supra* note 16, at 143 n.34. Advocates in Moscow, for example, pay about nine U.S. dollars (300 rubles) a month. *Id.*

B. Grounds for Suspension or Discipline

"On Work" merely lists grounds for suspension and termination of the advocate's status, while the Code sets forth the specifics of and grounds for discipline. The Code states that a violation of either the Code or "On Work" "committed intentionally or due to crude negligence, shall entail application of the measures of disciplinary liability…."[105] However, violations which "[do] not soil [the attorney's] honor and dignity…damage the authority of the legal profession, and [have] not caused substantial harm to a client or to a Chamber of Attorneys" will not require disciplinary measures.[106] In addition to termination, disciplinary measures can also include a reprimand or warning.[107]

According to "On Work," grounds for suspension or termination of an advocate's status will include, among other things, death, incompetence, conviction of a crime, failure to perform professional duties or election of the attorney to a state power, and inability to perform professional duties for a period of more than six months.[108] The Code then specifically explains that complaints against an advocate will be heard first by a qualifications commission and then a "council of the Chamber of Attorneys of a subject of the Russian Federation."[109] Disciplinary action cannot be taken if more than one year has passed since the violation took place.[110]

C. Malpractice Insurance & Legal Aid

The attorney regulations require that all advocates possess malpractice insurance.[111] It is interesting to note that this is possibly due to a lack of trust towards the legal profession, which has historically been a part of the attorney's image in the eyes of the Russian population. Also of interest is

---

105. KPEA, *supra* note 6, art. 18(1) ("Crude" negligence can be also referred to as "gross" using legal English. *See generally* WILLIAM E. BUTLER, RUSSIAN LAW (2d ed. 2003)).

106. *Id.* art. 18(2).

107. *Id.* art. 18(6).

108. On Work, *supra* note 5, arts. 16-17.

109. KPEA, *supra* note 6, art. 22. Complaints may be initiated by "another advocate; client or his/her representative; person who applied for civil legal aid and was denied such aid; vice president of the bar chamber; governmental agency supervising the bar (i.e. the Ministry of Justice); [or] a court or a judge in certain cases." SHABELNIKOV, *supra* note 53, at 9 (citing KPEA art. 20(1)).

110. KPEA, *supra* note 6, art. 18(5).

111. On Work, *supra* note 5, art. 19 ("In accordance with federal law, an attorney shall insure for risk to his professional property liability…"); *see also id.* art. 7(1)(6). This provision went into effect in 2007; however, many advocates apparently did not carry professional malpractice insurance prior to this because it was simply hard to obtain. *See* BURNHAM ET AL., *supra* note 16, at 146-47. Based on this history, it is unlikely the new requirement is being strictly followed. It is important to note, though, that malpractice claims have rarely been instituted in the past. *Id.* at 147. When one was brought, it was handled by the collegia. *Id.* Advocates had to compensate clients directly if malpractice was found, and if this requirement was not met, the advocate's right to practice could be revoked. *Id.*

a provision requiring mandatory free legal aid/pro bono services.[112] Such aid has to be rendered in cases that are filed in court, with priority given to disputes involving alimonies or compensation damages due to a loss of the household breadwinner, as well as to cases involving veterans of the Great Patriotic War (as long as they don't involve entrepreneurial activities) and citizens of the Russian Federation who were subjected to political repression.[113]

The Code further states that an advocate shall be "obliged to participate personally or materially in the rendering of free legal aid in instances envisioned by legislation,"[114] while the head of a legal practice shall be required to "take measures to ensure that attorneys duly perform their professional duties" pertaining to free legal aid or pro bono work.[115] The Code also maintains that pro bono work should be of the same quality as all other paid work.[116]

D. Permitted Types of Practices by Advocates

"On Work" specifically explains what types of law firms or other arrangements are appropriate for an advocate's legal practice. Advocates, however, may choose a form of permissible legal practice.[117] "On Work" provides specific guidelines for how an advocate can open an office including requirements to notify the Chamber of Attorneys, open proper bank accounts, and other details.[118] The law further groups legal practices into three major categories: collegiums of advocates, advocates' bureaus, and legal advice offices.[119] A collegium of advocates is a legal entity con-

---

112. "An attorney shall have the duty ... to render free legal aid to citizens of the Russian Federation." On Work, *supra* note 3, art. 7(1)(2); s*ee also* KPEA, *supra* note 6 art. 15(7)-(8).

113. On Work, *supra* note 5, art. 26(1). However, according to one Russian criminal defense lawyer who has been practicing for twenty years, lawyers often find ways to avoid this duty. Telephone Interview with Sergey Thak, Law Offices of Sergey Thak (June 17, 2010). This provision has failed to truly take effect because many attorneys do not have adequate funds to cover court fees for these clients. *Id.* However, there is potentially another loophole which allows chambers of advocates at the subject level to set up funds that lawyers can pay into if they do not wish to take on such cases. BURNHAM ET AL., *supra* note 16, at 148. The funds are then used to pay advocates who are willing to provide representation. *Id.*

114. KPEA, *supra* note 6. art. 15(7). Advocates who are new to practice or live in areas of low economic activity are typically more willing to take on pro bono cases. BURNHAM ET AL., *supra* note 16, at 148. These cases can often help their careers by leading to paid work. *Id.* In order to further encourage pro bono service by all advocates, the Association of Lawyers of Russia (ALR) along with the Public Interest Law Institute (PILI) "drafted a Memorandum on Social Responsibility of the Russian Lawyer" in 2008. SHABELNIKOV, *supra* note 53, at 19. The Memorandum sets standards for the annual number of billable hours for lawyers or organizations that join the ALR to spend on pro bono services. *Id.* The minimum is ninety-six hours for organizations or firms, and individual attorneys must devote at least twenty-four hours. *Id.*

115. KPEA, *supra* note 6, art. 15(8).

116. *Id.* art. 10(8).

117. On Work, *supra* note 5, art. 20(2).

118. *Id.* art. 21.

119. *Id.* arts. 20, 22-24.

sisting of two or more attorneys[120] and is considered to be established the moment it is entered into the state registration system.[121] In such an arrangement, members are not responsible for the collegium's obligations, and the collegium is not responsible for its members' obligations.[122]

The "Advocate's Bureau," on the other hand, is a partnership that unites two or more advocates for the purpose of rendering legal service.[123] Advocates are able to start a new bureau after terminating a current one.[124] Finally, a "Legal Advice" office is a "noncommercial entity created in the form of an establishment."[125] In terms of the numbers of practicing advocates, the guideline is as follows: "If [the Legal Advice Office is] on the territory of a single court district the total number of attorneys in all legal practices [should be] less than twice the number of federal judges…."[126]

The law further states that advocates have a right to work with legal assistants,[127] who are not permitted to perform attorney work[128] and are obliged to protect "secrets," i.e. confidential information.[129] Advocates' assistants must sign contracts specifying the terms of their employment.[130]

E. Attorney Advertising

Attorney advertising is permitted as long as it does not contain an "evaluative description[] of the attorney,"[131] other people's testimonials about the advocate's work, "comparisons with or criticism of other attorneys," or any kinds of statements, inferences, or ambiguities that may "create illusions in potential clients or arouse unfounded hopes in them."[132] It is further explained that, if an advocate discovers that an

---

120. *Id.* art. 22(1).
121. *Id.* art. 22(8).
122. On Work, *supra* note 5,. art. 22(12). "Collegia are mostly just offices where lawyers can meet with their clients, use equipment and share a secretary, rather than 'law firms.'" SHABELNIKOV, *supra* note 53, at 7. Membership is voluntary, and the organization is considered to be a non-profit. BURNHAM ET AL., *supra* note 16, at 146.
123. On Work, *supra* note 5, art. 23(1), (3). Bureaus are the least popular way to organize a law practice. SHABELNIKOV, *supra* note 53, at 7. As of 2008, there were 542 bureaus employing about 2000 advocates. *Id.*
124. On Work, *supra* note 5, art. 23(12)
125. *Id.* art. 24(2).
126. *Id.* art. 24(1).
127. *Id.* art. 27(1). "Persons who have a higher, unfinished higher, or middle-level legal education…may be assistants to an attorney." *Id.* Additionally, an attorney with at least five years of experience is permitted to have interns. *Id.* art. 28(1). Interns must have a higher legal education, and internships last between one and two years. *Id.* Like an attorney's assistants, interns are required to protect the attorney's "secrets" and comply with the terms of their employment contracts. *Id.* art. 28(3)-(4). They are also not permitted to carry on independent legal work. *Id.* art. 28(2).
128. *Id.* art. 27(2).
129. On Work, *supra* note 5, art. 27(3).
130. *Id.* art. 27(4).
131. KPEA, *supra* note 6, art. 17(1)(1).
132. *Id.* art. 17(1)(2)-(1)(4).

advertisement of his work which is not in compliance with the above-stated criteria has been distributed without his knowledge, he is required to notify the council.[133]

F. Independence of Judgment & Attorney-Client Relationship

"On Work" Article 7(1)(1) articulates the main principle underlying the new attorney-client relationship and lays the foundation for a duty of loyalty. It specifically states that advocates have the duty to work "honestly, rationally, and conscientiously to uphold the rights and lawful interests of [their] client[s] by all means not prohibited" by law.[134] According to Article 25, an agreement between advocate and client constitutes a civil law contract.[135] The contract should establish specific attorney's fees, which may be based on the "amount and difficulty of the work, the length of time necessary for its completion, the experience and qualifications of the attorney, the deadlines for and degree of urgency of the work, and other circumstances."[136] Advocates are not permitted to share their fees with non-lawyers, and contingency fees are generally prohibited with the exception of property disputes.[137] The Code offers a number of guidelines pertaining to managing client funds.[138] Mainly, an advocate managing a client's funds must do so according to the client's instructions and maintain detailed records of all transactions.[139] A client's money should be kept in a bank unless the client chooses otherwise.[140]

The Code further elaborates on and provides specific guidance regarding duties and responsibilities surrounding attorney-client relations. It emphasizes that the "professional independence of the attorney is a necessary condition for trust,"[141] that "abuse of trust is "incompatible with the calling of [an] attorney;"[142] and that advocates must avoid "actions that

---

133. *Id.* art. 17(2).
134. On Work, *supra* note 5, art. 7(1)(1).
135. *Id.* art. 25(2).
136. KPEA, *supra* note 6, art. 16(2). Large firms which serve businesses are more likely to charge hourly rates. SHABELNIKOV, *supra* note 53, at 11 (citation omitted). One of the largest Russian firms, located in Moscow, estimated its advocates' hourly rate to be 135 euro; however, various firms have been quoted as stating their hourly rate is as high as 1000 euro. *Id.* at 12 (citation omitted). Fixed fees for stages of a case or the entire case are more commonly used overall. *Id.* at 11. Although these fees may seem reasonable by Western standards, legal services are unaffordable for a great section of the Russian population. *Id.* at 12.
137. KPEA, *supra* note 6, art. 16(3)-(4).
138. *See id.* art. 16(6).
139. *Id.* "Documents that accompany every operation with the funds of the client must contain an indication that the attorney carried out the given operation on the instructions of the client." *Id.* Moreover, all records "must be presented to the client upon his demand." *Id.*
140. *Id.*
141. *Id.* art. 5(1).
142. KPEA, *supra* note 6, art. 5(3).

are likely undermine trust."[143] Moreover, advocates should be careful not to "sacrifice the interests of [their] client[s] for the sake of friendly or any other relations."[144] However, the "law and morality in the legal profession shall have priority over the will of the client,"[145] and an advocate cannot violate the law at the client's request.[146] To that end, an advocate shall not offer promises of a "positive outcome" of a dispute, which imply that he may use illegal means to achieve it.[147]

G. Conflict of Interest

The guidelines for issues relating to conflict of interest are rather general. The Code states that advocates cannot "act against the lawful interests" of their clients[148] or take a position in opposition to that of their clients, except for when the defense attorney believes her client would be incriminating himself.[149] An advocate also cannot publicly declare his client's guilt.[150] Although an advocate cannot represent opposing parties, she may attempt to facilitate conciliation of those parties.[151] Furthermore, an advocate cannot represent two defendants in the same criminal case if they have divergent interests or if "they take different positions on the same episodes of the case."[152] Once an advocate determines that a conflict is present, he must terminate representation and inform his client as soon as possible so that the client can retain a different attorney to represent him.[153]

"On Work" lists a number of instances when an advocate cannot accept payment for services.[154] Such instances include payment an advocate knows to be illegal, situations when an advocate has an independent self-interest in the case that is different from his client, when an advocate had been involved in the case as "judge or arbiter, intermediary, prosecutor, investigator, inspector, expert, specialist, or translator, if he is a victim or

---

143. *Id.* art. 5(2).
144. *Id.* art 15(5). This includes relations with other attorneys which the Code states "must not influence the defense of the interests of the parties to a case." *Id.*
145. *Id.* art. 10(1).
146. *Id.*
147. KPEA, *supra* note 6, art. 10(2).
148. *Id.* art. 9(1)(1). The Code makes it clear that the attorney's reason for acting against his client's interests are irrelevant – he may not do so even in situations where the attorney would be acting to his own advantage or due to outside pressures. *Id.*
149. *Id.* art. 9(1)(2).
150. *Id.* art. 9(1)(3).
151. *Id.* art. 11(1).
152. KPEA, *supra* note 6, art. 13(1)(1)-(1)(2).
153. *Id.* art. 10(9) ("If after an attorney has accepted a commission, apart from a commission to conduct the defense in a criminal case at the preliminary investigation or in a court of first instance, circumstances come to light that would have barred him from accepting the commission, he must repudiate the agreement.").
154. It is likely this rather means instances in which an advocate is unable to represent a client.

witness in the case, or if he has been an official whose competence included the adoption of decisions in the interests of the given client."[155] Moreover, an advocate cannot take on representation if he has familial relations with an official investigating or inquiring into the case of the client involved.[156] The Code, however, specifically provides that an advocate may take on the case "even if he has doubts of a legal character, provided that these doubts do not exclude the possibility of a reasonable and conscientious conduct of the case."[157]

H. Confidentiality

"On Work" defines the attorney's "secrets"[158] or confidential information as "any information connected with an attorney's rendering of legal aid to his client."[159] Advocates cannot be subpoenaed to testify as witnesses regarding the information obtained during representation of a client.[160] The Code states that the client holds his attorney-client privilege, and only the client can waive it.[161] However, an advocate may use

---

155. On Work, *supra* note 5, art. 6(4)(1)-(4)(2).

156. *Id.* art. 6(4)(2).

157. KPEA, *supra* note 6, art. 7(1). However, an advocate must not accept a case if "it is absolutely hopeless and cannot lead to any consequences other than baselessly raising the client's hopes of a favorable outcome to the case and causing him futile and unjustified expenditure of time, effort, and money, including payment for the services of the attorney." *Council of the Chamber of Attorneys of the City of Moscow Extract from Survey of Disciplinary Practice (May 15, 2006) – Disciplinary Proceeding Against Attorney K,* STATUTES & DECISIONS: LAWS OF USSR & ITS SUCCESSOR STATES, Sept.-Oct. 2008, at 18, 20 [hereinafter STATUTES & DECISIONS Sept.-Oct. 2008].

158. "Secrets" is a direct translation of the Russian "*sekreti.*" However, within the context of the Code, it is more likely the word probably means "confidential information."

159. On Work, *supra* note 5, art. 8(1). The duty of non-disclosure of information related to rendering legal aid may seem to conflict with reporting requirements imposed by other laws, such as the Taxation Code of the Russian Federation. In a recent case, an advocate argued receipts for client payments constituted "attorney's secrets" and thus refused to provide the documents to tax inspectorate. VESTNIK KONSTITUTSIONNOGO SUDA ROSSIISKOI FEDERATSII [VESTN. KS RF] [Messenger of the Constitutional Court of the Russian Federation] 2008, No. 451-O-P, *translated in* STATUTES & DECISIONS: LAWS OF USSR & ITS SUCCESSOR STATES, Nov.-Dec. 2008, at 73, 75 [hereinafter STATUTES & DECISIONS Nov.-Dec. 2008]. The Court ruled demand of documents necessary for calculation of taxes was not in itself unconstitutional. *Id.* at 78. However, it also determined "[the] resolution of disputes over whether a document demanded from an attorney contains information constituting an attorney's secret…belongs to the sphere of competence of law enforcement agencies and not to that of the Constitutional Court." *Id.*

160. On Work, *supra* note 5, art. 8(2). This provision (like its corresponding provision in the Criminal Procedure Code of the Russian Federation) "serves to protect the interests of the accused and is a guarantee of the defender's unimpeded performance of his functions." *On the complaint of Citizen Givi Vazhevich Tsitskishvili Regarding the Violation of His Constitutional Rights by Point 2 of Part 3 of Article 56 of the Criminal Procedure Code of the Russian* Federation, ROSSIISKAIA GAZETA [ROS. GAZ.] Mar. 6, 2003 (Russ.), *translated in* STATUTES & DECISIONS Nov. - Dec. 2008, *supra* note 159, at 41-42. Note that, in regard to the Criminal Procedure Code, the Constitutional Court has found the provision does not "exclude [an advocate's] right to give corresponding testimony in instances in which the attorney himself and his client have an interest in the disclosure of certain information." *Id.* at 42.

161. KPEA, *supra* note 6, art. 6(3).

the privileged information for her defense in instances of attorney-client disputes.[162]

V. ATTORNEY REGULATIONS IN RUSSIA VS. OTHER COUNTRIES' RULES OF ETHICS

A. ABA Model Rules & CCBE Code/Overview

In an effort to place the new attorney regulations in Russia in a more global context, this article briefly compares the existing language of the Code and "On Work" with the key provisions of the ethical regulations followed by European and American attorneys. Instead of selecting a few European countries, the author chose to compare the attorney regulations in Russia to the key ethical provisions stated in the Code of Conduct for European Lawyers ("CCBE Code").[163] The Council of Bars and Law Societies of Europe (CCBE) was created in 1960 as a result of the 1957 Treaty of Rome.[164] The specific purpose of the treaty was to facilitate agreements between the legal professions in a number of European countries, and the CCBE became the official representative for the legal profession in the European Economic Area (EEA) and the European Union, which includes approximately 700,000 attorneys.[165] The work on the ethical rules governing lawyers, compiled in the resulting CCBE Code, began in 1982.[166] In 1988, the CCBE Code was finally approved by the European Economic Community (EEC).[167]

---

162. *Id.* art. 6(4).

163. For a discussion of rules governing the legal professions of individual member states, see BRUNO NASCIMBENE, THE LEGAL PROFESSION IN THE EUROPEAN UNION 61-233 (Andrea Biondo ed., 2009).

164. Terry, *supra* note 7, at 9. The Treaty of Rome created the European Economic Community (EEC). *Id.*

165. Oskar Riedmeyer, *International Cooperation Between Lawyers* 2, DocStoc.com, http://www.docstoc.com/docs/3828379/Code-of-Conduct-for-Lawyers (last visited June 20, 2010). The CCBE contains twenty-eight delegations with their members nominated by the regulatory bodies in twenty-five European states that are members and three other countries that represent the European Economic Area (EEA). *Id.* In addition, observer delegations include the Bars of Switzerland, Bulgaria, Romania, Croatia, Former Yugoslav Republic of Macedonia, Ukraine and Turkey. *Id.* These "observer" countries also chose to participate in the regulation of transnational legal practice offered by the CCBE Code. Terry, *supra* note 9, at 13-14. The CCBE represents the legal profession before the European Court of Human Rights, the European court of Justice, and the European Commission. John Toulmin, *A Worldwide Common Code of Professional Ethics?*, 15 FORDHAM INT'L L.J. 673, 673 n.1 (1991-92).

166. Terry, *supra* note 9, at 7.

167. *Id.* at 9. The most recent amendments to the CCBE Code were made in May 2006. Laurel S. Terry, *A "How To" Guide for Incorporating Global and Comparative Perspectives in the Required Professional Responsibility Course*, 51 ST. LOUIS U. L.J. 1135, 1149 (2006-2007) (citing CCBE CODE, *supra* note 6). Interestingly, prior drafts of the CCBE Code are not available to the public (unlike drafts of the ABA Model Rules). *Id.* (citation omitted).

Although the CCBE Code itself is not officially binding, most EEC countries have adopted it as their law.[168] In that respect, the CCBE Code is similar to the ABA Model Rules of Professional Conduct,[169] which are also merely advisory but have become binding as a result of most United States States' adoption of the Model Rules as part of their law.[170] The CCBE Code's purpose is to govern only transnational and cross-border legal practice and conflict of law issues; it does not govern a lawyer's ethical practice in his home country, but is rather meant to apply in instances where an attorney practices in a different jurisdiction or host country from the one he is licensed in and it is unclear which ethical standard should govern.[171] The CCBE Code resolves this potential conflict by offering a uniform ethical standard that applies in such instances.

This article will compare the new attorney ethics regulations in Russia to those stated in the CCBE Code because, unlike the ethical framework and its nuances that pertain to a specific country and are not necessarily representative of the ethical values of a larger community, the CCBE Code arguably expresses the overall ethical standards agreed upon and accepted by the majority of attorney governing bodies in Europe. As such, a comparison to those provisions allows the author of this article to analyze, comprehend, and offer perspective on the overall focus of the new attorney regulations in Russia, and determine whether it is following a more global trend of development in the field or merely reflects the specifics of law practice in Russia, which are deeply rooted in the country's historic and socio-economic developments.

In addition to the CCBE Code, the new attorney regulations in Russia are compared to the key language and provisions of the ABA Model Rules,[172] allowing this article to determine whether the new developments

---

168. Terry, *supra* note 9, at 11-13.

169. *See* MODEL RULES OF PROF'L CONDUCT (2010). The CCBE Code contains an "Explanatory Memorandum," which is very similar to the commentary that follows the ABA Model Rules. Terry, *supra* note 9, at 14.

170. California is the one state that has "never fully embraced" the ABA Model Rules. STEPHEN GILLERS, REGULATION OF THE LEGAL PROFESSION 8 (2009). Differences between states' rules and the ABA Model Rules can be seen most significantly in the areas of conflict of interest, advertising and solicitation, and protection of client confidences. *Id.* For a list of states that have adopted the Model Rules of Professional Conduct, *see* http://www.abanet.org/cpr/mrpc/alpha_states.html.

171. CCBE CODE, *supra* note 8, R. 1.3. It is interesting to note "[t]he hope is to build on what has been done and to develop a code of professional conduct that will apply to the cross-border activities of lawyers from all the countries which are signatories to the General Agreement on Tariffs and Trade ("GATT")". Toulmin, *supra* note 165, at 674-75.

172. The first version of the Model Rules of Professional Conduct was adopted in 1983, and the Rules have since been amended in 1987, 1989, 1990, 1992, 1993, 1994, 1995, 1997, 1998, 2000, 2002, 2003, 2007 and 2009. Materials for Research in Legal Ethics, www.abanet.org/cpr/ethicsresearch/resource.html (last visited June 5, 2010) [hereinafter Materials]. Substantial modifications were made in August, 2001 as well as in February and August of 2002. THOMAS D. MORGAN & RONALD D. ROTUNDA, 2010 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 1 (2010). Notably, in August, 2003 Rule 1.6 and Rule 1.13 were amended in response to the Enron debacle. *Id.*

in Russian legal ethics in any way resemble or follow the American standards for its ethical practice of law. Numerous law review articles have previously addressed, outlined, and analyzed the provisions and key components of both the CCBE Code and ABA Model Rules.[173] As such, this article does not engage in a similar in-depth analysis of either source. Instead, the purpose of the comparison offered here is to focus on the differences and similarities between the language and applicable provisions of both the CCBE Code and ABA Model Rules and the new attorney regulations in Russia with an eye towards a better understanding of the overall focus and trend in the development and current status of legal ethics in Russia.

B. Comparative Analysis of the Russian Code, CCBE & ABA Model Rules

Although the major differences between the common law and civil law legal systems are reflected in the ABA Model Rules and CCBE Code,[174] one scholar argues that, "[d]espite differences in legal systems, practices and procedures and legal customs, lawyers in many countries throughout the world have laid down for themselves substantially the same standards of professional ethics."[175] On some level, that is true, as most ethical guidelines for lawyers all over the world contain some general language

---

173. For discussion of the CCBE Code, see Riedmeyer, *supra* note 165; Terry, *supra* note 9, at 17-45; Lauren R. Frank, *Ethical Responsibilities and the International Lawyer: Mind the Gaps*, 2000 U. ILL. L. REV. 957, 959-84 (2000); Toulmin, *supra* note 163. For discussion of the ABA Model Rules, see Frank, *supra*, at 959-84; 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).

174. The judicial decisions in civil law are based on written codes and statutes and, unlike in the common law, judicial decisions theoretically play no role in judicial decisions as "lower courts are generally at liberty to disregard the decisions of a higher court." Olga Pina, *Systems of Ethical Regulation: An International Comparison*, 1 GEO. J. LEGAL ETHICS 797, 800 (1987-88). In the civil law system, lawyers have less of an opportunity to "present facts subjectively," unlike the common law, where attorneys argue for a desired outcome by establishing analogies or distinctions from the facts in other decided precedents. *Id.* Another important difference between the two systems is the adversarial nature of the common law system versus the "inquisitorial" character of the civil law one. *Id.* at 809. As such, a common law lawyer is mainly his client's fiduciary and representative, while a civilian attorney is also a part of the legal system, with a stronger focus on him being an officer of the court. *Id.* In fact, these differences are easy to observe as the civilian lawyers wear a professional's robe when presenting in court, while a common law attorney wears a regular suit, thereby resembling his client's appearance rather than that of a judge. *Id.*

One author, for example, discusses other specific differences, including the way each system treats attorney alcoholism. *Id.* at 803. In the United States, the punishment is attached to a specific violation that was induced by the alcoholism, not the addiction to alcoholism itself. *Id.* However, in Spain for example, attorneys who have been found to be under the influence of alcohol, while involved in some type of law-related function, are subject to the highest possible sanction. *Id.*

175. SIR THOMAS LUND, PROFESSIONAL ETHICS 18 (1970). *But see* Mary C. Daly, *What Every Lawyer Needs to Know About the Civil Law System*, 1998 PROF. LAW. SYMP. ISSUES 37, 46 (1998) (explaining that while both civil and common law systems recognize standards related to independence, integrity, and confidentiality, the difference in the U.S. is that the meaning of these terms has been "fleshed out" by disciplinary decisions, court rulings, academics, and state bar committees). The standards in civil law countries lack a "comparable gloss." *Id.*

amounting to aspirations of high morals, honesty, and proper treatment of clients. In fact, all three sets of ethical guidelines—the ABA Model Rules, CCBE Code, and the Russian regulations—recognize a lawyer's duty to the profession,[176] clients,[177] and the court.[178] However, significant differences in the language and underlying purposes of all three sets of guidelines can be observed through a comparative analysis. For example, the CCBE Code and the Russian Code contain much broader language than the ABA Model Rules, which provide specific directions for American lawyers on most topics.[179] To that end, the CCBE and the Russian codes seem to leave more room for discretion of the disciplinary body in instances where a lawyer may have acted unethically given that the standards themselves are more general and vague.[180]

A major similarity between the CCBE Code and the Russian Code lies in that the focus of all stated rules is to ensure proper fulfillment of the attorney's obligations and responsibilities to the profession and society, rather than the client. In contrast, the main role of an American attorney lies in providing a zealous service to his client, who is viewed as more important than any of the lawyer's other responsibilities. Accordingly, the gist of the ABA Model Rules is centered on the attorney as the client's fiduciary and advocate, while the CCBE Code and the Russian Code mainly address the obligations of a lawyer as a member of the profession, society, and an overall representative of the legal system and courts. To engage in a more detailed analysis of the scope of the ABA Model Rules, CCBE, and the Russian Codes, this article will first compare the three documents using a three-prong test that was specifically created to uncover

---

176. On Work, *supra* note 5, art. 4(1); KPEA, *supra* note 6, art. 4(1); CCBE CODE, *supra* note 8, R. 5.1; *see* MODEL RULES OF PROF'L CONDUCT R. 8.1-8.5 (2009) (representing rules which are relevant to "maintaining the integrity of the profession").

177. On Work, *supra* note 5, art. 7(1)(1); MODEL RULES OF PROF'L CONDUCT RS. 1.7(b), 1.8 (2009); KPEA, *supra* note 6, art. 8; CCBE CODE, *supra* note 8, R. 2.7.

178. MODEL RULES OF PROF'L CONDUCT R. 3.3 (2009); KPEA, *supra* note 4, art. 12; CCBE CODE, *supra* note 6, R. 4.

179. For example, the ABA Model Rules address duties to and possible conflicts of interest pertaining to former, prospective, and current clients separately and details situations in which a conflict may arise. *See* MODEL RULES OF PROF'L CONDUCT RS. 1.9, 1.18, 1.8 (2009). However, the CCBE discusses on a wider scope, simply stating that an attorney may not provide representation "if there is a conflict" but failing to provide details on what exactly constitutes a conflict. CCBE CODE, *supra* note 8, R. 3.2.1. Although the CCBE mentions protecting former clients, it still does not provide guidance on what is considered sufficient protection. *See* CCBE CODE, *supra* note 8, R. 3.2.3. The Russian rules remain general as well, stating only that an advocate may not represent two parties who have "divergent interests." KPEA, *supra* note 6, art. 11(1).

180. For example, an advocate is not permitted to "impose his aid on persons...." KPEA, *supra* note 6, art. 9(6). The Council determined this article was violated by a retainer agreement requiring a party to provide compensation should he decide to terminate the agreement prematurely. *Council of the Chamber of Attorneys of the City of Moscow Extract from Survey of Disciplinary Practice (January 17, 2006) – Disciplinary Proceeding Against Attorney K*, STATUTES & DECISIONS Sept.-Oct. 2008.The Council found the attorney thus imposed his aid on the client by restricting the client's unconditional right to abrogate the agreement. *Id.* at 9.

major differences in various types of ethical regulations. Second, it will focus on comparing specific language and provisions of the three sources. Finally, it will analyze and explain resulting differences and similarities.

1. The Three-Prong Test

In her article *Systems of Ethical Regulation: An International Comparison*, Olga Pina set forth the three major factors outlining ethical differences between the common law and civil law legal systems.[181] These factors involve the "level of control by the government, the freedom granted lawyers in the organization of their practice, and contingent fee arrangements."[182] This article applies the three factors to the language and applicable provisions of the new attorney regulations in Russia in order to determine where it stands in relation to its American and European counterparts.

a. Level of Control by the Government

The first prong of the test asks the question: to what extent, if any, is the legal profession in a given country self-regulating and independent?[183] The essential issue is whether the government has control over lawyers' power via regulations or other mechanisms and whether there is any type of recourse in instances where the government is dissatisfied with the legal profession's direction. There is no question that, of the three systems discussed, the legal profession in the United States is the most self-regulated, and thus American attorneys enjoy the highest degree of professional independence.[184] The legal profession in the United States is directly regulated by each state's licensing board with the state supreme court being the highest authority. European lawyers, however, often have some outside restrictions on their professional practice. For example, Spanish lawyers have "some very specific limitations established for them by law directly,"[185] rather than by their professional governing body,[186] while French lawyers, although to a lesser degree, still experience

181. *See* Pina, *supra* note 174, at 809 (suggesting the adversarial nature of common law systems versus the inquisitorial nature of civil law systems is a "difference, which goes to the very nature of each system...and underlies three ethical differences between [them].").
182. *Id.* at 809-10.
183. *Id.* at 809.
184. *See id.* at 810 (discussing that the profession is more self-regulating in the United States than it is in both Spain and France).
185. *Id.*
186. Spanish governing bodies are called "Colegios de Abogados." Pina, *supra* note 174, at 801. They are set up on a regional level and can be considered the "Spanish equivalent of bar associations." *Id.* Although Spanish laws apply some very direct regulation of attorneys, the Colegios do still promulgate ethical standards for their respective regions. *Id.* Moreover, the Colegios have the power to administer disciplinary procedures and sanctions. *Id.* at 802.

more restrictions upon their professional practice than American lawyers.[187] Olga Pina argues that the professional regulation of attorneys in France and Spain shows a "greater degree of suspicion towards lawyers and a greater desire to limit their power."[188] The level of government control easily ties to the issues of overall trust and professional independence.

An argument can be made that a "general distrust of lawyers' 'manipulative powers'" can be observed in civil law legal systems in the way their codes reflect "distrust of oral evidence as presented by litigators and in the greater role given the judge as director of the courtroom."[189] To bolster this argument, a number of examples can be offered to show the distrust towards lawyers reflected in both the CCBE Code and Russian regulations. First, both sets of regulations prohibit clients from waiving a conflict of interest for the attorney.[190] That suggests attorneys are not trusted to balance the appropriate interests and act professionally when a conflict exists. Second, both codes oppose "incompatible" occupations.[191] This restriction further suggests that allowing attorneys to expand their services to fields other than law may make it much more difficult for licensing bodies to oversee them. In turn, this would potentially allow lawyers to function outside of the established norms of professional ethics. One can further argue that this provision also shows lawyers' inability to

---

187. *Id.* at 810. For a detailed discussion of the professional regulations of attorneys in Spain and France, *see id.*, § II.

188. Pina, *supra* note 174, at 810.

189. *Id.*

190. *See* On Work, *supra* note 5, art. 6(4); KPEA, *supra* note 6, art. 11(1); CCBE CODE, *supra* note 8, R. 3.2. *But see* Mary C. Daly, *The Ethical Implications of the Globalization of the Legal Profession: A Challenge to the Teaching of Professional Responsibility in the Twenty-First Century*, 21 FORDHAM INT'L L.J. 1239, 1289 (1998). However, one should be cautious of reading this provision in the CCBE Code too restrictively. *Id.* The countries following the CCBE Code do not interpret "conflicts of interest" as broadly as it is understood in America. *Id.; see also* Frank, *supra* note 171, at 974 (stating that, because of the narrow way European lawyers interpret "conflicts of interest," client consent is not a "real issue" (citation omitted)). Therefore, the conflicts contemplated in the CCBE Code are similar to those which cannot be waived even under the ABA Model Rules. Daly, *supra*, at 1289. The inability to waive conflicts under the CCBE Code reflects trust and confidence in a lawyer's ability to recognize a conflict of interest and voluntarily decline representation. *Id.* Note also that civil law supersedes professional regulations and may introduce "countervailing duties of confidentiality" and permit waiver in certain situations. Hans-Jurgen Hellwig, *At the Intersection of Legal Ethics and Globalization: International Conflicts of Law in Lawyer Regulations*, 27 PENN. STATE. INT'L L. REV. 395, 396 (2008).

191. On Work, *supra* note 5, art. 2(1). The CCBE does not explicitly say this but rather states that attorneys should follow rules of the home state while still suggesting it is inappropriate. CCBE CODE, *supra* note 8, R. 2.5. What is considered to be an incompatible activity varies between CCBE Member States. Julian Lonbay, *Lawyer Ethics in the Twenty-first Century: The Global Practice Reconciling Regulatory and Deontological Differences – The European Experience*, 34 VAND. J. TRANSNAT'L L. 907, 912 (2001). Some merely require members of the legal profession maintain "good character." *Id.* (citation omitted). Others, such as Belgium, prohibit employment of attorneys in business on the basis that it interferes with their independence and the dignity of the profession. *Id.* (citation omitted). Note that "this distrust of a lawyer who combines legal practice with involvement in a business enterprise is not embraced by the American legal system." Pina, *supra* note 174, at 810.

maintain an honest balance, this time as it pertains to different interests and occupations.

Russian regulations are even more stringent. "On Work" states that lawyering is "not entrepreneurial activity"[192] and restricts advocates from any business-related employment other than "scholarly, lecturing, and other creative work."[193] Examples of prohibited activities involve "selling goods, fulfilling tasks, or rendering services."[194] That regulation deprives lawyers of any business-related opportunities and requires a 100% commitment to "pure" lawyering. Among other explanations, this restriction can be seen as Russia's attempt to prevent lawyers from engaging in any business-related corruption, which is a serious problem for Russian society today,[195] as well as to emphasize attorneys' professional independence and improve their poor image that was established during the Soviet era. This view is supported by the fact that President Medvedev listed corruption as a key issue he plans to confront while signing an anti-corruption legislation packet into law in 2008.[196] Moreover, the prohibition of other occupations forces lawyers to stay truly focused on their law practice, as they will avoid becoming distracted by other activities that could interfere with their independence and professional judgment.

Mandatory malpractice insurance requirements stated in both the CCBE and Russian Codes further prove the lack of trust in attorneys' services and show that client protection is critical.[197] These requirements promote societal trust in the legal system by assuring clients that they will be protected even if malpractice occurs. In addition, these requirements can be explained as creating a lack of freedom of choice for attorneys, i.e. their inability to decide whether to take a risk or ensure their professional services. Similarly, such regulations leave no choice for the client because he is unable to retain the professional services of an attorney who

---

192. On Work, *supra* note 5, art. 1(2).

193. *Id.* at art. 2(1). For a discussion of the prohibitive nature of this provision, see Iurii Samkov, *Ne dumai o dokhodakh, advokat!* [*Don't Think About Making Money, Attorney!*], 18 NOVAIA ADVOKATSKAIA GAZETA 35 (2008), *translated in* STATUTES & DECISIONS July-Aug. 2008, *supra* note 73, at 68.

194. KPEA, *supra* note 6, art. 9(3).

195. Out of 180 countries, Russia ranked 147 on the 2008 Corruption Perception Index published by Transparency International. Carol M. Welu & Yevgenya Muchnik, *Corruption: Russia's Economic Stumbling Block,* BUS. WK., Aug. 27, 2009, http://www.businessweek.com/globalbiz/content/aug2009/gb20090827_771618.htm. Bribes remain a significant problem in the country, with an estimated 50% of demands coming from police or military personnel and 41%coming from government officials or employees. *Id.*

196. Welu & Muchnik, *supra* note 195. Although Russia did see promise in the form of initiation of investigations and trying of bribery cases in early 2009, critics point out a major issue with the new legislation is that it only criminalizes completed bribes and not the offering of bribes. *Id.*

197. Both "On Work" and the CCBE specifically require the attorney to "insure for risk to his professional property liability." On Work, *supra* note 5, art. 7(1)(6); *But see* MODEL RULES OF PROF'L CONDUCT R. 1.15 cmt. 6 (2009) (stating that a lawyer's fund for client fund for protection may be set up to reimburse clients negatively impacted by dishonest attorneys).

does not carry malpractice insurance. If there were no such provisions, the client would be able to decide for himself whether or not to hire a lawyer who does not carry malpractice insurance. In contrast, the ABA Model Rules do not require attorneys to carry malpractice insurance, allow waiver of conflict of interest with a client's consent,[198] and do not prohibit "incompatible occupations," as evidenced by the fact that American lawyers frequently take part in businesses, serve as trustees or organizations' board members, and work in various non-lawyer capacities.[199] These distinctions once again emphasize the differences between the civil and common law systems—the attorney in a common law system is given more independence from government or any other type of control and greater trust is placed in his ability to act ethically. A major emphasis is put on the attorney acting as his client's zealous advocate, and the client's wishes and choices are the center of the attorney-client relationship.

As discussed, Russia is now developing a new path leading to the independence of its attorneys. A major step towards that goal was the profession's liberation from the strong influence and control of the government exercised through the Ministry of Justice, which was the sole administrator of the legal profession under the Soviet State. The creation of an attorney ethics code is certainly another important step in that direction. However, these are still baby steps in comparison to the systems in the United States and even Europe. First, the new Code in Russia was created by the All-Russia Congress of Attorneys "in accordance with the requirements envisioned" by "On Work," a federal law that was adopted by State Duma.[200] As such, the new Code was drafted in response to and in compliance with a government initiative. This process of attorney regulation is very different from the American Bar Association promulgating its own professional guidelines and regulations by drafting and revising numerous versions of the Model Rules and its predecessors over the years.[201] It is

198. MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(4) (2009).

199. It is quite common to find a lawyer serving as Chief Executive Officer (CEO) of a company in the United States. For example, Kenneth I. Chenault (CEO of American Express), Richard D. Parsons (former CEO of Time Warner), and Sumner M. Redstone (former CEO of Viacom) are all attorneys. Mike France with Louis Lavelle, *A Compelling Case for Lawyer-CEOs*, BUS. WK. (Dec. 13, 2004), *available at* http://www.businessweek.com/magazine/content/04_50/b3912101_mz056.htm. In fact, the lawyer-CEOs who were interviewed listed several skills learned in law school which helped in their capacities as business leaders, such as "the ability to mediate disputes, see both sides of complex issues, and cut self-satisfied experts down to size." *Id.* However, due to the lack of business training experienced by many lawyers, risk aversion and inadequate financial expertise may be a source of problems. *Id.* Lawyer-CEOs have tended to migrate towards the airline, utilities, and financial services industries (areas in which "legal issues have a greater effect on profits…"). *Id.*

200. KPEA pmbl, *supra* note 6, at 55..

201. The United States has the "oldest practice of using written rules to govern the ethics of lawyers." Ronald D. Rotunda, *Legal Ethics, the Czech Republic and the Rule of Law*, 7 PROF. LAW. 1, 4 (1996). A Maryland lawyer drafted a set of fifty ethical guidelines in 1836. *Id.* These guidelines were then used as the basis for a series of lectures on lawyers' duties in 1854. *Id.* Alabama used these lectures as a model for the state's ethical code (adopted in 1887) which eventually influenced the ABA

also unlike the development of the CCBE Code, where a professional organization—the Council of Bars and Law Societies of Europe—was created to draft attorney regulations for its members. Instead, the All-Russia Congress of Attorneys convened to facilitate the task given by the government via federal law and draft the new code of legal ethics. Obviously, the Russian legal profession is not as independent as its American and European counterparts. However, this was still a huge step for Russia.

The whole concept of attorney ethics is very much a new phenomenon in Russia, unlike in the United States, where ethical regulations for attorneys have been in effect for over one hundred years.[202] Most importantly, a major distinction between legal ethics in Russia and the United States or Europe lies in that, unlike those countries, only a part of the profession is subject to attorney regulation in Russia. As discussed, the above-described detailed ethical regulations only apply to advocates, not to jurists.[203] Accordingly, one can still practice civil law as a jurist and not have to answer to any governing professional body or follow any applicable ethical regulations.[204]

b. Freedom to Organize Practice

As with many other aspects of lawyering, American attorneys are generally[205] not limited regarding the type of practice they may have in terms of the size of their law firm or how their practice should be set up.[206] Civil law countries, on the other hand, often dictate the number of lawyers that can join together in one practice.[207] Arguments have been made that these restrictions are an attempt to "limit the power of attorneys in society, and to prevent the profession from becoming too much like a business."[208]

Canons of Professional Ethics. *Id.* The Canons of Professional Ethics were adopted in 1908 and served as the first set of ethical standards for all lawyers in the United States. ABA Canons of Professional Ethics Centennial, http://www.abanet.org/cpr/centennial.html (last visited June 5, 2010). The Model Code of Professional Responsibility replaced the Canons in 1969. *Id.* Finally, the ABA Model Rules of Professional Conduct were adopted by the House of Delegates of the American Bar Association in 1983. *Id.* The ABA Model Rules have since been amended thirteen times. Materials, *supra* note 172.

202. *See* CANONS OF PROF'L ETHICS (1908) (representing the ABA's first official set of ethical guidelines for lawyers).

203. SHABELNIKOV, *supra* note 53, at 4.

204. "[A]dvocates do not have a monopoly in non-criminal cases, and civil legal assistance may be provided basically by anyone having a power of attorney from the client." *Id.* at 17.

205. The only restriction under the Model Rules is to not form a partnership with a non-lawyer. MODEL RULES OF PROF'L CONDUCT R. 5.4(b) (2009).

206. *See* Pina, *supra* note 174, at 811 ("Some critics have observed that the structure of the large firm interferes with the idea of professional independence and the lawyer's duty to zealously work for her client and act in her client's best interest.").

207. *Id.* at 810. For example, Spain and France restrict the number of attorneys able to join a law firm, thereby avoiding establishment of big law firms. *Id.* Spain has a twenty attorney firm limit. *Id.*

208. *Id.* at 811.

Russia's restrictions on the types of permissible practice certainly contrast to those of the United States and are even more restrictive than those in Europe. As discussed above, "On Work" specifically explains the types of law firms or other arrangements that are appropriate for an advocate's legal practice.[209] As such, advocates have to comply with these restrictions and are not free to set up their firm in any way they desire.

In order to explain these differences, an argument can be made that, even though the goal is to encourage attorney independence in Russia, the ethics code is still very new and the country is still working on its transition from a totalitarian regime where lawyers had no effective authority, ethical regulations, or independence. As a result, Russia's idea of professional independence is still very different from that of the United States, which has been a democratic society for many years. Moreover, it is important to remember that these regulations pertain to the advocates only, thereby making the overall progress appear even less significant. It appears that no specific restraints can apply to the size and type of practice of jurists, for example, since no official regulation is imposed on them.[210] Once again, Russia's ethical regulations are starting with just a fraction of the profession; however, despite being more than substantial for Russia, they are arguably limiting in a more global sense and do not leave Russian advocates as much freedom as is enjoyed by American attorneys.

c. Contingent Fee Arrangement

Another potential difference between civil and common law systems lies in that civil law countries prohibit contingency fees, while they are generally permitted in a number of common law jurisdictions,[211] such as the United States. In the United States, contingency fees are generally allowed except in divorce and criminal proceedings. [212] The CCBE Code

---

209. *See supra* Part IV.D.

