CORE VALUES: FALSE AND TRUE*

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Oscar Wilde, one of history's great wits, defined a cynic as one who "knows the price of everything and the value of nothing."[1] The remark works well as a quip ridiculing those people who devote their lives to market values and providing rhetorical support for those who choose artistic paths. As a factual statement, however, Wilde's definition of a cynic is exactly backwards. Cynicism was a movement in Greek philosophy that arose in the fifth century, B.C. Its adherents rejected established social conventions, including wealth, property, family and religion. Viewing money with disdain, they lived as ascetics. Because they wore tattered clothes and adopted the tactic of howling in public at practices they considered to be flawed, they were often referred to as the "dog philosophers." Contrary to the impression given by Wilde's quip, the Cynics believed that true happiness could only be achieved by living a virtuous life, not by worldly pleasures. To illustrate this point, the story is told that Diogenes, the most famous of the Cynics, would carry a lit oil lantern during the daytime, holding it up to people he encountered, to dramatize his search for a virtuous person.[2]

Fast forward from Victorian England and ancient Greece to debates about attorneys' ethics at the end of the twentieth century and the beginning of the twenty-first century. We hear much talk these days about the "core values" of the legal profession. Bar leaders emphasize core values of the profession in their speeches.[3] In a bruising debate over whether the ABA's Model Rules of Professional Conduct should be amended to allow lawyers to participate in

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1. Oscar Wilde, Lady Windermere's Fan, Act 3, at 45 (Peter Raby ed., 1995) (1892).

2. *See* Internet Encyclopedia of Philosophy, *at* http://www.utm.edu/research/iep/c/cynics.htm (last visited Sept. 10, 2001) (defining "Cynics").

3. *See, e.g.*, Gary L. Bakke, *Will the Real Lawyers Please Stand Up?*, Wis. Law., May 2001, at 5; Rusty Robnett, *Core Values*, The Advoc., May 2001, at 4; Molly Shepherd, *Core Values, In My Eyes*, Mont. Law., Apr. 2001, at 4; *see also* Robert MacCrate, *quoted in* John Gibeaut, *"It's a Done Deal": House of Delegates Vote Crushes Chances for MDP*, A.B.A. J., Sept. 2000, at 92.

Multidisciplinary Practice, the ABA adopted a resolution relying on the core values of the profession.[4] In another contentious debate over the ABA Ethics 2000 Commission's proposals to broaden exceptions to the ethical duty of confidentiality, opponents of change relied on the core values of the profession.[5]

The thesis of this article is two-fold. First, like Wilde's quip, reliance on core values of the legal profession in debates about legal ethics has rhetorical appeal but is fundamentally misleading. Second, like Wilde's quip, at a deeper level, reliance on the core values of the profession often reflects an antimarket, anticompetitive attitude of the bar that impedes change in rules of professional conduct, including efforts to improve the delivery of legal services to people of moderate means.

I. A FRAMEWORK FOR ANALYSIS OF CORE VALUES

Since the ABA adopted the Model Rules in 1983, it has faced several divisive debates over changes in the rules of professional conduct. One such debate dealt with Multidisciplinary Practice, or "MDP." In 1999 and again in 2000, the ABA Commission on Multidisciplinary Practice recommended that the ABA amend the Model Rules of Professional Conduct to relax the prohibitions against sharing legal fees and forming partnerships or other associations with nonlawyers when one of the activities of the organization is the practice of law.[6] At its July 2000 meeting, by a vote of 314 to 106, the ABA's House of Delegates rejected the Commission's recommendations and discharged it from further work.[7]

While the issue of MDP is usually associated with the "big five" accounting firms seeking to expand the delivery of professional services to sophisticated clients, the issue is also important for middle-income clients. Approval of MDPs would open the market to a wide range of legal services for moderate-income individuals. Lawyers could form partnerships with social workers, estate planners, financial consultants, real estate agents, medical providers and other professionals to offer combinations of services needed by ordinary consumers.[8]

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4. *See infra* note 9 and accompanying text. Robert MacCrate, former President of the ABA and a leader of the opposition to proposals allowing lawyers to participate in MDPs, stated, "[t]he action of the House of Delegates sends a clear message to would-be buyers and sellers [of law practices] that to preserve its core values, the American legal profession is not for sale." Gibeaut, *supra* note 3, at 92.

5. *Model Rules: ABA Stands Firm on Client Confidentiality, Rejects "Screening" for Conflicts of Interest*, 17 Law. Manual on Prof'l Conduct (ABA/BNA) No. 17, at 492 (Aug. 15, 2001) [hereinafter *Model Rules: ABA Stands Firm*].

6. For the history of these developments, see Center for Professional Responsibility, *at* http://www.abanet.org/cpr/home.html (last visited Sept. 1, 2001).

7. *See* Gibeaut, *supra* note 3, at 92.

8. Charles W. Wolfram, *The ABA and MDPs: Context, History, and Process*, 84

In rejecting MDP proposals the ABA adopted a resolution sponsored by several state and local bar associations emphasizing the "core values" of the profession. The resolution read in part:

> RESOLVED, that each jurisdiction is urged to revise its law governing lawyers to implement the following principles and preserve the core values of the legal profession:
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> 1. It is in the public interest to preserve the core values of the legal profession, among which are:
>
> a. the lawyer's duty of undivided loyalty to the client;
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> b. the lawyer's duty competently to exercise independent legal judgment for the benefit of the client;
>
> c. the lawyer's duty to hold client confidences inviolate;
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> d. the lawyer's duty to avoid conflicts of interest with the client; and
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> e. the lawyer's duty to help maintain a single profession of law with responsibilities as a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.
>
> f. The lawyer's duty to promote access to justice.[9]

The ABA's reliance on core values of the profession raises an important issue. How does one evaluate the claim that a proposed rule violates a core value of the profession? The issue is important because the term core value indicates a value that is central to what it means to be a lawyer, and not simply a policy choice between differing views of professional obligations. If a proposed rule violates a core value, it follows that the proposal must be rejected because it threatens a fundamental tenet of the profession.

To decide whether a professional value qualifies as a core value, I suggest a two-step approach. First, define precisely the value at issue to eliminate ambiguities and uncertainties about the meaning and scope of the value. Second, analyze whether the value qualifies for treatment as a core value. In making this determination, one should consider both the history and the importance of the value to the professional role. History of the value is significant because it is to be expected that core values find expression early in the history of professional ethics. The importance of the value to the professional role is significant because a value that has only marginal or uncertain importance hardly qualifies as a core value.

Minn. L. Rev. 1625, 1648-49 (2000).

9. ABA House of Delegates Resolution adopted July 2000, *at* http://www.abanet.org/cpr/mdprecom10F.html (last visited Sept. 2, 2001) [hereinafter ABA Core Values Resolution].

II. UNDIVIDED LOYALTY

"Undivided loyalty to the client" was the first core value the ABA mentioned in its MDP resolution. The ABA's conception of undivided loyalty presents definitional, historical and policy difficulties.

A. *The ABA's Concept of Undivided Loyalty is Ambiguous*

The following chart summarizes the most important issues surrounding the scope of a duty of loyalty to a client:

Issues Involved in Determining the Scope of the Duty of Loyalty

1. *Causes of Divided Loyalty*:
   Other clients
   Third parties
   System of Justice
   Lawyer's own interests

2. *Organizational Extent:*
   Personal to lawyer but not imputed to other lawyers in organization
   Imputed to other lawyers in organization:
   Firm-wide
   Office-wide
   Specialization-wide
   Screening permitted
   Screening prohibited

3. *Duration:*
   Forever
   Forever as to specific types of matters
   Time limit
   Time limit for specific types of matters

4. *Subject Matter:*
   Direct adversity in particular matters
   Matter in which client has economic or other interest that could be affected
   Unrelated matters

5. *Consentability:*
After conflict arises
Prospectively
All clients
Sophisticated clients
With advice of counsel

Take the first issue of the possible causes of divided loyalty. A number of conflicts could undermine a lawyer's undivided loyalty to a client, such as obligations to other clients, third parties who are not clients, the system of justice, or the lawyer's personal or financial interests. The resolution does not state whether the value of undivided loyalty encompasses all or only some of these causes. Since the drafters used the word "undivided" they presumably intended a broad concept of loyalty. Other sections of the resolution support this reading. Section 1(d) refers to one of these causes: "the lawyer's duty to avoid conflicts of interest with the client."[10] Let us assume, then, that the drafters intended the expression of the core value of undivided loyalty to be all encompassing, covering any possible cause.

