

**PLACE-BASED VERSUS PRACTICE-BASED NORMS FOR AMERICAN  
LAWYERS: “IT’S THE END OF THE WORLD AS WE KNOW IT (AND I FEEL  
FINE)”**

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I. INTRODUCTION

Place-based lawyer norms regulate lawyers based on the lawyer’s location and license. Practice-based norms regulate lawyers based on the lawyer’s practice setting, in other words, whom the lawyer represents and in what context.<sup>1</sup> In the United States, the standard organization of lawyer norms has been place-based, utilizing codes of ethics, rules of professional conduct,

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1. John Leubsdorf, *Legal Ethics Falls Apart*, 57 BUFF. L. REV. 959, 960 (2009).

etc., usually adopted by the state courts of last resort, and regulating all who hold a law license in that state.<sup>2</sup> There has been some movement toward legislative establishment of practice-based regulation, such as the Sarbanes-Oxley Act (SOX)<sup>3</sup> and SEC regulations<sup>4</sup> that regulate only lawyers who represent publicly traded companies. More recently, the Corporate Transparency Act (CTA) of 2021 (pursuant to which IRS regulations are currently being drafted) purports to command a certain investigation (“know your client”) and reporting of information by lawyers who create entities for clients.<sup>5</sup> The legislation is meant to make more difficult the process of creating opaque corporate forms that are sometimes used for money-laundering.<sup>6</sup> The process of identifying assets of Russians sanctioned during the Russian invasion of Ukraine has served to intensify the need to monitor such entities and the public attention to such activities.<sup>7</sup> In recent years, major breaches of law firm and bank records have exposed an enormous volume of such activity and the tax, civil, and criminal liability that the opaque entities avoid for their owners.<sup>8</sup>

This Article will acknowledge this growing trend toward practice-based lawyer norms, point out how it allows interaction between the existing place-based norms and the new practice-based norms, and compare this movement with the existing regulatory conditions outside the US. If there is movement from the world as we know it (place-based norms) to a world as it may come to be (practice-based norms), is the change tragic, inevitable, risky, in line with the rest of the global legal profession, or all of the above and more?

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2. *See id.* at 965–67.

3. 15 U.S.C. § 7245 (providing for the establishment of rules of professional responsibility for attorneys).

4. *See* 17 C.F.R. § 205.1 (2023).

5. Corporate Transparency Act, Pub. L. No. 116-283, § 6403, 134 Stat. 4604, 4605–25 (2021).

6. Jacob Azrilyant, Article, *Shell Game: How the Corporate Transparency Act Aims to End the Illicit Use of Shell Companies, Where It Fails, and What to Do About It*, 51 PUB. CONT. L.J. 1, 2 (2021) (“[S]hell companies have increasingly been used to facilitate crime, hide ownership, and threaten U.S. national security. The Corporate Transparency Act (CTA) is a notable step toward illuminating obfuscated corporate ownership . . .”).

7. *See, e.g.*, Press Release, Fin. Crime Enf’t Network, FinCEN Alert on Potential U.S. Commercial Real Estate Investments by Sanctioned Russian Elites, Oligarchs, and Their Proxies (Jan. 25, 2023), <https://www.fincen.gov/news/news-releases/fincen-alert-potential-us-commercial-real-estate-investments-sanctioned-russian> [<https://perma.cc/283J-45VD>].

8. *See e.g.*, Will Fitzgibbon & Michael Hudson, *Five Years Later, Panama Papers Still Having a Big Impact*, INT’L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Apr. 3, 2021), <https://www.icij.org/investigations/panama-papers/five-years-later-panama-papers-still-having-a-big-impact/> [<https://perma.cc/5LBC-CXBQ>]; *Offshore Havens and Hidden Riches of World Leaders and Billionaires Exposed in Unprecedented Leak*, INT’L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Oct. 3, 2021), <https://www.icij.org/investigations/pandora-papers/global-investigation-tax-havens-offshore/> [<https://perma.cc/7QTP-9PXL>].

Specifically, how would such an evolution affect the core duty of lawyer-client confidentiality?

## II. WHY ANYONE CARES

The prospect of a move from place-based norms to practice-based norms is frightening to important groups and associations of lawyers. The imposition of Sarbanes-Oxley regulations was initially fought hard by the ABA and groups of securities lawyers.<sup>9</sup> Eventually, the ABA and SEC regulation drafters formed a somewhat collaborative stance on the drafting and there was a significant, negotiated give and take that produced the final regulations. The final regulations left lawyers alone to a greater extent than some had anticipated.<sup>10</sup>

When the FTC preliminarily decided that lawyers should be covered by its regulations pursuant to the Gramm-Leach-Bliley Act of 1999,<sup>11</sup> the ABA responded quickly, requesting a lawyer-exemption from the privacy-policy regulations.<sup>12</sup> Despite support from select members of Congress, the FTC declined to make the lawyer-exemption.<sup>13</sup> Lest the legal profession be regulated by a federal agency on this narrow topic, the ABA and the New York State Bar Association filed lawsuits in federal district court seeking to have the application of the FTC regulations to lawyers enjoined.<sup>14</sup> Nineteen state and local bar associations filed amicus briefs with the court.<sup>15</sup> The litigation succeeded and lawyers were effectively exempted from the privacy obligations of the regulations.<sup>16</sup>

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9. See Susan Saab Fortney, *Chicken Little Lives: The Anticipated and Actual Effect of Sarbanes-Oxley on Corporate Lawyers' Conduct*, 33 CAP. U. L. REV. 61, 66–68 (2004).

10. Thomas E. Spahn, Counsel, McGuireWoods LLP, Presentation at Federal Bar Association CLE Program at Fairfax, VA: Sarbanes-Oxley, the ABA Model Rules and State “Whistleblowing” Duties: The Untold Story 6–7 (Oct. 31, 2006) (transcript available online), <https://www.fedbar.org/northern-virginia-chapter/wp-content/uploads/sites/74/2019/10/2006-10-31-pdf.pdf> [<https://perma.cc/WCS9-JXXY>]; Christin M. Stephens, Comment, *Sarbanes-Oxley and Regulation of Lawyers' Conduct: Pushing the Boundaries of the Duty of Confidentiality*, 24 ST. LOUIS UNIV. PUB. L. REV. 271, 282–83 (2005).

11. 15 U.S.C. § 6805(a).

12. James E. Moliterno, *The Trouble With Lawyer Regulation*, 62 EMORY L.J. 885, 901–02 (2013); see also *Examination of the Gramm-Leach-Bliley Act Five Years After Its Passage: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs*, 108th Cong. 91–93 (2004) (statement of Dennis W. Archer, President, American Bar Association).

13. See *id.* at 93.

14. *Id.*; *N.Y. State Bar Ass'n v. FTC*, 276 F. Supp. 2d 110, 112–13 (D.D.C. 2003).

15. *Id.* at 119 n.8.

16. *Am. Bar Ass'n v. FTC*, 430 F.3d 457, 473 (2005).

Now, the fight against the CTA rages.<sup>17</sup> Although cast as a contest between place-based versus practice-based norms, the reality may lie more in who or what creates the norms than in the place/practice distinction. The main body of place-based norms are adopted by courts and enforced by bar associations. In other words, lawyers (who happen at a given moment to be judges) create and enforce the norms. Comfort attaches to that configuration. Practice-based norms are largely created by legislatures and enforced by agency personnel. Although legislatures are at times dominated by lawyers, and agency enforcement personnel are likely to be lawyers, they are not making and enforcing the practice-based norms with primary reference to the culture of lawyers. Instead, they make and enforce the regulations to solve some social or economic problem: corporate defalcation in the SOX example and money-laundering in the CTA example. This Article proposes that lawyers would not be so fearful of practice-based norms if those norms were created and enforced by lawyers in that lawyer practice-setting. In other words, there would be no measurable place-based to practice-based fear if an association of securities lawyers adopted and enforced a set of regulations for themselves and their colleagues. As a result, the place-based toward practice-based norms discussion partly misses the point: who creates and enforces norms may matter more than whether the norms are place or practice based.

John Leubsdorf, in his article *Legal Ethics Falls Apart*, started the conversation about place-based norms giving way to practice-based norms.<sup>18</sup> He observed that, while state supreme courts and bar organizations once governed the law of lawyering, federal regulators have asserted themselves in the rule making that directs the attorney-client relationship.<sup>19</sup> Leubsdorf argues legal professional obligations are now structured to some degree by federal securities laws, tax laws, bankruptcy laws, and consumer protection laws, among other federal legal regimes.<sup>20</sup> Some legal scholars have contended that the new rules brought on by federal regulators have tended to restrain the freedom of lawyers to pursue their clients' interests, in favor of making lawyers "gatekeepers" protecting the interests of the government or of opposing parties.<sup>21</sup>

Leubsdorf furthered his analysis into an analysis of different classes of lawyers that have emerged in the fragmentation of regulation. Because of the highly specialized progression of legal practice, Leubsdorf maintains that

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17. Sam Skolnik, *Lawyers Fight Bill Forcing Them to Report Suspicious Client Acts*, BLOOMBERG L. (Aug. 29, 2022, 5:30 AM), <https://news.bloomberglaw.com/business-and-practice/lawyers-fight-bill-forcing-them-to-report-suspicious-client-acts> [<https://perma.cc/KGJ3-5GAH>].

18. Leubsdorf, *supra* note 1.

19. *Id.* at 961.

20. *Id.* at 1051.

21. *Id.* at 960.

legal professionals will likely find themselves switching in and out of professional rules as they practice in different areas of law. He suggests that these unique standards and ethical codes are amplifying and diminishing professional obligations depending on a particular area of practice.<sup>22</sup>

Rather than being regulated by a single body of rules such as the ABA Model Rules of Professional Conduct, lawyers have varying duties based on their practice area.<sup>23</sup> The previously self-regulated profession by the bench and bar gave way to governmental regulation, subjecting lawyers to a “web of additional and particularized requirements,” depending on their practice.<sup>24</sup> This follows the pattern of England, where “the ideal of professional self-regulation is almost entirely demolished.”<sup>25</sup>

*A. The Distinction Between Place- and Practice-Based Norms Is Not as Stark as It Might Appear*

There has always been some degree of variance between norms governing lawyers in different practice settings, even in the application of the place-based norms. Within the place-based norms are provisions that apply specifically to lawyers based on their practice setting. Model Rule 3.8 applies specifically to prosecutors.<sup>26</sup> Model Rule 1.13 applies specifically to corporate/entity lawyers.<sup>27</sup> As well, some place-based norms implicate clearly different applications based on a lawyer’s practice setting. Model Rule 3.3, regarding revelation of client perjury, applies differently to criminal defense lawyers than to others, largely because of the interplay between the Sixth Amendment privilege and the lawyer-client privilege.<sup>28</sup>

Further, there has always been significant soft law for lawyers in different practice settings, such as various ABA Guidelines for Prosecutors<sup>29</sup> or Criminal Defense Lawyers,<sup>30</sup> and these guidelines have sometimes been used by courts when seeking to apply reasonable lawyer standards in non-disciplinary settings (e.g., malpractice, collateral relief for convicted criminal defendants, prosecutorial misconduct, or relief from conviction).<sup>31</sup>

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22. Compare *id.* at 974 (FDIC regulations amplified attorneys’ duties to corporate client), with *id.* at 998 (Congress loosened requirements for prosecutors to carry out asset forfeitures).

