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OUT OF PRACTICE: THE TWENTY-FIRST-CENTURY LEGAL PROFESSION

DANA A. REMUS†

ABSTRACT

Lawyering has changed dramatically in the past century, but scholarly and regulatory models have failed to keep pace. Because these models focus exclusively on the "practice of law" as defined by the profession, they ignore many types of work that today's lawyers perform and many sources of ethical tension they encounter. To address these shortcomings, I examine significant twentieth- and twenty-first-century social dynamics that are fundamentally altering contemporary lawyers' work by broadening and blurring the boundary between law and business. Within the resulting boundary zone, a growing number of lawyers occupy roles for which legal training is valuable but licensure is not required. I argue that the ambiguity surrounding these roles—regarding what constitutes legal practice, what roles lawyers play, and what professional obligations attach—creates opportunities for abuse by individual lawyers and for ethical arbitrage by sophisticated corporate clients. The proliferation of these roles gives rise to key ethical tensions, ignored by existing models of the profession, that threaten to extinguish the profession's public-facing orientation in favor of its private interests. I conclude that we cannot effectively understand and regulate the twenty-first-century legal profession until we move beyond the rigid constraints of

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† Associate Professor of Law, University of North Carolina School of Law. For helpful comments on earlier drafts, I am grateful to Joseph Blocher, James Boyle, Alfred Brophy, Bernard Burke, Bruce Green, Geoffrey Hazard, Jr., Margaret Lemos, Marin Levy, Mary Mitchell, W. Bradley Wendel, and Ernest Young. For excellent research assistance, I am grateful to Corinne Blalock and Erin Locker.

existing models and begin to study the full range of roles and work settings—both in and out of practice—that today's lawyers occupy.

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INTRODUCTION

On August 24, 2005, nine individuals were indicted[1] for their involvement in the KPMG tax scandal, described as the "largest tax-evasion scheme in U.S. history."[2] These nine individuals played a central role in designing and marketing fraudulent tax shelters that generated $12 billion in phony losses and cost the Internal Revenue Service $2.5 billion in lost taxes.[3] Although only one of the nine was technically practicing law, five others were licensed lawyers.[4] These five lawyers were out of practice but very much in business.

The lawyer wrongdoing and resulting harm in this example are extreme, but the pervasive presence of lawyers throughout corporate

1. Sealed Indictment at 5–6, United States v. Stein, 435 F. Supp. 2d 330 (S.D.N.Y 2007) (05 Crim. 888), 2005 WL 6142978.

2. Terry Frieden, *Former KPMG Executives Indicted*, CNN MONEY (Aug. 30, 2005, 8:20 AM), http://money.cnn.com/2005/08/30/news/fortune500/kpmg. KPMG later entered into a deferred prosecution agreement and agreed to pay $456 million in penalties. *Id.*

3. *Id.* These nine men were employed by KPMG in a wide range of roles, including as high-level tax executives, operators of subsidiary shell companies, and as purportedly independent advisors. Sealed Indictment, *supra* note 1, at 3–5.

4. Sealed Indictment, *supra* note 1, at 3–5.

life has become routine. For several decades, lawyers have been moving out of law firms and courtrooms and into new legal practice settings in business and government.[5] Today, they are increasingly moving out of practice and into quasi-legal roles, defined loosely as roles at the intersection of law and business for which legal training is valuable but licensure is not required.[6] Although lawyers working in these roles exert considerable influence on the shape and orientation of the legal profession, scholars and regulators underestimate their significance.[7] Even as the profession has grown, changed, and fractured in recent decades, the prevailing models of the profession have remained fixed—structured around the fiction of crisp and clear boundaries between law and business.

The first of these models, the traditional unitary model, lies at the foundation of the profession's current regulatory system.[8] It posits a single, unified profession comprised of lawyers who share more commonalities than differences.[9] Based on these commonalities, the model prescribes, and our current system has, a single, broadly applicable code of conduct.[10] The second of these models, the

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5. *See, e.g.*, Robert L. Nelson, *The Futures of American Lawyers: A Demographic Profile of a Changing Profession in a Changing Society*, 44 CASE W. RES. L. REV. 345, 355, 369 (1994).

6. Broadly speaking, the term "quasi-legal role" encompasses any job for which a law degree and licensure are advantageous but not required, whether or not the job is associated with legal practice and the legal profession. The term therefore encompasses, but is not necessarily limited to, what the National Association for Law Placement (NALP) refers to as JD Advantage jobs. *See Employment for the Class of 2011—Selected Findings*, NAT'L ASS'N FOR L. PLACEMENT 2–3 (2012), http://www.nalp.org/uploads/Classof2011SelectedFindings.pdf ("Employment in business accounted for 18.1% of jobs, the highest that NALP has measured, and up from 15.1% for the Class of 2010. The percentage of jobs in business had been in the 10–14% range for most of the two decades prior to 2010, except in the late 1980s and early 1990s when it dipped below 10%. About 29% of these jobs were reported as requiring bar passage, and about 37% were reported as jobs for which a JD was an advantage."); *see also Class of 2011 National Summary Report*, NAT'L ASS'N FOR L. PLACEMENT (July 2012), http://www.nalp.org/uploads/NatlSummChart_Classof2011.pdf (reporting these figures in table format).

7. *See infra* Part I.

8. *See* Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 385–86 (1994) ("[T]he *Model Rules* continue the *Model Codes*' basic approach of considering lawyers' duties to be uniform, whatever role the lawyer plays.").

9. *See* David B. Wilkins, *Some Realism About Legal Realism for Lawyers: Assessing the Role of Context in Legal Ethics*, *in* LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT 25, 26 (Leslie C. Levin & Lynn Mather eds., 2012) ("The organized bar has long conceived of the practice of law as fundamentally a 'generalist' profession in which differences among lawyering roles are largely unimportant with respect to the task of defining professional norms, or even assessing professional competence.").

10. *See* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 393–403 (1988) ("[T]he standard conception . . . accurately represents leading themes in the official rules of the

segmented model, recognizes and accounts for the growing fragmentation and specialization in lawyers' work. It posits a collection of discrete subprofessions, each ideally governed by a distinct regulatory regime and a context-specific code of conduct.[11]

These models have a common shortcoming. Both focus narrowly and exclusively on the "practice of law," which encompasses work previously subsumed within the profession's jurisdiction and included within its monopoly. As a result, both models ignore one of the most significant sources of change and ethical tension in the contemporary legal profession: the evolving relationship between legal practice and business practice.

In this Article, I argue that we cannot understand the shape and orientation of today's legal profession without understanding the bar's changing approach to defining and defending its boundaries. The organized bar was once intent on drawing sharp distinctions between law and business, but the rise of the regulatory state changed the playing field.[12] As regulation came to pervade society, new kinds of work and roles proliferated. Law and business grew together, and a murky and ambiguous boundary zone replaced the once-crisp demarcation between the two. Today's quasi-legal roles, embraced by many lawyers and encouraged by the organized bar, exist in this broadened and blurred boundary zone in which legal training and licensure are valuable but professional ethical obligations are unclear.

Ambiguity surrounding lawyers' work in this quasi-legal zone—regarding what constitutes legal practice, what role a lawyer plays, and when professional rules attach—gives rise to key ethical tensions ignored by existing models of the profession. This ambiguity creates opportunities for abuse by individual lawyers who seek to evade ethical obligations and for ethical arbitrage by sophisticated corporate clients who seek to access legal expertise without the strictures of professional regulation. It calls into question the profession's legitimacy, and it suggests a worrisome answer to a question frequently asked in the wake of the KPMG tax shelter incident and

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American legal profession."); *see also* Keith R. Fisher, *The Higher Calling: Regulation of Lawyers Post-Enron*, 37 U. MICH. J.L. REFORM 1017, 1020–36 (2004) ("[I]ndeterminacy and lack of accountability arise in large part from the dominant . . . paradigm of legal ethics that informs the bar-drafted rules of professional conduct."). *See generally infra* Part I.A.

11. *See* David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye, Scholer*, 66 S. CAL. L. REV. 1145, 1149–50 (1993). *See generally infra* Part I.B.

12. *See infra* Part I.C.

other recent scandals: "Where were all the lawyers?"[13] The uncomfortable answer is that the lawyers were there amidst the scandal, but they had abandoned their previous roles as intermediaries between state and society in favor of new roles straddling law and business. Their work in these quasi-legal roles represents a new and thus far unrecognized domain in lawyers' corporate work.

This Article builds upon existing models of the profession to account for the proliferation of lawyers' quasi-legal work. I begin in Part I by reviewing and critiquing existing models of the profession. I then demonstrate that the traditional and segmented models each overlook a significant historical trend influencing the work of today's lawyers: the emergence of a quasi-legal boundary zone between law and business. In Part II, I analyze core ethical tensions that arise from the work of licensed lawyers in quasi-legal roles—work that is excluded from existing regulatory regimes of professional regulation. I argue that the proliferation of quasi-legal roles permits sophisticated corporate clients to reap the benefits of the profession's monopoly while the public bears a disproportionate share of the burdens. In Part III, I call for new forms of professional regulation to address these tensions. I propose that by combining insights from the traditional and segmented models, we can overcome the weaknesses of each, bringing clarity to lawyers' work and ethical obligations in quasi-legal roles. There is room—as well as need—for broad ethical principles that bind all lawyers together, alongside context-specific regulations that govern particular practice areas and work settings.

I. EXISTING MODELS OF THE PROFESSION

The traditional model of the legal profession, eschewed by most scholars but still espoused by bar leaders,[14] posits a single profession

13. The question was first posed by Judge Stanley Sporkin in *Lincoln Savings & Loan Ass'n v. Wall*, 743 F. Supp. 901, 920 (D.D.C. 1990), but has been repeated many times since. *See, e.g.*, Ashby Jones, *Where Were the Lawyers?*, WALL ST. J. L. BLOG (Jan. 2, 2007, 8:52 AM), http://blogs.wsj.com/law/2007/01/02/where-were-the-lawyers; Sarah Kellogg, *Financial Crisis 2008: Where Were the Lawyers?*, DCBAR (Jan. 2010), http://www.dcbar.org/bar-resources/publications/washington-lawyer/articles/january-2010-financial-crisis.cfm; Richard Moorhead, *Hackgate: Where Were the Lawyers?*, LAW. WATCH (July 10, 2011), http://lawyerwatch.wordpress.com/2011/07/10/hackgate-where-were-the-lawyers.

14. Leaders of the ABA and state bars have long maintained that a single set of ethical rules and a single regulatory regime are appropriate for all segments of the profession. *See* Zacharias, *supra* note 8, at 385–86.

regulated through barriers to entry and a uniform code of conduct. In contrast, current scholarship advances a segmented model, comprised of a number of subprofessions, each ideally governed by a distinct, context-specific code of conduct. Although these two approaches diverge significantly in their descriptive and prescriptive positions, they address the same normative question of how to organize and regulate lawyers' work so as to achieve balance among the profession's tripartite obligations to clients, the state, and the public. In this Part, I review these two models and then address a common and fundamental shortcoming: their narrow focus on the practice of law. Because of this focus, both models ignore the emergence and significance of the hybrid, quasi-legal zone between business and law.

A. The Traditional Model

During the late nineteenth and early twentieth centuries, as lawyers were asserting themselves as an organized profession, bar leaders developed and promoted the traditional or unitary model of the legal profession.[15] At its base is a social contract: in exchange for special expertise, heightened ethical standards, and devotion to the public interest, lawyers enjoy self-regulatory authority and a state-granted monopoly over legal practice.[16]

Early bar leaders explained that these necessary features of professional status supported the bar's ideal role in society.[17] Monopoly power allowed the bar to limit entry so as to protect the public from unqualified, incompetent, and unethical practitioners. Self-regulatory authority allowed the bar to maintain autonomy from both the state and private interests so as to protect lawyers' independent legal judgment.[18] In theory, these features of

15. *See id.* at 338 ("The American Bar Association . . . attempted to set a uniform standard for lawyer conduct in . . . 1908 . . . .").

16. *See* Deborah L. Rhode, *Lawyers as Citizens*, 50 WM. & MARY L. REV. 1323, 1323–24 (2009).

17. *See id.*; *see also* Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 3 (1981) ("Since its inception in the early 1930s, the bar's campaign against the unauthorized practice of law has been characterized by its partisans as a selfless enterprise actuated solely by considerations of 'public interest and welfare.'" (quoting Comm. on Evaluation of the Nat'l Conference on the Unauthorized Practice of the Law, Address at the National Conference on the Unauthorized Practice of Law (May 25–26, 1962), *in* AM. BAR ASS'N, NATIONAL CONFERENCE ON THE UNAUTHORIZED PRACTICE OF LAW: TEXT OF ADDRESSES OF SPEAKERS 153 (1962))).