A requirement that lawyers be free of any obligations except those to the client is not a core value of the profession because such a concept is fundamentally inconsistent with a number of well-established professional obligations. Lawyers are not only representatives of clients, but they are also "officers of the court"[11] with legal and professional obligations to the system of justice.[12] Indeed, the Core Values Resolution recognizes that a lawyer is "an officer of the legal system."[13] The obligations to the court include the duty not to present frivolous claims,[14] the duty not to offer perjured testimony,[15] the duty to disclose adverse legal authority under some circumstances,[16] and the obligation to refrain from improper communications with judges, jurors and court officials.[17] Lawyers owe certain duties of fairness to opposing parties and their counsel.[18] Lawyers have some obligations to third parties including an obligation not to engage in misrepresentation[19] and to respect the legal rights of

10. *Id.* § 1(d).
11. *See* Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 Vand. L. Rev. 39 (1989).
12. *See* Nathan M. Crystal, *Limitations on Zealous Representation in an Adversarial System*, 32 Wake Forest L. Rev. 671 (1997).
13. ABA Core Values Resolution, *supra* note 9, § 1(e).
14. Model Rules of Prof'l Conduct R. 3.1 (1996).
15. R. 3.3(a)(4).
16. R. 3.3(a)(3).
17. R. 3.5.
18. R. 3.4.
19. R. 4.1.

third parties.[20] Although critics of the rules of professional conduct have complained that these duties to the system of justice and to third parties should be strengthened,[21] such criticism does not refute the point that these duties do in fact exist.

Not only do lawyers have obligations as officers of the court, it is also well established that in some situations lawyers may represent multiple clients. Lawyers may do so with client consent if the interests are potentially conflicting[22] and may even undertake representation of clients with actually conflicting interests if there is a reasonable possibility that the lawyer can assist the clients in resolving those differences and the clients consent after consultation.[23] In these cases the lawyer has loyalty obligations to both clients and is prohibited from giving undivided loyalty to either.

The advocates of undivided loyalty will likely respond that the duty of undivided loyalty is, of course, subject to other legal and ethical obligations. Those limitations are simply implicit within the concept of undivided loyalty. But this response is insufficient for two reasons. First, it proves the point that the concept of undivided loyalty suffers from vagueness and must be more precisely defined. Secondly, it begs the question of the meaning of undivided loyalty. Although admitting that the concept of undivided loyalty is subject to legal and ethical restrictions, it provides no criteria for determining what those restrictions should be.

B. *Imputation of Conflicts of Interest Fails the Criteria for a Core Value*

Consider the second issue dealing with the scope of the duty of loyalty: organizational extent. One possible meaning of the concept of undivided loyalty is that the obligation of loyalty is personal to the attorney who represents the client but does not attach to other lawyers with whom the lawyer practices. Under this view of loyalty, a lawyer who is representing a client would violate the principle of loyalty by undertaking representation of another client against the first client, but no violation of the duty of undivided loyalty would result if another member of the firm undertook representation against the client. The current rules of professional conduct do not accept the principle of personal loyalty, but rather impute the principle firm-wide.[24] My point is not a statement of what the law of ethics is, but an analytical point. In deciding what we mean by undivided loyalty, we

20. R. 4.4.
21. *See* Gaetke, *supra* note 11.
22. R. 1.7(b).
23. R. 2.2.
24. R. 1.10(a).

need to understand that the concept could apply personally or vicariously.

Is firm-wide imputation of conflicts of interest a core value of the profession? Some commentators certainly think so. Larry Fox, a member of the Ethics 2000 Commission, and one of the staunchest defenders of core values has said, "[I]mputation is the foundation stone of the legal profession's commitment to the core value of loyalty to clients."[25] Others are not so sure. Dean Daniel Fischel of the University of Chicago Law School has referred to the concept as obsolete.[26]

An historical examination of imputation sheds light on whether it should be classified as a core value. The earliest ABA statement of rules of professional conduct is the ABA's Canons of Ethics adopted in 1908. The Canons were amended on a number of occasions until the Code of Professional Responsibility replaced them in 1969.[27] Nothing in the 47 Canons of Ethics refers to imputed or vicarious disqualification. In particular, the basic canon on conflicts of interest, Canon 6, makes no mention of the concept.[28]

A concept of imputation first appeared in the Code of Professional Responsibility in DR 5-105(D). Interestingly, the Ethical Considerations of the Code of Professional Responsibility, which were drafted to reflect the highest standards of the profession, make no mention of the concept of imputed or vicarious disqualification. Further, the courts soon recognized a major exception to the imputation of disqualification under the Code when a lawyer who did not actually possess confidential information moved between firms.[29]

Prior to 1969 a number of court decisions and ethics opinions recognized the concept of firm-wide disqualification, but these cases dealt with situations in which the disqualified lawyer possessed confidential information.[30] They could be read to support a broad principle of imputation, but they could also be read to support a principle of imputation only when necessary to protect a fundamental client interest in confidentiality.

Can a concept that made its first appearance in the formal rules of the profession in 1969, that was ill-defined in the case law, and that was subject to a major exception truly be viewed as a core value? In

25. Lawrence J. Fox, *All's O.K. Between Consenting Adults: Enlightened Rule on Privacy, Obscene Rule on Ethics*, 29 Hofstra L. Rev. 701, 728 (2001).

26. *See* Daniel R. Fischel, *Multidisciplinary Practice*, 55 Bus. Law. 951, 966 (2000).

27. ABA, Opinions of the Committee on Professional Ethics (1967) (containing annotated 1908 Canons of Ethics) [hereinafter ABA, Opinions].

28. *Id.* at 22.

29. Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975). The holding of *Silver Chrysler Plymouth* is reflected in Model Rules of Prof'l Conduct R. 1.9(b).

30. *See, e.g.*, Brasseaux v. Girouard, 214 So. 2d 401 (La. Ct. App. 1968) (discussing authorities).

fact, the ABA's Core Values Resolution does not mention whether the duties apply firm-wide or are personal to the lawyer. The language of the resolution, however, makes it appear that these duties are personal since the resolution refers to "the lawyer's" various obligations. If imputation were such an important aspect of loyalty, the resolution would mention it. In addition, a concept of personal rather than vicarious loyalty is not far-fetched or outrageous. The ABA's House of Delegates recently approved the Ethics 2000 Commission's proposed Rule 1.10(a), which recognizes a limited form of personal, nonvicarious loyalty. The rule states:

> While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.[31]

Under this rule, when a conflict arises from the personal interest of the lawyer, rather than because of some client interest, the conflict is not imputed to the rest of the firm but remains personal to the lawyer.

C. *The Prohibition on Screening Does Not Constitute a Core Value*

Another important issue dealing with the organizational extent of the duty of loyalty involves screening. The current rules of professional ethics prohibit screening of a disqualified lawyer except when the lawyer moves from service as a government lawyer, judge or arbitrator to private practice.[32] The Ethics 2000 Commission proposed that when a disqualified lawyer joins a firm, the firm could avoid imputation of the disqualification by screening the affected lawyer.[33] Two members of the Commission dissented from this proposal[34] and the House of Delegates rejected the recommendation.[35]

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31. Ethics 2000 Commission, Proposed R. 1.10(a), *at* http://www.abanet.org/cpr/e2k-final_rules2.html (last visited Oct. 16, 2001) [hereinafter Ethics 2000 Proposals].

32. *Compare* Model Rules of Prof'l Conduct R. 1.10(a) (1996), *with* R. 1.11 *and* R. 1.12. *See generally* Nathan M. Crystal, Professional Responsibility: Problems of Practice and the Profession 304-05 (2d ed. 2000) [hereinafter Crystal, Professional Responsibility] (discussing the scope of the screening rule).