23. See *id.* at 960.

24. *Id.* at 961, 963.

25. *Id.* at 961.

26. MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR ASS’N 2021).

27. *Id.* at r. 1.13.

28. *Id.* at r. 3.3.

29. CRIMINAL JUSTICE STANDARDS: PROSECUTION FUNCTION (AM. BAR ASS’N 2021).

30. CRIMINAL JUSTICE STANDARDS: DEFENSE FUNCTION (AM. BAR ASS’N 2021).

31. See, e.g., *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (“Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA STANDARDS

Further still, doctrines such as lawyer-client evidentiary privilege have differing contours depending on the practice setting of the involved lawyer (criminal defense, in-house, government lawyer, etc.).<sup>32</sup> The practice setting matters in this context largely because of the nature of the specific lawyer-client relationship involved.

For example, because their clients are public-abiding entities, government lawyers and their clients have a smaller and weaker lawyer-client privilege than do private lawyers and their clients.<sup>33</sup> Two strikingly similar cases were decided regarding the Ken Starr-led investigation of the Clintons. In both cases, the investigators sought information about a series of meetings that included Hillary Clinton and White House Counsel. In one, the lawyer was the private lawyer of White House Counsel, Vince Foster.<sup>34</sup> In the other, essentially the same information was sought from government lawyers who were in the meetings.<sup>35</sup> In *Swidler & Berlin*, the Supreme Court ruled in unmistakable terms that no amount of public interest in the investigation could eviscerate the privilege.<sup>36</sup> In *In Re Grand Jury Subpoena Duces Tecum*, the court of appeals held that, because the lawyers were government lawyers, whose client is meant to serve the public interest, a balancing test would determine if the information would be available to the investigators.<sup>37</sup>

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FOR CRIMINAL JUSTICE . . . are guides to determining what is reasonable . . . .”); *State v. Martinez*, 220 A.3d 498, 523–24 (N.J. Super. Ct. App. Div. 2019) (using ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION to describe special ethical restrictions for prosecutors); *Padilla v. Kentucky*, 559 U.S. 356, 367 (2010) (citing ABA STANDARDS FOR CRIMINAL JUSTICE in determining prevailing professional norms); *Calhoun v. United States*, 568 U.S. 1206, 1208 (2013) (using the ABA Standards for Criminal Justice to illustrate a settled professional standard for prosecutors to not appeal to the prejudices of the jury); *Okeowa v. State*, 337 So. 3d 767, 774 (Ala. Crim. App. 2021) (quoting *Jones v. State*, 43 So. 3d 1258, 1278 (Ala. Crim. App. 2007)) (describing that the ABA guidelines are used to determine what is reasonable, although not determinative, for criminal defense professional norms); *State v. Wilson*, 445 P.3d 35, 42, 44 (Haw. 2019) (using ABA STANDARDS FOR CRIMINAL JUSTICE to show defense counsel should consult with defendant before making important decisions); *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006) (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)) (citing ABA STANDARDS FOR CRIMINAL JUSTICE to show the “firmly established” nature “of an American prosecutor as a minister of justice”).

32. Federal criminal litigation is not privileged in the Eighth Circuit; in-house counsel communications are not privileged when participating in predominantly business decisions; government counsel communications are not privileged when the predominant purpose is administrative rather than legal advice; and patent application communications are not privileged, as the lawyer is considered a technical writer. See 12 MATTHEW BENDER, BENDER’S FORMS OF DISCOVERY TREATISE § 5.02 (2022) (describing lawyer-client privileges as applied to different practice areas).

33. James E. Moliterno, *The Federal Government Lawyer’s Duty to Breach Confidentiality*, 14 TEMP. POL. & C.R. L. REV. 633, 633–34 (2005).

34. *Swidler & Berlin v. United States*, 524 U.S. 399, 401 (1998).

35. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 913–14 (8th Cir. 1997).

36. *Swidler & Berlin*, 524 U.S. at 410–11.

37. *Grand Jury Subpoena*, 112 F.3d at 921.

Corporate and entity lawyers and their clients experience different aspects to their lawyer-client privilege: because the corporation cannot talk except through its agents, lawyer-client privilege has developed around who speaks for the entity.<sup>38</sup> Complex analysis of waiver replaces fairly simple analysis of waiver when the client is a person.

Beyond the place- *or* practice-based norms, it has long been understood that systems exist that regulate lawyers, some of which are place-based and others of which are practice-based.<sup>39</sup> With his ground-breaking article, Professor Wilkins opened the eyes of lawyer ethics educators to see the multiple control devices beyond bar discipline that affect lawyer conduct.<sup>40</sup> The beneficial consequence was that professors began teaching students and writing about all manner of control systems beyond bar discipline.<sup>41</sup> The lawyer ethics course and almost all teaching materials that facilitate it expanded dramatically.

Lawyers are often motivated to act out of concern for malpractice liability, which is largely place-based in its details and elements. Lawyers are regulated by court rules and the sanctions they make possible, which as well are largely place-based, or at least court-system by court-system based.<sup>42</sup> Lawyers are also regulated in their conduct by market-based factors: attracting and retaining clients. Market factors cut across places and are more centered on practices because they are largely competition-based: local domestic relations lawyers are not competing against urban corporate lawyers.

An empirical study examined what motivates lawyer conduct in a range of decisions they make, such as why they are careful about meeting deadlines, why they train staff to protect client confidences, why they maintain carefully managed client trust accounts, and why they charge reasonable fees.<sup>43</sup> The results demonstrated the expected. In areas that are heavily policed by the place-based bar discipline process, such as client trust accounts, lawyers say

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38. See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

39. See David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 801, 805–09 (1992) [hereinafter Wilkins, *Who Should Regulate Lawyers?*]; David B. Wilkins, Afterword, *How Should We Determine Who Should Regulate Lawyers?—Managing Conflict and Context in Professional Regulation*, 65 FORDHAM L. REV. 465, 482–83, 489 (1996) [hereinafter Wilkins, *Managing Conflict and Context*].

40. See Wilkins, *Who Should Regulate Lawyers?*, *supra* note 39, at 805–09.

41. For example, many articles about lawyer regulation were published following Wilkins's 1992 article, and the topic itself was the subject of a later law school symposium Wilkins participated in. See Wilkins, *Managing Conflict and Context*, *supra* note 39, at 465, 487–91.

42. See, e.g., FED. R. CIV. P. 11(c) (representation to the court sanctions); *id.* at 37 (discovery sanctions).

43. James Moliterno, *Why Lawyers Do What They Do (When Behaving Ethically)*, 4 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 2 (2014).

they are motivated by fear of bar discipline.<sup>44</sup> In areas much less heavily regulated, such as fee amounts, lawyers say they are motivated not by bar discipline fear but by largely practice-based market forces.<sup>45</sup>

So, for all the reasons mentioned, it would be a serious error to say that all, or nearly all, of lawyer regulation is place-based, even though that is the generally held view. Instead, reality is more nuanced. While the baseline regulations that govern lawyers are indeed place-based, there are many other schemes through which lawyer conduct is affected and molded, many of which are driven by practice setting.<sup>46</sup>

*B. The Issue Is More About “Who Regulates” Than About Place Versus Practice*

All of the talk about place-based versus practice-based norms masks what is likely the real driver of lawyer discontent and fear regarding practice-based norms: who makes the rules, and why they make them. Place-based norms are largely made by lawyers and judges; practice-based norms are largely made by legislators.

When place-based norms are drafted and amended, the focus is on the legal profession, sometimes in a self-interested sense and sometimes not. Place-based norms are drafted and enforced by lawyers, including judges who happen at that relevant moment to be judges but share the professional education, license, and culture with practicing lawyers. Historically, when commissions are created to draft or amend place-based norms, bar associations use words like “preserve,” “protect,” and “maintain.”<sup>47</sup> Such has been the case since the 1870s, when the first lawyer codes were being adopted, and it has remained so through the most recent efforts to modify the ABA Model Rules of Professional Conduct.<sup>48</sup> This “inward and backward” looking

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44. *Id.* at 13.

45. *Id.* at 15.

46. James E. Moliterno, *Practice Setting as an Organizing Theme for a Law and Ethics of Lawyering Curriculum*, 39 WM. & MARY L. REV. 393, 394 (1998).

47. See, e.g., JAMES E. MOLITERNO, *THE AMERICAN LEGAL PROFESSION IN CRISIS: RESISTANCE AND RESPONSES TO CHANGE* 176 (Oxford University Press 2013) (quoting the ABA’s Ethics 20/20 Commission’s mission statement as “*protection* of the public; *preservation* of core professional values; and *maintenance* of a strong, independent and self-regulated profession” (emphasis added)).

48. See *id.* at 3, 7 (“Already badly out of date in 1922, the American Bar Association’s (ABA) 1908 Canons, the first effort at an official, national statement of lawyer ethics, lasted with only modest amendment until 1969.”); Letter from Charles W. Jones, Senator, to Simeon E. Baldwin, Attorney (Aug. 10, 1878), in Simeon E. Baldwin, *The Founding of the American Bar Association*, 3 A.B.A. J. 658, 682 (1917) (“[W]hen innovation and change are demanded in every quarter, there ought to be found somewhere in our system a calm conservative power . . .”).



focus serves the interests of the legal profession and its culture, including the protection of client confidences.<sup>49</sup>

But when a practice-based norm is adopted and enforced by a legislature or agency, the focus is not on preserving lawyer culture. The focus, instead, is on solving whatever problem is in the crosshairs of the legislature or agency. This is as it should be, at least for the main part. For example, if the problem at hand to be solved by the legislature is money-laundering, the effect on lawyer conduct is incidental to the effort to reduce or prevent money-laundering. It just happens that lawyers play a role in that activity, and thus, they are regulated along with other players in that activity, such as banks, the owners of the created entity where the assets will be hidden and laundered, and so on.<sup>50</sup>

And this is as it should be. Legislatures (when functioning well) solve social and economic problems, among others. They are not heavily concerned with preserving the parochial values of an insular legal profession. Of course, they should balance the social good against harms that may result from changes to collateral matters, such as the lawyer-client relationship. But those collateral matters will be treated as such.

The purpose of Sarbanes-Oxley was to “protect investors and build confidence in U.S. securities markets . . . .”<sup>51</sup> In doing so, the Act created new protections for whistle-blowers and restrained collaboration between lawyers and accounting firms.<sup>52</sup> As stated by Senator Leahy, “[t]his bill is a crucial part of ensuring that the corporate fraud and greed that have been on display in the Enron debacle can be better detected, prevented and prosecuted. We cannot legislate against greed, but we can do our best to make sure that greed does not succeed.”<sup>53</sup> A thorough reading of the legislative history reveals no solicitude for lawyer-client confidentiality. Lawyers, like accountants, are simply the means by which egregious corporate frauds were facilitated and hidden from the eyes of authorities who could have prevented life-changing losses to shareholders and employees.<sup>54</sup>

Similarly, the purpose of the CTA is to reduce money laundering, which is well understood to be facilitated by lawyers who create opaque entities

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49. MOLITERNO, *supra* note 47, at 1 (“The legal profession tends to look inward and backward when faced with crisis and uncertainty.”); *see also id.* at 224 (“[T]he legal profession . . . seems to have eyes in the back of its head. But not on its face.”).

