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Who Needs the Bar?: Professionalism Without Monopoly

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WHO NEEDS THE BAR?: PROFESSIONALISM WITHOUT MONOPOLY

William Simon

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WHO NEEDS THE BAR?: PROFESSIONALISM
WITHOUT MONOPOLY

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Professionalism has an idealistic dimension and an institutional one. The idealistic dimension is the notion of voluntary commitment to both client interests and public values. The institutional dimension is the ideal of self-regulation by the bar.

The idealistic dimension remains powerful. However disappointed we are by the distance between the profession's ideals and its members' practices, these ideals continue to inspire valuable efforts. Various professional organizations are making admirable contributions through pro bono representation of disadvantaged people, public education, and disinterested law reform efforts in a range of areas, such as litigation procedure, prisons, and judicial selection. Moreover, the bar's ideals of public service provide the vantage point from which the profession's critics assess and propose improvements to its practices.

The institutional dimension is another story. It is implausible in principle and corrupt in practice. Its current manifestations are a set of strained rationalizations for tawdry self-seeking. The cynicism that the bar's self-regulatory project induces in lay people spills over to discredit the idealistic dimension. We could strengthen the appeal of the idealistic dimension of professionalism by jettisoning the institutional one, or at least revising it substantially.

The core of the institutional dimension is private, monopolistic regulation. Traditionally, professionals have sought to exempt themselves from the suspicion that conventionally attends private monopoly. But few disinterested observers have been persuaded. It is not certain that the bar acts as a self-seeking monopolist, but in such matters as admission to practice, the marketing of legal services, and even conflict and disclosure norms, it seems unlikely that a self-seeking monopolist would have behaved any differently.

The most salient alternative to private monopolistic self-regulation is public regulation through state institutions. I think

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that some of the most promising recent developments in professional responsibility have occurred through interventions of national public institutions applying general legal norms in ways that have modified or put pressure on the profession's own norms. What comes to mind is the Supreme Court's striking down of various restrictions on admission and marketing under the free speech and federalism provisions of the Constitution.¹ I am also thinking of the efforts of the Securities and Exchange Commission and the Office of Thrift Supervision to better align the professional commitment to confidentiality with the public values reflected in fraud and misrepresentation doctrine.²

Nevertheless, we are especially sensitive these days to the limitations of state institutions as regulatory actors. And indeed, state institutions have been complicit in the regulatory abuses I attribute to the bar. The bar's exercise of its monopoly power has depended on ratification by state judiciaries and legislatures. The kernel of plausibility in the idea of self-regulation is the implication that the state is too remote, inflexible, and compromised to provide the full range of institutional support for the idealistic aspects of legal professionalism. Moreover, the state is itself a monopolistic organization. To the extent that the objections to the institutional premise of traditional professionalism rest on its monopolistic rather than its private character, it seems most promising to consider non-monopolistic approaches, both public and private.

That is my plan. I first elaborate on the widely felt doubts about monopolistic self-regulation. Then I consider the possibility of non-monopolistic regimes for two of the most important areas—certification for practice and professional discipline.

I. THE TRADITIONAL STRUCTURE

I should explain what I mean by monopolistic self-regulation and, indeed, what I mean when I ask "Who Needs the Bar?" It may not be immediately obvious what one means by "the bar" in the American context.

The notion of self-regulation in the traditional conception is that practitioners organize in a single collectivity to promulgate and en-

1. See *infra* note 5.

2. See *In re Gutfreund*, Fed. Sec. L. Rep. (CCH) ¶ 85,067 (Dec. 3, 1992); *In re Carter & Johnson*, Fed. Sec. L. Rep. (CCH) ¶ 82,847 (Feb. 28, 1981); William H. Simon, *The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology*, 23 LAW & SOC. INQUIRY 243 (1998) (discussing the Office of Thrift Supervision efforts to discipline lawyers in the Savings and Loan scandal).

force norms of good practice.³ Now, of course, no such organization has ever existed in the United States. The American model departs from the theoretical paradigm in two respects. First, the remission of primary regulatory authority over lawyers to the states means that, instead of a single over-arching association, we have more than fifty separate sets of regulatory institutions. Second, our constitutional arrangements forbid explicit delegation of regulatory power to private organizations. Thus, regulatory power at the state level resides formally, not in organizations openly controlled by practitioners, but in public institutions, most notably the judiciary.

Nevertheless, the image of the bar as a monopolistic self-regulatory organization has some descriptive power. Our arrangements are more complex, but their output looks very much like what one would expect of the private monopolistic paradigm. Most of the ethics rules adopted by our many jurisdictions are quite similar. These rules in turn resemble those promulgated by the American Bar Association (“ABA”), a private organization that is the closest we come to a national lawyers’ collective. The ABA aspires to represent the entire bar and in fact includes more than a third of it.

Moreover, within each state, organizations of practitioners have powerful influence over admissions and professional responsibility regulation. The “integrated” bars include all practitioners within the state and often have explicitly delegated powers (subject to judicial oversight). In states without integrated bars, inclusive voluntary bar associations that purport to speak for practitioners throughout the state play a strong role in both admissions and ethics rule-making and enforcement.

The political structure of the states would seem to make judges responsive to organized practitioners. Most state judges run for office in elections in which the average voter has little information or interest. Often, local practitioners will be the largest constituency with enough information or incentive to take an interest.