18. *See* MODEL RULES OF PROF'L CONDUCT pmbl., para. 11 (2013).

professionalization prepared and empowered the bar to ensure qualified, competent, and ethical lawyers who bolstered the rule of law, mediated between state and society, and protected individual rights.[19]

The organized bar developed three interlocking regulatory elements to effectuate this vision of the profession: barriers to entry, statutes governing the unauthorized practice of law, and codes of ethical conduct. In the early decades of the twentieth century, bar leaders pursued the first of these elements by convincing state licensing authorities to adopt the American Bar Association's (ABA) entry standards.[20] The ABA's requirements included law school education, bar examination passage, and approval by a character-and-fitness committee. These requirements promoted professional unity by ensuring that all lawyers would share common training, commitments, and acculturation.[21] Throughout much of the twentieth century, they also sanctioned homogeneity by impeding the inclusion of immigrants, minorities, and women.[22]

While promoting uniformity within the profession, bar leaders drew sharp boundaries around its edges through the second interlocking element of regulation: the unauthorized-practice-of-law statutes.[23] Bar leaders first persuaded state legislatures to criminalize the practice of law by unlicensed practitioners and then formed enforcement committees to identify and pursue violations.[24] Bar leaders cited three principal explanations for their efforts: the specialized and state-constitutive nature of legal work, lawyers' unique competency to engage in that work, and the importance of

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19. *See id.*; Evan A. Davis, *The Meaning of Professional Independence*, 103 COLUM. L. REV. 1281, 1281–82 (2003).

20. RICHARD L. ABEL, AMERICAN LAWYERS 47 (1989).

21. *See id.* at 47, 223.

22. JERALD S. AUERBACH, UNEQUAL JUSTICE 108 (1976). Subsequently, the bar opened its doors to members of these previously excluded groups, but continued to control entry to ensure quality and to limit competition. As Professor Bruce Green has explained, "over time, the effect of the bar association rulings became less to protect the professional elite from lower-class competitors than to protect all lawyers against competition from nonlawyers . . . and, beyond that, to expand lawyers' turf." 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, 1144 (2000).

23. *See* JOHN F. SUTTON, JR. & JOHN S. DZIENKOWSKI, CASES AND MATERIALS ON THE PROFESSIONAL RESPONSIBILITY OF LAWYERS 231–41 (1989); Rhode, *supra* note 17, at 3.

24. Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581, 2583–84 (1999).

protecting the public from incompetent and unethical legal service providers.[25]

The third interlocking element of regulation entailed the promulgation of a single, broadly applicable code of conduct. In 1908, the ABA issued the Canons of Ethics (Canons), its first official statement on appropriate standards of professional conduct.[26] The Canons expressed a single vision of lawyers' work based on courtroom practice.[27] They articulated strong duties of confidentiality, loyalty, and care to clients, while also recognizing lawyers' obligations to the state as officers of the court and to the public as supporters of a just legal system.[28] The ABA premised the Canons on what Professor Fred Zacharias termed the "fictions of symmetry"—the notion that all lawyers are equally competent, that all clients are similar, and that, as a result, "all lawyers should be governed by the same rules, regardless of whom they represent or in what context."[29]

By focusing on the readily observable and carefully regulated context of the courtroom, the Canons presented a coherent and compelling picture of how the bar's system of self-regulation balanced lawyers' competing duties to clients, the state, and the public. In the courtroom, lawyers express their duties to clients through zealous advocacy. They express their duties to the state by supporting court proceedings and following court procedures. And they express their duties to third parties and the public by complying with prescribed standards of fair dealing in interactions with opposing and third parties.[30] By drawing attention to the courtroom, the bar thus demonstrated how its system of self-regulation balanced lawyers'

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25. *See generally* DORIS MARIE PROVINE, JUDGING CREDENTIALS: NONLAWYER JUDGES AND THE POLITICS OF PROFESSIONALISM (1986). These considerations continue to justify unauthorized-practice-of-law (UPL) statutes today. *See, e.g.*, Denckla, *supra* note 24, at 2594 ("The notion that permitting nonlawyers to practice law would harm clients rests on two basic assumptions: (1) under UPL rules, lawyers are more likely to protect client interests than nonlawyers would without UPL rules; and (2) clients would be worse off without UPL rules.").

26. LUBAN, *supra* note 10, at 393–403; *see* Fisher, *supra* note 10, at 1040.

27. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 54 (1986) ("[The Canons] speak of a kind of law practice that was carried on almost entirely in the courtroom.").

28. CANONS OF PROF'L ETHICS pmbl., Canons 1, 6 (1908).

29. 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, 838 (2002).

30. Though it was not entirely necessary to focus on the courtroom context to appreciate this, lawyers' public orientation was also expressed through their role in the overall function of litigation as a means of fair and effective dispute resolution.

tripartite duties in furtherance of rule-of-law values.[31] In theory if not in practice, represented litigants—rich or poor, urban or rural, sophisticated or unsophisticated—could enter the courtroom on equal footing, knowing that regardless of power or personal circumstances, the law would treat them equally.[32]

Even at the height of professionalization, therefore, the unitary model was likely a mix of reality and rhetoric. Most lawyers at the time were, in fact, courtroom lawyers,[33] but a nontrivial number also engaged in contract drafting, estate planning, and basic transactional work.[34] Notwithstanding these varied roles, it served the profession's interests to promote lawyers as uniform and unified, bound together by common training, work, and professional norms.[35] Doing so provided a powerful justification for the profession's monopoly over legal practice. It also drew attention to the public forum of the courtroom, where the profession's system of regulation was relatively effective in balancing and constraining lawyers' competing duties.

Throughout the twentieth century and even to today, bar leaders continue to embrace this traditional unitary model. Although the Model Rules of Professional Conduct (Model Rules) now govern in place of the Canons, the ABA and state bars insist that a single set of ethical rules and a single regulatory regime are appropriate for all

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31. The "rule of law" is an ambiguous and contested phrase, used here to refer to system-wide values created by a legal framework "based on law, not men"—values that include a moderate state, a strong and engaged civil society, and basic individual freedoms. *See* Terence C. Halliday, Lucien Karpik & Malcolm Feeley, *The Legal Complex in Struggles for Political Liberalism*, *in* FIGHTING FOR POLITICAL FREEDOM 1, 10–12 (Terence C. Halliday, Lucien Karpik & Malcolm M. Feeley eds., 2007). The bar's interlocking elements of regulation were advanced as supporting these values by providing society with a cadre of legal professionals who had special expertise, heightened ethical standards, and a commitment to the public interest, and who would ensure the integrity of court proceedings and of the legal system writ large.

32. *See* Rhode, *supra* note 16, at 1324

33. *See* WOLFRAM, *supra* note 27, at 54; Lewis F. Powell, Jr., Ethical Standards of the Bar, Address at the American Bar Association Regional Meeting 4 (Oct. 22, 1964), *available at* http://scholarlycommons.law.wlu.edu/powellspeeches/7 ("In 1908 the typical lawyer was a general practitioner, usually alone, who divided his time between the courts and a family type of office practice.").

34. *See* WOLFRAM, *supra* note 27, at 54 n.26.

35. The "principle of regulatory uniformity" has been referred to as "'one of the legal profession's most important constitutive beliefs' and also its 'most dramatic delusion.'" Scott R. Peppet, *Lawyer's Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism*, 90 IOWA L. REV. 475, 503 (2005) (footnote omitted) (quoting Wilkins, *supra* note 11, at 1148; Zacharias, *supra* note 29, at 841).

segments of the profession.[36] Notwithstanding limited amendments addressing transactional work,[37] these governing codes of conduct continue to focus overwhelmingly on litigation.[38] The ABA goes a step further, urging lawyers to strive to improve the profession, which it describes as unitary.[39] For decades, however, the bar's actual and rhetorical push toward uniformity has belied significant change and growing complexity in our legal system.

B. The Segmented Model

During the 1980s and 1990s, even as bar leaders continued to embrace the traditional model, commentators began to question it. Social scientists observed that significant twentieth-century changes in law and society had prompted an expansion and corresponding diversification of lawyers' work.[40] They placed particular emphasis on the emergence and growth of two organizational forms, which generated new kinds and an increased volume of legal work: the large

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36. *See* Zacharias, *supra* note 8, at 386. Specialty bar associations and lawyers' groups, such as the American College of Trusts and Estates Lawyers and the American Association of Matrimonial Lawyers, have formulated commentary on the Model Rules of Professional Conduct (Model Rules) to tailor them to specific areas of law, but neither the ABA nor state bars have adopted or endorsed this type of context-specific guidance. *See* Lynn Mather & Craig A. McEwen, *Client Grievances and Lawyer Conduct: The Challenges of Divorce Practice*, *in* LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT, *supra* note 9, at 63, 63.

37. The current Model Rules ostensibly recognize that not all lawyers are litigators. They include provisions that address the lawyer as advisor, *see* MODEL RULES OF PROF'L CONDUCT RR. 1.2, 1.4, 2.1 (2013), negotiator, *see id.* R. 4.1, and mediator, *see id.* R. 2.2. Rule 1.13 addresses the particular challenges of entity representation. *See id.* R. 1.13. The preamble also purports to recognize the significance of context. *See id.* pmbl., para. 9 (distinguishing the various functions of a lawyer and suggesting that contentious ethical issues "be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules"). Still, the Model Rules perpetuate the traditional approach of viewing the profession as unitary and the duties of lawyers as uniform, based on litigation. *See* Zacharias, *supra* note 8, at 385–86.

38. *See* Fisher, *supra* note 10, at 1042–43 (describing the Model Rules' reliance "exclusively on the adversarial litigation role model" and "the primacy of trial lawyers' . . . concepts of zealous advocacy of, and unswerving loyalty to, the client").

39. *See* MODEL RULES OF PROF'L CONDUCT pmbl.

40. *See* JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 1 (Nw. Univ. Press rev. ed. 1994) (1982) [hereinafter HEINZ & LAUMANN, CHICAGO LAWYERS]; JOHN P. HEINZ, ROBERT L. NELSON, REBECCA L. SANDEFUR & EDWARD O. LAUMANN, URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 7–8 (2005) [hereinafter HEINZ ET AL., URBAN LAWYERS]. As many scholars have noted, there has always been some diversity within the profession. *See, e.g.*, WOLFRAM, *supra* note 27, at 54–55. Accordingly, these twentieth-century developments increased and changed—but did not necessarily create—variation among lawyers' roles and work.

commercial enterprise and the administrative bureaucracy.[41] The former called upon lawyers to address novel and complex corporate restructurings, tax and antitrust issues, and bond offerings; the latter, to undertake new types of individual and institutional representations associated with the rise of the regulatory state.[42]

The bar responded by changing the structure of legal education to produce more lawyers and by developing the large, differentiated law firm to maximize efficiency.[43] Many newly trained lawyers moved out of traditional roles as courtroom litigators and into countless new roles as transactional lawyers and government advisors.[44] During this shift, some lawyers were pulled into new roles, while others pushed out to them.[45] In both cases, the bar incorporated much of this new corporate and government work within the definition of legal practice, dramatically expanding the profession's jurisdiction.[46]

Observing these changes in an influential 1982 study, sociologists John Heinz and Edward Laumann concluded that "the simple view of the bar as a single, unified profession no longer fits the facts."[47] They theorized that the late twentieth-century bar had fragmented into two hemispheres, differentiated by the type of client. In the "personal-plight" hemisphere, lawyers who generally came from lower socioeconomic backgrounds provided legal services to individuals and small businesses.[48] In the "corporate hemisphere," by contrast, elite

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41. ANDREW ABBOTT, THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR 248 (1988).

42. *See id.* at 248–49 (describing how lawyers' work grew increasingly diverse as lawyers engaged in activities "ranging from personal matters associated with the welfare state's involvement in housing and education to the corporate business generated by the state's regulatory intrusions into the economy").

43. *See id.* at 252–53.

44. *See* PATRICK SCHMIDT, LAWYERS AND REGULATION: THE POLITICS OF THE ADMINISTRATIVE PROCESS 13 (2005); Nelson, *supra* note 5, at 355, 369.

45. *See* Michael J. Powell, *Professional Innovation: Corporate Lawyers and Private Lawmaking*, 18 LAW & SOC. INQUIRY 423, 429–49 (1993) (discussing the development of the poison pill and noting that "law firms did not passively wait for clients to ask them for prescriptions for a poison pill but proactively marketed their particular brand through client memoranda and presentations to boards of directors"). *See generally* Yves Dezalay, *The* Big Bang *and the Law: The Internationalization and Restructuration of the Legal Field*, THEORY CULTURE & SOC'Y, June 1990, at 279 (documenting corporate lawyers' entrepreneurial activities in promoting new products and services to clients, with the effect of further increasing demand and further expanding their fields of influence).

46. *See* ABBOTT, *supra* note 41, at 249 ("Potential legal jurisdictions in [the late nineteenth century] . . . grew rapidly.").