50. *See* Leubsdorf, *supra* note 1, at 1053–54 (“[L]awyers work with clients in many differing economic areas, each of which has its own regulatory system. . . . [L]awyers must accept the universe.”).

51. *Carnero v. Bos. Sci. Corp.*, 433 F.3d 1, 8 (1st Cir. 2006).

52. *See* 107 CONG. REC. 2946, 2948 (2002).

53. *Id.* at 2945.

54. *See id.* at 2948.

within which clients may hide their wealth.<sup>55</sup> Inside such entities, client wealth is shielded from view of legitimate creditors, enforcers of criminal liability against corruptly or criminally acquired wealth.<sup>56</sup> Along with banks, accountants, financial advisors, and others, lawyers are critical to such clients' criminal and fraudulent schemes. The CTA aims to shine light on these entities and the professionals who assisted clients in using them to hide wealth. The Act specifically provides in its declaration of purpose:

It is the purpose of this subchapter (except section 5315) to--

(1) require certain reports or records that are highly useful in--

(A) criminal, tax, or regulatory investigations, risk assessments, or proceedings; or

(B) intelligence or counterintelligence activities, including analysis, to protect against terrorism;

(2) prevent the laundering of money and the financing of terrorism through the establishment by financial institutions of reasonably designed risk-based programs to combat money laundering and the financing of terrorism;

(3) facilitate the tracking of money that has been sourced through criminal activity or is intended to promote criminal or terrorist activity;

(4) assess the money laundering, terrorism finance, tax evasion, and fraud risks to financial institutions, products, or services to--

(A) protect the financial system of the United States from criminal abuse; and

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55. See STEVEN MARK LEVY, *FEDERAL MONEY LAUNDERING REGULATION: BANKING, CORPORATE AND SECURITIES COMPLIANCE* § 2.13 (2d ed. Supp. 2022); Azrilyant, *supra* note 6, at 2–3.

56. See Reid Weisbord, *A Catharsis for U.S. Trust Law: American Reflections on the Panama Papers*, 116 COLUM. L. REV. ONLINE 93, 99 (2016) (“[I]ndividuals . . . immunize[d] their *own* assets from their *own* creditors by transferring property to judgment-proof offshore trust havens beyond the jurisdictional reach of the settlor’s unpaid creditors. It is, therefore, unsurprising that offshore spendthrift trusts have been used to shelter the illegal fruits of tax evasion, fraud, and money laundering.”).

(B) safeguard the national security of the United States; and

(5) establish appropriate frameworks for information sharing among financial institutions, their agents and service providers, their regulatory authorities, associations of financial institutions, the Department of the Treasury, and law enforcement authorities to identify, stop, and apprehend money launderers and those who finance terrorists.<sup>57</sup>

As with Sarbanes-Oxley, the purpose statement is in no way solicitous of the culture of lawyers or the lawyer-client relationship. Of course, it is yet to be seen whether the Treasury regulations drafted pursuant to the CTA will be produced in cooperation with the legal profession.

Lawyers regularly debate whether a lawyer approached by such a client should wish to learn as little as possible or as much as possible about the sources of the client's wealth and the client's intentions regarding the opaque entity. To be sure, the lawyer who learns as little as possible is likely to avoid any bar discipline<sup>58</sup> or criminal liability<sup>59</sup> for the client's unlawful acts of hiding their ill-gotten wealth. But the lawyer who learns as much as possible can opt to decline the work of setting up such an entity, and in that way can not only avoid liability but also temporarily stymie the client's scheme. It may be likely that the next lawyer on the client's list will wish to know little and will set up the entity, but every frustration and delay for a client bent on pursuing criminal or fraudulent concealment of wealth slightly increases the risk of detection by authorities charged with policing such illegal activity. The CTA, showing little regard for lawyer-client confidentiality in such circumstances, seeks to command lawyers to know more and say more about their clients' schemes.<sup>60</sup> If the CTA worked perfectly, which is improbable, the lawyer who remains blissfully ignorant of client wrongdoing would be made extinct.

Of course, the focus on solving social issues over the focus on lawyer culture is precisely what frightens lawyers about practice-based, legislatively created regulation.<sup>61</sup> Such regulation will be created without primary consideration of lawyer culture and the legal profession. Indeed, in this particular example, the regulation is targeting bad conduct by lawyer's clients that is facilitated by lawyers. A law meant to diminish such conduct should not be expected to be exceptionally solicitous of the lawyer-client relationship

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57. 31 U.S.C. § 5311.

58. See MODEL RULES OF PRO. CONDUCT r. 1.2(d) (AM. BAR ASS'N 2021).

59. See MODEL PENAL CODE § 2.06 (AM. L. INST. 2021) (accomplice liability).

60. See U.S.C. § 5336(b)(1)(B)–(C) (required reporting regulations).

61. See MOLITERNO, *supra* note 47, at 224.

that is facilitating the social problem in the first place. What frightens lawyers is simple: rules made by legislatures to regulate lawyer conduct in some targeted context will not have as their first purpose (or any purpose) the maintenance of the longstanding core values of the legal profession.

There was a time when lawyers dominated legislatures, including Congress, and the prospect of legislative regulation should not have been so frightening.<sup>62</sup> But today, and going forward, the portion of legislative bodies made up of lawyers is on the decline.<sup>63</sup> Now, more than ever, lawyer associations fear legislative regulation.

Late in the 19th Century, when the ABA was founded, lawyers dominated Congress, with more than 75% of its membership holding law degrees.<sup>64</sup> By the late 1960s, when the ABA adopted the Model Code of Professional Responsibility, the percentage had been reduced to 57.5%.<sup>65</sup> When the Model Rules of Professional Conduct were adopted in the early 1980s, including the “other law” exception to the confidentiality rule, the percentage had fallen further to 48%.<sup>66</sup> By the time of the Enron debacle and the passage of Sarbanes-Oxley, the percentage had fallen further, to about 40%,<sup>67</sup> yet the process of adopting regulations by the SEC was seen as a largely cooperative enterprise between lawyers and agency regulation-drafters.<sup>68</sup> Now, when the percentage has fallen to an all-time low (36.5% in 2016),<sup>69</sup> lawyers do not expect such a collaborative spirit being adopted by Treasury Department regulation-drafters.

### III. WHERE PLACE-BASED AND PRACTICE-BASED NORMS MEET

There is at least one obvious point of contact between place-based and practice-based norms, especially as relates to lawyer-client confidentiality.

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62. See Nick Robinson, *The Decline of the Lawyer-Politician*, 65 BUFF. L. REV. 657, 672–74 tbl.2 (2017).

63. See *id.* at 674 tbl.2.

64. *Id.* at 673 tbl.2.

65. *Id.*; *Model Rules of Professional Conduct: About the Model Rules*, AM. BAR ASS’N, [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/#:~:text=The%20ABA%20Model%20Rules%20of,Model%20Code%20of%20Professional%20Responsibility](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/#:~:text=The%20ABA%20Model%20Rules%20of,Model%20Code%20of%20Professional%20Responsibility) [https://perma.cc/5EH8-D93N].

66. Robinson, *supra* note 62, at 674 tbl.2; *About the Model Rules*, *supra* note 65.

67. Robinson, *supra* note 62, at 674 tbl.2; Adam Hayes, *What Was Enron? What Happened and Who Was Responsible*, INVESTOPEDIA (Oct. 1, 2022), <https://www.investopedia.com/terms/e/enron.asp#:~:text=and%20Tyco%20International.,The%20Enron%20Scandal,were%20finally%20exposed%20in%202001> [https://perma.cc/RE3R-882H].

68. See, e.g., Letter from Dixie Johnson, Comm. on Fed. Regul. of Sec. Chair, Am. Bar Ass’n, to Jonathan G. Katz, Sec’y, SEC (Nov. 28, 2005) (on file with author).

69. Robinson, *supra* note 62, at 674 tbl.2.

The “other law” exception to the place-based confidentiality rule<sup>70</sup> analytically connects some practice-based norms to the traditional place-based norms and does so in a way that avoids the often-insurmountable political challenges of pushing provisions through the ABA House of Delegates and then through state high courts. In the traditional norms, the “other law” confidentiality exception permits or requires revelations when other law commands<sup>71</sup> (or in DC for government lawyers, “permits”)<sup>72</sup> such revelation. Rather than face the daunting task of pushing new exceptions to confidentiality through the ABA process, a statute such as the CTA of 2021 requires such disclosures that mesh into the “other law” exception.<sup>73</sup> The range of possibilities is as limitless as the social and economic problems a legislature might choose to solve.

The “other law” exception can affect both Main Street and Wall Street lawyers (where Main Street lawyers represent ordinary people and small businesses; Wall Street lawyers represent corporations).<sup>74</sup> When there was a push in the late 1990s and early 2000s to gain approval for U.S. lawyers to engage in Multidisciplinary Practices (MDPs), at first it was the Wall Street lawyers who wanted it.<sup>75</sup> They wanted—and still want—to partner with major accounting firms to produce “one-stop professional services shopping” for their clients.<sup>76</sup> It then emerged that many Main Street lawyers favored permission for MDPs as well, wanting to partner in small towns with social workers, local bankers and financial advisors, and even tow-truck services, depending on the nature of the small-town lawyers’ practice.<sup>77</sup>

The application of the “other law” exception is normally routine. When banks are obliged to file periodic reports with banking regulators regarding loans made, assets, and liabilities of the bank, the lawyer may be involved in making those disclosures and is permitted to make them because of the “other law” exception, even if the client does not give formal consent to the

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70. MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 12 (AM. BAR ASS’N 2021) (“Other law may require that a lawyer disclose information about a client.”).

71. *Id.* at cmt. 3 (“A lawyer may not disclose such information except as authorized or required by the RULES OF PROFESSIONAL CONDUCT or other law.”).

72. D.C. RULES OF PRO. CONDUCT r. 1.6 cmt. 22 (D.C. BAR ASS’N 2021) (“If, however, the other law requires disclosure, paragraph (e)(2)(A) permits the lawyer to make such disclosure as is necessary to comply with the law.”).

73. *Cf.* Moliterno, *supra* note 33, at 644 (“The [Whistle Blower Protection] Act’s real protection against bar discipline comes from its status as other law that permits disclosure, taking the material revealed outside the protection of the duty of confidentiality.”).

74. *See* MOLITERNO, *supra* note 47, at 162.

75. *See id.* at 170.

76. *Id.* at 162–63.

77. *Id.* at 162.

revelations.<sup>78</sup> The adoption of the “other law” exception was largely motivated by such routine, non-controversial circumstances.<sup>79</sup>

But beyond the routine applications of the “other law” exception, it might be easy to think of the “other law” exception as focused primarily on Wall Street lawyers. The securities lawyers subject to “other law” disclosures mandates by SOX and the corporate-creation lawyers subject to CTA come immediately to mind. But non-routine applications of the “other law” exception that are triggered by external statutes can, without much imagination, include Main Street lawyers as well. In Europe, there is movement toward requiring not only medical personnel but also lawyers and others to report acts of domestic violence.<sup>80</sup> It is not hard to imagine a state legislature in the U.S. adopting such a statute, triggering the lawyers in that state to use the “other law” exception to authorize or require their disclosures of past acts of violence that would otherwise be kept confidential. Likewise, in the immediate context of the 2020s, all manner of statutes requiring disclosure of information, even by lawyers, is easy to imagine: information about a medical facility’s provision of abortion services, and information about a teacher “indoctrinating” students regarding “divisive” topics, to name a few. Main Street lawyers representing local school boards, local medical facilities, and local citizens would be those most likely to be required by “other law” exceptions to disclose such information.

