

CHALLENGES TO THE LEGAL PROFESSION IN THE NEW MILLENNIUM*

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Introduction

In this paper I discuss four "ethical" challenges faced by the legal profession as we enter into a new millennium. I know that these are challenges faced by the profession in the United States. And from my brief stay in Japan, I think that they are challenges faced by your legal profession, as well. In the process of discussing these challenges, I will also discuss some recent developments in the United States regarding legal ethics.

Here are the challenges I will discuss:

- I. The Challenge of a Unified Legal Profession.
- II. The Challenge of the Modern Law Firm
- III. The Challenge Posed by the Need for Legal Services
- IV. The Challenge Posed by the Modern Regulatory Environment

I. The Challenge of a Unified Legal Profession

I start by asking one simple question: "Is there just one kind of lawyer?" The answer, of course, is that there is not. We have lawyers who specialize in criminal practice and those that specialize in civil law. Within criminal practice, we have criminal defense lawyers and prosecutors. Within civil practice, we have any number of specialties (real estate law; intellectual property; family law; estate planning; health law; environmental law; business law). We also have a major distinction between trial attorneys and transactions attorneys. And among "transactions" attorneys (although not exclusively) we have the distinction between lawyers who are full time employees of some corporation or other entity (called various things: "inside counsel" or "in house counsel" or "corporate counsel") and those who have many different clients ("outside counsel").

The distinctions between these different kinds of lawyers or roles that lawyers play create challenges for any attempt to maintain a unified legal profession. And the question I want to discuss is how we, in the U.S., go about dealing with these challenges. Along the way, I will

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have some comments as to whether we have handled these challenges adequately and whether we have reached the point where we should realize that the very different kinds of work done by different types of lawyers demand that different “ethics” rules be developed for each. No doubt this basic question could be discussed usefully by focusing on any one of the different types of lawyers I have just mentioned. But I will limit myself to discussing three of the most basic distinctions: (a) Criminal Practice vs. Civil Practice; (b) Trial Practice vs. Transactions Practice; and (c) Inside Counsel vs. Outside Counsel.

(a) Criminal Lawyers vs. Civil Lawyers

I know that the configuration of our legal profession in the U.S. differs radically from its configuration in Japan as to one type of lawyer: the prosecutor. Since I have been in Japan, I have been struck and even puzzled by this difference. You consider prosecutors to be government employees working for or under the Ministry of Justice, and subject to a separate legal regime than their criminal defense lawyer counterparts. We, on the other hand, consider prosecutors to be members of the same bar association(s) as criminal defense lawyers and civil lawyers generally, and subject to a single code of ethics.

This is not to say that we do not understand that prosecutors and criminal defense lawyers have very different sets of responsibilities. We might say something like this: prosecutors have a responsibility to protect society from criminal behavior within the constraints of the law, whereas criminal defense attorneys have a responsibility for protecting clients from the inappropriate exercise of power by the state. Nonetheless, we have required prosecutors and criminal defense lawyers to comply with a single code of ethics.¹

How have we done this? One way has been to include special rules in our “unified” codes to take account of these special responsibilities. In the ABA Model Rules, for example, Rule 3.8 addresses the special responsibilities of prosecutors and requires, among other things, that they (a) refrain from prosecuting cases not supported by probable cause; (b) respect the constitutional rights of accused persons as these have been set out in our constitution as interpreted by our Supreme Court; and (c) avoid prejudicial extrajudicial public statements.²

¹ I speak of one code of ethics, whereas in fact we have more than 50 such codes in the U.S., one for each state. For convenience, however, I will refer in my lecture generally to the “model” code most recently revised and published by the American Bar Association (ABA) in 2002, called the Model Rules of Professional Conduct (“MRPC”). Where I intend to refer to some state (or other) variation on the Model Rules, I will try to indicate this clearly. I will also, on occasion, refer to the Restatement of the Law Governing Lawyers (“Restatement”), which was published in 2000 by the American Law Institute and which, in some respects, has become a rival or additional national “model.”

² The rule, in its entirety, provides:

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

But by the same token, all of the other rules that apply to criminal defense lawyers also apply to prosecutors. Both kinds of lawyers, therefore, are required, for example, to avoid (a) conflicts of interest,³ (b) improper disclosure of confidences;⁴ (c) deceiving the court;⁵ (e) illegally obstructing access to evidence;⁶ (f) illegally influencing a judge or jury,⁷ and (e) improper communications with an accused.⁸ As a result of this “unified” approach, prosecutors are fully subject to the disciplinary power of state bar associations in each state, and they also participate actively in the activities of the bar associations.⁹ And lawyers, generally, consider prosecutors to be “full-fledged” members of the profession.

Tensions between the prosecutorial function and the roles that other lawyers play do, of course, arise. One of the most interesting recent examples of such tension relates to rules that prosecutors feel constrict their ability to conduct covert investigations. One rule says a lawyer “shall not communicate about the subject matter of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”¹⁰ Another prohibits a lawyer from engaging in conduct that involves “dishonesty, fraud, deceit or misrepresentation.”¹¹ Here is the problem as prosecutors see it: Many members of organized crime have lawyers on retainer whose purpose is to serve as a shield from police investigations, so “contacting” such persons without the permission of their lawyers may implicate the “no-contact rule.” Moreover, covert investigations routinely use deception to trick suspects into thinking they are dealing with other criminals instead of undercover law enforcement agents. So this implicates the “honesty” rule.¹² The problem is compounded for prosecutors, because not only direct violations of the rules are prohibited but also indirect violations through third persons (such as the police).¹³

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor’s action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

³ MRPC 1.7-1.12.

⁴ MRPC 1.6, 1.8(b).

⁵ MRPC 3.3 & 3.4(b).

⁶ MRPC 3.4(a).

⁷ MRPC 3.5

⁸ See, e.g., MRPC 4.2.

⁹ Here, another qualification is necessary because of the federal system we have in the United States. One of the features of the federal/state system is that we have federal prosecutors who prosecute crimes in federal court. These federal prosecutors must be members of some state bar association, but they are not required to be members of the bar association in the state where they happen to be serving as prosecutors. See, e.g., *U.S. v. Ferrara*, 847 F. Supp. 964, 969 (DDC 1993), *aff’d*, 54 F.3d 825 (D.C. Cir. 1995).

¹⁰ MRPC 4.2. Article 49 of Japan’s Code of Ethics is similar in effect, I think.

¹¹ MRPC 8.4(c).

¹² Prosecutorial objections to these rules also arise in contexts other than covert investigations. Sometimes a criminal defendant who is represented by counsel contacts prosecutors directly without the knowledge of his or her attorney, and the prosecutors may take the position that the no-contact rule should not preclude them from listening to what the defendant wants to say. See, e.g., *In re Howes*, 123 N.M. 311 (1997).

¹³ MRPC 8.4(a).

For years, prosecutors took the position that such investigations were “authorized by law” as part of the routine law enforcement responsibilities of prosecutors and so the ethics rules did not apply. But after a number of worrisome court cases, the U.S. Attorney General sought to deal with the problem by promulgating regulations that purported to authorize federal prosecutors, at least, to engage in such investigations and to immunize them from the operation of state ethics codes to the contrary. This maneuver by the Attorney General, however, was unsuccessful. First, the regulations were struck down by a federal court as beyond the delegated power of the Attorney General.¹⁴ Secondly, Congress enacted a bill, called the “Citizens’ Protection Act,” which expressly requires federal prosecutors to comply with state ethics rules.¹⁵ The consequences of this development continue to trouble federal prosecutors.¹⁶ But these questions are not just of interest to federal prosecutors in the U.S.¹⁷ State prosecutors worry about the applicability of these rules as well.¹⁸

Special ethical issues arise also for the criminal defense function. The constitutional rights of criminal defendants put unique demands on legal assistance that are not present in civil practice. Here is a quick summary of the classic argument that is made: Ordinarily a lawyer has duty of candor to the court and may not participate in the presentation of false information. But a criminal defendant has a right against self-incrimination and a right to counsel to help protect the former right.¹⁹ To be maximally effective, the right to counsel requires that the defendant be able to divulge everything to his/her lawyer. Unless the right against self-incrimination is to be compromised, the lawyer should not be permitted to disclose incriminating information received from the client. If a lawyer knows (because of confidential information) that his client has committed perjury and the lawyer is permitted to disclose this to the court, it will undermine the client’s right against self-incrimination and right to counsel. If accepted, the logical conclusion to this line of thought is that the lawyer should not be permitted (let alone required) to disclose the client’s perjury to the court.²⁰ In short, there should be an exception for such a criminal defense lawyer from the duty of candor to the court. But where the constitutional rights of a criminal defendant are not at stake, an exception to the duty of candor is not required. Thus, some have suggested that we need

¹⁴ *United States ex rel. O’Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252 (8th Cir. 1998).

¹⁵ “(a) An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney’s duties, to the same extent and in the same manner as other attorneys in that State.” 28 USC §530B.

¹⁶ The Act was upheld against a claim by the U.S. that another state ethics rule, this one modeled on ABA MRPC 3.8(f)(see footnote above) was preempted in *United States v. Colorado Supreme Court*, 189 F.3d 1281 (10th Cir. 1999).

¹⁷ What is most remarkable to me about the Citizens Protection Act, as an observer of the unique federalism that we have in the U.S., is that in the Act, the U.S. Congress has expressly deferred to the state regulation of lawyers, rather than seeking to exercise its ability to preempt state law regulating lawyers. The Act is especially interesting when compared to the more recent Sarbanes-Oxley Act in which Congress directed the SEC to adopt rules regulating securities lawyers, which the SEC has now done. 15 U.S.C. 7245 (2002); 17 CFR Part 205 (2003). The rules expressly preempt conflicting state rules. 17 CFR 205.1. But these questions of “federalism” are of little interest, I would suppose, in Japan, where you have a single national legal regime.

¹⁸ Cf. *In re Gatti*, 330 Ore. 517 (2000). In *Gatti*, a private lawyer set up a private “sting” operation to uncover medicare fraud and was disciplined for this by the bar for “dishonest” conduct. In affirming the discipline, the court held that there is no “prosecutorial exception” that exempts government lawyers from complying with the candor rules. After that, the Oregon legislature acted to authorize such covert activities and, in January 2002, the Supreme Court of Oregon adopted a rule amendment to permit supervision of “lawful” covert activities.

¹⁹ U.S. Constitution, amendments V and VI.

²⁰ See, e.g., M.H. FREEDMAN & A. SMITH, *UNDERSTANDING LEGAL ETHICS* 153-90 (2d ed 2002).

different rules for criminal and civil practice.²¹

To date, this argument has failed to carry the day.²² The ABA, and most states, have taken the position that as an officer of the court, even a criminal defense lawyer has an affirmative duty to notify the court of testimony “known” to be false if he/she cannot persuade the client to recant.²³ Some states disagree, but the disagreement is an uneasy one even in those states.²⁴ So we have resisted adopting a different rule for criminal defense lawyers in this important and controversial area.²⁵ No doubt we have resisted in part because it is really quite rare that a criminal defense lawyer “knows” that his or her client will commit or has committed perjury. So the problem does not arise very often as a practical matter.²⁶ On the other hand, if the lawyer lacks actual “knowledge” of perjury, the tables turn. Lawyers in the U.S. generally have the right (but not the duty) to refrain from introducing evidence that they “reasonably believe” is false.²⁷ But if it is a criminal defendant client who wishes to testify, that client has a constitutional right to testify and the lawyer is obliged to respect that right, even if the lawyer believes (but does not know) that the client will lie. Thus, we have in this alternative context recognized the need for different rules for criminal defense lawyers and other kinds of lawyers.²⁸

(b) Trial Lawyers vs. Transactions Lawyers

Another major distinction that challenges us in the United States is that between trial attorneys and transactions attorneys. As you know, here again we have maintained a “unified” profession and applied a single set of ethical rules to both types of lawyers. In this I think we differ from many countries, including yours. Certainly the British distinguish between barristers and solicitors and demarcate their respective areas of practice rather carefully. And while

²¹ See, e.g., M.H. FREEDMAN, *LAWYERS ETHICS IN AN ADVERSARY SYSTEM* 40, 53, 56 (1975); Hazard, “The Client Fraud Problem as a Justinian Quartet: An Extended Analysis,” 25 *Hofstra L. Rev.* 1041 (1997).

