ABA Ethics Reform From "MDP" to "20/20": Some Cautionary Reflections

Bruce A. Green*

Mary Daly, the posthumous recipient of this year's Michael Franck Award[1] would have been pleased that the ABA President has established an "Ethics 20/20 Commission." The commission will review ethics rules and regulation in light of technological advances and globalization, including by examining "changes in how other countries govern their lawyers."[2] Among Mary's many contributions to academia and the profession, she made an early and sustained commitment to study professional regulation on the global level.[3] Moreover, as Reporter to the ABA Commission on Multidisciplinary Practice ("MDP Commission"), she had a big hand in an earlier ABA effort to draw on how law practice is regulated outside the United States.[4] The MDP Commission's principal recommendation was that:

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*Bruce A. Green is the Louis Stein Professor, Fordham University School of Law, where he directs the Louis Stein Center for Law and Ethics. He is a member of the ABA Standing Committee on Ethics and Professional Responsibility, Chair-elect of the ABA Criminal Justice Section, and Reporter to the ABA Task Force on Attorney-Client Privilege. He thanks Stephen Gillers, Philip Schaeffer, Ted Schneyer, and Laurel Terry for their helpful comments on an earlier draft.

1. Awarded annually, the ABA's Michael Franck Professional Responsibility Award "brings deserved attention to individuals whose career commitments in areas such as legal ethics, disciplinary enforcement and lawyer professionalism demonstrate the best accomplishments of lawyers."

2. James Podgers, *Off the Mat*, A.B.A.J., Aug. 2009, p. 65.

For a discussion of changes to the regulation of European Union lawyers proposed by the European Union Professional Services "Competition" Initiative, see Laurel S. Terry, *The European Commission Project Regarding Competition in Professional Services*, 29 Nw. J. Int'l L. & Bus. 1 (2009). Professor Terry explains that the proposals do not originate with the bar or reflect sympathy for its traditional modes of regulation but derive from antitrust officials' concern that traditional professional regulation disserves the public interest.

3. *See, e.g.*, Liability and Ethics in International Legal Practice (Mary C. Daly & Roger J. Goebel, eds., 2d ed. 2004); Mary C. Daly & Carole Silver, *Flattening the World of Legal Services? The Ethical and Liability Minefields of Offshoring Legal and Law-Related Services*, 38 Geo. J. Int'l L. 401 (2007); Mary C. Daly, *Tourist or Resident?: Educating Students for Transnational Legal Practice*, 23 Penn. St. Int'l L. Rev. 785 (2005); Mary C. Daly, *The Ethical Implications of the Globalization of the Legal Profession: A Challenge to the Teaching of Professional Responsibility in the Twenty-First Century*, 21 Fordham Int'l L.J. 1239 (1998); Mary C. Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel*, 46 Emory L.J. 1057 (1997) ["The Role of General Counsel"]; *Thinking Globally: Will National Borders Matter to Lawyers a Century from Now?*, 1 J. Inst. For Study Leg. Ethics 297 (1996).

4. *See* ABA, Center for Professional Responsibility, Report from the ABA Commission on Multidisciplinary Practice, at http://www.abanet.org/cpr/mdpfinalrep2000.html (last visited Aug. 9, 2009).

"Lawyers should be permitted to share fees and join with nonlawyer professionals in a practice that delivers both legal and nonlegal professional services . . . , provided that the lawyers have the control and authority necessary to assure lawyer independence in the rendering of legal services."[5] The Commission viewed this as an essential response to the globalization of the economy and to other challenges facing the legal profession in the 21st century. Although the ABA did not ultimately adopt the proposed reform, Mary took the long view, and she would have followed the renewed effort with keen interest.

Mary found her work as MDP Reporter both professionally rewarding and edifying. She drew upon that work in her scholarship and teaching,[6] and it enhanced her understanding of bar politics and ethics rule-making. Having learned from experience, Mary would have had a great deal of counsel, some of it cautionary, for those undertaking the latest enterprise. The forward-looking Ethics 20/20 Commission, she would have noted, would surely benefit from looking back in hindsight at the experiences of its predecessor MDP Commission and of other prior commissions appointed to study and update lawyer regulation.