47. HEINZ & LAUMANN, CHICAGO LAWYERS, *supra* note 40, at 1.

48. *Id.* at 330.

law school graduates and members of influential law firms represented corporations, labor unions, and other complex organizational clients.[49]

Legal commentators in the 1990s built on Heinz and Laumann's descriptive work with normative projects addressing professional regulation. In a series of seminal articles, Professor David Wilkins criticized the bar's continued reliance on the traditional model of a unitary profession.[50] He accepted the value of conduct rules in balancing lawyers' competing obligations to clients, the state, and the public, but he questioned the ability of a single code to cover diverse areas of legal practice. Wilkins therefore proposed a system of context-specific rules to govern different practice areas.[51] Such a system, he argued, could preserve the benefits of professional regulation while addressing the increasing fragmentation and specialization of the bar.[52]

To illustrate how to develop context-specific rules, Wilkins examined the charges that the Office of Thrift Supervision brought against the law firm Kaye Scholer, in 1990, for failure to disclose problems with the underwriting and investment practices of its client, Lincoln Savings & Loan.[53] Wilkins suggested that, because lawyers who represent federally insured savings institutions play a critical role in maintaining the safety and soundness of the banking system, they should owe correspondingly heightened duties of candor to the tribunal to safeguard the public interest.[54] He argued, however, that

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49. *Id.* at 328. Professor John Heinz, Professor Edward Laumann, and two new collaborators set out to update their study in the 1990s. In the findings they published in 2005, they concluded that the two hemispheres had grown further apart, as it had become increasingly uncommon for lawyers to cross between them. HEINZ ET AL., URBAN LAWYERS, *supra* note 40, at 8. They also reported that the corporate hemisphere had grown at a much faster pace than the personal-plight hemisphere but had begun to fragment based on the area of law and the requisite skill specialization. *Id.* at 7–8.

50. *See* David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468 (1990) [hereinafter Wilkins, *Legal Realism*]; Wilkins, *supra* note 11; David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992).

51. He referred to these rules as "middle-level rules" to clarify that he was not advocating a contextual approach taken to an extreme—with each case taken entirely on its own facts and circumstances. *See* Wilkins, *Legal Realism*, *supra* note 50, at 515–19. Instead, he was proposing "a set of 'middle-level principles' that both isolate and respond to relevant differences in social and institutional context while providing a structural foundation for widespread compliance in the areas where they apply." *Id.* at 516 (footnote omitted).

52. *See id.* at 515–19.

53. *See* Wilkins, *supra* note 11, at 1151–59.

54. *See id.* at 1181–82.

the level of public obligation should vary with the type of engagement. He explained that lawyers need more leeway to advocate zealously for clients when litigating than when offering advice and guidance in a nonadversarial context.[55]

Wilkins acknowledged the difficulty of developing context-specific rules and enforcement mechanisms. In particular, he noted the definitional difficulty of determining which differences mattered for what purposes and the jurisdictional difficulty of determining which rules applied to what conduct.[56] Notwithstanding these difficulties, he emphasized the importance of the undertaking for the future of the profession. He therefore called for sustained study to explore differences between various practice settings.[57]

Many scholars answered the call. Some considered the broader systemic implications of specialization and fragmentation and concluded that the unitary legal profession was a relic. For example, Keith Fisher contended that "[t]o talk in the 21st century about '*the* legal profession' is to speak of a nonexistent, monolithic construct that is, at best, a holdover of 19th century images of small-town or local law practice."[58] Professor John Leubsdorf wrote of the "centrifugal movement" that led to the current fragmented profession and predicted that the profession would fragment even further.[59]

Other scholars explored specific practice settings, including large-firm practice, transactional practice, in-house advising, government lawyering, and cause lawyering.[60] In each context, they

55. *See id.* at 1183–84. Wilkins also argued that the implicated legal market was relevant in designing and imposing appropriate sanctions. With respect to the Kaye Scholer case, he concluded that the Office of Thrift Supervision's imposition of a temporary order to cease and desist was insufficiently sensitive to its fatal impact on a large law firm operating in a highly competitive market. *See id.* at 1214–15.

56. *See id.* at 1216–18 ("[One objection], which I call the spillover critique, argues that context-specific rules will inevitably reach beyond their intended scope.").

57. *See id.* at 1216 ("My purpose here is to spark, rather than to resolve, the debate over exactly how context should be incorporated into regulatory policy for thrift lawyers."). In 2012, Wilkins returned to these questions, observing that they are growing increasingly complicated "as lawyers, clients, and legal norms increasingly cross established contextual boundaries." Wilkins, *supra* note 9, at 40. Again, he called for further scholarly attention and research. *Id.* at 25.

58. Fisher, *supra* note 10, at 1042.

59. *See* John Leubsdorf, *Legal Ethics Falls Apart*, 57 BUFF. L. REV. 959, 959, 962 (2009).

60. *See, e.g.*, Audrey I. Benison, *The Sophisticated Client: A Proposal for the Reconciliation of Conflicts of Interest Standards for Attorneys and Accountants*, 13 GEO. J. LEGAL ETHICS 699, 721–23 (2000); Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STAN. L. REV. 1689, 1714–15 (2008);

explored the conditions of lawyers' work and decisionmaking and described current sources of regulation. Many scholars also proposed context-specific rules for particular practice specialties, including bankruptcy, estate planning, mass torts, securities, and employment.[61] These scholars advanced a segmented model of the legal profession that continued to embrace the profession's mediating role between state and society, while breaking free of the traditional model's exclusive focus on litigation.

C. Problematizing the Models

Although the segmented model provides important insights into ethical tensions that arise from specialization, it shares a fundamental flaw with the traditional model. Both models focus narrowly on established areas of legal practice, assuming that a static boundary exists between legal practice and business practice. As a result, neither model accounts for one of the most significant sources of change and ethical tension facing the profession today—the emergence of a robust but ambiguous boundary zone between law and business. Within this zone, an increasing number of licensed lawyers engage in hybrid quasi-legal work, which does not fit within existing conceptions of legal practice.

David J. Moraine, *Loyalty Divided: Duties to Clients and Duties to Others—The Civil Liability of Tax Attorneys Made Possible by the Acceptance of a Duty to the System*, 63 TAX LAW. 169, 181–207 (2009); Milton C. Regan, Jr., *Professional Reputation: Looking for the Good Lawyer*, 39 S. TEX. L. REV. 549, 562–63 (1998). *See generally* Abram Chayes & Antonia H. Chayes, *Corporate Counsel and the Elite Law Firm*, 37 STAN. L. REV. 277 (1985); Daniel R. Coquillette & Judith A. McMorrow, *Zacharias's Prophecy: The Federalization of Legal Ethics Through Legislative, Court, and Agency Reform*, 48 SAN DIEGO L. REV. 123 (2011); Fisher, *supra* note 10, at 1033–43; Monroe H. Freedman, *The Professional Obligation To Raise Frivolous Issues in Death Penalty Cases*, 31 HOFSTRA L. REV. 1167 (2002); Jonathan R. Macey & Geoffrey P. Miller, *Reflections on Professional Responsibility in a Regulatory State*, 63 GEO. WASH. L. REV. 1105 (1995); David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, 78 FORDHAM L. REV. 2067 (2010).

61. Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes To Include the Non-Adversarial Roles of Federal Prosecutors*, 37 B.C. L. REV. 923 (1996); Major Bernard P. Ingold, *An Overview and Analysis of the New Rules of Professional Conduct for Army Lawyers*, 124 MIL. L. REV. 1 (1989); Peppet, *supra* note 35; Nancy B. Rapoport, *Our House, Our Rules: The Need for a Uniform Code of Bankruptcy Ethics*, 6 AM. BANKR. INST. L. REV. 45 (1998); Stanley Sporkin, Commentary, *The Need for Separate Codes of Professional Conduct for the Various Specialties*, 7 GEO. J. LEGAL ETHICS 149 (1993); *see* STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION (Acad. of Family Mediators 1998), *reprinted in* CODES OF PROFESSIONAL RESPONSIBILITY 554, 554–58 (Rena A. Gorlin ed., 4th ed. 1999) (family and divorce mediation); CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (Am. Arbitration Ass'n 1977), *in* CODES OF PROFESSIONAL RESPONSIBILITY, *supra*, at 564, 564–72 (arbitration).

During the latter half of the twentieth century, the organized bar both responded to and encouraged the proliferation of quasi-legal work through a new approach to minding its jurisdiction.[62] Whereas bar leaders once sought clarity in defining, defending, and expanding the bar's jurisdiction over new work arising at the boundary between law and business, they subsequently came to embrace the ambiguity.

Early in the twentieth century, the bar insisted on a sharp distinction between legal work and other forms of work. Bar committees vigorously enforced unauthorized-practice-of-law statutes,[63] and the bar promulgated codes of conduct that limited lawyers' interactions with nonlawyers.[64] Because the vast majority of legal work occurred in the courtroom or the law firm office, minding the boundaries of the profession was relatively straightforward. In the observable and highly regimented setting of courtroom litigation, where the bar could prevent imposters from engaging in tasks reserved for lawyers with relative ease, it could persuasively defend the notion that navigating the intricacies of courtroom procedures required special training and expertise. In the less public setting of law firms, the bar could limit nonlawyer involvement by prohibiting nonlawyer ownership[65] and by narrowly prescribing appropriate communications between lawyers and the limited number of nonlawyers (primarily clients) with whom they interacted.[66]

Over the course of the twentieth century, a proliferation of new work at the boundary between law and business altered this

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62. The processes through which a discipline or profession attempts to distinguish itself from other disciplines or professions and to claim and defend jurisdiction over particular types of knowledge and forms of work is referred to by sociologists as "boundary-work." Professor Thomas Gieryn developed the concept to describe efforts by scientists to distinguish their work from other intellectual activities. *See* Thomas F. Gieryn, *Boundary-Work and the Demarcation of Science from Non-Science: Strains and Interests in Professional Ideologies of Scientists*, 48 AM. SOC. REV. 781, 781–82 (1983). When boundary work involves attempts by a discipline to expand its authority and jurisdiction over other areas of expertise, professionals attempt to distinguish their work and knowledge from the work and knowledge of outsiders and to cast outsiders in an unfavorable light. *See id.* at 791–92. *See generally* THOMAS F. GIERYN, CULTURAL BOUNDARIES OF SCIENCE: CREDIBILITY ON THE LINE (1999). The organized bar has always engaged in boundary work, generally by highlighting the specialized nature of legal work, the unique competency of lawyers to engage in that work, and the importance of protecting the public from incompetent and unethical service providers. *See generally* PROVINE, *supra* note 25.

63. WOLFRAM, *supra* note 27, at 825; Rhode, *supra* note 17, at 6–11.

64. WOLFRAM, *supra* note 27, at 826.

65. *See* CANONS OF PROF'L ETHICS Canon 34 (1937) ("No division of fees for legal services is proper, except with another lawyer . . . .").

66. *Id.*

landscape.[67] As legal practice and business practice grew together, the boundary between the two blurred. Legal knowledge became increasingly enmeshed in business concerns, and a new category of quasi-legal roles emerged. The bar responded with a new approach to policing its boundaries, which both reflected and facilitated these trends. It permitted and even embraced ambiguity, allowing the question of whether a particular task constituted the practice of law to turn on the work setting or job title of the person doing the work.

The bar expressed this new approach by pushing legal practice into new business settings while subsuming new forms of transactional work within its jurisdiction. For example, it created exceptions to its fee-sharing prohibitions to allow lawyers to practice law in not-for-profit corporations, insurance companies, and government agencies.[68] In these new work settings, lawyers performed new kinds of corporate, banking, and regulatory work.[69] Lawyers who remained in firms began lobbying for their corporate clients and representing them before agencies.[70]

Through these new forms of work, lawyers came into increasing contact with a wider array of nonlawyers—particularly corporate actors—outside of the traditional settings of courtrooms and law firm offices. This shift blurred the distinction between legal work and business work, raising concerns about the reach of professional regulations and the strength of professional independence. Corporate clients began dictating litigation strategies and participating in other activities traditionally characterized as legal practice.[71] Corporate lawyers, for their part, began participating in business strategy decisions from positions in upper management.[72] Legal scholars have

67. *See* SCHMIDT, *supra* note 44, at 13; Michele DeStefano Beardslee, *Taking the Business Out of Work Product*, 79 FORDHAM L. REV. 1869, 1874–81.

68. *See* Green, *supra* note 22, at 1152–53; Ted Schneyer, *Multidisciplinary Practice, Professional Regulation, and the Anti-Interference Principle in Legal Ethics*, 84 MINN. L. REV. 1469, 1510–14 (2000). Today, lawyers may be employed by nonlawyers or retained by a third party in a number of circumstances. For example, lawyers may be retained by insurance companies to represent policyholders, by social service agencies to represent the agencies' clients, or by the government to represent individuals. Schneyer, *supra*, at 1507–08.

69. *See* SCHMIDT, *supra* note 44, at 13; Nelson, *supra* note 5, at 357.

70. *See* SCHMIDT, *supra* note 44, at 14–15.

71. *See* Chayes & Chayes, *supra* note 60, at 289–93.

72. *Id.* at 285–93.

detailed the ethical problems arising from this trend,[73] but the organized bar has been slow to address them.[74]

Simultaneously, legal knowledge became increasingly relevant to existing and new business roles. For example, as the regulatory state grew larger and increasingly complex, demand for lobbyists to draft and advocate legislation steadily increased.[75] In the wake of corporate scandals, compliance officers became more prevalent and more influential.[76] These and other quasi-legal roles increased in number and prominence at the boundary of law and business.