²² The ABA has gone part way down the road of developing different rules from criminal and civil practice by promulgating suggested “Standards Relating to the Administration of Criminal Justice.” These standards, originally developed more than 20 years ago, are divided up into different chapters for various components of the criminal justice system. The most widely used by lawyers are “The Prosecution Function” (Ch. 3) and “The Defense Function” (Ch. 4), which were most recently revised in 1993. ABA Standards for Criminal Justice (3d ed. 1993). But these standards have never been adopted as a binding code by any U.S. jurisdiction and remain but “persuasive authority” for consultation and citation by lawyers and courts.

²³ MRPC 3.3(a)(3) and (3.3)(b).

²⁴ Compare, for example, Washington Rule of Professional Conduct 3.3 (prohibiting disclosure of such perjury) with *State v. Berrysmith*, 87 Wn. App. 268, 279 (1997) (concluding that there was a duty of disclosure in such a case).

²⁵ MPRC 3.3(a)(3) and (b).

²⁶ Many commentators have made this point. A couple of the most recent and most important to make it are: Hazard, “The Client Fraud Problem as a Justinian Quartet: An Extended Analysis,” 25 *Hofstra L. Rev.* 1041, 1049 (1997); Frankel, “Clients’ Perjury and Lawyers’ Options,” 1 *J. Inst. Stud. Leg. Eth.* 25, 28-34 (1996).

²⁷ MRPC 3.3(a)(3).

²⁸ MRPC 3.3(a)(3). The rules say that generally an attorney “may refuse to offer evidence ...that the lawyer reasonably believes is false.” MRPC 3.3(a)(3). But an exception has now been expressly stated in the ABA Model Rules for “the testimony of a defendant in a criminal matter.” *Id.* The idea here is that a criminal defense attorney is NOT free to prevent a criminal defendant client from testifying if the lawyer only “reasonably believes” the client will be lying, because the client has a constitutional right to testify. The lawyer may not set himself or herself up as judge based only on “reasonable belief” (as opposed to “knowledge”). See also MRPC 3.3, comment [9].

your own legal profession is not ostensibly divided in the same way as the UK system is, you seem to make a distinction similar to that made in the UK, between trial attorneys and other kinds of “legal practitioner.”²⁹

There are a variety of grounds for criticizing a unified system such as we have in the U.S. First, trial attorneys live and breathe in an “adversary” environment where disputants have resorted to an impartial factfinder to settle their dispute. This is not the life of a transactions lawyer, whose principal job is to try to facilitate agreement and compromise and to prevent disputes from arising. We might go so far as to say that these two different kinds of lawyers read from different legal “texts.” When litigators research and think about the law, they are thinking about making arguments to a particular judge or panel of judges. They are (so it seems to me) less worried about making an argument that will stand up on appeal than they are in convincing the judge(s) to accept the argument NOW. They are concerned with winning a case now, and it is typically a case with more factual than legal issues. Transactions lawyers, I think, have a very different attitude towards the law in the shadow of which they bargain, draft, and structure transactions. Their interpretive legal arguments are not addressed to a tribunal, and often not even to the client. For them, the legal analysis is done with the (potential) court far in the distant uncertain future. To them the law is a set of engineering principles which, if violated, may cause their building to crumble. But not immediately. Only if there is an earthquake, which we call a dispute. These different attitudes do, I believe, lead often to different, perhaps very different, interpretive attitudes. The viewpoint matters immensely.

Second, litigators seem to require different ethics rules. Many have observed that trial attorneys need a kind of aggressive style which would be positively counterproductive in a transactions lawyer. This aggressive zeal seems to require some very special kinds of rules relating to honesty and confidentiality. It is well understood that trial lawyers are expected to present evidence in a way that is most persuasive for their client, even if they do not necessarily believe that this is the most accurate interpretation of the evidence that is available. They are also expected to try to undermine the testimony of opposing witnesses — even those whom they believe to be telling the truth— if there are “truthful” ways of attacking the credibility of the witness.³⁰ Again, we say (at least in our system) that advocates are entitled (and for criminal defense lawyers, required) to put on witnesses who they reasonably believe will testify falsely.³¹ This seems like a very different notion of “honesty” and “truthfulness” than is expected of transactions attorneys, who are expected to make no false statements of material

²⁹ I have in mind, of course, the separate licensing systems for judicial scriveners (*shiho-shoshi*) and to a lesser extent, administrative scriveners (*gyosei shoshi*). At least one *shiho-shoshi* that I have met has likened his role to that of a solicitor under the British system. But I realize that *bengoshi* in Japan are not subject to the same limitations as are barristers in the British system.

³⁰ “If [defense counsel] can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State’s case in the worst possible light, regardless of what he thinks or knows to be the truth. Undoubtedly there are some limits which defense counsel must observe but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.” *United States v. Wade*, 388 U.S. 218, 257-58 (1967) (Justice White, concurring).

³¹ MRPC 3.3(c).

fact to third persons and to avoid engaging in conduct involving “honesty, fraud, deceit or misrepresentation.”³² Finally, we say that litigators who “know” (from confidential information) that their client has committed perjury must disclose this to the court, whereas a lawyer who “knows” that the client has lied to someone outside of a court is not even permitted, let alone obliged, to disclose this if it is confidential information.³³ So we seem to believe that confidentiality means something different for the litigator than for the transactions lawyer.

A third ground for criticism is that by suggesting that any lawyer is competent to be either a trial attorney or a transactions attorney upon graduation from law school and passing the bar, we guarantee that attorneys will not be properly trained to be either. American legal education has long been criticized for falling short in training law graduates in “practice skills.” We have made great strides in that connection in the last thirty years. And perhaps we are ahead of some other countries in this regard. But I think that our failure to recognize different “kinds of legal professional” from the outset may have been partly responsible for this shortcoming. The kind of legal education that trial attorneys need is in many respects quite different than that required by those who intend to be primarily transactions attorneys. Court room skills are very different than those needed to structure business deals or real estate developments or to do estate planning. As a teacher of legal ethics, for example, if I knew all the students in one of my classes were going to be trial attorneys, I would concentrate on one set of ethics rules; while if I knew they were all going to be transactions I would focus on quite another.

Do these criticisms mean that we should have a different kind of ethics code or a different regulatory regime for litigators than for transactions lawyers? In the United States, we continue to think that they do not. To some extent, we recognize the need for different rules even in our so-called “unified” system. Just as with prosecutors, we do have a number of rules in our ethics codes that are addressed primarily to trial attorneys and “litigators.” We even separately label the section of the code containing these rules as that addressing the lawyer as “advocate.” These rules focus on things like avoiding frivolous claims or arguments in court,³⁴ expediting litigation,³⁵ candor to the tribunal,³⁶ fairness to the opposing party and counsel,³⁷ impartiality and decorum in court,³⁸ and trial publicity.³⁹ These “advocacy” rules sit uncomfortably beside rules clearly written for transactions or “corporate” lawyers, such as that governing the organization lawyer,⁴⁰ that governing evaluations for use by third persons

³² MRPC 4.1 and 8.4(c). To be sure, Rules 4.1 and 8.4 on their face apply to litigators as well as transactions attorneys. So it might be thought that both kinds of lawyer must conform to the same notions of honesty and confidentiality. But I think we should see Rules 3.3 and 3.4 as specific rules that redefine what honesty means for litigators, whereas we do not have such specific rules for transactions attorneys. The result, I think, is very different standards.

³³ Compare MRPC 3.3(a)(3) and (b) with MRPC 4.1(b) and the comments thereto. To be sure, a transactions lawyer is not entitled to assist a client in committing a fraud, and must withdraw if there is no other way to avoid this. But this does not mean the lawyer may disclose client confidences. At least not directly. Noisy withdrawal might be permitted, however. See MRPC 1.6, comment [14].

³⁴ MRPC 3.1.

³⁵ MRPC 3.2.

³⁶ MRPC 3.3.

³⁷ MRPC 3.4.

³⁸ MRPC 3.5.

³⁹ MRPC 3.6.

⁴⁰ MRPC 1.13. Strictly, of course, Rule 1.13 would apply also to a litigator working for an entity, whether a business entity or a governmental entity. The duties of Rule 1.13 could be triggered if a constituent of the entity

(“opinion letters”),⁴¹ that governing honesty in negotiations,⁴² and those governing things like multi-disciplinary practice⁴³ and the provision of law-related services.⁴⁴ Nonetheless, we continue to believe that these rather extensive differences do not require the splitting of these two kinds of lawyers from one another. We believe that litigators and transactions attorneys have more in common than they differ.

(c) Outside Counsel vs. Inside Counsel

The third distinction between types of practice that I want to discuss is that between outside and inside counsel in civil practice.⁴⁵ In the U.S., I think we may have slightly more experience with this kind of lawyering than you do in Japan, at least as a form of law practice within the licensed legal profession. Your Practicing Attorney Law states that “a practicing attorney shall not ... become an employee” of a profit-making business “unless he obtains permission from the bar association.”⁴⁶ I understand that such permission is given fairly routinely now. But I believe it was not always so and that in the past, such “corporate counsel” practice was not common. As recently as 1990, for example, a survey of Japanese companies with legal departments reported that 30 percent of their staff had no legal education; and the vast majority of the remaining 70 percent were graduates of law departments but not licensed lawyers.⁴⁷ Out of a sample of 547 companies, a total of seven licensed lawyers were employed.⁴⁸ In the U.S., on the other hand, employment of licensed lawyers full-time has quite a long tradition.⁴⁹

As you surely know, we expect inside counsel to conform to the same ethical standards as any other lawyers. But the unique demands placed on inside counsel regularly put a strain on this expectation. In general, I think it is safe to say that the strains are largely caused by two facts: (a) First, inside counsel have only one client and depend entirely on that client for their livelihood. (b) Second, inside counsel work for an organization that depends, for its usefulness, on the activities of human beings. Each of these facts creates a distinct set of problems

instructed a litigator to take a position that was illegal or unethical. But the rule has as its primary thrust, I believe, decisions made in non-litigation contexts.

⁴¹ MRPC 2.3.

⁴² Comment [2] to MRPC 4.1 says: “Whether a particular statement should be regarded as one of fact [as to which honesty is required] can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value ... and a party’s intentions as to an acceptable settlement of a claim are ordinarily in this category....”

⁴³ MRPC 5.4.

⁴⁴ MRPC 5.7.

⁴⁵ The words used to describe lawyers employed full-time by a single company have changed in the U.S. We sometimes use the expression “inside counsel”; sometimes “in-house” or “house” counsel. The term that seems most “respectable” these days is “corporate” counsel. I prefer to use “inside counsel” instead. I do not mean to disparage this form of practice. But “corporate counsel” suggests that the role of a lawyer working in a for-profit business corporation is unique. In contrast, I think the same set of issues is raised for any lawyer who works full-time for a “collective” entity, be it a corporation or a partnership, for profit or non-profit, governmental or nongovernmental. I also think “inside” counsel provides a nice balance to the terms we use for other kinds of business lawyers, which we continue to speak of as “outside” counsel.

⁴⁶ Article 30(3).

⁴⁷ M. DEAN, JAPANESE LEGAL SYSTEM 269 (2d ed 2002).

⁴⁸ Id.

⁴⁹ See, e.g., Liggio, “The Future Structure and Regulation of Law Practice: A Look at the Role of Corporate Counsel: Back to the Future - or is it the Past?” 44 *Ariz. L. Rev.* 621 (2002).

for inside counsel. And while they are commonplace, it is nonetheless useful to outline them here before addressing whether the present approach to such lawyering is adequate.