I can only guess at what insight Mary would have provided. Surely, my own reflections could not match the depth and sophistication of hers. Nonetheless, I offer the following reflections in anticipation of the latest ABA professional responsibility project and with good wishes for its success. And I dedicate this essay to the memory of my great friend, colleague, and role model, who, over the course of an extraordinary academic career, contributed in almost every way imaginable to the development, interpretation, inculcation, dissemination and enforcement of ethics rules and professional norms.[7]

The Bar's Resistance to Ethics Reform

However innovative lawyers may be when working on clients' behalf, they are slow to accept change in their own professional lives, including when they work collectively through bar associations to establish the rules of professional conduct

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5. *Id*.

6. *See, e.g*., Mary C. Daly, *The Structure of Legal Education and the Legal Profession, Multidisciplinary Practice, Competition, and Globalization*, 52 J. LEGAL EDUC. 480 (2002); Mary C. Daly, *Monopolist, Aristocrat, or Entrepreneur?: A Comparative Perspective on the Future of Multidisciplinary Partnerships in the United States, France, Germany, and the United Kingdom After the Disintegration of Arthur Andersen Legal*, 80 WASH. U.L.Q. 589 (2002); Mary C. 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); Mary C. Daly, *What the MDP Debate Can Teach Us About Law Practice in the New Millennium and the Need for Curricular Reform*, 50 J. LEGAL EDUC. 521 (2000).

7. *See generally* John D. Feerick, *Mary Daly, A Life of Devoted Service*, 83 ST. JOHN'S L. REV. 8 (2009); Bruce A. Green, *Remembering Mary Daly: A Legal Ethicist Par Excellence*, 83 ST. JOHN'S L. REV. 23 (2009); Russell G. Pearce, *Mary Daly: Living Ethics Seriously*, 83 ST. JOHN'S L. REV. 30 (2009).

that shape professional practice. Ethics rules are hard to revise, especially when the result would be to alter how lawyers have practiced for decades.

To be sure, not everyone thinks the bar moves too slowly. Recently, in the ABA House of Delegates, my friend Larry Fox, an earlier Michael Franck Award recipient, argued that the ABA might be reforming its conflict rules too precipitously. He raised this concern during the February, 2009 debate over whether the ABA Model Rules should allow law firms to screen lateral lawyers who have conflicts of interest arising out of their prior work.[8] Although many state courts had already adopted similar rules without the ABA's guidance, Larry worried that the ABA was moving too far too fast. He suggested that from now on, to prevent ill-considered changes, any proposed amendments to the ABA Model Rules of Professional Conduct ("Model Rules") should not be subject to adoption the first time they are debated in the House, and further, that their approval by a super-majority of the House should be required.

Whatever one's view of the process leading to the new screening provision, the ordinary problem is not that the bar moves too fast, but that, when it comes to self-governance through rules of professional conduct, it reacts too cautiously to what is going on in the world, as if occasional missteps would be irremediable. Consider the Kutak Commission's proposal in the early 1980's that lawyers be permitted to disclose client confidences to prevent or rectify a client fraud.[9] It was not until 2002, after approximately two decades of intermittent corporate scandals, and under pressure from the SEC,[10] that the ABA adopted Model Rules 1.6(b)(2) & (3) establishing such exceptions to the confidentiality duty. By that point, many lawyers were already practicing under comparable provisions in the ethics rules of their home states without any obvious ill effect. A charitable explanation for the ABA's cautiousness might be that, like the U.S. Supreme Court, the national bar tends to see the states as laboratories for experimentation and hesitates to get too far ahead of them, but there is more to it.

To follow the lead of the bars in Europe and Australia, the Ethics 20/20 Commission will have to contend with our bar's innate conservatism, because much of

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8. Over strong opposition, the House approved the proposed amendment to Rule 1.10(a) at that meeting, and approved a subsequent housekeeping amendment of this provision at its August 2009 meeting.