Although laypeople routinely performed, and continue to perform, quasi-legal work, increasing numbers of licensed lawyers are

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73. *See, e.g.*, Sung Hui Kim, *The Ethics of In-House Practice*, *in* LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT, *supra* note 9, at 197, 205–06 (noting that under the Model Rules, "[b]usiness matters (even those that might involve immoral but legally permissible conduct) are not 'in the lawyer's province,'" and that "as such, lawyers may stick to the law and questions of legality (especially when dealing with sophisticated clients)"). Other scholars have argued for further change, analyzing the benefits of professional collaboration between lawyers and non-lawyers, especially in the commercial claim-funding context. *See, e.g.*, Michele DeStefano, *Nonlawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup?*, 80 FORDHAM L. REV. 2791, 2795–96 (2012).

74. *See* Sung Hui Kim, *The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983, 1034 (2005) ("[T]he ABA's 2003 amendments to the Model Rules . . . ignor[e] the situation of inside counsel by not addressing the ethical ecology of inside counsel . . . .").

75. Lobbyists engage in a variety of activities, including drafting and interpreting bills, preparing and delivering testimony, and recruiting sponsors. The demand for lobbyists increased as law and administration became more complex with the rise of the regulatory state. *See generally* William N. Eskridge, Jr., *Federal Lobbying Regulation: History Through 1954*, *in* THE LOBBYING MANUAL 5 (William V. Luneburg, Thomas M. Susman & Rebecca H. Gordon eds., 4th ed. 2009). Formal legal training and licensure are not required to be a registered lobbyist, but they can be highly valuable.

76. Compliance officers monitor the activities of a company's directors, officers, and employees to ensure compliance with governing rules and regulations. The visibility and prevalence of the role increased dramatically in publicly traded companies in the wake of the Sarbanes-Oxley Act of 2002. *See* WILLIAM E. KNEPPER & DAN A. BAILEY, LIABILITY OF CORPORATE OFFICERS AND DIRECTORS § 1.04[5] (8th ed. 2013) ("Among other things, the [chief governance officer], who is typically a legally trained executive, is responsible for compliance with certain governance-related laws . . . ."); Robert Eli Rosen, *Resistances to Reforming Corporate Governance: The Diffusion of QLCCs*, 74 FORDHAM L. REV. 1251, 1301 (2005) ("[Compliance officers] . . . have the potential for making directors accountable for corporate legal compliance decisions."); Harry Hurt III, *Drop That Ledger! This Is the Compliance Officer*, N.Y. TIMES, May 15, 2005, at B5 ("Sarbanes-Oxley has made chief compliance officers almost as important to corporate success—or at least survival—as chief executives and chief financial officers."). Registered lobbyists are not required to have formal legal training and licensure, but it is advantageous for those that do.

now occupying quasi-legal roles.[77] They include investment bankers, compliance officers, consultants, and accountants; they lead hedge funds, banks, private equity firms, and large corporations.[78] With the collapse in the market for legal services, many young lawyers now enter these quasi-legal roles directly from law school.[79]

The bar could have responded to these quasi-legal roles as it did when lawyers first moved in-house—by working to extend its jurisdiction and ethical rules to cover additional work sites, even as it tolerated the increasing enmeshment of lawyers in the business world.[80] Instead, bar leaders declined to act definitively, neither bringing quasi-legal work clearly within, nor excluding it clearly from, the profession's jurisdiction. As recently as 2003, an ABA committee

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77. Of the 2011 graduates who were employed as of February 15, 2013, 17.9 percent were working in business, and of those jobs, only 29.1 percent were positions for which bar passage was required. *See Class of 2012 National Summary Report*, NAT'L ASS'N FOR L. PLACEMENT 1 (July 2013), http://www.nalp.org/uploads/NationalSummaryChart2012.pdf. Of the wider sample of 2012 graduates whose employment status was known as of February 2013, 22.3 percent were working in jobs for which bar passage was not required or preferred; 13.3 percent were working in jobs for which legal training was preferred but not required. *See id.* NALP reported that these percentages were the highest it had measured since it began tracking such data in 2001. *See Employment for the Class of 2012—Selected Findings*, NAT'L ASS'N FOR L. PLACEMENT 1–2 (2013), http://www.nalp.org/uploads/Classof2012SelectedFindings.pdf. NALP statistics for the past ten years reveal a steady increase in the number of law graduates who accept jobs for which legal training is preferred but not required: 13.3 percent of 2012 graduates; 12.9 percent of graduates averaged over the past two years; 10.8 percent of graduates from the past five years; and 9.1 percent of graduates from the past ten years. *See Recent Graduates*, NAT'L ASS'N FOR L. PLACEMENT, http://www.nalp.org/recentgraduates (last visited Jan. 13, 2014) (linking to employment statistics of recent graduates for the past ten years).

78. The rate at which lawyers have moved out of practice appears to have increased considerably. *See* RENNARD STRICKLAND & FRANK T. READ, THE LAWYER MYTH: A DEFENSE OF THE AMERICAN LEGAL PROFESSION 6 (2008); Joe G. Baker and Brian K. Jorgensen, *Leaving the Law: Occupational and Career Mobility of Law School Graduates*, 50 J. LEGAL EDUC. 16, 16 (2000); Ben W. Heineman, Jr., *Law and Leadership*, 56 J. LEGAL EDUC. 596, 604–07 (2006); *see also* Sarah Helene Duggin, *The Pivotal Role of the General Counsel in Promoting Corporate Integrity and Professional Responsibility*, 51 ST. LOUIS U. L.J. 989, 1010–16 (2007) (noting the proliferation of quasi-legal and extralegal roles within large corporations); David Luban, *Asking the Right Questions*, 72 TEMP. L. REV. 839, 852–55 (1999) (commenting on the movement of lawyers out of practice and into business roles); Pater Lattman & Richard Perez-Pena, *Romney, at Harvard, Merged Two Worlds*, N.Y. TIMES, July 10, 2012, at A12 (reporting that "the vast majority of graduates [of Harvard's joint J.D./M.B.A. program] end up in business rather than law"). *See generally* DEBORAH ARRON, RUNNING FROM THE LAW: WHY GOOD LAWYERS ARE GETTING OUT OF THE LEGAL PROFESSION (2004).

79. *See Class of 2011 National Summary Report*, *supra* note 6; *Employment for the Class of 2011—Selected Findings*, *supra* note 6.

80. Licensure is required to work as in-house counsel, and, although the rules of professional conduct remain indexed primarily to litigation, it is clear that they cover the work of in-house lawyers. ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 35 (1931).

failed in its efforts to promulgate a model uniform definition of the practice of law.[81] The committee observed "an increasing number of situations where nonlawyers . . . are providing services that are difficult to categorize . . . as being . . . within the definition of the practice of law," and concluded that it would be impossible to offer a uniform definition.[82] In doing so, the committee effectively blessed the ambiguity that surrounds the boundaries of legal practice and the status of quasi-legal work.

Related ambiguity surrounds the coverage of the bar's ethical rules. The ABA purports to bind lawyers to all of the Model Rules, which contain provisions for "law-related services" performed in conjunction with legal services.[83] "Law-related services" are services, like accounting and financial planning, that do not constitute the unauthorized practice of law when performed by nonlawyers but that often relate to the provision of legal services.[84] By implication, lawyers who offer law-related services without also engaging in the practice of law are not bound by the provisions of the Model Rules. Most, but

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81. *See* AM. BAR ASS'N TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, REPORT TO THE HOUSE OF DELEGATES (2003), *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/taskforce_rpt_328.authcheckdam.pdf. ABA guidance is not binding unless states adopt it, but the ABA's efforts with respect to professional regulation serve as important reference points regarding the approach of the country's bar writ large. Here, they evidence the bar's growing ambivalence toward the scope of practice and the coverage of the rules of professional conduct.

82. *Id*. at 13. Early in its work, the committee circulated a draft definition "with the goal of stimulating discussion." *See id*. at 3. It defined the practice of law as "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." *Task Force on the Model Definition of the Practice of Law: Definition of the Practice of Law Draft*, A.B.A. (Sept. 18, 2002), http://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law/model_definition_definition.html. It then listed four activities that presumptively fell within this definition:

> (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.

Id. It later abandoned this definition, however, after observing too much variation regarding the practice of law as among the states. AM. BAR ASS'N TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, *supra* note 81, at 4.

83. MODEL RULES OF PROF'L CONDUCT R. 5.7 (2013).

84. *Id.*; *see, e.g.*, N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 678 (1996) (concluding that divorce mediation constitutes a "lawyer's services").

not all, states adopted this approach.[85] In practice, it generally exempts licensed lawyers working in quasi-legal roles from being regulated as lawyers (unless they are simultaneously practicing law).

Notwithstanding its apparent reticence to address quasi-legal work, the Model Rules also envision application of certain broad prohibitions to all licensed lawyers, practicing or not. For example, under Model Rules 8.3 and 8.4, it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects," "engage in conduct involving dishonesty, fraud, deceit or misrepresentation," "engage in conduct that is prejudicial to the administration of justice,"[86] or fail to report a violation of the professional rules by another lawyer.[87] These provisions purport to bind all licensed lawyers, practicing or not.[88] ABA Formal Opinion 04-433 goes a step further, purporting to bind all licensed lawyers to *all* provisions of the Model Rules.[89]

States have declined to adopt and implement these approaches, however. State supreme courts delegate their regulatory authority to state bars,[90] which generally do not concern themselves with the

85. *See* AM. BAR ASS'N CPR POLICY IMPLEMENTATION COMM., VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT: RULE 5.7 RESPONSIBILITIES REGARDING LAW-RELATED SERVICES (Nov. 2, 2010), *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/5_7.authcheckdam.pdf (noting whether each state has adopted Rule 5.7 and, if so, in what form).

86. MODEL RULES OF PROF'L CONDUCT RR. 8.4(b)–(d).

87. *Id.* R. 8.3.

88. *See, e.g.*, *id*. R. 8.4 ("It is professional misconduct *for a lawyer to* . . . ." (emphasis added)); *see also id.* pmbl., para. 3 (citing Rule 8.4 in noting that "there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity").

89. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 04-433 (2004) ("'[A] lawyer must comply at all times with all applicable disciplinary rules of the Code of Professional Responsibility whether or not he is acting in his professional capacity.'" (quoting ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 335 (1974))).

90. *See*, *e.g.*, S.D. CODIFIED LAWS § 16-19-31 (2004) ("The license to practice law in this state is a continuing proclamation by the Supreme Court that the holder is fit to be entrusted with professional and judicial matters, and to aid in the administration of justice as an attorney and as an officer of the court. It is the duty of every recipient of that privilege to conduct himself at all times, both professionally and personally, in conformity with the standards imposed upon members of the bar as conditions for the privilege to practice law."); Cohen v. Hurley, 366 U.S. 117, 123–24 (1961) (describing courts' traditional power to discipline members of the bar, incident to a "broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied"); Redball Interior Demolition Corp. v. Palmadessa, 908 F. Supp. 1226, 1245 (S.D.N.Y. 1995) ("A trial judge has the inherent authority to regulate lawyers' professional conduct."); *In re* Integration of Bar of Haw., 432 P.2d 887, 888 (Haw. 1967)

conduct and activities of nonpracticing lawyers.[91] Insofar as the ABA has exhibited ambivalence regarding quasi-legal work, state bar disciplinary committees have not—they view such work as outside the scope of professional regulation. On the ground, therefore, licensed lawyers working in business roles do so free from the strictures of professional regulation.

Scholars and regulators have given insufficient attention to the existence and ethical significance of quasi-legal roles, likely because of the existing models that inform their work. Both the traditional and segmented models focus narrowly and exclusively on the practice of law, and fail to recognize and account for other, increasingly significant forms of lawyers' work. But neither scholars nor regulators can continue to ignore the quasi-legal work of licensed lawyers. As I argue in the next Part, quasi-legal work is the source of significant ethical tensions that pose imminent threats of harm to clients, the public, and the independence of the legal profession.

II. THE ETHICAL AMBIGUITY OF QUASI-LEGAL WORK

When licensed lawyers perform quasi-legal work, a number of dangers arise. In this Part, I highlight three of these dangers: lawyers may take advantage of consumer confusion and leverage their law licenses to their own advantage; lawyers may evade ethical obligations by transitioning into and out of practice; and sophisticated corporate actors may engage in ethical arbitrage by relying on lawyers in different roles subject to different obligations for different purposes. I argue that the cumulative effect of the ambiguity surrounding quasi-legal work undermines the profession's mediating

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(discussing "the inherent power lodged in the courts . . . with respect to matters affecting the bar and the practice of law"); *see also* WOLFRAM, *supra* note 27, at 22–33 (discussing state and federal courts' inherent authority to regulate lawyers in all capacities); Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation—The Role of the Inherent-Powers Doctrine*, 12 U. ARK. LITTLE ROCK L. REV. 1, 4–5 (1989) (discussing courts' inherent power to regulate lawyers).

91. Notwithstanding two exceedingly high-profile examples—Presidents Bill Clinton and Richard Nixon, both of whom were disbarred—state bars have rarely attempted to regulate licensed lawyers who were not practicing law or engaging in law-related services. Exceptions generally entail egregious conduct. *See, e.g.*, Attorney Grievance Comm'n of Md. v. Lazerow, 578 A.2d 779, 779 (Md. 1990) (disbarring a real estate developer after he misappropriated $200,000 of clients' escrow funds); *In re* Discipline of Janklow, 709 N.W.2d 28, 30 (S.D. 2006) (observing that, among other things, Janklow had been convicted of second-degree manslaughter); *In re* Discipline of Hopp, 376 N.W.2d 816, 816 (S.D. 1985) (suspending the license of an inactive lawyer who was self-employed in the laundry and dry cleaning industry for convictions related to cocaine use).

role between state and society, and threatens to shift the profession's orientation away from the public and the state and toward private corporate interests.