The “other law” exception appears to give a lawyer discretion to reveal otherwise-confidential information when the introductory phrase in a state’s version of the Model Rule 1.6 exceptions uses “may” language.<sup>81</sup> Their *discretion* may shift to an *obligation* when other law requires such disclosures, such as child abuse reporting statutes.<sup>82</sup>

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78. See Margaret Shea Burnham, *The New Corporate Transparency Act and its Potential Impact on North Carolina Commercial Real Estate Attorneys*, NEXSEN PRUET: NEWSROOM (Aug. 31, 2021), <https://www.nexsenpruet.com/publication-the-new-corporate-transparency-act-nc> [<https://perma.cc/FAH9-DBV6>].

79. See CTR. FOR PROF. RESP., AM. BAR ASS’N, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2013, at 123–24, 130–35 (Art Garwin ed., 2013); see also Peter R. Jarvis & Trisha M. Rich, *The Law of Unintended Consequences: Whether and When Mandatory Disclosure Under Model Rule 4.1(b) Trumps Discretionary Disclosure Under Model Rule 1.6(b)*, 44 HOFSTRA L. REV. 421, 426–27 (2015) (describing the history of the adoption of Model Rule 1.6(b)(6)).

80. European Commission Press Release IP/22/1533, International Women’s Day 2022: Commission Proposes EU-wide Rules to Combat Violence Against Women and Domestic Violence (Mar. 8, 2022).

81. See, e.g., Donald R. Lundberg & Charles M. Kidd, *Survey of the Law of Professional Responsibility: You Say You Want an Evolution?: An Overview of the Ethics 2000 Amendments to the Indiana Rules of Professional Conduct*, 38 IND. L. REV. 1255, 1277 (2005).

82. *Id.* at n.88.

A. *Why Trudge Through the Daunting ABA Model Rule Amendment Process When Adopting “Other Law” Will Do Just as Well?*

Despite lacking formal power, the ABA effectively spoke for the profession early in its existence at the end of the nineteenth century and is the best evidence of the views of the twentieth- and twenty-first-century legal profession, especially when it has been followed by all or nearly all state bars.<sup>83</sup> The process of reform through the ABA House of Delegates has proven to be daunting.

The original Model Rules proposals in the early 1980s permitted Multi-Disciplinary Practices (the Kutak Commission), but those provisions were deleted when it was clear they would be defeated in the ABA House of Delegates.<sup>84</sup> The turn of the twenty-first century report of the multijurisdictional practice commission reads as if they will recommend abolishing state-by-state bar licenses, reciting dramatic changes in communication, travel, and business, but the internal ABA politics would not allow anything so bold.<sup>85</sup> The proposals to adopt some financial fraud exceptions to the confidentiality rule (Model Rule 1.6) failed in the late 1990s, then again in 2000, and only passed after intense government pressure following the Enron financial debacle.<sup>86</sup> When MDPs re-emerged, the Ethics 2000 Commission considered them out-of-bounds even for consideration because of the politics of gaining ABA House of Delegates approval.<sup>87</sup>

The ABA House of Delegates is the policy-making body of the association and meets twice a year.<sup>88</sup> A study commission must keep proposals modest to get the House of Delegates’ approval, and little real reform has passed the ABA House of Delegates gauntlet over the past forty years.<sup>89</sup>

The Model Rules and accompanying comments were amended fourteen times between 1983 and 2002.<sup>90</sup> The ABA Model Rules of Professional Conduct were thoroughly reviewed and revised between 1997 and 2002 by

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83. MOLITERNO, *supra* note 47, at 7, 13.

84. *See id.* at 165–66.

85. *See id.* at 197.

86. *See id.* at 204–05.

87. *Id.*

88. *ABA House of Delegates*, AM. BAR ASS’N [https://www.americanbar.org/groups/leadership/house\\_of\\_delegates/](https://www.americanbar.org/groups/leadership/house_of_delegates/) [<https://perma.cc/6RRS-WEAY>].

89. MOLITERNO, *supra* note 47, at 203.

90. *Model Rules of Professional Conduct: Preface*, AM. BAR ASS’N (Apr. 13, 2020) [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_preface/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preface/) [<https://perma.cc/Z98E-PSGL>].

the Ethics 2000 Commission.<sup>91</sup> The ABA Multijurisdictional Practice Commission was formed in 2000 to address problems relating to lawyers practicing in jurisdictions they were not licensed in.<sup>92</sup> Despite describing the explosion of global communication, global travel, and cross-border business and professional activity, this Commission affirmed state-by-state judicial regulation of the practice of law.<sup>93</sup>

By contrast, practice-based norms will mainly reflect the values and policies of the legislature and government agency that adopts them. The legal profession must find its way to sufficiently protect core lawyer-client values, while accounting for the larger public interests being served by the practice-based norms.

*B. European Sources of Lawyer Norms Differ Significantly from US Sources*

The European source of law governing lawyers, the state parliament,<sup>94</sup> has always contrasted with the traditional U.S. source, the courts. Historically, U.S. lawyers have opposed the adoption of statutes that regulate lawyers,<sup>95</sup>

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91. *Id.*; Lucian T. Pera, *Grading ABA Leadership on Legal Ethics Leadership: State Adoption of the Revised ABA Model Rules of Professional Conduct*, 30 OKLA. CITY U. L. REV. 637, 637 (2005).

92. Pera, *supra* note 91, at 640–41.

93. COMM’N ON MULTIJURISDICTIONAL PRAC., AM. BAR ASS’N, REPORT 201A, REPORT TO THE HOUSE OF DELEGATES (2002), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mjp\\_migrated/201a.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mjp_migrated/201a.pdf) [<https://perma.cc/4NL8-HERK>].

94. *See, e.g.*, Legal Services Act 2007, c. 29 (U.K.); Bundesrechtsanwaltsordnung [BRAO] [Federal Code for Lawyers], Aug. 1, 1959, GBGI I at 1146, as amended July 15, 2022 (Ger.).

95. MOLITERNO, *supra* note 47, at 177 (“Among the profession’s chief fears has been the fear of sharing power. It has held tight to its claims of self-regulation when those claims have long since become highly questionable.”); Roger C. Cramton et al., *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILL. L. REV., 725, 729 (2004) (“The organized bar . . . lobbied Congress, arguing that the federal government should stay out of lawyer regulation because state regulatory authorities could be counted on to enact and implement appropriate reforms to address the question of lawyer acquiescence or involvement in corporate fraud.”); MOLITERNO, *supra* note 47, at 234 (“Even in this instance of regulation coming from government action, the ABA used a ‘saturation bombing attack’ to stave off the originally proposed version of the SEC regulations that would have increased the obligations of lawyers to report up the ladder.”); *id.* at 235–36 (“Lest the legal profession be regulated by a federal agency on this narrow topic, the ABA and the New York State Bar Association filed lawsuits in federal district court seeking to have the application of the FTC regulations to lawyers enjoined. Nineteen state and local bar associations filed amicus briefs with the court.”); Lawrence J. Fox, *The Academics Have It Wrong: Hysteria Is No Substitute for Sound Public Policy Analysis in ENRON: CORPORATE FIASCOES AND THEIR IMPLICATIONS* 851, 866 (Nancy Rapoport & Bala Dharan eds., 2004) (“A foundation of our independent profession is that our rules of professional



while that is the norm in most of the world.<sup>96</sup> The basis of this objection has been that the legal profession depends on being self-regulated. Lawyers, who happen to be judges at that moment, adopt the regulations governing lawyers, and lawyers in bar association disciplinary committees provide the initial enforcement of those norms. As practice-based norms are adopted in the U.S., the global regulation of lawyers will move in the direction of European systems and away from the traditions of U.S. systems, with the notion of self-regulation being further eroded.

In the European civil law tradition, the law governing lawyers is created as are other laws regulating other matters, including other professions: the legislature adopts the law and the courts apply that law. The law regulating lawyers and the legal profession begins with a Law on Lawyers, or Law on Advocates, adopted by the legislature.<sup>97</sup> That law will describe how one becomes a lawyer (advocate) in that country and the most basic lawyer rights and duties.<sup>98</sup>

Often, but not always, that law creates a bar association and delegates limited powers to that lawyer association.<sup>99</sup> That delegation most often includes power to adopt a code of conduct or code of ethics.<sup>100</sup> Some such codes are not enforceable; others are enforced initially by a bar association body (e.g., Ethics Commission), with review by either courts or some government body.<sup>101</sup>

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conduct are promulgated by the states . . . [T]here is no greater threat to lawyer independence than having anyone other than courts establish the lawyer rules for practice.”)

96. JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* (Stanford University Press, 4th ed. 2007); MOLITERNO, *supra* note 47, at 233–34 (“[T]he mood for such [government] regulation is far different in the United States from, for example, the United Kingdom, and certainly from typical civil law jurisdictions. The independence of the legal profession from government power, as is true for judicial independence as well, is far more pronounced in the United States than elsewhere. In most civil law jurisdictions, the legal profession is explicitly subject to a ministry of justice or its equivalent.”).

97. *See Professional Regulations*, COUNCIL OF BARS AND L. SOC’YS OF EUR. (CCBE), <https://www.ccbe.eu/documents/professional-regulations/> [https://perma.cc/84QK-9Y4T] (listing European laws on advocates).

98. *See e.g.*, Bar Act, Apr. 9, 1993, OG RS No. 18-817/1993 at Arts. 5, 25, as amended Apr. 5, 2001 (Slovn.).

99. *See, e.g.*, Změna zákona o advokacii [Act on the Legal Profession] Zákona č. 85/1996 Sb. (Czech); BAR ACT [OFFICIAL GAZETTE OF THE REPUBLIC OF SLOVENIA] art. 43 (Slovn.) (“The Bar Association shall be a legal entity.”); ADVOKATURISEADUS [BAR ASSOCIATION ACT] [CIVIL CODE] ch. 1, § 1 (Est.) (establishing Estonia’s Bar Association Act).

100. *See, e.g.*, BAR ACT [OFFICIAL GAZETTE OF THE REPUBLIC OF SLOVENIA] art. 43 (Slovn.) (“The Bar Association shall be a legal entity.”).

101. *See, e.g.*, NETHERLANDS BAR ASSOCIATION, *THE RULES OF CONDUCT OF ADVOCATES 1992* (2009), [https://www.ccbe.eu/fileadmin/speciality\\_distribution/public/documents/National\\_Regulations/DEON\\_National\\_CoC/EN\\_Netherlands\\_The\\_Rules\\_of\\_Con](https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/National_Regulations/DEON_National_CoC/EN_Netherlands_The_Rules_of_Con)

Unlike the U.S., such law is created in the first instance by elected officials of the government (members of parliament). The parliament may have some lawyer members, but its members will always include those from many walks of life, businesspeople, farmers, technologists, social welfare workers, and so on, including full-time politicians.<sup>102</sup>

These contrasting systems surely have advantages and disadvantages, but without regard to better or worse, the differences have consequences.