9. For a discussion of the Kutak Commission's 1981 proposal by its Reporter, see Geoffrey C. Hazard, Jr., *Rectification of Client Fraud: Death and Revival of a Professional Norm*, 33 Emory L.J. 271 (1984). For a critique of the 2003 amendments to the confidentiality rule, see Thomas G. Bost, *Corporate Lawyers After the Big Quake: The Conceptual fault Line in the Professional Duty of Confidentiality*, 19 Geo. J. Legal Ethics 1089 (2006). For a discussion of the intervening corporate scandals, see Keith F. Fisher, *The Higher Calling: Regulation of Lawyers Post-Enron*, 37 U. Mich. J. L. 1017 (2004).

10. *See* Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 Minn. L. Rev. 265, 316 (2006) ("the ABA amendments to Model Rules 1.6 and 1.13 arguably were a calculated effort to forestall external regulation" by the SEC).

what takes place abroad could not be replicated without changing or superseding our rules of professional conduct. For example, like the MDP commission before it, the new commission might conclude that lawyers should be permitted to partner with non-lawyer professionals,[11] but that would require changing ethics rules that flatly forbid such partnerships.[12] Even more boldly, the commission might conclude that lawyers should be permitted to practice in corporations owned in part by external, non-lawyer investors as is now permitted Australia.[13] This is not a new idea, even in the United States. In 1931, Fordham law professor Maurice Wormser maintained that corporations such as banks and title and trust companies should be allowed to employ lawyers to perform legal work, noting "that corporations possess many attractive advantages, among them being large scale organization; the use of modern business methods; the standardization of certain types of legal work; their continuous, indeed perpetual life; business responsibility; wide experience and connections, as well as contacts superior to those possessed by the average attorney."[14] But again, ethics rules would first have to change.[15]

There are a host of possible explanations—philosophical, political and economic—for the resistance to change that the commission might generally expect to face. The following come to mind.

State-Based Regulation

As others have already noted, the bar may have to call for federal law to put into effect the kinds of reform that the new commission will contemplate.[16] A new

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11. In England, the Legal Services Act 2007 permits lawyers to work with non-lawyers as "managers" of firms providing legal assistance and, beginning in 2011, the law will permit "alternative business structures" in which there is both non-lawyer participation and external ownership. See Solicitors Regulation Authority, Preparing for alternative business structures, *available at* http://www.sra.org.uk/solicitors/code-of-conduct/1883.article; *see also* Podgers, *supra* note 2, at 65 (noting that "[i]n the United Kingdom, . . . the Legal Services Act of 2007 created a new regulatory structure that permits legal disciplinary practices–law firms whose professional rosters may be up to 25 percent nonlawyers–and alternate business structures, which will encompass multidisciplinary practices [and] external ownership of legal businesses").

12. *See* MODEL RULES OF PROF'L CONDUCT R. 5.4(b) & (d).

13. *See* Joel Henning, *A broken business model*, NAT'L L.J., Aug. 17, 2009, p. 39 ("Outside investors . . . would cast a cold eye on the inefficient and costly ways in which we deliver legal services. . . . The result might be very different service delivery, billing and compensation systems, minimizing individual performance and maximizing team, practice and firm performance."); Podgers, *supra* note 2, at 65 (noting that "[i]n 2007, Slater & Gordon in Sydney became the world's first publicly traded law firm").

14. I. MAURICE WORMSER, FRANKENSTEIN INCORPORATED 161–80 (1931).

15. *See* MODEL RULES OF PROF'L CONDUCT R. 5.4(d); Milton C. Regan, Jr., *Lawyers, Symbols, and Money: Outside Investment in Law Firms*, 27 PENN ST. INT'L L. REV. 407 (2008).

16. *See, e.g.*, Henning, *supra* note 13 (noting that "it would take a regulatory revolution to change the fundamental law firm business model" with leadership at the federal presidential level); Podgers, *supra* note 2, at 66 ("Some even suggest that the traditional state-based regulation of lawyers should be replaced with a more uniform national system, even if it takes an act of Congress").