The legitimacy of this regulatory structure is currently under tremendous pressure. The pressure arises from two basic problems. The first problem is that this structure gives major influence to a group with a strong conflict of interest. This seems most apparent with respect to admission and marketing practices. The bar’s norms have restricted admission and inhibited price and service competition. The bar has public rationales for these norms, but since a substantial range of its members have a selfish interest in them, non-lawyers tend to be skeptical.

3. *E.g.*, EMILE DURKHEIM, PROFESSIONAL ETHICS AND CIVIC MORALS (Cornelia Brookfield trans., 1957); A.M. Carr-Saunders, *Professions*, in 12 ENCYCLOPEDIA OF THE SOC. SCI. 476 (1934).

There are other grounds for this skepticism. Bar leaders are occasionally caught discussing the admission and marketing restrictions more or less openly as devices for insuring the economic welfare of incumbent practitioners.⁴ Further ground for doubt appears when we consider that, while these rules depend on controversial empirical assumptions, the bar has never shown any interest in investigating them. Would easier admission requirements—say two years of law school instead of three—really lead to lower quality practice? Would client interests be jeopardized if lawyers could practice with nonlawyer partners? Would deterrence of illegality be decreased or enhanced if confidentiality was cut back? The bar's rules have been premised for centuries on empirical assumptions about such matters, but there is almost no research on any of them. The American Bar Association supports an excellent research institution—the American Bar Foundation—but it has never done any research on the factual premises of the profession's core commitments.

The recent history of federal court review of state exclusionary practices in response to constitutional challenges is instructive and troubling. The challenged practices include citizenship requirements, residence requirements, in-state office requirements, requirements of association with local counsel, and a panoply of restrictions on advertising and solicitation. When the courts demand more than minimal rationality, the bar loses.⁵ The courts demand more when the practice impinges directly on an important federalism or free speech value. In such situations, the bar must offer more than fanciful speculation suggesting that there *might* be some legitimate policy

4. *Hoover v. Ronwin*, 466 U.S. 558 (1984) (dismissing antitrust claim against Arizona based on such allegations under state action exemption).

5. *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91 (1990) (holding advertising prohibition to violate First Amendment); *Supreme Court of Va. v. Friedman*, 487 U.S. 59 (1988) (stating that the limitation of "on motion" admission without bar exam to residents violates privileges and immunities clause); *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466 (1988) (holding advertising prohibition to violate First Amendment); *Frazier v. Heebe*, 482 U.S. 641 (1987) (stating that in-state office requirement for only non-residents violates privileges and immunities clause); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 629 (1985) (holding advertising prohibition to violate First Amendment); *Supreme Court of N.H. v. Piper*, 470 U.S. 274 (1985) (stating that the exclusion of non-residents violates the privileges and immunities clause); *In re R.M.J.*, 455 U.S. 191 (1982) (holding advertising prohibition to violate First Amendment); *In re Primus*, 436 U.S. 412 (1978) (holding solicitation prohibition to violate First Amendment); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (holding advertising prohibition to violate First Amendment); *In re Griffiths*, 413 U.S. 717 (1973) (stating that the exclusion of aliens violates equal protection clause); *Baird v. State Bar of Ariz.*, 401 U.S. 1 (1971) (stating that the requirement of submission to broad examination of political associations violates First Amendment); *In re Stolar*, 401 U.S. 23 (1971); *Konigsberg v. State Bar of Cal.*, 353 U.S. 252 (1957) (holding exclusion on the basis of Communist Party membership and radical political activities violates First Amendment); *Schware v. Bd. of Bar Exm'rs*, 353 U.S. 232 (1957) (holding exclusion on the basis of Communist Party membership and radical political activities violates First Amendment).

that under some not-totally-ridiculous but completely hypothetical scenario would be rationally served by the rule. The courts demand a policy with substantial plausibility and factual premises with some empirical support. The bar almost always fails to deliver.⁶

When the values harmed by the practice are less constitutionally salient, courts apply minimum rationality. Only a failure of imagination could lead to flunking this test. When the bar justifies its requirement that out-of-state lawyers affiliate with local counsel in state court, even in cases under federal law, as a means of insuring familiarity with local procedural rules, the courts accept this as minimally rational.⁷ When the bar justifies its requirement that its members have in-state offices as a means of assuring availability to clients, this too will pass the test.⁸

These conclusions may follow from the minimum rationality standard, but we should not ignore the layers of implausibility this standard by-passes. First, the connections between local admission and knowledge of local rules and between an in-state office and accessibility to clients are minor and wildly imprecise. It is likely that nearly all practitioners affected by the exclusions would have learned the local rules and made themselves accessible without having to undertake the expense of associating with a second lawyer or opening an in-state office.

Second, whatever benefits the exclusionary rules produce for clients have to be weighed against the costs they impose, which are ultimately borne by clients. The requirements raise the cost of lawyers and reduce client choice among them. The bar, of course, makes its

6. The Court did hold a speculative rationale—the likelihood of undue pressure from in-person solicitation—sufficient for more than minimal scrutiny in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978). The only Supreme Court case I am aware of in which the bar actually produced evidence that the Court deemed sufficient to satisfy greater-than-minimal scrutiny is *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995). The evidence, however, did not indicate that the advertising was harmful to clients, merely that it negatively affected “public perceptions” of the bar. The Court’s acceptance of this effect as a basis for a restriction of protected speech seems inconsistent with basic First Amendment principles. See *Am. Booksellers’ Ass’n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985) (stating in the course of invalidating a pornography ordinance, that the tendency of the speech to induce negative perceptions of women is not a legitimate basis for regulation under the First Amendment).