First, the U.S. system relies exclusively on the law-trained to regulate lawyers. The law-trained presumably have greater expertise in the work of lawyers and perhaps will make more appropriate rules that will honor the work of lawyers. But such a system is highly insular and can be stifling in its myopia.<sup>103</sup> There is wisdom about human relationships, business, technology and more that is lacking in lawyer-drafted lawyer regulation. A well-functioning parliament has those other aspects of wisdom within its ranks and may make law governing lawyers with the interests of other aspects of society in mind.<sup>104</sup>

Second, the source of law regulating a profession affects that profession's psyche and ethos. Civil law lawyers are regulated by the government. U.S. lawyers, for the most part, are not regulated by the government. This difference may account for the U.S. lawyer's willingness and even zeal about fighting the government on behalf of a client. Civil law lawyers will challenge government for a client, to be sure, but they do not relish the act as U.S. lawyers seem to relish it.

#### IV. ONE LEGAL PROFESSION OR MULTIPLE LEGAL PROFESSIONS?

The relationships among judges, prosecutors, and private legal professionals matter. For example, in some places, there is truly a single legal profession with branches that are mostly career choices.<sup>105</sup> In other places, there are multiple legal professionals, with judges, prosecutors, and private professionals thinking of themselves as different professions and interacting only in the ways designed by the legal system for them to interact.<sup>106</sup>

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duct\_of\_Advocates.pdf [https://perma.cc/3WBP-98MN] (“[These rules] shall not be binding in the sense in which the rules laid down in the by-laws of the Netherlands Bar Association are binding. They are meant as guidelines to advocates in exercise of their profession.”); Federal Code for Lawyers, Aug. 1, 1959, GBGI I at 1146, as amended July 15, 2022, GBGI I at 1146, § 74a (Ger.) (establishing that a bar association council's disciplinary decision can be appealed to an independent lawyer's disciplinary court).

102. See e.g., RICHARD CRACKNELL & RICHARD TUNNICLIFFE, HOUSE OF COMMONS LIBR., SOCIAL BACKGROUND OF MPS 1979–2019, at 24 (2022).

103. See MOLITERNO, *supra* note 47, at 216.

104. See *id.* at 240.

105. See *infra* text accompanying notes 107–19.

106. See *infra* text accompanying notes 120–24.

The existence of one or many legal professions affects the culture and the functionality of the operation and application of law. The primary fault lines exist along the definitions of judges, prosecutors, and private legal professionals. Whether these three are one profession with various career-choice branches or three distinct professions is largely determined by the training, professional mindset, and typical professional organizations of the three professions/branches.

In the U.S., the three are essentially one legal profession. Aspiring lawyers, judges, and prosecutors all receive the exact same legal education. Upon graduation, all three seek a law license in whatever state or states may be relevant to their future. Primarily, this law license, after graduation, is obtained by passing a bar exam and a character and fitness examination.<sup>107</sup> The same bar exam and character and fitness examination is applied no matter what career aspiration the particular individual may have.<sup>108</sup> Upon crossing these hurdles, the person is a lawyer and may seek a job in the private sector or with a prosecution office or other government employer, for example. Although judge positions are rarely available to recent graduates, no further education, training, or license is required to obtain a judgeship.<sup>109</sup> And the means to obtain a judgeship are varied among the states, from popular election to appointment by a state legislature or governor.<sup>110</sup> It is well understood that a judge or a prosecutor may easily return to being a private lawyer, provided they solve some possible conflicts of interest for at least some period of transition.<sup>111</sup> Likewise, it is common for a prosecutor to become a judge, and it is somewhat less common for the career transition to function the other way

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107. *Overview of Bar Admissions Information*, AM. BAR ASS'N (June 26, 2008), [https://www.americanbar.org/groups/legal\\_education/resources/bar\\_admissions/basic\\_overview/](https://www.americanbar.org/groups/legal_education/resources/bar_admissions/basic_overview/) [<https://perma.cc/PB3M-KT3X>] (“In order to obtain a license to practice law, almost all law school graduates must apply for bar admission through a state board of bar examiners. . . . The second area of inquiry by bar examiners involves the character and fitness of applicants for a law license.”).

108. See Mary Dunnewold, *The Other Bar Hurdle: The Character and Fitness Requirement*, AM. BAR ASS'N FOR L. STUDENTS: STUDENT LAWYER (Dec. 1, 2013), <https://abaforlawstudents.com/2013/12/01/bar-hurdle-character-fitness-requirement/> [<https://perma.cc/A6EG-GGDY>].

109. Nancy Joseph, *Would United States Judges Benefit from More Graduate Training?*, at 5 (2016) (LL.M. dissertation, Duke University School of Law) (on file with the Duke Law Scholarship Repository).

110. *Comparing Federal & State Courts*, U.S. COURTS, <https://www.uscourts.gov/about-federal-courts/court-role-and-structure/comparing-federal-state-courts> [<https://perma.cc/QV6J-X5AS>]; *Methods of Judicial Selection*, FUND FOR MODERN COURTS, <https://moderncourts.org/programs-advocacy/judicial-selection/methods-of-judicial-selection/> [<https://perma.cc/ETC7-R75N>] (discussing the methods of judicial selection and listing election and appointment as the “two primary methods” of selection).

111. MODEL RULES OF PRO. CONDUCT r. 1.11 (AM. BAR ASS'N 2021); *id.* at r. 1.12.

around.<sup>112</sup> But in any event, no new education, training, or license is needed to make these career transitions.

Further, in the common law tradition, private lawyers understand that when they win a case, they contribute to the law-making process. Often, judicial opinions borrow heavily from the briefs and arguments made by winning counsel, and no one considers this an act of plagiarism.<sup>113</sup> On the contrary, the winning lawyer is delighted to have pages of his or her brief appear with minor editing in the judge's opinion. The lawyer and the judge have a shared mindset of participation in law making.

Prosecutors, while of course being state agents, are also perceived as lawyers with a special client.<sup>114</sup> In this respect, they are only in modest ways different from the private lawyer. To be sure, some obligations attend the prosecutor's role,<sup>115</sup> but it is possible to see most of these differences as driven by the special nature of the prosecutor's client.<sup>116</sup> Unlike the private lawyer's client, the prosecutor's client is public-abiding, and the prosecutor must always seek the public good rather than mere winning.<sup>117</sup>

Although judges often take a kind of leave, they belong to the bar association and often attend bar activities and meetings, whether educational meetings, conferences, or even committees that may propose improvements in law. In this respect, U.S. lawyers, judges, and prosecutors may find themselves working together and sharing fellowship.<sup>118</sup>

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112. Compare, e.g., Clark Neily, *Are a Disproportionate Number of Federal Judges Former Government Advocates?*, CATO INSTITUTE (May 27, 2021), <https://www.cato.org/study/are-disproportionate-number-federal-judges-former-government-advocates> [<https://perma.cc/K6AG-82E6>] (finding that over 44% of federal judges are former government advocates), with Stephen B. Burbank et al., *Leaving the Bench, 1970–2009: The Choices Federal Judges Make, What Influences Those Choices, and Their Consequences*, 161 U. PA. L. REV. 1, 13–14 (2012) (reporting that, in four decades, only one federal judge became a prosecutor—Deputy Attorney General—upon leaving the bench).

113. See RICHARD A. POSNER, *THE LITTLE BOOK OF PLAGIARISM* 21 (2007) (“Judges or their clerks sometimes insert into their opinions, without attribution, verbatim passages from lawyers’ briefs, and many orders, findings of fact, and other documents signed by judges are actually prepared entirely by the parties’ lawyers, again without attribution. Yet judges sign their opinions and orders as if they were the sole authors, and they refer to one another’s opinions as if written by the judge named as the author. . . . Nevertheless the publishing of a law clerk’s draft under the judge’s name is not plagiarism.”).

114. Moliterno, *supra* note 33, at 633–34.

115. MODEL RULES OF PRO. CONDUCT r. 3.6 (AM. BAR ASS’N 2021); *id.* at 3.8.

116. Moliterno, *supra* note 33, at 633.

117. *Id.*

118. See, e.g., *Litigation Section*, L.A. CNTY. BAR ASS’N, <https://lacba.org/?pg=litigation-home-page> [<https://perma.cc/6WC2-BL33>] (“The Litigation Section is comprised of a diverse group of judicial officers and attorneys representing plaintiffs, defendants and the government in federal and state civil litigation within Los Angeles County.”); *Committee and Section Leadership*, HENNEPIN CNTY. BAR ASS’N, <https://www.mnbar.org/hennepin-county-bar->

Judges, and prosecutors as well, have almost always been private lawyers before becoming public legal professionals.<sup>119</sup> In this way, they have a sense of what it means to represent a private client's interests in court and otherwise.

All of this combines to mean that the U.S. legal profession is a single profession with three main branches.

By contrast, in most of Europe and Asia, there are really three (at least) legal professions. Most often, legal education begins in a university and is shared by all three professions.<sup>120</sup> But, for the most part, at some stage the three professions part company. An aspiring judge or prosecutor may not need to take the same professional exam as the private lawyer or join the same bar association and start with the same license.<sup>121</sup> Instead, the aspiring judge finishes university education and turns to whatever process his or her country has designed for aspiring judges,<sup>122</sup> which may include further education or an internship or both. The same is true for prosecutors, although here there is overlap between prosecutors and judges in some countries.<sup>123</sup> This critical juncture causes judges, prosecutors, and private lawyers to separate into their own professions. Under these circumstances, it is rare for a person to transition from one of the three professions to another.<sup>124</sup> It is rare for them to be in the same ballroom for a professional meeting or seminar. And because the judge and prosecutor have experienced different post-university education than the private lawyer, a sense of distance and often superiority is fostered.

On one hand, the U.S. judge or prosecutor has arguably missed out on the specialized training and education that is experienced by their European judge

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association/about-hcba/sections/committee-and-section-leadership [https://perma.cc/DZ3Z-AWB5] (enumerating judges and attorneys as Committee Chairs); *About Us*, WESTCHESTER CNTY. BAR ASS'N, <https://www.wcbany.org/?pg=seccom> [https://perma.cc/LU2E-HP43] (listing judges and attorneys as chairs or co-chairs of Westchester County Bar Association Sections and Committees); *Professionalism*, VA. STATE BAR, <https://www.vsb.org/site/about/professionalism> [https://perma.cc/GY5A-5D3P] (listing judges and attorneys as members of the Virginia State Bar's Standing Committee on Professionalism).

119. See MERRYMAN & PÉREZ-PERDOMO, *supra* note 96, at 104 (“[In the United States, ] [a]lthough many young graduates start out as private attorneys, government lawyers, or members of the legal staff of corporations, . . . it is common for them to change from one branch of the profession to another. . . . If they have a successful career, they may ultimately secure an appointment as a state or federal judge.”).

120. See *id.* (“[I]n civil law jurisdictions . . . a choice among a variety of distinct professional careers faces young law graduates. . . . They must make this decision early in life and then live with it.”).