Model Rule will not necessarily do the trick. For example, even if most state judiciaries revisited their rules governing law firm organization and eventually opted to allow lawyers to have non-lawyer partners, some conservative state judiciaries could effectively exercise a veto, since the reforms would be targeted principally at law firms with national practices. If the New York courts refused to amend their rules, as they have declined to adopt rules governing multijurisdictional practice, national law firms with New York offices probably could not make partners of non-lawyer professionals even if most other states (and Washington, D.C.) permitted them to do so. Indeed, the managing partners of law firms without New York offices but whose lawyers were licensed in New York or practicing in New York *pro hac vice* might be at risk of discipline if their firms added non-lawyer partners. Conservative state courts may thus impede experimentation by more adventurous ones.

More broadly, many assume that to account for globalization, lawyers must be relatively free to practice law outside the borders of the state or nation where they are licensed, as is true in the European Union, and that, correspondingly, lawyers must be regulated more consistently across state and national borders or be regulated principally by the regulatory rules of their home states rather than by conflicting sets of rules.[17] These principles could not feasibly be implemented by state judiciaries through the revision of their individual professional codes. Through the work of its Commission on Multijurisdictional Practice ("MJP Commission") culminating in 2002, the ABA pushed cross-border practice about as far as state-based regulation would realistically permit.[18] As a practical matter, if the ABA seeks further to enhance lawyers' freedom to engage in cross-border practice, it will have to acknowledge the need to do so through federal law or international treaty that would supersede state professional codes and constrict state courts' regulatory authority.

Given its strong historic commitment to state judicial regulation, however, the ABA would be hard-pressed to advance reform through federal or international

17. *See* Podgers, *supra* note 2, at 66 (noting that "[t]he ability of U.S. law firms to compete with increasingly agile legal providers in other countries is one cause for concern" and that "[s]ome elements of the profession, especially firms that do extensive international work, may push harder than ever to make U.S. lawyer regulation more compatible with the rules that govern key foreign competitors"); *see also* Anthony E. Davis, *Regulation of the Legal Profession in the United States and the Future of Global Law Practice*, 19 Prof'l Law. no. 2, at 1, 10 (2009) (observing that to achieve reform, "the large U.S.-based firms might . . . go to Congress and demand legislation that would create a national or federal regulatory structure, at least of the large firms, if not the legal profession as a whole").

18. For example, the ABA Commission on Multijurisdictional Practice declined to endorse the premise that state courts should allow out-of-state lawyers to practice temporarily in a jurisdiction without restriction, thereby treating a law license like a driver's license. *See* Cynthia L. Fountaine, *Have License, Will Travel: An Analysis of the New ABA Multijurisdictional Practice Rules*, 81 Wash. U.L.Q. 737, 764 (2003).

law.[19] The ABA resoundingly affirmed this commitment in 2002 when it adopted multijurisdictional practice reforms.[20] More recently, the ABA opposed federal administrative regulation of lawyers' practice, in part, because federal regulation interferes with state judicial regulation.[21] The bar's view that state courts should have nearly exclusive authority to make rules for lawyers reflects many motivations, among them: respect for history and tradition; recognition that law practice varies from state to state; an intuition that there are advantages to regulating lawyers on a somewhat smaller scale; a preference for preserving the bar's professional independence by limiting the number of regulatory bodies overseeing lawyers' work; and an interest in maintaining the significance of the Model Rules.[22] Moreover,

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19. For commentary questioning the state courts' primacy in regulating lawyers, see, e.g., Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, Or the Market?*, 37 GA. L. REV. 1167 (2003) (advocating federal or state legislative regulation); Fred A. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335 (1994) (discussing the arguments for a federal code of legal ethics).