A. Consumer Confusion

The first category of ethical tension surrounding lawyers' quasi-legal work is the likelihood of consumer confusion arising among business customers with whom these lawyers interact. Because the profession effectively exempts lawyers working in quasi-legal roles from professional regulation,[92] the nature and extent of these lawyers' ethical obligations are unclear. This ambiguity can confuse consumers, who may incorrectly assume that because these individuals are licensed lawyers, they owe professional duties of confidentiality, loyalty, and care to all consumers. Lawyers and the businesses that employ them can leverage this confusion to their own advantage.

The risks are well illustrated by the example of trust officers—a role for which legal training and licensure are advantageous but not required.[93] Trust officers engage in work that, in some respects, resembles the work of an estate-planning attorney. They advise clients on the use of trusts, draft trust instruments, and administer and manage trust accounts. In other respects, however, trust officers' work resembles banking work, as they routinely market and sell their employers' products and services. For a number of reasons, licensed and practicing lawyers are particularly attractive applicants for trust-officer positions. Previous experience as a practitioner signals to an employer that the applicant is already familiar with reading and drafting trust agreements and with the tax consequences of certain arrangements. It signals to actual and potential clients that the bank's funds are in the hands of individuals with the knowledge and experience to administer the trusts wisely.[94] For these reasons, banks often recruit junior associates at law firms to serve as trust officers.[95]

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92. *See supra* notes 81–91 and accompanying text.

93. *See* Marshall L. Zissman, *Potential Liability of Corporate Fiduciaries for Estate Planning Errors*, TR. & EST., June 1985, 28, 28–29 (summarizing the functions of trust officers).

94. *Id.*

95. *See* Ward Bower, *Law Firm Economics and Professionalism*, 100 DICK. L. REV. 515, 521–22 (1996) ("Banks and insurance companies hire lawyers for estate planning and administration . . . ."); *see also* John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 FORDHAM L. REV. 83, 105 (2000) ("[I]nvestment

When contacted by bank employees about complicated matters involving legal instruments and issues, clients who know that the employees are lawyers may think that these lawyers owe lawyerly duties of loyalty and competency in performing their work. Clients may reasonably believe, for example, that trust officers who are lawyers will only market a bank's estate-planning products and services that are in the clients' best interests. The bar's rules of professional conduct do not govern trust officers, however, and state regulations regarding trust officers' duties to clients vary significantly.[96] In some situations, they may owe fiduciary duties—for example, after offering financial and investment advice and establishing a formal business relationship.[97] But in other situations, fiduciary duties will not attach[98]—for example, when a trust officer initially contacts a potential client to market a product or service. Moreover, when banks market their products and services nationwide from a variety of different locations, there may be significant uncertainty as to which jurisdiction's rules apply.

Amidst this complexity and ambiguity, consumer confusion and harm are real risks. Without independent legal counsel, even relatively sophisticated individuals will struggle to sort through the relevant law and determine the role and duties of a particular lawyer-trust officer. Even worse, the resulting confusion may allow both trust officers and their employing banks or trust companies to leverage trust officers' law licenses to increase corporate sales. This manipulation can then reflect back on and undermine the legitimacy of the legal profession.

B. Transitions into and Out of Practice

Opportunities for abuse increase when lawyers transition between practice roles and quasi-legal roles. Scholars have observed

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banking firms seem to be hiring many lawyers who offer services to clients in the non-law firm setting.").

96. *See* Ruth Plato-Shinar & Rolf H. Weber, *Three Models of the Bank's Fiduciary Duty*, 2 L. & FIN. MARKETS REV. 422, 423–25 (2008).

97. *Id.* at 423.

98. Annotation, *Existence of Fiduciary Relationship Between Bank and Depositor or Customer so as To Impose Special Duty of Disclosure upon Bank*, 70 A.L.R.3d 1344, § 2 (1976 & Supp. 2013).

the increasing mobility that characterizes today's profession.[99] Overwhelmingly, the scholarship focuses on lawyers' transitions among law firms or other traditional practice settings.[100] Equally significant but overlooked are lawyers' transitions into and out of legal practice and quasi-legal roles. As legal expertise becomes increasingly valuable to a range of businesses and employers, lawyers acquire enhanced flexibility to move between legal practice and business practice. They are now doing so with increasing frequency.[101]

The profession's regulatory structures do not adequately address the resulting ethical tensions. Through conflict-of-interest provisions, the Model Rules address transitions among traditional practice settings,[102] including the special situation of a government lawyer who transitions into private practice.[103] They offer limited guidance, however, regarding transitions to and from quasi-legal roles. They address these transitions only indirectly, through broadly applicable confidentiality and conflict-of-interest provisions. Model Rule 1.6 prohibits disclosure of confidential information,[104] and Model Rule 1.9 prohibits use of confidential information gained in a former representation to the detriment of a former client.[105] These narrow provisions leave room for abuse in the context of quasi-legal work, where lawyers have no current clients, only former clients. A former client will face great difficulty in establishing that the lawyer used information gained during a former representation without disclosing

99. PAULA A. PATTON, THE NALP FOUND., TOWARD EFFECTIVE MANAGEMENT OF ASSOCIATE MOBILITY: A STATUS REPORT ON ATTRITION 10 (2005); *see supra* notes 78–79 and accompanying text.

100. *See* Heineman, *supra* note 78, at 604–07 (noting the mobility of lawyers from one career to the next); Eli Wald, *Lawyer Mobility and Legal Ethics: Resolving the Tension Between Confidentiality Requirements and Contemporary Lawyers' Career Paths*, 31 J. LEGAL PROF. 199, 199 (2007) (noting the mobility of lawyers among traditional areas of practice).

101. *See generally* ARRON, *supra* note 78; Baker & Jorgensen, *supra* note 78.

102. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 (2013) (addressing transitions between concurrent representations); *id.* R. 1.9 (addressing transitions between successive representations). *But see generally* Wald, *supra* note 100 (contending there is unresolved tension between confidentiality protections and conflicts rules).

103. *See* MODEL RULES OF PROF'L CONDUCT R. 1.11. To ensure that government lawyers do not exploit their previous government positions to the advantage of a subsequent client, this rule prohibits a lawyer from representing a client in a matter in which she personally participated while working for the government unless the associated government agency grants permission. *See id.* (disqualifying the lawyer's new firm also from representing the client on that matter unless the lawyer does not participate in the representation and does not receive any fee from the representation).

104. *Id.* R. 1.6.

105. *Id.* R. 1.9(c)(1).

it and without authorization.[106] Moreover, these provisions do not prohibit a lawyer from using the information in ways that benefit the lawyer without directly harming the former client—permitting, for example, the use of information about an adversary that has no relevance for the former client. This regulatory gap permits lawyers to leverage insider information to their advantage as they transition through roles.

A recent federal litigation development illustrates the risk of harm that can result from such information asymmetries. John Desmarais left his partnership at the law firm of Kirkland & Ellis in 2010 and opened a patent-licensing company called Round Rock Research (Round Rock).[107] Patent-licensing companies—pejoratively known as "patent trolls"—represent an entire business model arising from the quasi-legal zone. These companies typically evaluate and purchase patents they believe to underpin rapidly developing technological platforms. They neither perform scientific or technological research nor commercialize products.[108] Instead, they simply enforce their patents against alleged infringers. Because of the benefit of legal-practice experience in understanding which patents have value and are likely to be upheld, lawyers have moved into, and sometimes become principals of, many patent-licensing firms. John Desmarais, however, was not content simply to move out of practice. Concurrent with the founding of Round Rock, he also started a small law firm, Desmarais LLP, to negotiate Round Rock's licenses and to litigate its infringement suits.[109]

In 2011, after Round Rock sued Dell Inc. for infringement of a number of patents, Dell moved to disqualify Desmarais LLP on the grounds that the law firm could use Dell's "Confidential—Attorney's Eyes Only" information to advance Round Rock's business position.[110] More specifically, Dell alleged that Desmarais could acquire information as a practicing lawyer at Desmarais LLP that he

106. Former clients often have trouble satisfying the burden of production required upon moving for disqualification. *See, e.g.*, O Builders & Assocs., Inc. v. Yuna Corp. of NJ, 19 A.3d 966, 978 (N.J. 2011) (denying a motion for disqualification where a former client's claims that "information 'concerning pending litigation and business matters' had been disclosed" to an attorney were "vague[]").

107. *See* Jan Wolfe, *Round Rock Business Model Comes Under Attack from Dell*, CORP. COUNS. (May 31, 2012, 12:00 AM), http://www.corpcounsel.com/id=1202556654749.

108. *See* Peter Lee, *Patents and the University*, 63 DUKE L.J. 1, 3–4, 43 n.269 (2013) (discussing characteristics of "patent trolls").

109. Wolfe, *supra* note 107.

110. *Id.*

could then exploit in his role as chief executive officer of an allegedly independent business.[111] In its motion to disqualify, Dell wrote: "Mr. Desmarais himself has shown that the risk of such cross-over is very real, having at least once already provided to Round Rock reverse engineering information obtained from one client—while wearing his 'Desmarais LLP' hat—in order to facilitate Round Rock's licensing effort against another target."[112] Dell's counsel elaborated at oral argument: based on information gained from conversations with an opponent in his capacity as a lawyer at Desmarais LLP, Desmarais broadened the scope of pending patent applications held by Round Rock.[113] In response, Desmarais agreed to a protective order screening him from the case and precluding him from working on associated patent applications in the future.[114] Dell's counsel was not satisfied, arguing that the risks to Dell were grounds for disqualifying the entire firm from the representation.[115] A Texas district judge denied the request,[116] and the Federal Circuit denied the petition for a writ of mandamus that Dell subsequently filed.[117]

Desmarais's alleged conduct seems flatly inconsistent with the professional ideals that justify lawyers' monopoly power. Desmarais allegedly leveraged information that he gained in a traditional practice role (as a partner at Desmarais LLP) to his own advantage in a quasi-legal role (as chief executive officer of Round Rock). And yet, the profession's system of regulation neither prohibits nor deters his conduct.[118]

Desmarais neither disclosed confidential information nor used information gained during a representation to harm a former client. It is therefore unlikely that he would be subject to professional discipline by the bar. Moreover, Dell's resort to a writ of mandamus,

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111. *See* Round Rock Research, LLC v. Dell Inc., No. 4:11-CV-332, 2012 WL 1848672, at *1 (E.D. Tex. Apr. 11, 2011).

112. Wolfe, *supra* note 107.

113. *Id.*

114. *Id.*

115. *Round Rock Research*, 2012 WL 1848672, at *3.

116. *Id.* at *4.

117. *In re* Dell Inc., 498 F. App'x 40, 44 (Fed. Cir. 2012).

118. As discussed above, *see supra* notes 104–05 and accompanying text, the Model Rules comprehensively address transitions among traditional practice settings and into and out of government service. They offer limited guidance, however, regarding transitions to and from nontraditional and quasi-legal roles, such as the business role at issue here. They do not speak to the situation of a lawyer like Desmarais, who is concurrently practicing law at a law firm and occupying a leadership role of a company that the law firm represents.

a last-stop procedural device, reveals the reluctance of courts to intervene to address and deter this type of conduct. Ambiguity continues to surround these transitions, allowing lawyers like Desmarais to engage in conduct that, although not technically prohibited by the rules, is clearly improper—using information gained in practice for personal gain outside of practice.

C. Ethical Arbitrage

In addition to permitting lawyers to evade professional regulation, the ethical ambiguity surrounding quasi-legal roles enables sophisticated corporate actors to engage in troubling forms of gamesmanship. Corporate actors can manipulate the coverage of the professional rules to their advantage, relying on lawyers in different roles for different purposes. In this way, they can manage risk and liability and access legal expertise subject to as few constraints as possible.

Corporate management has long engaged in a limited form of this strategy by selectively relying on in-house counsel for some work and outside counsel for other work.[119] For example, corporate management may rely on in-house lawyers, who are embedded within the corporate structure and culture, for legal advice on formulating business plans and legal strategies. Although they may need outside counsel to provide third-party opinions that vouch for the legality of their business plans, they can rely on in-house counsel to determine the minimal information necessary to disclose to outside counsel to receive a favorable opinion letter.[120] By relying on a source of legal advice that is not fully independent and a source of independent evaluation that is not fully informed, sophisticated corporate actors can co-opt lawyers into facilitating desired business strategies. Often, they also acquire important defenses and limitations of liability in the process.

The proliferation of quasi-legal roles allows corporate management to expand its strategic access to legal expertise under a

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119. *See* Christine Hurt, *Counselor, Gatekeeper, Shareholder, Thief: Why Attorneys Who Invest in Their Clients in a Post-Enron World Are "Selling Out," Not "Buying In,"* 64 OHIO ST. L.J. 897, 928 (2003) ("Although companies rely on in-house counsel for some functions, they look to outside counsel in transactions where third-party verification is needed . . . ."); *see also* Deborah L. Rhode & Paul D. Paton, *Lawyers, Ethics, and Enron*, 8 STAN. J.L. BUS. & FIN. 9, 17–21 (2002) (describing the different roles of Enron's in-house and outside counsel during the company's accounting scandal).