Having only one client is, at best, a mixed blessing. On the one hand, such a lawyer does not have to deal with the conflicting demands of multiple clients, each competing for his/her time, each (to varying degrees) unable to understand that the lawyer owes some time and loyalty to other clients. This "undivided loyalty" of inside counsel can make life easier in some respects. Moreover, the lawyer with only one client can get to know the client better and typically will come to see the client as a whole "person" or "organization" and not just as an isolated legal problem or set of legal problems. Such an attorney-client relationship can be more satisfying than the kind of "hit and run" (literally, I suppose, "serve and run") relationship that many lawyers have with their clients. On the other hand, when one has only one client, one's professional life and livelihood is totally dependent on that client and one's ability to give independent advice to the client may become diminished. Or, if independent advice is given and rejected, the inside lawyer's ability to withdraw from this client and serve others is much more difficult. It is hard for the junior lawyer, who may have pinned his or her future hopes to this client and have foreclosed other options in taking this job; but it is also hard for the more senior lawyer, whose personal (and often family) life has become enmeshed both financially and personally with the organization. Yet professional independence is one of the most important things that lawyers have to offer their clients.

But this is only part of the problem for the inside counsel. The dependence on only one client is something that can occur for lawyers who are not the employees of a client, but who spend all or almost all of their time, as a practical matter, doing work for only one client. Many lawyers in American law firms have this experience. But for inside counsel, the dependence on one client is compounded by the fact that the lawyer is working for a collective entity which is, in reality, composed of a community of human beings with a shared purpose. Again, this is a mixed blessing for inside counsel. The good side of this situation is that it can be professionally rewarding to be part of such a community. We all, I think, have a need for community. Often, the lawyer in a law firm must find community in the firm. Law firms are very special kinds of communities, communities which have the shared purpose of providing legal services. The inside counsel, on the other hand, has the opportunity to be part of a community providing non-legal products or services and is able, perhaps, to gain a more balanced picture of the relative importance of the lawyer in the overall social scheme of things.

The difficult side of this aspect of the entity client is that while serving the client, one necessarily deals with real people who have their own identities, needs, desires, and expectations. Legal ethics theory in the United States is that inside counsel (just like outside counsel) represents the entity and owes confidentiality and loyalty to the entity.⁵⁰ But this theory runs up against the reality of the entity employees with whom a lawyer deals on a day to day basis. The human beings with whom the lawyer regularly interacts come to view him or her as a legal adviser that can help them as persons to navigate the intricacies of the law while doing their job for the entity. The line between the interests of the entity and personal interests is not always easy to draw; nor is it easy to remember the need to draw it.

Suppose that a corporate officer, with whom the lawyer regularly must deal to serve the client, discloses to the lawyer something that tells the lawyer that the officer has violated the

⁵⁰ See, e.g., MRPC 1.13 and Restatement §96.

law or some fiduciary obligation to the corporate employer, or is about to do so. At a minimum, the lawyer needs to advise the officer of this, and to make it clear that this is not acceptable, on behalf of the entity client. Our view in the United States is that the lawyer must do more. The lawyer must make it clear to the officer that the lawyer represents the entity, not the officer, and must act in the best interests of the entity, even if that means that the officer must be sacrificed. Part of this message is that the duty of confidentiality is owed to the entity, not to the officer, and so the lawyer may well have an obligation to report the officer's violations to a superior. These are not things that the officer will be happy to hear. Indeed, the officer may feel betrayed. Having built up a relationship of trust and confidence with the officer, the company's lawyer is threatening to betray the officer. These are also things that it is not easy for inside counsel to say. The reality is that such a lawyer is likely to have a much closer personal relationship with the officer than with the entity. It is difficult to develop personal relationships with collective entities. So the lawyer may not want to tell his or her friend that he/she can't do (or shouldn't have done) what has been revealed. But the ethics code says the lawyer must do so.

There is an even more difficult dimension of the dynamic under conventional U.S. ethical analysis. The officer's feeling of being betrayed may be more accurate than I have described it thus far, because the lawyer may inadvertently have established a separate attorney client relationship with the officer. The formation of an attorney client relationship depends on what is said (and not said) between the lawyer and the person who thinks that they are a client. If the lawyer has said things from which the officer has reasonably concluded that the lawyer is representing the officer's personal interests (as well as the entity's interests), and the lawyer reasonably should know this, then maybe the lawyer has in fact entered into an attorney client relationship with the officer.⁵¹ This is why the role of inside counsel is typically featured in any U.S. discussion of the problem of determining "who is the client." But as you can see, if the lawyer begins as counsel for the entity, if he has then established an attorney/client relationship with one of the corporate officers as well, then the lawyer has not one, but two clients. Where a corporate employee's interests are not in conflict with those of his/her employer, such a dual representation is harmless enough. It may also be benign if the corporate official happens to be the sole owner or owner of a majority of the stock of the entity. But once the officer's interests diverge from those of the entity, the lawyer finds himself with two clients with conflicting interests.⁵²

If there is a dual client conflict, the lawyer cannot ethically continue to represent both clients and must withdraw from representing at least one. Again, under standard ethical analysis in the U.S., it may not suffice to withdraw from representing only one of the two clients. Suppose the lawyer tries to withdraw from the (inadvertent) attorney/client relationship that has been established with the corporate officer. Now that officer becomes a "former" client and the lawyer has a "successive conflict of interest".⁵³ We would say that before the lawyer may continue to represent the entity against the interests of the officer/former client, the officer/former client must consent. Consent is something the officer may well be unwilling to give, especially if the officer has disclosed confidences to the lawyer that the office does not

⁵¹ Restatement §14.

⁵² Moore, *Conflicts of Interest for In-House Counsel: Issues Emerging From the Expanding Role of the Attorney-Employee*, 39 S. TEX. L. REV. 497, 503 (1998).

⁵³ MPRC 1.9.

want the lawyer to share with superiors. Absent former client consent, however, the lawyer may be required to withdraw from representing the entity client as well. Why? The lawyer has a duty to keep the entity client informed of information relevant to the representation.⁵⁴ The information obtained from the officer is relevant information. If the lawyer discloses it to the entity without the former client's consent, the lawyer violates the duty of confidentiality to the (now) former officer/client. If the lawyer refuses to disclose it to the entity, the lawyer violates the duty to inform the entity. Either option is a violation of ethics rules and so the lawyer, strictly speaking, is required to withdraw from the representation.⁵⁵

Sometimes, the corporate officer who feels betrayed by the lawyer is powerful enough to take the initiative, and may fire the lawyer before the lawyer follows through with threats to go over the head of the officer. Alternatively, the superiors in the entity may choose to side with the officer and may wish to silence the lawyer. One way they might do this is to fire the lawyer. The lawyer who is discharged because he or she has tried to exercise appropriate ethical responsibilities is in a particularly difficult position. If a "whistleblower" is discharged for blowing the whistle in the U.S., typically they will have a right to sue their employer for retaliatory discharge. But the same may not be true for the lawyer who is a whistleblower. We have a long tradition in the U.S. that says a client has complete freedom to choose (or dismiss) a lawyer. This principle has been interpreted to preclude suits for retaliatory discharge by lawyers.⁵⁶ One of the more interesting recent developments in the U.S. is that this traditional resistance to suits for retaliatory discharge by lawyers has begun to change.⁵⁷ But to date, the cases that have allowed such claims specify rather limited circumstances under which they will be permitted. Absent an ability to obtain damages after discharge for complying with ethical responsibilities, the professional stakes for inside counsel who wishes to comply with ethical duties are very high, indeed.

So as it turns out, the problems faced by inside counsel are "among the most complex and difficult of those functions performed by lawyers."⁵⁸ I think that these inherent tensions and potentials for loss of independence and conflicts of interest may have been the original insight that gave rise to the provision of your Practicing Attorney Law, which requires bar association permission for lawyers to serve in such a role. The logical question to ask at this point, then, might be whether it is consistent with the ethical duties that we believe lawyers must respect to continue to permit them to work full-time in house for organizations? Unfortunately, I do not think that this is a practical question to ask at this point, at least in the United States. We have walked too far down that road. An alternative question might also be asked: should we have different ethical expectations for inside lawyers? If not a different ethical code, should we not at least adopt special ethics rules addressing their distinct representational role? So far we have not developed such rules. Perhaps that is because we are at a loss to know what they would say that is different than our current rules.

⁵⁴ MRPC 1.4.

⁵⁵ MRPC 1.16.

⁵⁶ See, e.g., *Balla v. Gambro, Inc.*, 584 N.E.2d 104, 108 (Ill. 1991).

⁵⁷ See, e.g., *GTE Prods. Corp. v. Stewart*, 653 N.E.2d 161, 166 (Mass. 1995); *General Dynamics Corp. v. Superior Court*, 876 P.2d 487 (Cal. 1994); *Parker v. M & T Chems., Inc.*, 566 A.2d 215, 222 (N.J. Super. Ct. App. Div. 1989).

⁵⁸ Hazard, "Ethical Dilemmas of Corporate Counsel," 46 *Emory L.J.* 1011 (1997).

Conclusion

These examples clearly demonstrate that problems can and do arise from applying the same code of ethics to lawyers with different kinds of responsibilities. Sometimes the issues raised have required that special rules for a particular type of lawyer be included within the ostensibly unified code. But so far, we have concluded that we do not need different codes for prosecutors and for criminal defense lawyers, or for criminal practice and civil practice, or for outside and inside counsel. This does not mean that our existing codes sufficiently address the differing responsibilities. There is clearly room for improvement. But it does mean that the legal profession considers such improvement a shared enterprise. We are all in this together. The presumption is that every person trained in the law, no matter what their area of practice, has something valuable to say about changes in the rules proposed for every kind of lawyer, and a stake in the outcome. We have a single “justice system” and the rules that govern lawyers engaged in that system have a huge impact on whether that system functions for the benefit of society. At least so we have concluded.

II. *The Challenge of the Modern Law Firm*

The next topic that I want to address is the challenge posed by the modern law firm. Here I am thinking of the large law firm, typically with more than one hundred lawyers, often with multiple offices spread across jurisdictional lines. Obviously I do not have time to do the subject full justice. But I do want to focus on two particular challenges which have caused strong debate in the United States over the last decade: (a) The problem of imputed conflicts and (b) the problem of multidisciplinary practice.

(a) The Problem of Imputed Conflicts.

The numerical size of the modern law firm is staggering. The American Lawyer report on the top “Global 100” firms for 2001 (by size) showed that these firms ranged from a high of 2,923 lawyers⁵⁹ to a low of 444.⁶⁰ The American Lawyer reports on the Top 100 and Second 100 largest American law firms (by revenue) show that these 200 firms ranged in size from a high of 3,031 lawyers⁶¹ to a low of 130 lawyers.⁶² The data show that law firms have become,

⁵⁹ Baker & McKenzie (Chicago). The Am Law Global 100, viewed on line at http://www.law.com/special/professionals/amlaw/most_lawyers_2001.html, on February 9, 2003. The data for the reports was obtained at different times, which I presume explains the change in Baker & McKenzie’s size between the two reports.

⁶⁰ Covington & Burling (Washington, DC) and Debevoise & Plimpton (New York) tied for this honor. The Am Law Global 100, viewed on line at http://www.law.com/special/professionals/amlaw/most_lawyers_2001.html, on February 9, 2003. As an American, I was interested to note that in terms of Gross Revenue, the British firm Clifford Chance (which recently merged with Rogers & Wells of New York) is not first with a gross revenue \$1.4055 billion for 2001. The Am Law Global 100, viewed on line at: http://www.law.com/special/professionals/amlaw/revenue_2001.html on February 9, 2003. The lowest gross revenue among the “Global 100” for 2001 was \$189.475 million. Freehills National (Australia). The Am Law Global 100, viewed on line at: http://www.law.com/special/professionals/amlaw/revenue_2001.html on February 9, 2003.

⁶¹ Baker & McKenzie (Chicago). The Am Law 100, viewed on line at http://www.law.com/special/professionals/amlaw/2002/amlaw100/amlaw_100main.shtml on February 9, 2003.

⁶² Howard. Rice, Nemerovski, Canady, Falk & Rabkin (San Francisco). The Am Law 200, viewed on line at http://www.law.com/special/professionals/amlaw/2002/amlaw_200/amlaw_200main.shtml on February 9, 2003.

in their own rights, major economic players in the world economy. We have also come to realize that these law firms have become important “gatekeepers” to the justice system and the financial markets. But here I do not want to focus on these gatekeeper functions or on the economic power of the large modern law firm. Instead I want to focus on the challenges posed by the need in such firms to avoid conflicts of interests. To state the question more precisely: Having so many lawyers in a single firm necessarily means that some of them may be contacted (and wish) to represent parties whose interests are adverse, or potentially adverse, to the interests of clients other attorneys in the firm are already representing. Should this be permitted?