20. The MJP Commission's report noted that "in the European Union, a lawyer in one member state may establish a law practice in another member state with relative ease" and that "[a] number of organizations and individuals . . . have proposed that jurisdictional restrictions similarly be relaxed in the United States." The commission concluded, however that a sufficiently persuasive case had not yet been made. Based on its recommendation, the ABA adopted policy providing: "The American Bar Association affirms its support for the principle of state judicial regulation of the practice of law." *See* Client Representation in the 21st Century, Report of the Commission on Multijurisdictional Practice 13–17 (2002).

21. In July 2009, the ABA adopted a resolution urging "the Federal Trade Commission and Congress to clarify that the Commission's Red Flags Rule imposing requirements on creditors relating to identity theft is not applicable to lawyers while they are providing legal services to clients." The accompanying report relied in part on the Supreme Court's overstatement that "[s]ince the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions." (citing Leis v. Flynt, 439 438, 442 (1979)). The report also relied on the D.C. Circuit's more recent pronouncement, in the context of the ABA's successful challenge to the FTC's attempt to regulate lawyers under the Gramm-Leach-Bliley Act, that "[i]t is undisputed that the regulation of the practice of law is traditionally the province of the states." (citing American Bar Ass'n v. Federal Trade Commission, 430 F.3d 457, 471 (D.C. Cir. 2005)). A month later, the ABA cited this pronouncement in a civil complaint seeking to enjoin the Red Flags Rule's application to lawyers. American Bar Ass'n v. Federal Trade Commission, Complaint for Declaratory and Injunctive Relief ¶ 39 (Aug. 27, 2009), *available at* http://www.abanet.org/media/nosearch/1_1_Complaint.pdf.

For recent commentary discussing the breadth of lawyer regulation by authorities in addition to state courts, see Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147 (2009); *see also* Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?*, 64 GEO. WASH. L. REV. 460, 461 (1996) (noting that "[l]awyers refer to their profession as 'self-regulating,' but this term is misleading as well as wishful.").

22. Laurel Terry recently described changes in lawyer regulation in the European Union as involving a new paradigm that views lawyers as "service providers" who are undifferentiated from, and regulated like, other service providers. She points to parallels in the increasing willingness of Congress, administrative agencies and state legislatures to regulate lawyers. She argues that for the ABA to maintain its traditional influence over the development of lawyer regulation, it must

even if the ABA suddenly became more receptive to national regulation, the state chief judges, who are collectively influential, could be expected instinctively to defend their turf.

The Unitary Bar

As others have also noted, remaking the U.S. legal profession to better resemble some of its foreign counterparts might require departing from the bar's traditional "one-size-fits-all" approach to professional rules and regulation.[23] For example, the commission might recommend allowing large firms greater autonomy if they adopt effective mechanisms of self-regulation or propose rules enabling large firms with sophisticated clients more leeway to contract around ethical restraints. Following the lead of a recent report on the regulation of corporate legal work in England,[24] the Ethics 20/20 Commission might even consider whether corporate law firms should be separately regulated from other lawyers and law firms.

Historically, the ABA has sought to limit the extent to which it makes ethical distinctions among different categories of lawyers, such as among lawyers practicing in different settings or representing different clienteles. For example, the ABA has hesitated to distinguish between large and small law firms in rules that impute conflicts of interest within law offices. Large firms complain that imputed disqualification rules were developed in the nineteenth century when law firms were small and lawyers exchanged information liberally with their law partners. They consider the rules unrealistic when applied to national and multinational firms that are too large for anyone to recognize all the lawyers in the firm, and they point to more liberal regulation of conflicts of interest in England and other European countries. But the ABA has resisted making overt distinctions in its ethics rules between large and small firms, even if distinctions might theoretically and practically be justified. In part, the ABA's reluctance in this particular context can be explained on the ground that the conflicts of interest rules are principally default rules: Large firms with sophisticated corporate clients can generally seek client consent to otherwise

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participate actively in the development of regulation by authorities other than state courts and better justify regulatory restrictions that it endorses. *See* Laurel S. Terry, *The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as "Services Providers"*, 2008 J. Prof. Law 189.