121. *Id.* at 105–108.

122. *Id.* at 105–06.

123. *Id.* at 105–07 (describing a process of “judicialization” of public prosecutor service in civil law jurisdictions, which trends towards but has not yet reached “a merger of the two functions”).

124. *Id.* at 104.

or prosecutor counterpart. On the other hand, the common esprit de corps of U.S. legal professionals is entirely missing in most of Europe and Asia.

The German system, and countries following it, tries to strike a middle ground. All legal professionals, as a required part of the basic legal education, must successfully engage in an extensive period of internship placements in all three settings—private lawyer, prosecutor, judge.<sup>125</sup> In this way, before the judge and prosecutor aspirants go their separate ways from the private lawyers, they have at least obtained a small taste of private law practice. And, those who become private lawyers have seen some time in a judge's chambers and prosecutor's office. Once parted, however, the three professions rarely touch outside their separate roles in the courtroom, they do not belong to a common professional organization, and movement from one profession to another is rare.<sup>126</sup>

The consequences of “one profession or three” are real. The divisions between judges and prosecutors can produce a competition over which group is the more powerful in the criminal justice realm. Prosecutors bring charges, and judges decide their merits, giving judges what appears to be an obvious upper hand. But in some countries at some times, a judge's failure to convict may be met with a criminal charge for failure of official duty by the disappointed prosecutor.<sup>127</sup> My own conversations with lawyers, judges, and prosecutors in Republic of Georgia illustrate this phenomenon. In the wake of even a few charges brought against judges, acquittal rates can drop to near zero,<sup>128</sup> with judges fearing the consequences of ruffling a prosecutor's feathers with an acquittal.

Lawyers, especially criminal defense lawyers, are often assumed to be the weakest of the three distinct professions.<sup>129</sup> They wield no state power other than the authority to represent an accused. The result of professional division is a weakened lawyer profession, and clients, the accused especially, suffer the consequences.

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125. *Id.* at 105.

126. *Id.*; see, e.g., *Deutscher Richterbund*, EUROPEAN L. INST., <https://www.europeanlawinstitute.eu/membership/institutional-members/german-association-of-judges/> [<https://perma.cc/4YEX-K2S3>] (“Deutscher Richterbund ((DRB), the German Association of Judges) is the largest professional association of judges and public prosecutors in Germany.”)

127. Natascha Fauveau-Ivanovic et al., *Report on the Georgian Mission of the International Observatory for Lawyers*, INT'L OBSERVATORY FOR LAWYERS, at 7–11 (Dec. 2010). Further, the author has discussed this reality with judges in countries where these sorts of charges are sometimes brought.

128. See INTERNATIONAL OBSERVATORY FOR LAWYERS, REPORT 2010, at 48 (2010).

129. Bob Carlson, President's Message, *Defense of the Unpopular*, A.B.A. J., July–Aug. 2019, at 8 (arguing that criminal defense attorneys have long been underestimated regarding their importance to and influence within the legal system); see, e.g., INTERNATIONAL OBSERVATORY FOR LAWYERS, *supra* note 128, at 47 (documenting systemic acts that undermine criminal defense attorneys' effectiveness in Georgia).

In a single-profession jurisdiction, while private lawyers may still be the least powerful relative to judges and prosecutors, they have a significant role to play in the justice system and are regarded as closer to the equals of the state-employed legal professionals.

*A. German Legal Science and the Limited Need for Explicit Exceptions*

In a system with a hierarchy of norms, such as the hierarchy that exists in countries where the legal profession is divided into more separate professions, there is no need for a code of conduct (which is below both the law on advocates and the basic law, as well as EU directives), to explicitly state exceptions to rules. It is enough that the directive exists to inform lawyers of their duty and implicitly create an exception to the duty of confidentiality, for example.

Modern civil law systems, based on the foundation of Roman Law, sought to make law judge-proof.<sup>130</sup> The French Codes did so in revolutionary fashion by explicitly diminishing the role of judges and the “Aristocracy of the Robe.”<sup>131</sup> The first German Code, adopted in 1896, unlike the French Code adopted almost a century earlier during revolutionary zeal, was not revolutionary in nature but accomplished similar goals to the French Codes by regarding the system as scientific, just as much as biology or chemistry.<sup>132</sup> The “data” for this science was the aspects of legal institutions. Here, too, the judge’s role was strictly limited by the science of those institutions.<sup>133</sup> Treating analysis in this way made the law, adopted by legislatures, “judge-proof.” Judges were meant to be largely functionaries that applied the scientific system of analysis that the legislature created for them. In turn, lawyers were not creative advocates whose arguments could become law when adopted by courts. Instead, lawyers were meant to be functionaries aiding functionaries, the judges, in applying code provisions correctly.<sup>134</sup>

According to the scientific method of applying legal norms, superior norms need not be referenced in subordinate norms.<sup>135</sup> Superior norms are simply to be followed in spite of subordinate norms. Thus, a code of ethics, adopted by a bar association that was created and allocated its powers by a

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130. See MERRYMAN & PÉREZ-PERDOMO, *supra* note 96, at 35 (explaining that Roman judges were not experts in the law but rather mere “laypeople discharging an arbitral function” in accordance with a predetermined formula).

131. *Id.* at 16–17.

132. *Id.* at 31–33.

133. *Id.* at 32, 36, 47.

134. See *id.* at 32 (“The German view was that lawyers would be needed, that they would engage in interpreting and applying the law, and that the code they prepared should be responsive to the needs of those trained in the law.”).

135. See *id.* at 79.

legislature in a law on lawyers/advocates, can do nothing that would conflict with the law on lawyers. Likewise, the law on lawyers cannot compromise the content of the country's basic law, a set of statutes that occupy space above ordinary adoptions of the legislature, such as a law on lawyers. Further, the layers of various EU-adopted provisions control a country's basic law, its ordinary code adoptions, and any provisions, such as a lawyer ethics code, created pursuant to ordinary legislation.<sup>136</sup> Ultimately, a confidentiality duty referred to in a law on lawyers or a code of ethics is implicitly subject to legal duties of EU Directives or the country's basic law.

Interestingly, at the same period of history, a time of rising scientification in many realms, a U.S. scientification was happening in the study of law. At Harvard, Christopher Columbus Langdell pioneered the form of law study that placed the parsing of judicial opinions at its core.<sup>137</sup> Langdell's system rapidly replaced the lecture method, based on treatises, with the casebook method in which targeted understanding of prior court decisions would allow developed understanding of the legal principles of the common law. Langdell referred to the law as science, and the library full of prior court opinions as the "laboratory" for his scientific method.<sup>138</sup> At about the same time, West Publishing Company invented the "key number system" of indexing prior court opinions.<sup>139</sup> The visual design of the system appears strikingly like a biology chart with species and genus as the organizing model. The Key Number System systemically organizes topics within the law into broad categories such as Contract, Tort, and Real Property.<sup>140</sup> Of course, in the common law context, this American version of scientification did nothing to restrain judges or lawyers. Instead, it provided the tools for creative lawyering and judging.

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136. See JAMES E. MOLITERNO & GEORGE C. HARRIS, GLOBAL ISSUES IN LEGAL ETHICS 35 (2007) ("While lawyers must follow these [European Union] rules for transnational practice, they must also follow the rules of 'the Bar or Law Society to which [they] belong to the extent that they are consistent with the rules of the Code.'" (second alteration in original)).

137. ARTHUR E. SUTHERLAND, THE LAW AT HARVARD: A HISTORY OF IDEAS AND MEN, 1817–1967, at 176–77 (1967).

138. *Id.* at 174–78; ROBERT B. STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 52–53 (Lawbook Exchange 2001) (1983); James E. Moliterno, *Legal Education, Experiential Education, and Professional Responsibility*, 38 WM. & MARY L. REV. 71, 83, 86 (1996).

139. Robert M. Jarvis, *John B. West: Founder of the West Publishing Company*, 50 AM. J. LEGAL HIST. 1, 8 (2010).

140. MOLITERNO, *supra* note 47, at 225; Maggie Keefe, *Free vs. Westlaw: Why You Need the West Key Number System*, THOMSON REUTERS, <https://legal.thomsonreuters.com/en/insights/articles/using-the-west-key-numbers-system> [https://perma.cc/4WHX-R2ZB] ("A master classification system of U.S. law, the Key Number System allows our Attorney Editors to organize cases by corresponding legal issues and topics.").



When I have occasion to discuss confidentiality with European colleagues, I sometimes comment that there are no exceptions listed in some countries' codes of ethics for lawyers. Their answer is simple and uniform: we need no listed exceptions in the lawyer ethics code because they exist beneath other law that has greater position in the hierarchy of norms.

Functionally, there is very little difference between this hierarchy of legal norms and the "other law" exception to Model Rule 1.6. In civil law analysis, there is no need for an explicit "other law" reference; such a provision is implicit in the legal science.

Consider this passage that is utterly confusing for common law lawyers:

There are a number of ambiguities in society about several of the key concepts related to the process leading to enactment of *Undang-Undang*. First, is the ambiguity related to the concept of *Undang-Undang* in a *formal sense* and *Undang-Undang* in a *material sense*. Those two terms are based on the distinction between *wet in formele zin* dan *wet in materiele zin* that exists in the Netherlands. Traditionally, the common misconception that many people held was that the terms refer to two separate kinds of *Undang-Undang*. However, this misconception is rare nowadays, as people see *Undang-Undang* in the *formal sense* that is any law that is named a *Undang-Undang*, while *Undang-Undang* in the *material sense* are any kind of laws that bind the public. In other words, there is only one kind of *Undang-Undang*.

Second, is the ambiguity with respect to the concept of *Undang-Undang Pokok* and *Undang-Undang Payung*. Many people believed that *Undang-Undang Pokok* could be used as the mandatory source of law for another *Undang-Undang*. However, that conception is not popular currently, because many people have accepted the point of view that all *Undang-Undang*, regardless of name, are at the same level of the hierarchy. Therefore, an *Undang-Undang* can not act as the mandatory source of law for another *Undang-Undang*.<sup>141</sup>

Note that, although it is written about Indonesian legal analysis, its foundation is in Dutch law, the colonial era foundation for much of Indonesian civil codes.<sup>142</sup> I encountered this passage when working with Indonesian judges on their ethics codes and their application. They believed it was a very simple

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141. ASEAN L. ASS'N, *INDONESIAN LEGAL SYSTEM* 19–20 (Paulus E. Lotulung et al. eds., 2005), <https://www.aseanlawassociation.org/wp-content/uploads/2019/11/ALA-INDO-legal-system-Part-2.pdf> [<https://perma.cc/L4T7-NM4C>].

142. *Id.* at 22.

matter to follow and understand and that this passage would aid my work. Without attempting a probably futile thorough discussion of the passage, it describes the hierarchy of civil law analysis that allows there to be no explicit exceptions in a confidentiality rule. All the exceptions are in other, superior law.

All of this is to say that the disquiet of American lawyers about the “other law” exception and its possible future use by legislatures to create expansive, hidden confidentiality exceptions, is simply the way that most of the world’s lawyers understand confidentiality exceptions in the first instance.