The Court also accepted the bar’s rationale that current Communist political associations have some connection to fitness to practice law. See *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154 (1971); *In re Anastaplo*, 366 U.S. 82 (1961); *Konigsberg v. State Bar of Cal.*, 366 U.S. 36 (1961). But such inquiries are rarely pursued today, and at least one bar has come to regret the activities held permissible by the Court. David Rani, *30 Years Have Passed But License Still Sought*, NAT’L L.J., Aug. 22, 1983, at 8 (reporting that the Illinois State Bar Association petitioned the state supreme court to reconsider the 30-year old decision upheld in *In re Anastaplo*).

7. *Ford v. Israel*, 701 F.2d 689, 692 (7th Cir. 1983) (stating that the rule has “the air of a guild restriction” but satisfies minimum rationality).

8. *Tolchin v. Supreme Court of the State of N.J.*, 111 F.3d 1099 (3d Cir. 1997).

decisions without any information on the comparative magnitudes of the costs and benefits.

Third, in all such cases the bar has a choice of two approaches to dealing with the problem. It can deal with them prophylactically by excluding people or restricting practices it perceives have a tendency to harm clients. Or it can deal with the problem through after-the-fact sanctioning of bad practice. Lawyers who fail to comply with local court rules or to make themselves available to clients can be penalized. Thus, a plausible decision to adopt the exclusions would not only have to weigh the costs and benefits of the exclusions, but also compare them against the alternative of increasing after-the-fact enforcement. Of course, the bar does not do this, at least not explicitly and systematically. The bar's conflict of interest is severe here, since the costs of exclusion are borne by outsiders, while after-the-fact enforcement sanctions members. And in fact, the indications are that after-the-fact enforcement tends to be indulgent and lax.⁹

The second source of pressure on the traditional regulatory model is the increased difficulty of formulating any principled delineation of the professional monopoly. Our version of the traditional model requires both that we distinguish law practice from non-law practice and that we assign particular instances of practice to particular states. It gets harder every day to do either. Substantively, the bar is hard pressed to explain why what lawyers can do in tax counseling is or should be different from what accountants do, or why what lawyers can do in conveyancing is different or should be different from what brokers and lay title searchers do. Even in litigation, once within the paradigmatic core of the lawyering field, we find lay mediators performing work that is hard to distinguish from that which lawyers do. In the areas that the federal agencies have opened to lay practice—patents, immigration, and tax—lay practitioners have flourished alongside lawyers.

The other aspect of the problem is the increasing extent to which practice is either federal or multi-jurisdictional. The typical practice of large firm business lawyers involves the law of numerous states and requires travel to many states where they are not licensed. It is commonly said that lawyers for large businesses routinely engage in unauthorized practice, and under the stricter definitions of unauthorized practice, this is certainly true. But a more fundamental concern is the difficulty of formulating any coherent definition of intra-state practice that embraces any significant range of lawyering.

How do we decide in what state or states a particular act of lawyering takes place? Clearly, the source of the relevant law is no

9. DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 158-65 (2000).

longer a plausible touchstone. It is too late in the day to say that a lawyer needs to be a member of the bar of any state whose law she gives advice about. Most experts on Delaware corporate law are not members of the Delaware bar. They are scattered throughout the country, the largest group of them being in New York. A broad range of lawyering tasks require consideration of the law of many jurisdictions. No one suggests that a national securities offering requires that fifty different lawyers give opinions on their respective states' "blue sky" laws. Nor has there been a recommendation that a national publication needs to get its advice on libel from lawyers licensed in all of the jurisdictions where its product is distributed. And, of course, with respect to federal law, no state could claim that its lawyers are presumptively more qualified than out-of-state lawyers.

Recognizing this, the regulators are driven to focus on "presence" and "contacts."¹⁰ But most physical contacts are relevant only because they implicate some relevant law. Surely there is no reason, other than that its law applies, for New Jersey to think that its own practitioners are better qualified to do conveyances of in-state real estate.

The one kind of contact or presence that might reflect a distinct state interest is the residence of the client. A state might decide that it had a special responsibility to protect its residents from bad lawyering, regardless of what law applied to the problem in question. But current doctrine is generally not consistent with such a policy. In litigation, we apply the disciplinary rule of the place where the court sits rather than the residence of the parties. In transactional work, the key factor is the state where the lawyer is licensed.¹¹

Moreover, the residence rationale fails to explain regulation of in-state practice on behalf of non-resident clients. The New Jersey bar insists, for example, that lawyers practicing in New Jersey maintain a "bona fide" office within the state. It enforces this rule zealously against lawyers based in Philadelphia who seek to represent clients in New Jersey. The principal rationale for the rule is that an in-state office assures that the lawyer will be available to clients. In fact, however, it appears that most of the clients served by the Philadelphia-based lawyers are Pennsylvania residents—banks that do lend-

10. *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 949 P.2d 1, 5 (Cal. 1998) (analyzing whether there is "sufficient contact" with California to make practice by non-member unauthorized primarily but not exclusively in terms of physical links); AM. BAR ASS'N, REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE 16 (Aug. 2002), available at http://www.abanet.org/cpr/mjp/final_mjp_rpt_5-17.pdf (proposing a new prohibition on unauthorized practice that precludes establishing a "systematic and continuous presence" in a jurisdiction where the lawyer is not licensed) (last visited May 12, 2003) (on file with author).