In the United States, we have generally taken the position that it should not. The mechanism for enforcing this position is our “imputed conflicts” rule. ABA Model Rule 1.10 states that “[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so” by the concurrent or successive conflicts rules.⁶³ Article 27 of your Code of Ethics seems to be designed to protect against the same risks, although it speaks more generally in terms of “maintaining fairness” due to the relationship between lawyers in the same office or with the clients of such lawyers.⁶⁴

There are two interests at stake here. First, there is a concern that if one firm is permitted simultaneously to represent two clients with adverse interests, the firm will find it difficult, if not impossible to be loyal to both at the same time. Second, there is the concern that confidences received from one of the clients might inadvertently or deliberately be shared with an attorney in the office who is representing the adverse party. The problem is not limited, in our view, to simultaneous representation of two parties who are directly adverse in the same case. It extends to cases where the parties are adverse to one another in unrelated cases. If, for example, Attorney A is representing Honda Motors in a case against Nissan Motors, we say that Attorney B (in the same office) may not represent Nissan Motors in an unrelated case against Toyota Motors.⁶⁵ We are concerned that the firm where both A and B practice may be tempted to provide better service to Honda than it does to Nissan (or vice versa), even though it is not representing them both in the same or even a related proceeding. We are also concerned that Nissan confidences that are relevant to the Nissan-Toyota proceedings and therefore given to Attorney B might be relevant to the Honda v. Nissan proceeding and be shared with Attorney A.

Nor is the problem limited to simultaneous conflicts. While we do not consider loyalty to former clients to be as dominant a consideration as with concurrent representation, the problem of confidential information acquired from former clients remains of great concern. Here we say that if Attorney A represented Honda in a case against Nissan, and that representation has been terminated, there is risk of disclosing confidential information if Attorney B of the same firm is permitted later to represent Nissan in “the same or a substantially related matter” where Nissan is materially adverse to the firm’s former client Honda.⁶⁶ We impute conflicts of interest also where a lawyer has formerly worked for the

⁶³ MRPC 1.10(a), MRPC 1.7 and 1.9. The parallel rule in the Restatement is §123.

⁶⁴ JFBA Code of Ethics Article 27 states: “An attorney shall not participate in a matter which may keep him or her from maintaining fairness due to his or her relation with another attorney in the same office or with such attorney’s clients.”

⁶⁵ See MPRC 1.7, comment [6].

⁶⁶ MPRC 1.9 and 1.10.

government, or as a judge, and had “personal and substantial” involvement on a matter as to which his firm later wishes to represent a client.⁶⁷ We are also concerned about protecting the confidences of a client who has contacted a law firm about representation and been rejected, either because the firm has a conflict or because the lawyer contacted simply is not willing or able to represent the client. Thus, if the lawyer who has been contacted has obtained “would-be” client confidences that would disqualify that lawyer from later representing another party adverse to the “would-be” client who was rejected, we impute that disqualification to other lawyers in the firm.⁶⁸ Finally, the problem is not limited to imputing conflicts within a single law office. If it were, the solution for the modern law firm might be to multiply offices to minimize imputed conflicts.⁶⁹ But at least in the United States, conflicts are generally imputed across a whole firm, to all lawyers, everywhere.⁷⁰ Given the amount of movement and communication between branch offices over the telephone, fax, and email, this is hardly surprising.

To some extent, we think that client consent can cure such “imputed” conflicts of interest. Particularly with regard to “former client conflicts” we say that if the former client gives informed consent to the later representation, it is permissible.⁷¹ With regard to concurrent conflicts, we are more cautious. We say that concurrent imputed conflicts can be waived with the informed consent of both clients, but only if the two clients are not directly adverse in the same litigation or before the same tribunal and, even then, only if the lawyers reasonably believe they can provide “competent and diligent representation” to both clients.⁷² But obtaining client consent is not all that easy, particularly when the clients are adverse to one another in some arena. Furthermore, it must be “informed” consent, and giving sufficient information to one client to obtain truly informed consent may entail sharing some of the confidences of the other client, for which the consent of that client will be required.⁷³

In order to comply with these imputed conflict of interest rules, law firms need to institute complex “conflicts checking” systems whenever they are considering representing a new client. Such systems are far from foolproof. In one recent high visibility case, a dramatic conflict of interest was missed because of a “clerical error.”⁷⁴ In another, the name of the firm’s former

⁶⁷ MRPC 1.11 and 1.12.

⁶⁸ MRPC 1.18. The ABA Model Rules use the phrase “prospective client” but this seems to me imprecise because it suggests (contrary to fact) that the client did become an actual client, whereas the phrase “would-be client” does not carry such a suggestion.

⁶⁹ Multiple offices is another dimension of the modern mega firm. The American Lawyer report on the “Global 100” indicates that the global firm with the largest number of lawyers (Baker & McKenzie) had offices in 31 countries. The Am Law Global 100, viewed on line at http://www.law.com/special/professionals/amlaw/most_lawyers_2001.html, on February 9, 2003.

⁷⁰ MRPC 1.0(c) and comments [2]-[4]. Restatement §123 and comment c.

⁷¹ MRPC 1.9(a): “A lawyer who has formerly represented a client in a matter shall not thereafter represent 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 gives informed consent, confirmed in writing.” See also MRPC 1.18(d)(1).

⁷² MRPC 1.10(c) and 1.7(b).

⁷³ MRPC 1.0(e) defines “informed consent” and Comments [6] and [7] thereto now expand on what is required for such consent.

⁷⁴ *A v. B v. Hill Wallack*, 726 A.2d 924, 925 (NJ 1999). As the court explained: “Unfortunately, the clerk who opened the firm’s estate planning file misspelled the clients’ surname. The misspelled name was entered in the computer program that the firm uses to discover possible conflicts of interest. The firm then prepared reciprocal wills and related documents with the names of the husband and wife correctly spelled.” *Id.*

client was not entered during the conflicts check because the former client was not a formal party to the later proceeding for which a client sought to retain the firm.⁷⁵ But that did not prevent the court from concluding the law firm had an imputed conflict of interest because the former client's interests and confidences were at issue in the later representation.⁷⁶

Not surprisingly, given the difficulty of obtaining client consent, law firms in the United States have tried other methods to avoid the imputed conflicts problem. The device that presents itself is "screening."⁷⁷ The idea of a "screen," of course, is that one builds a "screen" between two lawyers in the same firm who have clients with conflicting interests, so that their respective clients' interests are protected.⁷⁸ We have accepted the use of such "ethical" screens in the U.S. for more than 20 years when it comes to a particular kind of successive conflict. We have said that a screen will cure an imputed conflict where a former government lawyer moves to a private firm and the firm wishes to represent a client in connection with a matter on which the former government lawyer participated "personally and substantially" while employed by the government.⁷⁹ In such a case, the former government lawyer is personally disqualified but if he/she is screened off, the personal disqualification is not imputed to the firm. We allow screens, as well, where a former judge or arbitrator or mediator or other "third party neutral" has participated personally and substantially in a matter on which another lawyer in the firm later wishes to represent a party.⁸⁰ "Screening" in these contexts denotes "the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law."⁸¹ We also say that the lawyer who is personally disqualified from representing the client should be "apportioned no part of the fee therefrom."⁸² The concern, with regard to the fee, is that a lawyer who will share financially in the representation of a client will have an incentive, even if not representing the client, to share confidential information acquired from an adverse party that can materially assist those who are representing the client.

But we are quite divided in the United States as to whether to permit screening in other contexts. And this is where there have been important recent developments. A number of jurisdictions have now adopted rules that permit screening where a lawyer with a former client

⁷⁵ *Oxford Systems, Inc. v. Cellpro, Inc.*, 45 F. Supp. 2d 1055, 1066 (W.D.Wash. 1999). The law firm involved was Perkins Coie ("Perkins") in Seattle. Perkins had formerly represented a client (Becton Dickinson) who was defending a patent infringement action brought against it by Cellpro. The litigation had largely been decided contrary to the plaintiff (Cellpro), although there was a sanctions motion pending against Cellpro and its lawyers (Lyon & Lyon). Then shareholders of Cellpro ("Oxford Systems") brought a shareholders' action against that company and its lawfirm, Lyon & Lyon. Inadvertently, Perkins agreed to defend Lyon & Lyon in that second action, unaware that it was directly related to the patent infringement case in which it had earlier represented Becton Dickinson, the adversary of Cellpro (and its lawyers).

⁷⁶ *Id.*

⁷⁷ Historically, "screening" has been referred to as the use of a "Chinese wall." I have heard this expression used in Japan. It seems apt to me given the historical function of the great wall of China: keeping intruders out. But as a result of a combination of misunderstanding and political correctness, this expression is thought by some to disparage the Chinese, and so the more acceptable expression "screening" has been adopted.

⁷⁸ Other commentators have used a different metaphor and have spoken of building a "cone of silence" around the personally disqualified lawyer.

⁷⁹ MRPC 1.11(b).

⁸⁰ MRPC 1.12(c).

⁸¹ MRPC 1.0(k). See also Comments [8]-[10] to this rule.

⁸² MRPC 1.11(b)(1); 1.12(c)(1); and 1.18(d)(2)(i).

conflict moves from one private law firm to another.⁸³ If the new law firm has a client with a conflict of interest with the new lawyer's former client, the firm is permitted to erect a screen around the incoming lawyer and other lawyers in the firm may continue to represent the conflicting client. In general, these jurisdictions have allowed screening in this context because they find it difficult to justify drawing a distinction between screening in the former government lawyer context where it is generally allowed, and screening in the context of a move from one private law job to another, which most states refuse to allow. In both kinds of situation, refusing to allow screening makes it extraordinarily difficult for a lawyer to change places of employment.⁸⁴ If screening is not allowed, such a lawyer with confidences (and conflicts) from former clients will be rejected by new law firms where he or she may wish to work because otherwise he or she will "infect" the new firm with various conflicts under the imputed conflict rule. So to preserve mobility in the modern legal profession, these jurisdictions have concluded that screening should be permitted in this context. But only in this context. It is important to emphasize, however, that even in those eight states, screening has not been adopted to cure an imputed conflict where the personally disqualified lawyer became disqualified while with the firm that proposes to set up the screen. It has only been adopted for the so-called "migrating" lawyer.⁸⁵

Notwithstanding the acceptance of screening in a growing number of states, the ABA continues to resist it. The revised ABA Model Rules (2002) make only two new concessions to screening. (1) Where a client has sought representation from a lawyer but been rejected by the lawyer, if the contacted lawyer has obtained confidential information from the would-be client that would disqualify the lawyer from later representing a party adverse to the would-be client, that disqualification would normally be imputed to the rest of the law firm.⁸⁶ But the ABA rule now permits the use of a screen to prevent that imputation.⁸⁷ (2) The Model Rules have also extended the use of screening previously allowed only for former judges and arbitrators to any lawyer who is personally disqualified as the result of having formerly served as a judge, arbitrator, mediator or other "third party neutral."⁸⁸ While former judges would usually not have become "personally and substantially" involved in a matter (and thus personally disqualified) while working in a law firm (unless, perhaps, they were serving as a part-time or "pro-tem" judge), the same will not be true of lawyers serving as arbitrators, mediators or other third party neutrals. Often these are not full-time employments and lawyers in big law firms may do this kind of work as part of their regular practice. Indeed, mediation is becoming quite a common "sideline" for many U.S. lawyers. In these two instances, the ABA rules now permit screening where the screened lawyer acquired the conflict while

⁸³ See, e.g., Washington RPC 1.10. A survey done in 2002 reported that at least eight American states allow screening in such a situation (Illinois, Kentucky, Maryland, Michigan, Oregon, Pennsylvania, Tennessee, and Washington.. T.D.MORGAN & R.D.ROTUNDA (eds), 2002 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 145-47 (FOUNDATION 2002). The notes to the survey suggest that at least two additional states may allow "limited" screening. Id. (Massachusetts and Minnesota).