33. ABA Ethics 2000 Commission Proposed Rule 1.10(c) provided as follows:

> (c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:
>
> (1) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
>
> (2) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.

Ethics 2000 Proposals, *supra* note 31, R. 1.10(c).

34. *See* ABA Ethics 2000 Comm. on Ethics and Prof'l Responsibility, Minority

Is a prohibition on screening a core value of the profession? Once again, we find no mention of the concept of screening in the ABA's 1908 Canons of Ethics, nor can the concept be found in the Code of Professional Responsibility. The mention of screening first appears in Model Rule 1.11, dealing with former government lawyers, and Model Rule 1.12, applying to former judges and arbitrators. Interestingly, these sections allow, rather than prohibit, a firm that hires a former government lawyer, judge or arbitrator who participated personally and substantially in a matter to handle that matter, provided the disqualified lawyer is screened from participation in the matter, apportioned no part of the fee, and the former agency is notified so that it can ascertain compliance with the rule.

Even though the current Model Rules prohibit screening of a disqualified lawyer except when the lawyer moves from service as a government lawyer, judge or arbitrator to private practice, courts are divided on the issue of whether screening should be allowed to prevent disqualification of an entire firm.[36] The Restatement of the Law Governing Lawyers adopts a qualified view of screening. The Restatement allows screening when a disqualified lawyer joins a firm but only when the confidential information held by the personally disqualified lawyer is "unlikely to be significant in the subsequent matter."[37]

Once again it is inaccurate to characterize the prohibition on screening as a core value of the profession. The concept found no expression in the rules of professional conduct until the Model Rules were adopted in 1983. Courts and other authorities are divided on whether and to what extent screening should be allowed.

In summary, claims that various rule changes would violate a core value of undivided loyalty to clients are very misleading. The profession does not accept a general value of undivided loyalty to clients because lawyers owe obligations to the system of justice, to

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Report of Commissioner Lawrence J. Fox (joined in as to screening by Commissioner Susan Martyn), *at* http://www.abanet.org/cpr/e2k-dissent.html (last visited Sept. 1, 2001) [hereinafter Fox, Minority Report].

35. *See Model Rules: ABA Stands Firm*, *supra* note 5, at 492.

36. *Compare* Cromley v. Bd. of Educ., 17 F.3d 1059 (7th Cir. 1994) *and* Manning v. Waring, Cox, James, Sklar & Allen, 849 F.2d 222 (6th Cir. 1988) (screening permitted), *with* Roberts v. Hutchins, 572 So. 2d 1231, 1234 n.3 (Ala. 1990) (screening prohibited). *See also* Kala v. Aluminum Smelting & Ref. Co., 688 N.E.2d 258 (Ohio 1998) (finding that screening is generally available to prevent disqualification of firm that hires personally disqualified lawyer but that on the facts of the case, the firm should be disqualified despite screening because of the appearance of impropriety caused by lawyer abandoning client two weeks after seeking continuance to file appeal).

37. Restatement (Third) of the Law Governing Lawyers § 124(2)(a) (2000) [hereinafter Restatement (Third)]. Comment (d) outlines certain factors that can be used to determine whether the information is significant. *Id.* The New York Court of Appeals has adopted the Restatement approach. *See* Kassis v. Teacher's Ins. & Annuity Ass'n, 717 N.E.2d 674 (N.Y. 1999).

third parties and to other clients they represent. Narrower definitions of the concept of undivided loyalty turn out not to be core values of the profession because they do not have a firm historical basis and because they represent policy choices rather than fundamental aspects of the professional role.

III. STRICT CONFIDENTIALITY

The ABA includes within its list of core values: "the lawyer's duty to hold client confidences inviolate."[38] For years, the ABA House of Delegates has battled over the scope of the duty of confidentiality.

The current rule on confidentiality, adopted by the ABA in 1983, provides only limited exceptions. The term "strict confidentiality" refers to a duty of confidentiality with few if any exceptions. Without client consent, express or implied,[39] a lawyer may reveal confidential information only "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm"[40] or to advance a claim or defense by the lawyer in a matter involving the client.[41] Lawyers may not reveal confidential information either to prevent or rectify criminal or fraudulent conduct that would damage or has damaged the property or financial interests of third persons. The rule prohibits lawyers from revealing confidential information even to prevent a horrible injustice, such as the execution of an innocent person.[42]

The Ethics 2000 Commission recommended substantial expansion of the exceptions to the duty of confidentiality. Proposed Rule 1.6 stated:

> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent reasonably certain death or substantial bodily harm;
>
> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
>
> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

38. ABA Core Values Resolution, *supra* note 9, § 1(c).
39. Model Rules of Prof'l Conduct R. 1.6(a) (1996).
40. R. 1.6(b)(1).
41. R. 1.6(b)(2).
42. *See* Symposium, *Executing the Wrong Person: The Professionals' Ethical Dilemmas*, 29 Loy. L.A. L. Rev. 1543 (1996).

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.[43]

At its August 2001 meeting the ABA approved the Commission's proposed exception in section (b)(1), but rejected the proposed exception in (b)(2) by a vote of 255-151.[44] The Commission then withdrew the proposed exceptions dealing with past wrongful conduct because their defeat appeared clear.[45] Opponents of the Commission's proposals argued that the core values of the profession required a strict duty of confidentiality subject to as limited exceptions as possible.[46]

A. *Historical Analysis Does Not Support the ABA's Position in Favor of Strict Confidentiality*

Does the ABA's unwillingness to provide broader exceptions to the duty of confidentiality protect the core values of the profession? Historically, the ABA's current position does not withstand analysis. Canon 37 of the ABA's 1908 Canons of Ethics, adopted in 1928, is enlightening.[47] It provided that "[t]he announced intention of a client to commit a crime is not included within the confidences which he is bound to respect."[48] Even more important, Canon 41 provided that lawyers should disclose fraud or deception that has been practiced on

43. Ethics 2000 Proposals, *supra* note 31, R. 1.6.

44. *See Model Rules: ABA Stands Firm*, *supra* note 5, at 493. In 1991 the ABA considered a proposal to amend Rule 1.6(b) to allow a lawyer to reveal confidential information to "rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used." The proposal revived an issue that had come before the ABA when the Model Rules were originally adopted. Model Rules of Prof'l Conduct R. 1.6(b) (Proposed Rule 1991). The ABA rejected the proposed amendment by a vote of 251-158, nearly identical to the 2001 vote. *See ABA Rejects Ancillary Business, Inroads on Client Confidences*, 7 Law. Manual on Prof'l Conduct (ABA/BNA) No. 15, at 258-59 (Aug. 28, 1991).

45. Ethics 2000 Commission, *at* http://www.abanet.org/cpr/e2k-summary_2001.html (last visited Sept. 2, 2001).

46. *See Model Rules: ABA Stands Firm*, *supra* note 5, at 493; *see also* Fox, Minority Report, *supra* note 34, at "Confidentiality" ("To maintain the sanctity of the lawyer-client relationship, the exceptions to confidentiality crafted into our rules must be as narrowly drawn as possible.").

47. ABA, Opinions, *supra* note 27, at 167 (setting forth Canon 37).

48. *Id.*

a court or another party. Canon 41 on the Discovery of Imposition and Deception provides:

> When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps.[49]

In addition, rules of evidence have long recognized a crime/fraud exception to the attorney-client evidentiary privilege.[50] Under this exception if the client consults a lawyer for the purpose of obtaining assistance in committing a crime or fraud or uses the lawyer's services to carry out a crime or fraud, any communications with the lawyer regarding such matter are not privileged.[51] It is difficult to claim that confidentiality regarding client fraud constitutes a core value when the law states that such matters are not confidential.