210. An attempt to rectify the problem of unregulated lawyers was first made in September 2008. SHABELNIKOV, *supra* note 53, at 18. The Joint Commission on Issues of Qualified Legal Assistance drafted its law "On the Provision of Qualified Legal Assistance" which gives a monopoly on "all and any legal services, including legal advice" to advocates. *Id.* However, the draft received criticism from the community of unregulated lawyers as well as the Presidential Administration. *Id.* at 19. "In practical terms, it appears to be unrealistic to expect that the vast majority of 'unregulated lawyers' with their own traditions and significant lobbying powers, will easily accept such imposed regulation." *Id.* This definitely reflects that the fragile state of the idea of ethical regulation of lawyers in Russia.

211. *See* JAMES MOLITERNO & GEORGE HARRIS, GLOBAL ISSUES IN LEGAL ETHICS 58-80 (2007) (discussing the issue of attorney's fees in civil versus common law jurisdictions and offering examples of specific countries); *see also* Pina, *supra* note 174, at 813. Some scholars suggest "[t]he social choice of fee systems...reflects a social preference for emphasis on different duties." Virginia G. Maurer et al., *Attorney Fee Arrangements: The U.S. and Western European Perspectives*, 19 NW. J. INT'L L. & BUS. 272, 300 (1999). It is also proposed the permitted fee arrangements have heavy influence on how fair the public perceives a particular justice system. *Id.* at 302.

212. MODEL RULES OF PROF'L CONDUCT R. 1.5(c)-(d) (2009). Law and economics literature suggests that the contingent fee arrangement encourages a lawyer to maximize his client's interests.

specifically prohibits contingency fees altogether.[213] However, it does permit bar-approved fee schedules.[214] Here, Russia also follows the civil law trend and prohibits contingency fees.[215] The rationale for this prohibition in civil law systems relates to the view that attorney's professionalism consists of a "balance between the social mission of protecting the client, and the duty to society at large."[216] In civil law systems, "professionalism is viewed as depending on being separate from the client."[217] Accordingly, "if a lawyer's remuneration were dependent on the success of his client's case, the scales would be tipped in favor of the client and the ideal of professionalism would not be achieved."[218] Based on this rationale, profit making does not fit within the primary goal of the legal profession.

This argument has even more merit when applied to Russia and its restriction of contingency fees for advocates. Based on the historical distrust of the profession and an ongoing problem with corruption[219] of various

---

Maurer et al., *supra* note 211, at 280 n.25. This belief may explain why the United States, with its view of the lawyer as a zealous advocate, has been more accepting of the contingency fee. Contingency fees also gained acceptance in the United States due to the belief that this fee arrangement makes the courts more accessible to the economically disadvantaged. *Id.* at 293 n.63 (citation omitted). In general, attorneys take twenty to fifty percent of the client's award. *Id.* at 305. Some states have set a maximum percentage that lawyers may charge. *Id.* at 307.

213. CCBE CODE R. 3.3.1, *supra* note 8. Distrust toward contingency fees existed even prior to the promulgation of the CCBE Code. For example, one author remarks that, under French law, the prohibition on contingency fees is "one of the very few provisions whose wording has not changed, even with respect to a comma, since the Napoleonic Code of 1804." Henri Adler, *Differences and Common Elements in Legal Ethics in France and the United States, in* LAWYERS' PRACTICE & IDEALS: A COMPARATIVE VIEW 351, 358 (John J. Barcelo III & Roger C. Cramton, eds., 1999). Some French commentators have gone as far as to say that contingent fees are "contrary to a principle essential to the morality of bars." Detlev F. Vagts, *Professional Responsibility in Transborder Practice: Conflict and Resolution,* 13 GEO. J. LEGAL ETHICS 677, 683 (1999-2000) (quoting RAYMOND MARTIN, DÉONTOLOGIE DE L'AVOCAT 250 (3d. ed. 1998)).

214. CCBE CODE, *supra* note 8, R. 3.3.3. This approach allows the lawyer to "disclaim responsibility" for the level of fee charged and may help to promote the idea of professionalism. Vagts, *supra* note 213, at 682. Another suggested advantage of fee schedules is that they provide a guarantee to law students that they will have a "decent" standard of living once they complete the lengthy and expensive process of becoming an attorney. Daly, *supra* note 190, at 1294. However, the use of fee schedules has been struck down as anti-competitive in the United States. Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975).

215. KPEA, *supra* note 6, art. 16(3). Although Article 16 states that the prohibition on contingency fees does not apply to property disputes, *id.*, the Russian Constitutional Court recently authorized prohibition of contingency fees in legal service contracts. Sergey Budylin, *Russia and Ukraine*, 42 INT'L LAW. 1083, 1092 (2008).

216. Pina, *supra* note 174, at 813 (citing Tang Thi Thanh Trai Le, *Professional Independence and the Associate in a Law Firm: A French Case Study*, 29 AM. J. COMP. L. 647, 654 (1981)).

217. *Id.*

218. *Id.*

219. When a journalist told President Medvedev that the "level of corruption in Russia's bureaucracy is one of the highest in the world," President Medvedev did not become defensive and responded that "[t]his has many causes." Ivan Dmitriev, Medvedev po politicheskim nigilizmom, natsional'nye proekty "Gazproma", i sredstva massovoĭ informatsii [Medvedev on Political Nihilism, National Projects, Gazprom, and the Media] Rossiiskaya Gazeta [Ros. Gaz.], Aug. 9, 2007, http://www.rg.ru/2007/08/10/doveritelno.html, *translated at* http://www.therussiamonitor.com/2007/08/medvedev-on-political-nihilism-national.html. "The moral and ideological values of the

professionals, it is understandable that lawyers are not trusted to recover a percentage of damages from the lawsuit. In fact, today it is critical to rebuild trust in the legal profession in Russia, and to do that, the new attorney regulations attempt to make sure there is no opportunity for even a perception of dishonesty and corruption. That is very different from the United States where the legal profession is old and established, and the lawyer is mainly seen as a zealous advocate for his client, thereby making his client's best interest the attorney's primary focus.

Accordingly, having applied Olga Pina's three-prong test, the new attorney regulations in Russia appears to resemble and reflect the European civil law trend rather than the American approach to legal ethics, which makes perfect sense given that Russia is and historically has been a civil law country. Despite this resemblance, however, Russia's approach to attorney ethics incorporates some of the unique characteristics of the country itself, its background and history, as well as the history and current status of its legal profession. To provide a thorough comparison of Russia's new attorney regulations with those stated in the CCBE Code and ABA Model Rules, and in order to further place attorney regulations in Russia into a more global context, the next section will take a closer look at particular language and remaining provisions of the three sets of ethical regulations.

2. Specific Language and Provisions of the CCBE, Russian Code & Model Rules

a. Purpose, Nature and Field of Application

All three sets of ethical regulations offer general guidelines applicable to attorneys' practice and establish disciplinary provisions for potential non-compliance. They also suggest that these ethical regulations are not all encompassing and that attorneys may be subject to a broader context of regulations set forth by courts and other entities.[220] The purpose of the ABA Model Rules is to set out guidelines for regulations (imperative or discretionary) for the states to follow in addition to other rules imposed by the courts.[221] The ABA Model Rules are merely a suggestive format that

---

Soviet Union, which departed along with communism, were not simply replaced during the 90s with European values." *Id.*

220. MODEL RULES OF PROF'L CONDUCT Scope (2009) ("The Rules presuppose a larger legal context shaping the lawyer's role."); KPEA, *supra* note 6, art. 12 ("[W]hen participating in ... proceedings ... an attorney must observe the norms of the corresponding procedural legislation ..."); CCBE CODE, *supra* note 8, R. 1.3.2 ("[T]he lawyer will remain bound to observe the rules of the Bar or Law Society to which he or she belongs...").

221. MODEL RULES OF PROF'L CONDUCT Scope (2009). For an example of additional rules an attorney may be subject to, *see* TEX. DISCIPLINARY RULES OF PROF'L CONDUCT (2005), *available at* http://www.texasbar.com/AM/Template.cfm?Section=Grievance_Info_and_Ethics_Helpline&Templat

becomes binding upon adoption by a specific state.[222] In contrast, the purpose of the CCBE Code is to eliminate any conflict possibly arising from "double deontology" with the goal of pointing to which specific rule should apply—rather than creating a brand new rule[223]—and thereby offering a unified standard to be applied in various ethical scenarios. Similarly, the purpose of the Russian regulations is to offer a unified set of federal guidelines assembled from different sources, such as the Constitution and federal laws of the Russian Federation.[224] Both the CCBE Code and the Russian regulations have provisions explaining to whom these rules apply.[225] No such provision can be found in the ABA Model Rules as American lawyers are all members of the Bar and are not divided into groups for the purposes of applying rules of ethics,[226] while in Russia procurators, advocates, notaries, and jurists, for example, represent several distinct professions.[227]

The CCBE Code and ABA Model Rules state the field of application for the rules,[228] while the Russian regulations fail to provide such specifics. When it comes to the function of the attorney in society, the CCBE Code and the Russian regulations similarly discuss the function using broader terms and concepts such as justice, honesty, and morality.[229] The lawyer's duties once again seem to be more focused on his responsibilities to the legal system and legal profession as a whole, while the ABA Model Rules focus on how an attorney can meet his client's needs, including pro-

---

e=/CM/ContentDisplay.cfm&ContentFileID=96. These rules cover many topics similar to those found in the ABA Model Rules, such as conflicts of interest, advertising, and candor towards the court. *See id.*

222. Daly, *supra* note 190, at 1260.

223. CCBE CODE, *supra* note 8, R. 1.3.1.

224. On Work, *supra* note 5, art. 4(1).

225. *Id.* arts. 4(1)- 4(2); CCBE CODE, *supra* note 8, R. 1.4.

226. In addition to general rules of ethics that apply to lawyers licensed in a particular jurisdiction, some legal professionals are subject to additional rules. For example, judges have their own set of applicable rules of ethics. *See, e.g.,* MODEL CODE OF JUDICIAL CONDUCT (2008); CODE OF CONDUCT FOR U.S. JUDGES (2009). The code adopted for U.S. judges contains five canons and commentary following each canon. *See* CODE OF CONDUCT FOR U.S. JUDGES (2009). It covers topics such as integrity, impropriety, extrajudicial activities, political activity, and a judge's responsibility to act diligently, impartially, and fairly. *See id.* The Code was first adopted in 1973 by the Judicial Conference and has since been amended seven times. *Id.* intro. It applies to circuit, district, magistrate, and bankruptcy judges as well as judges of the Court of Federal Claims and the Court of International Trade. *Id.* Prosecutors also have their own set of guidelines to abide by as well. *See* NAT'L PROSECUTION STANDARDS (2009), *available at* http://www.pretrial.org/Docs/Documents/NDAA%202010%20Standards.pdf. The standards cover six general topics: the prosecutor's responsibilities; professionalism; conflicts of interest; selection, compensation, and removal; staffing and training; and prosecutorial immunity. *See id.* The purpose of these standards is to supplement the existing rules in each jurisdiction, not replace them, and they apply to assistant and deputy prosecutors as well as the chief prosecutor. *Id.* intro.

227. *See* BURNHAM ET AL., *supra* note 16, at 131.

228. MODEL RULES OF PROF'L CONDUCT R. Preamble (2009); CCBE CODE, *supra* note 8, R. 1.5.

229. On Work, *supra* note 5, arts. 1(1), 3(2); KPEA, *supra* note 6, arts. 4(1), 8; CCBE CODE, *supra* note 8, R. 1.1.

visions discussing the representation of an organization,[230] a client's waiver of conflict of interest,[231] and other specifics.

b. Independence, Integrity, Confidentiality, and Respect

Consistent with its overall client-focused approach, the concept of attorney independence in the ABA Model Rules relates to the client and his best interests,[232] explaining that the lawyer's duty to give candid advice should be based on all possible considerations which "may be relevant to the client's situation."[233] The CCBE Code and Russian regulations' language relating to attorney independence is much broader. The CCBE Code merely states that an attorney should not compromise his professional standards under any circumstances,[234] while the Russian regulations discuss independence as a critical component for general trust in the attorney.[235] In fact, unlike the ABA Model Rules, both the CCBE Code and the Russian regulations emphasize the need for trust in the attorney,[236] as it is critical for a successful attorney-client relationship as well as the overall trust in the profession. All rules expect the lawyer to put his client's interests above his own while still following the rules of professional ethics.[237] As is the case with many other provisions, the CCBE Code and the Russian regulations use much broader general language[238] than the ABA Model Rules, which provide a set of specific guidelines in that area—another example of how the ABA Model Rules prioritize and protect the interests of the client.[239]

---

230. MODEL RULES OF PROF'L CONDUCT R. 1.13 (2009).

231. MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2009).

232. For example, see MODEL RULES OF PROF'L CONDUCT R. 1.7 (2009) (addressing conflicts of interest which could inhibit an attorney's independence).

233. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2009).

234. CCBE CODE, *supra* note 8, R. 2.1.

235. KPEA art. 5. It is interesting to note that, despite this emphasis, practices prevail in Russia which seem to detract from the supposed value placed on professional independence. For example, the Lawyer's Guild in Moscow is "a pyramid-like organization" in which lawyers are subordinate to and receive their salaries from the Guild's Presidium. Alain de la Bretesche, *Organisation and Administration of the Profession of Lawyer*, *in* THE ROLE AND RESPONSIBILITIES OF THE LAWYER IN A SOCIETY IN TRANSITION 23, 27 (1999).

236. *See* KPEA art. 5, *supra* note 6; CCBE CODE, *supra* note 8, R. 2.2.

237. KPEA arts. 8(1), 15(5), *supra* note 6; CCBE CODE, *supra* note 8, R. 2.7.

238. The CCBE Code simply states that attorneys must "always act in the best interests of the client." CCBE CODE, *supra* note 8, R. 2.7. The Russian regulations say advocates should perform duties and "in [a] rational…and timely fashion." KPEA art. 8(1), *supra* note 6.

239. One way in which the ABA Model Rules protect the client's interests is by allowing a lawyer to represent the client despite a conflict of interest if this is the client's wish.

Notwithstanding the existence of a concurrent conflict of interest…a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

All three sets of regulations discuss the attorney's obligation to provide diligent, competent and prompt representation to his client.[240] They all suggest it can be accomplished by taking on a reasonable case load and only agreeing to take on cases that the lawyer can properly handle based on his skill and knowledge.[241] All rules further protect the confidentiality of attorney-client communications by prohibiting lawyers from disclosing information related to client representation.[242] Protecting confidentiality appears almost unconditional under all codes with only the ABA Model Rules providing very limited exceptions to it,[243] thereby demonstrating the overall concern with upholding the principles and reputation of the legal profession.

In addition, the Russian regulations, unlike the CCBE Code and ABA Model Rules,[244] lack any type of specific provision regarding possible disputes or reporting obligations among lawyers, which may be critical to ensure ethical violations are discovered and dealt with. However, both the CCBE Code and Russian regulations offer general language suggesting the importance of mutual respect in the legal system, including cooperation between members of the legal community.[245] This shows a possible at-

---

(4) each affected client gives informed consent, confirmed in writing.
MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2009).

Other conflict of interest rules, such as "[a] a lawyer may not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client…" and "[a] lawyer may not accept compensation for representing a client from one other than the client…", also have exceptions that enable the client's interests to ultimately prevail. *See id.* R. 1.8.

240. MODEL RULES OF PROF'L CONDUCT RS. 1.1, 1.3-1.4 (2009); KPEA, *supra* note 6, art. 8.1; CCBE CODE, *supra* note 8, R. 3.1.

241. MODEL RULES OF PROF'L CONDUCT RS. 1.1, 1.3 cmt. 2 (2009); KPEA, *supra* note 6, art. 9(1)(5); CCBE CODE, *supra* note 8, R. 3.1.3.

242. *See* On Work, *supra* note 5, art. 6(4)(5); MODEL RULES OF PROF'L CONDUCT R. 1.6 (2009); CCBE CODE, *supra* note 8, R. 2.3. The Russian rules specifically discuss "[observation] of professional secrecy is an unconditional priority of the attorney's work." KPEA art. 6(2), *supra* note 6.

243. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2009) (outlining six specific situations in which it may be appropriate for an attorney to reveal confidential client information, such as prevention of death or substantial bodily harm or prevention of crime). It is also interesting to note that some scholars argue the CCBE Code is not unequivocal regarding confidentiality due to the fact that "privilege" can be understood differently from country to country. Frank, *supra* note 173, at 191.
The duty of confidentiality can potentially create far-reaching consequences for attorneys. An extreme example is provided in the biographical account of American attorney Frank Armani whose client (the defendant in a 1970's murder case) told him the location of two other undiscovered victims. *See* TOM ALIBRANDI WITH FRANK ARMANI, PRIVILEGED INFORMATION (1984). Although this case took place prior to the adoption of the recent version of ABA Model Rules, Armani cites his oath of office to "maintain the confidence and preserve inviolate the secrets of [his] client" as the origin of his duty of confidentiality. *Id.* at 2. Because of this duty, Armani and another attorney on the case did not provide the information to authorities and later attempted to use it for plea bargaining purposes. *Id.* at 1. After the public learned of the story, the attorneys suffered severe societal backlash, including death threats and vandalism. *Id.* at 2-3.

244. *See* MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (2009); CCBE CODE, *supra* note 8, R. 5.9.

245. KPEA, *supra* note 6, art. 15(1); CCBE CODE, *supra* note 8, R. 5.1.

tempt to build a strong foundation for the legal profession, suggesting that potential disputes can be resolved.

Both the CCBE Code and ABA Model Rules address respect for rules of other bars by explaining the attorney's responsibility to comply with professional standards of other jurisdictions when engaged in transnational practice,[246] while Russia offers no such provision. This raises the question of whether such omission is accidental or based on failure to anticipate or desire Russian lawyers' involvement in transnational or global law practice.

c. Termination of the attorney-client relationship, conflict of interest, and fees

The Russian regulations describe the attorney-client relationship as a civil law contract,[247] while the CCBE Code appears to characterize it the same way without specifically using the same language.[248] The ABA Model Rules do not expressly address this issue, although, "for many purposes, the attorney-client relationship is contractual in nature."[249] All rules discuss the attorney's ability to terminate representation of a client, with the ABA Model Rules providing more specificity than the other two codes. For example, the ABA Model Rules state that the lawyer "shall" terminate representation in certain instances, but it also appears to leave some discretion to the lawyer by allowing termination for "other good cause."[250] The other two codes state in vague language that the attorney must withdraw if "circumstances come to light that would have barred him from accepting the commission"[251] and a "lawyer shall not be entitled to exercise his or her right to withdraw from a case in such a way…that the client may be unable to find other legal assistance in time to prevent prejudice"[252] but fail to provide any further explanation or direction regarding how to apply these guidelines. Both the CCBE Code and ABA Model Rules, however, seem to suggest that an attorney may terminate representation if the client fails to fulfill his payment obligation after hav-

246. MODEL RULES OF PROF'L CONDUCT R. 5.5(a) (2009); CCBE CODE, *supra* note 6, R. 2.4; *see also* MODEL RULES OF PROF'L CONDUCT R. 8.5 cmt. 2 (2009) ("A lawyer may be potentially subject to more than one set of rules of professional conduct…").

247. On Work, *supra* note 5, art. 25(2).

248. The attorney's representation is discussed in terms of "acceptance and termination of instructions." CCBE CODE, *supra* note 8, R. 3.1. This seems similar to the notion of taking on duties upon entering into a contractual relationship.

249. Robert Begg, *The Lawyer's License to Discriminate Revoked: How a Dentist Put Teeth in New York's Anti-Discrimination Rule*, 64 ALB. L. REV. 153, 201 (2000). The ABA Model Rules discuss the lawyer's obligation to keep his client informed, consult with his client, and comply with information requests. MODEL RULES OF PROF'L CONDUCT R. 1.4(a) (2009).

250. MODEL RULES OF PROF'L CONDUCT R. 1.16(a)-(b) (2009).

251. KPEA, *supra* note 6, art. 10(9).

252. CCBE CODE, *supra* note 8, R. 3.1.4.

ing received reasonable warning,[253] while this issue is not explicitly addressed by the Russian regulations.

In addition to what was already discussed in terms of possible waiver of the conflict of interest provisions, it is important to note that, unlike other regulations, the Russian regulations offer more specificity here by stating examples of actions that constitute a conflict of interest.[254] The regulations also have a catch-all provision that prohibits representation of two clients "in a single case who have divergent interests,"[255] while the CCBE Code focuses on "breach[es] of confidence" and situations "where the lawyer's independence may be impaired" but fails to provide examples of situations that would create a conflict of interest for the attorney.[256]

In addition to the prohibition of contingency fees, the CCBE Code contains a provision stating that "[a] fee . . . shall be fair and reasonable."[257] However, a similarity exists between the ABA Model Rules and Russian regulations in that they both provide guidelines to help determine what constitutes a "reasonable" fee, discussing factors like the level of difficulty of the work, necessary length of time to complete it, and others.[258] These provisions attempt to ensure that both the attorney and his client are treated fairly: the client doesn't pay unreasonable fees while the attorney receives appropriate compensation for his services. In fact, the Russian regulations go even further to specify essential terms and conditions in the agreement between the attorney and his client.[259] This level of

---

253. MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(5) (2009); CCBE CODE, *supra* note 8, R. 3.5.

254. An attorney may not render legal aid:

> [I]f he has an independent interest in the substance of his agreement with the client, different from the interest of the given client; if he has taken part in the case as a judge, arbitration judge or arbiter, intermediary, prosecutor, investigator, inspector, specialist, or translator, if he is a victim or witness in the case, or if he has been an official whose competence included the adoption of decisions in the interests of the given client; if he has kinship of family relations with an official who has taken or is taking part in the investigation or inquiry into the case of the given client; if he is rendering legal aid to a client whose interests are in conflict with the interests of a given client.

On Work, *supra* note 5, art. 6(4)(2).

255. KPEA, *supra* note 6, art. 11(1).

256. CCBE CODE, *supra* note 8, R. 3.2. One scholar suggests "the silence of the *CCBE Code* reflects more trust in the judgment of the lawyer and the lawyer's ability to resist temptation." Terry, *supra* note 9, at 55.

257. CCBE CODE, *supra* note 8, R. 3.4.

258. MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2009); KPEA, *supra* note 6, art. 16(2).

259. On Work, *supra* note 5, art. 25(4).

> The essential conditions of an agreement shall be:
>
> (1) indication of the attorney (attorneys) who has (have) agreed to carry out a commission as an agent (agents), and also his (their) affiliation to a legal practice and to a Chamber of Attorneys;
>
> (2) substance of the commission;
>
> (3) conditions of the client's payment of remuneration for the legal aid rendered;
>
> (4) procedure and amount of reimbursement for attorney's (attorneys') expenses connected with carrying out the commission;
>
> (5) magnitude and character of the liability of the attorney (attorneys) who has (have) agreed to carry out the commission.

specificity is distinguished from the rest of the general language that is typical for the Russian regulations, thereby demonstrating that this aspect of attorney regulation was viewed as especially important by the drafters. All three sets of ethical guidelines prohibit fee sharing with non-lawyers,[260] with the CCBE Code leaving the door open to possible exceptions provided by the rules of member states.[261] The strictness of these provisions supports the emphasis on attorneys' professional independence by all three sources. Along these same lines, both the ABA Model Rules and CCBE Code explicitly prohibit referral fees to individuals.[262] The Russian regulations, however, failed to include a similar provision despite the fact that such a provision would go along with a prohibition on fee sharing and be very helpful in further strengthening the concept of attorney independence. In addition, all three sets of guidelines reflect similar concerns pertaining to clients' funds. To that end, they all require safeguards such as that the funds be deposited in an account and proper accounting records be kept.[263]

d. Personal Publicity and Advertising

Interestingly, the Russian regulations pertaining to advertising are much more specific than both the CCBE Code and ABA Model Rules.[264] In fact, the Russian regulations emphasize that clients may sometimes be more affected by presentation tactics than the actual information about the lawyer's skills.[265] All three sets of ethical guidelines prohibit misleading and false advertisements and advertisements that create false hopes, illusions and unjustified expectations,[266] while the Russian regulations go fur-

---

Id.

260. MODEL RULES OF PROF'L CONDUCT R. 5.4(a) (2009); KPEA, *supra* note 6, art. 16(4); CCBE CODE, *supra* note 8, R. 3.6. *But see* Mary C. Daly, *Thinking Globally: Will National Borders Matter to Lawyers a Century from Now?*, 1 J. INST. FOR STUDY LEGAL ETHICS 297, 310-11 (1996) (suggesting that there may be future pressure to eliminate fee-sharing prohibitions in the United States based on arguments that they are anti-competitive).

261. CCBE CODE, *supra* note 8, R. 3.6.1.

262. MODEL RULES OF PROF'L CONDUCT R. 7.2(b) (2009); CCBE CODE, *supra* note 8, R. 5.4.

263. MODEL RULES OF PROF'L CONDUCT R. 1.15 (2009); KPEA, *supra* note 6, art. 16(6); CCBE CODE, *supra* note 8, R. 3.8. The ABA Model Rules and CCBE Code expressly require clients' funds be kept in a *separate* account. MODEL RULES OF PROF'L CONDUCT R. 1.15(a) (2009); CCBE CODE, *supra* note 8, R. 3.8.1. The Russian ethical guidelines do not specifically state this. *See* KPEA, *supra* note 6, art. 16(6).

264. *Compare* KPEA *supra* note 6, art. 17(1), *with* MODEL RULES OF PROF'L CONDUCT RS. 7.1-7.3 (2009) *and* CCBE CODE, *supra* note 8, R. 2.6. The Russian regulations specifically state that advertising must not contain "1) evaluative descriptions of the attorney; 2) testimonials of other persons about the work of the attorney; 3) comparisons with or criticism of other attorneys; 4) declarations, hints, or ambiguities that may create illusions in potential clients or arouse unfounded hopes in them." KPEA, *supra* note 6, art. 17(1).

265. *See* KPEA, *supra* note 6, art. 17(1).

266. MODEL RULES OF PROF'L CONDUCT R. 7.1 (2009); KPEA, *supra* note 6, art. 17(1)(4); CCBE CODE, *supra* note 8, R. 2.6.1.

ther by prohibiting specific evaluative descriptions, testimonials and comparisons.[267] This type of prohibition can once again be attributed to the desire to improve the attorney's image in Russian society and to overcome the historic perception that lawyers can never be trusted. It appears that allowing lawyers to disappoint their clients via false and exaggerated stories would be counter-productive to the effort to rebuild attorney image; therefore, what appears to be an over-restrictive provision, actually makes sense in light of the history and current goals pertaining to the legal profession in Russia.

e. Legal Aid, Court, Communications with Others and Professional Development

All three codes express a general requirement that attorneys respect the court and comply with its rules,[268] with the CCBE and Russian codes referring to "fair conduct of proceedings"[269] and "[observing] the norms of procedural legislation"[270] without explaining what is actually covered by such language. In contrast, the ABA Model Rules specifically state the type of conduct that would interfere with the fairness of proceedings, such as ex parte communications with the judge or jurors.[271] Both the ABA Model Rules and CCBE Code prohibit an attorney from providing false or misleading information to the court, while the Russian regulations lack such specific language. Furthermore, both the CCBE Code and Russian regulations show concern for efficient resolution of disputes and preservation of judicial resources,[272] while the ABA Model Rules do not place much emphasis on this.[273] This can be explained by focusing on the attorney's role in these different jurisdictions: his ultimate duty is to the court and society in the civil law system and thus he should help minimize the burden placed on the court system, while the attorney is completely independent in a common law system and is not considered a part of the court system. The ABA Model Rules do, however, discuss the attorney's aspirations for pro bono work[274] (while not making it mandatory) and also

267. KPEA, *supra* note 6, art. 17(2). If an attorney becomes aware that advertisements of his services do not meet these rules and "[have] been spread without his knowledge," he is required to notify the council. *Id.*

268. MODEL RULES OF PROF'L CONDUCT R. 3.4(c) (2009); KPEA, *supra* note 6, art. 12; CCBE CODE, *supra* note 8, R. 4.1.

269. CCBE CODE, *supra* note 8, R. 4.2.

270. KPEA, *supra* note 6, art. 12.

271. MODEL RULES OF PROF'L CONDUCT R. 3.5 (2009); s*ee also id.* R. 3.4 (discussing fairness to the opposing party and counsel).

272. KPEA, *supra* note 6, art. 7(2); CCBE CODE, *supra* note 8, R. 3.7.1.

273. *See* MODEL RULES OF PROF'L CONDUCT R. 3.2 (2009) ("A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.").

274. MODEL RULES OF PROF'L CONDUCT R. 6.1 (2009) ("A lawyer *should* aspire to render at least (50) hours of pro bono publico legal services per year.") (emphasis added). In addition to providing

address the limited circumstances under which the attorney may refuse court-appointed representation.[275]

Moreover, the CCBE Code and Russian regulations suggest a need for a balance between asserting the client's rights and showing due respect for the court,[276] thereby once again emphasizing that the attorney's ultimate duty is not merely to his client. In other words, the interests of the court should guide the attorney's actions as well, which is not the case in the United States, a common law jurisdiction. All three sources, however, prohibit direct communications with a represented individual unless that person's lawyer gives consent.[277] The ABA Model Rules explain that the provision is meant to protect clients from "possible overreaching."[278] Overall, all three sets of guidelines seem concerned with protecting clients from interference by other lawyers. This prohibition on communication also reduces the chance that clients will accidently reveal confidential information to the opposing party.

Finally, both the CCBE Code and the Russian regulations contain explicit provisions requiring lawyers to maintain and develop their professional skills and expertise.[279] Such provisions are not mandatory in the United States, and each state has an opportunity to decide whether to require its attorneys to fulfill continuing legal education (CLE) requirements. Some states have chosen to adopt such a requirement, while others have not.[280] This appears to be another regulation developed with the goal of increasing societal trust in the legal profession in Russia. Contrastingly, the legal profession is very old and well-established in the United States, and therefore most people would arguably assume an attorney has knowledge and skill. The requirements under the CCBE Code and Russian regulations, however, take this step to further assure the client (and possibly other professionals) that his counsel is competent.

---

services personally, attorneys "should voluntarily contribute financial support to organizations that provide legal services to persons of limited means." *Id.*

275. MODEL RULES OF PROF'L CONDUCT R. 6.2. (2009) A lawyer must accept court-appointed representation unless it is likely to cause a violation of the ABA Model Rules, put "an unreasonable financial burden" on him, or "the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client." *Id.*

276. *See* KPEA *supra* note 6, art. 12; CCBE CODE, *supra* note 8, R. 4.3.

277. MODEL RULES OF PROF'L CONDUCT R. 4.2 (2009); KPEA *supra* note 6, art. 14(2); CCBE CODE, *supra* note 8, R. 5.5.

278. MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 1 (2009).

279. On Work, *supra* note 5, art. 7(1)(3); CCBE CODE, *supra* note 8, R. 5.8.

280. For example, Texas requires credits for CLE on an annual basis. State Bar of Texas, *Minimum Continuing Legal Education*, http://www.texasbar.com/Template.cfm?Section=Minimum_Continuing_Legal_Ed (last visited June 5, 2010). However, Washington D.C. does not have any mandatory CLE requirements. CLE Obligations for D.C. Bar Members, http://www.dcbar.org/for_lawyers/continuing_legal_education/mcle_credit/obligation.cfm (last visited June 5, 2010). As another example, Illinois just recently began requiring CLE credits in 2008. Illinois MCLE Board: Purpose and History, http://www.mcleboard.org/purpose-history.htm (last visited June 5, 2010).

3. What is Lawyering: Business or Profession?

Although no code specifically mentions this issue, it is interesting to observe how the ethical framework for each of the three sets of ethical guidelines reflects each jurisdiction's perception of lawyering either as a business venture or independent profession.[281] The discussion of this particular issue alone could be a subject of a separate law review article[282] as an "extensive body of literature on professionalism" is available, "running from Max Weber through Talcott Parsons."[283] That is, however, not the purpose of this article. This article briefly applies some factors set forth in Professor Vagts' discussion of the business-versus-profession[284] view of lawyering, as well as raises additional observations, to support its position that the CCBE Code[285] and Russian regulations mainly perceive lawyering as a profession, while the ABA Model Rules take more of a business approach to it.[286] It is critical to remember that each jurisdiction is likely to have some "contradictory impulses in situating itself along the continuum

---

281. One may argue that labeling lawyering as business or profession is inaccurate because, to some extent, lawyering always incorporates both concepts and thus cannot be viewed as one or the other. Although the author generally acknowledges the gist of this position, she still believes that the question of whether lawyering is overall perceived as business or profession is a very important one and a reflection of critical views in a given society. In fact, "since as early as 1875, the legal community has grappled with the issue of 'business' versus 'profession.'" Laurie Hatten-Boyd, *Ebbs and Tides and Water Rise – What's the Real Concern with MDPs?*, 53 TAX LAW. 489, 492 (2000) (citation omitted). One way of looking at this distinction is to consider the typical understanding of each word outside of a legal context. "Professions are distinguished from businesses in that the professional relationship is one in which the professional . . . holds considerable power, as a result of knowledge . . . over the individual . . . placing the [individual] in a vulnerable position." David A. Nash & William R. Willard, *Profession or Business?*135 J. AM. DENTAL ASS'N. 21, 21 (2004), *available at* http://jada.ada.org/cgi/reprint/135/1/21.

However, in a classical business relationship, "the proprietor of the business and the customer are generally in comparable power position . . . The primary motivation for the business owner is to make money . . . . " *Id.* In summary, "the underlying principle of professionalism is the belief that a professional is not unduly influenced by fluctuations in a free market and, instead, responds to higher societal values – at times to the detriment of his or her own self-interest." Hatten-Boyd, *supra*, at 492 (citation omitted).

282. *See* Vagts, *supra* note 213, at 677 (discussing the issues of lawyering as business versus profession in different countries and providing a thorough comparative analysis of various attorney regulations).

283. *Id.* at 679.

284. *See id.* at 677.

285. "[D]espite the emphasis placed on market values, including competition, as the foundation of policy, the European Union ("EU") views law predominantly as a profession...." Christopher J. Whelan, *The Paradox of Professionalism: Global Law Practice Means Business*, 27 PENN ST. INT'L L. REV. 465, 469 (2008).

286. One American lawyer remarked "I'm a lawyer first and a businessman second. But, sometimes, I put on my business hat first . . . ." Carla Messikomer, *Ambivalence, Contradiction, and Ambiguity: The Everyday Ethics of Defense Litigators*, 67 FORDHAM L. REV. 739, 750 (1998). However, it is interesting that interviewed attorneys expressed both disappointment at the fact law was increasingly looked at as a business as well as a belief that, "unless it is run like [one], it will disappear." *Id.* at 758.

between the strictly business/economics and the strictly professional."[287] Thus, there is no true black or white answer at the end, but rather one can arrive at a conclusion that is logical in light of the overall analysis of specific attorney regulations.[288]

To begin with, both the CCBE and Russian regulations do not apply to in-house attorneys,[289] while the Model Rules certainly govern all lawyers, including in-house counsel.[290] Because in-house counsel works in a corporate or business setting, excluding him from ethical regulations shows that the CCBE and Russian regulations approach lawyering as a profession and choose to take the business context out of its regulations. Meanwhile the ABA Model Rules certainly include the business aspect into lawyering,[291]

---

287. *See, e.g.,* Vagts, *supra* note 213, at 679 (in which the author found all developed countries examined had legal systems with elements of both business and profession).

288. The law in general is thought of as a profession according to factors set forth by Harvard Business School. *See* Rakesh Khurana et al., Is Business Management a Profession? (Feb. 21, 2005), http://hbswk.hbs.edu/item/4650.html. These factors include:

> a common body of knowledge resting on a well-developed, widely accepted theoretical base; a system for certifying that individuals possess such knowledge before being licensed or otherwise allowed to practice; a commitment to use specialized knowledge for the public good, and a renunciation of the goal of profit maximization, in return for professional autonomy and monopoly power; [and] a code of ethics, with provisions for monitoring individual compliance with the code and a system of sanctions for enforcing it. *Id.*

Another article characterizes a profession as an occupation which requires university-level training, Alan A. Klass, *What is a Profession*, 85 CAN. MED. ASS'N J. 698, 698 (1961), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1848216/pdf/canmedaj00909-0027.pdf, has obtained legal status ("A profession must acquire a statutory basis in the law of the country"), is self-regulated, *id.* at 699, and has a "professional spirit" among its members, *id.* at 700. Despite these conceptualizations, it is important to examine the ethical guidelines and their application in the United States, CCBE Member States, and Russia respectively to get a clearer understanding of how the end results of these analyses may not be entirely on point for each legal system.

289. On Work, *supra* note 5, art. 1(3) ("Work as an attorney does not include legal aid rendered by ... participants in and employees of organizations ...). "Corporate in-house attorneys are not covered by the CCBE Code: they are not 'lawyers' for the purpose of Rule 1.4." Anastasia M. Pryanikova, Comment, *Successive Representation in Cross-Border Practice: Global Ethics or Common Rules?*, 10 TRANSNAT'L. L.& CONTEMP. PROB. 325, 338 n. 70 (2000) (citation omitted); *see also* Christopher J. Whelan, *Ethics Beyond the Horizon: Why Regulate the Global Practice of Law?,* 34 VAND. J. TRANSNAT'L L. 949 (2001) (explaining that in-house counsel is not covered by the CCBE Code based on the language of the CCBE Explanatory Memorandum and Commentary). As such, the European Court of Justice has held in-house counsel may not invoke attorney-client privilege. Daly, *supra* note 188, at 1279 (citation omitted).

290. *See* MODEL RULES OF PROF'L CONDUCT (2010) (stating that its provisions apply to "lawyers" without noting any excepted categories).

291. There has also been recent discussion surrounding pressures to change the ABA Model Rules to allow multi-disciplinary practices (MDPs), which would further infuse business aspects into lawyering. *See* Hatten-Boyd, *supra* note 279, at 489. In MDP set-ups, attorneys partner with other professionals such as engineers, financial planners, and accountants to provide "one-stop shopping" to clients. *Id.* at 490 (citation omitted). The ABA has "demonstrated its willingness to address change" with other issues in the past, and it took its first step towards addressing this question by appointing a Commission on Multidisciplinary Practice in 1999. *Id.* at 494. However, it is important to keep in mind the negative commentary regarding MDPs and their effects on legal practice as well. One researcher warned that strong law firms could become "targets" for larger "predators," such as major accounting firms. R.G. Lee, *From Profession to Business: The Rise and Rise of the City Law Firm*, J.L. & SOC'Y 31, 40 (1992). It will be interesting to watch the ABA's treatment of MDPs in the future as globalization and competitive pressures continue to increase.

which makes it consistent with the rules allowing American lawyers to work in corporate and other business settings.[292] In contrast, Russia's regulations are especially strict on this issue, prohibiting its lawyers from any business-related employment other than academic, teaching or other creative activities[293] and thereby showing even a stronger effort to separate lawyering from business than the CCBE Code.[294]

The next issue to consider here is the way these regulations treat advertising.

> One set of rules that reflects the professional, as opposed to commercial, tension most strikingly is the body of restrictions on advertising. A traditionalist would say that advertising *per se* hurts the bar. It lowers the esteem in which people hold lawyers; it produces an undesirable kind of competition among lawyers and imposes additional costs on lawyers that they will pass on to their clients. From a law and economics perspective one sees advertising in this market as in others as producing a better-informed body of consumers--clients who can more easily find their way to the lawyer who can fill their needs most efficiently and economically. Of course, ideas originating entirely outside the body of rules governing lawyers have a powerful impact; once one accepts the idea that commercial speech is entitled to be protected in much the same way as other types of speech one is pushed in the direction of striking down limitations on lawyer advertising.[295]

In the past, attorney advertising was mainly viewed as inappropriate around the world.[296] However, that has changed[297] and, as discussed, Russia's advertising regulations today are much stricter and more specific than the Model Rules[298] and even the CCBE, again indicating that Russia definitely views lawyering as a profession rather than a business venture.

Another point of comparison involves attorney's fees and freedom in fee negotiation under the business approach and a fee restriction or structure that is permissible under the profession approach. To that end, Rus-

---

292. *See generally supra* note 197 and accompanying text.
293. KPEA *supra* note 6, art. 2(1).
294. The CCBE Code simply states that "a lawyer may be prohibited from undertaking certain occupations." CCBE CODE, *supra* note 8, R. 2.5.1. The CCBE Code itself does not restrict lawyers from obtaining other gainful employment but rather says a lawyer who "wishes to participate directly in commercial or other activities not connected with the practice of the law shall respect the rules regarding forbidden or incompatible occupations as they are applied to lawyers of that Member State." *Id.* R. 2.5.3.
295. Vagts, *supra* note 213, at 680.
296. "As of 1950, the concept that lawyers should not advertise was adhered to around the world." *Id.*
297. For a discussion of attorney advertising history and its changes, please *see id.* at 680-82.
298. *See supra* Part V.B.b.4.

sia and the CCBE Code are more restrictive regarding their fees as they prohibit contingency fees.[299] In addition, the CCBE Code's permitted bar-approved schedules[300] also provide another example of fee regulation, which is distinguishable from the ABA Model Rules' general guidelines on fees that indicate freedom of contract between the attorney and his client.[301] Thus, both the Russian regulations and the CCBE Code once again show a much stronger tendency towards perceiving lawyering as a profession, rather than business as is more the case in the United States. Along these same lines, Russia and the CCBE Member States set forth strict regulations on how lawyers may practice, which may include the size and forms of professional organizations, which are permitted.[302] This goes against the notion of freedom to organize under the business model that is in existence in the United States, which sets no restrictions on lawyers' organization and type of practice other than prohibition of partnership with non-lawyers.[303]

This brief comparison and accompanying discussion very much confirm that Russia views lawyering as a profession rather than business, which is similar to the CCBE Code and distinguishable from the ABA Model Rules. This furthers shows that influence of the civil law system on Russia's legal profession remains significant, and it managed to stay in force despite the drastically different experience the country underwent during communism. It further sheds light on the new regulations restricting advocates in Russia from participation in any type of business and the regulations' overall lack of focus on a client's wishes in his relationship with an attorney, which is vastly different from the approach to lawyering taken by the United States.[304]

---

299. KPEA *supra* note 6, art. 16(3) (except in property disputes); CCBE CODE, *supra* note 8, R. 3.3. These provisions can be compared to MODEL RULES OF PROF'L CONDUCT R. 1.5 (2009) which allows contingency fees in all cases except for criminal and domestic relations. *See also* discussion of contingency fees *supra* Part V.B.A.3.

300. CCBE CODE, *supra* note 8, R. 3.3.3.

301. *See* MODEL RULES OF PROF'L CONDUCT R. 1.5 (2009).

302. *See* On Work, *supra* note 45, art. 20(1) (setting forth the three permissible ways to practice in Russia); *see also* discussion *supra* Part V.B.a.2 (discussing firm size limits in CCBE Member States). "The rules governing a profession are shaped by the size of the bar as a whole and by the size of the organizations that lawyers inhabit within it. The number of lawyers in different countries varies tremendously, as we learned when the controversy about "excess" lawyers in the United States was launched by Vice President Dan Quayle." Vagts, *supra* note 213, at 688 (citation omitted).

303. MODEL RULES OF PROF'L CONDUCT R. 5.4(a) (2009).

304. The business-like approach taken in the United States can also be seen in the way legal services are treated similar to a commodity on the open market. Over the last decade or so trade in legal services has been steadily increasing. *See* Laurel S. Terry, *U.S. Legal Ethics: The Coming of Age of Global and Comparative Perspectives*, 4 WASH. U. GLOBAL STUD. L. REV. 463, 494 (2005). In 2003, the United States exported $3.376 billion in legal services. *Id.* at 439. Moreover, many firms are becoming global to increase their presence in the market. *See id.* By 2004, all of the top ten largest firms worldwide had office branches in at least ten different countries. *Id.* One scholar has humorously but truthfully commented that:

4. Where do the Russian Regulations Stand?

In summary, it is apparent that the new attorney regulations in Russia represent a combination of the elements of the civil law legal system with the country's historic roots, cultural and societal values, and its recent effor for change in the image, role, and substance of the legal profession. This outcome certainly makes sense as, Russian law has been mainly based on codes and statutes with its rulers historically influenced by German and French law. Also consistent with the civil law approach, Russia's vision of an advocate involves a balance of his responsibilities to clients, the court and the profession, rather than putting the client at the center of the attorney-client relationship, as is the case in the United States. Olga Pina argues that distrust for lawyers is embedded in civil codes.[305] Obviously, the new attorney regulations in Russia more than reflect this trend, which is exaggerated based on the history of the legal profession during the communist era that was discussed earlier in this article.