120. *See* Hurt, *supra* note 119, at 928.

greater range of conditions and subject to fewer constraints. For example, management could hire a licensed but nonpracticing lawyer to serve as a compliance officer. Compliance officers monitor the activities of a company's directors, officers, and employees to ensure compliance with governing rules and regulations. Although the role is not new, its visibility and prevalence in publicly traded companies increased dramatically in the wake of the Sarbanes-Oxley Act of 2002[121] (Sarbanes-Oxley).[122] Compliance officer positions do not require specific credentials, but a law license—signaling legal knowledge and experience—can be highly valuable in the hiring process. In some companies, including many smaller companies, a single individual may serve as both general counsel and chief compliance officer.[123] In many other companies, however, the compliance function is located outside of, and walled off from, the functions of the general counsel's office.[124]

If compliance officers are located outside of the general counsel's office, management derives the benefits of a lawyer's expertise and reputational capital in the compliance role while ceding far less control than if the lawyer-compliance officer was subject to professional regulation.[125] In contrast to the clear principle that a corporate lawyer's loyalty runs to the company as an entity, a compliance officer has vague duties and loyalties.[126] In practice, her loyalty and reporting obligations likely run to direct superiors in corporate management.[127] And, because a compliance officer is not

121. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

122. KNEPPER & BAILEY, *supra* note 76, § 1.04[5]; Hurt, *supra* note 76.

123. *See* Hurt, *supra* note 76.

124. *See* Rosen, *supra* note 76, at 1307. For a criticism of this trend toward departmentalization, see Michele DeStefano, *Creating a Culture of Compliance: Why Departmentalization May Not Be the Answer*, 10 HASTINGS BUS. L.J. 71, 154–67 (2014).

125. Compliance officers are neither bound by the obligations of the legal profession nor regulated by any other professional or disciplinary body. Pietro M. deVolpi, Jr., *Protocols for the Chief Governance Officer*, 10 J. BUS. & SEC. L. 59, 78–80 (2009).

126. *See* Amy H. Hutchens, *Wearing Two Hats: The Dual Roles of In-House Counsel and Compliance Officer*, CONT. MGMT., Feb. 2012, at 18, 21–24 (discussing conflicts between statutory reporting duties and professional duties of loyalty and confidence).

127. *See* deVolpi, *supra* note 125, at 85 (indicating that general counsel and board members review a Chief Governance Officer's performance); *see also* MICHAEL D. GREENBERG, DIRECTORS AS GUARDIANS OF COMPLIANCE AND ETHICS WITHIN THE CORPORATE CITADEL: WHAT THE POLICY COMMUNITY SHOULD KNOW 23 (2010), *available at* http://www.rand.org/content/dam/rand/pubs/conf_proceedings/2010/RAND_CF277.pdf (recognizing that a compliance officer reporting directly to the board could create a "mutually enabling relationship"); Ben Heineman, *Don't Divorce the GC and Compliance Officer*, HARVARD L.

subject to the rules of professional conduct, she is free from affirmative duties to report corporate wrongdoing up the ladder to the board of directors.[128] Given case law suggesting that compliance officers can be terminated at will,[129] she will move beyond her immediate superior at her own peril. Accordingly, management can hold the lawyer-compliance officer out to the board and to shareholders as evidence that it is working proactively to incorporate legal expertise in all decisionmaking and auditing processes. But it need not worry—at least not to the extent it might worry with in-house counsel—that the lawyer-compliance officer will report corporate wrongdoing up the ladder to the board.

In addition, a compliance officer can engage in conduct in which in-house or outside counsel cannot engage but that could be helpful to corporate management. For example, she can interview corporate employees and other constituents without disclosing that she represents the organization and without advising them to secure separate counsel.[130] She can also communicate directly with employees and third parties who have secured separate counsel,[131] and she need not refrain from giving an impression of disinterestedness to parties who are unrepresented.[132]

In this way, corporate actors can arbitrage the gaps and ambiguities left by the failure of the current regulatory regime to

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SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Dec. 26, 2010, 9:53 AM), https://blogs.law.harvard.edu/corpgov/2010/12/26/don%E2%80%99t-divorce-the-gc-and-compliance-officer (citing "lack of independence" as one of the problems that results from the relationship between the CFO and supervisor CEO).

128. In-house counsel has a duty under section 307 of Sarbanes-Oxley and Model Rule 1.13 to report corporate misconduct and wrongdoing up the ladder and eventually to the board of directors. *See* 15 U.S.C. § 7245 (2012); MODEL RULES OF PROF'L CONDUCT R 1.13(b) (2013).

129. *See* Sullivan v. Harnisch, 969 N.E.2d 758, 761 (N.Y. 2012) (upholding the firing of a compliance officer who confronted a company's chief executive officer with evidence of his insider trading). Although the whistleblower provisions of Sarbanes-Oxley purport to offer protection, *see* 5 U.S.C. § 1221, they have frequently failed to do so in any meaningful way, *see* Valerie Watnick, *Whistleblower Protections Under the Sarbanes-Oxley Act: A Primer and a Critique*, 12 FORDHAM J. CORP. & FIN. L. 831, 860–61 (2007) (arguing that "the convergence of the at-will employment doctrine and the burden set out for a Sarbanes-Oxley whistleblower" will, in practice, "leave the whistleblower largely unprotected").

130. *Cf.* MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. 10 (recommending that lawyers clarify that they represent the corporation and that the constituent may seek independent counsel).

131. *Cf. id.* R. 4.2 (requiring a lawyer to communicate only with the lawyer of a represented individual).

132. *Cf. id.* R. 4.3 (requiring a lawyer to refrain from giving an impression of disinterestedness when interacting with an unrepresented party).

address quasi-legal roles at the boundary of law and business. Corporations can gather significant information while parting with minimal control over that information, and they can access legal expertise that is beholden to them, rather than to corporate boards or shareholders. All too often, corporate actors do so in furtherance of excessively aggressive, profit-driven strategies.

When sophisticated corporate actors engage in this form of ethical arbitrage, they derive a disproportionate share of the benefits from the legal profession's monopoly while bearing only a portion of the corresponding burdens. Certainly, corporate clients bear their share of the most recognizable burdens of the profession's monopoly—namely, the rents that inflate the cost of legal services.[133] But additional burdens from the profession's monopoly extend beyond these rents and are borne by other individuals and groups throughout society. Most notably, they are borne by the large and growing portion of the population who cannot afford legal services. Even the lowest-cost legal services, generally found within the profession's personal-plight hemisphere, price many individuals out of the market.[134]

As the profession uses its market power in ways that entrench existing power disparities, low- and middle-income individuals and less powerful segments of society also bear the burdens of the profession's monopoly. Frequently, legal interactions involve sophisticated corporate actors on one side and individuals and small businesses on the other. This is often the case when ordinary individuals enter into service, property, insurance, and employment contracts. To the extent that the profession is used to the advantage of corporate actors and at the expense of individuals, it exacerbates the structural inequalities and problems of collective action that already characterize these interactions.[135]

Finally, society at large bears the costs of the profession's monopoly as corporate actors co-opt lawyers into facilitating excessively aggressive strategies. Lawyers become, at best, pawns in morally ambiguous corporate strategies, and, at worst, agents of

133. Although a very real cost, monopoly rents are a feature and not a flaw in the system, which, ideally, ensures high standards of competency and behavior among lawyers.

134. Deborah L. Rhode, *The Professionalism Problem*, 39 WM. & MARY L. REV. 283, 323 (1998).

135. *See generally* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974) (discussing the advantages that repeat players in the legal system have over occasional participants).

corporate malfeasance. As one corporate scandal after another comes to light,[136] the legal profession's failure to serve the public and the state by curbing law-breaking behavior becomes more acute.[137] This trend may foretell the emergence of a new, less prestigious, and likely less lucrative sphere of corporate work; it may also demonstrate how an overwhelming orientation toward corporate interests has eclipsed lawyers' tripartite duties to clients, the state, and the public.

III. THE PATH AHEAD

The ethical tensions surrounding the work of licensed lawyers in the quasi-legal zone threaten harm to clients, the profession, and the public at large. In this final Part, I ask how we can most effectively address these tensions. I argue that role-based regulation by corporations or trade organizations would exacerbate the problems discussed above, whereas carefully tailored mechanisms of professional regulation could successfully address such problems. Critical to the path ahead will be acknowledging the inadequacies of current forms of professional regulation based on existing models of the profession. The evolving legal landscape requires new forms of professional regulation, grounded in an empirical understanding of lawyers' work and ethical orientations within the quasi-legal zone.

A. The Disadvantages of Role-Based Business Regulation

Industries, trade groups, and/or businesses could adopt ethical rules to govern individuals working in particular quasi-legal roles—lawyers and nonlawyers alike. These rules could aim to improve these

136. *See, e.g.*, Alexei Barrionuevo, *Two Enron Chiefs Are Convicted in Fraud and Conspiracy Trial*, N.Y. TIMES, May 26, 2006, at A1 (reporting on the trial of Enron's chief executives); Ken Belson, *Adelphia Proposes To Settle Federal Cases*, N.Y. TIMES, Dec. 29, 2004, at C2 (discussing Adelphia's proposal to settle its cases with the Securities and Exchange Commission and Department of Justice); *Corporate America's Woes, Continued*, ECONOMIST, Nov. 30, 2002, at 59, 60 (discussing the aftereffects of the Enron scandal on regulations); Simon Romero & Alex Berenson, *WorldCom Says It Hid Expenses, Inflating Cash Flow $3.8 Billion*, N.Y. TIMES, June 26, 2002, at A1 (reporting on WorldCom's admission that it overstated its cash flow by over $3.8 billion); Andrew Ross Sorkin & Alex Berenson, *Tyco Admits Using Accounting Tricks To Inflate Earnings*, N.Y. TIMES, Dec. 31, 2002, at A1 (reporting on Tyco International's admission that it inflated its earnings).

137. *See, e.g.*, Zach Lowe, *Lawyer To Serve Six-and-a-Half Years in KPMG Tax Fraud Case*, AMLAW DAILY (Apr. 2, 2009, 11:30 AM), http://amlawdaily.typepad.com/amlawdaily/2009/04/kpmg-lawyer.html (describing the sentence for the lawyer who wrote approximately six hundred letters over more than a decade endorsing the tax shelters that KPMG created). *See generally* Milton C. Regan, Jr., *Teaching Enron*, 74 FORDHAM L. REV. 1139 (2005) (explaining how Enron transactions demonstrate the need for judgment in ambiguous ethical situations).

individuals' ethical standards and to address consumer confusion. They could, for example, articulate appropriate standards of conduct for all trust officers or all compliance officers. Alone, however, externally imposed role-based regulation will not resolve, and will likely exacerbate, the waning independence of lawyers working in quasi-legal roles.

As an initial matter, regulation by an industry, trade group, or business would necessarily be controlled by, and beholden to, the regulated group. Accordingly, as quasi-legal roles proliferate and licensed lawyers constitute a greater percentage of the quasi-legal workforce, this type of regulation could initiate a significant cession of the legal profession's self-regulatory authority and could further yield control over lawyers to corporate interests. Moreover, although new role-based regulations might guard against abuse by individuals occupying particular quasi-legal roles, they would not prevent corporate management from continuing to leverage the varying ethical obligations that attach to lawyers in different roles.

Exclusive reliance on external role-based regulation could also undermine the checks and balances provided by the profession's system of licensure. Lawyers working in regulated quasi-legal roles could retain their law licenses even in cases of blatant misconduct, and the threat of disbarment would no longer deter ethical breaches. This shift would not only eliminate a powerful incentive for lawyers to avoid extreme misconduct, but also potentially dilute the signaling and credentialing power of a law license.[138]

Indirect regulation through quasi-legal lawyers' corporate employers would be similarly problematic. Empirical research reveals a shift in the allocation of authority within corporate attorney-client relationships.[139] Increasingly, corporate clients take a more dominant

138. Notwithstanding lawyers' bad reputations in many sectors of contemporary society, a license to practice law continues to signal training, competence, and core ethical commitments. If lawyers could retain their law licenses even while violating the codes of conduct for the quasi-legal roles in which they were working, licensure would lose its signaling power.

139. *See, e.g.*, Chayes & Chayes, *supra* note 60, at 277 ("A striking development in the legal profession over the last decade has been the rapid growth in both importance and size of in-house, or corporate, counsel."); Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503, 526–27 (1985) (concluding on the basis of an empirical study of Chicago lawyers that corporate lawyers "show such a strong identification with the interests of clients . . . that it is unrealistic to think of corporate lawyers as neutral professionals who are detached from the substantive interests of their clients"); *see also* Deborah A. DeMott, *The Discrete Roles of General Counsel*, 74 FORDHAM L. REV. 955, 958–60 (2005) ("By the 1970s, the general counsel's position in many

role in determining legal strategy, whereas corporate lawyers, seeking to please their clients, view their function as facilitating innovative and sometimes aggressive business strategies.[140] In light of this shift, entrusting corporate clients with the task of regulating their lawyer-employees holds little promise. Corporate clients would be more likely to manage and manipulate regulation than to check their lawyer-employees' client-focused orientation by encouraging strong loyalty to the state and the public. Motivated principally by the entity's bottom line, corporate clients' decisionmaking processes would frequently turn on whether the profits of noncompliance outstrip the burdens of censure or bad public relations.