11. MODEL RULES OF PROF'L CONDUCT R. 8.5 (2001).

ing in New Jersey—who are best served by the lawyers’ out-of-state offices.¹²

Note that the two aspects of the boundary problem push the bar in opposite directions. The bar’s response to the fact that nonlawyers practice competently in particular fields is to emphasize lawyers’ competence in broad skills of complex analysis that cut across fields. Thus, it is the general analytical skills of lawyers that are said to be the comparative advantage that they have over nonlawyers. This is the general view of the ethics codes. The *Model Code of Professional Responsibility*, conceding that lay practitioners may be able to apply law in specialized fields, asserts that what lawyers have that lay practitioners do not is “professional judgment.” It defines “professional judgment” as the “educated ability to relate the general body and philosophy of the law to a specific legal problem of a client.”¹³ And the *Model Rules* assert that it is fine for lawyers to accept employment in an area in which they are unprepared, so long as they intend to study up on it.¹⁴ The assumption is that lawyers are certified, not for knowledge of specific rules, but for a general aptitude that covers any legal field.

By contrast, the response to the jurisdictional aspect of the problem is to emphasize the importance of particular competence in local law. Thus, we are told that the reason out-of-state lawyers must affiliate with local counsel to appear *pro hac vice* in many state courts, and even some federal courts, is that in-state lawyers have better knowledge of local rules.¹⁵ A lawyer in any state is free to take on the most complicated tax or securities matter without demonstrating any prior knowledge of these bodies of law. But fear that lawyers might not be able to master a handful of unfamiliar procedural rules is said to warrant an exclusion that imposes substantial burdens and expenses.

It is difficult to see how the bar can have it both ways. If the “essence” of lawyering is, as the *Model Code of Professional Responsibility* asserts, “the ability to relate the general body and philosophy of law to a specific legal problem,”¹⁶ then there is no reason why lawyers

12. Charles Toutant, *N.J. Court Panel Balks at Shared Bona Fide Office*, N.J. L.J., Oct. 29, 2001, at 1, 14.

13. MODEL CODE OF PROF’L RESPONSIBILITY EC 3-5 (1981); see also MODEL RULES OF PROF’L CONDUCT R. 1.1 cmt., para. 2 (2001): “Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge.”

14. “A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. . . . A lawyer can provide adequate representation in a wholly novel field through necessary study.” MODEL RULES OF PROF’L CONDUCT R. 1.1 cmt., para. 2 (2001).

15. *E.g.*, *Ford v. Israel*, 701 F.2d 689, 692 (7th Cir. 1983).

16. MODEL CODE OF PROF’L RESPONSIBILITY EC 3-5 (1981).

should be required to demonstrate knowledge of any particular body of law. On the other hand, if law is just a series of discrete specialties, then it is hard to distinguish what lawyers do within those specialties from what experienced nonlawyer practitioners do, and hence hard to explain why they should or could have an exclusive right to a certain scope of practice.

A striking fact of recent history is the increasing homogenization of legal education and the admissions process. The trend in bar examinations for many decades has been away from testing local law to testing general principles. National law schools consider it beneath them to give systematic instruction in the law of any given jurisdiction. In most states, the Multistate Bar Exam counts for half or more of an applicant's score. Even the essay portions test mostly general principles. For example, California, one of the most exclusive jurisdictions with a low bar pass-rate and almost no waive-in opportunities, tests virtually no local law. Review courses for the California bar typically tell the student what the "prevalent view is," and what the "minority view" is; a star performer on the exam may have no idea what the California view is on most of the questions tested.

In this situation, it is difficult to take seriously the idea that a member of a particular state's bar can be presumed to have a better knowledge of its law—the principal rationale for the exclusion of out-of-state lawyers.¹⁷

The recent report of the ABA Commission on Multijurisdictional Practice comes as close as possible to acknowledging the bankruptcy of monopolistic regulation without abandoning it. "[T]here is no evidence," the report concludes, that unauthorized practice in one state by lawyers licensed in another "result[s] in the provision of incompetent representation."¹⁸ Nevertheless, the Commission endorses the clarification and re-affirmation of unauthorized practice prohibitions for no better reason than that "a large segment of the bar" supports it.¹⁹

17. The ABA's Commission on Multijurisdictional Practice mentions two other rationales for exclusion—the possibility that members of a state's bar will have better knowledge of unwritten local customs that are relevant to effective practice and that members will be more likely to engage in in-state pro bono activity. See AM. BAR ASS'N, *supra* note 10, at 9. These rationales were held insufficient to justify residence requirements against federalism-based constitutional challenges. See, e.g., Supreme Court of N.H. v. Piper, 470 U.S. 274 (1985). Since the only remaining major entry barrier—the bar exam—is probably subject to a more deferential constitutional test, these rationales may be sufficient for that purpose, but it is doubtful that they could survive disinterested, critical examination. The bar exam has only the most speculative and attenuated relation to either goal, and if the bar were serious about either, it could pursue them more effectively at less cost by testing knowledge of local practice on the exam and by setting minimum pro bono requirements.

18. See Am. Bar Ass'n, *supra* note 10, at 6.

19. *Id.* The Report's full explanation of its recommendation reads:

If the bar were a private organization, its practices would be struck down under the antitrust laws. What legitimacy they have is due to their adoption by the state courts. But the courts seem to have been a weak check on the economic self-seeking we readily impute to private monopolists. They have no accountability to out-of-state interests. Within the state, it seems at least possible that they will be more sensitive to the interests of highly organized practitioners than to the more diffuse interests of clients. And the fact that the courts have tended to more or less rubber stamp the output of the ABA and the state associations strengthens such doubts.