Ethical standards in most states also undermine the ABA's claim that a strict view of confidentiality is a core value of the profession. The vast majority of states have adopted confidentiality rules that authorize disclosure under circumstances not currently allowed by the ABA rule. Only a handful of states follow the ABA's Model Rule 1.6.[52] Forty-two states provide that lawyers have discretion to reveal confidential information to prevent substantial financial injury resulting from a client's criminal or fraudulent conduct.[53] A number of states go even further.[54]

B. *Policy Justifications Do Not Justify Strict Confidentiality*

The claim that strict confidentiality is a core value of the profession is not only weak historically, but it rests on tenuous policy justifications. Advocates of a strict view of confidentiality have made two arguments in support of their position. One argument rests on the rights of clients, either legal rights or more broadly defined moral

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49. *Id.* at 181 (setting forth Canon 41). Canon 41 was adopted in 1928.

50. 8 Wigmore on Evidence § 2292, at 554 (McNaughton ed., 1961). *See generally* Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 Cal. L. Rev. 1061, 1063 (1978) (discussing crime-fraud and tort exceptions to attorney-client privilege).

51. Restatement (Third), *supra* note 37, § 82; *see* Am. Tobacco Co. v. Florida, 697 So. 2d 1249 (Fla. Dist. Ct. App. 1997) (finding tobacco company documents not privileged because of crime/fraud exception).

52. Restatement (Third), *supra* note 37, § 69, rep. note.

53. *Id.*

54. For a current description of state-by-state variations prepared by the Attorneys' Liability Assurance Society, Inc., see Thomas D. Morgan & Ronald D. Rotunda, 2001 Selected Standards on Professional Responsibility (Appendix A, following reprinting of Model Rules of Prof'l Conduct).

rights. The other argument rests on social utility of client confidentiality.

Proponents of a strong view of confidentiality have argued that clients have constitutional rights to confidentiality based on the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to counsel. In *Fisher v. United States*[55] the Supreme Court held that the privilege against self-incrimination protected information that a client had conveyed to a lawyer (1) if the attorney-client privilege applied to the conveyance of the information from the client to the lawyer and (2) if the information could not have been obtained directly from the client because of the privilege against self-incrimination.

Under *Fisher*, a rule providing lawyers with discretion to reveal confidential information to prevent or to rectify wrongful client conduct would not violate the privilege against self-incrimination for several reasons. First, the privilege against self-incrimination only applies when a client is compelled to give incriminating testimony.[56] A rule providing lawyers with discretion does not involve any client compulsion.

Second, the privilege only applies when the information would incriminate the client. If a lawyer revealed information to prevent a crime, there would be no incrimination because the crime would have been averted, unless a client's conduct involved a conspiracy or amounted to criminal attempt. In many cases the client's conduct would not rise to the level of either conspiracy or attempt. If the client has acted or is planning to act alone, the client has not engaged in a conspiracy. If the client is merely planning some wrongful conduct, perjury or assault for example, but has not committed an overt act, the client probably would not be guilty of attempt. Similarly, revelation of information to prevent or to rectify noncriminal but tortious conduct would also not carry any criminal implications. Disclosure to rectify past criminal conduct could incriminate the client, but lawyers could use their discretion in this situation to refuse to reveal this information unless the client were given use immunity.[57]

Finally, to the extent the client is seeking to employ the lawyer's services to commit a crime or fraud or to the extent the client actually uses the lawyer's services in the commission of a crime or fraud, any communications from the client to the lawyer are not subject to the attorney-client privilege.[58] Under *Fisher*, when the communication from the client to the lawyer is not subject to the attorney-client

55. 425 U.S. 391 (1976).

56. *Id.* at 397.

57. *See* Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 Iowa L. Rev. 1091, 1120-27 (1985).

58. *See supra* notes 50-51 and accompanying text.

privilege, the communication is not protected under the privilege against self-incrimination.

Similarly, the Sixth Amendment right to counsel does not prevent lawyers from having discretion to reveal confidential information to prevent or to rectify client harm. First, the Sixth Amendment only applies to criminal cases, and not to civil matters. Even in criminal cases the right to counsel does not attach until the initiation of adversarial judicial proceedings.[59] A rule that required disclosure of information prior to that time would not violate the Sixth Amendment. Even if the attorney were making disclosure after a right to counsel attached, a Sixth Amendment violation only occurs if counsel's conduct falls below the standard of "reasonably effective assistance" and the client suffers prejudice.[60] If a lawyer disclosed information to prevent or to rectify client harm pursuant to a rule of professional conduct authorizing such disclosure, it would be difficult to argue that the lawyer's conduct fell below the level of reasonably effective assistance. Indeed, in *Nix v. Whiteside*[61] the Supreme Court held that a criminal defendant's Sixth Amendment right to counsel was not violated when his lawyer threatened to disclose to the court, pursuant to Model Rule 3.3, the client's intention to commit perjury. The Court held that defense counsel's actions fell "well within accepted standards of professional conduct... acceptable under *Strickland*."[62]

A broader statement of the clients' rights argument focuses on moral rather than legal rights.[63] Under this view, the client's moral rights to privacy and autonomy justify an obligation of confidentiality.[64] But moral philosophy recognizes that rights such as privacy and autonomy may be limited in various situations, in particular when a person intends to harm others.[65] Thus, neither constitutional nor moral rights justify a strict rule of confidentiality.

The social utility argument for confidentiality claims that if clients are encouraged to reveal confidential information, including information about wrongdoing, lawyers will be in a position to dissuade them from wrongful conduct. Under this view a rule of confidentiality is more likely to prevent or to rectify harm than a rule authorizing disclosure.

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59. *See* Moran v. Burbine, 475 U.S. 412, 428 (1986).
60. Strickland v. Washington, 466 U.S. 668 (1984).
61. 475 U.S. 157 (1986).
62. *Id.* at 171.
63. *See generally* Nancy J. Moore, *Limits to Attorney-Client Confidentiality: A "Philosophically Informed" and Comparative Approach to Legal and Medical Ethics*, 36 Case W. Res. L. Rev. 177 (1985).
64. *Id.* at 188-91.
65. *Id.* at 194; *cf.* 1 Joel Feinberg, The Moral Limits of the Criminal Law: Harm to Others (1984) (arguing that behavior should not be criminalized unless it is harmful to others).

The social utility argument is based on assumptions that are both unproven and of doubtful validity.[66] The argument assumes that clients will be deterred from seeking legal advice or from providing lawyers with complete information about past or prospective wrongful conduct if lawyers have discretion to disclose information to prevent or to rectify such conduct. Clients seeking to conform their conduct to the law but uncertain about what the law requires are unlikely to be deterred from seeking legal advice simply because lawyers have discretion to reveal confidential information to prevent or to rectify wrongful conduct. These clients will seek advice to comply with the law. On the other hand, clients who are seeking to use the lawyer's services instrumentally to achieve their ends, whether they violate the law or not, may be deterred from seeking legal advice, but this deterrence is probably socially desirable. Without the assistance of counsel it may be more difficult for them to obtain their ends through violation of the law.[67] In addition, even the staunchest supporters of confidentiality agree that lawyers should be allowed to reveal confidential information to defend themselves against charges of wrongdoing.[68] Clients seeking legal advice must, therefore, assume that if they reveal information about their wrongful conduct, a lawyer might under some circumstances divulge this information. Expanding the scope of the exceptions to the duty of confidentiality is unlikely to have much effect, if any, on client incentives to consult with counsel. Limited empirical studies of attorney-client confidentiality lend little support to the need for strict confidentiality.[69] Finally, some states, most notably New Jersey[70] and Florida,[71] require lawyers to disclose

66. *See* Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. Chi. L. Rev. 1 (1998) (arguing that confidentiality rules benefit lawyers but are of dubious value to clients and society as a whole); Fred C. Zacharias, *Rethinking Confidentiality*, 74 Iowa L. Rev. 351 (1989) (questioning the wisdom of strict confidentiality rules on both policy and empirical grounds).