Finally, role-based regulation would replicate a fundamental weakness of the segmented model's prescription for context-specific regulation. In both cases, it is impossible to keep pace with all the new roles that lawyers occupy and the work that they perform. Accordingly, although efforts to regulate particular quasi-legal roles may be part of an answer, they cannot be the only answer.

B. The Advantages of Professional Regulation

As a means of conditioning and constraining lawyers' conduct in quasi-legal roles, self-imposed professional regulation holds many advantages over externally imposed business regulation. The fundamental purpose of professional regulation—ensuring a strong and independent profession—holds particular force when the central problem is the growing power and influence of sophisticated corporate clients. Codes of conduct are typically viewed as means of constraining undesirable behavior, but they can play an equally important role in empowering independent and principled behavior. They stand as a powerful justification for lawyers to exercise their independent judgment, not only (or necessarily) because they want to, but also because they may otherwise lose their license. In addition,

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large corporations grew in stature and scope of responsibility. . . . General counsel joined senior management near or at the top of the corporate hierarchy.").

140. Research confirms that many corporate lawyers increasingly view themselves primarily as innovators and facilitators, tasked with enabling and effectuating business goals by, for example, helping to structure beneficial transactions, providing comfort letters as evidence that corporate actors acted in good faith, and shielding information from discovery through attorney-client privilege. For a perspective of in-house counsel as value creators, see generally Omari Scott Simmons & James D. Dinnage, *Innkeepers: A Unifying Theory of the In-House Counsel Role*, 41 SETON HALL L. REV. 77 (2011). *See also* Dezalay, *supra* note 45, at 279–93 (describing business lawyers as "legal entrepreneurs"); Powell, *supra* note 45, at 423 (same).

insulating the adjudication structures of professional regulation from client control helps to ensure that professional norms, rather than business or other norms, drive disciplinary decisions.

Professional regulation can also be used in unique and, thus far, unexplored ways to influence corporate clients from within. As noted above, a troubling implication of the move of lawyers out of law firms and into the business sector is a shift in authority from lawyers to the clients and businesses for which they work. But this move also creates new opportunities for lawyers to shape their clients' culture and decisionmaking from within. Empirical research supports the notion that lawyers can and sometimes do constrain imprudent or illegal business strategies by, for example, advising conservative approaches to risk tolerance and insisting on proper disclosure.[141] Effective professional regulation mechanisms can encourage this remedial orientation by valuing and empowering independent professional judgment. By requiring lawyers to act in certain ways and offering them a measure of protection if and when they do, professional regulation empowers lawyers to check aggressive business strategies and to influence the decisionmaking processes of the organizations for which they work.

Opponents may argue that it is inequitable to impose higher standards on lawyers than nonlawyers in the same quasi-legal role. This argument ignores the benefits that lawyers derive from their licenses, even outside of traditional practice settings. In addition to reputational benefits that flow to licensed lawyers through their formal connection with the profession, the license also grants lawyers the flexibility to transition into and out of practice roles at will. To ensure that lawyers and their corporate employers do not trade inappropriately on law licenses—and, in doing so, to protect the profession's legitimacy and independence—the benefits of licensure must be accompanied by the obligations of professional regulation.

Moreover, because the license establishes a formal connection between a lawyer and the bar, licensed lawyers' conduct reflects back onto the entire profession's legitimacy, regardless of whether the

141. *See* Robert L. Nelson & Laura Beth Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 LAW & SOC'Y REV. 457, 468 (2000) (describing the authors' interviews with corporate counsel aimed at determining how frequently these lawyers function in a restraining, as opposed to enabling, role); Christine E. Parker, Robert Eli Rosen & Vibeke Lehmann Nielsen, *The Two Faces of Lawyers: Professional Ethics and Business Compliance with Regulation*, 22 GEO. J. LEGAL ETHICS 201, 207–14 (2009) (noting that lawyers often act as compliance monitors).

attorney practices law. When lawyers in quasi-legal roles engage in misconduct, the public's trust in all lawyers diminishes, and without the public's trust, lawyers cannot fulfill their roles as mediators between state and society.

C. Moving Beyond Existing Models

Although professional regulation holds great potential as a means of addressing ethical tensions in the quasi-legal zone, existing forms of regulation are inadequate to achieve this potential. As discussed in Part I, the existing regime is based on the traditional unitary model of the legal profession and is therefore overwhelmingly directed toward litigation.[142] Proponents of the segmented model persuasively show this regime's inadequacies and inability to address new areas of legal practice.

Significantly, however, even a regulatory regime based on the segmented model that seeks to tailor the fundamentals of legal ethics to particular quasi-legal roles would be inadequate. Hybridized quasi-legal work rarely fits neatly under the rubric of legal practice. The fundamentals of legal practice, which include a lawyer's duties of loyalty, confidentiality, and care to clients, are generally inapposite to the context of quasi-legal work, which lacks a client and an attorney-client relationship to anchor and guide lawyers' duties and orientation. Indeed, many ethical tensions surrounding quasi-legal work arise from confusion regarding the absence of a client to whom the lawyer owes duties of loyalty, confidentiality, and care. The profession therefore needs to move beyond existing approaches and models and to explore new forms of professional regulation.

As an essential first step, the profession should commission sustained empirical studies to better understand the nature and challenges of quasi-legal work. Because existing scholarly models ignore this area of work, we know very little about the roles, pay levels, backgrounds, and ethical decisionmaking processes of lawyers engaged in it. We also know very little about the ethical training and socialization of the growing number of lawyers who begin their careers in quasi-legal roles rather than in law firms or other traditional practice contexts. Empirical research will provide an essential first step for designing an appropriate and effective regulatory response.

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142. *See supra* notes 36–39 and accompanying text.

Scholarship on the roles and activities of in-house counsel can guide us in developing frameworks through which to approach this regulatory task. Early empirical work tended to view in-house counsel as either acting as a brake on aggressive strategies—what Professors Robert Nelson and Laura Beth Nielsen call the "cop" role—or as promoting gamesmanship to facilitate aggressive strategies—what Nelson and Nielson call the "entrepreneur" role.[143] Subsequently, commentators began building a more nuanced picture of the roles, work, and influence of in-house counsel. They asked, for example, when and under what circumstances in-house counsel take on different roles and orientations toward management and risk.[144] We should work toward a similarly nuanced understanding of lawyers in quasi-legal roles to understand the profession's shifting contours and to lay the groundwork for more effective regulation.

Concurrently, the profession should use what we do know about these roles to begin addressing and managing the ethical ambiguity that pervades the quasi-legal zone. As a first step, the profession should reexamine its current formulation of the "practice of law." Many lawyers in quasi-legal roles engage in work that, when performed by a lawyer in a different setting, is characterized and regulated as legal practice. In many cases, clients and customers believe this work to be legal practice and assume that they are therefore owed lawyerly duties of confidentiality, loyalty, and care. Given the confusion, the profession should examine this work and consider whether it should be regulated as legal practice.

To do so, the ABA and state bars should renew their efforts to define legal practice more precisely. As discussed above, state bars currently rely on broad and vague definitions of the "practice of law," which generally reference the application of specialized legal knowledge and judgment to a particular set of facts or circumstances.[145] The resulting ambiguity played a large role in

143. *See* Nelson & Nielsen, *supra* note 141, at 468 (defining the "cop" and "entrepreneur" roles); Parker et al., *supra* note 141, at 203–04 (reviewing the literature); Tanina Rostain, *The Emergence of "Law Consultants,"* 75 FORDHAM L. REV. 1397, 1398–1400 (2006) (discussing the rise of lawyers as "law consultants" on business matters).

144. *See, e.g.*, DeMott, *supra* note 139, at 974 (explaining various roles of general counsel and highlighting ethical tensions arising out of the interplay among roles); Parker et al., *supra* note 141, at 204–05 (offering a quantitative and qualitative study of general counsel in Australian corporations).

145. *See* AM. BAR ASS'N TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, *supra* note 81, at app. A, *available at* http://www.abanet.org/cpr/model-def/model_def_statutes.pdf (listing each state's definition).

broadening and blurring the boundary between law and business. Although some ambiguity is inevitable, much can be eliminated through careful and regular review of particular activities performed by lawyers and nonlawyers alike (and characterized as legal practice in the former instance but not in the latter) to determine which, if any, fall clearly within or outside of the profession's jurisdiction.[146] In each instance, the risk of harm to consumers, clients, or the public at large should guide analysis[147] and should be weighed against the desire to open the market for legal services and to reduce prices when possible.[148] For example, a strong argument can be made that when compliance officers move beyond monitoring and reporting functions and begin advising employees or corporate management, they are practicing law. The risk of harm to corporate constituents, who may unwittingly waive legal rights or compromise legal positions, is great. But given that compliance officers do not purport to offer these individuals legal representation, there will be no direct increase in the costs of obtaining counsel. Rather, these individuals will simply be on notice that retaining counsel may be advisable.

The goal of an activity-by-activity analysis should be to achieve greater clarity when possible, while accepting the inevitable ambiguity of the boundary between law and business. Defining legal practice broadly, to extinguish the boundary area and to reclassify all quasi-legal work, would threaten an unwarranted extension of the profession's jurisdiction and of its monopoly rents. Defining legal practice narrowly and business practice broadly would exacerbate the existing problems of abuse and ethical arbitrage that flow from insufficient regulation. Accordingly, the goal of regularly revisiting the definition of legal practice should not be to eliminate the ambiguity that exists at the boundary of legal practice, but rather to acknowledge it and, to the extent possible, minimize it.

Second, the profession should develop new and improved forms of professional regulation, which are tailored to what we currently

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146. *See* Soha F. Turfler, *A Model Definition of the Practice of Law: If Not Now, When? An Alternative Approach to Defining the Practice of Law*, 61 WASH. & LEE L. REV. 1903, 1951–59 (2004) (proposing an "activity-centered approach" to determining what constitutes the practice of law).

147. *See* Benjamin Hoorn Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 440 (2001).

148. *See* Turfler, *supra* note 146, at 1911–13 ("[T]he definition of the practice of law directly influences competition in the legal services market, which in turn has great influence upon the price of legal services.").

know about quasi-legal work's hybrid nature. New approaches should take three forms: heightened disclosure requirements, new rules governing transitions into quasi-legal roles, and new rules creating baseline conduct standards for all licensed lawyers, practicing or not.

Heightened disclosure requirements should be designed to guard against consumer confusion. Lawyers in quasi-legal roles regularly interact with nonlawyers who are not clients. Examples include trust officers who interact with bank customers and compliance officers who interact with corporate employees. Confusion frequently surrounds these interactions as customers and employees may believe that lawyerly duties attach to the relationship. The bar addressed the potential for confusion in analogous situations by mandating clear statements of role and intent. For example, when interacting with corporate constituents, a corporation's lawyer must "explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."[149] A lawyer interacting with an unrepresented individual may not "state or imply that the lawyer is disinterested," and, "[w]hen the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, [she must] make reasonable efforts to correct the misunderstanding."[150] Lawyers who advertise or solicit clients must clearly disclose their names and identities, as well as the promotional nature of the communications.[151]

Requiring similar transparency regarding quasi-legal roles could significantly diminish confusion regarding these lawyers' duties and loyalties. Thus, a licensed lawyer working as a trust officer should be required to explain her position immediately upon contacting a

149. MODEL RULES OF PROF'L CONDUCT R. 1.13(f) (2013).

150. *Id.* R. 4.3.

151. *See id.* R. 7.1 (prohibiting advertising material that "make[s] a false or misleading communication about the lawyer or the lawyer's services"); *id.* R. 7.2(c) (requiring that advertising material "include the name and office address of at least one lawyer or law firm responsible for its content"); *id.* R. 7.3(c) (requiring that written, recorded, or electronic communications from a lawyer soliciting business "from anyone known to be in need of legal services . . . shall include the words 'Advertising Material' on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication"); *see also Practice Manual: Advertising and Solicitation: Specialization, Certification, and Practice Limitations*, ABA/BNA LAW. MANUAL ON PROF. CONDUCT, http://lawyersmanual.bna.com/mopw2 (last visited Feb. 15, 2014) (with a subscription, under the heading "Practice Guides" click "Advertising and Solicitation," then click "Specialization, Certification, and Practice Limitations") (on file with the *Duke Law Journal*) (noting varied requirements by individual states respecting disclaimers in lawyer advertising).

potential client and to offer a disclaimer. A compliance officer performing an internal investigation should be required to explain to employees that she is not acting in her capacity as a lawyer and has no special relationship with the employees; rather, her responsibility flows directly to management. There is some risk that disclosure to someone who is not already aware of an individual's status as a lawyer could exacerbate existing problems by creating heightened expectations when none previously existed. This risk could be minimized by ensuring that disclosure entails a sufficiently clear and comprehensive explanation that heightened expectations are not warranted. Disclosure requirements such as these would not remove ethical tensions from lawyers' roles, but they could guard against the public's sometimes mistaken and dangerous beliefs.[152]

The profession should also amend its existing rules to address problems that arise at transition points between practice and quasi-legal roles. For example, the provisions governing use of confidential information should be strengthened. Rather than solely prohibiting lawyers from using information gained in a representation when use would be detrimental to a (former) client,[153] new provisions should prohibit lawyers from using information gained in a representation for their own benefit, regardless of the threat of harm to others.[154] This rule, for example, would prohibit someone in a similar position to Desmarais from using the information gained in one representation to leverage an advantage in another.