⁸⁴ The problem may be particularly acute for inside counsel for a big company who wishes to leave an enter law firm practice, since such a former inside counsel will carry with him or her extensive former client conflicts as to the previous employer.

⁸⁵ The statement in the text needs to be qualified as to lawyers who are personally disqualified as a result of having served as judges, arbitrators, or mediators. See discussion in the next paragraph.

⁸⁶ MPRC 1.18(c).

⁸⁷ MRPC 1.18(d)(2).

⁸⁸ Compare MRPC 1.12(c)(1983) with MRPC 1.12(c)(2002).

working at the screening firm. But beyond these areas, the ABA Model Rules prohibit screening to cure former private client conflicts, even those carried into the firm by a migrating lawyer.⁸⁹

Although it goes further than the ABA towards screening, the new Restatement also reflects considerable resistance to the mechanism. It permits screening in two of the contexts that the ABA Model Rules now do: conflicts resulting from consultations with would-be clients and from former government service.⁹⁰ The Restatement also goes one step further and permits screening for the private attorney who is moving from one private setting to another.⁹¹ But the circumstances under which screening is permitted by the Restatement rule are quite limited. Screening is only allowed “when there is no substantial risk that confidential information of the former client will be used with material adverse effect on the former client” and when the confidences are “unlikely to be significant in the subsequent matter.”⁹² The qualification that the confidences must be “unlikely to be significant” effectively means that the Restatement rule accepting screening will rarely make a difference. Indeed, it is open to question whether there would be an imputed conflict when the confidences at issue are insignificant. Moreover, the Restatement seems to rely on this limited screening rule for conflicts arising from service as a judge or mediator. So it actually allows screening less often in that context than the ABA.⁹³

What explains this continued resistance to screening? The answer seems fairly straightforward: Acceptance of screening presupposes confidence in the screening mechanism, itself. One needs to have confidence that screens are effective to accomplish their stated goals. The ABA lacks that confidence, as do more than 80 percent of the American states. For of course, the person (or entity) responsible for establishing an effective screen is the same law firm which has something to gain from leaks or holes in the screen. The American idiom describes this as the “fox watching the hen house.” Furthermore, the evidence that must be relied on to prove the timeliness, completeness and effectiveness of the screen is normally going to be supplied by the lawyers and employees of the law firm that set up the screen. Typically this evidence will be supplied under oath by means of affidavit. But there are few sources of “disinterested” evidence with which to test the recollection of the swearing lawyers and employees.

So here is the problem. The modern large law firm seems to require the use of screening in a variety of contexts if (a) it is going to be free to hire lawyers “laterally” from other firms and careers; (b) its own lawyers are going to be free to provide not only legal but dispute

⁸⁹ The Ethics 2000 Commission proposed a rule in its August 2001 draft that would have permitted such screening, but it was rejected by the ABA. Love, “The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000,” 15 *Geo. J. Legal Ethics* 441, 456 and note (2002)

⁹⁰ Restatement §124(3) (permitting screening for former government lawyers) and Restatement §15(2) (permitting screening of lawyers personally disqualified as a result of consultations with prospective clients).

⁹¹ Restatement §124(2).

⁹² Restatement §124(2) provides: “(2) Imputation specified in §123 does not restrict an affiliated lawyer with respect to a former-client conflict under §132, when there is no substantial risk that confidential information of the former client will be used with material adverse effect on the former client because:

(a) any confidential client information communicated to the personally prohibited lawyer is unlikely to be significant in the subsequent matter;

(b) the personally prohibited lawyer is subject to screening measures adequate to eliminate participation by that lawyer in the representation; and

(c) timely and adequate notice of the screening has been provided to all affected clients.

⁹³ See Restatement §124(2) and §132, along with comment g and Reporters’ Notes to §132.

resolution services; and (c) its lawyers are going to be able to interview prospective clients without fear of tainting the ongoing representations of the firm. But we do not have much confidence in such screens.

One solution to this problem would be to return to a world with many small firms and less lawyer mobility and diversity of practice. But I do not seriously expect that solution to materialize. Another solution would be to find some way to institutionalize the screening mechanism that instills more confidence. One possibility that has occurred to me is the creation of third party screen service providers. Since one of the ongoing concerns has been that we depend on the firm with the conflict of interest to prove that it has a screen in place, perhaps if we “outsource” that function to an independent third party provider, we would have more confidence in it. Thus, when a new lawyer joins a firm, the screen provider (should we call this the “screen saver”?) could be called in for consultation to determine if the new lawyer needs to be screened from involvement with other lawyers in the firm and, if necessary, to help establish and “secure” the screen. With increased availability of electronic security mechanisms, we might reinforce such a system with more secure files which allow computer or other access only for specific identities. This sounds (to me) like a very expensive undertaking and one that is very complex. But few can doubt how expensive disqualifications are when a screen has not be properly put in place. Nor is it inexpensive to defend against a motion for disqualification. I suspect that I am not the first to come up with such an idea and that our modern “mega” firms are already exploring the possibilities of such independent “screen” providers. But ultimately the weak link is the personally disqualified lawyer who has confidences in his or her head that need to be protected. How can we really prevent inadvertent (or deliberate) sharing in a culture where sharing of client confidences within the firm is part of the community value of having a firm.⁹⁴

One other issue of continuing debate and discussion also needs to be mentioned at this point, before I move on to another topic. That is the potential for imposing “ethical” responsibility not just on lawyers, but also on law firms, as entities. If one or more lawyers in a law firm undertake a representation and it turns out that their firm has a conflict of interest which forces the firm to withdraw (either voluntarily or after a successful motion for disqualification is filed), then this serves as its own kind of sanction for the law firm. It is expensive to be forced to withdraw, particularly after substantial hours of attorney time have been invested. Often the attorney time spent will not be compensated, since the firm may be forced to forego some or all of the fees it has theoretically earned. The firm will also be exposed to malpractice liability to the client affected. But some have recommended that the lawyer disciplinary system should also include discipline of law firms.⁹⁵ Professor Ted Schneyer, who seems first to have proposed this, argues that the nature of modern large law firms makes such “firm” discipline important. Lawyers in firms with many lawyers are rarely disciplined. There are a variety of reasons why this may be true: (1) such lawyers may enjoy a kind of informal

⁹⁴ Consider how screening will work in the two contexts that the ABA has added: former mediators and would-be clients. In these contexts, the personal disqualification may well have been acquired by the lawyer while working in the same firm which later needs to screen him or her. If time has elapsed between the time that the disqualifying work was done, and the time when the screen was instituted, who is to say that confidences were not inadvertently shared? Such “sharing” by firm lawyers would be quite common during informal law firm encounters such as over coffee or lunch among lawyers who were aware of no need to screen at the time.

⁹⁵ Schneyer, “Professional Discipline of Law Firms?,” 77 *Cornell L. Rev.* 1 (1991).

“immunity” from discipline as part of the more prestigious segment of the bar; (2) the kind of conduct that frequently attracts complaints from clients (such as neglect) may occur less frequently in bigger firms; (3) the clients of such firms may complain less frequently even if they are mistreated; (4) even if lawyers have misbehaved in such firms, with a large number of lawyers responsibility becomes more diffuse and it is difficult for the bar to assign responsibility; (5) even if some lawyers can be identified as responsible, bar associations may be reluctant to single them out, aware that other lawyers in the firm are probably equally responsible; and (6) the ethical “infrastructure” in the modern law firm (such as conflicts checking mechanisms or calendar systems) may be as much responsible for ethical shortcomings than the activities of individual lawyers.⁹⁶ All of these arguments combine to suggest that misbehavior in such firms is a real concern, but some alternative or additional mechanism must be found to police it. Schneyer argues that civil liability and such things as disqualification are not sufficient. Bar associations should discipline firms as entities. Such discipline could involve such things as suspending the firm from practice, or from a particular area of practice, or requiring the firm to institute institutional reforms, or placing the firm on “probation”.

To date, only one U.S. state (NY) has adopted a rule providing for law firm discipline and that rule has not been utilized much.⁹⁷ As late as the summer of 2000, the ABA Ethics 2000 Commission seems to have favored an amendment to the ABA Model Rules that would have allowed for law firm discipline.⁹⁸ But that change ultimately was not made. Margaret Love, a member of the Ethics 2000 Commission, has recently written that “[t]he Commission ... became persuaded that any possible benefit from being able to extend disciplinary liability firm-wide was small when compared to the potential cost of de-emphasizing the personal accountability of partners and supervisors.”⁹⁹ Notwithstanding the Commission’s conclusion, however, I believe that this is an idea whose time has come, and hope that sooner or later more jurisdictions will adopt such a change.

(b) The Problem of Multidisciplinary Practice

Another challenge posed to the modern legal profession is the demand for “multi-disciplinary” services. Many of the larger law firms, and some of the giant accounting firms as well, have pressed for a greater regulatory acceptance of “multi-disciplinary practice” (“MDP”). The idea of MDP is that one firm should be able to provide not only legal services but non-legal services to clients who wish to have various kinds of needs met by one entity which houses different professionals under one roof. Let me be very clear: this is not a proposal to allow non-lawyers to practice law. It is a proposal to allow lawyers to partner with non-lawyers so that each can practice his or her own profession or business in a single “multi-disciplinary” entity.

In the United States, of course, we have been having a debate about whether MDP should

⁹⁶ 77 Cornell L. Rev. at 8-11.

⁹⁷ G.C. HAZARD, S.P.KONIAK, & R.C.CRAMTON, *THE LAW AND ETHICS OF LAWYERING* 945 (3d ed. 1999). New York adopted such a rule in 1996, I believe.

⁹⁸ Love, “UPDATE ON ETHICS 2000 PROJECT AND SUMMARY OF RECOMMENDATIONS TO DATE,” Item 27 (August 8, 2000).

⁹⁹ Love, “The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000,” 15 *Geo. J. Legal Ethics* 441, 471 (2002).

be permitted for at least twenty years now.¹⁰⁰ For almost a century, we have had a prohibition of MDP in our ethics codes.¹⁰¹ Its current form is found in Model Rule 5.4. The rationale for this prohibition is four-fold: (a) lawyers' independence may be compromised if they are subject to the control or influence of non-lawyer professionals with whom they are engaged in a common business enterprise; (b) lawyers may be deeply conflicted if their firm provides not only legal services but non-legal services on which the lawyer is expected to give "impartial" advice; (c) lawyers will have a conflict insofar as they wish to refer their clients to the lawyers' non-law partners for non-law services; and (d) client confidences may be jeopardized because the non-lawyers in a MDP may not have the same professional duty to maintain confidentiality as the lawyers.¹⁰²

But many lawyers do not find these concerns persuasive. There are institutional ways to prevent non-lawyers from controlling a lawyer's provision of legal services. Clients can be informed about the potential for conflict resulting from a firm's provision of non-legal services, and they (it is argued) should be able to make their own decisions. Non-lawyers in a firm can be bound contractually to respect confidences and the lawyers in the firm can be held ethically and civilly responsible for maintaining confidentiality. Most large law firms already employ non-lawyers in a variety of contexts, sometimes giving them significant firm responsibility, and they have managed to maintain their duties to clients notwithstanding the presence of these non-lawyers. Moreover, it is virtually impossible for a modern law firm to function without building reciprocal alliances with non-lawyers, and these alliances pose virtually indistinguishable ethical dangers. And yet we have managed. Last, but surely not least, the big accounting firms have already established MDP enterprises outside the United States, where rules are less strict.¹⁰³ And these mega-MDPs pose a real competitive threat to American law firms in the global marketplace.

More than fifteen years ago, American law firms began to deal with the prohibition in Rule 5.4 by setting up what have been called "ancillary" law-related entities in which both lawyers and non-lawyers are principals. The ancillary business refers its clients to the parent law firm for legal services, so these ancillary firms are not, strictly, MDPs. Thus, they technically do not violate the prohibition of Rule 5.4. But these ancillary businesses are a thinly disguised "technical" avoidance of the formal ethics rules. They carry with them the same dangers as do true MDPs, and they lack one of the key benefits of the MDP: a single multi-service entity. So American firms continue to push for MDP.