Having examined and discussed the new attorney regulations in Russia, it becomes clear that, to its credit, the country was able to compose reasonable western-type law in a relatively short period of time. In fact, merely adopting these new attorney regulations represents a huge step towards the establishment of a new type of legal profession in Russia: one that is independent and self-regulated. To that end, it does not seem worthwhile to engage in overanalyzing and arguing over the wording or various readings of the Code or "On Work." Most importantly, the regulations present a solid framework for the ethical practice of law in Russia, especially in light of the fact that they are in their initial versions and can possibly be further amended or adjusted in the future. However, three major questions arise pertaining to this discussion. First, based on the historic distrust the Russian people have towards the rule of law, will these new regulations be consistently enforced? Second, what will happen to the jurists—unregulated lawyers, which represent a majority of lawyers in Russia today? Third, does what appears to be a tremendous step towards creating the ethical practice of law represent a true perestroika in Russia's perception of the legal profession and its role in society, or are these regulations merely perfunctory guidelines that came about together with many

---

> Competitive pressures inspire fear – even terror …. Law firms sometimes appear to be seized by the adolescent angst that all your friends are at a party to which you haven't been invited – it is unbearable not to be there, even if you know you would have a terrible time. For many American firms, the foreign office is a loss leader, an outpost to entertain visiting firemen, a way of showing the flag, an address to add to the letterhead and a discreet form of advertising.

George C. Nnona, *Multidisciplinary Practice in the International Context: Realigning the Perspective on the European Union's Regulatory Regime*, 37 CORNELL INT'L L.J. 115, 123 (2004) (quoting Richard L. Abel, *The Future of the Legal Profession: Transnational Law Practice*, 44 CASE W. RES. L. REV. 737, 738 (1994)).

305. Pina, *supra* note 174, at 810.

other laws mechanically put on the books during the years in transition between political regimes and are not to be taken seriously?

VI. ENFORCEMENT ISSUES—RULE OF LAW IN RUSSIA

In order to arrive at the best answer to the first issue of whether the new regulations will be enforced, it is important to discuss why the Russian people disobey and disrespect the law in the first place.[306] "[T]he rule of law requires some level of shared expectations by political elites, lawyers, and laypersons about what counts as law, about what are the limits of judicial power, and about into what spheres of life the law may not be permitted to intrude."[307] Professor Jeffrey Kahn has identified three main principles essential to establishing the meaning of the rule of law. First, the "rule of law, or supremacy of law over government, means that there can be no offense—criminal, civil, political or administrative—without law."[308] The second principle requires that the first one be applied on a universal basis: all laws must have an equal application to all citizens.[309] The third one requires the "existence of an independent and politically neutral judiciary that is broadly accessible to aggrieved individuals."[310] Each of these principles is of equal importance in terms of its contribution to the overall realization and success of the "rule of law."

Most scholars agree that Russia still fails to implement the "rule of law" the way it is defined in the West, and many believe that the Russian government's commitment to law is not credible overall.[311] According to Professor Kathryn Hendley, institutional as well as societal changes are needed for the "rule of law" to prevail, and she believes that Russian society is not currently willing to "take responsibility for ensuring that the state lives up to its promises."[312] However, Professor Kahn argues against the most common approach taken by political scientists and states that the rule of law in Russia should not be perceived and analyzed as a tool that would advance democratic ends. Instead, he believes it should be viewed as more of a "causeway" for Russia's political development.[313]

Despite all efforts to develop and regulate the legal profession, a relatively recent survey demonstrates that "[a]n overwhelming majority of

---

306. *See* Lewinbuk, *supra* note 10, at 848.
307. Kahn, *supra* note 39, at 360.
308. *Id.* at 364.
309. *Id.* at 365.
310. *Id.* at 366.
311. Hendley, *supra* note 48, at 241-43.
312. *Id.* at 262.
313. Kahn, *supra* note 39, at 370. "The value of this causeway lies first in the free movement of citizens that it facilitates among state and non-state institutions in daily life, commerce, and politics." *Id.*

Russians do not think that they live under a rule-of-law state."[314] Moreover, periodic surveys conducted by the Levada Center in Russia over the last ten years reveal that less than twenty percent of survey participants have confidence in Russian courts, and very few participants view Russia's law as a shield against wrongdoing.[315] It is also interesting to note that, overall, Russian citizens prefer to avoid using the courts.[316] When asked why that is the case, those surveyed explained that it is hard for them to find a competent attorney due to rumors of corruption in the education system and lack of a meaningful accreditation system.[317] They further blamed it on a culturally-driven dislike for conflict, especially among women, as well as their fear of dishonest judges who can be bought off.[318] Also, besides the general perception that telephone law is the main reason people do not rely on courts, the interviewees stated that other common concerns include the time, expense and emotional energy involved in a lawsuit.[319] Overall, Professor Hendley argues that poll results tend to be "more consistent with the common wisdom that the Russian courts are dysfunctional than with the reality of increased use of courts."[320] Most of her interviewees still viewed the law as an instrument used by the state at its discretion and blamed the legislature and others while not actually putting any responsibility on the President himself.[321] The survey participants, however, failed to place any blame upon themselves, which, ac-

---

314. *Id.* at 407 n.180 (quoting Richard Rose et al., *Resigned Acceptance of an Incomplete Democracy: Russia's Political Equilibrium*, 20 POST-SOVIET AFF. 195 (2004)).

315. Hendley, *supra* note 48, at 243. In another national survey, thirteen percent of respondents believed the courts to be truly independent of political influence, and forty-two percent saw the courts as being somewhat dependent on the political leadership. *Id.* A 2007 survey revealed that fifty-one percent of Russians believed the courts were the proper remedy if their rights were violated versus forty-two percent in 2003. *Id.* at 244. However, given that only a small portion of respondents (ten percent) had initiated a lawsuit, this suggests that these poll results are not indicative of actual increased court use. *Id.* Overall, it is safe to say in the past "the Russian Judiciary has not functioned as an independent branch of government to which its citizens may come for access to justice or protection from government excess or unfairness," and this has created long-lasting challenges to increasing court use and democratizing Russia in general. John. D. Shullenberger, *The Russian Federation and Karelia: Rapid Change and the Rule of Law*, 21 VER. B.J. & L. DIG. 20, 22 (1995).

316. *Id.* at 249-52.

317. Hendley, *supra* note 48, at 251 (citation omitted). In 2006, seventy-six percent of those surveyed by the Foundation for Public Opinion stated that it was easy to buy a diploma, and seventy-eight percent believed attorneys with purchased diplomas did not have adequate professional skills. *Id.* n.25.

318. *Id.* at 249-52. For a discussion of judicial selection and recent reforms attempting to increase judicial independence under President Putin, see Alexei Trochev, *Judicial Selection in Russia: Towards Accountability and Centralization*, *in* APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD 375 (Kate Malleson & Peter H. Russell eds., 2006).

319. Hendley, *supra* note 48, at 249. *But see* Solomon, 2008 WLNR 4772643, at 69 (arguing for the efficiency of the Russian court system regarding the time frame for civil cases).

320. Hendley, *supra* note 48, at 244.

321. Hendley, *supra* note 48, at 247.

cording to Professor Hendley, adds to the explanation of "why societal demand for rule of law has been slow to materialize."[322]

It is thus understandable that society's lack of faith in the law will not change overnight and will continue to take time to overcome. Obviously, it is impossible to predict how slowly it will change, although, based on just the enactment of the new attorney regulations and other indicators pertaining to the changes in Russia's political and economic situation,[323] it appears safe to conclude that the public's attitude towards the rule of law will continue changing for the better. According to President Dmitryi Medvedev, who "laid out a bold democratic vision" of Russia in the future, the country's "political system will be extremely open, flexible and inherently complex."[324]

That brings this article back to the question of whether the new attorney regulations will be enforced and, if so, how rigorous that enforcement will be. Although the regulations are still new and it is hard to know for sure, substantial steps have been made to demonstrate the seriousness of enforcement. Since the regulations' enactment, a number of ethical violations have already been addressed resulting in sanctions to attorneys. For example, an attorney was found in violation of Article 12 of the Code[325] when he submitted seventy identical declarations to the court petitioning for the disqualification of the judge with jurisdiction over one of his cases.[326] The attorney was issued a warning for his conduct.[327] In another recent case, an attorney had his status terminated, i.e. disbarred, after the attorney violated Article 16 of the Code,[328] among other provisions.[329] These examples, together with a number of other disciplinary proceedings,

---

322. *Id.* at 248.

323. For example, the fall in the Russian economy in 2009 caused many international firms to cut back their services in the country. The Legal 500: Europe, Middle East & Africa, Russia http://www.legal500.com/c/russia (last visited July 6, 2010). In turn, domestic Russian firms "have been able to capitalize on the downturn." *Id.* Not only are they becoming involved in more transactions, but, because many law graduates are now hesitant to join international practices, the Russian firms are also "cherry picking from the surplus of available and more affordable lawyers." *Id.* This increase reliance on domestic firms can potentially emphasize the importance of the rule of law, and the improved selection of attorneys may be helpful in promoting change from within the profession.

324. Simon Shuster, *Medvedev Dashes Hopes for More Democracy in Russia*, TIME, Oct. 30, 2009, http://www.time.com/time/world/article/0,8599,1933251,00.html.

325. "[A]n attorney must ... show respect for the court . . . [i]n raising objections to the actions of judges . . . the attorney must do so in a correct form in accordance with the law." KPEA *supra* note 6, art. 12.

326. *Council of the Chamber of Attorneys of the City of Moscow Record of Disciplinary Proceedings Against Attorney I. [Spring 2008]*, *translated in* STATUTES & DECISIONS Sept.-Oct. 2008, *supra* note 157, at 52, 67.

327. *Id.*

328. "An attorney must refrain from including in an agreement conditions that make payment of remuneration dependent on the outcome of the case." KPEA *supra* note 6, art. 16(3).

329. *Council of the Chamber of Attorneys of the City of Moscow Disciplinary Proceedings Against Attorney B. [Spring 2008]*, *translated in* STATUTES & DECISIONS Sept.-Oct. 2008, *supra* note 157, at 37, 50.

will likely send the message to advocates, and even possibly to jurists, that unethical conduct among members of the legal profession is no longer acceptable in Russia.

VII. PERESTROIKA OR JUST PERFUNCTORY?: WHERE IS THE RUSSIAN LEGAL PROFESSION HEADING?

It is captivating to see how the fall of communism led to a speedy westernization of Russia, with its new regulations for advocates promoting their independence of judgment rather than allowing attorneys to be used as tools of the state and promotion for the totalitarian system.[330] Similar to the United States and most European countries, Russia now has its own code of professional ethics that regulates its advocates; many fail to realize what a major accomplishment that is. Focusing on finding deficiencies in Russia's new laws, cynics and critics forget that a post-communist country that has just managed to carve out its first formal regulations of professional ethics cannot be compared to the United States, which has an old and prominent legal profession performing in a world of democracy.[331] It is critical to remember that the new legal profession is being born in Russia as we speak, with its initial regulations enacted less than ten years ago.

However, as discussed earlier in this article, enforcement of any law in Russia is not automatic.[332] Moreover, a number of Russian lawyers continue to face threats and dangers based on the type of work they do and positions they take in support of their clients.[333] According to one expert,

---

330. "[A] great deal of significant legislation has been introduced," and Russia is currently dealing with many of the same legal issues that the United States faced about eighty years ago. Interview by the Russian Investment Review with Dimitry Afanasiev, Managing Partner, Egorov, Puginsky, Afanasiev & Partners, LLP (April 21, 2007), *available at* http://www.epam.ru/index.php?id=21&id1=569&1=eng. "[T]he recent phenomenon is the emergence of Russian law firms with a thorough understanding of Western professional and ethical standards of practice, who can, at the same time, effectively deal with the local conditions by being local players." *Id.* An argument can also be made that a part of "westernization" of Russia encounters its return to some of its pre-revolutionary roots.

331. To put things into perspective:

> America had been an independent legal system for 120 years before its bar found it necessary to adopt the first rules – and those rules were merely called canons of ethics. Those rules, like those currently in force in other countries, were brief and very general in tone, trying to set standards rather than lay down specific rules (citation omitted). Since that time they have evolved in the direction of greater and greater detail and specificity. In many cases involving trans-border questions, the American rules that govern will address the issue much more specifically than the counterpart rules in other countries.

Vagts, *supra* note 213, at 689.

332. *See* discussion *supra* Part VI.

333. "For lawyers in Russia these days, life is difficult, even dangerous. Even attorneys who handle run-of-the-mill corporate work – including real estate deals, corporate contracts, environmental regulations and tax matters – have reported threats and harassment, according to the Moscow-based think tank Memorial Human Rights Center." Lynda Edwards, *Russia Claws at the Rule of Law*, 95 JUL A.B.A. J.,, 38, 40 July 2009 *available at* http://www.abajournal.com/magazine/article/russia_claws_at_the_rule_of_law. Tactics used against attorneys "[range] from imprisonment

a "lawyer can keep a low profile and work on cases that never bring him close to peril, but the problem in Russia is, danger can lie in unexpected places."[334] Despite the potential danger, a serious attempt to regulate the profession and enforce the law is being made from above.[335] To that end, President Medvedev specifically stated: "We must reach a level of stability, in order that nobody is scared of the future. Only then can we motivate people to consider it illegal to not pay taxes or take bribes."[336] The

---

to deportation." Alastair Gee, *Russian Lawyers Claim Kremlin Abuses*, (July 28, 2008), http://politics.usnews.com/news/world/articles/2008/07/28/russian-lawyers-claim-kremlin-abuses.html ? PageNr=1. The case involving Yukos Oil is a fairly recent example of the danger attorneys working in Russia may face. The Russian company's CEO (Mikhail Khodorkovsky) was convicted of fraud and later faced charges of money laundering and embezzlement. Edwards, *supra* at 41. Those attorneys who were part of Khodorkovsky's defense team suffered serious consequences for their involvement. *Id.* American attorney John Pappalardo refused to take cabs in Moscow out of fear he would be kidnapped and he received a death threat via telephone as well. *Id.* The executive vice president of Yukos and former head of its legal department was arrested and not given proper medical attention in jail despite the fact he suffered from AIDS, cancer, and tuberculosis. *Id.* Even more extreme is Stanislav Markelov's story. Markelov represented the family of an eighteen year old woman who was kidnapped and raped. *Id.* at 43. A Russian colonel was convicted for her murder and sentenced to ten years. *Id.* The colonel was released early, and Markelov held a press conference in opposition. *Id.* Immediately following the press conference, Markelov was murdered. *Id.* There is uncertainty as to exactly what led to Markelov's murder due to the fact he was working on several other cases involving alleged torture by politicians and officers. *Id.* Sadly, this was not the only time Markelov encountered physical harm – he was previously attacked by skinheads in a subway while working on a case against a Russian police officer. *Id.*

334. Edwards, *supra* note 333 at 41. Because the "legal boundaries [are] so uncertain … even mundane transactions can involve personal risk to the lawyers involved." *Id.* at 42.

335. "For lawyers in Russia these days, life is difficult, even dangerous. Even attorneys who handle run-of-the-mill corporate work – including real estate deals, corporate contracts, environmental regulations and tax matters – have reported threats and harassment, according to the Moscow-based think tank Memorial Human Rights Center." Lynda Edwards, *Russia Claws at the Rule of Law*, A.B.A. J., July 2009, at 40, *available at* http://www.abajournal.com/magazine/article/russia_claws_at_the_rule_of_law. Tactics used against attorneys "[range] from prison to deportation." Alastair Gee, *Russian Lawyers Claim Kremlin Abuses*, (July 28, 2008), http://politics.usnews.com/news/world/articles/2008/07/28/russian-lawyers-claim-kremlin-abuses.html?PageNr=1. The case involving Yukos Oil is a fairly recent example of the danger attorneys working in Russia may face. The Russian company's CEO (Mikhail Khodorkovsky) was convicted of fraud and later faced charges of money laundering and embezzlement. Edwards, *supra* at 41. Those attorneys who were part of Khodorkovsky's defense team suffered serious consequences for their involvement. *Id.* American attorney John Pappalardo refused to take cabs in Moscow out of fear he would be kidnapped and he received a death threat via telephone as well. *Id.* The executive vice president of Yukos and former head of its legal department was arrested and not given proper medical attention in jail despite the fact he suffered from AIDS, cancer, and tuberculosis. *Id.* Even more extreme is Stanislav Markelov's story. Markelov represented the family of an eighteen year old woman who was kidnapped and raped. *Id.* at 43. A Russian colonel was convicted for her murder and sentenced to ten years. *Id.* The colonel was released early, and Markelov held a press conference in opposition. *Id.* Immediately following the press conference, Markelov was murdered. *Id.* There is uncertainty as to exactly what led to Markelov's murder due to the fact he was working on several other cases involving alleged torture by politicians and officers. *Id.* Sadly, this was not the only time Markelov encountered physical harm – he was previously attacked by skinheads in a subway while working on a case against a Russian police officer. *Id.*

336. Dmitriev, *supra* note 219. Medvedev's poll ratings "remained consistently high" throughout 2009, despite the problems brought on by the country's economic downturn. Simon Tisdall, *Medvedev Faces Russia's New Reality* (July 21, 2009), http://www.guardian.co.uk/commentisfree/2009/jul/21/russia-

decisions enforcing the new attorney regulations that have already been published certainly show that enforcement mechanisms for these new regulations exist and are being used to ensure compliance with the new ethical standards. [337] These decisions also demonstrate the seriousness of these ethical rules and their application to members of the "advokatura" or advocacy. This point, however, brings us back to the dilemma addressed earlier in this article—no matter how vigorous these regulations and their enforcement may be, they are only applicable to a small fraction of the profession. What about jurists,all the other lawyers who remain unregulated? Will there ever be mandatory ethical standards to regulate them?

Like other dilemmas and predictions, that question is hard to answer. The hope is that the advocates who are arguably already more popular, reliable, and known to offer higher quality legal work, will eventually push out the jurists, forcing all lawyers to become members of the "advokatura" or advocacy. However, this prediction may be overly optimistic. Today, there are many more jurists than advocates, and most jurists will definitely not want to change their ways.[338] As such, for this outcome to prevail, it may require that the next generation of lawyers have an independent willingness to join the "advokatura" or advocacy. However, it is also possible that the vigorous enforcement of ethics rules may discourage people from going into the "advokatura" or advocacy, which is already difficult to join. Some advocates may even choose to give up their licenses and practice as jurists, deciding to avoid being subject to regulation and offering a lower rate to their clients because they no longer have to prepare for examinations, pay dues, or incur other costs associated with membership. The advocates and jurists in Russia are currently divided into two distinct camps that are engaged in power struggle. It is certainly unclear who will win, but it is unlikely the profession will remain divided for long. The advocates are also distinguishable from all other legal professionals, such as notaries, procurators, and judges which do not share the same level of ethical regulation and accountability. As such, the "advokatura" or advocacy has a difficult battle to fight, and only time and new developments in Russia's socio-economic and political life will determine whether it can win control of the legal profession in the future.

Finally, does this battle for regulation of the legal profession in combination with the creation of these new ethics laws establish a full perestroika or is it just perfunctory? The author believes it does both. On the

---

medvedev. This could be a promising sign that Russian citizens trust the President and are on board with his agenda which would make stability and compliance with the law a more likely reality for the country.

337. *See* discussion *supra* Part VI.

338. In fact, a previous attempt to regulate jurists had failed. For a discussion, *see supra* note 210.

one hand, the regulations had to be enacted as part of the westernization of the legal profession and something that had to be put on the books given Russian society's attempt to westernize and transition into a democracy. On the other hand, the regulations are truly revolutionary considering the history of the legal profession in Russia. Despite this inspiring effort, however, a tremendous amount of work is left to be done to allow for an actual, full transformation of Russia's legal profession. In fact, President Medvedev, a lawyer himself, admitted that "[s]trong laws alone do not help."[339] Pointing out that the explanation for challenges in law enforcement lies in Russia's historically "high level of legal nihilism," Medvedev specifically cited the policies that the Russian government followed in the past and further added that "[i]t has not been understood how a government that acts illegally shows disdain for fundamental rules."[340]

What starts as perfunctory can eventually lead to a serious perestroika, and that is exactly what has happened in Russia. The country's political and socioeconomic regime led to the changing role, westernization and increasing demand of lawyers and judges. That westernization eventually led to the need for regulation, and once the body of "advokatura" or advocacy became regulated and clearly stood apart from jurists, a substantial perestroika of the legal profession began. It is fascinating to watch these developments, and the author remains hopeful that the advocates will continue to operate the way they are envisioned to, thereby changing the role, image, and responsibilities of a lawyer and ultimately arriving at perestroika—the true and actual restructuring of the legal profession in Russia.

339. Dmitriev, *supra* note 219.
340. *Id.*

IS LEGAL OUTSOURCING UP TO THE BAR? A REEVALUATION OF CURRENT LEGAL OUTSOURCING REGULATION

Sejal Patel

In July 2008, one of the most prominent law firms in New York City announced that it was going to layoff about 20% of the Firm's lawyers due to overdeveloping its real estate finance and securitization practice[1] prior to the housing bubble burst. The layoff marked the first domino in the tremendous legal layoffs of the current recession, [2] with lawyer layoffs between January 2008 and June 2009 totaling almost 5,000 lawyers.[3]

The layoffs in 2008 were just one facet of the current global economic crash. At the end of 2008, the total value of the world's financial assets had fallen by $16 trillion to $178 trillion, the largest setback on record.[4] Predictably, the story of the current recession for the legal profession has been— and ostensibly will remain—one of the bottom line. Firms must cut costs in order to stay afloat, even if that means replacing attorneys with a more cost efficient substitute. At a large firm, laying off one lawyer can save the firm about $250,000; in addition to salary, the firm no longer has to pay for the personnel costs, copies and faxes, or car services attendant to employing the attorney.[5]

One popular—and often controversial—method law firms have used to maintain the bottom line is to pass legal work to other countries through legal process outsourcing ("LPO").[6] The term "outsourcing" refers to hiring an outside firm, which may be located overseas, which offers services for a price that is often only a fraction of the cost of those same ser-

---

1. Dan Slater, *Another View: In Praise of Law Firm Layoffs*, N.Y. TIMES, July 1, 2009, http://dealbook.blogs.nytimes.com/2009/07/01/another-view-in-praise-of-law-firm-layoffs.

2. Slater, *supra* note 1. "As of June 14 [2009], nearly 5,000 lawyers had been cut by major law firms since January 2008, or about 300 a month, the approximate size of many law school graduating classes." This number only reflects layoffs of "Big Law" firms--which means that the total lawyer layoffs is probably higher.

3. *Id*.

4. CHARLES ROXBURGH ET. AL., MCKINSEY GLOBAL INSTITUTE, GLOBAL CAPITAL MARKETS: ENTERING A NEW ERA 7 (2009).

5. Leigh Jones, *Just How Much Do Law Firm Layoffs Save?* NAT'L L.J. 1, Feb. 9, 2009, at Col. 1, *available at* http://www.law.com/jsp/article.jsp.

6. Alison M. Kadzik, The Current Trend To Outsource Legal Work Abroad and the Ethical Issues Related to Such Practices, 19 GEO. J. LEGAL ETHICS 731, 731 (2006).

vices in the United States. [7] With the recession, outsourcing is likely to become even more popular for firms[8] trying to keep up with the demands of business without overextending themselves financially. By using LPOs, law firms can acquire services for 30%-70% less than what they would pay in the U.S., according to the Associated Chambers of Commerce and Industry of India.[9] LPO salaries for Indian lawyers are generally below $10,000 a year; by comparison, a U.S. contract lawyer usually earns around $30 an hour and associate base salaries at major firms in New York start at $160,000 a year.[10] Some industry observers have predicted that as many as 50,000 to 80,000 or more legal jobs may move overseas within the next decade.[11]

This paper argues that the current recession should compel the legal industry to reassess its position in an increasingly globalizing world by reevaluating outsourcing regulations. Though the growth of outsourcing will increase due to the economic pressures of our time, it can be tailored to protect the interests of all parties involved through enforcement of regulation. This paper does not suggest that outsourcing is "good" or "bad," but rather highlights the current problems in outsourcing regulation that put the reputation and quality of the American legal system in peril. However, with the solutions proposed in this paper, both the economic needs of legal service entities in the U.S. and the desire for growth by LPO firms in foreign nations can be met more effectively. Just as globalization through technology and the current economic crisis cannot be ignored, neither can the U.S. ignore the need for effective regulation at the intersection at which both these realities meet—outsourcing.

Part I of this paper will discuss the background of LPO and the problems that have grown out of it, including how outsourcing undermines the integrity of American legal system, takes away American jobs, and creates jurisdictional problems. Part II will outline the deficiencies in current laws regulating outsourcing, particularly inconsistencies with one another and the lack of enforcement. Part III suggests potential regulatory solutions to outsourcing laws in order to ensure that the quality of the legal industry does not suffer due to an industry wide "bottom line" mentality. These solutions are: (1) the creation of satellite regulatory bodies, (2) implementing incentives for U.S. businesses and LPO firms to follow U.S. ethics

---

7. James I. Ham, 2008 Global Legal Practice Symposium: Ethical Considerations Relating to Outsourcing of Legal Services by Law Firms to Foreign Service Providers: Perspectives from the United States, 27 PENN ST. INT'L L. REV. 323, 324 (2008).

8. Kadzik, *supra* note 6.

9. Maya Karwande, *Legal Process Outsorcing: Efficient and Ethical?,* http://www.sddglobal.com/LPO_India_Efficient&Ethical.htm (last visited Oct. 8, 2010).

10. Anthony Lin, *Legal Outsourcing to India Is Growing, but Still Confronts Fundamental Issues*, N.Y. L.J., Jan. 23, 2008, *available at* http://www.law.com/jsp/article.jsp?id=1200996336809.

11. Ham, *supra* note 7.

laws, and (3) developing internal alternatives that are equally attractive as outsourcing to minimizing outsourcing problems altogether. These solutions will help guide the outsourcing industry to fall in line with U.S. ethical standards without restricting free trade needlessly, bolstering the health and reputation of the American legal industry.

I. THE BACKGROUND OF OUTSOURCING AND CURRENT PROBLEMS

Outsourcing is still considered to be "in its infancy."[12] Outsourcing in the United States began with manufacturing jobs in the late 1980s, and then expanded to include the service sector, including customer service and product support.[13] In 1995, the law firm Bickel & Brewer began the foreign legal outsourcing trend by opening a supporting office in India.[14] This was soon followed by various other companies venturing into foreign legal outsourcing, including General Electric, General Mills, and Accenture.[15]

Initially, LPO services focused on "legal support services," including proofreading, typing, legal coding, and document review.[16] These services are generally obtained from paralegals, legal assistants, and general legal support staff. Surprisingly, however, many lawyers and experienced paralegals feel that their jobs are immune to outsourcing. These "dismissive attitudes towards the possibility of outsourcing the practice of law reflect a surprising level of naiveté and overconfidence. Though not yet widespread, outsourcing has already begun to impact the practice of law . . . ."[17]

More recently, LPO firms have been advertising services that go beyond just legal support services. Some providers offer to perform legal research and writing projects "no matter how complex"[18] and "work that highly placed attorneys at top law firms would do."[19] According to one vendor, these tasks include complex legal research, drafting legal memos for lawyers and corporate legal departments, and drafting legal briefs.[20]

---

12. Keith Weffinden, Comment, Surfing the Next Wave of Outsourcing: The Ethics of Sending Domestic Legal Work to Foreign Countries under New York City Opinion 2006-3, 2007 BYU L. REV. 483, 487 (2007).

13. Darya V. Pollak, *"I'm Calling My Lawyer...in India!": Ethical Issues in International Legal Outsourcing,* 11 UCLA J. INT'L L. & FOREIGN AFF. 99, 102 (2006).

14. Woffinden, *supra* note 12 at 486.

15. *Id*. at 487.

16. Pollack, *supra* note 13.

17. Id. at 103.

18. Ann Sherman, *Should Small Firms Get on Board With Outsourcing?*, LAW.COM, Sept. 12, 2005, http://www.law.com/jsp/law/sfb/lawArticleSFB.jsp?id=1126256712489.

19. George W. Russell, *In-House or Outsourced? The Future of Corporate Counsel*, ASIA LAW, July-Aug. 2005, at 22, *available at* http://www.bmacewen.com/blog/pdf/AsiaLawJulyAugust2005LegalOutsourcingToIndia.pdf.

20. *Id*.

One provider of legal services in India, Lexadigm, even recently drafted its first brief for a U.S. Supreme Court case.[21] The proliferation of legal outsourcing "has vastly outpaced the theory of whether and how such practice should be regulated . . . despite the increase in scholarly writing on this topic . . . ."[22]

Furthermore, the rise of outsourcing has been accompanied by problems that are slowly tearing at the roots of the U.S. legal industry. Outsourcing has the potential to undermine many characteristics vital to the reputation and quality of the U.S. legal industry. Such characteristics include: the conception of the legal field as uniquely equipped to handle local problems; keeping American jobs in America; and the ability to reach the wrongdoer in legal malpractice actions.

A. The Idea that Law is Uniquely Local

In his famous 1889 treatise on democracy in America, Alexis De Tocqueville observed that the U.S. federal government "only regulates the relations of the Government with the citizens, and of the nation with Foreign Powers: the relations of citizens amongst themselves are almost exclusively regulated by the sovereignty of the States."[23] In addition to noticing the local aspect of American law, which was considered unique to democratic governments at the time, Tocqueville also discussed the steadfast American belief that "the strength of free peoples resides in the local community. Local institutions are to liberty what primary schools are to science; they put it within the people's reach; they teach people to appreciate its peaceful enjoyment and accustom them to make use of it."[24] Tocqueville's observations highlighted the conception that the strength of American government lay in the ability of the individual to be able to act on the local level.

The idea that local government is integral to a healthy democracy is a concept which extends by derivation to the legal profession, which is entrusted with upholding the ideals of justice upon which the founding fathers based this nation. Indeed, Tocqueville stated that, "Lawyers are attached to public order beyond every other consideration. . . ."[25] The ability for lawyers to work at the local level, then, is an important attribute in being able to serve the public.

---

21. Woffinden, *supra* note 12, at 490.

22. Pollack, *supra* note 13, at 103 (citing Laurel S. Terry, A Case Study of the Hybrid Model for Facilitating Cross-Border Legal Practice: The Agreement Between the American Bar Association and the Brussels Bars, 21 FORDHAM INT'L L.J. 1382, 1384 (1998)).

23. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 191 (Henry Reeve trans., Cambridge: Sever and Francis 1862).

24. Tocqueville, *supra* note 23, at 76.

25. Tocqueville, *supra* note 23, at 351.

Today, lawyers are considered the gatekeepers of the American justice system, and their responsibilities are to the localities in which they work. For example, an individual who has gone through law school must take the Bar exam for the state or states in which they want to practice. Furthermore, the lawyer must adhere to the ethics code of his or her state or they risk losing their license to practice law. Consequently, just because a lawyer has been trained in one of the United States does not mean that another state must allow the lawyer to practice in that state. Many states have statutes to protect their citizens "against the dangers of legal representation and advice given by persons not trained, examined and licensed for such work, whether they be laymen or lawyers from other jurisdictions."[26] A lawyer of one state who practices in another may therefore face serious professional consequences.

Outsourcing legal work to other countries, then, creates a problematic double standard in the U.S. legal profession. On one hand, lawyers trained in the U.S. must have membership to a State Bar in order to practice the law in that state; if a U.S. lawyer practices law in a state in which he is not a member of the Bar, then he could face negative professional consequences.[27] On the other hand, legal work is freely outsourced to foreign companies whose employees do not have the license to practice law in the U.S. at all. Furthermore, under the current laws that apply to outsourcing, there is no discernable consequence that such foreign employees face in the event something goes wrong. Therefore, the practice of legal outsourcing, if unregulated, will continue to undermine the integrity of the legal system in the U.S. that comes from the requirement that the lawyer be accredited at the local level.

B. Preserving the Integrity of the Legal System: Keeping Jobs in America

Perhaps the most immediately observable effect of outsourcing—and the one that is the most strongly vocalized—is the taking away of jobs from U.S. lawyers. Given the current recession and the increasing necessity for law firms to outsource legal work in order to keep afloat, the prospect of American jobs being outsourced should cause concern. For this reason, some individuals have begun to voice the need for America to

---

26. Birbrower, Montalbano, Condon & Frank v. Superior Court, 949 P.2d 1 (1998). In Birbrower, the court determined that it was an unauthorized practice of law for attorneys in New York to practice law in California. In defining what constituted the practice of law in California, the court stated, "Our definition does not necessarily depend on or require the unlicensed lawyer's physical presence in the state. Physical presence here is one factor we may consider in deciding whether the unlicensed lawyer has violated section 6125, but it is by no means exclusive. For example, one may practice law in the state in violation of section 6125 although not physically present here by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means," *Birbower*, 949 P.2d at 5-6.

27. *Id*.

rethink its strategy away from unrestrained free trade to one that defends national preservation. One such individual, mathematician Ralph, asserts that there is a tension between multinational companies that use other countries for cheaper labor and the welfare of the nation in which they are based.[28] While this practice can be beneficial where there is mutual gain, it becomes harmful to the outsourcing nation when the poor nation develops stronger capabilities and can produce more advanced goods.[29]

The poorer nation develops capabilities equal to those of the outsourcing nation, but for a fraction of the cost, which the outsourcing nation cannot compete with if it is to retain a certain standard of living.[30] This, in turn, creates downward pressure on the economy of the outsourcing country resulting not only in lost jobs, but in lowered incomes and overall standards of living.[31] Gomory also rebuts the argument of free trade advocates that American workers will simply have to become better educated to compete with the cheaper foreign workers.[32] The argument is that more education only works if there is somewhere to apply it, and Gomory insinuates that there might not be enough places to apply higher education to compete with cheaper foreign workers. Gomory stresses that "losses from trade are not confined to the 'localized pain' felt by displaced workers who lose jobs and wages[,]"[33] but that "the accumulating loss of a country's productive base can injure the broader national interest--that is, everyone's economic well-being."[34]

Although some individuals believe that outsourcing takes jobs away from Americans—and may contribute to a decline in quality of life—some analysts believe that outsourcing actually benefits the U.S. and may potentially create new jobs and other benefits. "Offshoring creates wealth for U.S. companies and consumers and therefore for the United States as a whole[,]" concluded a report by the McKinsey Global Institute.[35] According to the report, outsourcing generally saves U.S. companies money,

---

28. William Greider, *The Establishment Rethinks Globalization*, THE NATION, April 30, 2007, *available at* http://www.thenation.com/article/establishment-rethinks-globalization.com.

29. *Id*.

30. *Id*. "'The situation today is that the companies have discovered that using modern technology they can do all that overseas and pay less for labor and then import product and services back into the United States. So what we're doing now is competing shovel to shovel. The people in many countries are being equipped with as good a shovel or backhoe as our people have. Very often we are helping them make the transition. We're making it person-to-person competition, which it never was before and which we cannot win. Because their people will be paid a third, a quarter of what our people are paid. And it's unreasonable to think you can educate our people so well that they can produce four times as much in the United States.'"

31. *Id*.

32. *Id*.

33. *Id*.

34. *Birbower*, 17 Cal. 4th at 119.

35. OFFSHORING: IS IT A WIN-WIN GAME?, PERSPECTIVE (MCKINSEY GLOBAL INST., San Francisco, CA), August 2003, *available at* http://www.mckinsey.com/mgi/publications/win_win_game.asp.

increasing productivity and profitability.[36] Generally, "[f]ar from being bad for the United States, offshoring creates net additional value for the U.S. economy that did not exist before, a full 12-14 cents on every dollar offshored."[37] The report goes on to say that while some workers are displaced, new jobs are created as a result of the savings—in 2005, over 257,000 net new jobs were created, and by 2010 over 337,000 net new jobs are expected to be created.[38]

Whether this is true for the legal industry is uncertain, however, since the report focuses on outsourcing generally. The important issue is whether legal outsourcing is beneficial for the legal industry overall; this determination is not necessarily contingent on the perceived economic benefits brought by outsourcing. As the previous discussion mentions, the quality of the legal system is not only based on financial considerations, but also on considerations of the legal system's role in promoting civic duty and social welfare. These additional considerations, in conjunction with the loss of American legal jobs, serve to highlight the problems that non-regulation of the legal outsourcing industry may exacerbate.

C. The Inability to Reach the Wrongdoer in Legal Malpractice Actions

The differences between the American legal system and the Indian legal system are also cause for concern in situations where malpractice suits are adjudicated in an Indian court. While companies can contract with an LPO firm over which jurisdiction a suit between the two parties can be filed, there are instances where Indian law could supersede contract, and the lawsuit would have to be adjudicated in India. This can yield uncertain results and further undermines the ethical obligations of lawyers under U.S. law where the law of another country must be used instead.

A major problem with malpractice actions in India is that the Indian court system is notoriously slow, which is due to the lack of judges and high levels of corruption in the justice system.[39] In one case, a plaintiff company attempted to sue an Indian bank in New York and was given its choice of venue because a former Indian Chief Justice, B. N. Kirpal, testified that due to "the huge backlog of existing cases, the fact that no pref-

---

36. OFFSHORING: IS IT A WIN-WIN GAIN?, PERSPECTIVE (MCKINSEY GLOBAL INST., San Francisco, CA), August 2003, *available at* http://www.mckinsey.com/mgi/publications/win_win_game.asp.

37. *Id*.

38. GLOBAL INSIGHT, THE COMPREHENSIVE IMPACT OF OFFSHORE SOFTWARE AND IT SERVICES OUTSOURCING ON THE U.S. ECONOMY AND THE IT INDUSTRY 1, (October 2005), *available at* http://www.ihsglobalinsight.com/publicDownload/genericContent/103105execsum.pdf.

39. Praful Bidwai, INDIA: LEGAL SYSTEM IN THE DOCK, INTERPRESS SERVICE, May 31, 2007, http://ipsnews.net/news.asp?idnews=37972. "Judicial corruption in India is attributable to a number of factors, including 'delays in the disposal of cases, shortage of judges and complex procedures, all of which are exacerbated by a preponderance of new laws…'"

erence is given to commercial cases or postamendment cases and the shortage of judges, it would take the Delhi High Court at least 10 years to decide a case such as this."[40] Kirpal stated to an Indian newspaper, ''Let's not delude ourselves . . . There are already several judgments passed by the US courts holding that India is not a convenient forum . . . because of the inordinate delays. The situation won't change till there is a big increase in the number of judges.''[41]

Corruption is also prevalent in the Indian justice system, which makes adjudication in India difficult for American companies seeking recourse. Corruption in the judiciary is part of systemic corruption in the legal industry; the estimated amount paid in bribes per year is around 2,630 crores ($580 million in U.S. dollars) with 61% being paid to lawyers, 29% to court officials, 5% to judges, and 5% to middlemen.[42] The prevalence of corruption is partially to blame on the fact that there are relatively few judges in the Indian system and the public perception is that bribery is the best way to move their cases through the backlog of cases in the Indian judicial system.

In India, there are twelve to thirteen judges per one million people, as compared to 107 judges in the U.S., seventy-five judges in Canada, and fifty-one in the UK per the same population.[43] This creates a huge backlog of cases: "As of February 2006, 33,635 cases were pending in the Supreme Court; . . . 3,341,040 cases in the high courts...; and 25,306,458 cases in the 13,204 subordinate courts. This vast backlog leads to long adjournments and prompts people to pay to speed up the process."[44] In 1999, it was estimated that "' [a]t the current rate of disposal it would take another 350 years for disposal of the pending cases even if no other cases were added.'"[45]

II. THE CURRENT OUTSOURCING REGULATION SCHEME AND ITS DEFICIENCIES

The concerns regarding outsourcing have not escaped the attention of legislators, who have attempted to pass numerous bills on the issue. Initially, bills regarding outsourcing were few. In 2003, only four states—North Carolina, Indiana, New Jersey and Michigan—had introduced out-

40. Shin-Etsu Chem. Co., Ltd. v. ICICl Bank Ltd., 9 A.D.3d 171, 174 (N.Y. App. Div. 2004).
41. Manoj Mitta, IN NEW YORK VS. NEW DELHI, IT'S CHIEF JUSTICE VS. CHIEF JUSTICE, Sep 14, 2003, *available at* http://www.indianexpress.com/oldStory/31505.
42. Transparency Int'l, Global Corruption Report 2007: Corruption in Judicial Systems 215 (2007).
43. *See supra* note 42 and accompanying text.
44. *Id*.
45. *Id*.

sourcing bills.[46] However, by the end of 2004, "state legislators had introduced more than 200 such bills in more than 40 states."[47] To date, none of these bills have been passed. One reason is that some politicians are against outsourcing laws because they believe it would restrict free trade and prove to be detrimental to the nation's foreign relations.[48] Additionally, even if an outsourcing bill did pass, it would potentially face constitutional obstacles since states are precluded by federal law from making their own trade or policy agreements with other nations.[49]

Potentially, the government could regulate outsourcing under the Foreign Commerce Clause. Under the Foreign Commerce Clause, the power of the government to legislate commerce with other nations is exclusive.[50] Since outsourcing entails the movement of work between the U.S. and other countries, Congress would likely be able to legislate on the issue of outsourcing as long as there is a rational basis for the statute. However, the federal government has been less aggressive than the states in pursuing outsourcing legislation.[51] Most of the federal government's regulations related to outsourcing to date tend to legislate on the issues peripheral to outsourcing; for example, the legislation tends to attack job losses from outsourcing indirectly through immigration control and teaching workers who have lost their jobs to outsourcing a new trade.[52]

Even in a case where a federal outsourcing law could be successfully legislated, it is likely an international treaty or agreement would be a significant obstacle for the legislation. One illustration of this was the 2004 proposed anti-outsourcing Thomas-Voinovich Amendment. Essentially, "the Thomas-Voinovich Amendment state[d] that government organizations cannot hire foreign contractors for any jobs which in the past have not been performed by government employees outside the United

---

46. NAT'L FOUND. FOR AM. POLICY BRIEF, ANTI-OUTSOURCING EFFORTS DOWN BUT NOT OUT 2 (2007) (citing STUART ANDERSON, CREEPING PROTECTIONISM: AN ANALYSIS OF STATE AND FEDERAL GLOBAL SOURCING LEGISLATION (2003)).

47. *Id*.

48. Steve Lawrence, SCHWARZENEGGER VETOES BILLS TO PREVENT OUTSOURCING OF JOBS, Ass'd Press, Sept. 29, 2004. Governor Schwarzenegger of California stated, "'There is a right way and a wrong way to expand economic opportunity in California, the wrong approach is to implement measures that restrict trade, invite retaliation or violate the United States Constitution or our foreign trade agreement.'"

49. U.S. CONST. art. I, § 8. *See also supra* note 46 at 6.

50. Gibbons v. Ogden, 22 U.S. 1, 228-229 (1824). "[T]he power to regulate *foreign* commerce is necessarily exclusive. The States are unknown to foreign nations; their sovereignty exists only with relation to each other and the general government. Whatever regulations foreign commerce should be subjected to in the ports of the Union, the general government would be held responsible for them; and all other regulations, but those which Congress had imposed, would be regarded by foreign nations as trespasses and violations of national faith and comity."

51. Mark B. Baker, "THE TECHNOLOGY DOG ATE MY JOB": THE DOG-EAT-DOG WORLD OF OFFSHORE LABOR OUTSOURCING, 16 FLA. J. INT'L L. 807, 828-829 (2004).

52. *Id*.

States."[53] However, this amendment would have possibly violated the Government Procurement Agreement (GPA).[54] "The United States, along with more than 30 other nations, has signed the Government Procurement Agreement, which prohibits state and federal procurement policies from discriminating on the basis of where work would be performed."[55] Since the Thomas-Voinovich Amendment did not allow bids from American firms that outsource, it would have violated the GPA, which requires equal treatment for goods and services from member states.[56] Consequently, the Thomas-Voinovich Amendment would have invited "retaliation from trading partners through its disregard of international treaties."[57] Furthermore, the Thomas-Voinovich Amendment is only one example of federal legislation failing because of previous stipulations in international agreements.[58] Therefore, while the federal government would only need a rational basis to pass outsourcing legislation, it would face major obstacles in the way of its international policies.