Finally, and most importantly, the profession should impose and enforce broad, baseline conduct standards for all licensed lawyers.

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152. *Cf.* Sandra L. DeGraw & Bruce W. Burton, *Lawyer Discipline and "Disclosure Advertising": Towards a New Ethos*, 72 N.C. L. REV. 351, 362 (1994) (proposing a requirement that "an attorney who has been sanctioned or disciplined for serious misconduct must carry information concerning such sanction or discipline in his advertising materials").

153. *See* MODEL RULES OF PROF'L CONDUCT R. 1.9(c) ("A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client . . . or (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.").

154. *Cf.* RESTATEMENT (THIRD) OF AGENCY § 8.05 (2006) ("An agent has a duty (1) not to use property of the principal for the agent's own purposes or those of a third party; and (2) not to use or communicate confidential information of the principal for the agent's own purposes or those of a third party."); *id*. cmt. c ("An agent's use of the principal's confidential information for the agent's own purposes breaches the agent's duty as stated in subsection (2) although the agent's use of the information does not necessitate revealing it. Thus, it is a breach of an agent's duty to use confidential information of the principal for the purpose of effecting trades in securities although the agent does not reveal the information in the course of trading.").

Notwithstanding the strong disagreement between proponents of the traditional and segmented models of the profession, broad, unifying rules and context-specific regulation need not be antithetical to each other. Context-specific, role-based regulation holds a place in legal practice and may be valuable in resolving consumer confusion regarding quasi-legal roles. Alone, however, it is insufficient to prevent sophisticated corporate actors from leveraging legal expertise from different sources who are subject to different ethical obligations.[155] Combining context-specific rules with unifying, baseline duties that apply to all lawyers could address this latter issue. Moreover, by encouraging and requiring all licensed lawyers to abide by certain standards of conduct, these new rules would bolster lawyers' independence and empower them to resist manipulation by corporate actors.

To these ends, the profession may develop several rules over time. To start, it should implement baseline duties of candor and fair dealing in business transactions. Currently, many jurisdictions impose a duty of fair dealing on bankers[156] and other financial providers.[157] Following these examples[158] and drawing on the fundamentals of

155. *See supra* Part II.C.

156. *See, e.g.*, Lori J. Henkel, Annotation, *Bank's Liability for Breach of Implied Contract of Good Faith and Fair Dealing*, 55 A.L.R. 4th 1026, § 2[a] (1987 & Supp. June 2013) (reviewing cases concluding that a bank's imposition of excessive service charges could give rise to a cause of action for a breach of the duty of good faith and fair dealing); *id.* § 6[e] (reviewing cases concluding that "a bank's wrongful dishonor of a check could give rise to a successful cause of action for breach of the [duty] of good faith and fair dealing").

157. *See e.g.*, MINN. STAT. §§ 58.16(2)(a)(2)–(a)(3) (2007) (imposing a duty on a mortgage broker to enter into a contract with the borrower describing whether the broker is to receive compensation from another source); Grambart v. Fremont Inv. & Loan, Inc., Civ. No. 05-2416, 2006 WL 1072065, at *1 & n.3 (D. Minn. Apr. 21, 2006) (indicating that under Minnesota law, "a fiduciary relationship exists between a borrower and certain residential mortgage originators"); Jones v. USMoney Source, Inc., No. 1:99-CV-1522A-JEC, 2000 U.S. Dist. LEXIS 20400, at *52 (N.D. Ga. Aug. 10, 2000) (noting that under Georgia law, a loan broker has a fiduciary duty to a homebuyer); McGlawn v. Pa. Human Relations Comm'n, 891 A.2d 757, 769 (Pa. Commw. Ct. 2006) (finding that a broker violated its fiduciary duty to its customers by engaging in predatory and unfair brokering activities). As discussed in Part III.A, however, such duties will not be effective if they attach only to particular quasi-legal roles, rather than to all lawyers engaged in quasi-legal work.

158. An additional example is provided by New Jersey's Rule of Professional Conduct 3.2, which provides broadly that "[a] lawyer . . . shall treat with courtesy and consideration all persons involved in the legal process." N.J RULES OF PROF'L CONDUCT R. 3.2 (2014). Some commentators have interpreted this rule to encompass duties to opposing counsel of "respect, courtesy and fair dealing, candor in the pursuit of truth, cooperation in all respects not inconsistent with the client's interests, and scrupulous observance of all agreements and mutual understandings." David H. Dugan III, *Mandatory Professionalism: RPC 3.2 and the Lawyer's*

fiduciary law, jurisdictions should impose an analogous duty on licensed lawyers. The new duty would require licensed lawyers to act in good faith in all of their business transactions, promoting faithfulness to the agreed upon purpose of the transaction and consistency with the justified expectations of the party with whom the lawyer is transacting.[159]

In addition, Model Rule 4.1, "Truthfulness in Statements to Others," should be amended to establish a new duty of candor that applies to all licensed lawyers. Currently, Rule 4.1 prohibits lawyers, in the course of representing clients, from "(a) mak[ing] a false statement of material fact or law to a third person; or (b) fail[ing] *to disclose a material fact* to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by [the confidentiality provisions of] Rule 1.6."[160] This affirmative duty should be extended in two ways. First, it should attach to all licensed lawyers, whether or not they engage in client representation.[161] Second, a duty to disclose material facts should exist not only when necessary to avoid assisting a criminal or fraudulent act by a client, but also when necessary to comply with the lawyer's duty of fair dealing. Stated otherwise, disclosure should be required when the information in question is materially relevant to an interaction or transaction, and when, absent disclosure, the interaction or transaction could not be viewed as objectively fair.

Some may object that baseline conduct standards that require candor and fair dealing will create new tension in the lawyer's role, particularly in the courtroom context, where justifications for the

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Duty To Be Courteous and Considerate, N.J. LAW. MAG., Dec. 2011, at 28, 29. *But see id.* (describing these principles as "only admonitions . . . useful reminders of what courtesy and consideration should look like in the everyday practice of law").

159. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981) ("The phrase 'good faith' is used in a variety of contexts, and its meaning varies somewhat with the context. Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party . . . .").

160. MODEL RULES OF PROF'L CONDUCT R. 4.1 (2013) (emphasis added); *see also id.* R. 8.4(c) (prohibiting "dishonesty, fraud, deceit or misrepresentation" by attorneys).

161. Under some understandings of the profession's current regulatory regime, this proposal does not represent a change. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 98(1) & cmt. b (2000) (providing that a lawyer communicating with "a non-client may not . . . knowingly make a false statement of material fact or law to the non-client," and noting that "[c]ompliance with those obligations meets social expectations of honesty and fair dealing and facilitates negotiation and adjudication"). *But see* Michael H. Rubin, *The Ethics of Negotiations: Are There Any?*, 56 L.A. L. REV. 447, 453 (1995) ("Truthfulness and fair dealing are not required by the Model Rules." (emphasis omitted)).

primacy of client-centered duties are at their strongest. But, whenever there is a client, these new rules will be qualified by duties to the client. For example, Model Rule 1.6's duty of confidentiality to clients continues to qualify Model Rule 4.1's duty of candor.[162] Moreover, few commentators would dispute that the adversarial excess that characterizes litigation today harms clients, third parties, and the public at large. Formulating broad conduct standards that apply uniformly to all lawyering contexts could productively recalibrate the balance between lawyers' duties to clients and others, including the system at large.[163]

Compliance with these overarching rules should be framed as a cost of the flexibility that a license grants to lawyers to move into, out of, and among legal practice settings. Whether or not a licensed lawyer works in a role that requires licensure, she retains the flexibility to practice if she wishes, so long as she keeps up her license. Compliance with new conduct floors would therefore constitute an opportunity cost of licensure. It would be a trade-off for the relatively greater mobility among workplaces that licensure confers. Breach would open a lawyer to possible loss of licensure.

Some lawyers may respond to these efforts by simply forfeiting their licenses or flaunting the rules. But, in both cases, these individuals would lose the benefit of their license's signaling function and the flexibility it offers to reenter practice in the future. Although they could still use their legal training in problematic ways (such as in furtherance of corporate wrongdoing), they would no longer be leveraging a connection to the legal profession nor benefiting from its reputation for expertise, its heightened ethical standards, and its well-established set of obligations, protections, and duties. Moreover, their problematic conduct would not reflect back on the legal profession, thereby undermining its legitimacy.

A number of obstacles would undoubtedly stand in the way of these reforms, including resistance by current participants in the legal market. The organized bar may seek to maintain ambiguity at its boundaries—by doing so, it could protect its monopoly while

162. *See* MODEL RULES OF PROF'L CONDUCT R. 4.1(b).

163. Tension has long characterized the relationships among lawyers' ethical duties. *See* Barry R. Temkin, *Misrepresentation by Omission in Settlement Negotiations: Should There Be a Silent Safe Harbor?*, 18 GEO. J. LEGAL ETHICS 179, 181 (2004) (noting the long-standing tension between the lawyer's duty of zealous advocacy to the client and the duties of candor and fair dealing with others). The goal is not to eliminate tension but to manage it so as to strike a desirable balance among duties.

supporting its members' flexibility to perform jobs outside of its jurisdiction. Lawyers working in quasi-legal roles would prefer to remain free from professional regulation, and sophisticated corporate clients would prefer to continue leveraging different sources of legal expertise, some subject to professional regulation and some not.

Meanwhile, the parties likely to support these reforms may be poorly positioned to do so. Many of the unsophisticated individuals who could be harmed by confusion over lawyers' roles would lack sufficient knowledge or resources to object. And the shareholders and amorphous public who would be harmed by excessive market risk and corporate malfeasance would probably be too diffuse to act.

These obstacles do not preclude reform, but rather suggest that state courts must play a central role in achieving change. In many states, excessively close ties with state bars have compromised state courts' ability to serve as a check on lawyers and bar associations' self-interest.[164] However, state courts have a responsibility to serve the public and, in furtherance of that responsibility, should reclaim some of the regulatory authority and responsibility that they delegated to state bar associations. They could do so by designating task forces to develop and study proposals for specific rules and, ultimately, by adopting new rules.

As the organized bar begins exploring new forms of regulation, the legal academy should pursue educational reform to prepare law students for the ethical challenges of the contemporary business world. At the very least, law schools should incorporate the ethics of quasi-legal work into the curriculum and alert students to the ethical challenges of transitioning into and out of quasi-legal roles. With many new lawyers transitioning directly into quasi-legal work, professional ethical norms must be imbued during law school if they are to be shared by all licensed lawyers.

CONCLUSION

Lawyering has changed dramatically in the past century, but scholarly and regulatory models have failed to keep pace. These models ignore significant and expansive social dynamics that broadened and blurred the boundary between law and business. Within the resulting quasi-legal zone, lawyers and their clients can

164. *See* Dana Ann Remus, *Just Conduct: Regulating Bench-Bar Relationships*, 30 YALE L. & POL'Y REV. 123, 156 (2011).

promote ambiguity about the nature of lawyers' work and ethical obligations. Corporate clients can then leverage lawyers in different roles and subject to different ethical obligations to their advantage.

These changes have eliminated balance in the profession's tripartite orientation toward clients, the state, and the public. In its place, they have allowed the corporate sector to derive a disproportionate share of the benefits from the profession's monopoly while the state and the public bear a disproportionate share of the burdens. Eliminating professional regulation would only exacerbate this imbalance. Instead, we should recalibrate professional regulation to address the particular challenges faced by licensed lawyers in quasi-legal roles.

There is room as well as need for broad ethical principles, context-specific regulations, and better rules governing moves among contexts.[165] Although neither existing model is alone sufficient, both offer important insights. By combining the two models, the profession can address the risks of harm arising at the profession's edges. It can take an important step in codifying and enforcing the profession's highest aspirations, and in allowing the public and the state to extract the full benefit of the bargain of professional regulation. Accordingly, instead of focusing exclusively on factors that draw licensed lawyers apart, as the current literature does, we should begin the difficult discussions of what core principles bind licensed lawyers together.

165. Professor Anthony Kronman and others have suggested that a renewed commitment to high standards for lawyers cannot be pursued through the rules of professional conduct. Any such efforts, they contend, result in mere mechanical applications and arbitrage of rules that insufficiently instill and enforce ethical conventions. *See, e.g.*, ANTHONY T. KRONMAN, THE LOST LAWYER 365 (1993); DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 9 (2007); WILLIAM H. SIMON, THE PRACTICE OF JUSTICE 138 (1998). Conversely, I seek ways in which ethical principles may be incorporated within the rules as the unifying ethical platform of licensed lawyers. Such an approach has the advantage of raising ethical standards for the entire bar while allowing for the adoption of specific contextual rules called for by Wilkins and other commentators.