### B. *Global Practice Realities*

Law practice crosses borders more now than ever, and this change from the parochial days of largely in-state practices will continue exponentially.<sup>143</sup> Especially the U.S. and U.K. legal professions already dominate the world of cross-border practice, as they have done for more than a century. Legal education—as is often the case—was late to this game, bursting new frontiers of teaching the law governing lawyers in more internationally sensible ways in the early 2000s.<sup>144</sup> Materials expanded to encourage such comparative elements around the same time.<sup>145</sup> These expansions in legal education resulted from the simple observation that few, if any, of today’s American law students will traverse their careers without crossing borders.

The consequence of the ever-expanding nature of cross-border practice already means that global systems of regulating lawyers are in need of harmonizing. On a modest level, this means more intense study and understanding of choice of law rules for regulating lawyer practices that cross borders.<sup>146</sup> But, over time, that shallow dive into harmonizing cross-border lawyer regulation will be woefully insufficient. Lawyers will practice for the

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143. See MOLITERNO & HARRIS, *supra* note 136, at v (2007) (“[C]onnections among societies and cultures around the globe are becoming closer. This phenomenon has and will increasingly affect the work of lawyers. . . . There can be no doubt that American lawyers now and in years to come will be governed by the law governing lawyers in the EU, in Japan, and elsewhere.”).

144. See, e.g., Laurel S. Terry, *U.S. Legal Ethics: The Coming of Age of Global and Comparative Perspectives*, 4 WASH. U. GLOB. STUD. L. REV. 463, 514 (2005) (discussing the 2005 Association of American Law School’s Midyear Meeting, which the author describes as an example of “the coming of age of global and comparative legal ethics perspectives”).

145. See, e.g., MOLITERNO & HARRIS, *supra* note 136 (translated into Mandarin, Czech, Georgian, and Slovak); JAMES E. MOLITERNO & KATERINA P. LEWINBURK, *GLOBAL ISSUES IN THE LEGAL PROFESSION* (3rd ed. 2022); JAMES E. MOLITERNO, *CASES AND MATERIALS ON THE LAW GOVERNING LAWYERS* (4th ed. 2012) (including “international notes”).

146. See James Moliterno, *Where’s Rudy?*, 67 LOY. L. REV. 415, 419 (2021).

clients across borders, and the choice of law rules of the U.S.,<sup>147</sup> the EU,<sup>148</sup> EU member countries,<sup>149</sup> and elsewhere will create a chaotic situation with few, if anyone, understanding what a lawyer is to do in complicated cross-border transactions that implicate lawyers from half-dozen different countries and their choice-of-law rule baggage.

Even in the context of the choice of law rules, cross-border practice makes place-based regulation a moving target.<sup>150</sup> The cross-border lawyer must analyze *which* set of place-based norms to follow. In some instances, it will remain the lawyer's home place.<sup>151</sup> In others, it will be the place of a tribunal with which cross-border work is associated.<sup>152</sup> In still others, it will simply be the place where the conduct is occurring. And finally, it may be the place where the predominant effect of the lawyer's conduct is felt.

Instead, what will be needed is a genuinely global system for regulating lawyers. Such a system will begin with an adjustment one way or the other to either the much more common legislatively driven system of the civil law tradition or the far less common but powerfully influential court-driven system of the U.S. The U.K. system stands apart from either. U.K. legal professions have a long, rich history of self-regulation that has been largely supplanted in recent decades by sweeping government regulation.<sup>153</sup>

In civil law countries, courts are not thought of as they are in common law countries. Instead of being recognized as lawmakers, courts are mainly treated as functionaries that apply law. Historically, much legal blood has been shed to establish courts in civil law systems as lesser entities that should not be permitted to undermine law's goals as set by legislatures. The existence of constitutional courts, a fairly recent invention, is the countertrend.<sup>154</sup> A global shift in civil law countries with systems for law-making dating at minimum to Roman times into systems in which courts regulate lawyers stretches the imagination.

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147. MODEL RULES OF PRO. CONDUCT r. 8.5 (AM. BAR ASS'N 2020).

148. CODE OF CONDUCT FOR EUR. LAWS. r. 2.4 (COUNCIL OF BARS & L. SOC'YS OF EUR. 2020).

149. *See, e.g.*, RULES OF ETHICS FOR ADVOCS. & THE DIGNITY OF THE PRO. § 1(4) (POLISH BAR COUNCIL 2011).

150. Charles W. Wolfram, *Choice of Law in Lawyer Discipline: Excursions into the Dismal Swamp*, 49 U.S.F. L. REV. 267, 298 (2015); *see also* William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953) ("The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon.").

151. *E.g.*, MODEL RULES OF PRO. CONDUCT r. 8.5(b)(2) (AM. BAR ASS'N 2021).

152. *E.g.*, *id.* r. 8.5(b)(1).

153. *See* Paul D. Paton, *Multidisciplinary Practice Redux: Globalization, Core Values, and Reviving the MDP Debate in America*, 78 FORDHAM L. REV. 2193, 2232 (2010) (discussing the adoption of the 2007 Legal Services Act in the UK).

154. MERRYMAN & PÉREZ-PERDOMO, *supra* note 96, at 37–38, 136–44.

If, over time, the shift is away from the court-regulated system of the U.S. toward the legislature-regulated system of nearly the rest of the world, American lawyers will simply have to get over their fear of being regulated by non-lawyers.

#### V. THE FINAL SAY REGARDING THE NATURE OF THE DUTY OF CONFIDENTIALITY

Although U.S. lawyers are not entirely self-regulated,<sup>155</sup> they surely have more than their share of self-regulation compared with the rest of the world's legal professionals. Undoubtedly, some good and some ill have resulted from the high level of self-regulation. But here may be the real reason that an expansive use of the "other law" exception may be used by legislatures to alter the lawyer-client relationship and solve myriad social problems: Society may be tiring of the harm that comes from a lawyer-client relationship that is almost entirely regulated by lawyers in the interests of themselves and their clients.

The legal profession places high honor on the confidential relationship it has with clients. It is always mentioned among the core values of the profession,<sup>156</sup> and is often first mentioned as critically important to the proper functioning of the lawyer's work.<sup>157</sup> Whether correctly or incorrectly (a topic outside the scope of this essay), the public increasingly sees trouble in an expansive confidentiality owed by lawyers to clients.<sup>158</sup>

The public sees enormously costly corporate defalcations, known to lawyers of those corporations, but kept quiet by those lawyers.<sup>159</sup> Lawyers for Enron, Worldcom, and many other entities, knew of their clients' defalcations, and even designed the instruments to execute the corporate thefts from shareholders, employees and innocent others.<sup>160</sup> The lawyers stayed quiet and watched their clients do enormous harm. Some of the same can be said about

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155. See Wilkins, *Who Should Regulate Lawyers?*, *supra* note 39, at 802–03.

156. HOUSE OF DELEGATES, AM. BAR ASS'N, RESOLUTION 10F (2000) (listing confidentiality among the profession's core values); William H. Simon, *Attorney-Client Confidentiality: A Critical Analysis*, 30 GEO. J. LEGAL ETHICS 447, 447 (2017).

157. See Simon, *supra* note 156, at 450–51.

158. See, e.g., *id.* at 459 ("The rationales for strong confidentiality are unconvincing. There is no reason to believe that strong confidentiality induces greater disclosure by clients to lawyers, and even if it did, there is no reason to believe that the added disclosure to lawyers produces socially desirable effects sufficient to justify the socially undesirable effects of reduced disclosure by lawyers.").

159. See Fox, *supra* note 95, at 867.

160. *Id.*

the savings and loan debacles of the 80s,<sup>161</sup> the housing crisis of 2008,<sup>162</sup> and other corporate abuses.

The public sees confessed, factually guilty criminals walk the public streets because of lawyers who kept their secrets.<sup>163</sup> Public outrage ensued when stories became public about lawyers who stayed quiet regarding client confessions to crimes unrelated to the lawyer's representation of the client.<sup>164</sup> For example, in three cases, clients confessed their guilt to their lawyers regarding past crimes for which innocent people had been wrongly convicted.<sup>165</sup> The lawyers in these stories stayed quiet for a decade or more, until their clients had died before finally revealing that an innocent person was incarcerated for crimes the lawyer's client had long ago committed.<sup>166</sup>

More than twenty years ago, the drafters of the Restatement of the Law Governing Lawyers struggled mightily with a hypo similar to the following:

A criminal defense lawyer learns from his client that his client was the perpetrator of a crime for which someone else has been convicted and is scheduled to be executed. What may or must the criminal defense lawyer do?<sup>167</sup>

Under the law prior to the 2002 amendments to the Model Rules, the formal, doctrinal answer was clear: No future crime was being committed in the hypothetical, so there was no existing exception to the confidentiality rule embodied in MR 1.6 (nor former DR 4-101).<sup>168</sup> The lawyer would be subject

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161. See generally Harris Weinstein, *Attorney Liability in the Savings and Loan Crisis*, 1993 U. ILL. L. REV. 53.

162. Brian E. Berger, Note, *The Professional Responsibility of Lawyers and the Financial Crisis*, 31 REV. BANKING & FIN. L. 3 (2011).

163. See James E. Moliterno, *Rectifying Wrongful Convictions: May a Lawyer Reveal Client Confidences to Rectify the Wrongful Conviction of Another?*, 38 HASTINGS CONST. L.Q. 811, 833 (2011).

164. See, e.g., Harold J. Winston, *Learning from Alton Logan*, 2 DEPAUL J. FOR SOC. JUST. 173, 182–83 (2009).

165. Moliterno, *supra* note 163, at 814, 817, 820.

166. Winston, *supra* note 164, at 814–15, 817–18, 820.

167. *Thursday Afternoon Session—May 18, 1989: Continuation of Discussion of Restatement of the Law Third, The Law Governing Lawyers*, 66 A.L.I. PROC. 299, 332–39 (1989) (discussing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 132 cmt. e, illus. 4 (Tentative Draft No. 2, 1989)) [hereinafter *Restatement Discussion*]. The hypothetical was loosely based on the fact pattern in *State v. Macumber*, 582 P.2d 162 (Ariz. 1978) (refusing to allow alleged confession by third party in a murder trial on the grounds of privilege). RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 132 note (AM. L. INST., Tentative Draft No. 2, 1989).

168. MODEL RULES OF PRO. CONDUCT r. 1.6(b) (AM. BAR ASS'N 1983) (“A lawyer may reveal such information to the extent the lawyer reasonably believes necessary: (1) to prevent

to discipline if she revealed the client's information. Despite the fairly clear doctrinal answer,<sup>169</sup> the American Law Institute (ALI) could not agree on a resolution and eventually voted to eliminate the illustration, thereby avoiding the necessity of answering it in the Restatement.<sup>170</sup>

Some in the legal profession believe that:

the execution of an innocent man was a morally intolerable result and the Illustration should have affirmatively rejected such an outcome; to others, any departure from a rule of absolute protection for such communications represented a slippery slope descent, leading to the ultimate disintegration of the attorney-client relationship; to still others, the Illustration accurately represented the state of the law, but should have been dropped from the Restatement or modified because of its starkness.<sup>171</sup>

To the public, the current state of lawyer client confidentiality is entirely unpalatable.<sup>172</sup> The public sees lawyers offering services and silence for a fee to those who ask for their help hiding corruptly and illegally obtained fortunes.<sup>173</sup> Instance after instance of lawyers seemingly aiding their clients in corrupt and criminal conduct has been revealed in scandals like the widely reported Panama Papers and the Paradise Papers.<sup>174</sup> Clients come to lawyers for assistance in hiding wrongly acquired fortunes, and lawyers justify that request by making the hollow claim that they were merely creating an entity and the client used it as the client wished. Few accept the pablum from lawyers

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the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm . . . ."); MODEL CODE OF PRO. RESP. DR 4-101(C) (AM. BAR ASS'N 1980) ("A lawyer may reveal . . . (3) The intention of his client to commit a crime and the information necessary to prevent the crime.").