Due to the various obstacles at the state and federal level, legal outsourcing legislation in the U.S. has manifested in the curious form of ethics opinions in limited jurisdictions (specifically Florida, Los Angeles County, New York City, North Carolina and San Diego County) as well as an opinion by the American Bar Association (ABA).[59] The opinions of state and local bar associations and the ABA, while enforceable by state laws if the states so choose, are not binding.[60] The ABA, for example, was founded as "a national, voluntary professional organization" but has "no role in administering bar exams or licensing attorneys in the U.S."[61] State bar associations, on the other hand, have more legal influence depending on the laws of the state. For example, some states have a mandatory bar and require membership in it to practice law there.[62] Therefore, lawyers in such states must follow that state's bar association rules in order to practice. Some states have gone further—California has written the State Bar of California into its constitution.[63] As a result, the enforcement of the

53. Lee A. Patterson, III, Outsourcing of Legal Services: A Brief Survey of the Practice and the Minimal Impact of Protectionist Legislation, 7 RICH. J. GLOBAL L. & BUS. 177, 200 (2008) (citing Shannon Klinger & M. Lynn Sykes, Exporting the Law: A Legal Analysis of Outsourcing Legislation, NAT'L FOUND. FOR AM. POL'Y 16-17 (2004), available at www.nfap.com/researchactivities/studies/NFAPStudyExportingLaw_0404.pdf).

54. Nat'l Found. for Am. Pol'y, *supra* note 53 at 201.

55. Nat'l Found. for Am. Pol'y, *supra* note 46 at 6.

56. Transparency Int'l , *supra* note 42 at 201.

57. *Id.*

58. *Id.*

59. *See infra* notes 61, 62, 64, and 68.

60. http://www.pangea3.com/aba-blesses-legal-outsourcing.html.

61. http://www.abanet.org/members/faqs.html#twentytwo.

62. William Burnham, Introduction to the Law and Legal System of the United States 135 (Thomson West 4th ed. 2006).

63. *Id*.

ABA rules and respective state bar association rules depends largely on state law and whether a particular state requires a lawyer to adhere to the Rules in order to practice in that state.

Consequently, there are two major gaps in current outsourcing legislation. One is that the ethics opinions are not really legislation per se, but rather ethical guidelines that may or may not be enforced. The second is that most jurisdictions have not spoken at all on the issue of outsourcing and therefore the potential to circumvent ethical considerations is high.

Generally, the current bar ethics opinions "take settled principles and familiar rules and apply them to a slightly different setting . . . ."[64] The current ethics bar opinions on outsourcing address four concerns: (1) supervision of non-lawyers in order to avoid the unauthorized practice of law; (2) the preservation of the client's confidences through client consent; (3) conflicts of interests; and (4) billing.

A. The Supervision of Non-Lawyers

The ABA and the state bar ethics rules (of the states that have given an opinion on outsourcing) oppose the unauthorized practice of law by a non-lawyer since they require that those who practice law be competent in each respective state of practice.[65] The solution, according to these state ethics rules, is to ensure that the non-lawyer is adequately supervised.[66] To this end, the Florida County, Los Angeles County and New York City bar opinions have adopted the suggestion that "the attorney must review the brief or other work provided by Company and independently verify that it is accurate, relevant, and complete, and the attorney must revise the brief, if necessary, before submitting it to the appellate court."[67] North Carolina makes a similar recommendation in determining the amount of supervision a non-lawyer should have.[68] North Carolina is the only state that has determined a clear cut-off point to determine where supervision is feasible and states: "If physical separation, language barriers, differences in time zones, or inadequate communication channels do not allow a reasonable and adequate level of supervision to be maintained over the foreign assis-

---

64. STEVEN J. MINTZ, ETHICS OPINIONS ALLOW FOREIGN LEGAL OUTSOURCING (2007) *available at* http://www.abanet.org/litigation/litigationnews/2007/july/0707_article_outsourcing.html (quoting Bruce A. Green, New York City, Professor at Fordham University School of Law and Member of the Section of Litigation's Council).

65. *See supra* notes 61-62 and 64.

66. *Id.*

67. L.A. County Bar Ass'n. Op. 518 8-9 (June 19, 2006).

68. N.C. State Bar Ass'n 2007 Formal Ethics Opinion 12 (April 25, 2008). "In supervising the foreign assistant, the lawyer must review the foreign assistant's work on an ongoing basis to ensure its quality; have ongoing communication with the foreign assistant to ensure that the assignment is understood and that the foreign assistant is discharging the assignment in accordance with the lawyer's directions and expectations; and review thoroughly all work-product of foreign assistants to ensure that it is accurate, reliable, and in the client's interest."

tant's work, the lawyer should not retain the foreign assistant to provide services."[69]These four jurisdictions define what adequate supervision entails.

San Diego County's Ethics Opinion does not delineate what constitutes "supervision" but does suggest a guideline to determine the level of supervision required. A "U.S. lawyer must know something about the requirements of lawyering where the work will be performed and the credentials of those who will actually perform the work."[70] The ABA opinion takes a similar approach to San Diego County and opines that lawyers must obtain information about the LPO firm, such as the background of the company, the educational background of the non-lawyers, the security with which information is handled, the quality, and quantity of the workers likely to have access to sensitive information and the facilities.[71]

In addition to the current bifurcation of how to determine an adequate amount of supervision in outsourcing, there is also the problem of applying ethics laws to outsourcing that were largely meant for legal support staff within the U.S. Supervising lawyers in other countries adequately—and obtaining detailed information about how LPO firms are structured—is hardly as simple as these ethics laws imagine them to be. While the current outsourcing ethics rules might be adequate in the supervision of temporary lawyers within the United States, outsourcing raises concerns about the unique way foreign non-lawyers are managed, supervised, and instructed.[72]

Under the current outsourcing ethics opinions, a lawyer should take into account the background of the foreign non-lawyer.[73] A supervising lawyer can more easily take this factor into account when the non-lawyer works in the same office or city. If the supervising attorney is familiar with the non-lawyer's skills and experience, she can at least track the non-lawyer's progress and physically supervise him if necessary. It is much more difficult for the lawyer to take into account the foreign non-lawyer's experience and amount of work delegated for the reason that, unlike the legal support within the same office, town, or even country, the lawyer may not know exactly what kind of entity he is dealing with or whom the work is being given to.

---

69. N.C. State Bar Ass'n Formal Ethics Op., *supra* note 68.

70. S.D. County Bar Ass'n Formal Op. 2007-1. "[T]he attorney does not aid in the unauthorized practice of law where he retains supervisory control over and responsibility for those tasks constituting the practice of law. The authorities make it clear that under no circumstances may the non-California attorney 'tail' wag the California attorney 'dog.'"

71. Am. Bar Ass'n Formal Op. 08-451, 3 (Aug. 5, 2008).

72. Helen Coster, Briefed in Bangalore, First, Call Centers. Then, Back Office Operations. Now, Legal Services Are Moving Offshore. Will India's Lawyers Help Reshape the U.S. Legal Market?, AM. LAW., Nov. 1, 2004, at 98.

73. *See supra* notes 61-62 and 64.

Furthermore, although some law firms use LPO firms that do very basic legal work that has virtually no legal implications, some LPOs advertise that their services are of equal sophistication of prestigious law firms.[74] This higher end legal work might not be so easily supervised from far distances given the complexity of work. Lawyers and law firms are required to supervise LPO firms from vast distances and must be "rigorous" and "vigilant" to compensate for "the hurdles imposed by the physical separation" of an offshore outsourcing relationship,[75] yet the supervision is blurred by distance, time, and language differences.

For example, one LPO firm claims that it screens work through a Delivery Acceptance and Review Team (DART), which consists of senior attorneys and, the company claims, acts as a "Quality Gateway" for all legal processes and deliveries.[76] The company, only started in 2006, has the capacity to house 150 lawyers.[77] Assuming this information is true, this means that this LPO company's elite DART team has been delegating work to 150 people that have only been employed with them for 4 years (at the very longest) or less.[78] From this example, it seems as though at least some LPO companies are not in a position to adequately supervise all their employees with the reasonable care required by current outsourcing ethics laws. It is even more difficult to argue that a lawyer in the U.S. would have the ability to reasonably supervise these foreign non-lawyers based on experience and amount of work, since they do not actually participate with the DART team to delegate work to the non-lawyers.[79]

The ABA Ethics Opinion acknowledges that "[e]lectronic communication can close this gap somewhat, but may not be sufficient to allow the lawyer to monitor the work of the lawyers and non-lawyers working for her in an effective manner."[80] Where physical remoteness undermines the adequacy of supervision, the ABA Opinion (as well as the New York, North Carolina, and San Diego County Opinions) suggests measures to determine the background of the LPO firm discussed supra.[81] It also recommends that it is "prudent to pay a personal visit to the intermediary's facility, regardless of its location or the difficulty of travel...."[82]

---

74. See Keith Woffinden, Comment, Surfing the Next Wave of Outsourcing: The Ethics of Sending Domestic Legal Work to Foreign Countries Under New York City Opinion 2006-3, 2007 B.Y.U. L. REV. 483, 487-88 (citing George W. Russell, In-House or Outsourced? The Future of Corporate Counsel, ASIA L., July-Aug. 2005, at 20)

75. Ass'n of the Bar of the City of New York Comm. on Prof'l & Jud. Ethics, Formal Op. 2006-3 (2006).

76. Legasis, http://www.legasis.in/dart.php. Legasis is a legal support services company that was started in 2006 and has the capacity to house 150 lawyers in Pune and Mumbai, India.

77. Legasis, *supra* note 76.

78. *Id*.

79. *Id*.

80. Am. Bar Ass'n, *supra* note 71 at 3.

81. *Id.*

82. *Id*.

The problem, again, has to do with distance and communication realities. For example, the suggestion does not indicate how often the LPO firm should be visited, or how to ensure that the LPO firm is not fraudulently touting its security measures in order to gain business, or that the facilities and employees remain up to par. Practically, this "solution" does nothing more than tell lawyers and law firms to "do the best they can" since there are no legal mechanisms by which to enforce these guidelines.

Finally, it has been noted that there is some irony to the supervision requirement. The purpose of the supervision requirement is to "sanitize" the ethical dilemmas created from using an LPO firm by supervision and review of the final product.[83] However, "the work was offshored in the first place because U.S. attorneys were either too busy or too expensive [. . .] It is unrealistic to assert that attorneys will be able to continue to 'adequately' supervise LPO work [. . .] especially if more and more work starts going overseas."[84]

B. Preservation of the Client's Confidences: Client Consent

Privileged communications and confidentiality of information are fundamental principles that contribute to the trust that is the hallmark of the client-lawyer relationship.[85] However, the State Bar Ethics Opinions and the ABA differ as to what information can be shared with LPO firms and at which point client consent is required. Ostensibly, this can create discrepancies between LPO firms based on what state a given law firm is working in, and ultimately undermine ethical considerations.

The Florida Ethics Opinion asserts that law firms should limit the overseas provider's access to only the information necessary to complete the work for the particular client and should provide no access to information about other clients of the firm.[86] Florida advocates the same steps as New York in protecting confidentiality, including "contractual provisions addressing confidentiality and remedies in the event of breach, and periodic reminders regarding confidentiality."[87] Florida opines that "[t]he requirement for informed consent from a client should be generally commensurate with the degree of risk involved in the contemplated activity for which such consent is sought."[88] It is the responsibility of the law firm or lawyer to request and receive sufficient assurances that confidential infor-

---

83. Aaron R. Harmon, The Ethics of Legal Process Outsourcing—Is the Practice of Law a "Noble Profession" or is it Just Another Business? 13 J. TECH. L. & POL'Y 41, 81 (2008).
84. *Id.* at 85.
85. Model Rules of Prof'l Conduct R. 1.6, cmt. 2 (2008).
86. Fl. Bar Op. 2007-2 (January 18, 2008).
87. S.D. County Bar, *infra* note 94.
88. Fl. Bar, *supra* note 86.

mation will be protected in light of differing rules and regulations of LPO host countries.

In contrast, New York does not limit overseas access to confidential information necessary to complete work, but instead highlights that the transient nature of outsourcing requires heightened scrutiny across the board.[89] For New York, this heightened scrutiny comes in the form of consent, which it recommends be obtained from any client, any time client's information is sent abroad.[90] North Carolina takes a similar approach, and requires the disclosure to the client of the use of foreign assistants.[91]

Los Angeles County and San Diego County both "maintain inviolate the confidence, and at every peril to himself or herself, to preserve the secrets, or his or her client."[92] The Los Angeles Opinion states that confidential information can be shared with the LPO firm as long as the LPO firm "agree[s] to keep the client confidences and secrets inviolate," though it is incumbent upon the lawyer to ensure this, in fact, happens.[93]Both the Los Angeles and San Diego Opinions only require consent by the client where outsourcing constitutes a "significant development" to the case.[94] There is no suggestion as to what a "significant development" entails in either opinion, and both opinions flatly state that this determination depends on a case by case evaluation.

Under the ABA Opinion, "in a typical outsourcing relationship, no information protected by [attorney-client confidentiality] may be revealed without the client's informed consent. The [ability] to share confidential information within a firm does not extend to outside entities or to individuals over whom the firm lacks effective supervision and control."[95] However, it is unclear whether client consent is necessary to use an LPO firm, or if consent is only needed in the case of confidential information. In short, it is uncertain whether the consent attaches to the use of the LPO firm or the confidential information itself. Even though, arguably, most communication between the lawyer and client given to the LPO firm will be considered protected by attorney-client privilege, it is not hard to imagine a situation where the information in question is one of general knowl-

89. *Id*.
90. *Id*.
91. N.C. State Bar Ass'n, *supra* note 68. "Finally, the lawyer has an ethical obligation to disclose the use of foreign, or other, assistants and to obtain the client's written informed consent to the outsourcing. In the absence of a specific understanding between the lawyer and client to the contrary, the reasonable expectation of the client is that the lawyer retained by the client, using the resources within the lawyer's firm, will perform the requested legal services."
92. S.D. Bar Ass'n, *supra* note 70.
93. L.A. County Bar Ass'n, *supra* note 67 at 78.
94. S.D. County Bar Assn'n Formal Op. 2007-1; L.A. County Bar Ass'n. Op. 518 (June 19, 2006) at 78.
95. Am. Bar Ass'n, *supra* note 71 at 5.

edge and therefore not subject to attorney confidentiality protection.[96] In those cases, the necessity of whether or not to get consent from the client might be less clear.

This discussion makes it apparent that the existing ethics laws differ from one another not only due to their conception of how confidential information should be protected, but also in the extent to which the client should be informed. It is not hard to imagine that an LPO firm might not deal with confidential information ethically due to the vague lines each State Opinion draws—compounded by the fact that even though they could be worded similarly to one another, they might not be interpreted the same as one another.

Fortunately, India's confidentiality laws define confidentiality broadly; therefore, theoretically more information will be protected there than in the U.S.[97] On the other hand, the Indian justice system might not deal with breach of confidentiality or lack of client consent as harshly as in the U.S. If this is the case, then there is not much in the way of punishment to deter LPO firm employees from being careless with confidential information.

Presumably, it is in the interest of LPO firms to comply with American lawyers and firms in order to maintain business. However, to what extent are American lawyers and firms responsible to disclose information about LPO firms to their clients?

In January 2007, the "Satyam Scandal," dubbed as the "Indian Enron" hit the media.[98] Satyam Computer Services ("Satyam"), India's fourth-largest IT outsourcing firm, admitted that it had inflated the amount of cash on the balance sheet by nearly $1 billion, and overstated Satyam's September 2008 quarterly revenues by 76% and profits by 97%.[99] More alarmingly to the discussion of confidentiality and disclosure, the World Bank banned Satyam from doing any of its work after it found Satyam employees had hacked into its system and gained access to sensitive information.[100] Additionally, Satyam was accused of intellectual fraud and forgery by a former client.[101]

---

96. Model Rules of Prof'l Conduct R. 1.6 (2000).

97. S.D. County Bar, *supra* note 70. "Under India's attorney-client privilege, no attorney may: "(i) disclose any communication made to him in the course of or for the purpose of his employment as such attorney, by or on behalf of his client; (ii) state the contents or condition of any document with which he has become acquainted in the course of and for the purpose of his professional employment; or (iii) disclose any advise [sic] given by him to his client in the course and for the purpose of such employment." (Indian Evidence Act of 1972, quoted at www.lexmundi.com, India.) The attorney-client privilege is more limited than in America."

98. Manjeet Kripalani. *India's Madoff? Satyam Scandal Rocks Outsourcing Industry*, BUS. WK., January 7, 2009, *available at* http://www.businessweek.com/globalbiz/content/jan2009/gb2009017_807784.htm.

99. Kripalani, *supra* note 98.

100. *Id*.

101. *Id*.

While practices such as those that fueled the Satyam Scandal may not be common to LPO firms generally, it illustrates the potential confidentiality and disclosure problems with using a foreign third-party vendor to do legal work. The State Ethics Bar and ABA Opinions regarding outsourcing require different levels of disclosure, but they are generally just the disclosure agreements for the use of U.S. legal support reiterated to include outsourcing. While it might be easier to determine information about legal support companies in the U.S. (especially when your own company hires legal support staff internally), it might be less so with a foreign corporation that operates under different laws. Additionally, the question of control also looms: it seems logical that a lawyer be held accountable for investigating the background of legal support staff and making sure they execute the work ethically. But does it make sense to hold lawyers accountable for a foreign non-lawyer when they might not know their identity or have the control to guide their work?

C. Conflicts of Interests

Another issue related to protecting confidential information sent abroad is the possibility that an LPO firm could be aiding two adversaries in the same matter—thereby creating a conflict of interest. Perhaps this is not so alarming where only legal support services are being outsourced. Yet, since LPO firms are already engaging in more complex services, even with the industry in its infancy, there is a danger that there will exist more conflicts of interest in the future. The State Ethics Bar and ABA Opinions impose an onerous burden on the lawyer and law firm to determine whether conflicts of interest exist. Notably, the lawyer or law firm will be on the hook if a LPO firm does not adequately reveal conflicts of interest, not the LPO firm.

The New York Opinion places the responsibility on the lawyer to ask the LPO firm about its conflict checking procedures and determine how the LPO firm tracks work performed for other clients.[102] It also recommends that the lawyer ask both the LPO firm and *the non-lawyer* whether either is performing, or has performed, services for any parties adverse to the lawyer's client. [103] The extent of this inquiry is up to the lawyer, and as a safeguard the lawyer should remind the LPO firm and non-lawyer "of the need for them to safeguard the confidences and secrets of their other current and former clients."[104]

Florida, North Carolina, San Diego and Los Angeles are much more vague in their advice on how to check for conflicts. Florida only states"

102. L.A. County Bar Ass'n, *supra* note 67 at 78.
103. *Id*.
104. *Id*.

"lawyer[s] should be mindful of any obligations under law regarding disclosure of sensitive information of opposing parties and third parties."[105] North Carolina notes that the lawyer must use effective conflict checking procedures and make sure that the non-lawyer is aware of the lawyer's professional obligations,[106] but does not provide suggestions by which to accomplish this. San Diego County only states that lawyers must avoid conflicts of interests, but does not state how.[107] The Los Angeles Opinion is similarly undetailed in its guidance, stating only that the lawyer must "satisfy himself that no conflicts exist . . . [and] recognize that he or she could be held responsible for any conflict of interest that may be created from by the hiring of [the LPO firm]."[108]

The ABA strongly advises written confidentiality agreements to minimize the risk that an LPO firm might reveal confidential information to third parties or adversaries.[109] Additionally, the opinion suggests that the lawyer should verify that the LPO firm does not work for adversaries of their clients on the same or substantially related matters.[110] If the LPO firm does also do work for adversaries, then the outsourcing lawyer should choose another provider. [111]

D. Billing

Another concern is the transparency of billing measures when a contracted third party—especially one out of the country and not subject to the same laws—is involved.

Under the Florida opinion, a law firm may charge a client for the LPO firm's work, unless the charge would normally be covered as overhead. However, in contingent fee cases, a law firm cannot charge a client for what would usually otherwise be accomplished by a client's own attorney. New York is more stringent with fees, stating that "the lawyer should charge the client no more than the direct cost associated with outsourcing, plus a reasonable allocation of overhead expenses directly associated with providing that service"[112] unless there is a specific agreement to the contrary. Los Angeles County opines that a client should be informed if the work of the LPO firm is passed onto them since this constitutes a "signifi-

105. L.A. County Bar Ass'n, *supra* note 67 at 78.
106. N.C. State Bar Ass'n, *supra* note 68.
107. S.D. County Bar Ass'n, *supra* note 70. In fact, "conflict" is mentioned only in one instance in the Opinion.
108. L.A. County Bar Ass'n, *supra* note 67 at 78.
109. Am. Bar Ass'n, *supra* note 71 at 5.
110. *Id.*
111. *Id.*
112. *Supra* note 68.

cant development."[113] The North Carolina and San Diego opinions do not discuss billing at all.

Finally, the ABA states that outsourced services should be billed at cost, plus "reasonable allocation of the cost of supervising those services if not otherwise covered by the fees being charged for legal services."[114] There is no limit as to what "supervising" entails. Additionally, the ABA insists that the billing analysis is no different from regular billing procedures, with the exception that overhead costs might be minimal. Of course, this does not take into account that the overhead costs of outsourcing might increase with increased need for the development of infrastructural support.

In the case of billing, the potential for ethics violations seems adequately addressed, mainly because it is the duty of the *U.S. lawyer*—not the foreign non-lawyer—to disclose his billing practices. The U.S. lawyer is subject to sanctions under the appropriate ethical or other laws that he should be aware of as a licensed professional.

III. POTENTIAL SOLUTIONS

Thus far, this paper has discussed the background of legal outsourcing, problems that legal outsourcing creates, current ethics laws, and deficiencies of these laws in adequately ensuring that the ethical obligations of the lawyer or law firm are carried out. However, it must be stressed that the focus of this paper is not the validity of outsourcing itself, but simply the current legal framework which does not have what it takes to make laws effective: enforcement.

In recognition of this problem, Part III will discuss three potential solutions: (1) the creation of satellite regulatory bodies, (2) implementing incentives of U.S. businesses and LPO firms to follow U.S. ethics laws and (3) development within the country for alternatives that are equally as attractive as outsourcing—thereby decreasing the potential for legal ethical violations overall.

A. Satellite Regulatory Bodies

The federal and state governments face several obstacles in regulating outsourcing through legislation. Although the federal government could potentially create legislation based on its Foreign Commerce Clause power, it is likely that such laws would conflict with current general trade agreements with other countries.[115] Thus far, the federal government has

113. L.A. County Bar Ass'n. Op. 518 (June 19, 2006) at 78.
114. *Supra* note 65.
115. *See* Paterson, *supra* note 53 at 198.

limited legislation related to outsourcing by creating laws on peripheral issues of outsourcing, such as immigration laws and educating Americans who lose their jobs due to outsourcing.[116] Yet, states cannot effectively legislate on outsourcing either since states are prohibited from making laws regarding foreign nations.[117]

One solution to this legislative quagmire is to place the responsibility for law firms to comply with ethics laws on the law firms themselves. The law firms themselves could create satellite compliance offices. This way, the firm ensures that its ethical obligations are being met without putting the firm or clients at risk.

One such firm that has ventured into this solution is Clifford Chance, a major U.S. law firm. In 2007, Clifford Chance formed a Global Shared Service center in New Delhi, India as part of an approach that includes a "mixture of onshoring, offshoring and outsourcing."[118] The Center allows the Firm to consolidate its global functions and gives the firm more control because it uses its own facilities and standard of technology, as well as power over "recruitment, motivation, training, language, and maintaining the feel of one firm."[119] The advantages to Clifford Chance's Global Shared Service Center is that it gives the Firm control over the legal work being there, as well as a way to channel its own resources efficiently. While the Firm still outsources document review to an LPO firm in Mumbai, it still has a greater ability to supervise the outsourced work because the Global Shared Service Center is close by and works as the Firm's inside man in dealing with LPO work.

Although such Global Centers created by law firms are a step in the right direction, a disadvantage is that it is entirely up to the law firm to self regulate its LPO policies in India. There are several problems with firms self regulating themselves. One problem is "This overseas investment decision may then prove to be very good for that multinational firm [. . .] But there remains the question: Is the decision good for its own country?"[120] Law firms and companies are fueled by a desire to make profits, and this can effect the way in which the firm or company chooses to regulate its activities in another country. Another problem is that there is no clear understanding of which laws should be used. While the ABA, Florida, Los Angeles, New York, North Carolina and San Diego have created outsourcing opinions, they have some major differences from one another, as discussed in Part II of this paper. A national law firm might

---

116. *See* Baker, *supra* note 51.
117. *See* National Foundation for American Policy, s*upra* note 46.
118. K. William Gibson, *Outsourcing Legal Services Abroad*, L. PRAC. MAG., Jul./Aug. 2008, at 47 *available at* http://thenation.com/article/establishment-rethinks-globalization.
119. *Id*.
120. Greider, *supra* note 28.

outsource legal work for its client, a national company, and there would be no certainty over which opinion should be used based on the fact that the law firm practices in many different jurisdictions and the national company might have offices in many different jurisdictions. Finally, such satellite global centers are created only if a law firm decides to create one. Since the enforcement of ethics laws in outsourcing is already lacking, firms have little financial incentive to create a global center, staff it, and share its resources for something that does not financially benefit it.

Another kind of satellite regulatory agency that could be used to ensure that LPO firms comply with U.S. ethics laws are American compliance companies located in India. This kind of company could be used by larger firms, but it would also be particularly useful for small firms and single practitioners who want to outsource legal work but do not have the resources to make sure their outsourcing practices comply with U.S. ethics laws. The problem with this solution, however, is that since there is no imminent punishment for breaking ethics rules,[121] a law firm or practitioner might have no incentive to seek the services of a compliance company. It is not lucrative for a compliance company to be built where there is no demand for its services.

An especially relevant illustration of compliance companies emerging only after the creation of solid regulation is the example of the Sarbanes-Oxley Act of 2002.[122] After the Sarbanes-Oxley was enacted, publicly traded companies were required to ensure compliance in order to avoid criminal penalties. Whereas there had been little securities regulation before 2002, was and thus no need for compliance companies. However, the need for compliance bodies increased after Sarbanes-Oxley; as of 2007, companies spent an average of $437,787 a year on outside vendor costs for Sarbanes-Oxley compliance alone.[123] These outside vendor costs entail any external body used for compliances purposes other than those related to audits,[124] and include compliance companies and other compliance and regulatory bodies. Therefore, securities compliance bodies were not common before Sarbanes-Oxley was enacted, but only proliferated after extensive regulation was created and there was a need for compliance with these laws.

Unfortunately, regulatory and compliance bodies are useful and lucrative in areas where solid legislation exists[125] —this is not the case for the area of outsourcing. While several kinds of regulatory bodies may be cre-

---

121. Greider, *supra* note 28.
122. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204 (July 30, 2002).
123. United States Securities and Exchange Commission, Study of the Sarbanes-Oxley Act of 2002 Section 404 Internal Control over Financial Reporting Requirements 41 (Sept. 2009), *available at* http://www.sec.gov/news/studies/2009/sox-404_study.pdf#39.
124. *Id*. at 38.
125. Kadzik, *supra* note 6.

ated to ensure ethical compliance overseas, it is doubtful whether companies or law firms will do so given the lack of penalties in current outsourcing legislation. Drawing a comparison to Sarbanes-Oxley, there is simply no economical reason for compliance agencies that regulate outsourcing to exist where there are no solid laws regarding outsourcing. As mentioned in Part II above, not only are the ethics laws that guide outsourcing practices inconsistent with one another,[126] but also the consequences for ethics violations are unclear.[127] With such scant legislation, there is very little for an American compliance company in India to regulate.

However, this solution could be successful depending on how violations of U.S. ethics laws regarding outsourcing are treated in the future. The current outsourcing ethics rules are only a few years old at this point, and so currently there is not a significant body of law on the subject of outsourcing ethics violations. If outsourcing ethics violations are treated with highly undesirable outcomes as the field develops, law firms and individual practitioners might be more likely to need the services of a compliance company or other regulatory body.

B. Implementing Incentives for U.S. Businesses and LPO Firms to Follow U.S. Ethics Laws

Another solution to preserve the integrity of the American legal system and ensure compliance with U.S. outsourcing ethics laws could be to implement incentives for outsourced countries to follow and enforce these laws through contractual agreement. The federal government could also intervene without expressly violating foreign agreements by creating incentives for companies to keep legal work within the U.S.

On the corporate level, the use of contract is probably the best solution for the lack of legislation where legal ethical obligations are implicated by outsourcing. As one commentator noted, "With U.S. lawyers, you always have the rules of ethics....Going to a service provider offshore, you have to replace that gap-filler with contract."[128] U.S. law firms and lawyers could make their business with the LPO firm contingent on the ethical practice of legal or nonlegal work. For example, a U.S. law firm could require that an LPO firm's payment for completing services only be due upon satisfactory documentation that the LPO firm has complied with the ethical requirements of the U.S. firm's jurisdiction. It could require, at the offset, details about the LPO firm and its employees, basic background

126. Burnham, *supra* note 62.

127. *Id*.

128. Anthony Lin, Legal Outsourcing to India is Still Growing, but Confuses Fundamental Issues: Is it about cost, or can Indian lawyers do some things better than their American counterparts? N.Y.L.J., Jan. 23, 2008, *available at* http://www.law.com/jsp/article.jsp?id=1200996336809 (quoting Gregg Kirchhoefer, an outsourcing lawyer with Kirkland & Ellis).

information about the LPO firm's clients in order to determine if there is conflict, and other pieces of proof that the LPO firm will uphold client confidentiality.

The problem with corporate level contracts is that they would be individualized to the respective outsourcing corporate entity—and therefore they would not aid the effort to a coherent national framework for the practice of outsourcing. Rather, these contracts would be the result of a compromise between the corporation and the LPO, and might not be as concerned with following ethics guidelines that are weakly enforced as they are with making a profit.[129] This is especially a concern where recent events have created substantial doubts that corporations can effectively self-regulate despite the immense pressure to be profitable.[130] Therefore, while piecemeal contracts between American companies and LPO firms abroad might ensure that the interests of both parties are preserved, they do not serve the general public interest in maintaining the integrity of the American legal system.

Additionally, a contract between an American firm and an LPO firm might not supersede applicable Indian law. Although a contract may state the applicable law in an arrangement, and most countries accept foreign judgments (including India), "there will be certain national legal procedures and laws which the sovereign country will not allow to be governed by any other national law."[131] For example, where Indian law speaks on the issue, a contract cannot circumvent the statute; this includes areas such as IP transfer, registration and protection, real estate, labor law and, bankruptcy[132] that are governed by statute in India. Therefore, contractual agreement can aid in the ethical practice of legal or nonlegal work abroad, but it is still subject to the legal limitations of the host country.

The federal government could help preserve the ethical obligations under the legal system in the U.S. without overly restricting access to foreign LPO firms by creating monetary incentives. As mentioned in Part II, Senators Craig Thomas and George Voinovich attached an anti-outsourcing amendment to a Senate appropriations bill in 2004. The

---

129. Greider, *supra* note 28. "The Gomory-Baumol book describes this as 'a divergence of interests' between multinational firms and their home country. "This overseas investment decision may then prove to be very good for that multinational firm," they write. "But there remains the question: Is the decision good for its own country?"

130. FRANK R. BAUMGARTNER & BRYAN D. JONES, THE POLITICS OF ATTENTION: HOW GOVERNMENT PRIORITIZES 72-74 (University of Chicago Press 2005). Perhaps unsurprisingly, there is a significant body of historical evidence that suggests that deregulation is fueled by economic booms, and it is when self regulation fails that the government intervenes by imposing stricter regulations. Examples of self-regulation failures that subsequently lead to greater regulation include the events precipitating the Great Depression and corporate scandals such as Enron. Applying the lessons learned from the failure of self regulation to the current state of outsourcing, it seems that government regulation could prevent similar failures in the outsourcing industry.

131. Bharat Vagadia, Outsourcing to India: A Legal Handbook 117 (Springer 2007).

132. *Id*.

Amendment stated that: "An activity or function of an executive agency that is converted to contractor performance . . . may not be performed by the contractor at a location outside the United States except to the extent that such activity or function was previously performed by Federal Government employees outside the United States."[133] The Amendment's "likely intention was to help American firms win contract wars over foreign competitors who could make a lower bid."[134] While such contracts would probably violate international law, as discussed supra in Part II, it might be possible for the government to create incentives that do not violate international agreements.

For example, under the Taxing and Spending Powers Clause in the Constitution, the government could create a financial incentive to deter companies from outsourcing. Such uses of the Taxing and Spending Powers Clause[135] could be to charge extra taxes where companies choose to outsource, and give tax breaks where the outsourcing company creates measures to ensure compliance with U.S. ethics laws. Or, the government could give a direct subsidy to companies who choose not to use outsourcing. In this manner, the government could use its taxation powers to incentivize compliance with U.S. ethics laws without directly stepping on the toes of the international community. Depending on the financial status of the company, it might decide to keep work in the U.S. to save money; alternatively, it might make a business decision that outsourcing work will still be financially economical even with tax implications. Such legislation would not be restricting free trade, but rather give companies an incentive to make sure LPO firms are complying with U.S. law.

Currently, "federal income tax is replete with tax incentive provisions . . . adopted to assist particular industries, business activities, or financial transactions."[136] However, there is some disagreement whether tax incentives are the best way for the government to effectuate social goals. Stanley Surrey, the influential Assistant Secretary of the U.S. Treasury for Tax Policy for the eight years during the Kennedy and Johnson administrations, concluded that it was "unlikely that clear advantages in the tax in-

---

133. *Id.*

134. *Id.*

135. U.S. Const. Art. 1 Sec. 8 Cl. 1. "The Congress shall have power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." This, in conjunction with U.S. Const. Art. 1 Sec 8. Cl. 2, which states that Congress has the power "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes" could make a strong case that Congress can tax interstate commerce. Currently, the Supreme Court is highly likely to defer to Congressional spending via the Commerce Clause. *See also* CHRISTOPHER MAY & ALLAN IDES, CONSTITUTIONAL LAW: NATIONAL POWER AND FEDERALISM 234-247 (4th ed., Aspen Publishers 2007).

136. Stanley S. Surrey, Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures, 83 HARV. L. REV. 705 (1970).

centive method [would] be found"[137] and stressed strongly that "the advantages must be clear and compelling to overcome the losses that accompany the use of the tax incentive, even the well-structured incentive."[138] Furthermore, tax incentives for the purpose of encouraging certain behavior do not exist in a bubble but have far reaching consequences. Such negative consequences include "confusion and divided authority in the legislative and administrative processes, difficulties in maintaining budgetary control, confusion in perceiving and setting national priorities, and dangers to the tax structure itself."[139]

Others argue that tax subsidies are more effective in influencing public policy than direct government subsidy. The argument is that by giving individuals a tax subsidy to offer a service or create a good, more of that good will be supplied and, therefore, the government objective will be achieved.[140] On the other hand, direct government spending or action is limited to the budgetary restraints of the government and could be less effective.[141] Regarding LPO regulation, both tax incentives and direct subsidies are promising solutions to ensuring LPO firms comply with U.S. standards. Since LPO firms are used in order to save money and maintain the bottom line, a tax break or subsidy would probably influence LPO practices greatly because they, too, offer a financial incentive.

C. Develop Internal Alternatives that are Equally Attractive to Outsourcing

Another way to prevent outsourcing ethics violations could be to create alternatives that would make keeping legal practice within the U.S. as much as or more attractive than outsourcing it. This would also address the growing concern that legal jobs are being taken away from American lawyers. Two alternatives to outsourcing are services that match legal work with law students or lawyers who are willing to be paid less, and "homeshoring" legal work to areas where legal work is cheaper due to lowered living costs because they are further from major cities.

Setting up legal students and lawyers with legal work but paying them less than market rate can be advantageous for several reasons. One advantage is that it does not displace American lawyers from jobs, but it does address a law firm's need to reduce legal costs. Additionally, it fosters compliance with U.S. ethics laws because the lawyers that are used still

---

137. *Id*. at 734.
138. *Id*.
139. *Id*.
140. Martin Feldstein, A Contribution to the Theory of Tax Expenditures: The Henry J. Aaron, Michael J. Boskin, The Economics of Taxation 108 ((Henry J. Aaron & Michael J. Boskin eds., The Brookings Institution 1980).
141. *Id*.

must be state certified to practice and are in a position where they are more easily supervised by the law firm or company that hires them. One company, Law Clerk Connection LLC, attempts to provide an alternative to outsourcing by connecting competent law students with lawyers and law firms in need of per diem assistance.[142] The Law Clerk Connection Solution states that "it allows law firms to remain competitive by offering their clients the same superior level of legal service at reduced rates."[143] Also, it helps law students gain the experience they need to do more complex work that cannot be outsourced under the current ethics rules. Law Clerk Connection states that "it provides law students - future U.S. lawyers - with the mentoring and experience they need to assume their place in the 'creative class' and to ensure that the U.S. remains a bastion of productive creative professionals."[144]

With alternatives such as Law Clerk Connection, jobs are not only preserved for the U.S., but the risk of violating legal ethical rules is also diminished because these professionals are within the U.S. and must adhere to U.S. ethics rules. Law Clerk Connection cites four reasons that its services are superior to outsourcing legal work. The first reason is that law students are well versed in confidentiality rules since they attend ABA-approved schools and "a breach of those ethical standards by these Law Clerks may mean no bar certification in the future."[145] The second reason that the service is superior to outsourcing is that the law students and lawyers are thoroughly integrated into the American legal system, and this means "these Law Clerks have a firm grasp on the intricacies of the law governing . . . client's lives."[146] Additionally, companies and law firms can present their projects for flexible bidding or have pre-set rates for work, which serves the same purpose as LPO firms: lowering the cost of legal work.[147] Finally the Law Clerk Connection advertises that it gives the law firm or company that hires the law clerk control over the work that is done.[148]

In addition to the prospect that services like Law Clerk Connection will keep jobs in America, use lawyers who are familiar with- and held to-American legal standards, and provides adequate control over lawyers, there is also a cost advantage that is attractive. The cost for using services like Law Clerk Connection might be less than setting up the infrastructure

142. Law Clerk Connection, LLC, *ABA Ethics Guidelines to Legal Outsourcing: The Law Clerk Connection Solution* (2008), http://www.lawclerkconnection.com/whitepapersABA_Ethics_of_Legal_Outsourcing_White_Paper.pdf.

143. Law Clerk Connection, *supra* note 142.

144. *Id*.

145. Law Clerk Connection, LLC, The Law Clerk Connection Solution, http://www.lawclerkconnection.com/solutions.php (last visited Sept. 14, 2010).

146. Law Clerk Connection, *supra* note 142.

147. *Id*.

148. *Id*.

and software to use a foreign LPO firm's services as well as diminish expenditures in ensuring data is kept private. For example, there are several costs to using an outsourcing provider. First, there are costs associated with hiring and retaining an outsourcing firm, such as documenting requirements, request for proposals, negotiating contracts, and legal fees associating with outsourcing advisement.[149] Then, there are costs related to bringing offshore management to the United States on company-paid work visas in order to analyze and become familiar with the companies technological infrastructure, a process that may take months.[150] Finally, there are several transition costs, including trying to overcome cultural differences, the displacement of workers (who might be eligible for severance benefits), and reluctance on the part of remaining employees.[151] These are all costs associated with hiring an outsourcing firm that can be saved by using a service such as the Law Clerk Connection.

Another solution that keeps jobs in America and saves companies and law firms from costs associated with outsourcing is homeshoring. Homeshoring, the practice of getting cheaper labor from within the U.S.-usually far from a big city where the cost of living is not so high-is another attractive alternative to outsourcing and the problems that come with it. The practice of homeshoring "lets companies save money on pricey urban salaries and attract workers whose language, culture, and working schedules mesh better with those of their own clients."[152] Usually, work is homeshored to an individual who is hired to do the work, and the hired individual is able to work from home or a location remote to the office where the business is located.[153] Currently, there are about 200,000 homeshored jobs in the U.S. and more than 300,000 are expected by 2012.[154]

Thus far, mostly call centers have been homeshored.[155] However, the success of homeshoring in this area could also be seen in the legal industry if this model was used. Some noted benefits of homeshoring call centers are better work productivity by employees who are happier and less stressed because they are able to work from home, as well as more effi-

149. Stephanie Overby, *The Hidden Costs of Offshore Outsourcing*, CIO 1, Sept. 1, 2003, *available at* http://www.cio.com/article/29654/The_Hidden_Costs_of_Offshore_Outsourcing.
150. *Id*. at 2.
151. *Id*. at 5-6.
152. Sarah Lacy, *Homeshoring: Beyond Call Centers*, BUS. WK., May 2, 2006, *available at* http://www.businessweek.com/technology/content/may2006/tc20060502_237154.htm.
153. Laura Tiffany, *Bringing Work Home*, ENTREPRENEUR, Nov. 07, 2007, *available at* http://www.entrepreneur.com/management/operations/article186482.html.
154. Jon Swartz, *Businesses Use Twitter to Communicate with Customers*, USA TODAY, June, 26 2009, *available at* http://www.usatoday.com/tech/news/2009-06-25-twitter-businesses-consumers_N.htm.
155. *Id*.

cient communication between clients and the homeshored employees.[156] Given the current recession, many workers have had to leave major cities to afford housing costs.[157] These same workers face long and expensive commutes to get to their jobs.[158] These educated individuals might be willing to be paid less where their costs of living are lower, they do not have to spend money on commuting, and are given the ability to stay at home with children or have flexible working hours. These same benefits can be applied to lawyers who have moved out of a competitive and expensive market, but still have the academic and professional credentials to perform legal work. Some argue that while companies look to outsourcing to save money, homeshoring will actually save more money than outsourcing because the homeshoring model improves "'customer loyalty, conversion rates, average order value or customer service satisfaction rating with a higher quality agent.'"[159]

Services that set up law students and other legal professionals with legal work with a lower rate as well as the homeshoring model are attractive alternatives to outsourcing. Not only do they keep American jobs in America and ensure compliance with U.S. legal ethics laws, but they have the potential to save companies and law firms the costs of hiring LPO firms and help them maintain the bottom line.

IV. CONCLUSION

The current economic recession is an incredibly opportune time for the legal industry to reassess itself so that it may learn from its weaknesses in a depressed economy to grow stronger. The practice of outsourcing, which is the result of recent technological gains and globalization, is where this inquiry should begin. Outsourcing is a prime example of the American legal industry's inability to adapt to current technological advances and the prevalence of globalization in order to strengthen itself. Instead, the American legal industry is concerned with keeping the "bottom line," which takes away American jobs, undermines the integrity of the American legal system, and leaves the practice of outsourcing in a vague ethical limbo.

Legal outsourcing can be beneficial to the U.S. and to the outsourced country as long as measures are put in place to adequately ensure that the interests of both sides are met. Unfortunately, the U.S. has too little outsourcing regulation to protect its interests. Consequentially, outsourcing

156. Ed Frauenheim, *Homeshoring to Trump Offshoring?* CNET.COM, December 21, 2004, *available at* http://news.cnet.com/Homeshoring-to-trump-offshoring/2100-1036_3-5499784.html.
157. *Id*.
158. *Id*.
159. *Id*.

has started to chip away at the principles that underlie the American legal system in several ways. The legal system in our country was founded upon the principle that lawyers, as the gatekeepers of justice, work at the local level to adequately represent individuals in a democratic society. Lawyers today follow these principles by getting accreditation in the respective states they choose to practice law in. However, outsourced lawyers are not held to U.S. accreditation standards, though they perform work that can be considered legal. Furthermore, the lack of regulation takes American legal jobs from American lawyers, which deteriorates the legal industry more. And, in situations where LPO firms should be held accountable for malpractice, the U.S. client often has little recourse in the courts of a foreign country.

Although more regulation would be the best solution to the problems caused by outsourcing, the states are unable to legislate directly due to constitutional prohibition. The federal government could legislate, but is reluctant to do so because it would break international agreements and face international repercussions. Therefore, the only "laws" that exist in the area of outsourcing are in the curious form of the ABA and State Ethics Opinions. These Opinions are only binding where the state chooses to follow them, and enforcement is up to the individual state- as is punishment. Furthermore, only the ABA and five jurisdictions- Florida, Los Angeles County, New York City, North Carolina and San Diego County- have created Opinions on outsourcing. Much of these Opinions are inconsistent with one another, though they are the only regulations of outsourcing to foreign nations. However, for the time being, these Opinions are the best outsourcing regulation that exists. They might be the only outsourcing regulation that is created for a long time. Therefore, they ought to be protected as much as possible in order to preserve the integrity of the American legal system.

This paper proposed three solutions to ensure compliance with current outsourcing ethics rules: the creation of satellite regulatory bodies, implementing incentives for U.S. businesses and LPO firms to follow U.S. ethics laws and developing internal alternatives that are equally attractive as outsourcing. The purpose of each of these solutions is to help guide the outsourcing industry to fall in line with U.S. ethical standards without restricting free trade needlessly, which will bolster the health and reputation of the American legal industry.

While satellite regulatory bodies would be incredibly useful if there was solid outsourcing regulation, there is little reason for a compliance company to invest the time and capital to build an office in India where there is no need. Only five states and the ABA have outsourcing ethics rules, and it is vague what the consequences are for violations are of these rules. Furthermore, the vast majority of states have said nothing on outsourcing, so few law firms that outsource would need the services of a

compliance company abroad. However, some law firms have created satellite offices to act as the middle-man between their U.S. headquarters and LPO firms. While this is a commendable step in doing their part to ensure the ethical practice of outsourcing, it is also a concern that such satellite offices are self-regulated.