So it seems promising to consider competitive approaches to regulation. I focus on two of the most important areas—admissions and professional discipline. I consider an approach to admissions that involves competition among public authorities, and an approach to discipline that involves competition among private associations. But there are many possible variations on each proposal, involving different mixes of public and private institutions.

II. A COMPETITIVE ADMISSIONS REGIME

Given the large extent to which practice involves federal law and multi-state relationships, the case for federalization of lawyer regulation is a strong one. But the state-based regime might look more attractive if it were shorn of its monopolistic elements. At least, it is worth considering what a non-monopolistic regime of admissions would look like.

Some invoke the analogy of the driver's license in discussing such a regime. Taken literally, the analogy connotes a regime in which each state accords those licensed in other states all the privileges accorded by the licensing state without imposing any additional qualifying conditions. No one proposes to go this far with lawyers, however; nearly all proposals contemplate some local requirements.²⁰

Given the principle of state-based judicial regulation of the legal profession, the assumptions underlying that principle, and the support of a large segment of the bar for preserving it, the Commission believes that a stronger case would have to be made that national law practice is essential and that a more measured approach will not suffice to facilitate law practice and to promote the public interest.

Although this may sound like three reasons, it is only one. In the conceded absence of "evidence," the "principle" of state monopolization and its underlying assumptions carry no more weight than the competing principle of freedom of contract and *its* underlying assumptions. The conclusion thus rests only on the "support" of the bar. Note also how the Commission, having failed to come up with any evidence to support the bar's predisposition, insists without explanation that the burden of proof be placed on those who challenge it.

20. Christine R. Davis, Comment, *Approaching Reform: The Future of Multijurisdictional Practice in Today's Legal Profession*, 29 FLA. ST. U. L. REV. 1339, 1357-66 (2002). Most proposals contemplate at least summary registration with the possibility of suspen-

I find it useful to consider lawyer regulation in the light of another federalist analogy—corporate chartering. The corporate chartering regime involves a measure of reserved local power over out-of-state licensees that seems closer to what reformers contemplate for the legal profession. Moreover, a large literature on corporate chartering has sensitized us to the potential advantages of competitive state regulation in this area.²¹

Finally, the corporate regime is also interesting because the Supreme Court has indicated that the Constitution limits monopolistic regulation in this area.²² The Court summarily rejected suggestions that there are comparable limits on monopolistic regulation of the legal profession, but the arguments for Constitutional limitation seems at least as strong with the legal profession, and the Court may some day reconsider its casually-taken prior position.²³

To an even greater extent than the legal profession, businesses that assume the corporate form have become increasingly multistate and increasingly subject to federal regulation. Yet, here, as with law and other occupations, our system has not moved toward federalization of the basic regulatory regime. The states retain primary responsibility for corporate chartering. Yet, the corporate model is one of competitive rather than monopolistic federalism.

In this model, each state permits corporations chartered by other states to conduct business within the state, subject to conditions tai-

sion or revocation of the right to practice locally for in-state disciplinary violations. The European Union has such a system. American states that permit summary registration of attorneys licensed out-of-state typically condition registration on some period of practice in the licensing state and on licensing state reciprocity toward its own lawyers.

21. See Roberta Romano, *The State Competition Debate in Corporate Law*, 8 CARDOZO L. REV. 709 (1987).

22. *Edgar v. MITE*, 457 U.S. 624 (1982).

23. The authority is sparse and ambiguous. In *Norfolk & Western Railroad Co. v. Beatty*, 423 U.S. 1009 (1975), *aff'g mem.* 400 F. Supp. 234 (S.D. Ill. 1975), the Court summarily affirmed a district court opinion suggesting there are no constitutional limits on state court decisions regarding admission *pro hac vice* in cases involving federal rights. In *Leis v. Flynt*, 439 U.S. 438 (1979), it rejected another constitutional challenge to a state court denial of admission *pro hac vice* in a case involving federal rights. The Court's opinion in *Leis* focuses on and rejects the claim that the lawyer has a federal constitutional right to state court admission *pro hac vice*. It addresses the more important claim of whether the claimant (client) has a right to have the attorney of his choice admitted only in a brief response to a dissenting opinion with a conclusory reference to the *Norfolk & Western* opinion. The dissent in *Leis* had invoked the contention in a Second Circuit opinion by Judge Friendly that "under the privileges and immunities clause of the Constitution no state can prohibit a citizen with a federal claim or defense from engaging an out-of-state lawyer to collaborate with an in-state lawyer and give legal advice concerning it within the state." *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161, 170 (2d Cir. 1966).

Where the client is not asserting a federal right, the constitutional claim would be that the restriction unreasonably burdens interstate commerce, as in *Edgar v. MITE*. However, given the Court's deference to state regulatory interests in the *Norfolk & Western* and *Leis* cases and in occupational regulation cases in general, the prospects of such a claim seem dim.

lored to local needs. These conditions are usually minimal. The foreign corporation must pay fees and subject itself to suit in the state's courts. Most states demand little more. In particular, while the states apply local law to the local activities of the corporation that affect outsiders to the corporation, they tend to defer to the chartering state in enforcing protections for shareholders.²⁴

A few, however,—notably California and New York—do.²⁵ They impose some restrictions from their own corporate law designed to protect local shareholders. These provisions are narrowly tailored, however. Only a few provisions deemed important are imposed, and they are limited to corporations whose investors and/or operations are concentrated within the state. Moreover, they typically exempt publicly traded corporations, without regard to whether their shareholders are concentrated within the state. The Supreme Court has interpreted the commerce and privileges-and-immunities clauses of the Constitution to preclude the states from going much farther than this. But most states have seen no need to approach the limits of constitutional power in this matter. Thus, within the typical state, the protection accorded in-state corporate shareholders in a foreign corporation is usually the law of the chartering state.