23. Podgers, *supra* note 2, at 66 (noting that " 'there is no "one-size fits all" approach' " to attorney regulation in New South Wales, where "[l]aw firms are allowed to develop their own systems for meeting 10 measures of compliance with appropriate management systems") (quoting Steven Mark, the legal services commissioner for New South Wales). For criticism of the rules' failure to make relevant distinctions, see Steven S. Krane, *The Fallacy of the Monolithic Client-Lawyer Relationship: Leaving 1908 and Procrustean Regulation Behind*, 2008 J. Prof. Law. 43; Fred C. Zacharias, *The Future Structure and Regulation of Law Practice: Confronting Lies, Fictions, and False Paradigms in Legal Ethics Regulation*, 44 Ariz. L. Rev. 829, 841–43 (2002).

24. Nick Smedley, Review of the Regulation of Corporate Legal Work (March 31, 2009), *available at* http://www.legalregulationreview.org.uk/files/report_smedleyfinal.pdf.

forbidden representations, and allowing lawyers and clients privately to contract in this manner seems to be preferable to drafting a rule that attempts to make distinctions based on the level of client sophistication. But this is not the only instance in which the rule drafters have hesitated to make special rules based on distinctions among different types of practitioners.[25]

It is not just that the ABA is loath to appear to favor one group of lawyers over another or to imply that some lawyers are more trustworthy than others. It is strongly motivated to preserve the unity of the bar by maintaining the identity of all lawyers as members of a single profession. This is in marked contrast to the approach elsewhere. Countries such as Japan have multiple classes of legal professional, each with their own professional admission and regulatory processes. Lawyers in the United States, in contrast, are educated, admitted to practice, and regulated in essentially the same way, and share authority to do virtually anything that legal professionals might do. This lets lawyers magnify their public influence by speaking with one loud voice, whether through the ABA or through state and local bar associations. Because U.S. lawyers are members of a single profession, the ABA can claim to speak for over one million U.S. lawyers, not merely its 400,000 members. The "one-size-fits-all" regulatory approach, by unifying the bar, helps preserve the ABA's ability to do so. But the ABA's commitment to a unitary profession is less about professional influence than about the public interest. As the 1992 MacCrate report stressed, the preservation of law as "a single public profession of shared learning, skills and professional values" with responsibility for self-regulation is essential to maintain the professional independence necessary "to be an important force in preserving government under law."[26]

The Professional Monopoly

Some potential reforms, including those facilitating partnerships between lawyers and non-lawyer professionals, would bump up against the legal profession's commitment to preserving its near monopoly to provide legal services, a professional monopoly in which lawyers have an obvious economic stake. This commitment has been reflected in the bar's historic support for unauthorized practice of law ("UPL") provisions that exclude non-lawyers from providing law-related services, premised on the rationale that non-lawyers are unqualified and inadequately regulated. Some opponents of MDP reform a decade ago called for stepped up enforcement of these provisions. Over time, legislatures and administrative agencies

25. For example, the solicitation rules do not distinguish between an unsolicited telephone call to a sophisticated corporate officer to discuss a prospective corporate engagement and an unsolicited call to a recent accident victim to discuss a possible personal injury suit, even though the risk of overreaching is far greater in the latter case.

26. LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 119–20 (1992).

have chipped away at the UPL laws, in part to enable individuals who cannot afford lawyers to obtain other help, but with no thanks to the bar. Despite its commitment to "access to justice," the ABA has resisted efforts to promote access to justice for middle- and low-income individuals through UPL reform. This might be explained cynically as an expression of economic self-interest or be justified by a public-spirited concern for client protection.