67. *See* Nathan M. Crystal, *Confidentiality Under the Model Rules of Professional Conduct*, 30 U. Kan. L. Rev. 215, 225-26 (1982) (using a hypothetical analysis of types of clients that lawyers represent to conclude that a disclosure rule is more likely to reduce harm than a rule of confidentiality); Subin, *supra* note 57, at 1166-72 (finding instrumental defense less persuasive than rights-based argument for confidentiality); *see also* Steven Shavell, *Legal Advice About Contemplated Acts: The Decision to Obtain Advice, Its Social Desirability, and Protection of Confidentiality*, 17 J. Legal Stud. 123 (1988) (developing model dealing with effect of advice and confidentiality on rational decision-making).

68. *See* Fox, Minority Report, *supra* note 34, at "Confidentiality."

69. *See* Zacharias, *supra* note 66, at 376.

70. N.J. Rules of Professional Conduct Rule 1.6(b) provides as follows:

> (b) A lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client:
>
> (1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another;
>
> (2) from committing a criminal, illegal or fraudulent act that the lawyer

confidential information to prevent harm in various situations. Lawyers in these states are not crying out in anguish that these rules of ethics have crippled their ability to function as professionals.[72]

Thus, as is the case with undivided loyalty, the ABA's conception of confidentiality does not protect a core value of the profession. Indeed, the ABA's action with regard to confidentiality is even less defensible than its position on loyalty. The scope of the duty of loyalty is at least unclear. With regard to confidentiality, the ABA's position violates a core value of the profession included in its original rules of ethics requiring lawyers to reveal fraud or deception that has been practiced on a court or third party. Even worse, under the lawyer protection exception[73] to confidentiality, the current confidentiality rules allow a lawyer to reveal the information to protect the lawyer's own interests but not when others are the victims of fraud.

IV. DELIVERY OF LEGAL SERVICES

The ABA Core Values Resolution lists as one obligation the "lawyer's duty to promote access to justice."[74] Many studies have documented a substantial need for legal services by both poor and moderate-income Americans. Approximately eighty percent of the legal problems of the poor and forty to sixty percent of the legal issues facing middle-income individuals go unmet.[75]

Despite this well-recognized need, evidence indicates that the problem is getting worse. Federal funding of the Legal Services Corporation, the primary vehicle for delivery of civil legal services to low-income individuals, has languished and the program has been mired in political controversy for years.[76] Recent surveys indicate that

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reasonably believes is likely to perpetrate a fraud upon a tribunal.

N.J. Rules of Prof'l Conduct R. 1.6(b) (1997).

71. Florida Rules of Professional Conduct Rule 4-1.6(b) provides as follows:

(b) When Lawyer Must Reveal Information. A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent a client from committing a crime; or

(2) to prevent a death or substantial bodily harm to another.

Fla. Rules of Prof'l Conduct R. 4-1.6(b) (1998).

72. *But see* Leslie C. Levin, *Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others*, 47 Rutgers L. Rev. 81 (1994) (expressing doubt about the wisdom of New Jersey's mandatory disclosure rule based on a survey of lawyers).

73. The exception found in Model Rule 1.6(b)(2) is sometimes referred to, even by critics of confidentiality, as the self-defense exception, but this is a misnomer. *See, e.g.*, Fischel, *supra* note 66, at 10-11. The rule allows lawyers to disclose confidential information in self-defense, but it also allows lawyers to disclose when asserting affirmative claims.

74. ABA Core Values Resolution, *supra* note 9, § 1(f).

75. Deborah L. Rhode, *Access to Justice*, 69 Fordham L. Rev. 1785, 1785 & n.1 (2001).

76. *Id.* at 1793-97.

the private bar does not provide significant pro bono services.[77] The August 17, 2000, issue of the *New York Times* comments on the dramatic decline in the number of pro bono hours donated by major law firms.[78] In 1992, the top ranking firm, Arnold & Porter, averaged 220.6 pro bono hours per lawyer.[79] By contrast, in 1999, the top ranking firm, Covington & Burling, averaged 105.5 pro bono hours per lawyer.[80] Arnold & Porter, now number three on the list, declined to 89.3 hours per lawyer.[81] Why the decline? Esther Lardent, the director of the pro bono institute at Georgetown, notes that the number of billable hours for lawyers has increased from 1700 a few years ago to an average of 2200 to 2300.[82]

A. *Historically, Rules of Ethics Have Done Little to Promote Delivery of Legal Services*

In light of this historical background, does the profession have a core value of a duty to promote access to justice? Historically, the Bar has barely recognized the need for delivery of legal services. The 1908 Canons said very little about promotion of access to justice. Canon 4 stated: "A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf."[83] Canon 29 provided that a lawyer "should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice."[84] Similarly, the 1969 Model Code of Professional Responsibility did not contain a disciplinary rule on the duty to promote access to justice, relegating the concept to the ethical considerations, which were purely aspirational.[85] The 1983 version of the Model Rules included an aspirational statement: "A lawyer should render public interest legal service."[86] In 1993 the ABA House of Delegates voted to amend the rule to provide a standard of

77. *Id.* at 1809-10.

78. Greg Winter, *Legal Firms Cutting Back On Free Services for Poor*, N.Y. Times, Aug. 17, 2000, at A1.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. ABA, Opinions, supra note 27, at 19 (setting forth Canon 4).

84. *Id.* at 131 (setting forth Canon 29).

85. Ethical Consideration 2-25 stated that the "basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer .... Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged." Model Code of Prof'l Responsibility EC 2-25 (1981). EC 8-3 stated that "[t]hose persons unable to pay for legal services should be provided needed services." EC 8-3. EC 8-9 stated that "[t]he advancement of our legal system is of vital importance in maintaining the rule of law ... [and] lawyers should encourage, and should aid in making, needed changes and improvements." EC 8-9.

86. Model Rules of Prof'l Conduct R. 6.1 (1983).

50 hours per year of pro bono service a substantial majority of which should be directed to persons of limited means, but the standard remained voluntary.[87] The Ethics 2000 Commission considered but finally rejected the concept of mandatory pro bono.[88] Some states have considered proposals for mandatory pro bono. The report of the Marrero Committee in New York represents probably the most well known, fully developed of these proposals.[89] But no state has adopted such a requirement. In fact, only a few states have adopted rules requiring lawyers to disclose the number of pro bono hours they render.[90] The Ethics 2000 Commission also refused to recommend a disclosure requirement.[91]

B. *The ABA Has Ignored Proposals by Its Own Commission to Lessen Restrictions on the Unauthorized Practice of Law*

Not only has the bar refused to impose a professional obligation to assist in the delivery of legal services, the bar has actively resisted efforts to provide those services from other sources. The most direct way to improve delivery of legal services to moderate-income individuals is by relaxing the restrictions on the unauthorized practice of law. In 1994 the ABA-sponsored Commission on Nonlawyer Practice issued a report describing the activities of "legal technicians" (nonlawyers providing legal services without supervision by lawyers) in the following areas: federal and state administrative agency practice, immigration practice, federal and state taxation, specially authorized practice in certain courts, housing disputes, family law, real estate, independent claim adjusters, debt collection, debt counseling and general practice.[92] In August 1995 the commission issued a second report, "Nonlawyer Activities in Law-Related Situations," in which it found that, with adequate protection for the public, nonlawyers had an important role to play in delivery of legal services to the public. The commission recommended that the ABA reconsider its ethics rules and policies in a variety of areas, including those governing the unauthorized practice of law. In particular, the

87. Model Rules of Prof'l Conduct R. 6.1 (1993).

88. Margaret Colgate Love, ABA Ethics 2000 Commission Final Report—Summary of Recommendations, § 34, *at* http://www.abanet.org/cpr/e2k-mlove_article.html (June 9, 2001).

89. Committee to Improve the Availability of Legal Services: Final Report to the Chief Judge of the State of New York (1990), *reprinted in* 19 Hofstra L. Rev. 755 (1991). For a summary of the report and a critical review of the literature in support of and in opposition to mandatory pro bono, see Crystal, Professional Responsibility, *supra* note 32, at 481-86.

90. *See, e.g.*, Fla. Rules of Prof'l Conduct R. 4-6.1(b) (1998) (Florida is the largest state with such a requirement).