A stronger solution to the lack of outsourcing legislation is the creation of incentives for U.S. businesses and LPO firms to follow U.S. ethics laws. This can be done in a variety of ways. U.S. firms, in order to protect themselves, can make business with LPO firms contingent on following U.S. ethics laws through contract. The government can also create tax incentives or give tax subsidies for companies that prove they are outsourcing ethically. The federal government can also choose to give tax breaks to companies that choose to keep legal work in the U.S. Unlike the creation of outsourcing legislation, this is less likely to infringe on international agreements to treat members of different nations the same when it comes to employment. Since many law firms and companies probably use LPO firms to save money, a financial incentive from the government might also be a strong influence on making sure U.S. ethics rules on outsourcing are followed.

Finally, the strongest solution might be to create an alternative that is just as attractive- if not more- to outsourcing. This keeps legal outsourcing out of the hands of the government, and in the free trade market. Such alternatives include services that employ American law students or American trained lawyers at a reduced cost, which is more desirable to the student or lawyer than having no work at all. Additionally, such services gives lawyers the ability to gain more experience and become less disposable in an increasingly competitive market. Another promising alternative is homeshoring, which moves work from centers where the cost of living is high to areas where the cost of living is low. Both these solutions also save law firms the start up costs of using LPO firms, such as contract negotiation, management training, and creating new software and infrastructure.

Any of these solutions, even if weak, provide some kind of regulation in the growing area of outsourcing. Though outsourcing is considered to be in its infancy, it is sure to be the beginning of a series of changes in the legal industry due to the growth in technology and globalization. The path that legal outsourcing takes in America might pave the road for other important changes in the legal industry. Ultimately, the legal industry has the power to direct where this path is forged.

SOCIAL MEDIA AND THE LEGAL SYSTEM: ANALYZING VARIOUS RESPONSES TO USING TECHNOLOGY FROM THE JURY BOX

I. INTRODUCTION

The 21st century is one of rapid technological change. As the internet has become increasingly extant in many Americans' lives, its pervasiveness has spread into the social realm. Technologies like mobile telephones—combined with search engines, blogs, and social media—have become widespread. The effect of these types of technology has spilled over into the courtroom, and has begun to impede the administration of justice.

Part II of this article provides historical context to the internet in general and social networking in specific. Part III is a survey of the current state of jury instructions and other sources of law concerning jurors' access to information. Part IV delineates two specific instances of trials adversely affected by the use of social media, and the subsequent judicial responses used as attempts to remedy the problem. Part IV analyzes possible solutions to the problems described in the cases discussed. Finally, Part V concludes with the most efficient means for trial judges to avoid unnecessary litigation and delay caused by jurors' inappropriate use of the internet and electronic communication.

II. THE INTERNET AND SOCIAL MEDIA

The internet is a global network of computers that allows individuals to access and share information with other users.[1] According to the World Bank, nearly three out of four Americans had access to the internet in 2008.[2] This is well above the global average, and puts the United States among the most Internet saturated nations.[3] The information contained on the internet, while varied, is easily accessible through search engines: for

1. *See* MERRIAM WEBSTER DICTIONARY 610 (10th ed. 2000) (defining the word Internet as "an electronic communications network that connects computer networks and organizational computer facilities around the world."). *See also* BLACK'S LAW DICTIONARY 834 (8th ed. 2004) (defining the term Internet Service Provider as "A business that offers Internet access through a subscriber's phone line, usu. charging the user for the time spent connected to the business's server.).

2. Internet users (per 100 people), http://datafinder.worldbank.org/internet-users?cid=GPD_44 (last visited Jan. 6, 2010).

3. Internet users (per 100 people), *supra* note 2.

instance, Google, Inc., describes the services they provide as "universal search technology."[4]

Apart from the organization and searching of information, the internet increasingly is being used as a social tool.[5] Two of the most popular social networking sites are Facebook and Twitter.[6] Twitter—varyingly referred to as a "blog", or "microblog"—allows its users to post short comments to Twitter pages, which can be read by anyone on the internet, including those with mobile devices.[7] Facebook is a website that allows users to create an online profile, share personal information and photos, and comment on the content of others' profiles.[8] The information on Facebook can likewise be updated and viewed by users with mobile devices.[9]

With technology's perpetual advancement, the internet and social networking sites are easily accessible anywhere through handheld devices—including from within the jury box and deliberation rooms.[10] This is where the proverbial rubber meets the road for juror misconduct disrupting trials. As one recent commentator has noted, "Occurrences of jurors posting comments on social networking sites during trials and using the internet to conduct inappropriate research are ubiquitous."[11] Moreover, "A search for

---

4. Google Corporate Information, http://www.google.com/intl/en/corporate (last visited Jan. 6, 2010) ("When you visit www.google.com or one of more than 150 other Google domains, you can find information in many different languages (and translate between them), check stock quotes and sports scores, find news headlines and look up the address of your local post office or grocery store. You can also find images, videos, maps, patents and much more. With universal search technology, you can often find all of these things combined in one query.").

5. *See, e.g.,* Robert S. Kelner & Gail S. Kelner, *Social Networking Sites and Personal Injury Litigation*, 242 N.Y.L.J. 3, (2009) ("Social networking Web sites such as Facebook and MySpace have become an increasingly popular vehicle for people to communicate with friends and family, share their innermost thoughts, feelings and post personal photographs. These personal Web sites generate a plethora of personal data and may be an enticing source of information . . . .").

6. Nielsen Internet Usage and Rankings, http://en-us.nielsen.com/main/news/news_releases/2009/june/time_on_facebook (last visited Jan. 6, 2010) (describing, by total number of minutes, how Facebook and Twitter are among the most visited social networks in the United States).

7. Twitter 101: A Special Guide, http://business.twitter.com/twitter101 (last visited Jan. 6, 2010) ("Twitter lets you write and read messages of up to 140 characters, or the very length of this sentence, including all punctuation and spaces. The messages are public and you decide what sort of messages you want to receive—Twitter being a recipient driven information network. In addition, you can send and receive Twitter messages, or tweets, equally well from your desktop or your mobile phone.").

8. *See* Facebook general information,www.facebook.com (last visited Jan. 6, 2010) (follow the "About" link; then select the "Info" tab).

9. Facebook general information,www.facebook.com (last visited Jan. 6, 2010) (select the "Mobile" link). *See also* Ratcliffe, *infra* note 10 and accompanying text.

10. *See* Heather Ratcliffe, *Legal System is Atwitter about Jurors' tweets,* ST. LOUIS POST-DISPATCH, Apr. 27, 2009, at A1 ("The words [posted on social networking sites] can be sent or received from a cell phone in a pocket. Even a juror's pocket."). *See generally*, Facebook General Information, *supra* note 9 (describing Facebook's own description of the accessibility of their service on mobile devices).

11. Stacey Stumpf, *When Justice Peeks: Today's Technology Challenges "blind eye",* FT. WAYNE J. GAZETTE, May 10, 2009, at A11. The author goes on to argue, "But instances where jurors are using technology to break these long-honored rules are popping up more frequently. The justice system will decline if the courts don't learn to adapt to the realities of technology." *Id*. at A11.

'jury duty' on Twitter will bring up dozens of posts."[12] The problems presented by use of these technologies are greater than a juror simply talking about the case with a neighbor or a juror reading a media report about a trial.[13] There does not seem to be much debate regarding whether a problem exists; however, what mechanisms exist to solve the problem?

III. SOURCES OF CURRENT LAW CONTROLLING JURORS' ACCESS TO INFORMATION AND COMMUNICATIONS

There is a robust substantive body of rules governing the communication and access to information by jurors during trials at both the federal and state levels.[14] These rules often take the form of jury instructions, and typically forbid jurors from conducting research on their own in an effort to prevent juror's access to information that would be inadmissible or inappropriate.[15] These types of instructions, or admonitions given to the jury by the judge, are commonplace in civil and criminal trials at both the state and federal levels.[16] Of course, jury instructions were part of jury trials long before the internet existed.[17]

Jurors empanelled in a trial might vary greatly with respect to socioeconomic status and education. Courts have recognized that some jurors

---

12. Stumpf, *supra* note 11.

13. Daniel A. Ross, *Juror Abuse of the Internet: While Control Over Information is Less Effective Today, Counteractive Measures Can Limit the Danger,* 424 N.Y.L.J. S4 (2009) ("To begin with, online information can be incorrect or incomplete; almost anyone can post a biased or inaccurate opinion online and pass it off as authoritative. The prototypical example is the popular online encyclopedia, Wikipedia, which relies on contributions from the general public. Inquisitive jurors can also go to social networking Web sites to learn personal information about the parties in a trial or can conduct a simple Google search to explore facts or issues related to the trial. Even authoritative online legal resources may provide out of date information or information that is accurate only for a particular jurisdiction.").

14. *See* Rebecca Porter, *Texts and "Tweets" by Jurors, Lawyers Pose Courtroom Conundrums,* 45 TRIAL: NEWS AND TREND 9, 12 (2009) ("Both federal and state courts generally set their own rules on the use of electronic devices in the courthouse . . . .).

15. *See, e.g.,* ILLINOIS PATTERN JURY INSTRUCTION Civil 1.01 (2009); ARIZONA PATTERN JURY INSTRUCTIONS CIVIL PI Intro. 1 (4th ed.); NEW YORK PATTERN JURY INSTRUCTIONS 1.11 (2009); 1 FED. JURY PRAC. & INSTR. Ch. 4 Appendix E (6th ed.).

16. *See e.g., supra* note 14; PA. SSJI (CRIM), § 2.06 (2005) ("Do not try to get information relevant to the case on your own. Do not make any investigation, do any research, visit the scene, or conduct any experiment.").

17. Ross, *supra* note 13 at S4 ("Judges have long instructed jurors to refrain from researching anything about the case at hand, and to abstain from discussing the case with anyone other than their fellow jurors once deliberations begin."). *See also* 6 AM. JUR. TRIALS 923 § 2 (2009) ("The use of pattern jury instructions has steadily spread across the country since their inception in California more than twenty years ago. The judges of the Superior Court of Los Angeles County pioneered by compiling *California Jury Instructions—Civil*, popularly called Book of Approved Jury Instructions (BAJI).This work was the offspring of experience that had been gained in more than 100 trial courts of Los Angeles County. In a short time BAJI came into general use throughout California, and is now also used as a guide in other jurisdictions.").

do not understand difficult legal concepts or their role in trial.[18] Indeed, every state allows judges to issue jury instructions, with a minority requiring specific jury instructions for specific issues.[19] Pattern jury instructions are generally accepted, and lawyers find them an effective means of explaining complex legal terms or concepts to jurors.[20] Furthermore, due to the pattern jury instructions, trials may be more predictable, allowing lawyers to strategize with greater certainty.[21]

Along with jury instructions, judges will often admonish jurors not to engage in certain types of behaviors. The language from Arizona's civil jury instructions is illustrative of the type of instruction relevant to the use of electronic devices and the internet: "Do not do any research or make any investigation about the case on your own . . . . Research also includes searching on the internet or using other electronic devices to obtain information."[22] The instructions continue, "Do not talk to anyone about the case, or about anyone who has anything to do with it, and do not let anyone talk to you about those matters, until the trial has ended and you have been discharged as jurors."[23] The instructions place the onus on the jury, not the court, to avoid violating the rules: "It is your duty not to speak with or permit yourselves to be addressed by any person on any subject connected with the trial."[24]

Although it is clear that posting messages concerning the trial itself, or the experience of jury duty, on a social networking site such as Twitter or Facebook would qualify as conduct typical state civil jury instructions seek to avoid, many instructions do not directly reference the use of handheld devices to post information and commentary to the internet. Some judges—using the discretion given to them—have now begun specifically to forbid the use of social networking and internet searches in an attempt

---

18. 6 AM. JUR. TRIALS 923 § 3 (2009) ("Jurors frequently admit that they do not understand the instructions because they are too long and contain too many words that are peculiar to—or peculiarly employed by—lawyers. It is the duty of the profession to remove these just grounds for criticism, and thereby materially strengthen the jury system.").

19. *See id* at § 2. *See also* 49 A.LR. 3d 128 (2009) § 2 ("The official publication of standardized pattern instructions intended for mandatory use when applicable in jury trials is, as the cases indicate, a comparatively recent development which at present writing only involves a few jurisdictions. However, the movement by other jurisdictions for the adoption of such mandatory instructions is apparently an active one, and is likely to spread.").

20. *See id.* at § 5 ("Pattern jury instructions have been generally accepted by the bar in jurisdictions where they are available. Although it has been said that it is characteristic of lawyers to resist change, experience with pattern instructions has made converts of most trial lawyers.").

21. *See id.* ("Instructions in simple, intelligible language were noted to be more easily understood by the average juror. The judges' replies also cited the advantage, in those states in which the use of approved instructions is required by court rule, of having lawyers and judges alike know the path they are to tread.").

22. ARIZONA PATTERN JURY INSTRUCTIONS- CIVIL (2008) Preliminary Instruction 9 (4th ed).

23. *Id.*

24. *Id.*

to solve the increasing problem.[25] Additionally, some states, such as Illinois, have updated their pattern jury instructions to reflect the rising use of technology.[26]

The Illinois instructions in part mirror the typical admonishments restricting research: "You should not do any independent investigation or research on any subject relating to the case.... This includes any press, radio, or television programs and it also includes any information available on the Internet."[27] However, the instructions concerning extrinsic juror communication are critically different: "The use of cell phones, text messaging, Internet postings and Internet access devices in connection with your duties violates the rules of evidence and you are prohibited from using them."[28] The comments to these instructions further stress the point:

> The practice of instructing jurors not to discuss the case until deliberation is widespread. The use of Web search engines, wireless handheld devices, and Internet-connected multimedia smartphones by jurors in any given case has the potential to cause a mistrial. It is critical to the administration of justice that these electronic devices not play any role in the decision making process of jurors.[29]

The Illinois Pattern Jury Instructions urge judges to admonish jurors not to use their handheld devices to access the internet and use social networking sites; however, the rules are not mandatory.[30]

Other states' jury instructions are aligned with Illinois.[31] Yet, there is no universal policy concerning the use of these technologies.[32] Judges are generally free to modify the instructions to cover specific situations.[33] Regardless, even with the flexibility built into the practice of giving jury in-

---

25. *See* Ross, *supra* note 13 ("Baltimore City Circuit judge Wanda Keyes Heard specifically instructs jurors that they 'are not permitted to...use Google, Facebook or Twitter concerning the case or read about the case on-line.'").

26. *See generally* ILLINOIS PATTERN JURY INSTRUCTIONS 1.01 Preliminary Cautionary Instructions (2009).

27. *Id.*

28. *Id.*

29. *Id.* cmt. 6.

30. *See* Ratcliffe, *supra* note 10 ("The Illinois Supreme court does not regulate instructions, leaving judges more leeway to address such issues on their own.").

31. *See* Michael Hoenig, *Juror Misconduct on the Internet,* 242 N.Y.L.J. 3, 4 (2009) ("The sage members of the New York Pattern Jury Instructions (PJI) Committee, in 2009, revised PJI 1:10 and 1:11 to cover Googling, Twitter and other forbidden computer activities.").

32. *See* Talia Buford, *New Juror Policy Accounts for Twitter, Facebook,* PROVIDENCE J. BULL., May 17, 2009, at A11 ("There is no uniform standard across the country for jurors and the use of technology once they are seated on a trial."). *See generally* 49 A.L.R. 128 (2009) (discussing at length the author's multijurisdictional survey of mandatory and suggested patterned jury instructions).

33. *See e.g.,* 1 FED. JURY PRAC. & INSTR. Ch 4 Appendix E (6th ed.) ("These suggested instructions are designed to be given following the swearing of the jury. They are general and may require modification in light of the nature of the particular case."). *See also supra* note 30 and accompanying text.

structions, and some jurisdictions taking a proactive stance on revising their jury instructions, the problem of jurors' improper use of technology still exists.

IV. SPECIFIC INSTANCES OF, AND RESPONSES TO, JUROR MISCONDUCT RESULTING FROM USE OF ELECTRONIC OR MOBILE MEDIA

When faced with jurors using the internet to conduct outside research, or make extraneous and improper communications, courts have responded in different ways.

A. Goupil v. Cattell*, No. 07-cv-58-SM, 2008 WL 544863 (D.N.H. Feb. 26, 2008)*

When appeals involving juror misconduct through improper use of electronic resources are heard in federal courts, there have been different reactions. One possible reaction is embodied in a New Hampshire case, *Goupil v. Cattell*.[34] Goupil was convicted at the state trial level of multiple counts of sexual assault and theft.[35] Goupil appealed his conviction to the New Hampshire supreme court, claiming that comments by a juror on that juror's blog deprived him of his constitutional right to a fair and impartial jury.[36] After Goupil was denied relief by the New Hampshire supreme court,[37] he filed a habeas corpus petition claiming the state court's "resolution of his constitutional claims was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States."[38]

Goupil's appeal centered on a juror posting certain comments on the internet,[39] including one that the juror had "to listen to the local riff-raff try and convince me of their innocence."[40] The federal district court de-

34. *See* Goupil v. Cattell, No. 07-cv-58-SM, 2008 WL 544863 (D.N.H. Feb. 26, 2008).

35. *See id.* at 1. ("[Goupil] was convicted in state superior court of five counts of aggravated felonious sexual assault and one count of theft by unauthorized taking."). *See also* State v. Goupil, 154 N.H. 208, 908 A.2d 1256, 1260 (N.H. 2006) ("The defendant, Stephen J. Goupil, was convicted in Superior Court (*Smukler,* J) of five counts of aggravated felonious sexual assault...and one count of theft by unauthorized taking.").

36. *See* Goupil v. Cattell, No. 07-cv-58-SM, 2008 WL 544863, at 1 (D.N.H. Feb. 26, 2008) ("Goupil appealed his convictions to the New Hampshire Supreme Court asserting, among other things, that he was deprived of his constitutionally guaranteed right to a fair and impartial jury."). *See also* State v. Goupil, 154 N.H. 208 908 A.2d 1256 (N.H. 2006) .

37. *See* Goupil v. Cattell, No. 07-cv-58-SM, 2008 WL 544863, at 1 (D.N.H. Feb. 26, 2008) ("The [New Hampshire Supreme] court rejected Goupil's arguments and affirmed his conviction.").

38. *Id.*

39. *See* Goupil v. Cattell, No. 07-cv-58-SM, 2008 WL 544863 , at 1 (D.N.H. Feb. 26, 2008) ("Specifically, Goupil claimed that his criminal trial was tainted because one of the jurors made derogatory comments about criminal defendants in his personal Web log (known generally as a 'blog').").

40. *Id* at 2.

scribed the rest of the juror's relevant postings as "his impression of the jury selection process, his desire not to serve as a juror, and his disgust at possibly being chosen as a juror for an unrelated child pornography case."[41] Some of the comments were posted online before the trial started, others were posted during the trial.[42]

The juror's postings were not brought to the attention of the trial court until after the verdict was rendered and the panel dismissed.[43] The defendant moved to set aside the verdict and the trial court denied the motion.[44] The court did, however, rule that further individual voir dire of all jurors was necessary to ascertain the blog's "impact, if any, on the remaining jurors . . . ."[45] All jurors were brought back before the court and the juror who had posted the comments was questioned extensively about the motivations behind his postings.[46] At the end of this questioning, the trial court questioned the remaining jurors and found that "[a]ll of the jurors indicated that there had been no discussion of this case prior to deliberation."[47] Additionally, "The trial court found that there was no indication that there had been any postings on the blog regarding either the defendant's case or anything that would question Juror 2's impartiality."[48] Lastly, the trial court allowed the defense counsel to find and submit additional evidence concerning the blog, but they were unable.[49] Goupil was not satisfied with the trial court's decision and appealed to the state appellate court.[50]

The New Hampshire appellate court also denied Goupil relief: "After discussing the relevant judicial precedent and considering Goupil's argu-

---

41. *Id.*

42. *See id.* ("Prior to jury selection, Juror 2 wrote, 'Lucky me, I have Jury Duty! Like my life doesn't already have enough civil participation in it, now I get to listen to the local riff-raff try and convince me of their innocence.' . . . Once he was seated on the defendant's jury, but prior to the start of the trial, Juror 2 wrote: 'After sitting through 2 days of jury questioning, I was surprised to find that I was not booted due to any strong beliefs I had about police, God, etc..'").

43. *See id.* at 3. ("The trial court learned of Juror 2's blog soon after the jury returned the verdicts and was released from duty.").

44. *See* Goupil v. Cattell, No. 07-cv-58-SM, 2008 WL 544863, at 3 (D.N.H. Feb. 26, 2008) ("The court conducted a chambers conference at which it denied the defendant's first motion to set aside the verdicts, but ruled that further inquiry into Juror 2's blog and its impact, if any, on the remaining jurors was warranted.").

45. *Id.*

46. *See id.* at 3-4 ("The following day, the trial court conducted individual voir dire with each of the jurors, including the alternates. The court began with Juror 2, who acknowledged having a blog.").

47. *Id.* at 4.

48. *See* Goupil v. Cattell, No. 07-cv-58-SM, 2008 WL 544863, at 5 (D.N.H. Feb. 26, 2008).

49. *Id.* at 5 ("Furthermore, the trial court granted defense counsel additional time to submit evidence of any postings to the blog; none was forthcoming.").

50. *Id.* at 1 (Goupil now seeks federal habeas corpus relief, *see* 28 U.S.C. § 2254, asserting that the New Hampshire Supreme Court's resolution of his constitutional claims was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States.").

ments, the appellate court held that the comments made in Juror 2's blog were not presumptively prejudicial and, therefore, Goupil bore the burden of demonstrating that those comments adversely affected his right to a fair and impartial jury."[51] They went on to hold that, "Goupil failed to demonstrate that Juror 2's conduct caused him to suffer any actual prejudice or that his constitutional rights were violated."[52] The court reached this holding by focusing specifically on the blog's impact on other juror members: "The mere fact that Juror 2 chose to makes [sic] his journal available to members of the public does not change the situation because, as the trial specifically found, not only did none of his fellow jurors read his online blog, but none was even aware of its existence."[53] They concluded by stating, "In short, there is nothing in the record to suggest that Juror 2's blog constituted an impermissible communication with a third party *about Goupil's trial* [emphasis in original]."[54]

The New Hampshire supreme court was no more receptive of Goupil's arguments, stating, "[Goupil] has failed to demonstrate that the state court's resolution of the issues he presented was 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'"[55] The court commented on the adequacy of the trial court's remedial measures: "Here, the state trial court conducted a comprehensive post-verdict voir dire of the jurors and afforded Goupil a fair hearing on his claim that Juror 2's blog represented an impermissible extraneous influence on the jury."[56] The New Hampshire supreme court went on to suggest, "The fact that Juror 2 might have come to the criminal justice process with preconceived notions about the 'local riffraff'…is, in this case, of little moment."[57] The court finally held, "Goupil is not entitled to habeas relief and the State's motion for summary judgment…is granted."[58]

Even though the court determined that the juror's conduct was not enough to prejudice the defendant, a few simple posts on the internet caused numerous appeals and increased litigation.[59] Other federal courts dealing with similar types of juror misconduct have found the prejudicial effect substantial.

---

51. *Id.* at 5.
52. *Id.*
53. *See* Goupil v. Cattell, No. 07-cv-58-SM, 2008 WL 544863, at 7 (D.N.H. Feb. 26, 2008).
54. *Id.* at 8.
55. *Id.* (quoting 28 U.S.C. § 2254 (d)(2)).
56. Goupil v. Cattell, No. 07-cv-58-SM, 2008 WL 544863, at 8 (D.N.H. Feb. 26, 2008).
57. *Id.* at 10.
58. *Id.*
59. *See generally,* Goupil v. Cattell, No. 07-cv-58-SM, 2008 WL 544863 (D.N.H. Feb. 26, 2008) (a juror's misconduct spawned unsuccessful appeals on constitutional grounds); *see also* section IV.A. *supra*.

B. United States v. Bristol-Mártir*, 580 F.3d 29 (1st Cir. 2009)*

In *United States v. Bristol-Mártir* four police officers were charged with criminal conspiracy to distribute narcotics, a federal offense.[60] During jury deliberations, the jury foreman informed the judge, via written note, that "one of the jurors searched the internet…for federal laws and terms definitions."[61] Further, "The jury foreman stated that the errant juror read out loud from a note she had and spoke about the definitions of terms like 'distribution' or 'possesses.'"[62] After having heard about the juror's research, the defendants filed a motion for mistrial, which was denied by the trial judge.[63] All defendants were found guilty at trial.[64] Subsequently, the defendants appealed, claiming, among other things, that "the district court improperly handled an issue of juror misconduct."[65]

The trial court, like the New Hampshire trial court in *Goupil v. Cattell*, attempted to remedy the juror's misconduct.[66] The trial judge questioned not only the juror accused of conducting the research,[67] but also the other jurors to ascertain whether the juror's misconduct had influenced the other jurors.[68] The trial judge established that one juror had conducted internet research, and then read aloud definitions of certain legal terms to the entire panel.[69] To remedy the juror's violation of the judge's previously given instructions prohibiting outside research, "the district court ruled that the errant juror had to be disqualified."[70] The court replaced the juror with an alternate juror, and "further instructed [all jurors] not to do any outside research…."[71] Specifically, the jury was "reminded that they were to consider all of the [c]ourt's instructions as a whole, not to ignore any instruction and that they had to consider the evidence as to each de-

---

60. *See Bristol-Mártir*, 570 F.3d at 33 (1st Cir. 2009) ("This case involves an investigation into corruption in the Puerto Rico Police Department and the subsequent convictions of four police officers who were willing to escort cocaine to various locations throughout Puerto Rico.").
61. *Id.* at 36.
62. *Id.* at 37.
63. *See id.*at 38 ("Defendants subsequently filed a motion for mistrial, which the district court denied.").
64. *See id.* ("On April 4, 2006, the jury resumed deliberations and after approximately four and one-half hours found the defendants guilty.").
65. *Id.* at 34.
66. *See supra* Part III. A.. *See also* United States v. Bristol-Mártir, 570 F.3d 29, 35-38 (1st Cir. 2009) ("The district court immediately ordered the jury to cease deliberating. It then called a meeting with counsel for both parties. In the presence of counsel, the court questioned the errant juror.").
67. *See Bristol-Mártir*, 570 F.3d at 36 ("In the presence of counsel, the court questioned the errant juror.").
68. *See id.*at 36-37 ("The district court next called in the jury foreman, who said that the errant juror had shared information that she obtained in her research with the jury.").
69. *See id*. at 36-38 ("The jury foreman stated that the errant juror read out loud from a note she had and spoke about the definitions of terms like 'distribution' or 'possesses.'").
70. *Id.* at 37.
71. *Id.* at 38.

fendant and each charge separately."[72] After these measures were taken, the court "ruled that the errant juror's research and subsequent statements to the other jurors did not taint the jury."[73]

In dismissing the defendant's motion for a new trial, the trial judge focused on what was believed to be the sufficiency of the judge's own instructions.[74] Specifically, the trial judge stated, "Jurors are presumed to follow the [c]ourt's instructions on the law, and just because one juror failed to do so one cannot speculate that the remaining jurors did not heed the [c]ourt's instructions."[75]

The defendants appealed to the United States Court of Appeals where the trial court's actions were reviewed for abuse of discretion.[76] In doing so, the court sought to determine "whether the alleged incident occurred and if so, whether it was prejudicial."[77] If these two inquiries were resolved in the affirmative, "the court must then consider the extent to which prophylactic measures (such as the discharge of particular jurors or the pronouncement of curative instructions) will suffice to alleviate that prejudice."[78] The court of appeals, even though the trial court dismissed the errant jury and reemphasized its prohibition on outside research, found the prophylactic measures taken by the trial court to be insufficient.[79]

The court of appeals reasoned, "[C]rucially, the district court did not inquire, either in a group setting or on an individual basis, as to whether jury members had been influenced by the errant juror's improper research and presentation."[80] The court went on to stress that this insufficiency specifically stemmed from a failure to reinstruct the jury properly with regard to extraneous research.[81] In failing to reinstruct the jury, the court was unable to "ensure that jury members can remain impartial when they have been exposed to extrinsic information that is potentially prejudi-

72. Order, United States v. Marrero-Cruz, et. al., 2006 WL 941687, at 2 (D. Puerto Rico April 11, 2006).

73. *Bristol-Mártir*, 570 F.3d at 38.

74. *See generally* Order, United States v. Marrero-Cruz, et. al., 2006 WL 1236739 (D. Puerto Rico May 2, 2006) (Judge denying defendants' motion for new trial).

75. *Id.* at 1.

76. *See Bristol-Mártir*, 570 F.3d at 41 ("We review a district court's actions for abuse of discretion '[i]n the majority of our cases that have involved claims that a jury was improperly exposed to extrinsic information,' including those cases that 'involve the jury's accidental exposure to potentially prejudicial material that was not offered in evidence at trial,' where 'egregious circumstances' are not present, and where the 'trial judge responds to the claim of contamination by conducting an inquiry and employing remedial measures.'"(quoting U.S. v. Ofray-Campos, 534 F.3d 1, 20-21 (1st Cir. 2008)).

77. *Id.* at 42 (citing United States v. Barone, 114 F.3d 1284, 1307 (1st Cir. 1993) (quoting United States v. Ortiz-Arrigoitia, 996 F. 2d 436, 442 (1st Cir. 1993))).

78. *Id.* (quoting United States v. Bradshaw, 281 F.3d 278, 289 (1st Cir. 2002)).

79. *See id.* at 42-43.

80. *Id.* at 43.

81. *See id.* ("In its re-questioning of jury members, the district court made only slight modifications to its generic instructions and made no mention of the errant juror's improper communications.").

cial."[82] The court of appeals further suggested that the trial court could easily have remedied the situation: "This additional inquiry regarding the errant juror's communications would not have been burdensome because the district court was already interviewing each of the jurors individually in order to inform them not to read the news or perform ex parte research."[83] Because of this, the court "conclude[d] that the district court's handling of the errant juror's misconduct constituted an abuse of discretion because it compromised the defendants' right to have a trial by an unbiased jury."[84] In light of this abuse of discretion, the court of appeals "vacate[d] the defendants' convictions and remand[ed] for a new trial."[85]

The importance of judge-given jury instructions to preserve the constitutionality of the trial and prevent bias of jurors was further emphasized in the dissent. The dissent stressed, "[T]he fact that the rogue juror was essentially 'turned in' by her fellow jurors suggests that the remainder of the jury took the instruction on outside research seriously from the beginning."[86] Even in reaching an opposite conclusion than the majority, the dissent recognized the importance of not only the judge's reaction to juror misconduct, but also the nature of specific jury instructions and admonitions.[87]

Even though these cases show two disparate yet predictable responses of federal courts, they have at least one overarching commonality—jurors who improperly use internet or electronic resources unnecessarily increase litigation.[88] The damage that one particular type of technology can inflict upon the trial process is not unique—similar issues are created with the improper use of blogs, internet searches, and social network sites alike.[89] Both courts took similar prophylactic steps after being made aware of juror misconduct and came to different conclusions about the prejudice of the jurors' misconduct.[90] Regardless of whether the behavior eventually was found to be prejudicial or not, excess litigation and trial delay resulted. Both cases—through the standards of review used on appeal—further stress the importance of jury instructions and admonitions. If the

82. United States v. Bristol-Mártir, 570 F.3d 29, 43 (1st Cir. 2009).
83. *Id.*
84. *Id.* at 43-44.
85. *Id.* at 45.
86. *Id.* at 46 (Howard, J., dissenting).
87. *See generally* United States v. Bristol-Mártir, 570 F.3d 29 (1st Cir. 2009) (Howard, J., dissenting) (arguing prophylactic remedies were sufficient to remedy juror misconduct).
88. *See* Goupil v. Cattell, No. 07-cv-58-SM, 2008 WL 544863 (D.N.H. Feb. 26, 2008). S*ee also Bristol-Mártir*, 570 F.3d 29 (both cases, discussed at length in this note, are examples of appeals based at least in part on alleged jury misconduct stemming from improper use of the internet and other technologies).
89. *See* Goupil v. Cattell, No. 07-cv-58-SM, 2008 WL 544863 (D.N.H. Feb. 26, 2008). S*ee also Bristol-Mártir*, 570 F.3d 29.
90. *Compare* Goupil v. Cattell, No. 07-cv-58-SM, 2008 WL 544863 (D.N.H. Feb. 26, 2008), *and* United States v. Bristol-Mártir, 570 F.3d 29 (1st Cir. 2009).

warning of voices, like those of the Illinois jury instruction drafters, is to be taken seriously, this is a severe problem for the administration of justice.[91] Even though some jurisdictions have rules in place to prevent jury misconduct involving the use of technology during trials, the problem is still occurring. What can be done to avoid unnecessary litigation?

C. Possible Solutions to Juror's Inappropriate Use of the Internet and Technology During Trial

There are several possible solutions to the issue of jurors using the internet or other electronic resources—including search engines, blogs and social networking sites such as Facebook and Twitter—in ways that violate court policies during trials. Below, four solutions, which various people and legal institutions throughout the United States have suggested, are discussed.

1. No Changes Are Made to the Existing Legal Regime Governing Juror Misconduct Through Misuse of Electronic Resources

The judicial system could, of course, make no changes to jury instructions in an effort to account for the problems caused by jurors' use of the internet and electronic resources during trial. For instance, one federal district court judge told *Massachusetts Lawyer Weekly* that despite the risk and cost of a mistrial, he had no plans to change his jury instructions.[92] Specifically, U.S. District Court Judge William G. Young stated, "Thus far I'm satisfied, because the language I use, if obeyed, would prevent a juror from blogging or Twittering . . . . I don't want to beat it to death by specifically mentioning Google or some other technology . . . ."[93]

This sentiment is also reflected in some state courts. For instance, "In Lehigh County, [Pennsylvania] court officials have discussed recent web worries, but have no plans to implement new policies or limit certain gad-

---

91. *See supra* note 29 ("The practice of instructing jurors not to discuss the case until deliberation is widespread. The use of Web search engines, wireless handheld devices, and Internet-connected multimedia smartphones by jurors in any given case has the potential to cause a mistrial. It is critical to the administration of justice that these electronic devices not play any role in the decision making process of jurors.").

92. David E. Frank, *Use of Technology by Jurors has Some Judges a-Twitter,* MASS. LAWYER WEEKLY, Mar. 30, 2009 ("Meanwhile, U.S. District Court Judge William G. Young agreed that the consequences of such a juror infraction would be costly, particularly where an average trial in federal court costs at least $25,000 per day. However, he said he has no plans to supplement his instructions since he has been telling jurors for years that they should not discuss the substance of a trial with anyone or use the Internet to research a case.").

93. *Id.* Despite refusing to mention certain technologies or reference mobile devices in particular, Judge Young does a "blanket" statement of "Don't go on the Internet and do research about this case or anyone involved in it." *Id.*

gets, said county jury coordinator Gayle Fisher."[94] However, some judges in that same county take a hybrid approach, warning about jurors using the internet for research. But these judges refuse to go as far as to "yank hand[]held Internet devices from jurors. Asking them to leave such gadgets behind would be too intrusive and would require his staff to police the policy . . . ."[95]

Indeed, there is some evidence that several courts are not at all worried about technology's possible negative impact on the judicial system.[96] In one criminal trial, a Boulder, Colorado judge allowed the district attorney to "send[] out messages about the trial via his Twitter account."[97] Even though this example is not exactly on point, the dangers of the information disseminated via the internet, possibly tainting the jury, still exist. The defense attorney in the same trial worried that the district attorney's Twittering might "announce certain upcoming witnesses and attract a crowd to the courtroom . . . sending an unintended message to the jury about the importance of that person's testimony."[98] In response to these issues, "Boulder District Judge James Klein . . . [said] he didn't have a 'big concern' about [the district attorney] posting updates about the trial."[99]

---

94. Riley Yates & Kevin Amerman, *Trial by Net—Courts Tackle Access by Jurors: Jury Instructions: How can Judges Keep Them From Using Google and Twitter?,* MORNING CALL, Mar. 30, 2009, at A1.

95. *Id.* ("Lehigh County Judge Robert L. Steinberg has updated his jury instructions to include precautions about gaining information from the Internet, and he also gives his long-standing warnings about reading newspaper accounts of trials or seeing or hearing them on TV or radio."). *See also* Frank, *supra* note 92 ("With technology making online access increasingly easier, Boston trial lawyer Andrew Stockwell-Alpert said he expects more judges will adopt instructions similar to the ones [some judges] issued. 'It's sort of like a product liability warning: "Do not insert knife into chest because of pointy edge." . . .People need to have the obvious pointed out to them because sometimes they don't necessarily connect what they're doing as being an inappropriate or impermissible form of communication.'").

96. *See generally* John Aguilar, *Judge lets Garnett "tweet" Elmarr Murder Case,* BOULDER DAILY CAMERA, July 10, 2009, at A5 (describing trial where presiding judge allowed the district attorney to update his Twitter live from the courthouse). *See also* Clay Evans, *Will Twitter Last? Trial Updates a Good Use of Tool, For Now,* BOULDER DAILY CAMERA, July 14, 2009, at A4 ("But as long as we've got Twitter, updating interested citizens on the proceedings of government is a pretty good way to use it. So we're pleased to hear about District Attorney Stan Garnett's plan to tweet updates from the upcoming trial of Kevin Elmarr, who allegedly killed his wife more than two decades ago. Elmarr's attorney raised concerns that tweets from Garnett could prejudice the jury about the importance of upcoming witnesses or pack the courtroom with recipients who become intrigued by the information he sends. District Judge James Klein didn't buy the argument, and neither do we. After all, Garnett used Twitter to send basic updates during the recent murder trial of Diego Olmos Alcalde—such things as when closing arguments were coming, and how the family of victim Susannah Chase was faring. The district attorney has made clear he would never send information that could in any way be prejudicial.").

97. Aguilar, *supra* note 96, at A5.

98. *Id.*

99. *Id.*

However, the problem of jurors' misuse of technology looms large and shows no sign of decreasing.[100] It seems unlikely that ignoring the problem will prevent jurors from improperly using technology during trial. What other responses might be more efficient in doing so?

2. Be Proactive in Attempting to Avoid the Problem through Issuing Admonishments and Jury Instructions

Perhaps one of the best solutions is for trial judges to be proactive. An increasingly popular solution is to admonish jurors to avoid the dangers of improper use of technology and the internet. For instance, one state judge decided to be proactive after reading media reports of jurors improperly accessing technology during trial.[101] These media reports spurred the judge to issue a specific admonition before the jurors went home for the day: "Remember: no research; no use of a computer, a BlackBerry, an iPhone; no posting on a blog or on a Twitter, or any such thing. We have to be extremely careful about that, folks."[102] The same judge went on to explain that while he is not personally familiar with these technologies, he knows their potential to cause problems in his courtroom: "So while I have never Twittered anyone, nor have I Facebooked anyone, I have a vague understanding of what these things mean and figured I'd try to be comprehensive, which in today's technology means talking about BlackBerry[]s, the iPhone and everything else."[103] Several judges at both the state and federal level are issuing similar admonishments.[104]

---

100. *See, e.g.* Richard Raysman & Peter Brown, *How Blogging Affects Legal Proceedings,* 6 INTERNET L. & STRAT. 1, (2009)

> ("Technology has entered the jury box. While the press has long reported on pending trials, bloggers—or so-called 'citizen journalists,' some sitting in juries—have increasingly posted commentary about judicial proceedings. Yet recent events suggest that blog posts and other electronic communications by jurors about ongoing trials can potentially disrupt the integrity of the proceedings.");

Robert K. Gordon, *Facebook, Twitter Causing Judges to Amend Jury Rules,* BIRMINGHAM NEWS, Oct. 20, 2009, at N4 ("Although people routinely posting updates about their day on Facebook and Twitter can keep their friends and family in the loop, it also can cause problems for the justice system. In several cases so far this year, the issue of jurors using social networking sites has been brought up."); Ratcliffe, *supra* note 10 ("Social networking websites like Twitter, Facebook and MySpace are creating a buzz in St. Louis area courts, where there are worries—if not examples—of the kind of jury misconduct seen elsewhere.").

101. *See* Frank, *supra* note 92, at 1 ("In an age when citizen blogging is all the rage and most people don't leave the house without a telephone equipped with full Internet capability, [Judge] Brassard said he gave the admonition [about blogging and Twittering] after reading a story that morning in The New York Times.").

102. *Id.*

103. *Id.*

104. *See, e.g.,* Gordon, *supra* note 100, at N4 ("After U.S. District Court Judge Scott Coogler seated jurors to hear the case of Birmingham Mayor Larry Langford, he gave them an extra instruction: no tweeting during the trial. Judges typically tell jurors not to talk about the trial or read or listen to information about it, but the warning over electronic communication is a fairly new one.").

The need for being proactive is magnified because of the unique ability of technology to reach vast numbers of people:

> But it isn't surprising that the courts are being forced to grapple with questions arising from changing technology, said Shira Goodman, the associate director of Pennsylvanians for Modern Courts, a nonpartisan organization in Philadelphia. 'As new technology evolves, it has affected all of our lives,' Goodman said. 'It was bound to affect jury deliberations.' Goodman said the courts need to come up with effective instructions to underscore to jurors that communicating through Twitter or MySpace is still communicating outside the jury box. Unlike, say, a juror who talks with a neighbor about a case, an Internet posting reaches more people and has the potential of doing far more damage, she said.[105]

This unique quality of the internet has been recognized by attorneys, as well as judges: "The freewheeling nature of the Internet makes it much easier to read and react to something without writing it down and mailing it, said Adam Tebrugge, a Sarasota, [Florida] attorney."[106]

Courts can be proactive in preventing juror misconduct through improper use of technology in two ways: "(1) jury instructions and (2) policies on the use of electronic devices."[107] Courts have the inherent power to regulate their own policies regarding which instructions are given, or whether cell phones and other electronic devices are even allowed in the courtroom.[108] Of course, courts also can tailor their policies with jury instructions and the prohibition or allowance of electronic devices in the courtroom.[109] This proactive response to the problem of juror misconduct through improper use of technology creates an obvious advantage by increasing the flexibility and efficiency of the solution. However, because of a court's inherent authority to give instructions, a court has the authority

---

105. Yates and Amerman, *supra* note 94, at A1.

106. Todd Ruger, *Attorneys to Look for Internet Bias in Lee Case,* SARASOTA HERALD TRIB., June 12, 2009, at B01.

107. Ross, *supra* note 13, at S4.

108. *See generally supra* notes 18, 94. *See also* 6 AM. JUR. TRIALS 923 § 5 (2009) ("General approval or endorsement of pattern instructions by the highest court of any state does not, and should not, prevent review by the trial court of the instructions sought in any particular case. Each case has its own particular facts, and the instructions must be tailored to the requirements of the facts and issues. Counsel must exercise independent thought in adapting the pattern instructions to the particular needs of the case on trial. It will always remain the trial judge's responsibility to determine whether a requested instruction is supported by the facts in evidence and the law applicable to the case on trial.").

109. *See* Yates and Smerman, *supra* note 94, at A1 ("In many ways, the use of high-tech tools by jurors is a modern twist on an age-old court question: How do you prevent panel members from looking into or talking about a case on their own, even if a judge tells them not to?").

not to give specific instructions.[110] Yet, if judges refuse to be proactive in solving the problem of juror misconduct through the misuse of technology, should the drafters of jury instructions include specific reference to these technologies in an effort to persuade judges and courts into being more proactive in dealing with the issue of this misuse?

3. Draft New Rules to Force Judges and Courts to Address Juror Misconduct through Improper Use of Technology During Trials

One possible solution to the problem of juror misconduct through improper use of technology is to draft new rules—through revising the jury instructions at the state or federal level—that specifically reference and address the problems associated with technology, the internet, and websites like Twitter, Google and Facebook. This solution has gained favor.[111] For example, "Courts around the country are beginning to turn their attention to the problem. Most notably, the Michigan Supreme Court held hearings . . . on an amendment to its rules concerning preliminary instructions to a jury."[112] Specifically, the proposed amendment states in part:

> The court shall specifically instruct the jurors that they shall not:…
>
> (c) use a computer, cellular phone, or other electronic device with communication capabilities while in attendance at trial or during deliberations;
>
> (d) use a computer, cellular phone, or other electronic device with communication capabilities to obtain information about the case when they are not in court . . . .[113]

Even though it appears these proposed instructions are mandatory, they are not: "Comments by the Michigan [T]rial [J]udges' [A]ssociation have suggested that it is not necessary to incorporate the instruction into a

---

110. *See generally supra* Part IV.C.i. (generally discussing the substantive body of law governing judges and their ability to issue jury instructions).