The ABA has been struggling with the issues posed by ancillary businesses and MDPs for twenty years now. The Kutak Commission that proposed the original ABA Model Rules proposed a rule which would have permitted MDP in 1983, but that rule was rejected by the

¹⁰⁰ See, e.g., Daly, "Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership," 13 *Geo. J. Legal Ethics* 217 (2000); Andrews, "Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?" 40 *Hastings Law Journal* 577 (1989).

¹⁰¹ *Id.* at 584-91.

¹⁰² *Id.* at 605-17.

¹⁰³ A number of commentators have argued that the big accounting firms have effectively established MDPs in the United States, as well, notwithstanding Rule 5.4. Lawyers working for such firms in the United States may well be in violation of Rule 5.4 because they are, in fact if not in name, providing legal services to the public in an organization containing both lawyers and non-lawyers as partners. See, e.g., Andrews, *supra*, 40 *Hastings L.J.* at 632-36. State bar associations, however, seem unwilling or unable to police such violations.

ABA House of Delegates.¹⁰⁴ In 1991, the ABA adopted a Rule 5.7 which approved of ancillary businesses, under tight constraints.¹⁰⁵ One year later, the House of Delegates repealed the rule by a close vote.¹⁰⁶ Two years later, in 1994, a new Rule 5.7 was approved.¹⁰⁷ This rule survived the recent Ethics 2000 changes to the Model Rules with only minor change.¹⁰⁸ Those who seek MDPs have been less successful. In 1998, the ABA established another Commission to study the problem of MDP and once again, the Commission recommended adoption of MDP.¹⁰⁹ But once again, the ABA House of Delegates rejected that recommendation.¹¹⁰ The Ethics 2000 Commission, originally in favor of MDP, backed off when the ABA special commission proposal to allow MDP was rejected. The ABA debate has spurred an intensive examination of MDP in many of the 50 states. There are proposals pending in a number of states recommending the adoption of MDP.¹¹¹ But to date, no state has actually adopted rules that permit MDP.¹¹²

Few issues have consumed as much time as the MDP debate at both the ABA and state levels. My own view is that the legal profession has been blinded by its fear of competition. On the one hand, many of the advocates of MDP push for it because they are concerned that the giant accounting business pose a competitive threat that makes MDP necessary. On the other hand, many of the opponents fear that allowing MDP would give a green light to the giant accounting firms and other large non-law corporations to start providing legal services and totally displace traditional law practice. I cannot deny that there is a competitive struggle going on at the level of the megafirm and that MDP is and will continue to play a part in that struggle. But I think MDPs have the most promise, and pose the fewest dangers, at the much smaller level of partnerships of two or three professionals who want to set up what we might call “boutique” MDPs. Such MDPs would permit highly talented professionals to combine to offer specialized services for a particular kind of clients who is looking for a package of services from one provider. I continue to believe that such enterprises can function in a way that complies with the ethical responsibilities of all the participants.

Nonetheless, I have to concede that to date, the MDP opponents have clearly carried the

¹⁰⁴ Andrews, *supra*, 40 *Hastings L.J.* at 593-7.

¹⁰⁵ J.S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES : 2002-2003 248 (2002)..

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ The current rule reads as follows:

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term “law-related services” denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer. (MRPC 5.7.)

¹⁰⁹ AMERICAN BAR ASSOCIATION COMMISSION ON MULTIDISCIPLINARY PRACTICE, REPORT TO THE HOUSE OF DELEGATES (1999).

¹¹⁰ The ABA maintains a website on MDP where the relevant materials can be examined: <http://www.abanet.org/cpr/multicom.html>.

¹¹¹ http://www.abanet.org/cpr/mdp_state_summ.html

¹¹² *Id.*

day. The Enron debacle and Andersen's role in that scandal, in particular, seems to have given fuel to the anti-MDP forces. Andersen was providing two distinct kinds of services, auditing and consulting, under one roof. Critics point to the firm's failure to have balanced its professional responsibilities adequately as an illustration of the dangers of MDP. I agree that the Andersen story may illustrate the dangers and that any abuses that occurred in that case need to be addressed. But somehow, I do not think that even the Enron debacle will end the MDP debate. The big accounting firms continue to engage in MDP internationally, and I do not think that the legal profession has the power or the will to enforce its rules against the lawyers involved in such enterprises. I suspect that little by little, the large multi-national MDPs will show that they can serve their clients well, without all of them succumbing to the temptations apparently illustrated by Andersen's role in the Enron affair. In other words, we will learn to deal with abuses on a case by case basis, rather than relying on a prophylactic rule banning MDPs altogether. Once that lesson is learned, I think the prohibition on MDPs will die a quiet death.

III. *The Challenge Posed by the Need for Legal Services*

The third challenge that I want to address is that of providing legal services to those who need them but are not currently being served. Apparently one of the things that has driven the reform of your legal education system, now in process, has been a consensus that you do not currently have enough licensed lawyers to meet the need for legal services.¹¹³ Perceptions differ as to how severe the shortage may be, or how big a difference there really is between (say) Japan and the United States.¹¹⁴ But everyone seems to agree that your society could use more lawyers. What may be more surprising to you, however, is that so could the United States !!! What I mean by this is that there are a great many Americans who go without legal services who could use them. Although we have gone a fair ways towards providing lawyers for criminally accused persons who have a constitutional right to counsel,¹¹⁵ we have been far less successful in providing legal services to low income populations who are in need of such services to protect their meager opportunities for affordable shelter, employment, health care and food.

¹¹³ Recommendations of the Justice System Reform Council for Justice System to Support Japan in the 21st Century (June 12, 2001) at 46-47 ("Justice System Report").

¹¹⁴ Japan has roughly half as many citizens (127 million) as does the United States (285 million), but only as many licensed lawyers (about 18,000) as we have in my home state of Washington (about 19,000), which has a population of about 6 million. Based on these numbers there is roughly one lawyer for every 7000 Japanese compared to one lawyer for every 315 in Washington state. Your own Justice System Reform Council identified 20,000 lawyers in Japan as of 1997 (or one lawyer per 6,300 persons) and 941,000 lawyers at that time in the U.S. (or one lawyer per 290 citizens). Justice System Reform Council, Recommendations of the Justice System Reform Council For a Justice System to Support Japan in the 21st Century (June 12, 2001) at page 46. But these statistics tell only a part of the story, since Japan has a number of legal professionals who are not bengoshi. As of 2001, Dean counts 18,246 bengoshi, roughly 17,000 shiho-shoshi, and roughly 35,000 gyosei-shoshi, for a total of 70,000. M. DEAN, *supra*, at 267-69 and note 62. Japan also has patent attorneys (benrishi) and tax attorneys (zeirishi) who provide legal services, but since the United States has similar "non-lawyer" professionals, I do not add them to the comparative counts, otherwise their American counterparts would need to be added. Finally, you have tens of thousands of law-trained persons who work within government and corporations performing functions that are often performed in the United States by licensed attorneys.

¹¹⁵ Even here many commentators argue, with substantial evidence, that we do not do nearly enough.

Historically, the U.S. legal profession has provided some of the legal services needed by indigent populations by free legal service, called “pro bono” legal service. But there is a wide consensus that such contributions by American lawyers have never been sufficient to meet the need.¹¹⁶ Since the 1960s, we began to fund at the federal level community legal services offices that would help provide such services. Beginning in about 1980, a third mechanism was devised in the United States to help fund such legal services, which goes by the name of IOLTA. “IOLTA” stands for “interest on lawyer trust accounts” and it refers to pooled bank accounts that American lawyers are required to set up for certain client funds held in their custody. Ordinarily client funds are held in accounts which are earmarked to each client and return interest to the clients for the period the funds are held. But where clients funds are of such a small amount or held for such a short time that they cannot justify a separate client-specific account to be established, they are put into a pooled account and it is the interest from each lawyer’s pooled account which is referred to as “IOLTA.” Beginning in 1981, courts throughout the United States adopted rules mandating that *where the interest on such pooled accounts could not be allocated to individual clients in a cost-effective way*, it should be remitted annually to the courts and be dedicated to funding legal services for the poor.¹¹⁷ The IOLTA System has generated many millions of dollars each year to fund indigent legal services.

One of the developments that has occurred in the United States over the last two decades is that both of these funding sources have become endangered. Beginning with the Reagan administration and continuing through the two Bush administrations, there has been a cut back in federal funding of legal services for the poor.¹¹⁸ Political concerns developed that such publicly funded legal services offices were being utilized to lobby and mount class action and test cases against governmental authorities in an effort to secure and protect the legal interests of the poor. Various Republican administrations moved to restrict the use of public funds by such legal services offices and to cut the overall level of funding.¹¹⁹ As a consequence, federal funds going into the provision of legal services for the poor have been sharply reduced.

More recently, the IOLTA system has come under attack as unconstitutional. Two constitutional arguments have been raised: first, that the IOLTA system constitutes a taking of property without compensation, in violation of the fifth amendment of the U.S. Constitution;¹²⁰ second, that the IOLTA system violates the first amendment rights of clients whose funds are deposited in IOLTA accounts. In a decision that surprised many, the fifth amendment argument was laid to rest in March of 2003. The United States Supreme Court upheld the Washington state IOLTA system against a fifth amendment attack in *Brown v. Legal Foundation*.¹²¹ Having earlier held that the interest generated by the IOLTA system was “private property” within the scope of the fifth amendment takings clause,¹²² in *Brown* the

¹¹⁶ See, e.g., “Special Issue: Conference on the Delivery of Legal Services to Low-Income Person: Professional and Ethical Issues,” 67 Ford. L. Rev. 1713-2786 (1999).

¹¹⁷ Background information may be found in *Phillips v. Washington Legal Found.*, 524 U.S. 156, 160-61 (1998)

¹¹⁸ Background information can be found in *Legal Services Corporation v. Valazquez*, 531 U.S. 533 (Feb. 28, 2001).

¹¹⁹ *Id.*

¹²⁰ See generally Comment: “PENNIES FROM HEAVEN - WHY WASHINGTON LEGAL FOUNDATION V. LEGAL FOUNDATION OF WASHINGTON VIOLATES THE U.S. CONSTITUTION,” 77 Wash. L. Rev. 775 (2002).

¹²¹ 155 L. Ed. 2d 376, 123 S. Ct. 1406, 2003 U.S. LEXIS 2493, 71 U.S.L.W. 4221 (U.S. 2003)

¹²² *Phillips v. Washington Legal Foundation*, 524 U. S 156, 141 L. Ed. 2d 174, 118 S. Ct. 1925 (1998).

Court went on to hold that while the IOLTA system had “taken” such property for “public use,” no “just compensation” was due because there had been no net loss to the clients.¹²³ This is because lawyers are not supposed to put funds in an IOLTA account if the funds can generate net interest for the client whose funds they are.¹²⁴ As a consequence, the fifth amendment is not violated by the IOLTA system. The attack on the IOLTA system, however, is not over. A first amendment argument has also been raised. The first amendment argument is that state courts have interfered with clients’ freedom of expression by mandating that certain client property be held in IOLTA pooled accounts and then directing that the interest derived from such pooled accounts be devoted to a purpose (providing legal services to the indigent) with which the clients might not agree.¹²⁵ Now that the fifth amendment attack has been resolved, the courts must turn to this first amendment argument.¹²⁶ It is a serious one and it is quite possible that the Court will still strike down the IOLTA system on this basis.¹²⁷

If these two funding sources are abolished or seriously diminished, the provision of legal services to the indigent in the United States will depend even more heavily on the willingness of the legal profession to provide free legal services.¹²⁸ To date, we have been unwilling to impose on the whole legal profession an enforceable duty to provide such service.¹²⁹ Instead, we empower courts to appoint lawyers to serve without charge on a case by case basis. And even that exercise of judicial power is increasingly coming under challenge. That, too, may be an unconstitutional taking of property (lawyers’ services) for public use without compensation.¹³⁰ After the IOLTA case is resolved, this may be the next battleground.

Lawyers concerned about the provision of legal services for the poor are generally concerned about this conglomeration of developments. Aside from a change of political winds, they do not see any hope for increased legal services to the poor. To me, the only serious hope is for us to reexamine the structure of our legal profession and the barriers to entry.

¹²³ Brown, *supra*, 155 L.Ed. 2d at 396.

¹²⁴ *Id.* at 397.