91. Love, *supra* note 88, § 34.

92. ABA Comm'n on Nonlawyer Practice, Nonlawyer Practice in the United States: Summary of the Factual Record Before the Commission (1994).

commission concluded that for many, legal services regulation of nonlawyers rather than prohibition was in the public interest. The commission also summarized various areas in which states might consider regulation, including age, experience, education, training, recordkeeping, continuing education and admission examinations.

The organized bar has responded to this ABA report by ignoring it. In fact, the typical response of the bar to a recommendation to lessen restrictions on the unauthorized practice of law is just the opposite: to strengthen enforcement efforts. In this regard, it is interesting to note the ABA's Core Values Resolution includes the following: "Jurisdictions should retain and enforce laws that generally bar the practice of law by entities other than law firms."[93] Deborah Rhode has concluded that meaningful progress in removing restrictions on the unauthorized practice of law is likely to require reduction of bar control of the process.[94]

V. EXCLUSIVE AUTHORITY OF COURTS TO REGULATE THE PRACTICE OF LAW

The position of the organized bar against relaxation of restrictions on the unauthorized practice of law is closely related to a more general issue: Do courts have the exclusive authority to regulate the practice of law? Professor Wolfram has labeled the claim of exclusive judicial authority to regulate the practice of law as the negative inherent powers doctrine.[95] In 1989, the ABA House of Delegates took a firm position on this issue much like the Core Values Resolution in connection with the MDP debate. The ABA House of Delegates adopted a resolution providing that the ABA "opposes the regulation of the practice of law by executive or legislative bodies, whether national, state or local."[96]

The negative inherent powers doctrine dramatically limits the power of state legislatures to make changes that they believe would improve the delivery of legal services to moderate income individuals. Moreover, the doctrine does not simply limit legislative attempts that directly affect court proceedings; it also applies to administrative proceedings and to transactional matters that do not involve

93. ABA Core Values Resolution, *supra* note 9, § 6.

94. *See* Deborah L. Rhode, *The Delivery of Legal Services by Non-lawyers*, 4 Geo. J. Legal Ethics 209, 232-33 (1990).

95. Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation–The Role of the Inherent-Powers Doctrine*, 12 U. Ark. Little Rock L.J. 1, 7 (1989-1990); *see also* Charles W. Wolfram, Modern Legal Ethics § 2.2 (1986) [hereinafter Wolfram, Modern Legal Ethics]. The affirmative inherent powers doctrine provides that courts have the inherent power to regulate certain matters, including the legal profession, even in the absence of legislative authorization. *Id.* § 2.2.2. In its positive form, the doctrine does not limit the power of other branches of the government. *Id.*

96. ABA Res., ABA House of Delegates, 114 ABA Reports, No. 1, at 35 (1989).

appearance before tribunals. Two recent cases illustrate the impact of the doctrine.

A. *Recent Cases Show the Broad Scope of the Negative Inherent Powers Doctrine*

Turner v. Kentucky Bar Association[97] involved the constitutionality of a Kentucky statute that was enacted as part of a comprehensive reform of the state's workers' compensation system. One goal of the reform was to make claims resolution more administrative and less dependent on formal litigation. The legislation created a Division of Ombudsman and Workers' Compensation Specialist Services.[98] In addition, the General Assembly passed another provision which stated, "Notwithstanding any provisions of law to the contrary, the provisions of this chapter shall not be construed or interpreted to prohibit nonattorney representation of injured workers covered by this chapter."[99] After the legislation was passed, the Kentucky Bar Association adopted an ethics opinion advising that nonlawyers may not represents clients before the Department and nonlawyers may not serve as workers' compensation specialists because such activities constitute the unauthorized practice of law.[100]

The Kentucky Supreme Court held that under the state's constitutional provisions and prior decisions of the court, the Supreme Court had exclusive authority over the practice of law.[101] The court did recognize, however, the possibility of a limited degree of legislative action under the principle of comity:

> "The correct principle, as we view it, is that the legislative function cannot be so exercised as to interfere unreasonably with the functioning of the courts, and that any unconstitutional intrusion is per se unreasonable, unless it be determined by the court that it can and should be tolerated in a spirit of comity."
>
> Undoubtedly, the separation of powers principles strictly prohibit the legislature from infringing upon the judiciary's exclusive power to make rules governing the practice of law, court procedures, and any exceptions thereto.[102]

Based on this principle, the court found that Section 342.320(9) of the legislation, which authorized nonlawyers to appear before the Department, was unconstitutional:

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97. 980 S.W.2d 560 (Ky. 1998).
98. Ky. Rev. Stat. Ann. § 342.329 (1997).
99. *Id.* § 342.320(9).
100. Ky. Bar Ass'n, Formal Op. U-52 (1997).
101. *Turner*, 980 S.W.2d at 562-63.
102. *Id.* at 563 (quoting *Ex parte* Auditor of Public Accounts, 609 S.W.2d 682, 688 (Ky. 1980)).

> In the case at bar, the legislature has authorized non-attorneys in the Department to act as legal representatives in workers' compensation cases. This is not within its purview. The legislature has no power to make rules relating to the practice of law or create exceptions to the settled rules of this Court. Thus KRS 342.320(9) is unconstitutional.[103]

The court also held that it would not recognize the legislation under the principle of comity because it was not a "'statutorily acceptable' substitute for current judicially mandated procedures."[104]

The Virginia case of *Fears v. Virginia State Bar*[105] involved the constitutionality of legislation authorizing nonlawyers to perform a variety of real estate closing and settlement services. The plaintiffs, a Virginia attorney who specialized in real estate practice and an association of real estate attorneys, sought a declaratory judgment that the Virginia Consumer Real Estate Settlement Protection Act ("CRESPA") was unconstitutional.[106] The act authorized "settlement agents" to provide a variety of real estate closing and settlement services. Settlement agents may be lawyers or nonlawyers so long as they comply with the provisions of the act.[107] The act provided for regulation of settlement agents and preempted court rules that would otherwise prohibit their activities: "Notwithstanding any rule of court to the contrary, a settlement agent operating in compliance with the requirements of this chapter or a party to the real estate transaction may provide escrow, closing or settlement services and receive compensation for such services."[108] Settlement agents were required to be licensed and meet certain requirements for financial responsibility, including malpractice insurance and fidelity and surety bonds.[109] The act directed the Virginia State Bar, in consultation with the Virginia State Corporation Commission and the Virginia Real Estate Board, to promulgate regulations establishing guidelines for

103. *Id.*

104. *Id.* (quoting Foster v. Overstreet, 905 S.W.2d 504, 507 (Ky. 1995)). The court upheld, however, the constitutionality of the statute authorizing the Department to employ workers' compensation specialists. Reviewing the actual practices of the specialists, the court found that they did not involve the practice of law. None of these tasks involved the interpretation or analysis of law. Most of the tasks performed by specialists were procedural and administrative in nature and were similar to services that the court had previously authorized paralegals to perform. Ky. Sup. Ct. R. 3.700. In addition, although the chief specialist was not required by statute to be an attorney, in practice, the chief specialist had always been an attorney. Thus, in operation, the specialists were supervised by a lawyer. *Turner*, 980 S.W.2d at 564.

105. 2000 WL 249247 (Va. Cir. Ct. Mar. 1, 2000).

106. Va. Code Ann. §§ 6.1-2.19 to 6.1-2.29 (1950).

107. *Fears*, 2000 WL 249247, at *1.

108. Va. Code Ann. § 6.1-2.21(B).

109. *Id.* § 6.1-2.21(D).

settlement agents to avoid the unauthorized practice of law in conjunction with providing escrow, closing and settlement services.[110]

The court rejected the plaintiff's constitutional claims based on the special legislation clause of the Virginia constitution and claims based on the Due Process and Equal Protection clauses of the United States Constitution.[111] It then turned to the separation of powers challenge.

The Attorney General argued that CRESPA did not amount to an attempt to regulate the practice of law because CRESPA expressly defined escrow and settlement services as "administrative and clerical" rather than the practice of law. The court found this argument "untenable" because the Virginia Supreme Court, not the legislature, had the inherent power to determine what constituted the practice of law.[112] The court then proceeded to examine the activities that settlement agents were allowed to perform under the act[113] to determine if they constituted the practice of law.[114]

After examining each of the activities authorized for settlement agents, the court found that some of the activities clearly did not amount to the practice of law[115] while some were too vaguely defined to make a facial determination as to whether they amounted to the

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110. *Id.* § 6.1-2.26(B).