111. *See*, *e.g.,* Dennis M. Sweeney, *Commentary*: *Judge on the Jury: Jurors Online: Recent Developments,* DAILY RECORD, June 1, 2009, *available at* 2009 WLNR 10688860 ("After looking at some suggestions from other trial judges, I have formulated [a jury instruction] that I will use in future jury trials. It reads: If you are selected as a juror in this case, you will be required to decide this case solely based on the sworn testimony you hear from witnesses in this courtroom and any exhibits that are presented to you as evidence. You will be forbidden from looking for or considering information that is potentially available from other sources.
During the trial, you many not communicate with others about the trial or discuss it with family, friends or anyone else. This includes on-line discussions, chat rooms, or postings on Internet sites such as Facebook, MySpace, Twitter or similar means of communication.").

112. Sweney, *supra* note 111.

113. *Id.*

rule, and that judge should be free to tailor an instruction on the subject to the case at hand."[114] Thus, it appears the proposed Michigan rules follow the hybrid approach taken by other judges—both regulating use of technology when the jurors leave court through instruction, and regulating what devices and technologies are physically allowed in the courtroom.[115]Other states, such as Maryland and New York, have considered adopting similar jury instructions, or already have adopted such instructions.[116]

Notably, judges, who are in charge of giving the jury instructions and delegating courtroom policies, are increasingly wary of the problem of juror misconduct through the misuse of technology, and some are encouraging the promulgation of new rules.[117] Judge Sweeney, the chairperson of Maryland's Judiciary's Committee on Jury Use and Management, states, "I remain confident that the overwhelming majority of jurors, if properly warned of the dangers, will abide by the court's cautions and reach a verdict considering only the evidence they should."[118]

Despite the support for redrafting jury instructions, the idea does have its detractors: "Nevertheless, such detailed instructions are not without their critics. Some have argued that mentioning specific devices only serves to put the idea of using them into jurors' heads and may prove under-inclusive due to rapidly changing technology."[119] Additionally, "[O]ne commentor finds the rule too draconian, saying it could be interpreted to prevent a juror from, for example, using a cell phone to check on his or her children or communicate with other family members."[120] Despite the proponents and critics of this possible approach to solving the problem, lawyers themselves are capable of taking strides to help jurors from abusing technology and causing mistrials. Therefore, attorneys neither have to rely on judges to issue specific instructions, nor wait for the promulgation of new rules. Even if judges are proactive or new rules are promulgated, lawyers can supplement measures already taken by the court through stringent and pointed questions during voir dire.

---

114. *Id.*

115. *See id. See also* Yates and Amerman, *supra* note 94, at A1.

116. *See* Sweeney, *supra* note 111. ("Retired Court of Appeals Judge Irma S. Raker, who chairs the Maryland State Bar Association's Pattern Jury Instruction Committee, recently told [Judge Dennis Sweeney] in an e-mail that the committee is considering preparing a special instruction on the subject for eventual inclusion in the Maryland Pattern Jury instructions."). *See also* Hoenig, *supra* note 31 and accompanying text.

117. *See* Sweeney, *supra* note 111 ("After looking at some suggestions from other trial judges, I have formulated one that I will use in future jury trials. It reads: . . . During the trial, you may not communicate with others about the trial or discuss it with family, friends or anyone else. This includes on-line discussions, chat rooms, or postings on internet sites such as Facebook, MySpace, Twitter or similar means of communication.").

118. *Id.*

119. Ross, *supra* note 13, at S4.

120. Sweeney, *supra* note 111.

4. Voir Dire Questioning Specifically To Remove Jurors Who are Likely to Misuse Technology

Voir dire is the process by which lawyers screen and ultimately select jurors from a pool of prospects before trial.[121] There are jurisdictional differences regarding how voir dire is conducted: in some jurisdictions, lawyers ask the prospective jurors questions; in other jurisdictions, only the judge is allowed to ask questions; and, yet in other jurisdictions, both lawyers and judges are allowed to question the panel.[122] This process can be a valuable tool for lawyers who want to reinforce the court's admonishments: "Good, solid voir dire of prospective jurors on the subject seems necessary. Counsel (and the court) may need to do more to identify the serious bloggers and tweeters, the veteran Internet surfers, much as they explore other behaviorisms."[123] Indeed, judges themselves, such as U.S. District Court Judge Sarah Evans Barker, advocate that attorneys and the court should "ask more expansive questions of jurors during voir dire."[124] Additionally, Judge Dennis M. Sweeney, retired, suggests, "[i]t may be best to deal with the matter by a tailored question in examination of prospective jurors."[125] Nebraska's Judge Gary Randall reinforces the idea: "The lawyers have a part in this too, explaining to people that…if you do have Twitter accounts, if you do use Facebook, if you do have a

---

121. *See* BLACK'S LAW DICTIONARY 1605 (8th ed. 2004) ("voir dire 1. A preliminary examination of a prospective juror by a judge or lawyer to decide whether the prospect is qualified and suitable to serve on a jury. Loosely, the term refers to the jury-selection phase of a trial. 2. A preliminary examination to test the competence of a witness or evidence . . . ."). *See also* 47 AM. JUR. 2D *Jury* 167 § 5 (2009) ("The purpose of conducting voir dire is to secure an impartial jury. Litigants are granted the right to examine prospective jurors on their voir dire in order to enable them to select a jury composed of men and women qualified and competent to judge and determine the facts in issue without bias, prejudice, or partiality.

The voir dire of prospective jurors serves a two-fold purpose: (1) to determine whether a basis for a challenge for cause exists; and (2) to enable counsel to intelligently exercise peremptory challenges. In a criminal prosecution, the state as well as the accused enjoys a right to examine potential jurors. The examination of prospective jurors should not be used to educate the jury panel to the particular facts of the case, to compel the jurors to commit themselves to vote a particular way, to prejudice the jury for or against a particular party, to argue the case, to indoctrinate the jury, or to instruct the jury in matters of law. The requirement of impartiality demands that voir dire examination serve as a filter capable of screening out prospective jurors who are unable to lay aside any opinion as to guilt or innocence and render a verdict based on the evidence presented in court.").

122. MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES: PROSECUTION AND ADJUDICATION 469 (3d ed. 2007) ("In most jurisdictions, statutes and rules of procedure allow both the judge and the attorneys to formulate the questions; often the judge asks questions proposed by counsel, but sometimes the attorneys query potential jurors directly. Fewer than 10 states allow the attorneys to conduct all the questioning. Some questions are directed to the jurors as a group, while follow-up questions with individual jurors are typical in most places. Regardless of the voir dire process described in statues or procedure rules, the trial judge commonly retains discretion to alter the voir dire process in individual cases. The greatest authority of the trial judge relates to the content of the questions asked on voir dire.").

123. Hoenig, *supra* note 31, at 4.

124. Stumpf, *supra* note 11, at A11.

125. Sweeney, *supra* note 111.

Blackberry, there's . . . a right way and a wrong way to use this, because it's all about the fair trial...."[126]

Furthermore, "Lawyers can reinforce juror instructions by asking strategic questions during voir dire to identify potentially problematic jurors."[127] This "enables lawyers to emphasize the importance of the instructions while reducing the risk of a mistrial in the future."[128] Voir dire is just one tool that may be employed to prevent juror misconduct. It is also distinct from other possible solutions because attorneys can play an active role in preventing jurors from erroneously using the internet and other technologies during trials.

V. CONCLUSION

The legal world certainly has not remained immune from the evolution of technology. Instead, the legal world has felt technology's effect in many areas, including the jury trial. The internet, combined with technologies such as mobile telephones capable of browsing the internet, has given rise to resources and cultural phenomena such as Google, Facebook, and Twitter—things that pervade the lives of many potential jury members. Courts have always been diligent in seeking to limit the amount of information accessible by jurors to only information that is proper by rule or statute. Through this effort, the sanctity of the jury trial can be preserved. However, if technology has done nothing else, it has made information nearly omnipresent and communication virtually instantaneous. The proliferation of information and increased ease of communication has presented a challenge to courts because some jurors use the internet and other electronic resources to improperly access information, resulting in mistrials and excessive litigation. Along with these mistrials comes the inevitable expense and delay.

What can be done to avoid the problem of juror misuse of technology during trials? Several possible solutions exist. Judges might choose to make no changes and use the same procedures and instructions they have always used, while hoping for the best. Some judges might be proactive in giving jury admonishments and instructions that specifically address improper use of technology and the internet. The drafters of pattern or model jury instructions might include admonishments or instructions in their rules to address the problem of juror misconduct through misuse of technology during trial. Finally, attorneys and judges might attempt to iden-

126. *Social Media Crashes the Courtroom* (NPR Talk of the Nation radio broadcast Sept. 17, 2009).
127. Ross, *supra* note 13, at S4.
128. *Id.*

tify, and presumably avoid, the type of person prone to improper access to technology through extensive and pointed questioning during voir dire.

The best way to avoid the problem is twofold: judges should be proactive in strictly admonishing jurors not to use technology in improper ways, and extensive voir dire should be conducted to eliminate those jurors who cannot follow the judges' instructions. This combination of solutions provides several advantages. Primarily, it allows great flexibility. Judges and court personnel can tailor their policies to fit any given situation. Further, the protections are layered. Policies can be established to limit access to handheld devices before the trial even starts. There can be admonishments at any stage of the jury duty process, including before it starts, and after it ends. There can be specific and pointed instructions at critical stages, such as immediately before the presentation of evidence, or at the conclusion of each day of a multi-day trial. Additionally, by combining judicial warnings with pointed questions during voir dire, jurors who are most likely to use the internet and technological resources improperly hopefully will have been removed, and those that remain, duly chastened. Furthermore, because this solution does not require waiting on the drafting of new pattern jury instructions, the entire process will not need to be repeated with the invention of new technology in the future—merely the content of admonitions and voir dire questions will change.

Regardless of the solution chosen, it is evident that the problem of juror misuse of technology during trials exists and needs to be addressed. As one commentator has warned in foreboding fashion, "[I]t is unlikely that judges or lawyers will be able to eliminate juror misuse of the Internet, and they should adjust to a world in which control of information to or from jurors is much less effective than it was before the advent of Google, Facebook and the next emerging technology."[129] The adjustments made to control the information accessible by jurors will have great influence upon the legal world.

Grant Amey

---

129. Ross, *supra* note 13, at S4.

LATERAL HIRING: A SHORT TERM SOLUTION OR A LONG TERM PROBLEM?

On February 16, 2009, the American Bar Association (ABA) voted in favor of Recommendation 109.[1] This recently revised version of Rule 1.10 of the Model Rules of Professional Conduct permits a law firm to avoid imputed disqualification caused by its employment of a lawyer carrying a potential conflict of interest.[2] It does so by screening the lawyer from participation in the current matter and from receiving any portion of the fee therefrom.[3] Nevertheless, the new rule permits law firms to hire lawyers with conflicts of interest without a client waiver. [4] Recommendation 109 requires the hiring firm to inform the client of the procedures taking place as well as the client's option to seek judicial review.[5] Despite these new requirements, the removal of the client consent requisite in the amendment essentially lowers the ethics hurdle for lateral hiring in the legal profession.[6] Proponents of the new amendment argue that the requirement of informing the client makes possible conflicts more transparent;[7] however, opponents argue that this amended rule puts the convenience of the lawyer ahead of the duty of loyalty to the client.[8] The conflict surrounding this amendment raises a bigger question about the practice of lateral hiring: Does lateral hiring allow for the economics of the legal profession to trump the ethical duties of a lawyer?[9]

The days of a lawyer maintaining a practice with one firm are limited. The movement of lawyers to multiple firms within a career is the norm today and not merely a trend. [10] The practice of lateral hiring has become prevalent for several reasons. First, the economics and forced cost cutting

---

1. In Brief, *ABA Lowers Ethics Hurdle for Lateral Hiring,* NAT'L L.J., Feb. 23, 2009, at 3.
2. JOHN K. VILLA, *ETHICAL ISSUES FOR INSIDE COUNSEL*, CORPORATE COUNSEL GUIDELINES § 3.4 (2009).
3. *See* In Brief, *supra* note 1, at 3.
4. *Id.*
5. *Id.* (requiring the hiring firm to give the incoming lawyer's former client written notice of the screening procedures. Also, the firm must let the clients know they may seek judicial review).
6. *See id.*
7. *See* Leigh Jones, *ABA May Amend Ethics Rules on Conflicts: Steep Climb in Lateral Movement Behind Move*, NAT'L L.J., Feb. 2, 2009, at 5.
8. *See* Jones, *supra* note 7, at 5.
9. *See* Letters to Editor, *ABA Ethics Rule Change*, NAT'L L.J., Mar. 2, 2009, at 27.
10. *See* Dan Binstock, *What To Ask the Headhunter When It's Time To Move On, Make Sure Your Recruiter Does His Job*, LEGAL TIMES, Oct. 30, 2006, at 61; *see* Villa, *supra* note 2; *see also* Paul R. Tremblay, *Migrating Lawyers and The Ethics of Conflict Checking*, 19 GEO. J. LEGAL ETHICS 489, 492 (2006).

in firms have left many firms hiring attorneys with reputations as high profit makers away from competing firms.[11] Second, the need for immediate revenue impacts firms to seek outside help rather than develop their own associates over time.[12] Third, when firms experience growth within certain areas of practice they need seasoned talent immediately. [13] Finally, the client demand for efficient work product has left a need for highly specialized, experienced attorneys rather than leaving matters to young associates.[14]

Despite its overwhelming growth, the inherent ethical risks involved with lateral hiring has left many pining for the "good ole days" before the practice of law became highly mobile.[15] In addition, the concern over lateral hires extends beyond the conflicts of interest concern that has sparked a significant amount of debate over Recommendation 109.[16] Lateral hiring requires an extremely high level of due diligence regarding prospective lateral hires, regardless of reputation and past dealings with the potential new hire,[17] which comes at great expense.

This note will examine both ethical and practical dilemmas created by lateral hiring with an emphasis on the practice as it stands in Alabama. This note suggests that while the practice of lateral hiring provides a short term solution, over time, it could prove to be adverse to the entire profession. It will explore the ethical pitfalls by discussing the Model Rules associated with lateral hiring.[18] Finally, this note will discuss how this practice cripples the long term effectiveness of many firms by seeking to maximize profit rather than developing beginning associates.

I. STATE OF LAW AS IT APPLIES TO LATERAL HIRING

On February 16, 2009, the American Bar Association voted in favor of Recommendation 109, by a margin of 226 to 191.[19] The new rule permits law firms to hire lawyers with conflicts of interest without a waiver from the client.[20] However, informing clients of the procedures taking

---

11. Margaret C. Hepper, *Contemporary Challenges to Maintain Firm Competency*, 580 PLI/Lit 995, 997 (1998).
12. *Id*.
13. *Id*.
14. *Id*.
15. *See* David J. Beck, *Exploding Unprofessionalism: Fact or Fiction*, 61 TEX. B.J. 534 (1998) (discussing the change in the perception of professionalism in the legal profession).
16. *See* Jones, *supra* note 7, at 5.
17. *See* Hepper, *supra* note 11, at 999-1007; *see also*, Gunnarsson, *infra* note 125, at 269 (discussing the specific changes made to Model Rule 1.10).
18. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7- 1.10 (2007).
19. In Brief, *supra* note 1, at 3; *see also,* Kathy L. Yeatter, *Ethical Considerations of the Mobile Lawyer*: *Five Important "Dos and Don'ts" for Partners In Transition*, AM. BANK. R. INST. J., May 28, 2009, at 65.
20. In Brief, *supra* note 1, at 3.

place, as well as the option for judicial review, remain in order to protect client interests.[21] According to critics of Recommendation 109, the new ABA amendment essentially lowers the ethics for lateral hiring in the legal profession.[22] The ABA chose Recommendation 109, which "eases the conflict of interest rule by allowing a law firm to 'screen' an incoming attorney from the rest of its attorneys and to enable the firm to continue representing its client without the consent of the incoming attorney's former client," over a more restrictive and traditional imputation regulation given in Recommendation 110.[23] Both recommendations before the ABA House of Delegates dealt with attorneys who leave one law firm and go to another, but the opinions about each became sharply divided.[24] Under the former ABA rule, if an attorney moves to a new firm, and this firm has a client in conflict with one of the attorney's clients at his former firm, the attorney's conflict of interest infects the other attorneys at the current firm and disqualifies them from representation, absent the old client's waiver of the conflict.[25] However, Recommendation 109 treats lateral attorneys the same way the Model Rule 1.11 addresses attorneys who move from government positions to private firms, which has a more relaxed imputation standard.[26]

A. Proponents of the New Rule

Those supporting the ABA rule change, such as Robert Mundheim, believe "Recommendation 109 makes the movement of attorneys and possible conflict issues more 'transparent' because it requires the new firm to affirm to the former client that it has properly screened the incoming attorney."[27] The change stems heavily from the need to protect a client's confidential information with a lawyer's ability to practice law in a mobile society.[28] Additionally, the alarming rise in unemployment, particularly in the legal field, necessitates a rule that gives attorneys more flexibility in finding work.[29] Proponents opine that the old rule unfairly restricts the mobility of attorneys.[30] Furthermore, attorneys do not spend their entire

---

21. *Id*.
22. Jones, *supra* note 7, at 5.
23. *Id*.
24. *See id*. (discussing the opposing viewpoints of Robert Mundheim and Lawrence Fox, who were proponents of Recommendations 109 and 110, respectively).
25. *See* Jones, *supra* note 7, at 5; *see also*, MODEL RULES OF PROF'L CONDUCT R. 1.10 (2007).
26. *See id*.
27. *Id*.
28. *Id*.
29. *See* Jones, *supra* note 7, at 6.
30. Erik Wittman, *A Discussion of Nonconsensual Screens As The ABA Votes to Amend Model Rule 1.10*, 22 GEO. J. LEGAL ETHICS 1211, 1218 (2009) ("Unemployment as of February 2009 [was] 8.1%. As of October 2008, the legal industry had eliminated 15,800 jobs over the past year. Additionally, 94 of the American Lawyer 200 law firms laid off attorneys."); *see* Erin A. Cohn, Comment,

careers with one firm, and the challenges of the new economy have forced attorneys into the "involuntary choice of finding a new job."[31] Therefore, the use of "nonconsensual screens" would provide protection for clients while ensuring further mobility for the attorneys.[32] However, the mere use of screens and elimination of the consent requirement arguably further opens the opportunity for attorney mistake or self-dealing to negatively impact the client.[33] The potential for the increase of inadvertent or purposefully unethical disclosure of client confidences without remedy seemingly undermines the integrity of the system.[34] And this potential damage to the legal profession, which has been hindered by a growing mistrust from the public,[35] is something opponents of Recommendation 109 did not want to risk.

B. Opponents of New Rule

Lawrence Fox, an outspoken critic of the new rule, said Recommendation 109 places the convenience of lawyers above the duty of loyalty to clients.[36] Fox was a supporter for Recommendation 110, the other measure presented to the ABA. Recommendation 110, which does not permit firm-to-firm screening and instead requires client consent, was a compromise by opponents to Recommendation 109.[37] Fox and his supporters argued that the screens are difficult to monitor and will not prevent deliberate or inadvertent breach.[38] However, Recommendation 110 fell short of addressing issues facing law firms and lateral hiring.[39] According to supporters of the consensual screens, attorneys are not making lateral moves voluntarily, but as a result of the economic crisis.[40] Supporters find verification in the 12.5% increase of lateral hires from 2006 to 2007 and believe that the

---

The Use of Screens to Cure Imputed Conflicts of Interest: Why the American Bar Association's and Most State Bar Associations' Failure to Allow Screening Undermines the Integrity of the Legal Profession, 35 U. BALT. L. REV. 367, 374-75 (2006).

31. Pittman, *supra* note 29, at 1218.
32. *Id*.
33. *Id*.
34. *Id*. at 1217, 1219.
35. *Id*. at 1219.
36. *See* Jones, *supra* note 7, at 5.
37. *See id*. ("The change would allow a lawyer, whose participation with a client at a previous firm was not significant and who did not learn material confidential information, to work for an adversary law firm without client consent, so long as the transferring lawyer was screened and provided certification of compliance with screening.").
38. Pittman, *supra* note 29, at 1217; *see also*, Lawrence J. Fox & Susan R. Martyn, *Screening? Consider the Clients: Making the World Safe for Side-Switching Lawyers Is an Idea Whose Time Should Never Come*, 19 NO. 4 PRAC. LITIGATOR 47, 52 (2008).
39. Jones, *supra* note 7, at 5.
40. Pittman, *supra* note 30, at 1211.

mobile nature of the legal business necessitated such a change in the rules.[41]

Regardless of which side of the rules debate one takes, it is clear this change is a sign that lateral movement has become a prevalent practice among attorneys in private firms.[42]

Additionally, the conflict over this amendment raises bigger questions about the popular practice of lateral hiring. First, does the practice of lateral hiring allow for the economics of the legal profession to trump the ethical duties of a lawyer?[43] If and why should the client shoulder the burden of pursuing a disqualification motion when the client's lawyer, who holds the client's confidential information, moves to the opponent's law firm?[44] And finally, what impact does this movement have on the loyalty aspect of the profession?[45] Is loyalty still a cornerstone of the profession or a mere afterthought in the pursuit of bigger and better business?[46]

II. SUMMARY OF SCHOLARSHIP WITH RESPECT TO THESIS

The days of a lawyer maintaining a practice with one firm are limited. The movement of lawyers to multiple firms within their career is the norm in the business today and not merely a trend.[47] In a survey done in March 2009, lateral hiring was shown to be down more than 25% from 2007.[48] However, lateral hiring experienced significant growth the five years prior to 2008.[49] It exceeded entry-level hiring by roughly 25% in the years 2004-2006 according to a report done by the NALP in 2007.[50] Lateral hiring dramatically increased in firms with 500-700 lawyers; however, lateral hiring had the largest gap over entry-level hiring in firms of 100-200.[51] Proponents of the lateral hiring trend point to the fact that graduate employment over the past 25 years has an overall average of 89%. [52] Additionally, in 2007 the 91.9% rate of graduate employment represented a 20-year-high.[53] This evidence seemingly shows that the lateral hiring

41. *See* Jones, *supra* note 7, at 5.
42. *See* Binstock, *supra* note 10, at 63.
43. *See* Letters to Editor, *supra* note 9, at 27.
44. *Id.*
45. *Id.*
46. *Id.*
47. *See* Tremblay, *supra* note 10, at 491.
48. NALP Bulletin, *Lateral Hiring: Down Just About Everywhere*, NATIONAL ASSOCIATION FOR LAW PLACEMENT, INC., March 2009, *available at* http://www.nalp.org/2009marlateralhiring.
49. NALP Bulletin, *supra* note 48.
50. NALP Bulletin, *Lateral Hiring Continues to Outpace Entry-Level Hiring*, NATIONAL ASSOCIATION FOR LAW PLACEMENT, INC., May 2008, *available at* http://www.nalp.org/2008maylateralhiring.
51. NALP Bulletin, *supra* note 50.
52. NALP Bulletin, *Trends in Graduate Employment (1985-2008)*, NATIONAL ASSOCIATION FOR LAW PLACEMENT, INC., July 2009, *available at* http://www.nalp.org/july09trendsgradempl.
53. *Id.*

movement has had no ill effect on the ability of law school graduates to obtain employment.[54] However, this data does not take into account the severe economic recession that impacted the hires of the past two graduating classes and will affect more in the future.[55]

The practice of lateral hiring has become prevalent in the profession for several reasons:

> First, after initiating massive cost-cutting measures over the last five years, many firms are scrambling to broaden their revenue-generating pool by hiring reputedly profitable 'rainmakers' away from other law firms. Second, many law firms are experiencing considerable growth with certain litigation and transactional areas of practice, and need seasoned talent . . . thus forcing law firms to hire laterally. And finally, there are still those firms which hire laterally with no compelling, articulable strategy at all.[56]

However, it must be remembered that law firms are not the only parties seeking lateral movements, attorneys voluntarily seek other opportunities for various reasons.[57] For example, attorneys move for better compensation possibilities, more sophisticated legal work, or general lifestyle changes.[58] Overall, the lateral movement norm has magnified the greener pastures approach to the business of law. While this practice has become prevalent in firms in all areas of practice of law, the inherent risks that come with firm to firm movement of attorneys can produce expenses that many firms are not equipped to handle.[59]

First and foremost, lateral hires are "unknown quantities."[60] Therefore, despite any previous knowledge or dealings the firm had with a potential lateral hire, they must engage in "meaningful due diligence."[61] Otherwise, the firm runs the significant risk of the new lateral hire producing subpar work quality, failing to assimilate to the culture of the firm, or simply acting in a self-dealing manner.[62] All of these potential gambles with lateral hires have been highly successful when the new hire has performed up to par, but when the attorney fails to meet various standards the effects can be devastating on both the firm's culture and its wallet.[63] Perhaps one reason why these risks are higher with lateral hires than entry-

---

54. *See id.*
55. *Id*.
56. *See* Hepper, *supra* note 11, at 997.
57. *See id*.
58. *Id*.
59. *Id.*
60. *See id*. at 999.
61. Hepper, *supra* note 11, at 999.
62. *Id*.
63. *See id*.

level hires is the clout that accompanies transferring attorneys.[64] If lateral hires have significant income potential, firms may relinquish practice management oversight regarding these individuals.[65] Thus, these attorneys may refuse to adhere to firm practices regarding client-screening, associate training and development, or the delegation of work to other attorneys in the firm, [66] which have a significant impact on firm efficiency and in revenue potential. Additionally, the evolution of the law practice to a mobile society has caused the idea of institutional loyalty to disintegrate.[67] The promises of partnership that served as motivation in the past have dwindled somewhat with the use of lateral hiring; therefore, firms have been forced to implement attorney accountability measures to ensure quality work from employees.[68] These once unknown measures have become a staple in the modern firm to serve as a protective measure against firm liability.[69] However, implementation of attorney accountability has not come cheap to modern firms.

The predominance of lateral hiring in conjunction with the use of temporary lawyers, paralegals, mergers, and other major changes in law firm management has lead to a loss of collegiality, which in turn has led to a decline in professionalism.[70] In his journal article, *Exploding Unprofessionalism*, David Beck states, "[w]hen even partners are deemed potentially transitory, the bonding once assumed at that level is threatened, and the jettisoning of less productive partners unfortunately deprives associates of much needed mentors."[71] This loss of mentoring potentially hinders the growth of young attorneys who will soon be the potential "rainmakers" of the firm.[72] Thus, some of the most difficult conflicts of interest faced by firms arise from lateral hiring.[73]

Lawyer mobility, while now a way of life in law firms, places a strain on compliance with two fundamental beliefs of legal ethics: "[K]eeping information about the old law firm's clients confidential and avoiding conflicts between those clients' interests and the interests of the new law

---

64. *See id*. at 999-1000.
65. *Id*. ("Perhaps these same firms hope that by affording rainmakers considerable autonomy, they will be satisfied to remain indefinitely. All the while, these firms hope that the rainmakers act responsibly, but turning a blind eye can be devastating.").
66. Hepper, *supra* note 11, at 1000.
67. *Id*.
68. *Id*.
69. *Id*.
70. *See* Beck, *supra* note 15, at 539. *See also,* Peter A. Joy, *What We Talk About When We Talk About Professionalism*, 7 GEO. J. LEGAL ETHICS 987, 993 (1994).
71. *See* Beck, *supra* note 14, at 539.
72. *See id*.
73. *See* Susan P. Sharpiro, *Everest of the Mundane: Conflict of Interest In Real-World Practice*, 69 FORDHAM L. REV. 1139, 1169 (2000).

firm's clients."[74] It must be said that this tension between conflicts of interests has always existed, but in the traditional legal practice the problem rarely arose.[75] The Model Rules of Professional Conduct seek to maintain the delicate balance between the lawyer's earning needs and his obligation to serve the client.[76] However, increased lawyer mobility significantly affects this balance by pushing for a more pro-lawyer approach, taking the lawyer's role as an economic actor more seriously.[77] This approach feeds the public perception of legal services becoming more like a business and less like a profession,[78] a perception that creates some animosity among the public and those who adhere to the traditional legal system.

The resulting lawyer-to-client conflicts that result from lawyer mobility have an economic as well as a confidentiality element.[79] The transient lawyer imposes economic cost on former clients because they are potentially forced to invest in another attorney-client relationship if the moving lawyer withdraws from representation of his old firm's clients.[80] In terms of confidentiality the former clients have two concerns: conflict-checking information the attorney will want to share with the new firm and confidential information in his possession when the move takes place.[81] This newer form of attorney-client conflict creates a struggle between the rules governing attorneys.[82] The client must have assurance of the security of his confidential information,[83] or the attorney-client relationship for moving and non-moving attorneys suffers. On the other hand, the moving lawyer wishes to report some of this information to his new firm in order to avoid conflicts of interest.[84] Unfortunately, the Model Rules of Professional Conduct include nothing explicit about how sharing of client information in the conflict-checking process ought to be done.[85] Thus, there is no agreed upon solution that continues to grow with the ever increasing mobility of the typical lawyer.[86]

---

74. *See* Eli Wald, *Lawyer Mobility and Legal Ethics: Resolving The Tension Between Confidentiality Requirements and Contemporary Lawyer's Career Paths*, 31 J. LEGAL PROF. 199, 200 (2007).
75. *See* id.
76. *Id.* at 201-02.
77. *Id.* at 202.
78. *Id.*
79. Wald, *supra* note 74, at 268.
80. *Id.*
81. *Id.*
82. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6-1.8 (2007).
83. Wald, *supra* note 74, at 271 (addressing the interest of the client which can conflict with the interests of the transient lawyer).
84. *Id.* at 270-71.
85. *Id.* at 268.
86. *See id.*

III. APPLICATION TO THE STATE OF ALABAMA

Ethical rules are a form of professional self-regulation enforced by civil liability or professional discipline.[87] An important, though not only, function of ethical rules is reducing agency costs between lawyers and clients.[88] Agency costs typically involve conflicts between the agent's and principal's interests.[89] The conflicts arise because the agent has the power to control the principal's affairs but does not fully bear the risks and rewards associated with this control.[90] Agency costs are potentially significant in legal representation because the client delegates significant discretion to the lawyer, but incurs high monitoring costs because of the specialized and idiosyncratic nature of professional work.[91] Thus, adherence to a looser professional standard, such as the revised Model Rule 1.10, coupled with the prevalence of lateral hiring seems to raise the probability of agency costs. These costs will not only be borne by the clients, but also the firms that represent them.

Those in support of the newly passed Recommendation 109, including ABA President Elect Carolyn Lamm, believe the ABA "simply cannot ignore the mobility of lawyers."[92] Furthermore, "[w]hether it's increased because of an evolution in the way we practice law or because of economic necessity, we also must recognize [more] client mobility."[93] Accordingly then, "[o]n both sides of the equation, life is different. Report 109 appropriately balances the interests[sic] the moving lawyer, the receiving firm, the client that's left behind and the clients at the new firm."[94] However, Alabama has not adopted this inevitable mobility concept and has yet to accept the changes to the Model Rules regarding imputation of conflicts of interest.

Alabama Rule 1.10 follows the old rule, providing:

> (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any of them, practicing alone, would be prohibited from doing so by Rules 1.7, 1.8(a)-1.8(k), 1.9, or 2.2.
>
> . . . .

---

87. *See* Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707, 1708 (1998).
88. *Id.*
89. *Id.* at 1709.
90. *Id.*
91. *Id.*
92. Sheri Qualters, *ABA Lowers Ethics Hurdle for Lateral Hiring*, NAT'L L. J., Feb. 17, 2009, at 1.
93. *Id.*
94. *Id.*

> (d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.[95]

According the comments of Rule 1.10, "[t]he rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm."[96] The comments suggest that there are several competing considerations to be given effect when applying this rule to the lateral movement of attorneys.[97] First, the client previously represented must have reasonable assurance that the loyalty inherent to the attorney-client relationship will not be compromised.[98] However, in applying the rule, "the rule of disqualification should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel."[99] Finally, the rule of disqualification should not unreasonably hamper lawyers from forming new associations and conducting new business after leaving a previous firm.[100]

Alabama Rule 1.10 also takes into account that "today many lawyers practice in firms, that many to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers."[101] Therefore, defining imputed disqualification too broadly would radically curtail the opportunities of lawyers to move from one practice setting to another and the opportunity of clients to obtain new counsel.[102] The application of Alabama Rule 1.10 should be based on a functional analysis determining the question of vicarious disqualification.[103] The comments suggest that if an appearance of impropriety rubric were adopted, "disqualification would become little more than a question of subjective judgment by the former client."[104] The two functions to be considered when applying this rule are preserving confidentiality and avoiding positions adverse to a client.[105] The Alabama version of imputed disqualification recognizes the increasing mobility of lawyers, but has yet

---

95. ALABAMA RULES OF PROF'L CONDUCT R. 1.10 (2009).
96. ALABAMA RULES OF PROF'L CONDUCT R. 1.10 cmt. Principles of Imputed Disqualification (2009).
97. *See* ALABAMA RULES OF PROF'L CONDUCT R. 1.10 cmt. Lawyers Moving Between Firms (2009).
98. *Id*.
99. *Id*.
100. *Id*.
101. *Id*.
102. ALABAMA RULES OF PROF'L CONDUCT R. 1.10 cmt. Lawyers Moving Between Firms (2009).
103. *See id*.; *but see* MODEL CODE OF PROF'L RESPONSIBILITY Canon 9 (1983) (calling for an appearance of impropriety as a rubric for dealing with vicarious disqualification).
104. ALABAMA RULES OF PROF'L CONDUCT R.1.10 cmt. (recognizing that the problem of imputed disqualification cannot be solved by simple analogy).
105. *Id*.

to sacrifice the principles of client loyalty to provide more flexibility in the movement of attorneys.

In addition to adverse effects on clients, the departure of a lawyer from a firm has potential negative repercussions on the firm as well.[106] One commentator notes, "law firms are under siege . . . . For each firm that gains a partner and a new basket of clients, another firm loses an important source of revenues and gains an incentive to do its own lateral hiring [ ]."[107] One such repercussion of increased lawyer mobility is the challenge of maintaining firm culture with a new hire.[108] Lateral hiring of like minds, despite attempts to weed out prospects with compatibility issues, can be challenging.[109]

A second repercussion is the loss of mentors for new associate due to the practice of lateral hiring.[110] The firm invests in new associates by means of facilities, equipment, training, and professional development among others.[111] However, perhaps one of the most important forms of investment comes from mentoring opportunities received from more experienced associates and partners.[112] Firms make these kinds of investments in the hopes that these investments create a return for firm members, but also to enhance the overall quality and availability of legal services for the public.[113] When a lawyer departs a firm to practice elsewhere, the move imposes costs on the firm in a variety of ways.[114] Direct costs of such a move include the costs of hiring, training, and mentoring a replacement.[115] Furthermore, the firm may experience the indirect, yet significant costs of lost good will or reputation and lost clientele with the departure of an attorney[116] and must accept the potential ethical and financial risks of making another hire. As previously mentioned, the transitory nature of the business threatens the stability of a strong partner/associate relationship and deprives associates of much needed mentors.[117] The pressures of current-day law practice means that the mentoring of new lawyers may be compromised.[118] Newer lawyers have fewer opportunities to learn

---

106. Linda Sorensen Ewald, *Agreements Restricting the Practice of Law: A New Look At An Old Paradox*, 26 J. LEGAL PROF. 1, 25 (2002)
107. *Id*.
108. *Id*.
109. *What 'Burning Issues' Are Keeping Managing Partners Up At Night Now?*, L. OFF. MGMT. & ADMIN REP., Nov. 2005, at 1 (discussing "burning issues" for firms of 100-300 attorneys).
110. *See* Ewald, *supra* note 106, at 1.
111. *Id*.
112. *Id.*
113. *Id.*
114. *See id.* at 48, n.219.
115. *See* Ewald, *supra* note 106, at 48, n.219.
116. *Id.*
117. *See* Beck, *supra* note 15, at 539.
118. Louis R. Lupica, *Professional Responsibility Redesigned: Sparking A Dialogue Between Students and The Bar*, 29 J. LEGAL PROF. 71, 80 (2005).

the habits, behaviors, and practices expected of professionals.[119] Therefore, while providing a potential quick solution, lateral hires can have negative long term impact on the firm.

IV. IMPACT ON FUTURE ATTORNEYS

The shift in the nature of the modern law firm has not only influenced those already employed in the field, but when coupled with the current economic hardships, it has potential for negative ramifications for the next crop of young associates. The economic recession has hit the legal market as hard as any other industry.[120] There seems to be a strong correlation between the economic downturn and the decrease in lateral hires in recent years;[121] however, that does not provide opportunities for students coming out of law school. Many firms hosting summer associate programs have indicated that they do not expect to give offers to each of their summer clerks, leaving many competent students without work.[122] Additionally, some firms expect to defer starting dates for incoming associate; thus, finding a full-time legal job has been, and will continue to be, a challenge for law students.[123] Those law students graduating in the near future cannot fall back on temporary contract work to sustain themselves either because these positions are either being deferred to in-house counsel or the work is nonexistent.[124] However, it has yet to be determined if this slowdown in graduate employment will continue after the end of the current recession or whether this "trend" will become a constant reality for those in the legal field.

Many commentators who have addressed the lateral hiring movement believe change is inevitable in the form of business growth.[125] With the exception of lifelong sole practitioners, the personal preferences or business needs of a firm or individual lawyer will probably necessitate lateral movement.[126] Whether it be in the form of the hiring of attorneys laterally, merging practices with another attorney, or becoming a lateral hire yourself, this change is seemingly inevitable.[127] Also seemingly inevitable is the exacerbation of conflicts of interest associated with increased lawyer

---

119. *Id*.
120. *See* Rachel J. Littman, *Finding the Silver Lining: The Recession and The Legal Profession Market*, 81 N.Y. ST. B.A.J. 16 (2009).
121. *See* NALP Bulletin, *supra* note 48.*; but see,* NALP Bulletin, *supra* note 48; *but see* Kathy L. Yeatter, *Ethical Considerations of the Mobile Lawyer*, 28 AM. BANKR. INST. J. 22 (2009) (stating that the recession has produced an unprecedented amount of bankruptcy work; thus, a high level of movement from bankruptcy attorneys).
122. *See* Pittman, *supra* note 120, at 17.
123. *Id*.
124. *Id*.
125. *See* Helen W. Gunnarsson, *Hire Laterally, Think Ethically*, 95 ILL. B.J. 240 (2007).
126. *See id.*
127. *See id.*

mobility.[128] Unlike most other occupations, practice mergers and lateral hiring in law require careful attention to the ethical rules that govern attorneys and their practices.[129] And despites the obvious inconvenience,[130] the use of a strong imputed disqualification standard protects the most valuable commodity of a firm, the client.

V. CONCLUSION

The intention of ethical rules in the legal profession is to protect the interests of the client, who is the entire backbone of the profession. The modification set forth by the ABA, if adopted in Alabama, would be what Lawrence Fox constitutes as an "'assault on the rules governing confidentially[sic] and loyalty.'"[131] Additionally, an overemphasis on lateral hires can have a negative impact on maintaining firm culture. Rainmakers who bring immediate business, are superseding young associates who are either finding themselves out of work, or are not receiving the same type of training and mentoring as in the past. Despite its money-making appeal, firms in Alabama should hire laterally in moderation and continue to hire and develop young associates. The message sent to clients by an overabundance of lateral hiring is that the business profit of the firm has taken precedence over the loyalty to the client. The possibility of losing confidential information because of a profit hungry attorney or firm further creates a rift in the attorney-client relationship as a whole. This lack of faith could potentially cause a decrease in business for firms that have evolved from a practice to more of a business. Thus, the short term solution will be the long term problem for firms that rely heavily on lateral hiring rather than balancing lateral hiring with hiring and molding of young lawyers.

Drew Morris

---

128. *See* Wald, *supra* note 74, at 268.
129. *See* Gunnarsson, *supra* note 125, at 241.
130. Qualters, *supra* note 92 (quoting Lawrence Fox as saying, "'All the rules of conflicts of interest are inconvenient. I turn down more matters than I accept.'").
131. *Id*.

WALL POSTS, STATUS UPDATES, AND THE BAR: HOW SOCIAL NETWORKING IMPACTS CHARACTER AND FITNESS REQUIREMENTS

I. INTRODUCTION

Both Internet use and social networking use have increased dramatically in recent years, especially among younger generations. The social networking site Facebook, for example, currently has more than 350 million active users, half of whom log onto the site every day.[1] With the rise of these sites has come the rise of more professionally oriented sites, like LinkedIn and CasemakerX, a social networking site designed specifically for law students.[2] These sites allow users to connect and network with friends, colleagues, and acquaintances; create profiles with information about their personal lives, education, and employment history; and share status updates and photographs with other users in their networks.[3] Additionally, these social networking sites allow users to control the privacy of their profiles and the information posted throughout the sites.[4]

The increased use of social networking sites among law students has raised concerns among law firms, law schools, and law students themselves.[5] The use of social networking sites, combined with the permanence and accessibility of the Internet, raises issues about the content that law students post on the Internet, as well as the character they display in doing so. This can affect not only their future employment options[6] but

---

1. Facebook Statistics, http://www.facebook.com/press/info.php?statistics (last visited Oct. 25, 2010).

2. Lawriter Introduces the First Social Network for Law Students, Socialnetworkingnews.com, Aug. 6, 2008, http://www.collexis.com/news/documents/CasemakerXrelease_FINAL_080608.pdf.

3. *See, e.g.,* Profiles, LinkedIn Learning Center, http://learn.linkedin.com/profiles (last visited Oct. 25, 2010); Set Up a Profile, Facebook Help Center, http://www.facebook.com/help/?guide=set_up_profile. (last visited Oct. 25, 2010).

4. *See, e.g.,* Controlling How You Share, Facebook.com, http://www.facebook.com/privacy/explanation.php (last visited OCt. 25, 2010); Settings & Personalization, LinkedIn Learning Center, http://learn.linkedin.com/settings (last visited Oct. 25, 2010).

5. *See, e.g.,* Karen Sloan, *Professor Wants Law Students to Think Before They Tweet*, The National Law Journal, Oct. 21, 2009, http://www.law.com/jsp/article.jsp?id=1202434795449&Professor_Wants_Law_Students_to_Think_Before_They_Tweet; Carlo Longino, *Law Students Say Message Board Postings Are Costing Them Jobs*, TechDirt, Mar. 7, 2007, http://www.techdirt.com/articles/20070307/103126.shtml.

6. Sloan, *supra* note 5 (noting that "[d]uring orientation, we have a session on social networking and we make sure [law students] understand that law firms will go to their social networking sites.").

also their potential admission to the bar.[7] As such, candidates for admission to the bar should be required to disclose their use of social networking sites.

Part II of this comment will examine traditional and modern character and fitness requirements. Part III will summarize the legal scholarship surrounding bar applicants' disclosure of social networking use. Part IV of the comment will examine the Florida Bar's new character and fitness requirements on social networking, the first requirements of this kind. Finally, Part V will propose a standard requirement for disclosure of social networking use.

II. CHARACTER AND FITNESS

A. Traditional Character and Fitness Requirements

The American legal system has always required its lawyers to exhibit good moral character, although the particular requirements of establishing moral character have changed since the inception of the system.[8] During the eighteenth century, for example, "Massachusetts demanded references from three ministers; Virginia mandated certification from a local judge; and New York and South Carolina provided for examination by the court to determine whether the candidate was 'virtuous and of good fame' or manifested 'probity, honesty and good demeanor.'"[9] Standards of this type remained in place for decades, even when educational standards declined.[10] Despite their constant existence, however, these character requirements had little formal oversight; the enforcement of character requirements fell to local jurisdictions, a practice that became impractical as the legal profession grew and lawyers become more mobile.[11]

As the nineteenth century ended, "the recently-founded American Bar Association, joined by various state and local organizations as well as law schools, began spearheading a campaign for higher professional standards."[12] Although this effort centered on stronger educational and ethical requirements, it necessarily implicated character and fitness screening, as well.[13] The adoption of entry procedures like probationary periods, inves-

---

7. The Florida Bar has recently adopted a policy mandating investigation of social networking sites for certain "red flag" applicants. Jan Pudlow, *On Facebook? FBBE may be planning a visit*, THE FLORIDA BAR NEWS (Sept. 1, 2009), http://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/8c9f13012b96736985256aa900624829/d288355844fc8c728525761900652232?OpenDocument.

8. Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 Yale L.J. 491, 496 (1985).

9. *Id.* at 496-97.

10. Rhode, *supra* note 8, at 497.

11. *Id.* at 498.

12. *Id.* at 500.