Although many would prefer a regime of federal chartering, there is an argument that a competitive federal regime has an advantage over a national one. If corporate promoters or managers have a choice of regimes and if shareholders are sensitive to the variations among them, then promoters or managers have a reason to seek out regimes that shareholders regard as superior. A solid legal regime increases the value of the corporation to shareholders and hence the price they are willing to pay for shares. State governments desiring to attract incorporations, in order to get revenues or prestige, will have reasons to make their protections of shareholders effective, and the competitive process will penalize those who fail. The extent to which the process functions this way is controversial, but the corporate chartering regime clearly enjoys considerably more legitimacy and respect than the very different state-based regime of lawyer licensing.

There is one element of the current regulatory regime for lawyers that corresponds to the corporate regime. In professional responsibility cases, states adopt a choice-of-law approach that looks to the licensing state's norms for most purposes.²⁶ However, since states ex-

24. HARRY G. HENN & JOHN R. ALEXANDER, *LAWS OF CORPORATIONS* 229-35 (3d ed. 1983).

25. *Id.* at 189-99.

26. MODEL RULES OF PROF'L CONDUCT R. 8.5 (2001). The main exception is for litigation practice, where the jurisdiction in which the court sits controls. *Id.* Note that, to the extent that the choice of law rule looks to the licensing state's norms with respect, not just

tensively prohibit in-state practice by foreign lawyers, the choice-of-law norm is of limited importance. We can easily imagine, however, a lawyer regime developed along the corporate chartering model.

In it, each state would be obliged to permit lawyers licensed by other states to practice within the state subject to narrowly tailored restrictions designed to protect specifically identified local interests. It would, for example, be appropriate to require foreign lawyers, like foreign corporations, to consent to the adjudication of claims by local citizens before local tribunals. It would be appropriate to require minimum levels of liability insurance coverage. And a state might require special qualification by way of study or examination, but only with respect to genuinely local practice.

Thus, for example, it might in theory be appropriate to require, as a condition of practicing conveyancing or divorce within the state, an exam focused on the particular subject in question. I say "in theory" because, in fact, I doubt if most states, acting in good faith, would find any need for such protections, just as most do not find any need for specific protections for local shareholders of foreign corporations. After all, under the current regime, states do not condition the right to practice in most areas on specific testing in these areas. Many local practice areas are not tested at all on the bar exams, and none are tested more than cursorily. Nevertheless, restricting conditions to those focused on local matters in this manner would focus regulation on the areas of at least potentially legitimate state interest. Moreover, it is possible that testing focused on specific areas of practice in which the particular lawyers are about to engage would induce more valuable preparation than the once-over-lightly approach of the current exams.

In the competitive federalist regime, consumers within each state would face a choice of lawyers licensed in many different states for most services. Lawyers would be required to make clear at the outset where they had been licensed. The market might develop so that consumers could usefully take account of variations in state certification regimes. Some states might acquire a reputation for especially high general standards; some might acquire reputations for effective emphasis on certain areas of practice. Some states might compete to become the premier national brand, like Delaware in corporate law. Other states might focus on perceived local needs. A rural state like North Dakota, for example, might focus on small business skills. One could imagine that Florida might focus on estate planning, among other subjects.

to the protection of clients, but to the protection of third parties, it goes beyond the corresponding corporate norm, and is, I would submit, unjustifiable.

To the extent that state certifications send useful but varying signals about lawyer quality and preparation, there is every reason to think that sophisticated clients would be able to take account of such information. Even unsophisticated clients might, with the help of consumer rating services, be able to make meaningful distinctions among different regimes. The legal needs of unsophisticated clients tend to fall predominantly in a small number of categories, such as personal injury, divorce, and estate planning. Cross-state comparisons in quality of training might yield information that would be accessible to consumers.

No doubt some will fear a “race to the bottom” in which some states try to earn revenues by certifying poorly qualified candidates under easy standards and then export them to prey on out-of-staters. But reputation would seem a strong obstacle to this course in two respects. First, consumers would shy away from lawyers certified in the low-standards jurisdictions. Second, the better-qualified local practitioners in the low-standards state would feel degraded by the poor reputation of the local bar, and would likely push to change it.

If a state found that its citizens were victimized by low-quality foreign practitioners, it could, as I have suggested, act by establishing local standards with respect to genuinely local issues. But the restrictions ought to be narrowly tailored to clearly identified local interests.

III. A COMPETITIVE DISCIPLINARY REGIME²⁷

Turn now to the ethical rules that protect third party and public interests. Critics within the profession, and most lay people, consider that the bar’s rules on confidentiality and zealous advocacy excessively sacrifice third party and public interests to client interests. They require or permit lawyers to withhold material information in situations where withholding may contribute to substantial injustice, and they even require or permit lawyers to actively obfuscate in some circumstances, for example, attempting to discredit witnesses they know are testifying truthfully.

While the general public seems not to share the bar’s commitment to strict confidentiality and aggressive advocacy, these rules are less often seen as an expression of economic self-interest than the rules specifically focused on admission and marketing. Critics are as likely to explain the bar’s ethical orientation in terms of ideological commitments as in terms of economic self-interest.

27. Here I draw on some suggestions I made in WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS* 202-14 (1998). See also Richard W. Painter, *Rules Lawyers Play By*, 76 N.Y.U. L. REV. 665 (2001).