111. *Fears*, 2000 WL 249247, at *2-4.

112. *Id.* at *4.

113. *See* Va. Code Ann. § 6.1-2.20.

114. Under rules adopted by the Virginia Supreme Court, the practice of law occurs if:

> (1) One undertakes for compensation, direct or indirect, to advise another, not his regular employer, in any matter involving the application of legal principles to facts or purposes or desires.
>
> (2) One, other than as a regular employee acting for his employer, undertakes, with or without compensation, to prepare for another legal instruments of any character, other than notices or contracts incident to the regular course of conducting a licensed business.
>
> (3) One undertakes, with or without compensation, to represent the interest of another before any tribunal.

Fears, 2000 WL 249247, at *7 (citations omitted).

115. The court found:

> Preliminarily, activities in Code § 6.1-2.20 that clearly are not the practice of law are placing orders for title insurance, receiving and issuing receipts for money received from the parties, ordering loan checks and payoffs, ordering surveys and inspections, setting the closing appointment, receiving and disbursing funds, sending recording documents to the lender, and sending the recorded documents and the title policy to the buyer. These activities do not require the application of law to fact, do not necessarily involve the giving of legal advice, and, at most, require the creation of documents which . . . are simple and incidental to the regular business of real estate brokers.

Id. at *7. The court found that the preparation of settlement statements did not amount to the practice of law. *Id.* at *8. In addition, handling or arranging for the recording of documents and reporting federal tax information for the real estate sale to the IRS did not necessarily involve the practice of law. *Id.* at *10.

practice of law.[116] However, the court concluded that two of the activities listed in the statute did involve the practice of law: "In summary, a person or entity licensed and acting under CRESPA necessarily practices law whenever he or she determines that all closing documents conform to the parties' contract requirements or ascertains for the purposes of closing that the lenders' instructions have been satisfied."[117]

Having determined that the statute did in part attempt to regulate the practice of law, the court turned to the question of whether the statute was unconstitutional. The court noted that the purpose of the separation of powers doctrine was to prevent the exercise of the whole power of one department by another. The doctrine did not prevent some overlapping regulation.[118] Under the police power, the legislature had the power to regulate professions so long as its regulation was confined to the public's health, safety, morals or welfare, while the courts had the power to regulate the legal profession to maintain integrity and confidence in the judicial system.[119] Nonetheless, for the judiciary's power to have meaning it must necessarily displace the power of the legislature within its sphere of action. Despite this analysis the court still denied plaintiffs relief. The Virginia Supreme Court had previously adopted the state bar's unauthorized practice opinion number 183. That opinion excluded from the unauthorized practice of law the activities of settlement agents who were duly qualified and registered under CRESPA. Thus, in an odd twist to an opinion that seemed to have reached the point of declaring CRESPA unconstitutional, the court found that the legislation could not be upheld on its own, but that it had legal effect by virtue of the Virginia Supreme Court's adoption of the legislation through the bar's ethics opinion.[120] Under this analysis the Virginia Supreme Court would, of course, be free to withdraw the authority of nonlawyers to act under CRESPA.

B. *Historically, A Number of Courts, Including the Supreme Courts of California and New York, Have Rejected a Broad Negative Inherent Powers Doctrine*

Is exclusive judicial authority over the practice of law a core value of the profession? Historically, many state courts, perhaps a majority, have claimed the exclusive authority to regulate the practice of law.[121] But assertion of such a power is far from uniform. In a number of important states, including California and New York, extensive

116. *Id.* at *8-9.
117. *Id.* at *10.
118. *Id.* at *11.
119. *Id.*
120. *Id.* at *11-12.
121. Wolfram, Modern Legal Ethics, *supra* note 95, § 2.2.2.

legislative regulation of the practice of law exists.[122] Courts in these states have been willing to uphold such legislation even when it goes so far as to affect directly the court's power to discipline lawyers. For example, in *In re Paguirigan*[123] the California Supreme Court stated:

> "We long have recognized the Legislature's authority to adopt measures regarding the practice of law.... This pragmatic approach is grounded in this court's recognition that the separation of powers principle does not command a []hermetic sealing off of the three branches of Government from one another."[124]

Similarly, in *Forti v. New York State Ethics Commission*,[125] the New York Court of Appeals stated:

> Plaintiff Forti's separation of powers claim rests on the erroneous assumption that only the judiciary may regulate the practice of law, so that any legislative attempt to impose restrictions on attorneys' practices would be a usurpation of judicial power. In fact, the Legislature can—and does—regulate many aspects of the practice of law in this State (*see*, Judiciary Law art. 15). Indeed, the very power of this court to prescribe rules for the admission of attorneys is

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122. Cal. Bus. & Prof. Code §§ 6000-6228. (1990); N.Y. Jud. Law, §§ 460-496. (1983).

123. 17 P.3d 758 (Cal. 2001).

124. *Id.* at 762 (citations omitted); *accord* Obrien v. Jones, 999 P.2d 95 (Cal. 2000) (upholding against a separation of powers challenge the constitutionality of legislation authorizing executive and legislative branches to appoint three of five hearing judges to State Bar Court and eliminating lay judge position from Review Department of State Bar Court).

In *Paguirigan* the court noted that only on "rare occasions" would a legislative enactment significantly impair the court's inherent authority over the practice of law. *Paguirigan*, 17 P.3d at 763. One of the rare occasions mentioned was *Hustedt v. Workers' Compensation Appeals Board*, 636 P.2d 1139 (Cal. 1981), where the court held that a statute granting the state workers' compensation board the power to temporarily or permanently prohibit an attorney from practicing before the board was an unconstitutional infringement of the court's inherent authority to regulate the practice of law. The court first recognized that the legislature had a legitimate interest in regulating the legal profession because the legal profession and the practice of law were matters of public interest. *Id.* at 1143 & n.7. Under the police power the legislature could adopt reasonable regulations of the practice of law so long as legislative action did not "defeat or materially impair the exercise of [the constitutional] functions" of the courts. *Id.* at 1144 (citation omitted). Having adopted this cooperative standard, however, the court found that the statute in question was unconstitutional because it did materially impair the court's powers. The court reasoned that the statute gave original jurisdiction over discipline to the board and limited judicial review of the board's actions. *Id.* The court ruled that the board could either refer the matter to the normal attorney disciplinary process or institute contempt proceedings against the lawyer. *Id.* at 1148-49. Justice Newman dissented on the separation of powers issue. He pointed out that the legislature had authorized nonlawyers to appear before the board and the board had the power to discipline these lay representatives. He reasoned that attorneys who opt to appear before the board should be subject to the same rules and regulations as nonlawyers who represent clients before the board. *Id.* at 1152 (Newman, J., concurring in part and dissenting in part).

125. 554 N.E.2d 876 (N.Y. 1990).

> derived from the Legislature (*see*, Judiciary Law § 53; *see also*, § 90 [authorizing the Appellate Divisions to administer character and fitness, as well as disciplinary, procedures]).[126]

The Restatement of the Law Governing Lawyers does not take a position on the issue, but the Reporter's Note to Section 1 criticizes broad claims of exclusive judicial authority to regulate the practice of law:

> Claims of such sweeping judicial power over lawyers, exclusive of the other branches of government, are unpersuasive. They first appear in American jurisprudence only late in the 19th century. The concept has sometimes been asserted in situations in which there was no discernibly vital interest of the judicial branch in the claim of regulatory power over lawyers. Those extreme assertions are probably rooted in inter-branch politics in a jurisdiction and in its particular traditions of state constitutional law. They are undoubtedly often a reflection of the view of the court that the particular legislative intervention is an excessive or simplistic response to a complex problem. In some few states, a claim of exclusive competence to regulate lawyers is more firmly based on state constitutional provisions explicitly conferring on the judiciary the power to regulate lawyers.[127]

C. *Policy Justifications for the Negative Inherent Powers Doctrine Are Weak*

Not only is the historical claim of exclusive judicial authority to regulate the practice of law doubtful, but, as a matter of policy, the claim is weak. Some legislative attempts to regulate the practice of law or to deal with internal court affairs might be so extreme that courts would be compelled to act in order to maintain their basic functions. For example, if a legislature were to attempt to specify methods of judicial deliberation by making judicial conferences subject to open meetings laws, a court could properly declare such legislation unconstitutional.[128] But barring such extreme cases, it is difficult to see how legislative action undermines basic judicial functions.