13. *Id.*

tigation by character committees, and candidate interviews demonstrated this commitment to more stringent character requirements.[14]

Despite the claims of character concerns, however, it appears that character requirements worked less to exclude lawyers of poor character than to exclude certain undesirable groups.[15] In fact, "[m]uch of the initial impetus for more stringent character scrutiny arose in response to an influx of Eastern European immigrants, which threatened the profession's public standing."[16] Under character and fitness guidelines in the early twentieth century, only "undesirable" people had significant trouble meeting the requirements.[17] Although some members of the bar emphasized that an applicant's background and contacts often had little correlation with character, the bias nonetheless remained in the early part of the twentieth century.[18]

The modern character requirement is much less driven by such biases, and modern justifications for the requirements "not only prevent irrational discrimination, but also require legitimate explanations for exclusion."[19] Common rationales for character requirements include protecting clients from careless practitioners and making the profession's self-policing nature as effective as possible by ensuring that only ethical practitioners are admitted.[20] The character requirement remains part of the admission process for each state bar, even though no universal definition of "character" exists.[21]

According to the 2007 Comprehensive Guide to Bar Admissions:

> [t]he "character and fitness" screening is intended to evaluate [character] elements as they "relate to the practice of law" and is meant for "protection of the public and the system of justice" so that those admitted are "worthy of the trust and confidence clients may reasonably place in their lawyers."[22]

Although the standards may change from state to state, at their root they work to ensure that "the applicant's record of conduct establishes him

---

14. Rhode, *supra* note 8, at 500.
15. Aaron M. Clemens, *Facing the Klieg Lights: Understanding the "Good Moral Character" Examination for Bar Applicants*, 40 Akron L. Rev. 255, 260 (2007).
16. Rhode, *supra* note 8, at 499.
17. Clemens, *supra* note 15, at 260.
18. Rhode, *supra* note 8, at 499.
19. Clemens, *supra* note 15, at 267.
20. *Id*. at 268-70.
21. *Id.* at 257.
22. Dina Epstein, *Have I been Googled? Character and Fitness in the Age of Google*, *Facebook, and YouTube*, 21 Geo. J. Legal Ethics 715, 717 (2008) (citing NAT'L CONFERENCE OF BAR EXAM'RS & AM. BAR ASS'N SECTION OF LEGAL EDU. AND ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS, at vii (2007), *available at* http://www.ncbex.org/fileadmin/mediafiles/downloads/Comp_Guide/2007CompGuide.pdf).

as trustworthy, honest, diligent, and reliable."[23] In making this determination, bar examiners investigate such information as "unlawful conduct, academic or professional misconduct, acts of dishonesty, fraud or misrepresentation, neglect of financial responsibilities or professional obligations, and drug or alcohol dependency."[24] Since many states do not articulate their standards for determining character and fitness, however, the consideration and weight given to these issues remains ambiguous.[25] In fact, bar examiners deny admission to the bar not only because of activities that openly display a lack of proper character but also because of activities and beliefs that demonstrate a propensity for immoral behavior.[26]

B. Changing Requirements in the Internet age

The emphasis on self-reporting in bar applications presents certain concerns in light of the rise in available information in the Internet age—information that can include "[r]uminations and rants posted on blogs, discussions of sexual orientation and experiences, and candid party photos."[27] With this rise in information has come a rise in searches for that information.[28] In 2006, for example, 22% of adults had searched for information about themselves online; by 2007, the number had risen to 47%.[29]

The rise in available personal information can negatively impact one's career, as law schools increasingly attempt to make clear.[30] The often ambiguous character standards used by bar examiners, however, leaves open the question of whether personal information found online will be used to determine the character of bar applicants.[31] Given the historical overreaching of bar examiners, however, "there is reason to believe that as bar examiners become increasingly comfortable searching for this newly available 'private' information, this increase in private information online will impact admission."[32] This raises concerns about what information might be

---

23. Epstein, *supra* note 22, at 717.
24. Epstein, *supra* note 22, at 717.
25. *Id*. at 718-19.
26. In 1999, Matthew Hale was denied admission to the Illinois State Bar because his anti-Semitic and white supremacist beliefs demonstrated a propensity for immoral behavior. Similarly, "a law student who denounced his law school's administration in newspaper was denied admission to the bar because his controversial behavior was recast as a propensity for illegal activity." *Id.* at 721-22.
27. *Id.* at 724.
28. *Id.* at 723.
29. Epstein, *supra* note 22, at 723-24.
30. *Id*. at 725 (noting, in particular, that a potential employer confronted a Georgetown University Law Center student with objectionable Facebook photos).
31. *Id.*
32. Epstein, *supra* note 22, at 725.

used and to what extent it will be considered in evaluating bar applicants' character.[33]

III. PROPOSALS AND CRITICISMS OF ONLINE ACTIVITY DISCLOSURE

The increase in information available online has prompted several proposals for bar admission standards relating to this information. Michelle Morris, for example, has proposed a requirement that students submit a three-year history of online aliases and related information on both law school and bar applications.[34]

Morris' proposed disclosures stem from the idea that "[a]spiring lawyers need to understand that Internet activity is public behavior and conduct themselves accordingly."[35] Many law students, especially those in the millennial generation, perceive online activity as separate from, and somehow less "real" than, communication and activity in the physical world.[36] To effect this change in perception and behavior among law students, Morris proposes the disclosure of not only online aliases but also "e-mail addresses, IP addresses, blogs, and social networking site profile information" over a three-year period.[37]

Morris' proposed disclosures focus on both anonymous communications and communications made under applicants' own names,[38] which creates a potential for abuse. Anonymous communications may allow for applicants to engage in immoral or unethical behavior to a greater extent than would an applicant posting under his actual name; in fact, Morris argues, the anonymous poster may be "less fit for admission because he not only engages in disqualifying behavior, he lies (even if by omission) about his association with it."[39] Morris does not consider, however, that information posted under applicants' own names is the type of information that would actually indicate lack of regard for confidentiality (and thus lack of fitness to practice). Communications posted under a pseudonym implicitly acknowledge the need for confidentiality in the communication. Although the communication itself may reflect "the lack of respect for the rights of others" that seems to be Morris' primary concern,[40] it does demonstrate a need for confidentiality in certain communications.

---

33. *Id.* at 726.
34. Michelle Morris, *The Legal Profession, Personal Responsibility, and the Internet*, 117 Yale L.J. (Pocket Part 54 2007).
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. Morris, *supra* note 34.
40. *Id.*

Furthermore, the examination of anonymous communications would open the door for bar examiners to investigate activity conducted under a privacy filter. Morris' assertion "that Internet activity is public behavior"[41] implies that all Internet activity is public, regardless of privacy filters placed on it. If bar examiners could require bar applicants to identify their online pseudonyms, what would stop them from requiring applicants to make their filtered information available to the bar? The principles underlying Morris' proposed disclosures—that online communications are public no matter how they are made—would support such an overreach.[42]

Other criticisms of Morris' proposal include Jonathan Sabin's argument that Morris' plan, applied to state law schools (and, by extension, state bars), would violate the First Amendment right to free association through expressive associations.[43] Sabin argues that, contrary to Morris' characterization of the Internet as a playground for those seeking to extend adolescence, the Internet is a series of expressive associations that "has emerged as the modern public commons—a space where young people freely and frequently engage in a variety of social and political discourse."[44]

Sabin argues that social networking sites like Facebook are expressive associations entitled to First Amendment protections because:

> Facebook literally organizes groups of individuals according to educational, geographic, political, and religious categories. In this sense, Facebook is the digital analog to traditional organizations such as the NAACP and Boy Scouts. Also, like traditional organizations, Facebook has formalized membership procedures whereby individuals must create an elaborate user profile in order to join a particular network. The Facebook community also exercises a degree of selectivity because users can restrict access to their profiles. Finally, Facebook activity is distinctly "expressive" because members constantly "take positions on public questions" through "Wall" posts, "Status Updates," and personal notes.[45]

Even though the bulk of Facebook activity is personal and trivial, it is still entitled to protection because the only requirement is that the activity be expressive.[46]

---

41. *Id.*
42. *See id.*
43. Jonathan Sabin, *Every Click You Make: How the Proposed Disclosure of Law Students' Online Identities Violates Their First Amendment Right to Free Association*, 17 J.L. & POL'Y 699 (2009).
44. Sabin, *supra* note 43, at 705.
45. *Id.* at 723-24.
46. *Id.* at 724.

Sabin further argues that Morris' proposal "creates a chilling effect because its unlimited and indiscriminate scope would create serious burdens on the associational freedoms of law students."[47] Both the three year time period and the expansive reach of the disclosures would leave applicants with no guidance of how to control their activities and could force them to unnecessarily restrict their speech for fear of running afoul of social networking guidelines imposed by an outside party.[48] Sabin criticizes Morris' proposal for its stated objective to discourage Internet speech—a serious concern should the plan be applied to state law schools or bar associations.[49]

Sabin also criticizes Morris' proposal for its overreach—that is, "because it does not discriminate between blogs with a history of user abuse, such as Autoadmit.com, and blogs with no such history of user abuse."[50] Sabin depicts Morris' proposal as requiring disclosure of online association,[51] which mischaracterizes Morris' intent. In fact, Morris proposes to disclose communication—to ask potential lawyers to "take credit (or blame) for their own words."[52] Because online expression does reflect bar applicants' adherence to necessary standards of character and fitness, and because online expression is both public and relatively permanent, requiring disclosures of online activity to determine bar applicants' character and fitness would likely be a compelling state interest.[53]

Furthermore, a more limited form of disclosure would be unlikely to implicate First Amendment concerns. Because of social networking sites' increased attention to privacy settings,[54] most law students are unlikely to maintain fully public profiles on social networking sites. In fact, law schools regularly warn students to carefully maintain their online profiles, and many students already do so because of the impact online profiles might have on their future employment.[55] Therefore, a form of disclosure whose scope was limited to public activity over a short time period, for example, would have a permissible scope.[56]

Dina Epstein, meanwhile, worries that "the ambiguity in character and fitness reviews will dampen, and may already have dampened, the intellectual exchange on the Internet."[57] Without knowing what kind of informa-

---

47. *Id.*
48. Sabin, *supra* note 43, at 726.
49. *Id.* at 728.
50. Sabin, *supra* note 43, at 729.
51. *Id.*
52. Morris, *supra* note 34.
53. Baird v. State Bar of Ariz., 401 U.S. 1, 7 (1971).
54. *See supra* note 4.
55. *See supra* note 5 and accompanying text.
56. *Compare* Shelton v. Tucker, 364 U.S. 479, 388 (1960) (disclosure of all associations over a five-year period was "completely unlimited").
57. Epstein, *supra* note 22, at 726.

tion may be made available to bar examiners, she argues, law students will self-censor to avoid the possibility of disclosing something the bar might consider inappropriate.[58] Unlike Sabin, who would accept a policy of "traceable anonymity" for online communication,[59] Epstein proposes a policy that would put all online activity beyond the reach of bar examiners.[60] Because it lacks the context of real-world situations, she argues, online activity is inherently impossible to evaluate fairly or accurately.[61]

Epstein's proposal ignores the fact that online communication, although it lacks the context of real-world situations, is often a substitute for real-world communication, or at the very least an offshoot of real-world communication. Furthermore, the accessibility and permanence of online communication gives it a different character than real-world communication; a questionable conversation in the real world may quickly fade from memory, but a similar conversation online may appear in Internet searches and archives for years. Lack of regard for the permanence and accessibility of Internet activity may raise greater concerns about the character and fitness of a bar applicant than the actual opinions expressed, whether online or in the real world.

IV. FLORIDA BOARD OF BAR EXAMINERS' NEW SOCIAL NETWORKING REQUIREMENTS

A. The Florida Rule

In July 2009, the Florida Board of Bar Examiners (FBBE) adopted a policy that required investigation into social networking use of certain "red flag" bar applicants:

> • Applicants who are required to establish rehabilitation under Rule 3-13 "so as to ascertain whether they displayed any malice or ill feeling towards those who were compelled to bring about the proceeding leading to the need to establish rehabilitation;"
> • Applicants with a history of substance abuse/dependence "so as to ascertain whether they discussed or posted photographs of any recent substance abuse;"
> • Applicants with "significant candor concerns" including not telling the truth on employment applications or resumes;

58. *Id.*
59. Sabin, *supra* note 43, at 731.
60. Epstein, *supra* note 22, at 727.
61. *Id.*

> • Applicants with a history of unlicensed practice of law (UPL) allegations;
> • Applicants who have worked as a certified legal intern, reported self-employment in a legal field, or reported employment as an attorney pending admission "to ensure that these applicants are not holding themselves out as attorneys;"
> • Applicants who have positively responded to Item 27 of the bar application disclosing "involvement in an organization advocating the overthrow of a government in the United States to find out if they are still involved in any related activities."[62]

In adopting the policy, FBBE refined a suggestion from its Character and Fitness Commission that it "consider expanding its current review of personal Web sites during background investigations 'as deemed necessary' and determine whether a question should be added to The Florida Bar application to require that all such sites be listed and access granted to the board."[63] FBBE rejected the proposal to require investigation of all applicants, reasoning that requiring all applicants to provide access to social networking sites would prompt them to remove information the bar examiners might consider objectionable.[64] Instead, FBBE limited its investigation to categories of applicants it already considers problematic.[65]

B. The Florida Rule's failings

FBBE's policy has met with criticism from around the Internet because it requires disclosure of too much information from too small a group. The restriction of the policy to "red-flag" applicants is problematic because these applicants' social network use is unlikely to provide more information for bar examiners than the activities giving rise to the red flags themselves.[66] As even FBBE has noted, the knowledge that bar examiners will be investigating their social networking profiles would prompt bar applicants to delete any objectionable information,[67] so this restriction would accomplish nothing but prompting "red-flag" applicants to minimize the information available on their social networking profiles. In this light, there is no ascertainable difference between requesting social

---

62. Pudlow, *supra* note 7.
63. *Id.*
64. *Id.*
65. *Id.*
66. Jan Pudlow, *Examiners' Facebook policy sets cyberworld all atwitter*, Sept. 15, 2009, http://www.floridabar.org/divcom/jn/jnnews01.nsf/Articles/83F1CF3224405117852576250069E228 (quoting Carolyn Elefant of Law.com's "Legal Blog Watch").
67. Pudlow, *supra* note 7.

network access to "red-flag" applicants and requesting such access to all applicants.

Furthermore, FBBE's policy overreaches by requiring what appears to be unfettered access to applicants' social networking sites.[68] This policy will give FBBE "access to information it could never legally ask for," such as religious affiliation and sexual orientation.[69] Furthermore, it would allow FBBE access to aspects of the profiles of other applicants who are not red-flagged but are merely friends with red-flagged applicants.[70] FBBE's policy would also likely run afoul of the terms of service of the social networking sites it seeks to access.[71]

Requesting access to applicants' social networking sites would not only draw an unnecessary distinction between red-flagged applicants and other applicants but would also allow FBBE to obtain information beyond what it requires to adequately assess these red-flagged applicants. The potential for abuse far outweighs the minimal advantages FBBE might gain in this investigation, and as a result, the policy fails.

V. PROPOSED SOCIAL NETWORKING DISCLOSURES

Although FBBE's policy fails to adequately address the concerns presented by social network use, this does not mean a social network policy is unnecessary or impossible for bar examiners to implement. Candidates for the bar should be required to disclose their current social networking usernames and update this information as they would update any information on their bar applications, but they should not be forced to allow bar examiners access to information placed under privacy filters.

Character and fitness committees should only access public information in their assessment of bar applicants' online profiles. Information placed under privacy filters shows awareness for the need to keep sensitive information confidential. This is a primary concern in character and fitness, as an essential characteristic of practicing lawyers is concern for confidentiality of information. Therefore, information placed under a privacy filter that shows the necessary concern for confidentiality should not be accessible to character and fitness committees.

In addition, requiring candidates to disclose certain information would clarify what information character and fitness committees seek. A chief concern about character and fitness evaluation is the lack of clarity about

---

68. *See, e.g.,* Andrew Moshirnia, *Florida Nukes the Fridge: Facebook, the Bar, and the Latest Entry in the Social Networking Hijacking Saga*, Citizen Media Law Project, Sept. 2, 2009, http://www.citmedialaw.org/blog/2009/florida-nukes-fridge-facebook-bar-and-latest-entry-social-network-hijacking-saga.

69. *Id.*

70. *Id.*

71. *Id.*

what criteria are used to determine a bar applicant's character and fitness,[72] but a comprehensive social networking policy could give applicants adequate notice of the online information with which bar examiners are particularly concerned, which might give them better notice of offline information that might be of similar importance to bar examiners. It would also prompt bar applicants to be more responsible in their social networking use, a value law schools already try to impress upon their students because of Internet searches by potential employers.[73]

Unfortunately, not all social networking information can be placed under a privacy filter. Facebook's latest privacy upgrade, for example, eliminated certain privacy features entirely.[74] Although Facebook once allowed a user to place all user information other than name and network under a privacy filter, the new policy makes public a user's primary photo, gender, geographic area, friends list, and fan pages.[75] This could present a problem for Facebook users who must make their public information accessible to bar examiners; these bar applicants cannot filter their friends or their fan pages, both of which might present concerns about an applicant's character. This concern could be avoided, however, by a policy that prohibits bar examiners from considering information that an applicant cannot place under a privacy filter.

Furthermore, law students are already made aware of the need to protect their online identities. Many employers access public social networking profiles of their potential employees, and many employers run Google searches of their potential employees—and law schools make students aware of this.[76] Law schools prompt students to refine their Internet presences within a few months of beginning law school, and many students take this advice because of the effect it may have on their job searches.[77] A policy that requires bar applicants to submit information about their social networking use accomplishes the same goal as the committees running Internet searches of candidates (much like potential employers would), but it places the burden on candidates to be candid and open in their applications. This is consistent with other aspects of the bar application process, which requires applicants to provide affirmative representations of information that would be accessible through other means.[78]

---

72. *See, e.g.,* Epstein, *supra* note 22, at 723-24.

73. Sloan, *supra* note 5.

74. Megan J. Erickson, *New Facebook Privacy Policy May Catch Some Users by Surprise*, Erickson's Blog on Social Networking and the Law, Dec. 17, 2009, http://www.socialnetworkinglawblog.com/2009/12/new-facebook-privacy-policy-may-catch.html.

75. *Id.*

76. Sloan, *supra* note 5.

77. *Id.*

78. For example, bar applicants must provide information on their traffic tickets and prior mailing addresses. Morris, *supra* note 34.

Moreover, disclosure of social network use is increasingly important given the popularity of such sites. Facebook, with 350 million users,[79] often functions as an offshoot of real life; users document real-life events, form networks, and interact with other users, both contacts from real life and contacts from the Internet.[80] Many publications have either mentioned the need for online privacy or given instructions on how to create this privacy.[81] Furthermore, a lack of awareness of the need for privacy on the Internet may raise valid concerns of a similar lack of awareness in the real world; that is, a bar applicant who does not understand the need to make photographs from last night's party inaccessible to the general Internet population may likewise not understand the need to keep a client's information confidential. Because of the increasing interplay between online activity and real-world activity, bar applicants' online activity is of increasing importance to bar examiners.

VI. CONCLUSION

As social networking use increases among law students, and as the interplay between online communication and real-world communication increases within the legal community, there is a growing need for a comprehensive social networking policy for bar applicants. Policies that require complete access to applicants' profiles are overreaching and unrealistic; they may actually prompt users to self-censor information by removing it from their profiles entirely, rather than placing it under a privacy filter. This advances neither bar examiners' character and fitness concerns nor the value of applicants' use of social networking sites.

Rather, a policy that requires bar applicants to submit information about their social networking use but does not require them to permit access to anything but public information advances applicants' candor toward the bar examiners, makes them aware of the professional need to keep sensitive information confidential, and allows bar examiners to adequately examine applicants' behavior in a public forum. In the interest of advancing character and fitness examination in the Internet age, bar applicants should be required to submit current and accurate information about their social networking use.

Amy-Kate Roedger

---

79. Facebook, *supra* note 1.

80. Sabin, *supra* note 43, at 708.

81. *See, e.g.,* Nick O'Neill, *10 New Privacy Settings Every Facebook User Should Know*, All Facebook, Dec. 15, 2009, http://www.allfacebook.com/2009/12/facebook-privacy-new; Kevin Bankston, *Facebook's New Privacy Changes:The Good, The Bad, and The Ugly*, Electronic Frontier Foundation, Dec. 9, 2009, http://www.eff.org/deeplinks/2009/12/facebooks-new-privacy-changes-good-bad-and-ugly; Rafe Needleman, *How To Fix Facebook's New Privacy Settings*, Rafe's Radar, Dec. 10, 2009, http://news.cnet.com/8301-19882_3-10413317-250.html.

AWKWARD SITUATION: "I'M SORRY MOM BUT IT IS AGAINST THE LAW FOR ME TO ANSWER THAT"

I. INTRODUCTION

A. Overview

Justice Holmes famously opined, "[w]hat usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not."[1] Justice Holmes's wisdom remains relevant: customs or rules either have the intrinsic value of reason or they do not. Evidence that a rule has been enacted and followed by people for just a few days or for centuries has no bearing on whether or not the rule is "fixed by a standard of reasonable prudence."[2] Thus, a person violating an unreasonable rule deserves praise rather than punishment if that person is acting according to a "fixed . . . standard of reasonable prudence."[3]

Many law students provide family members and close friends with rudimentary legal advice.[4] Although this is a common occurrence, few law students, excluding those that have taken a professional responsibility course,[5] are aware that this is considered the unlicensed practice of law (UPL). A law student is not authorized to give legal advice, and in doing so violates not only state law[6] but also the Model Rules of Professional Conduct (MRPC).[7] However, the Preamble to the MRPC proclaims that "[t]he Rules of Professional Conduct are rules of reason. They should be

1. Texas & P. Ry. Co. v Behymer, 189 U.S. 468, 470 (1903).
2. *Id.*
3. *Id.*
4. *See* Nick Johnson, *Unauthorized Practice By Law Students: Some Legal Advice About Legal Advice*, 36 TEX. L. REV. 346, 346 (1958) (explaining that, "Virtually every law student must face this problem on some occasion...because friends and relatives periodically ask them for legal opinions."). The scope of this comment is limited to instances where law students provide fundamental legal advice, and does not purport to endorse law students answering complicated legal conundrums; *see infra* note 68 and accompanying text.
5. Josh Ard, *Staying in Bounds Preparing Law Students to Recognize the Unauthorized Practice of Law*, 81 MICH. B. J. 48, 48 (2002) (discussing that professional responsibility courses give great attention to UPL and also address the sanctions that could occur for UPL).
6. See Ala. Code § 34-3-6 (2008) (defining who may practice law as "[o]nly such persons as are regularly licensed have authority to practice law.").
7. *See* MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. 2 (2009) (stating that "[t]he definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons.").

interpreted with reference to the purposes of legal representation and of the law itself . . . ."[8] The rules are intended to be reasonable and thus are not entirely concrete. Rather, they are "fixed by a standard of reasonable prudence"[9] that transcends the actual text of the rules. Although this purpose pertains directly to the MRPC, it is safe to assume that reason plays some, if not a large, role in the promulgation of state statutes regarding UPL. Moreover, even in the unlikely scenario that the legislators arbitrarily designed a statute devoid of logic and reason, courts will interpret the statute according to the precepts of reason because, as the Supreme Court of Pennsylvania has stated, "[s]atisfaction in the existence of laws, however efficient and adequate they may be, is wholly illusory if they are not properly and wisely interpreted."[10] Overall, allowing a law student to provide family and close friends with fundamental legal advice is reasonable, pragmatic, and unlikely to cause systemic harm to society. [11] Hence, the activity comports with the intrinsic standards of reason discussed above and should not be prohibited.

B. What is the Unauthorized Practice of Law

To understand what constitutes UPL it is necessary to look at a definition of who may practice law.[12] In Alabama, for example, "[o]nly such persons as are regularly licensed have authority to practice law."[13] Law students are not licensed and have not passed the bar exam. Furthermore, students may not have completed the MPRE (ethics exam) or sat before the character and fitness committee. Thus, law students are not "such persons as are regularly licensed",[14] which means students are not permitted to give legal advice.[15]

Additionally, in order to have a complete understanding of UPL it is essential to find a definition of the "practice of law," which is defined by state statute and explained by case law.[16] The definition may differ from

8. MODEL RULES OF PROF'L CONDUCT pmbl. (2009).
9. *Texas & P. Ry. Co.*, 189 U.S. 468, 470.
10. Shortz v Farrell, 193 A. 20, 24 (Pa. 1937).
11. *See infra* note 39 and accompanying text.
12. This comment will focus primarily on Alabama statutes regarding the unlicensed practice of law. *See infra* notes 13, 14, 24, 28. Additionally, the comment references the Model Rules of Professional Conduct, which are exemplary rules that may be enacted in whole or only in part by the states. These rules are a useful common example of what states may employ as ethics guidelines.
13. ALA. CODE § 34-3-6 (2008); *see also* Johnson, *supra* note 4 at 347 (explaining that "[c]ourts almost universally declare that the reason for limiting the practice of law to licensed lawyers is to protect the public from the incompetent or unethical practitioner.").
14. ALA. CODE § 34-3-6.
15. ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 85 (1932) (discussing that the student is not allowed to provide professional functions such as giving legal advice until the student is admitted to the bar).
16. *See* MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. 2 (2009) (stating that "[t]he definition of the practice of law is established by law and varies from one jurisdiction to another.").

state to state, but the general idea is that if a person is not admitted to the bar and engages in giving legal advice or providing legal services, then that person is committing UPL.[17] Furthermore, a state may not require a course of conduct, rather a single act may constitute UPL. [18] Also, a state may believe that "[i]n determining what is the practice of law it is well settled that it is the character of the acts performed and not the place where they are done that is decisive."[19]

According to the United States Supreme Court, the "practice of law" includes "[p]ersons acting professionally in legal formalities, negotiations or proceedings by the warrant or authority of their clients"[20] who for all relevant purposes "may be regarded as attorneys-at-law within the meaning of that designation as used in this country."[21] This is a highly formalistic definition of what constitutes the "practice of law," and it provides insight into what types of activities a court will deem the "practice of law". If a person represents another person "professionally in legal formalities, negotiations or proceedings"[22] while proclaiming to be acting on behalf of a client, then that person is unequivocally engaging in the "practice of law." A law student providing a family member or close friend legal advice does not rise to the threshold of the Supreme Court's rigid definition,[23] but the activity does violate state laws[24] and the MRPC.[25] Nevertheless, the Supreme Court's strict definition[26] makes clear that if a student claims to be representing a client in some type of legal proceeding or transaction, the student is indisputably engaging in the "practice of law."

---

17. *See* Johnson, *supra* note 4 at 348 (explaining that "[a]s a general proposition, the 'practice of law' encompasses any activity, including the giving of advice, which requires knowledge of the law".).

18. In Re Baker, 85 A.2d 505, 513-514 (N.J. 1951) (discussing that it is not necessary that a person be engaged in a course of conduct to be engaged in the "practice of law").

19. *Id.* at 514-515.

20. Savings Bank v Ward, 100 U.S. 195, 199 (1879).

21. *Id.*

22. *Id.*

23. When a law student conveys advice to a loved one there is no attorney client relationship and the activity is for the purposes of disseminating basic legal knowledge, rather than representation in a formal proceeding or transaction, which falls short of the Supreme Court's definition; *see also* Johnson, *supra* note 4, at 346 (explaining that giving free legal advice may constitute the practice of law under certain circumstances but "not because law students are tempted to open law offices or appear in court for clients".).

24. ALA. CODE § 34-3-6 (2008) (Which defines who may practice law as "Only such persons as are regularly licensed have authority to practice law.").

25. *See* MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. 2 (2009) (Stating that "[t]he definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons.").

26. *See supra* text accompanying notes 20-22.

Unfortunately there is not one clear, concise, and concrete definition of what constitutes the "practice of law."[27] A law student or certified lawyer must look to state statutes to determine the activities that exemplify the "practice of law," which may be time consuming due to the dense list of activities found in some state statutes.[28] Surprisingly, a law student giving basic legal advice to family members and close friends does not fall within the formalistic definitions provided by the Supreme Court or by Alabama's statute.[29] Yet a student still violates state law by giving legal advice because she is not admitted to the state bar.[30] The informal nature of a law student transferring fundamental legal nuggets to family and close friends suggests that the student should only be admonished or slightly reprimanded. However, the harsh reality is that the hapless student can be penalized by the courts or the state bar. [31]

C. Primary Reasoning Underlying UPL Rules: Is it necessary?

"The reason for prohibiting the unauthorized practice of the law by laymen is not to aid the legal profession but to safeguard the public from the disastrous results that are bound to flow from the activities of untrained and incompetent individuals. . . ."[32] The theory behind the rules is "that the cost society pays by restricting competition through licensing is

---

27. See supra note 16; see also Estate of Marks v. Estate of Marks, 957 P.2d 235, 240 (Wa. Ct. App. 1998) (defining "practice of law" to include legal advice and counsel and the preparation of legal instruments); In re Duncan, 65 S.E. 210, 211 (S.C. 1909) (discussing that that it is obvious that the practice of law is not limited to cases in court, and providing a lengthy definition that includes the preparation of pleadings and all advice to clients and actions taken on a client's behalf connected to the law); Gary A. Munneke, A Nightmare on Main Street (Part MXL): Freddie Joins an Accounting Firm, 20 Pace L. Rev. 1, 17 (1999) (contemplating how the profession as a whole should revise and broaden the definition of what constitutes the practice of law).

28. Ala. Code § 34-3-6(2008) (Which states:

For the purposes of this chapter, the practice of law is defined as follows:

> Whoever,(1) In a representative capacity appears as an advocate or draws papers, pleadings, or documents, or performs any act in connection with proceedings pending or prospective before a court or a body, board, committee, commission, or officer constituted by law or having authority to take evidence in or settle or determine controversies in the exercise of the judicial power of the state or any subdivision thereof; or (2) For a consideration, reward, or pecuniary benefit, present or anticipated, direct or indirect, advises or counsels another as to secular law, or draws or procures or assists in the drawing of a paper, document or instrument affecting or relating to secular rights; or (3) For a consideration, reward or pecuniary benefit, present or anticipated, direct or indirect, does any act in a representative capacity in behalf of another tending to obtain or secure for such other the prevention or the redress of a wrong or the enforcement or establishment of a right; or (4) As a vocation, enforces, secures, settles, adjusts, or compromises defaulted, controverted or disputed accounts, claims or demands between persons with neither of whom he is in privity or in the relation of employer and employee in the ordinary sense; is practicing law.)

29. *See supra* notes 13-14, 20-22, and accompanying text.

30. *See* ALA. CODE § 34-3-6(2008) (stating "[o]nly such persons as are regularly licensed have authority to practice law.").

31. *See infra* notes 38-43.

32. In re Baker, 85 A.2d 505, 511 (N.J. 1951)

worth the assurance of quality that licensing brings."[33] Thus, the theory suggests that society is comfortable with prohibiting unlicensed individuals from giving basic legal advice due to the fear that the advice will be meritless and lead to larger problems.[34] But is that entirely true? It seems that family members and close friends would be more than willing to heed fundamental advice from trustworthy law students. After all, the family member or close friend already has a rapport with the student, and it will be convenient for the curious family member to discuss these matters at family gatherings and barbecues. Such a convenient exchange between student and a loved one serves the interests of pragmatism and reason because the student can provide quick concise answers to fundamental legal questions, which will prevent wasting the time of an experienced lawyer and satisfy the loved one's curiosity. [35] As Justice Holmes stated, "what ought to be done is fixed by a standard of reasonable prudence."[36] Unfortunately for the family member or close friend that seeks basic legal advice, the law student that shares a special relationship with them is prohibited from doing what is reasonable and "ought to be done."[37] These contentions will be developed further in Section II below.

D. Penalties for engaging in UPL

Under Alabama law, UPL is viewed as a criminal misdemeanor.[38] It is unlikely that a prosecutor will pursue the charges, with respect to the informal scenario where a law student gives basic legal advice to kin or best friends.[39] But that does not mean the student will escape punishment from the bar. For example, *In re Maryland* involved a woman who had completed law school and passed the bar exam, but was not admitted to the bar because of character and fitness issues.[40] The woman was not a certified lawyer but nevertheless gave substantive legal advice to a pseudo client.[41] Consequently, she was denied admission to the Louisiana State

33. Soha F. Turfler, *A Model Definition of The Practice of Law: If not now When? An Alternative Approach to Defining the Practice of Law,* 61 WASH. & LEE L. REV. 1903, 1923 (2004).
34. *Id.*
35. *See infra* notes 52-55, for a more in depth discussion of the benefits of allowing the student to answer basic legal questions.
36. Texas & P. Ry. Co. v. Behymer, 189 U.S. 468, 470 (U.S. 1903).
37. *Id.*
38. *See* Ala. Code § 34-3-7 (2008) (Stating "Any person, firm or corporation who is not a regularly licensed attorney who does an act defined in this article to be an act of practicing law is guilty of a misdemeanor and, on conviction, must be punished as provided by law".)
39. *See* Munneke, *supra* note 27 (discussing that in some cases it is virtually impossible to prosecute people for UPL, but that a law student going door to door offering to draft wills for people will most likely be prosecuted); Johnson, *supra* note 4, at 348-349 (discussing that it is socially desirable for all people to know some law and that it would be impossible to prosecute all people who freely give legal opinions).
40. In re Maryland, 882 So.2d 548 (La. 2004)
41. *Id.* at 549.

Bar.[42] This case illustrates the severe penalties a person that is not admitted to the bar, which includes a law student, may face for engaging in UPL. Interestingly, lay people that are unaware of the legal implications regarding certain activities may also engage in UPL and be held to the same standards as a lawyer admitted to the bar.[43]

Other law students may fall victim to the same lack of knowledge,[44] even if they have taken a professional responsibility course, due to the complexities and ambiguities of state statutes and the MRPC.[45] Furthermore, it is relatively easy to outline the rules regarding UPL, but it is difficult to explain the boundaries and when those boundaries have been crossed.[46] The problem is further compounded by the fact that "little attention is devoted to UPL issues in core courses."[47] Accordingly, law students who have been involved in clinical programs are the most well equipped to ascertain what constitutes "the practice of law" and avoid possible sanctions.[48] Unlike students that have only been exposed to the rules in a professional responsibility course, a clinical student has seen the rules in action, which underscores the importance of law students being exposed to the practical as well as the theoretical.[49]

This comment seeks to address the issues regarding law students providing family members and close friends with legal advice.[50] The comment proposes that because rules are to be interpreted using the principles

---

42. *Id.* (The facts of the case also provide that she drafted pleadings and was compensated for her work, but the court does not disclose which factor or factors exclusively lead to the court's ultimate conclusion. But it implies that if Maryland had merely provided legal advice, instead of engaging in professional conduct with respect to formal proceedings, her punishment may not have been as severe.)

43. *Estate of Marks*, 957 P.2d at 241 (involved a woman filling in the blanks from a will kit issued by the bar which was deemed the practice of law and because of a conflict of interest woman that completed predetermined form was held to same standard as a lawyer); *see also* Ard, *supra* note 5, at 48 (Stating "[g]enerally, people holding themselves out as members of a licensed profession are held to the same standard of that profession…".).

44. *But Cf.*, Ard, *supra* note 5 at 48 (discussing that most law students presumably know that UPL carries sanctions).

45. *See supra* notes 13-14, 16, 20-22, 28 and accompanying text (which illustrate that definitions of what constitutes the practice of law vary according to jurisdiction, and state statutes can be dense and difficult to comprehend).

46. Ard, *supra* note 5at 48.

47. Ard, *supra* note 5 at 48.

48. Ard, *supra* note 5 at 49.

49. Woodrow Patterson, *The Legal Aid Clinic—Benefits to Lawyers, to Law Students, and to Indigents*, 21 TEX. L. REV. 423, 427 (1943) (discussing that law schools are usually criticized because students get all theory and no practical experience and clinics allow the student to gain invaluable practical experience).

50. It is important to note that this comment will focus primarily on first and second year law students that have not taken a Professional Responsibility course. However, the comment will make references to students that have taken a Professional Responsibility course, in order to augment the analysis. Also it will discuss students who have participated in legal aid clinics, which include mostly third year students. Thus, although the comment will predominantly concern first and second year students, it will include third year students as well.

of reason,[51] a law student providing fundamental legal advice to family members and close friends is not only reasonable, but pragmatic, convenient, and harmless.[52] This comment will display that it is not unethical for law students to provide legal advice to loved ones because the majority of law students possess a fresh and considerable understanding of the law,[53] Pareto Improvement[54] and efficiency will result from the practice, the practice will serve the interests of graciousness and help those in need, [55] people are aware that law students are merely students and a student's advice should be taken lightly,[56] and many students gain invaluable practical experience in legal aid clinics and should be permitted to help loves ones.[57]

II. REASONS TO ALLOW THE DISSEMINATION OF BASIC LEGAL ADVICE BY LAW STUDENTS

A. Knowledge: General vs. Specialized

According to the MRPC, in order for an attorney's knowledge to be deemed ethically palatable, the attorney must have a proficiency level comparable to that of a general practitioner.[58] Under the model ethics guidelines, an attorney does not necessarily have to be an expert to advise a client, and "[a] lawyer can provide adequate representation in a wholly novel field through necessary study."[59] So lawyers will most likely not be reprimanded for giving advice in area in which they are initially unfamiliar, as long as the lawyer dedicates some time to familiarizing herself with

---

51. *See supra* text accompanying notes 1-3, 6.

52. Johnson, *supra* note 4, at 349 (discussing that simple advice, with little or nothing financially at stake, does not threaten the public welfare and that lawyers feed critics by insisting that every task, even remotely involving the law, must be performed by an attorney); *see also* Munneke, *supra* note 27, at 15 (discussing that virtually every transaction in the world involves some legal aspects and proposing that, as a profession, lawyers are not prepared to lay claim over every activity that involves law).

53. Students have to learn a great deal of information and maintain a firm grasp on this information in order to perform well on exams. *See* Jason L. Whitney, *Brother's Keeper: The Legal Ethics of Representing Family Members*, 38 ST. MARY'S L.J. 1101, 1102 (2006) (mentioning the realization that law students have about the substantial amount of information they must conquer).

54. *See infra* note 72.

55. *See* Bruce A. Green, *Conference on the Delivery of Legal Services to Low-Income Persons: Professional and Ethical Issues*, 67 FORDHAM L. REV. 1713, 1713(1999) (stating that "…it is a commonplace observation that many people in this country cannot afford a lawyer to assist them...because the cost of legal assistance it too high given the funds available to them.").

56. *See* Johnson, *supra* note 4, at 348 (discussing that law students are in limbo and are not yet qualified to help people with the intricacies associated with most legal work, but not dismissing the proposition that a law student may be able to give some competent advice)

57. *See infra* notes 100-111.

58. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt.1 (2009) ("In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.").

59. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 2 (2009).

the material. Law students are exposed to a variety of subjects in the first year of law school,[60] and although the classes predominantly cover the fundamentals in each respective area, a general knowledge of the class material will not suffice on the final exam. A student must delve deeper and obtain a focused understanding of the material to be successful on the final exam, which incidentally gives the student solid footing to provide rudimentary advice to others.

Attorneys are permitted by the MRPC to give advice in areas in which they are learning on the go, especially in emergency situations.[61] So why can't a law student who has just been diligently studying the material disseminate some of these fresh legal nuggets to friends and family members? The simple answer is that it is against the law.[62] Notwithstanding the discussion above, the law student still has one advantage over the attorney: the student is an updated and modified version of the general practitioner.[63]

The hustle and bustle of the modern world has forced the general practitioner to virtually vanish, because each area of law has become exceedingly complicated necessitating "a greater commitment to become knowledgeable in [a] particular area."[64] The general practitioner cannot survive in today's fast paced and highly specialized legal world.[65] Consequently, the majority of attorneys in modern society focus and specialize in one particular area of law.[66]

A law student's experience, however, is more akin to the general practitioner. A law student must become proficient in a number of legal categories, such as torts, civil procedure, and contracts,[67] to survive the strenuous exams each fall and spring. Thus, a law student may be more apt to give general advice, in an area such as torts, as opposed to a middle aged lawyer that has specialized in criminal defense work for the past twenty years.

---

60. Curricula will differ according to school, but at the University of Alabama law school students take Criminal Law, Torts, Civil Procedure, Contracts, Property, Constitutional Law, and Evidence in the first year of law school.

61. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 3 (2009). (Stating that "[i]n an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to ...another lawyer would be impractical".).

62. *See supra* notes 6-7, 13, 20-22, 28.

63. For a brief example of what a "general practitioner" is, *see* Whitney, *supra* note 53, at 1103 (giving an example of a "general practitioner" as someone that represents a family in all legal matters that arise).

64. Whitney, *supra* note 53, at 1103; *see also* Geoffrey C. Hazard, Jr., *Conference on Legal Ethics: "What Needs Fixing?": The Changing Professional Environment and the Ideal of General Practice*, 30 HOFSTRA L. REV. 759, 761 (2002) (discussing in detail that in today's fast-paced society the general practitioner cannot keep pace and thus has become a vanishing breed).

65. Hazard, *supra* note 64 at 761.

66. Hazard, *supra* note 64 at 761.

67. *See supra* note 60.

However, this comment only proposes that the student could answer fundamental questions regarding a legal area such as torts. Students are not prepared to tackle complex legal conundrums,[68] complex issues should be left for an experienced practitioner. For example, a student speaking to a family member who is an Alabama resident could competently explain the harsh realities surrounding the Doctrine of Contributory Negligence,[69] but a student does not have the tools to place a value on a potential plaintiff's case or advise the potential plaintiff on whether or not they would have a case under Alabama statutes or Alabama case law.

Nevertheless, because the student is a refined form of the now obsolete general practitioner, a law student is still capable of providing competent advice to fundamental legal questions. Practically, a diligent law student who has recently completed a civil procedure exam is just as, if not more, qualified than a venerable criminal defense attorney to explain the basic rules regarding service of process in the civil system.

B. Efficiency and Pareto Improvement

In today's fast-paced, technologically driven society people crave information and people want it at the drop of a hat. Legal advice is coveted and not readily accessible to many members of society,[70] which is why people seek consultation from legal practitioners. Moreover, prominent, highly sought after attorneys and prestigious law firms do not have a second to waste. Taking all of these factors into account, is it better from a societal perspective for people[71] who are merely curious about basic legal issues to bother their sibling or best bud while watching television, or formally set an appointment downtown with an experienced attorney? It is more efficient to allow the law student to resolve basic issues, because it will allow licensed practitioners to avoid needless consultations, consisting of rudimentary questions from a curious individual not willing to pursue a lawsuit. The experienced lawyer will be able to devote the saved time to more complex legal issues and clients that unequivocally want legal relief from a judicial proceeding. [72] Transaction costs will be lowered because

68. Johnson, *supra* note 4, at 348 (discussing that a law student lacks the experience required to give competent advice regarding complex legal questions).

69. Contributory negligence is a simplistic doctrine that basically states that if the potential plaintiff's behavior in any way precipitated the accident, the plaintiff cannot recover damages. For a more formal definition of contributory negligence, *see* Restatement (Second) of Torts § 463 (1965) (defining contributory negligence as "[c]onduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause co-operating with the negligence of the defendant in bringing about the plaintiff's harm.").

70. *See infra* note 72 and accompanying text.

71. For the purposes of this paper, the scope of the word "people" is limited to family members and close friends.

72. The efficiency contemplated here is known as Pareto Improvement, which entails an action that makes at least one person better off without making anyone worse off, *see* J. Shahar Dillbary,

the relative or close friend and the prominent firm will not have to expend money and resources to set up and conduct the interview. Also neither party has to forego another more lucrative (the law firm can spend time pursuing more productive and high profile legal endeavors) or convenient (the family member or close friend can get the advice in some kind of informal setting such as a cookout) opportunity in order to conduct the fruitless interview, which avoids unnecessary opportunity costs. Most importantly, the family member or close friend will have their question answered, and if necessary, will pursue more experienced counsel if the student is ill equipped to tackle the issue. Accordingly, if students are permitted to answer fundamental legal questions time is saved and all parties are better off because the parties avoid unnecessary transaction costs and detrimental opportunity costs.[73] As a result, society receives a benefit rather than a detriment.[74] Unfortunately, under the current law students face possible sanctions if they provide answers to fundamental legal questions.[75]

C. Legal Assistance Comes at a Price

"[I]t is a commonplace observation that many people in this country cannot afford a lawyer to assist them in addressing their legal problems…because the cost of legal assistance is too high given the funds available to them."[76] It is by now no secret that legal services in this country come at a price, and in most cases an expensive price. However, lawyers generally do not bill people for introductory legal consultations. Nevertheless, at some point if you want to retain the lawyer, billing will commence or the plaintiff will have to sign a contingency fee agreement,[77] which relinquishes a piece of the pie in the event the plaintiff prevails.

Law and Economics Cases and Materials 22 (Aug. 2009) (on file with author). Also the idea discussed above is derived from the economic concept of an opportunity cost, which is a measure of the enjoyment (or money) one forgoes in order to undertake an activity, *see* J. Shahar Dillbary, Law and Economics Cases and Materials 4 (Aug. 2009) (on file with author).

73. The law student gets an opportunity to test her knowledge, the experienced prominent lawyer does not waste precious time, and the close friend or family member gets their thirst for fundamental legal guidance quenched. Consequently, everyone is better off.