And in fact, the bar's economic interests are ambiguous. On the one hand, strong confidentiality and aggressive advocacy enable lawyers to promise prospective clients that they will pursue their interests aggressively, even at the cost of injustice to others. This undoubtedly appeals to many clients. On the other hand, these norms may impair lawyers' ability to serve other clients. Much of what lawyers do involves efforts to induce either state officials or private third parties to rely on their clients—that is to credit their claims and assertions or to trust them enough to enter into relations of mutual dependence with them. Strong confidentiality and advocacy norms limit such efforts. The client of the lawyer who adopts an ethic of minimal third party and public responsibility will pay a price in terms of diminished trust by third parties and officials. The client gets the benefit of zealous advocacy relatively unconstrained by commitment to anything but the unambiguous commands of the positive law. But she may experience more wariness on the part of the people she is dealing with. These people may be inclined to insist on more substantiation of factual representation or more specification of contractual terms to protect against the higher danger of opportunism from the client who opts for low commitment ethics. In marginal cases, private parties may refuse to enter into relationships that would enter with a higher degree of trust, and public officials may exercise their discretion against the client simply because they feel unable to credit the lawyer's representations.

So, it is less clear whether the ethics rules reflect economic self-interest. Nevertheless, as with the admission and marketing rules, the ethics rules rest on debatable empirical assumptions that the bar tends not to analyze rigorously and has never sought to investigate factually. For example, does strong confidentiality promote compliance with law by inducing more disclosure *to* lawyers, thus enabling lawyers to give advice that encourages compliance? Or does it undermine compliance by reducing disclosure *by* lawyers, thus depriving lawyers of leverage to induce compliance and precluding enforcers from acting on the information? Obviously, the rule must have both effects. It increases compliance in some cases by increasing disclosure *to* lawyers, and it reduces compliance in others by reducing disclosure *by* lawyers. Whether strong confidentiality is legitimate depends on which effect is greater. But the bar's premise that the pro-compliance effect dominates is based on nothing more than faith. It has no evidence on the matter and has never sought to acquire any.

One of the virtues of a competitive regime is that it would enable us to observe and compare the effects of alternative regimes. Regulators would have a range of information on effects that they do not now have.

Let us try to imagine what a competitive regime would look like with respect to such rules. Where the lawyer negotiates on behalf of clients with third parties, the parties might agree contractually to adopt a particular set of ethical rules for the transaction. When the lawyer appears before a tribunal or agency, she might simply indicate to the tribunal or agency what level of ethical responsibilities to the tribunal or agency she was committing herself to. Some lawyers might opt for the current regime of the ABA rules, with its low level of commitment to third-party and public interests. Others might opt for ethics reflecting a high level of commitment to third party and public interests, one requiring them to volunteer material information, for example.

In this way, individual lawyers could tailor their ethical commitments to particular clients or clienteles, and third parties could adjust accordingly. Moreover, one can imagine tribunals and agencies might adjust their conduct in accordance with an advocate's level of commitment. Judges would be less apt to accept the informal assurances of low-commitment lawyers, and more wary about drawing inferences from their presentations at trial. Agencies might focus more enforcement resources on verifying the presentations of low-commitment lawyers. The IRS, for example, might consider the level of ethical commitment of a taxpayer's preparer or advisor in allocating its auditing resources.

If it could work, such a regime would be both efficient and fair. It would be efficient because it would enable those with whom the lawyer deals to allocate their efforts to counter deception and opportunism more rationally. They would have better information about the degree to which they could plausibly trust a lawyer or correspondingly the degree to which they should devote resources toward protection against opportunism. It would be fair because it would facilitate protective and enforcement activity in ways that would better vindicate the substantive law. Deception and opportunism would succeed less often, which would enhance fairness. Clients of low-commitment lawyers would pay the price of increased wariness, but this seems entirely fair. The current situation in which lawyers are presumed to commit only to a low level of third-party obligation is unfair to clients who would be willing to bind themselves to a higher level. They currently pay a penalty because it is harder to distinguish them from low-commitment clients. A competitive regime would remedy this unfairness. Each client would receive the level of trust appropriate to the ethical commitment she was willing to make.

If such a regime would be both efficient and fair, you might ask why we do not have it already. The current regime does not preclude private parties from contracting for a higher level of ethical commitment than the minimum one required by the ABA rules, and many

tribunals and agencies would have the power to enact rules forcing lawyers who practice before them to declare the level of commitment they would commit to. In fact, we do occasionally see private contracts over such matters as disclosures. Think, for example, of a “10b-5 opinion” in a securities dealing, in which the lawyer warrants that, as far as she knows, no material information has been withheld. Nevertheless, we see little of this kind of activity.

There are a variety of reasons why such a regime has not arisen, even though it might be efficient and fair. Let me mention three problems, each of which might be remediable through public-spirited intervention.

First, issues of ethical commitment may be part of the category of issues research suggests that psychological inhibitions impede people from recognizing and raising. Summarizing some of this literature, Melvin Eisenberg suggests that people may not negotiate contractual safeguards against opportunism because they tend to be overly optimistic and insensitive to remote, hypothetical contingencies.²⁸ Ethical issues also have an emotional charge that may generate anxiety. Because to doubt someone’s ethics is sometimes taken as a negative judgment on her character, a person may feel that simply raising the issue of ethical commitment will be perceived by the other as offensive.