¹²⁵ Wash. Legal Found. v. Legal Found. of Wash., 236 F.3d 1097, 1115 (9th Cir. 2001)

¹²⁶ Brown v. Legal Found., 123 S. Ct. 1406; 155 L. Ed. 2d 376, 406 (2003)(Kennedy, J, dissenting); Wash. Legal Found. v. Legal Found. of Wash, 271 F.3d 835, 864 (9th Cir. 2001).

¹²⁷ A federal district court in Texas upheld that state’s IOLTA system against a first amendment challenge in Washington Legal Found. v. Texas Equal Access to Justice Foundation., 86 F. Supp. 2d 624, 632-36 (W.D.Tex. 2000), *rev’d* on other grounds, 270 F.3d 180 (5th Cir. 2001). But that is by no means the end of the story. Dissenting from the Court’s decision in Brown, Supreme Court Justice Kennedy noted:

“The First Amendment consequences of the State’s action have not been addressed in this case, but the potential for a serious violation is there. See *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 52 L. Ed. 2d 261, 97 S. Ct. 1782 (1977); *Keller v. State Bar of Cal.*, 496 U.S. 1, 110 L. Ed. 2d 1, 110 S. Ct. 2228 (1990). Today’s holding, [**61] then, is doubly unfortunate. One constitutional violation (the taking of property) likely will lead to another (compelled speech). These matters may have to come before the Court in due course.”

155 L. Ed. 2d. at 406.

¹²⁸ A constitutional IOLTA system could theoretically be devised if clients are given a choice to dedicate the interest from their trust accounts to the provision of legal services to the poor. But the legal profession is pessimistic about the willingness of clients to do this and/or the costs involved in obtaining such consent.

¹²⁹ See.,e.g, MRPC 6.1. To date, no American state has adopted a “mandatory pro bono” obligation.

¹³⁰ Compare *Williamson v. Vardeman*, 674 F.2d 1211, 1214-15 (8th Cir. 1982) and *United States v. Dillon*, 346 F.2d 633, 638 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966)(rejecting federal constitutional takings clause challenges to mandatory court appointment) with *Sholes v. Sholes*, 760 NE2d 156, 162-63 (Ind. 2001) and *DeLisio v. Alaska Super. Ct.*, 740 P.2d 437 (Alaska 1987)(upholding arguments against appointment based on state constitution takings clauses).

Fortunately, that project has already begun. In my home state of Washington, our Supreme Court recently adopted one of the first comprehensive rules defining the “practice of law” and delineating what constitutes unauthorized practice.¹³¹ Perhaps stimulated by this development, the ABA has set up a Task Force to draft a model definition and report back by August 2003.¹³² That Task Force has already circulated a draft definition for comment.¹³³ I suspect that if you take the time to read these definitions, you will be struck by how broad the basic notion of “practice of law” is thought to be in the United States. These rules go part way towards clarifying a variety of matters that have been surrounded by uncertainty for years in the United States. But our prohibitions continue to be extraordinarily broad. I suspect, for example, that many of the things that you in Japan allow law-trained, but unlicensed, persons

¹³¹ Washington GR 24. The Washington definition reads as follows:

(a) General Definition: The practice of law is the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person(s) which require the knowledge and skill of a person trained in the law. This includes but is not limited to:

(1) Giving advice or counsel to others as to their legal rights or the legal rights or responsibilities of others for fees or other consideration.

(2) Selection, drafting, or completion of legal documents or agreements which affect the legal rights of an entity or person(s).

(3) Representation of another entity or person(s) in a court, or in a formal administrative adjudicative proceeding or other formal dispute resolution process or in an administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review.

(4) Negotiation of legal rights or responsibilities on behalf of another entity or person(s).

(b) Exceptions and Exclusions: Whether or not they constitute the practice of law, the following are permitted:

(1) Practicing law authorized by a limited license to practice pursuant to Admission to Practice Rules 8 (special admission for: a particular purpose or action; indigent representation; educational purposes; emeritus membership; house counsel), 9 (legal interns), 12 (limited practice for closing officers), or 14 (limited practice for foreign law consultants).

(2) Serving as a court house facilitator pursuant to court rule.

(3) Acting as a lay representative authorized by administrative agencies or tribunals.

(4) Serving in a neutral capacity as a mediator, arbitrator, conciliator, or facilitator.

(5) Participation in labor negotiations, arbitrations or conciliations arising under collective bargaining rights or agreements.

(6) Providing assistance to another to complete a form provided by a court for protection under RCW chapters 10.14 (harassment) or 26.50 (domestic violence prevention) when no fee is charged to do so.

(7) Acting as a legislative lobbyist.

(8) Sale of legal forms in any format.

(9) Activities which are preempted by Federal law.

(10) Such other activities that the Supreme Court has determined by published opinion do not constitute the unlicensed or unauthorized practice of law or that have been permitted under a regulatory system established by the Supreme Court.

(c) Nonlawyer Assistants: Nothing in this rule shall affect the ability of nonlawyer assistants to act under the supervision of a lawyer in compliance with Rule 5.3 of the Rules of Professional Conduct.

(d) General Information: Nothing in this rule shall affect the ability of a person or entity to provide information of a general nature about the law and legal procedures to members of the public.

(e) Governmental agencies: Nothing in this rule shall affect the ability of a governmental agency to carry out responsibilities provided by law.

(f) Professional Standards: Nothing in this rule shall be taken to define or affect standards for civil liability or professional responsibility.

¹³² The ABA has set up a website displaying the mission of the Task Force, a copy of the current draft definition, and comments on the draft that has been circulated. http://www.abanet.org/cpr/model_def_home.html.

¹³³ The ABA draft, circulated in September 18, 2002, for comment reads as follows:

(a) The practice of law shall be performed only by those authorized by the highest court of this jurisdiction.

(b) Definitions:

to do for companies and government offices would be prohibited to such persons under these United States definitions. For that reason, I believe the most important part of these definitions is found in the exceptions. What sorts of legal services will we permit persons to do without a general license to practice law? In Washington, we have developed a number of rights to engage in the limited practice of law, and most jurisdictions have some of these. But no American jurisdiction goes so far as to license what we call paralegals. I believe that we need to do this, among many other things, if we are to ensure that those in need of legal services can obtain the help they need.

On this point, I think we could learn something from your system. You license a variety of kinds of legal professionals who are given limited powers to provide legal service. Judicial scriveners (Shiho-shoshi) can draft legal documents that are to be filed in court. They also prepare documents that are integral to real estate and other kinds of transactions.¹³⁴ They can also give legal advice related to such drafting and, now, they can represent persons in summary court proceedings. You also license “administrative scriveners” who are permitted to do

(1) The “practice of law” is the application of legal principles and judgment with regard to the circumstances or objectives of a person that require the knowledge and skill of a person trained in the law.

(2) “Person” includes the plural as well as the singular and denotes an individual or any legal or commercial entity.

(3) “Adjudicative body” includes a court, a mediator, an arbitrator or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party’s interests in a particular matter.

(c) A person is presumed to be practicing law when engaging in any of the following conduct on behalf of another:

(1) Giving advice or counsel to persons as to their legal rights or responsibilities or to those of others;

(2) Selecting, drafting, or completing legal documents or agreements that affect the legal rights of a person;

(3) Representing a person before an adjudicative body, including, but not limited to, preparing or filing documents or conducting discovery; or

(4) Negotiating legal rights or responsibilities on behalf of a person.

(d) Exceptions and exclusions: Whether or not they constitute the practice of law, the following are permitted:

(1) Practicing law authorized by a limited license to practice;

(2) Pro se representation;

(3) Serving as a mediator, arbitrator, conciliator or facilitator; and

(4) Providing services under the supervision of a lawyer in compliance with the Rules of Professional Conduct.

(e) Any person engaged in the practice of law shall be held to the same standard of care and duty of loyalty to the client independent of whether the person is authorized to practice law in this jurisdiction. With regard to the exceptions and exclusions listed in paragraph (d), if the person providing the services is a nonlawyer, the person shall disclose that fact in writing. In the case of an entity engaged in the practice of law, the liability of the entity is unlimited and the liability of its constituent members is limited to those persons participating in such conduct and those persons who had knowledge of the conduct and failed to take remedial action immediately upon discovery of same.

(f) If a person who is not authorized to practice law is engaged in the practice of law, that person shall be subject to the civil and criminal penalties of this jurisdiction.

Comment

[1] The primary consideration in defining the practice of law is the protection of the public. Thus, for a person’s conduct to be considered the practice of law, there must be another person toward whom the benefit of that conduct is directed. That explains the exception for pro se representation. The conduct also must be targeted toward the circumstances or objectives of a specific person. Thus, courts have held that the publication of legal self-help books is not the practice of law.

[2] The exception for pro se representation in paragraph (d)(2) contemplates not only self-representation by an individual but also representation of an entity by an authorized nonlawyer agent of the entity in those jurisdictions that permit such representation.

Id.

¹³⁴ M. DEAN, *supra*, at 269.

similar things in working with government administrative offices. As I understand the Judicial System Reform Council report, the proposal is to expand still further the areas that are appropriate for shiho-shoshi and other “para-lawyers.”¹³⁵ I applaud these proposals and these developments and hope that we see the value of licensing “para-lawyers” in our own system. I see no other way in which we will be able to meet the need for legal assistance in our country.

IV. *The Challenge Posed by the Modern Regulatory Environment*

The last challenge I want to discuss is that of the modern regulatory environment. Here, I have in mind not the regulation of the legal profession by bar associations and the oversight provided such regulation by the courts. Rather, I wish to discuss the interface between the legislative/administrative branches of government and the bar associations. We have in the United States a long tradition of what we called “self-government” by the legal profession or, we might say, freedom from “governmental regulation”. I believe that the same is true in Japan. But increasingly, we see in the United States that legislatures and regulatory agencies are asserting control over lawyers in ways which to many seem deeply inconsistent with the traditions of autonomy the bar has enjoyed.

The two examples that I will focus on are the developments prompted by the Enron Scandal and the developments proposed to combat international money laundering. The first development is the passage of the Sarbanes-Oxley Act by the U.S. Congress and regulations adopted (and some still only in proposal form) by the Securities Exchange Commission. The second development is the so-called “Gatekeepers Initiative.”

The SEC regulations were adopted under a mandate from Congress in the Sarbanes-Oxley Act requiring the SEC to develop “minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers.”¹³⁶ I have discussed the regulations in detail elsewhere and do not intend to do so here.¹³⁷ But reference to the two most controversial components of the SEC regulations are sufficient to make my point. First, the SEC has adopted a rule that permits securities lawyers to disclose client confidences (i) To prevent the issuer from committing an illegal act that the attorney reasonably believes is likely to result in substantial injury to the financial interest or property of the issuer or investors; (ii) To prevent the issuer from committing an illegal act that the attorney reasonably believes is likely to perpetrate a fraud upon the Commission; or (iii) To rectify the consequences of the issuer’s illegal act in the furtherance of which the attorney’s services had been used.”¹³⁸ Second, the SEC has proposed to impose a duty of “noisy withdrawal” on lawyers who have reported evidence of illegality to their client, but believe that they have not received an “appropriate response” and “reasonably believe that a material violation is ongoing or is about to occur and is likely to result in substantial injury to the

¹³⁵ Justice System Report at Section III, Part 3, paragraph 7, page 67.

¹³⁶ Pub. L. 107-204, section 307 (2002).

¹³⁷ See Andrews, “The Limits of Confidentiality: Recent Developments in the United States Relating to a Lawyer’s Right to Disclose Confidences to Prevent Property Damage and Fraud,” presentation given as part of the JFBA Symposium on Money Laundering and Gatekeeper Legislation (Tokyo Feb. 15, 2003).