74. *See Supra* note 72.

75. ALA. CODE § 34-3-7 (2008).

76. Bruce A. Green, *Conference on the Delivery of Legal Services to Low-Income Persons: Professional and Ethical Issues*, 67 FORDHAM L. REV. 1713, 1713 (1999).

77. Contingency fee agreements are predominantly used by plaintiff's lawyers, in order to provide legal representation to people who normally could not afford it. Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 FORDHAM L. REV. 247, 270 (1996). Agreements may vary, but generally the agreement states that if the plaintiff wins the lawyer will retain something like one-third of the total damages. *Id.* at 248. Contingency fees present many ethical issues, and as a result the MRPC does not permit contingency fees in criminal cases or divorce cases, *see* MODEL RULES OF PROF'L CONDUCT R. 1.5(d) (2009).

Stated simply, legal advice does not grow on trees and as a result many members of the public lack basic legal knowledge.[78]

A law student that is graciously providing family members and close friends with fundamental legal knowledge is enhancing rather than hindering society.[79] A prudent student will only answer the most basic of legal questions and for more complex issues refer the loved one to an experienced attorney.[80] Thus, a student who is gratuitously trying to help a family member or close friend avoid paying for unnecessary legal consultation should be rewarded, or at the very least ignored, rather than punished.[81] As discussed above, the student is preventing the licensed practitioner from wasting time[82] on a fruitless consultation, while providing a quick and beneficial service to a loved one. The student is presumptively acting with compassionate motives and as long as the student only answers fundamental legal questions, the practice should be regarded as ethically palatable and congruent with the principles of reason.[83] As Justice Holmes said "what ought to be done is fixed by a standard of reasonable prudence",[84] and a student "ought"[85] to be permitted to honor her loyalty to family and close friends by helping them resolve basis legal issues at no monetary cost.

D. Law Students are Merely Students

"Rules of unauthorized practice of law are part of the bargain that society struck by providing lawyers a monopoly in return for the assurance of high quality legal services [and]...help to protect the public from...overeager, first year law students."[86] The majority of courts agree that these rules are designed to shield the general public from inexperienced or incompetent practitioners.[87] There is no disputing that law students are not yet lawyers. Students have not passed the bar exam, most first and second year students have not taken the MPRE, and the majority of students have

---

78. *See* Johnson, *supra* note 4, at 348-49 (mentioning that it is beneficial for all lay people to know some basic law and that a monopoly on legal information only fuels critics).
79. *See supra* notes 52, 55.
80. *See supra* note 68 and accompanying text.
81. *Contra* Johnson, *supra* note 4, at 349 (Stating the "fact that the practice of law is intended by most lawyers to be an income-producing business supports the presumption that a gratuitous service should not be punishable..." but "[l]ack of compensation should in no way relieve a law student from responsibility for the untoward results of his inexpert advice.").
82. *See supra* notes 72 and accompanying text.
83. *Texas & P. Ry. Co.*, 189 U.S. at 470.
84. *Texas & P. Ry. Co.*, 189 U.S. at 470.
85. *Texas & P. Ry. Co.*, 189 U.S. at 470.
86. Turfler, *supra* note 33 at 1923; *see also* People v. Alfani, 125 N.E. 671, 673 (N.Y. 1919) (stating "[t]he reason why preparatory study, educational qualifications, experience, examination, and license by the courts are required, is not to protect the bar,...but to protect the public.").
87. Johnson, *supra* note 4, at 347.

not sat before the character and fitness committee.[88] The biggest disadvantage for the law student is the lack of experience. Experience is an invaluable tool when confronting complicated, intricate, and ambiguous legal issues. Most law students are "apt to overlook relevant facts,...be unaware of [a] statutory or administrative regulation which has supplanted the common law, and fail to recognize available defenses."[89]

But is a law student fully incapable of providing quality answers to fundamental legal questions in an area such as torts or criminal law? The answer is undoubtedly no. As discussed above,[90] students rigorously prepare for exams and a cursory understanding of the material will not suffice on the exceedingly complicated exams.[91] As long as the scope of the question posed by a loved one is limited to the fundamentals, a diligent law student is an ideal candidate to provide a trustworthy answer. But should the family member or close friend bet the farm or take out a second mortgage based on the law student's answer? Absolutely not.

As stated above, the purpose behind the rules is to protect people like family members and close friends from being mislead or devastated by inept legal advice.[92] In the context of an "over-eager, first-year law student..."[93] giving advice to loved ones regarding fundamental legal issues, the rules are wholly unnecessary.[94] A family member or close friend that adheres to the principles of reason discussed above[95] is well aware that the student is merely a student, an individual in training, and the student's advice should be taken with a grain of salt. The rules are designed to prevent actual injustices[96] not friendly post-thanksgiving dinner conversations.

Perhaps family members and close friends are not prepared to accept "the bargain society struck"[97] that essentially relinquishes the loved one's access to free legal advice in exchange for giving "lawyers a monopoly"[98]

---

88. The scope of this comment is limited to first and second year students who have not taken a professional responsibility course and thus are not cognizant of the rules surrounding UPL.

89. Johnson, *supra* note 4, at 348.

90. *See supra* note 53 and accompanying text.

91. *See* Shortz v. Farrell, 193 A. 20, 24 (Pa. 1937) (discussing that one is "obliged to 'scorn delights, and live laborious days'" in order to get the law degree necessary to take the bar exam and gain admission to the bar.).

92. *See supra* notes 32-33 and accompanying text.

93. *See supra* note 33, at 1923.

94. For the purposes of this comment, it will be assumed that the diligent law student will refer the loved one to more experienced counsel when confronted with complex legal issues, and the loved one will relent.

95. *See supra* notes 1-3.

96. *See Shortz*, 193 A. 20 at 24-25 (discussing that it is important to interpret the rules wisely in order to protect the public, and some things, like easily drafted form pleadings, should not be deemed the practice of law).

97. Turfler, *supra* note 33, at 1923.

98. Turfler, *supra* note 33, at 1923; *see also* Woodrow Patterson, *The Legal Aid Clinic—Benefits to Lawyers, to Law Students, and to Indigents*, 21 TEX. L. REV. 423, 423 (1943) (discussing that attorneys have the exclusive control over the practice of law, and this monopoly is protect by the UPL rules).

that will ensure "high quality [legal] services."[99] In the interests of convenience and practicality, a loved one would presumably prefer to be able to ask their brother or cousin a simple question regarding an overzealous landlord or fender-bender, rather than go through the formalities of setting an appointment with a licensed lawyer. This is especially true when the loved one is just trying to satisfy personal curiosities. After all, it may just be a hypothetical question.

E. Many Law Students Gain Practical Experience in Legal Aid Clinics

Although law students are merely students, many students get a unique opportunity to gain practical legal experience through participating in legal aid clinics.[100] Courts all over the country have proclaimed the importance and "need for 'hands-on' legal training."[101] Practice programs and rules may vary from state to state, but the main goal is to advance legal education.[102] Students who participate in these programs, ultimately, are better prepared to "discern what is and is not the practice of law...."[103] Law students that participate in clinical programs get to see the law in action, rather than just merely discussing the theoretical or hypothetical in a classroom.[104]

Some of the advantages to the student include: "contact, face to face, with [a] flesh-and-blood client, solv[ing] actual problems of life, and work[ing] under and observ[ing] the working methods of a trained lawyer...."[105] Additionally, indigent clients who would otherwise have no access to the law's remedies receive help from the students.[106] Even though the student is supervised while participating, the student is entrusted with a considerable degree of latitude in dealing with the cases.[107] For example, at the University of Texas School of Law's clinic the student "does the necessary research, prepares written instruments, interviews clients and witnesses, writes letters..., and is responsible for all details."[108] Moreover, the student is required to do all that is necessary to care for the

---

99. Turfler, *supra* note 33, at 1923.

100. *See* Ard, *supra* note 5, at 49 (discussing the valuable practical knowledge the student gains by participating in a clinic, and how well it prepares the student for the real world).

101. Ursula H. Weigold, *The Attorney-Client Privilege as an Obstacle to the Professional and Ethical Development of Law Students*, 33 PEPP. L. REV. 677, 709-710 (2006) .

102. *Id.* at 709.

103. *See* Ard, *supra* note 5 at 49.

104. *See* Patterson, *supra* note 49 at 427 (discussing that law schools are usually criticized because students get all theory and no practical experience, and clinics allow the student to gain invaluable practical experience).

105. Patterson, *supra* note 49 at 427.

106. *See* Patterson, *supra* note 49 at 427.

107. *See* Patterson, *supra* note 49 at 427.

108. Patterson, *supra* note 49 at 427; Programs will vary according to the state, because each state may have different student practice rules.

client and in some instances the student will argue the case in court. In the clinics, law students are provided with a great deal of discretion to work on behalf of the indigent and prepare written instruments, do research, and argue in court; yet a law student is not permitted to provide rudimentary legal advice to a close friend or family member?

Admittedly, unlike the student in the clinic, the student is not supervised when giving this advice to a loved one, and the student is not quite a lawyer so she is not directly subject to the ethics rules.[109] Nevertheless, the student presumably has been working diligently all year and has a keen understanding of the basics in all the areas covered in the first years of law school.[110] Assuming the student is a morally sound individual who does not intend to mislead or bamboozle her loved ones, she should be permitted to share this legal knowledge with curious family members and close friends. It simply defies the precepts of reason[111] to allow a student to extensively participate in a clinical practice program but simultaneously prohibit that student from sharing basic legal knowledge with loved ones.

III. CONCLUSION

To reiterate the wise teachings of Justice Holmes, "what ought to be done is fixed by a standard of reasonable prudence, whether it is usually complied with or not."[112] Reason is not the product of rules or a custom that has been followed for years and years; reason stands alone steadfast and does not waver according to the pace or technological climate of the times. Rules should be promulgated and interpreted with the tools provided by the principles of reason.[113] As discussed above in the Introduction,[114] the principles of reason and pragmatism call for the practical and prudent solution in all circumstances. The essence of what is practical and reasonable does not vary according to circumstance, and what is reasonable and "what ought to be done"[115] under the circumstances is to allow students to provide convenient and fundamental advice to loved ones. The practice would be ethical and harmless because the majority of law students possess a fresh and considerable understanding of the law, [116] Pareto

---

109. *See* Johnson, *supra* note 4, at 348. But also keep in mind that the student may still be punished by being denied entry into the bar. *See supra* notes 38-41 and accompanying text.
110. *See supra* note 53 and accompanying text.
111. *See supra* notes 1-3.
112. *See supra* note 1.
113. *See supra* note 10.
114. *See supra* notes 1-3 and accompanying text.
115. *See supra* note 1.
116. Students have to learn a great deal of information and maintain a firm grasp on this information in order to perform well on exams. *See* Whitney, *supra* note 53 (mentioning the realization that law students have about the substantial amount of information they must conquer); *see supra* note 91 and accompanying text.

Improvement and efficiency will result from the practice,[117] the practice will serve the interests of graciousness and help those in need, [118] people are aware that law students are merely students and a student's advice should be taken lightly,[119] and many students gain invaluable practical experience in legal aid clinics and should be permitted to help loved ones.[120]

The current rules governing UPL should be reevaluated regarding the prohibition against unlicensed students providing basic legal advice.[121] However, this comment does not advocate for students to be able to provide advice for complex legal issues.[122] Rather this comment advocates for students to be permitted to provide answers to fundamental legal questions. Students are subjected to rigorous reading assignments and exceedingly complex exams during law school.[123] The students who tirelessly work to achieve success in law school should be rewarded with the gift of being able to help their loved ones with basic legal issues. The rules governing UPL should trust, rather than question, the competence and integrity of diligent law students.

"The rule limiting the practice of law to trained and qualified persons is founded upon the principle of public benefit and protection. The rule however does not go beyond the principle upon which it is based and should not be extended beyond the requirements of the common good."[124] The "common good"[125] is better served by allowing law students to provide family members and close friends with fundamental legal advice. The law student is not a blank canvas lacking the proper legal paint, rather the student is a work in progress wrought with detailed legal outlines. The student channels these detailed outlines when answering loved ones' questions about various pedestrian legal problems. It is a waste of time, resources, and a drain on society to prohibit students from providing rudi-

---

117. *See supra* note 72.

118. *See* Green, *supra* note 55 at 1723 (stating that "…it is a commonplace observation that many people in this country cannot afford a lawyer to assist them…because the cost of legal assistance it too high given the funds available to them.").

119. *See* Johnson, *supra* note 4, at 348 (discussing that law students are in limbo and are not yet qualified to help people with the intricacies associated with most legal work, but does not dismiss the proposition that a law student may be able to give some competent advice)

120. *See supra* notes 100-111 and accompanying text.

121. *See* Munneke, *supra* note 27 at 17 (contemplating how the profession as a whole should revise and broaden the definition of what constitutes the practice of law).

122. *See* Johnson, *supra* note 4 at 348 (discussing that law students are inexperienced and will probably overlook important facts and be unaware of precedent and special statutes in that jurisdiction).

123. *See Shortz*, 193 A. 20 at 24 (discussing the pleasures a law student must forego to diligently study and perform well in law school); *see also supra* note 86.

124. Johnson, *supra* note 4 at 347.

125. *Id.*

mentary advice. Allowing students to provide answers to fundamental legal issues will better serve the greater good.

Trey Woodfin

RECENT LAW REVIEW ARTICLES CONCERNING THE LEGAL PROFESSION

Bobby Click

In keeping with the tradition of *The Journal of the Legal Profession*, the following section is a selection of law review and journal articles centered on the subject of the legal profession that were published from January 2010 through October 2010. Brief summaries accompany selected entries.

LEGAL PROFESSION

John M. Burman, *Ethics for Lawyers Who Represent Governmental Entities as Part of Their Private Practices*, 10 WYO. L. REV. 357 (2010). This article focuses on the ethical rules that apply to attorneys who represent government entities in their private practice as opposed to rules that apply to attorneys who are employed by the government.

Mathilde Cohen, *Sincerity and Reason-Giving: When May Legal Decision Makers Lie?*, 59 DEPAUL L. REV. 1091 (2010).

Kim Diana Connolly, *Navigating Tricky Ethical Shoals in Environmental Law: Parameters of Counseling and Managing Clients*, 10 WYO. L. REV. 443 (2010). This article focuses on the Model Rules of Professional Conduct, specifically Rules 2.1 and 1.6, and how those rules apply to attorneys who practice environmental law.

Nathan M. Crystal, *Ethical Responsibility and Legal Liability of Lawyers for Failure to Institute or Monitor Litigation Holds*, 43 AKRON L. REV. 715 (2010). In this article the author discusses the ethical and legal basis for disciplining lawyers who fail to initiate or implement litigation holds in relation to electronically stored information.

Gregory M. Duhl, *The Ethics of Contract Drafting*, 14 LEWIS & CLARK L. REV. 989 (2010). This article explores the ethical obligations and duties lawyers may have to third parties when drafting contracts.

Shelby D. Green & Temisan Agbeyegbe, *The Improvident Real Estate Deal: The Lawyer's Ethical Duty to Warn*, 39 REAL EST. L. J. 147 (2010).

Steven J. Johansen, *Was Colonel Sanders a Terrorist? An Essay on the Ethical Limits of Applied Legal Storytelling*, 7 J. ASS'N LEGAL WRITING DIRECTORS 63 (2010). This article explores the characteristics of storytelling and concerns that applied legal storytelling is unfairly manipulative.

Justice Marilyn S. Kite, *The Good Guy Actually Does Win*, 10 WYO. L. REV. 397 (2010).

Charles M. Kidd, *2009 Survey of the Law of Professional Responsibility*, 43 IND. L. REV. 919 (2010). This article offers an overview of a number of recent Indiana Bar disciplinary actions that deal with the legal profession. These actions include advertising, limited liability entities, and "imputed status" for law firms.

Renee Newman Knake, *Prioritizing Professional Responsibility and the Legal Profession: A Preview of the United States Supreme Court's Term 2009-2010 Term*, 5 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 1 (2010). This article discusses the increased attention the United States Supreme Court has been recently giving to cases that involve the ethical obligations and legal duties of attorneys. Specifically, the article offers an overview of such cases the Supreme Court has on its docket for the 2009-2010 term.

Renee Newman Knake, *The Supreme Court's Increased Attention to the Law of Lawyering: Mere Coincidence or Something More?*, 59 AM. U. L. REV. 1499 (2010). The author provides a comprehensive overview of cases decided by the Supreme Court, which deal with the access to lawyers, legal advice, and the harm done by lawyers.

Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO. J. LEGAL ETHICS 103 (2010). This article focuses on the issues created by the use of "cardboard clients" – one dimensional figures who are only concerned with maximizing their legal and financial interests – in legal ethics. The author also discusses possible alternatives that could be used to solve such issues.

Ariana R. Levinson, *Legal Ethics in the Employment Law Context: Who is the Client?*, 37 N. KY. L. REV. 1 (2010).

Tracy Walters McCormack & Christopher John Bodnar, *Honesty is the Best Policy: It's Time to Disclose Lack of Jury Trial Experience*, 23 GEO. J. LEGAL ETHICS 155 (2010). This article discusses the potential injury to clients who are unaware of litigators' diminishing jury trial experience and skills. The authors also discuss the possible obligations an attorney should have to disclose their lack of experience.

Mika C. Morse, *Honor or Betrayal? The Ethics of Government Lawyer-Whistleblowers*, 23 GEO. J. LEGAL ETHICS 421 (2010). The author examines the limited protection offered to government whistleblower lawyers. He also examines the additional constraints government lawyers face because of their professional and ethical obligations.

Nancy M. Olson, *Judicial Elections and Courtroom Payola: A Look at the Ethical Rules Governing Lawyers' Campaign Contributions and the Common Practice of "Anything Goes"*, 8 CARDOZO PUB. L. POL'Y & ETHICS J. 341 (2010). This article discusses judicial campaign contribu-

tions made by lawyers and what ethical rules may be relevant to such contributions.

Julie A. Oseid & Stephen D. Easton, *The Trump Card: A Lawyer's Personal Conscience or Professional Duty*, 10 WYO. L. REV. 415 (2010). This article consists of an exchange between two professors of law. The exchange focuses on whether an attorney has a professional obligation to act in ways that are contrary to their conscience or if it is ethical for attorneys to influence their clients in order to avoid these types actions.

Dakota S. Rudesill, *Closing the Legislative Experience Gap: How a Legislative Law Clerk Program Will Benefit the Legal Profession and Congress*, 87 WASH. U. L. REV. 699 (2010). In this article the author presents arguments in favor of House Bill 151 and Senate Bill 27 – legislature that would create a law clerk program with the United States Congress. William H. Simon, *Role Differentiation and Lawyers' Ethics: A Critique of Some Academic Perspectives*, 23 GEO. J. LEGAL ETHICS 987 (2010).

A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353 (2010). This article examines modern civil procedures the author contends are being developed and interpreted in a restrictive manner. The author then argues such restrictions limit the ability of claimants to have their cases decided on merits instead of technicalities.

David H. Tennant & Lauren M. Michals, *Mixing Business with Ethics: The Duty to Malpractice by Trial Counsel*, 20 NO. 1 PROF. LAW. 3 (2010). This article discusses the conflict of interest appellate attorneys may face in reporting malpractice by trial attorneys when such reporting may adversely affect the amount of business referred to the appellate attorney.

Alice Woolley & W. Bradley Wendel, *Legal Ethics and Moral Character*, 23 GEO. J. LEGAL ETHICS 1065 (2010).

Fred C. Zacharias, *Steroids and Legal Ethics Codes: Are Lawyers Rational Actors?*, 85 NOTRE DAME L. REV. 671 (2010). This article focuses on the ethical regulations that address conduct in which lawyers must accommodate client demands against the potentially contrary interests of clients, courts, specified third parties, or society as a whole.

REGULATION OF LEGAL PROFESSION AND ADVERTISING

Margaret Raymond, *Inside, Outside: Cross-Border Enforcement of Attorney Advertising Restrictions*, 43 AKRON L. REV. 801 (2010). This article discusses the difficulty of enforcing cross-border attorney advertisement regulations.

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

CONFLICTS OF INTEREST

Elizabeth J. Bondurant, *Standard of Review and Discovery After Glenn: The Effect of the Glenn Standard of Review on the Role of Discovery in Cases Involving Conflicts of Interest*, 77 DEF. COUNS. J. 120 (2010). This article examines both the standards of review embraced by the individual circuits since *Metropolitan Life Insurance Co. v. Glenn* and the recent trends regarding the issue of discovery in cases involving an administrator's conflict of interest.

William Freivogel, *A Short History of Conflicts of Interest. The Future?* 20 NO. 2 PROF. LAW 3 (2010). This article discusses the developments during the last twenty years that relate to conflicts of interest

Jonathan A. Kohl, Philip D. Weller, *Drafting Advance Waivers of Conflicts of Interest*, SR052 A.L.I.-A.B.A. 1447 (2010).

Anne Bowen Poulin, *Conflicts of Interest in Criminal Cases: Should the Prosecution Have a Duty to Disclose?*, 47 AM. CRIM. L. REV. 1135 (2010). In this article the author focuses on the duty of the prosecution to disclose conflicts of interest in situations where the prosecution has special access to information relating to the conflict.

PRO BONO AND PUBLIC INTEREST

Laurie Barron, Suzanne Harrington-Steppen, Elizabeth Tobin Tyler & Eliza Vorenberg, *Don't Do it Alone: A Community-Based, Collaborative Approach to Pro Bono*, 23 GEO. J. LEGAL ETHICS 323 (2010).

Cynthia Fuchs Epstein, Hella Winston, *The Salience of Gender in the Choice of Law Careers in the Public Interest*, 18 BUFF. J. GENDER, L. & SOC. POL'Y 21 (2010). This article examines the decisions and thought processes involved when an attorney chooses to work in the public interest field as opposed to private practice. It also addresses what role gender plays when an attorney is making the decision to join the public interest field.

LAW FIRMS AND THE BUSINESS OF LAW

John M. Burman, *Ethically Speaking: Should Perspective Clients Know if Law Firms Do Not Have Malpractice Insurance?*, WYO. LAW. June 2010, 40.

Cynthia Thomas Calvert, Linda Bray Chanow & Linda Marks, *Reduced Hours, Full Success: Part-Time Partners in U.S. Law Firms*, 21 HASTINGS WOMEN'S L.J. 223 (2010). This article discusses the part-time partners who are becoming more common in law firms across the country.

Susan Saab Fortney, *Leaks, Lies, and the Moonlight: Fiduciary Duties of Associates to Their Law Firms*, 41 ST. MARY'S L.J. 595 (2010). In this

article, the author discusses the fiduciary duties associates owe to their law firms and whether or not these associates recognize and fulfill those duties

Larry E. Ribstein, *Death of Big Law*, 2010 WIS. L. REV. 749 (2010). This article discusses the forces that have driven "Big Law" to downsize in recent years.

Paul R. Tremblay, *Shadow Lawyering: Nonlawyer Practice Within law Firms*, 85 IND. L.J. 653 (2010). This article explores the substantive law and legal opinions that address the regulation of nonlawyer practices within law firms.

TECHNOLOGY

Juan A. Albino, *Do Defendants Have a Privacy Interest in Their Cell Phone's Text Messages and E-mails?*, 44 REV. JURIDICA U. INTER. P.R. 383 (2010).

Steven C. Bennett, *Are E-Discovery Costs Recoverable by a Prevailing Party?*, 20 ALB. L.J. SCI. & TECH. 537 (2010). In this article the author discusses the high costs associated with E-discovery and the possibility of curtailing such high costs by threatening to award discovery costs to prevailing parties.

Beth C. Boggs, Misty L. Edwards, *Does What Happen on Facebook Stay on Facebook? Discovery, Admissibility, Ethics, and Social Media*, 98 Ill. B.J. 366 (2010). This article explores emerging case law that addresses the discovery, admissibility, and legal ethics involved in information gathered from social media sites.

Daniel B. Garrie & Daniel K. Gelb, *E-Discovery in Criminal Cases: A Need for Specific Rules*, 43 SUFFOLK U. L. REV. 393 (201f0). In this article, the author explores issues involving e-discovery and electronically stored information. Specifically, the author focuses on the development of the rules governing e-discovery an electronically stored information in civil cases and the current development of such rules involved in criminal cases.

Sarah A. Geers, *Common Sense and the Fact Finder Without Skill in the Art: The Role of Objective Evidence in Achieving Proper Technology Specificity*, 40 Seton Hall L. Rev. 225 (2010).

Michael P. Griffin, John W. Clark III, *Juror Expectations Concerning Technology Implementation in the Courtroom*, 43 NO. 2 CRIM. LAW BULLETIN ART 2 (2010).

Evan E. North, *Facebook Isn't Your Space Anymore: Discovery of Social Networking Websites*, 58 U. Kan. L. Rev. 1279 (2010). This article focuses on the discoverability of social-networking information by private litigants in civil cases.

Andrew M. Perlman, *The Legal Ethics of Metadata Mining*, 43 AKRON L. REV. 785 (2010). This article addresses the ethical problems

presented by meta-data mining, as discussed in bar opinions. The article also presents the argument that meta-data mining should be dealt with under the rules that deal with inadvertent disclosures.

Allison D. Rhodes & Robert W. Hillman, *Client Files and Digital Law Practices: Rethinking Old Concepts in an Era of Lawyer Mobility*, 43 SUFFOLK U. L. REV. 897 (2010). This article discusses the effects of digitizing client files and firm information in light of lawyer mobility. The article also evaluates the existing framework of law and ethics that were developed in a time dominated by hard copies.

CRIMINAL DEFENSE AND PROSECUTION

Lawton P. Cummings, *Can an Ethical Person be an Ethical Prosecutor? A Social Cognitive Approach to Systemic Reform*, 31 CARDOZO L. REV. 2139 (2010). This article focuses on Albert Bandura's moral disengagement theory, as applied to the American prosecutorial system. The article uses the theory to examine the factors present in the prosecutorial system that may support willful prosecutorial misconduct by encouraging moral disengagement in ethical prosecutors.

Robert C. Faber & Ostrolenk Faber, *Prosecution Ethics*, 997 PRAC. L. INST. 715 (2010).

Maureen A. Howard, *Taking the High Road: Why Prosecutors Should Voluntarily Waiver Peremptory Challenges*, 23 GEO. J. LEGAL ETHICS 369 (2010). In this article the author presents the argument that any benefits of peremptory challenges gained by a criminal prosecutor are outweighed by the detriment caused to the criminal justice system; and therefore, a prosecutor should voluntarily waive such challenges.

Adam Lamparello, *Establishing Guidelines for Attorney Representation of Criminal at the Sentence Phase of Capital Trials*, 62 ME. L. REV. 97 (2010). The author focuses on the need for guidelines for attorneys who represent clients in capital cases. Specifically, the author argues for the need of such guidelines in the sentencing phase of capital cases in order to avoid ineffective assistance of counsel.

Tom Mighell, *The Cyber-Ethical Defense Lawyer (or, How Not to Commit Malpractice with Your Technology)*, 73 TEX. B.J. 540 (2010). This article offers a brief guide for attorneys on how to use technology in an ethically responsible manner.

Robert P. Mosteller, *Why Defense Attorneys Cannot, But Do, Care About Innocence*, 50 SANTA CLARA L. REV. 1 (2010). This article discusses defense attorneys' reactions to client the attorneys think are innocent as opposed to clients the attorneys think are guilty. The author discusses problems presented by the different reactions and argues for an equal, zealous representation of all clients, regardless of whether the attorneys think their clients are innocent or guilty.

Cheyenne L. Palmer, *DUIS and Apple Pie: A Survey of American Jurisprudence in DUI Prosecutions*, 13 UDC L. REV. 407 (2010).

THE RIGHT TO COUNSEL

Russell Engler, *Pursuing Access to Justice and Civil Right to Counsel in a Time of Economic Crisis*, 15 ROGER WILLIAMS U. L. REV. 472 (2010). This article focuses on the need for a right to counsel in civil cases and includes a discussion on how such a system could be installed regardless of the current economic crisis.

Stephen A. Gerst, *Forfeiture of the Right to Counsel: A Doctrine Unhinged from the Constitution*, 58 CLEV. ST. L. REV. 97 (2010).

Adam J. Hegler, *Is the Temple Collapsing?: Montejo v. Louisianna and the Extent of the Right to Counsel in Criminal Proceedings*, 61 S.C. L. REV. 867 (2010).

Zachary L. Heiden, *Too Low a Price: Waiver and the Right to Counsel*, 62 ME. L. REV. 487 (2010).

Robert Hornstein, *The Right to Counsel in Civil Cases Revisited: The Proper Influence of Poverty and the Case Reversing Lassiter v. Department of Social Services*, 59 CATH. U. L. REV. 1057 (2010).

MALPRACTICE, MISCONDUCT, AND INEFFECTIVE ASSISTANCE OF COUNSEL

Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 LEWIS & CLARK L. REV. 771 (2010). In this article, the author addresses the issue of ineffective assistance of counsel that occurs in juvenile court and the lack of redress that is available to clients when they receive ineffective assistance.

Aliza B. Kaplan, *A New Approach to Ineffective Assistance of Counsel in Removal Proceedings*, 62 RUTGERS L. REV. 345 (2010). This article discusses ineffective assistance of counsel as it exists in removal proceedings—one of the most common types of immigration hearings. The author analyzes current standards for such proceedings, makes a number of recommendations on how the standards should be changed, and then makes a few recommendations that she thinks will help avoid ineffective assistance of counsel in removal proceedings in the future.

Shana-Tara Regon, *Bringing an Unlawful Verdict to Light*, CHAMPION, Feb. 2010, 12 (2010).

Paul J. Sampson, *Ineffective Assistance of Counsel in Plea Bargain Negotiations*, 2010 B.Y.U. L. REV. 251 (2010). This article addresses ineffective assistance of counsel, as it exists in plea bargain negotiations,

through an analysis of the major case law in the area and a defendant's constitutional right to counsel.

INTERNATIONAL LAW

Diana Chang, *Piracy Laws and the Effective Prosecution of Pirates*, 33 B.C. INT'L & COMP. L. REV. 273 (2010). This article discusses the international piracy problem and analyzes the current international legal framework for the punishment and prosecution of maritime piracy.

Sigurd D'hondt, *The Cultural Defense as Courtroom Drama: The Enactment of Identity, Sameness, and Difference in Criminal Trial Disclosures*, 35 LAW & SOC. INQUIRY 67 (2010).

Laura A. Dickinson, *Military Lawyers, Private Contractors, and the Problem of International Law Compliance*, 42 N.Y.U. J. INT'L L. & POL. 355 (2010).

Eric S. Fish, *Peace Through Complementarity: Solving the Ex Post Problem in International Criminal Court Prosecutions*, 119 Yale L.J. 1703 (2010).

Jenia Iontcheva Turner, *Legal Ethics in International Criminal Defense*, 10 CHI. J. INT'L L. 685 (2010). This article addresses the special characteristics of international criminal defense, which cause attorneys to face new and more complex ethical dilemmas.

J. Benjamin Lambert, *Professional Liability and International Lawyering: An Overview*, 77 DEF. COUNS. J. 69 (2010). This article addresses the complex issues involved when an attorney in the United State, who is practicing international law, can be subject to professional liability for their actions.

Shannon M. Roesler, *The Ethics of Global Justice Lawyering*, 13 YALE HUM. RTS. & DEV. L.J. 185 (2010). This article focuses on the means by which lawyers advocate for legal reform around the country and the possible problems such advocacy may create.

MULTI-JURISDICTIONAL PRACTICE

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

Arthur F. Greenbaum, *Multijurisdictional Practice and the Influence of Model Rule of Professional Conduct 5.5 – An Interim Assessment*, 43 AKRON L. REV. 729 (2010). This article explores the impacts the 2002 American Bar Association Amendment to Rule 5.5 of the Model Rules of Professional Conduct has had on the multi-jurisdictional practice of attorneys who do not work in-house for organizational clients.

J. Mark Little, *The Choice of Rules Clause: A Solution to the Choice of Law Problem in Ethics Proceedings*, 88 TEX. L. REV. 855 (2010). In this article the author discusses choice of law problems that exist in multi-jurisdictional ethics proceedings. In this article he also argues for the adoption of a rule that would allow lawyers and their clients to specify, in a multi-jurisdictional case, which ethics rules should apply to their case.

Carol A. Needham, *The Changing Landscape for In-House Counsel: Multijurisdictional Practice Considerations for Corporate Law Departments*, 43 AKRON L. REV. 985 (2010).

CORPORATE AND TRANSACTIONAL LAW

Michele DeStefano Beardslee, *Advocacy in the Court of Public Opinion, Installment Two: How Far Should Corporate Attorneys Go?*, 23 GEO. J. LEGAL ETHICS 1119 (2010).

Franklin A. Gevurtz, *The Role of Corporate Law in Preventing a Financial Crisis: Reflections on In Re Citigroup Inc. Shareholder Derivative Litigation*, 23 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 113 (2010). This article discusses the ability of state legislatures to create laws that can govern corporations and help prevent another financial crisis in the United States.

John Hasnas, *Between Scylla and Charybdis: Ethical Dilemmas of Corporate Counsel in the World of the Holder Memorandum*, 44 VAL. U. L. REV. 1199 (2010). In this article the author addresses the tension between corporate attorneys' obligations to zealously represent their clients and the attorneys' moral obligations to deal with corporate employees justly.

ATTORNEY'S FEES

Matthew Albanese, *Reasonably Untimely: The Difficulty of Knowing When to File a Claim for Attorney Fees in Social Security Disability Cases, and an Administrative Solution*, 78 GEO. WASH. L. REV. 1014 (2010).

Victoria L. Collier & Drew Early, *Cracks in the Armor: Due Process, Attorney's Fees, and the Department of Veteran Affairs*, 18 ELDER L.J. 1 (2010).

Adam Shajnfeld, *A Critical Survey of the Law, Ethics, and Economics of Attorney Contingent Fee Arrangements*, 54 N.Y.L. SCH. L. REV. 773 (2010). This article offers a comprehensive overview of contingency fee arrangements. Including a discussion of the historical development of the arrangements, justifications for the arrangements, rules governing arrangements, and various proposals of reform.

Stephen E. Friedman, *Giving Unconscionability More Muscle: Attorney's Fees a Remedy for Contractual Overreaching*, 44 GA. L. REV. 317 (2010). This article focuses on contractual unconscionability. Specifically, the author contends there are inadequate remedies available for victims of contractual unconscionability. The author also suggests giving the courts the ability to award attorney fees in situations of contractual unconscionability to help prevent it in the future.

Brett E. Heyman, *Administrative Law – Government Agency Withholding Information, Reimbursing Attorney Fees – Davy v. Central Intelligence Agency, F.3d 1155 (D.C. Cir. 2008)*, 43 SUFFOLK U. L. REV. 501 (2010).

Philip Talmadge, Emmelyn Hart-Biberfeld & Peter Lohnes, *When Counsel Screws Up: The Imposition and Calculation of Attorney Fees as Sanctions*, 33 SEATTLE U. L. REV. 437 (2010).

Eyal Zamir & Ilana Ritov, *Revisiting the Debate over Attorney's Contingent Fees: A Behavioral Analysis*, 39 J. LEGAL STUD. 245 (2010). This article presents a series of experiments that were designed to reveal people's preferences regarding attorneys' fees.

PRIVILEGE AND ATTORNEY CLIENT RELATIONSHIP

Noah P. Barsky, Anthony H. Catanach, Jr., Ilya A. Lipin & Shelley C. Rhoades-Catanach, *Protecting a Client's Confidences: Recent Developments in Privileged Communication Between Attorneys and Accountants*, 28 J.L. & COM. 211 (2010). This article examines how recent cases have affected privileged communications in tax and transactional matters between attorneys and accountants who have been retained for the purposes of client representation.

Anthony Francis Bruno, *Preserving Attorney-Client Privilege in the Age of Electronic Discovery*, 54 N.Y.L. SCH. L. REV. 541 (2010). This article provides an overview of the history of the attorney-client privilege and discusses the unique problems electronic discovery has created in the area of the attorney-client privilege.

Katrice Bridges Copeland, *Preserving the Corporate Attorney- Client Privilege*, 78 U. CIN. L. REV. 1199 (2010). This article argues for the necessity of legislation such as Attorney-Client Privilege Protection Act in order to protect the corporate attorney-client privilege. However, the author contends the Act or any similar legislation must include remedies for violations in order to be effective.

Keith Kendall, *The Economics of the Attorney-Client Privilege: A Comprehensive Review and a New Justification*, 36 Ohio N.U. L. Rev. 481 (2010).

Gregory C. Sisk, Pamela J. Abbate, *The Dynamic Attorney-Client Privilege*, 23 GEO. J. LEGAL ETHICS 201 (2010).

Elizabeth King, *Waving Goodbye to Waiver? Not So Fast: Inadvertent Waiver of the Attorny-Client Privilege, and Federal Rule of Evidence 502*, 32 CAMPBELL L. REV. 467 (2010). This article explores Federal Evidence Rule 502, in respect to waiver of the attorney-client privilege through inadvertent disclosures. The article focuses mainly on the application of Rule 502 to inadvertent disclosures made through electronic discovery.

Jean Fleming Powers, *Comparing Exceptions to Privilege and Confidentiality Relating to Crime, Fraud, and Harm – Can Hard Cases Make Good Law?*, 79 UMKC L. REV. 61 (2010).

David B. Wilkins, *Team or Rivals, Toward a New Model of the Corporate Attorney-Client Relationship*, 78 FORDHAM L. REV. 2067 (2010).

HEALTH CARE LAW

Mark E. Battersby, *What Health Care Reform Means to Law Practices*, PA. LAW. Aug. 2010, 36.

Thomas Wm. Mayo & Hallie Elizabeth Graves, *Health Care Law*, 63 SMU L. REV. 607 (2010). This article offers a comprehensive overview of the changes made to Texas health care law in 2009.

ALTERNATIVE DISPUTE RESOLUTION

Maggie T. Grace, *Criminal Alternative Dispute Resolution: Restoring Justice, Respecting Responsibility, and Renewing Public Norms*, 34 VT. L. REV. 563 (2010).

Robert J. Grey, Jr., *Promoting the Rule of Law by Facilitating Alternative Dispute Resolution*, 16 No. 4 DISP. RESOL. MAG. 29 (2010).

Peter Reilly, Mindfulness, *Emotions, and Mental Models: Theory that Leads to More Effective Dispute Resolution*, 10 NEV. L.J. 433 (2010).

James M. Van Nostrand & Erin P. Honaker, *Preserving the Public Interest Through the Use of Alternative Dispute Resolution in Utility Retail Rate Cases*, 27 PACE ENVTL. L. REV. 227 (2010). This article discusses the expenses involved in utility general rate cases, and how the public interest could be better served by the use of alternative dispute resolution in such cases.

JUDICIAL ETHICS

Carmen Beauchamp Ciparick & Bradley T. King, *Judicial Independence: Is it Impaired or Bolstered by Judicial Accountability?*. 84 ST. JOHN'S L. REV. 1 (2010).

Teresa Stanton Collett, *Judicial Independence and Accountability in an Age of Unconstitutional Constitutional Amendments*, 41 LOY. U. CHI. L.J. 327 (2010).

Philip Hamburger, *A Tale of Two Paradigms: Judicial Review and Judicial Duty*, 78 GEO. WASH. L. REV. 1162 (2010). This article discusses two paradigms that exist in the roles of judges. The first paradigm discussed is the paradigm of "judicial review," and the second is the paradigm of "judicial duty."

Raymond J. McKoski, *Judicial Discipline and the Appearance of Impropriety: What the Public Sees Is What the Judge Gets*, 94 Minn. L. Rev. 1914 (2010). This article discusses the judicial appearance of impropriety standard, including a discussion on the adoption of the standard and criticisms the standard has been subjected to since its adoption.

Ronald D. Rotunda, *Judicial Transparency, Judicial Ethics, and a Judicial Solution: An Inspection for the Courts*, 41 LOY. U. CHI. L.J. 301 (2010).

Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061 (2010). In this article the author discusses the rise of judicial elections in the 1800s and how these elections lead to increased judicial review.

Keith Swisher, *Pro-Prosecution Judges: "Tough on Crime," Soft on Strategy, Ripe for Disqualification*, 52 ARIZ. L. REV. 317 (2010). This article offers a comprehensive discussion of pro-prosecution judges and the issues posed by the biases of such judges.

Margaret Tarkington, *A Free Speech Right to Impugn Judicial Integrity in Court Proceedings*, 51 B.C. L. REV. 363 (2010). The author in this article discusses the importance of an attorney's, as officers of the court, free-speech right to impugn judicial integrity in the courtroom.

Nancy A. Welsh, *What Is "(Im)partial Enough" in a World of Embedded Neutrals*, 52 ARIZ. L. REV. 395 (2010).

MEDIA

Cynthia D. Bond, *Laws of Race/ Laws of Representation: The Construction of Race and Law in Contemporary American Film*, 11 TEX. REV. ENT. & SPORTS L. 219 (2010).

Perry L. Moriearty, *Framing Justice: Media, Bias, and Legal Decision Making*, 69 MD. L. REV. 849 (2010).

Grant H. Morris, *The Greatest Legal Movie of All Time: Proclaiming the Real Winner*, 47 SAN DIEGO L. REV. 533 (2010).

SYMPOSIA

Richard Abel, *The Paradoxes of Pro Bono*, 78 FORDHAM L. REV. 2443 (2010).

Debra Lyn Bassett, *Reasonableness in E-Discovery*, 32 CAMPBELL L. REV. 435 (2010).

Ming W. Chin, *Judicial Independence: Under Attack Again?*, 61 HASTINGS L.J. 1345 (2010).

Ramsey Clark, *"How Can You Represent That Man?": Ethics, The Rule of Law, and Defending the Indefensible*, 44 GA. L. REV. 921 (2010).

Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 FORDHAM L. REV. 2357 (2010). This symposium issue focuses on the changes that have occurred to pro bono legal services provided by law firms. It also makes several recommendations on how law firms can improve the quality of their pro bono services.

Mark Duedall, Steve Jakubowski, Kevin O'Keefe & Scott Riddle, *The Ethics Panel Ethics 2.0 – The Ethical Challenges and Pitfalls Web 2.0 Presents to Bankruptcy Attorneys*, 26 EMORY BANKR. DEV. J. 245 (2010).

Monroe H. Freedman, *The Cooperating Witness Who Lies – A Challenge to Defense Lawyers, Prosecutors, and Judges*, 7 OHIO ST. J. CRIM. L. 739 (2010).

Anne-Marie Rhodes, *Helping Nonprofits Police Themselves: What Trust Law can Teach Us About Conflicts of Interest*, 85 CHI.-KENT L. REV. 469 (2010).

Lawrence Goldstein, *Why Scientific Details are Important When Novel Technologies Encounter Law, Politics, and Ethics*, 38 J.L. MED. & ETHICS 204 (2010).

Bruce A. Green, *Beyond Training Prosecutors About Their Disclosure Obligations: Can Prosecutors' Offices Learn From Their Lawyers' Mistakes?*, 31 CARDOZO L. REV. 2161 (2010).

Bruce A. Green, *Fear of the Unknown: Judicial Ethics After Caperton*, 60 SYRACUSE L. REV. 229 (2010).

Thomas F. Guernsey, *Continuing Professional Development in Law School*, 41 U. TOL. L. REV. 291 (2010). This symposium issue discusses tenure in higher education and how the focus should not be on post-tenure review, but instead on how legal institutions can encourage professional development among faculty members beyond tenure.

David C. Iglesias, *A Prosecutor's Non-Negotiables: Integrity and Independence*, 44 GA. L. REV. 939 (2010).

Katherine R. Kruse, *Lawyers, in Character and Lawyers in Role*, 10 NEV. L.J. 393 (2010).

Earl Martin & Gerald Hess, *Developing a Skills and Professionalism Curriculum—Process and Product*, 41 U. TOL. L. REV. 327 (2010).

Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043 (2010). This symposium issue presents the concept that class action attorneys, especially the "small-stakes" class action attorneys, are undercompensated. There is also a discussion about how the criticism that class action attorneys are overcompensated misguided.

Paul D. Paton, *Cooperation, Co-Option or Coercion? The FATF Lawyer Guidance and Regulation of the Legal Profession*, 2010 PROF. LAW. 165 (2010).

Nancy B. Rapoport, *Through Gritted Teeth and Clenched Jaw: Court-Initiated Sanctions Opinions in Bankruptcy Courts*, 41 ST. MARY'S L.J. 701 (2010).

Joyce S. Sterling & Nancy Reichman, *So You Want to Be a Laywer? The Quest for Professional Status in a Changing Legal World*, 78 FORDHAM L. REV. 2289 (2010).

Eli Wald, *Foreword: The Great Recession and the Legal Profession*, 78 FORDHAM L. REV. 2051 (2010). This symposium issue focuses on the impact the "Great Recession" of 2008-2009 has had on the legal profession.

Eli Wald, *Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women at Large Law Firms*, 78 FORDHAM L. REV. 2245 (2010).