In England and elsewhere, low-income clients are assisted, evidently to their benefit, by non-lawyers.[27] If it is to study how our foreign counterparts are responding to technological, social, economic and demographic changes sweeping the globe, the Ethics 20/20 Commission might include this among its subjects of study. Surely, it would be useful to consider how the United States might develop a regulatory regime for training, licensing and overseeing non-lawyers who can assist individuals in routine or non-complex law-related matters at relatively low cost.[28] But simply broaching the subject would likely become controversial.[29] Even the lesser measure of permitting lawyers to partner with non-lawyer professionals would again become a hot-button issue, in part because the endorsement of such collaborations would imply that non-lawyer professionals can assist with some legal problems as well as lawyers, thereby calling the rationale for UPL provisions into question.[30]

Basic Satisfaction with the Current Mode of Professional Regulation

The bar's reflexively conservative response to ethics reform is likely to be magnified when proposed changes are premised in particular on how foreign bars are regulated. This is not a matter of xenophobia but reflects a host of legitimate intuitions. One is that the U.S. bar has developed organically over time, adapting to its unique modes of professional regulation in a manner that enables lawyers generally to serve clients well. Other approaches might be better if one were writing on

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27. *See* Richard Moorhead et al., *Contesting Professionalism: Legal Aid Lawyers and Nonlawyers in England and Wales*, 37 Law & Soc'y Rev. 765 (2003).

28. For example, the Ethics 20/20 Commission might revisit and build on the Report and Recommendations of the ABA Commission on Nonlawyer Practice. *See* ABA Commission on Nonlawyer Practice, NonLawyer Activity in Law-Related Situations (1995), *available at* http://www.abanet.org/cpr/clientpro/Non_Lawyer_Activity.pdf.

29. *See, e.g.*, Robert Rubinson, *A Theory of Access to Justice*, 29 J. Legal Prof. 89, 141 (2004/2005) ("One set of proposals that seems to have garnered the most support among academics is easing unauthorized practice of law restrictions in order to enable paraprofessionals to serve clients who otherwise cannot obtain legal advice. As proponents of such initiatives recognize, a primary challenge here is the bar's vigorous opposition to even modest exceptions to its professional monopoly on legal services, even in areas where lawyers dare not tread because there is no money to be made.").

30. *See generally* Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 Stan. L. Rev. 1689 (2008).

a blank slate, but the new commission will not be. Lawyers, judiciaries and others have made substantial investments predicated on the current regulatory regime.

Further, regulatory regimes are situated in broader legal and societal contexts. Regulation of the legal profession that makes sense in one country may not make sense in another, at least without making much broader legal and institutional changes. Our system of state-based judicial regulation is unique, but so too may be the extent to which the United States generally reserves law-making authority to its states. Our litigation processes, to which much of our regulation responds, also differ from those of many other nations. The United States has more lawyers (over a million) to oversee than any European country—indeed, more than all of the European Union countries combined (approximately 700,000). Differences such as these may necessitate distinct approaches to regulation.

However much they may be struggling economically at the moment, U.S. lawyers generally consider themselves better off than their foreign counterparts. We seem to do better economically. We have a more substantial public role (as Tocqueville long ago recognized), and one that is fundamental to our collective professional self-image and raison d'etre. Arguably, on average, we do better for our clients. In travels to developing countries, U.S. lawyers extol our legal profession and (perhaps unjustifiably) offer it as a model.[31] Why, some will ask, should we mirror our counterparts?

Further, changes designed to serve laudatory ends may have unintended and unforeseen consequences. Consider, for example, how possible reform might affect attorney-client confidentiality and privilege. During the course of the MDP commission's work, opponents of change worried about eroding "core values" of the legal profession—for example, they feared that non-lawyer partners might breach client confidentiality in pursuit of profit.[32] The experience abroad suggests that these particular fears were largely overblown. But confidentiality might be undermined in other, less obvious ways.

For example, the attorney-client privilege applies only when lawyers give legal, not business, advice and assistance. Without the privilege, lawyers might still assure their clients that they will not (subject to rare exceptions) voluntarily disclose confidences, but they cannot promise to preserve client confidences if called to testify in legal proceedings. The privilege is much easier to sustain when services are provided by outside counsel than when provided by in-house corporate counsel, whose advice is more easily characterized as "business" advice. Indeed, in many European countries, professional privilege is inapplicable to the

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31. *See, e.g.*, Samuel J. Levine & Russell G. Pearce, *Rethinking the Legal Reform Agenda: Will Raising the Standards for Bar Admission Promote or Undermine Democracy, Human Rights, and Rule of Law?*, 77 FORDHAM L. REV. 1635 (2009).