¹³⁸ 17 CFR 205.3(d)(2), available at the SEC website at <http://www.sec.gov/rules/final/33-8185.htm>.

financial interest or property of the issuer or of investors.”¹³⁹ “Noisy withdrawal” involves a withdrawal from the representation and a “disaffirmance” to the SEC of documents that the lawyer has assisted in preparing but comes to believe contain material violations. It is said to be “noisy” because it involves an indirect disclosure to the SEC that the documents contain an unidentified “problem”, information which would be confidential otherwise.¹⁴⁰

The Gatekeepers Initiative is a set of recommendations proposed by the Financial Action Task Force on Money Laundering (FATF) which was set up by the G8 nations to develop strategies for combating money laundering by international criminal elements, including terrorists.¹⁴¹ In a Consultation Paper released on May 30, 2002, the FATF proposed extension of its anti-money laundering program to the legal profession, which it sees as one of the “gatekeepers” to international financial markets.¹⁴² The most controversial parts of the proposal are that individual nations should require lawyers to report “suspicious transactions” engaged in by their clients without notifying their clients that they are doing so, and that the lawyers should then follow the directions of the governmental agency to whom they have reported this information.¹⁴³ As with the SEC regulations, these FATF proposals envision that lawyers, to some extent, will help the government uncover illegal activities by their clients.

Not surprisingly, both the ABA and the JFBA have filed comments opposing both of these developments. The concerns are fairly obvious. The regulation (SEC) or recommendation (FATF) propose to a greater or lesser extent to authorize or require the disclosure of client confidences without client consent, in the service of government law enforcement. Surely this will have a negative effect on client trust in lawyers and the ability of lawyers to provide legal services to clients will be impaired. But I think that the bars are overreacting. My reasons

¹³⁹ Proposed 17 CFR 205.3(d)(1)(i), available at the SEC website at <http://www.sec.gov/rules/proposed/338150.html>

¹⁴⁰ See MRPC 1.6, comment [14]. The JFBA has published its comments on the SEC proposals at <http://www.nichibenren.or.jp/en/activities/statements/20021214.html>.

¹⁴¹ The ABA has established a website containing materials and positions on the Gatekeepers Initiative. <http://www.abanet.org/crimjust/taskforce/home.html>. The JFBA has also published its comments on the Initiative at <http://www.nichibenren.or.jp/en/activities/statements/20020718.html>.

¹⁴² FATF Review of the FATF Forty Recommendations Consultation Paper 97-98 & 100-03 (May 30, 2002) (“FATF”).

¹⁴³ *Id.* at 100-03. The FATF proposes that lawyers be subject to its “Recommendations 14-19.” *Id.* The most controversial recommendations are 15, 17 and 18 but understanding them requires that number 14 also be read:

Recommendation 14

Financial institutions should pay special attention to all complex, unusual large transactions, and all unusual patterns of transactions, which have no apparent economic or visible lawful purpose. The background and purpose of such transactions should, as far as possible, be examined, the findings established in writing, and be available to help supervisors, auditors and law enforcement agencies.

Recommendation 15

If financial institutions suspect that funds stem from a criminal activity, they should be required to report promptly their suspicions to the competent authorities.

Recommendation 17

Financial institutions, their directors, officers and employees, should not, or, where appropriate, should not be allowed to, warn their customers when information relating to them is being reported to the competent authorities.

Recommendation 18

Financial institutions reporting their suspicions should comply with instructions from the competent authorities.

are very different, however, in each case.

As for the SEC regulations, I think that the position the SEC has taken is in accord with the vast majority of American states and with a large body of professional opinion. As could be demonstrated at length, both of the ABA Commissions that have been charged with large scale re-examination of the ABA model codes in the last twenty years (the Kutak Commission and the Ethics 2000 Commission) recommended permitting the disclosure of client confidences in precisely the context that the SEC has now permitted such disclosure by securities lawyers.¹⁴⁴ They did so, among other reasons, because most of the states permit disclosure to prevent clients from committing financial crimes that will cause serious financial injury to innocent victims. The rule articulated in the Restatement of the Law Governing Lawyers also permits such disclosure.¹⁴⁵ Notwithstanding these developments, the ABA House of Delegates has continued to reject an amendment of the model rules to allow such disclosure. But the fact that the ABA House of Delegates has rejected this position cannot hide the fact that many lawyers consider such exceptions to the duty of confidentiality completely consistent with their professional obligations and quite compatible with their ability to represent clients faithfully. The ABA Model Rules, as interpreted by the ABA's own ethics committee, requires noisy withdrawal in basically the same circumstances as would the SEC proposal.¹⁴⁶ And as recently as last August, the ABA's own Task Force on Corporate Responsibility, set up to propose changes to prevent Enron type debacles, recommended that the confidentiality rule be amended to require disclosure of client confidences to prevent client financial crimes.¹⁴⁷ One might go so far as to say that by refusing to adopt recommended rules permitting these kinds of disclosure that appear to so many to be in the public interest, the ABA invites intervention by legislators and regulators charged with protecting that interest.

There is no question that we have a division of opinion in the United States legal profession on the issue of confidentiality, and that many believe that client trust is jeopardized by such exceptions. Those that advocate for such exceptions, however, have become persuaded that the professional need to protect innocent persons from being victimized by clients must, at some point, outweigh a client's right to secrecy, even when it comes to financial loss. Assuming that they are notified that such exceptions do exist, clients will need to enter into the attorney client relationship as so defined. If they are not willing to utilize the services of lawyers with such rights and obligations, then that is their prerogative. If they are not willing to confide some things to lawyers with such rights (or duties) of disclosure, that too is the client's prerogative. But I do not think that lawyers' ability to serve clients generally will be seriously compromised by such a turn of events.

As for the Gatekeepers Initiative, I think that critics are overreacting here too. To be sure, if lawyers were required to disclose client confidences based on mere suspicions, this would be very troubling indeed. But this is not what is proposed. The Consultation Paper carefully states that "[u]nder all the options ..., there would be no obligation to report the suspicious transaction if the relevant information came to the lawyer ...in circumstances in which the

¹⁴⁴ See ABA Formal Opinion 92-366 at note 11 (1992) and Love, "The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000," 15 *Geo. J. Legal Ethics* 441, 450-51 (2002).

¹⁴⁵ Restatement of the Law Governing Lawyers §67 (2000).

¹⁴⁶ ABA Formal Opinion 92-366 (1992).

¹⁴⁷ See Preliminary Report of the American Bar Association Task Force on Corporate Responsibility, 58 *Bus. Lawyer* 189, 206 (2002).

lawyer ...is subject to professional secrecy or legal professional privilege.”¹⁴⁸ To me, this is the most crucial and necessary caveat. The process of determining what information is confidential and what is not will be troubling to lawyers and time consuming. It is not without risk of error for lawyers or clients.¹⁴⁹ But lawyers need to make this determination in client affairs every day and I do not think the exercise will be materially different here. Unlike the critics, I do not think that the likely reaction by lawyers will be to “over report” when there is a judgment call to be made.¹⁵⁰ Lawyers who err on the side of reporting where it is arguably not necessary will risk losing clients and livelihood. I think the tradition of client confidentiality is more than strong enough to withstand such an exercise. On the other hand, I think that requiring reporting of such (nonconfidential) information to government authorities without notifying the client is far more troubling.¹⁵¹ I think that clients are entitled to know, at the outset of the attorney client relationship, what they may expect of their attorney, and they are entitled to full information from their lawyer as to information necessary to make informed decisions about the matter on which they have retained the lawyer.¹⁵² If lawyers were required to make reports to the government without notifying the clients, this is a fundamental breach of what I think is a fundamental duty of information and fairness to the client. The only way to salvage the duty in the face of such a “no tipping” duty would be one based on client consent. The lawyer (I believe) would need to say to the client at the outset that he is obliged to report certain specified kinds of information to the government and, if a report is made, the client will not be notified. If a client were willing to retain the lawyer, notwithstanding that advice, then one could say that the client has consented to such a relationship. Few clients, I suspect, would consent to such an arrangement if they could avoid it. But the FATF is not unaware of this problem with the “no-tipping” proposal. Indeed, it has included a “tipping-off” option as an alternative.¹⁵³

Finally, it is worth asking whether these regulatory initiatives pose a larger threat to the legal profession’s historical independence? I do not think so. I think that the notion of lawyer “self-regulation” has always been something of a myth, at least in the United States. Even our bar associations, which carry the initial burden of admitting lawyers to practice, proposing rules of conduct, and disciplining lawyers if they misbehave, do not really do so independently. The rules governing admission to practice, professional conduct, and discipline are rules

¹⁴⁸ FATF at 101.

¹⁴⁹ The Consultation Paper adds: “It would be for each jurisdiction to determine the matters that would fall under legal professional privilege or professional secrecy relating to lawyers, notaries or other professionals. This would normally cover information they receive from or obtain through one of their clients: (a) in the course of ascertaining the legal position of their client and (b) performing their task of defending or representing that client in, or concerning judicial proceedings, including giving advice on instituting or avoiding proceedings.” *Id.* at 103. Earlier the Paper notes as well that “the rule of secrecy or privilege may not apply (depending on the laws of the country concerned) if the lawyer ...has knowledge or a strong suspicion (in some countries, this extends to ‘suspicion’) that their services are being abused for money laundering or criminal purposes.” *Id.* at 101.

¹⁵⁰ It has been suggested that if an obligation to report is backed up by criminal sanctions, as it may be in some countries, lawyers will indeed err on the side of reporting, out of self-interest. This may be true. But again, scienter would be required for criminal liability and if there is a good faith argument that disclosure was not required because the information was confidential, then lawyers may choose to risk non-disclosure even here.

¹⁵¹ Not surprisingly, the FATF sets out two options as to the notification of clients that a report is made, one envisioning that the client is “tipped off” and another that the client is not “tipped off.” The discussion that follows should be read as a criticism of the “no tipping” option.

¹⁵² MRPC 1.4.

¹⁵³ FATF.at 102.

adopted by the state supreme court in virtually all American states. In each state, lawyers are admitted to practice only upon final approval of the state supreme court. There is an automatic right to appeal negative admission and serious disciplinary decisions to the highest court in each state as well. To be sure, the judiciary is more closely aligned to the legal profession than are the other branches of government, particularly in the United States which has no separate judicial career path. But as judges have shown time and time again, they are not the equivalent of the bar association and they are quite ready to reject rules and decisions advocated by the bar associations.¹⁵⁴

Moreover, the involvement of the legislature and regulatory agencies in lawyer conduct is also not new. In most of our states, unauthorized practice of law rules are creatures of statute rather than the judiciary, and they are enforced by prosecutors rather than by the courts. In every state, legislatures have enacted criminal and in some cases civil statutes that seriously limit what lawyers may do.¹⁵⁵ The United States Congress early on became involved with lawyers by enacting legislation governing patent practice and tax practice. In addition, regulatory agencies, whose power flows from such legislative authority, have always been entitled to adopt their own rules governing the conduct of lawyers seeking to practice before them and they have done so. Legislatures at both the state and federal level have also enacted laws that circumscribe the ethics of government lawyers and former government lawyers. So the fact is that regulation of the legal profession is a shared enterprise and always has been.

For me, this is as it should be. The legal profession is too important a component in the justice system to be self-regulating. After all, saying that the legal profession is or should be “self-regulating” is another way of saying that it is not (or need not be) accountable to the public at large. That is a position that I find unacceptable in a democratic society. It is also too important a component to be regulated solely by the courts, which, themselves, are not always fully accountable to society.¹⁵⁶ This does not mean that we should be indifferent to the specific regulatory decisions that are made nor to the need for a careful balance between majority rule and independence. There are essential functions that are performed by lawyers and they serve as an important check on the excesses of government. We are constantly called upon to make sure that the rules fashioned for the legal profession do not destroy these essential functions. But ultimately, I do not believe that the legal profession should be a fourth branch of government. It needs to be held accountable to the population through this kind of shared government by all the branches of government. I hope that I have shown you that in the United States, maintaining the proper role of the legal profession has been a continuing challenge. But it is one from which we are not hiding; and we have done tolerably well in meeting the challenge so far.

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¹⁵⁴ See, e.g., M. FRANKEL, *PARTISAN JUSTICE* (1980); Frankel, “The Search for Truth: An Umpireal View,” 123 U. Pa. L. Rev. 1036 (1975)

¹⁵⁵ Lawyers, for example, are subject to the extortion, obstruction of justice, fraud, racketeering and antitrust laws.

¹⁵⁶ In the United States, of course, federal judges are not elected and serve for life. State judges are appointed in some states, elected in others. Only where state judges are elected would it be fair to say that they are accountable for the decisions they make to the people.