169. ALI Reporter, Charles Wolfram, expressed some agreement with the criticism leveled at the illustration and its doctrinal answer, but then stated, "This is law at its most logical and I think supportable as a matter of restatement." *Restatement Discussion*, *supra* note 167, at 333.

170. In the end, the debate over the illustration ended in its elimination. *Id.* at 339. The position of Professor Paul Carrington was adopted, after he stated, "[W]e don't need this Illustration. This is more clarity than we really need." *Id.* at 336. The ALI members voted 164 to 65 to eliminate the illustration. *Id.* at 339.

171. Mary C. Daly, *To Betray Once? To Betray Twice?: Reflections on Confidentiality, A Guilty Client, an Innocent Condemned Man, and an Ethics-Seeking Defense Counsel*, 29 LOY. L.A. L. REV. 1611, 1616 (1996).

172. *See, e.g., 60 Minutes: 26-Year Secret Kept Innocent Man in Prison* (CBS television broadcast Mar. 9, 2008); Winston, *supra* note 164, at 182-83.

173. *See, e.g., Fitzgibbon & Hudson, supra* note 8; *60 Minutes: Anonymous, Inc.* (CBS television broadcast Jan. 31, 2016).

174. *See, e.g., Fitzgibbon & Hudson, supra* note 8 ("In the United Kingdom, members of parliament repeatedly referenced the Panama Papers when passing legislation in 2017 that created the country's first criminal offense for lawyers who do not report clients' tax evasion.").

that they knew not that what the client was doing was illegal. The reality of some lawyers' awareness of and willingness to assist clients who wish to do wrong was demonstrated for all to see in a *60 Minutes* episode, when an actor posing as a prospective client quite openly told numerous prospective lawyers that he wished to hide his corruptly obtained fortune.<sup>175</sup> While spinning verbiage, nearly every lawyer approached agreed to do this service.<sup>176</sup> Further:

lawyers in [thirteen] different New York law firms met with an investigator posing as a German lawyer who represented a West African mining minister. The minister wanted to buy a brownstone, a jet plane, and yacht with money whose origins were questionable. Only one lawyer immediately declined the representation during the meeting. But some were willing to discuss it and even offer suggestions.<sup>177</sup>

The public is also aware that a lawyer's duty of confidentiality has the potential to facilitate domestic violence. In some states, physicians, social workers, and mental health professionals have a duty to report instances of domestic violence.<sup>178</sup> Lawyers do not. Although lawyers have been so far shielded from personal liability for the predictable, future acts of domestic violence committed by their clients,<sup>179</sup> public awareness that lawyers keep silent in such situations grates the nerves of the public. Even when the violence is predictable and continuing, lawyers "may," but need not, reveal it.<sup>180</sup> Europe has begun a process of establishing such a duty of revelation for everyone, including lawyers.<sup>181</sup> The American public may press for the same. In the European effort, based on the Istanbul Convention, lawyers and other professionals will not have confidentiality duties to hide behind:

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175. *60 Minutes: Anonymous, Inc.*, *supra* note 173; Martina Barash, *Another N.Y. Lawyer Censured After 60 Minutes Sting Report*, BLOOMBERG L.: U.S.L. WK. (Jan. 16, 2019, 11:49 AM), <https://news.bloomberglaw.com/us-law-week/another-n-y-lawyer-censured-after-60-minutes-sting-report> [<https://perma.cc/49EG-7BMB>].

176. *See 60 Minutes: Anonymous, Inc.*, *supra* note 173; Barash, *supra* note 175.

177. Barash, *supra* note 175.

178. *See* Carolyn J. Sachs, *Mandatory Reporting of Injuries Inflicted by Intimate Partner Violence*, 9 *AMA J. ETHICS* 842, 842 (2007); Ariella Hyman et al., *Laws Mandating Reporting of Domestic Violence: Do They Promote Patient Well-being?*, 273 *JAMA* 1781, 1781–1782, 1782 tbl.1 (1995).

179. *See* Brooke Albrandt, Note, *Turning in the Client: Mandatory Child Abuse Reporting Requirements and the Criminal Defense of Battered Women*, 81 *TEX. L. REV.* 655, 662–64 (2002) (noting that, while courts have found other professionals liable for failing to warn potential victims of violence, lawyers have thus far escaped such liability); *Hawkins v. King County*, 602 P.2d 361 (Wash. Ct. App. 1979).

180. MODEL RULES OF PRO. CONDUCT r. 1.6(b)(1) (AM. BAR ASS'N 2021).

181. Convention on Preventing and Combating Violence Against Women and Domestic Violence, art. 27–28, May 11, 2011, C.E.T.S. No. 210.

## Article 27 – Reporting

Parties shall take the necessary measures to encourage any person witness to the commission of acts of violence covered by the scope of this Convention or who has reasonable grounds to believe that such an act may be committed, or that further acts of violence are to be expected, to report this to the competent organisations [sic] or authorities.

## Article 28 – Reporting by professionals

Parties shall take the necessary measures to ensure that the confidentiality rules imposed by internal law on certain professionals do not constitute an obstacle to the possibility, under appropriate conditions, of their reporting to the competent organisations [sic] or authorities if they have reasonable grounds to believe that a serious act of violence covered by the scope of this

Convention, has been committed and further serious acts of violence are to be expected.<sup>182</sup>

The public watches as lawyers for public officials, including some as prominent as a former president, make patently false statements to protect the illicit secrets of their clients.<sup>183</sup> The demonstrably false assertions by Trump lawyers after the 2020 election have laid bare some of the profession's members' willingness to become the mouthpiece of gross deceptions that threaten the very foundations of democracy.<sup>184</sup> The same is being revealed by

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182. *Id.*

183. See, e.g., Merrit Kennedy, *New York State Bar Association Considers Expelling Rudy Giuliani*, NAT'L PUB. RADIO (Jan. 11, 2021, 12:13 PM), <https://www.npr.org/sections/insurrection-at-the-capitol/2021/01/11/955629940/new-york-state-bar-association-considers-expelling-rudy-giuliani> [https://perma.cc/6CFS-B4F2] (“The New York State Bar Association [] consider[ed] expelling Trump attorney Rudy Giuliani as a member because of his comments ahead of the [January 6] attack on the U.S. Capitol, and his efforts for months to cast doubt on the results on the presidential election.”). The New York State Bar, it should be understood, is not the license-granting authority in New York. But its action could prompt action by the Appellate Division of the court, which does have power over licenses.

184. See Josh Wingrove, *Giuliani Drops Sidney Powell as Trump's "Strike Force" Splinters*, DETROIT NEWS (Nov. 22, 2020, 8:05 PM), <https://www.detroitnews.com/story/news/politics/2020/11/22/giuliani-drops-sidney-powell-trump-strike-force/115030720/> [https://perma.cc/QJC3-W73B]; Chris Megerian, *As Trump's Election Lawsuits Fizzle, Giuliani Goes to Court. It Doesn't Get Better*, L.A. TIMES (Nov. 17, 2020, 5:12 PM), <https://www.latimes.com/politics/story/2020-11-17/trump-election-lawsuits-fizzle-as-giuliani->



the submissions and statements of Trump's lawyers in his dispute over wrongfully retained documents.<sup>185</sup>

Lawyers are being called, for example, “the bodyguards of lies,” in current scholarship.<sup>186</sup> Society's expectations of professionals have been changing in striking ways. One can easily imagine a time when society will no longer tolerate, let alone honor, lawyer-enabled and protected wrongdoing.

The time may not be yet, but the public will eventually come to see the high level of lawyer silence as a pox instead of the central, vital feature of an honorable profession. When this happens, it truly will be the end of the world as we know it. Legislatures will seek to correct social ills that have been facilitated by lawyer silence, and lawyers will be in the cross-hairs of such regulation rather than writing it themselves. The daunting path through the ABA and state bar regulatory machinery will matter not at all to this mechanism for reducing lawyer-client confidentiality.

If the legal profession has been correct about the need for a nearly exceptionless duty of confidentiality to clients, then the public and the justice system will suffer accordingly. But if the targeted inroads on lawyer-client confidentiality help solve some social and economic problems without damaging the core, positive functions of the duty of confidentiality, then society will be better for the effort, and the legal profession's internally focused system of self-regulation will be exposed and chastened.

## VI. CONCLUSION

The ongoing discussion of place-based versus practice-based lawyer norms is primarily a discussion about who makes lawyer regulations and why. Longstanding lawyer fear of legislative regulation, or regulation by anyone other than lawyers for that matter, is the true foundation beneath the place-based, practice-based discussion.

Lawyer-made, placed-based norms have often ignored the public interest in favor of lawyer interest and client interests that in turn serve the market for lawyer services. Legislatures making largely—but not exclusively—practice-

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appears-in-court-for-him [<https://perma.cc/2EFD-XSLR>]; Jane C. Timm, *Rudy Giuliani Baselessly Alleges “Centralized” Voter Fraud at Free-Wheeling News Conference*, NBC NEWS (Nov. 19, 2020, 10:24 PM), <https://www.nbcnews.com/politics/donald-trump/rudy-giuliani-baselessly-alleges-centralized-voter-fraud-free-wheeling-news-n1248273> [<https://perma.cc/GY S8-7V97>].

185. Lucien Bruggeman & Katherine Faulders, *DOJ Revelations Could Place Trump Lawyers in Legal Peril of Their Own, Experts Say*, ABC NEWS (Sep. 1, 2022, 4:55 PM), <https://abcnews.go.com/US/doj-revelations-place-trump-lawyers-legal-peril-experts/story?id=89171999> [<https://perma.cc/4PF2-9HXC>].

186. CHRISTOPHER WHELAN, *THE BODYGUARDS OF LIES: LAWYERS' POWER AND PROFESSIONAL RESPONSIBILITY*, at vii (2022).

based norms put the public interest first, well above the interests of the legal profession. This simple reality strikes fear in the hearts of lawyers and bar associations.

Lawyers outside the U.S. have been regulated by legislatures for hundreds of years. Some good and some ill exist in civil law systems of lawyer regulation.

The American legal profession has always been shielded from regulation by non-lawyers. That appears to be changing. Legislatively created, practice-based regulation, especially regulation that creates new exceptions to the confidentiality rule, threaten to breach the walls around the insular legal profession.

American lawyers could have avoided this phenomenon by adopting more public-abiding self-regulation. But they did not. Now, they will need to become accustomed to being more like lawyers in the rest of the world. Specifically, they will begin to see reductions in specific areas of the confidentiality duty to accommodate legislation adopted in the public interest.