32. For a discussion of the invocation of "core values" during the MDP debates and the history of the rules that were implicated in the debate, see Bruce A. Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 MINN. L. REV. 1115 (2000).

work of in-house legal professionals.[33] A new Model Rule authorizing law firms to partner with non-lawyer professionals might be taken as a concession that much of the transactional work of outside counsel is also "business" rather than "legal" in nature. This might lead courts to reexamine and narrow the privilege, particularly in the context of corporate representations, where the privilege, although dear to the ABA, is already controversial and perceived to be imperiled.[34]

If the U.S. legal profession resists change, reformers may predict dire consequences, as did Fordham's Professor Wormser when he declared almost 80 years ago that it "is too late, by many long years, to turn back the hands of time by adopting and seeking to enforce hard and fast rules against the practice of law by corporations."[35] But others might note that such predictions have not always borne out; our profession has demonstrated an ability to adapt to changing times while retaining many traditional restrictions. Worrying that reforms may have unintended consequences, many in the ABA will prefer that the bar figure out how, within our traditional regulation, to achieve the ends that lawyers abroad serve in other ways. For example, they may suggest that even though lawyers may become partners with non-lawyers in foreign firms in order to provide a broader range of services to clients in a single setting, U.S. lawyers should find ways to serve clients equally well and efficiently through other means of collaborating, such as by employing non-lawyer professionals or by teaming with non-lawyers who maintain independent practices.

Conclusion

All this suggests that the Ethics 20/20 Commission should approach the process of ethics reform cautiously, however bold its ultimate recommendations. Yes, the commission should be forward-looking, not hind-bound or nostalgic. And, yes, it should seek to learn from our brethren beyond our borders. But it should remain cognizant of our native bar's resistance to change. It should proceed with respect for existing regulatory rules and processes and for the ABA's historic philosophical commitments to state judicial regulation and a unitary bar. It should be inclusive, remembering that the national bar is a big tent sheltering over a million lawyers engaged in varying legal practices in various legal settings. Reform may not equally benefit all lawyers and all clients, and it may have unanticipated consequences.

The Ethics 20/20 Commission is certainly starting off on the right foot. It has two distinguished co-chairs and a distinguished membership of judges, lawyers

33. See Daly, *The Role of General Counsel*, *supra* note 3, at 1103 ("As a matter of domestic law, seven of the fifteen member states of the European Union do not recognize the privilege for communications between in house counsel and a corporate client."); *see generally* Lawton P. Cummings, *Globalization and the Evisceration of the Corporate Attorney-Client Privilege and a Proposal for Harmonization*, 76 Tenn. L. Rev. 1 (2008).

34. *See* Bruce A. Green & David C. Clifton, *Feeling a Chill*, A.B.A.J., Dec. 2005, pp. 61–65.

35. Wormser, *supra* note 14, at 180.

and academics, and it is housed within the ABA Center for Professional Responsibility, whose staff are veterans of past ethics reform efforts. In launching the commission, ABA President Carolyn Lamm struck just the right chord when she announced that "its work will be guided by three simple principles: protect the public, preserve core professional values, and maintain a strong, independent and self regulated profession."[36]

President Lamm added that the commission "will require 20/20 vision."[37] Indeed, the commission will require not only the foresight to anticipate future societal changes in a time of increasing globalization and to identify their implications for legal practice, but also the foresight to anticipate the obstacles it will encounter within the ABA to salutary changes designed to meet the bar's future challenges. A look back at earlier reform efforts, including those of the MDP Commission, may help sharpen the new commission's focus.

36. News Release, ABA, ABA President Carolyn B. Lamm Creates Ethics Commission to Address Technology and Global Practice Challenges Facing U.S. Lawyers (Aug. 4, 2009), http://www.abanet.org/abanet/media/release/news_release.cfm?releaseid=730.

37. *Id*.