Take, for example, the Virginia legislation discussed above which authorizes nonlawyers to handle real estate transactions. In what way does such legislation undermine any basic function of the judiciary? To say that such legislation attempts to regulate the practice of law begs the question. A proponent of exclusive judicial power might

126. *Id.* at 884-85.

127. Restatement (Third), *supra* note 37, § 1, rep. note.

128. "[A] claim of exclusive judicial power to regulate lawyers is well-founded as a general proposition of American constitutional law when intrusion by the executive or legislative branch into the court's power to regulate would significantly prejudice the judicial branch in its essential activity of adjudicating disputes." *Id.*

argue that such legislation could lead to public confusion between lawyers and nonlawyers, but well-drafted legislation could avoid this problem by prohibiting nonlawyers who perform real estate functions from holding themselves out as lawyers and by requiring their advertisements to disclaim that they are lawyers or admitted to practice law. If the legislation did not contain such restrictions, a court could employ the positive inherent powers doctrine to impose the requirements without invalidating the legislation.[129]

A proponent of the negative inherent powers doctrine could argue that consumers will not understand such disclaimers and will be unable to appreciate the value of having a lawyer. Such claims do not, however, have any empirical support. Further, there is no reason to believe that courts are in any better position than legislatures to make the determination of whether the need for consumer protection requires prohibition of certain activities rather than disclosure coupled with some form of regulation. Indeed, good reasons exist to believe that courts are not in as good a position as legislatures to make such evaluations. Judges are, after all, drawn from the practice of law and will more likely be willing to protect the interests of lawyers than legislative bodies, which are more representative of the public.

The Reporter's Note to the Restatement of the Law Governing Lawyers also expresses a skeptical view of the policy arguments in favor of a broad negative inherent powers doctrine:

> It should not be considered such an intrusion for an administrative agency to regulate the conduct of lawyers in matters pending before the agency or for the legislative branch to regulate the activities of lawyers who appear before or are members of it. Moreover, general regulation of lawyers by the legislative or executive branch that does not substantially differ from similar regulation applicable to members of other professions should not be considered to violate separation-of-powers principles. The legislature speaks for the whole electorate and can coordinate state policies concerning lawyers with other policies, although it cannot provide the continuing, detailed, and informed involvement that courts can, and it may be swayed by transient complaints.[130]

The policy argument against exclusive judicial authority over the practice of law finds support in the practice of the federal courts. The federal courts have never claimed, as against Congress, the broad negative inherent powers doctrine claimed by some state courts. In 1866 in *Ex parte Garland*,[131] the Supreme Court stated that "[t]he legislature may undoubtedly prescribe qualifications for the office [of

129. *See supra* note 95 (discussing the positive inherent powers doctrine).

130. Restatement (Third), *supra* note 37, § 1, rep. note.

131. 71 U.S. (4 Wall.) 333 (1866); *see also* Wolfram, Modern Legal Ethics, *supra* note 95, § 2.2.5 n.82.

lawyer]."[132] Congress has enacted many statutes that regulate the activities of lawyers. For example, as a result of complaints about solicitation by lawyers following air craft disasters, Congress enacted legislation prohibiting solicitation by lawyers within 45 days after a disaster.[133] Rules of procedure in the federal courts are subject to Congressional disapproval under the Rules Enabling Act.[134] Many federal administrative agencies including the Social Security Administration[135] and the Internal Revenue Service[136] provide that nonlawyers may appear before agencies. None of these intrusions into regulation of the practice of law seem to have undermined the power of the federal judiciary to any significant degree.

In summary, like the claimed core values of undivided loyalty to the client, strict confidentiality, and promotion of access to justice, the contention that the judiciary has the exclusive authority to regulate the practice of law cannot withstand either historical or policy analysis.

CONCLUSION

This article has focused on four claimed "core values" of the legal profession: undivided loyalty, strict confidentiality, promotion of access to justice, and exclusive judicial authority to regulate the practice of law. It has suggested that in deciding whether a value qualifies as a core value of the profession two issues are significant. First, what is the historical basis of the value? Second, how central is the value to the functioning of the legal profession? In each of the four instances considered in this article, the claimed value does not withstand analysis.

The concept of the core values of the professional has been more a rhetorical tool than a useful basis for analysis of proposed changes in

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132. *Garland*, 71 U.S. (4 Wall.) at 379-80.

133. The statute provides as follows:

> Unsolicited communications.—In the event of an accident involving an air carrier providing interstate or foreign air transportation and in the event of an accident involving a foreign air carrier that occurs within the United States, no unsolicited communication concerning a potential action for personal injury or wrongful death may be made by an attorney (including any associate, agent, employee, or other representative of an attorney) or any potential party to the litigation to an individual injured in the accident, or to a relative of an individual involved in the accident, before the 45th day following the date of the accident.

49 U.S.C. § 1136(g)(2) (1997). The statute is similar to the Florida Rule of Professional ethics, the constitutionality of which the Supreme Court upheld in *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995).

134. 28 U.S.C. §§ 2071-2077 (1984). Section 2074 requires submission of procedural rules approved by the Supreme Court to Congress. Such rules become effective unless disapproved by Congress. *Id.* § 2074.

135. 20 C.F.R. § 404.949 (2001).

136. 31 C.F.R. § 10.3 (2001).

rules of professional conduct. At a deeper level the appeal to core values has been used in an effort to maintain professional independence from other regulatory forces and to help sustain a professional monopoly over the delivery of legal services.[137] The profession is not well served by this rhetoric. It supports the claims of critics of the profession who assert that the profession cannot be trusted to regulate itself in the public interest. Moreover, it places the profession in the position of arguing that market forces are irrelevant to the debate over ethics. They are not. Lawyers function in a competitive market place. Although the ABA took a strong stance against MDPs, market forces are undermining the ABA's action and reducing its position to one of irrelevance.[138] Similarly, in many jurisdictions, market changes, particularly the development of title insurance, have marginalized lawyers in real estate transactions.[139] The profession would be much better served by fostering realistic debates that take into account a full range of values, including market values, rather than by using the rhetoric of core values as a kind of veto over change in rules of professional conduct.

137. For the classic study of the anticompetitive consequences of professional standards, see Milton Friedman, Capitalism and Freedom (1962); *see also* Benjamin H. Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 Ariz. St. L.J. 429 (2001) (criticizing present structure of professional regulation and proposing an alternative system narrowly tailored to defensible rationales).

138. John Gibeaut, Cash Boughs: Since the ABA's Rejection of Multidisciplinary Practices, More Law Firms are Branching Out into Law-Related Businesses, A.B.A. J., Feb. 2001, at 50; *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 (2000). The Appellate Divisions of the New York Supreme Court recently adopted rules allowing lawyers to participate in business affiliations with other professionals who provide nonlegal services. *New York Modifies Rules to Authorize Multidisciplinary Business Affiliations*, 17 Law. Manual on Prof'l Conduct (ABA/BNA) No. 16, at 464 (Aug. 1, 2001). A task force of the California Bar has recommended that lawyers be allowed to participate in fully integrated MDPs. *California Bar Task Force Floats Plan for Amending Ethics Rules to Allow MDPs*, 17 Law. Manual on Prof'l Conduct (ABA/BNA) No. 15, at 431 (July 18, 2001).

139. Michael Braunstein, *Structural Change and Inter-Professional Competitive Advantage: An Example Drawn from Residential Real Estate Conveyancing*, 62 Mo. L. Rev. 241 (1997).