The second problem arises from the costs of communicating about, negotiating, and drafting contracts. In order for a lawyer to find out a client’s preference on the matter, the lawyer has to explain to the client what a high commitment ethic would mean. In order to negotiate over whether to adopt a high commitment ethic, two parties have to arrive at some understanding of what it would mean. If they want to agree that each of them will act in accordance with the highest ethical standards, they can’t simply write a covenant promising to adhere to “the highest ethical standards.” They cannot be sure that they both agree about what the “highest ethical standards” are, or even if they do agree, they cannot be sure that in the event of a later dispute, an enforcement authority would know what their understanding was. So, first with their clients and then with opposing lawyers, lawyers would have to spend a lot of time discussing what these standards were and how they applied across the range of situations that might arise in their relationship between the parties. Once they arrived at an understanding, they would have to write out this understanding in a form intelligible to a court or other enforcement authority. This process would be costly and time-consuming, too costly and time-consuming for most situations.

28. Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 251-52 (1995).

In many areas, the legal system responds to this problem by providing default terms or optional terms that parties can use to fill in the gaps in their contracts. Private associations also provide standard form contracts designed to obviate the costs of elaborating terms for each deal. In the professional responsibility field, however, there is really only one standard form contract in each jurisdiction—the ABA Model Rules or Code. The problem is not that deviation is not permitted from the Rules or Code. Although many of the rules are mandatory, most of them simply provide a floor; they don't preclude contracting for a higher level of commitment. But they do not do anything to reduce the costs of elaboration of these terms. Parties can have the low-commitment default terms of the ABA rules for free without doing anything. If they want higher standards, they have to assume the costs of explaining and drafting themselves.

My colleague Michael Klausner has suggested the preference of public corporations for Delaware's corporation law might reflect, not the substantive superiority of Delaware law, but simply the fact that people are widely familiar with it and it is more extensively elaborated than other states' laws. Because opting into Delaware's rules saves communication, negotiation, and drafting costs, people may choose it even though they don't especially like its substance.²⁹ It's possible that the same thing accounts for the failure to draft out of the ABA rules.

And third, we have the problem of enforcement. People will negotiate for a particular level of commitment only if they expect compliance with the negotiated standard, and compliance usually requires some enforcement apparatus. Tribunals and agencies will usually have some enforcement powers that they can devote to punishing defections from disciplinary commitments. Moreover, private actors who encounter each repeatedly can informally sanction defectors by refusing to trust them in later encounters. But where people encounter each other only once or sporadically, enforcement will be a problem. It would be easy enough to make some right of action in court available in contract or tort. But the high costs of enforcement in conventional damage suits would often not be warranted by the provable and recoverable damages. This, of course, is one of the reasons we supplement common law enforcement of ethical duties with disciplinary enforcement by the agencies of the bar. But these agencies, at present, are only available to enforce the low-commitment ethics of the ABA rules.

The project of competitive ethical regimes could be advanced by reforms designed to mitigate each of these difficulties. First, we need

29. Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757 (1995).

rules that force the parties to focus on and make commitments regarding ethical standards. It would be easy enough for tribunals and agencies to require those who practice before them to indicate their type or level of commitment, either categorically or on a case-by-case basis. The Rules currently require lawyers to force the client to address the level of fees at the outset of the relation. In a similar manner, they could require lawyers to raise the issue of ethical commitment with both client and opposing counsel.

Second, to mitigate the costs of communication, negotiation, and specification, we need publicly subsidized alternative ethical codes. These codes need to be sufficiently elaborated so that, once chosen, they provide an array of relatively clear answers to a broad range of contingencies. These alternative codes would provide sets of norms that lawyers and clients could adopt without having to assume the costs of communication and drafting. They could, for example, take the form of a Restatement. Unfortunately, the American Legal Institute's *Restatement of the Law Governing Lawyers* does not fill the bill at all. Like most of the Restatements, this one is largely concerned with summarizing the dominant tendencies of established low-commitment doctrine. It thus reinforces the tendency to opt for this doctrine simply because it is easiest to do so. What we really need are comparably clear and developed but strongly differentiated codes that increase the range of ethical options.

Here there may be a promising role for specialized bar associations, and it is heartening to see some rising to the challenge. To date, the outstanding example appears to be the American Academy of Matrimonial Lawyers.³⁰ The Academy is a national association of great prestige to which some of the most distinguished practitioners belong. One of its many projects is the promulgation of a code of advocacy that explicitly "aspires to a level of practice above the minimum established in the [Rules of Professional Conduct]."³¹ The Academy's rules take a familiar code form, with principles followed by elaborative comments and illustrative cases. Many of its precepts seem to depart notably from the ABA rules. For example, one provides, "[a]n attorney should not permit a client to contest child custody . . . for . . . financial leverage."³² Another condemns "avoidance of compliance with discovery through overly narrow construction of in-

30. Information regarding the American Academy of Matrimonial Lawyers can be found on the Internet at www.aaml.org (last visited Feb. 5, 2003).

31. AM. ACAD. OF MATRIMONIAL LAWYERS, BOUNDS OF ADVOCACY: GOALS FOR FAMILY LAWYERS, *Preliminary Statement* (Nov. 2000), at <http://www.aaml.org/Bounds%20of%20Advocacy/Bounds%20of%20Advocacy.htm> (last visited May 12, 2003) (on file with author).

32. AM. ACAD. OF MATRIMONIAL LAWYERS, BOUNDS OF ADVOCACY: GOALS FOR FAMILY LAWYERS R. 6.2 (Nov. 2000), at <http://www.aaml.org/Bounds%20of%20Advocacy/Bounds%20of%20Advocacy.htm> (last visited May 12, 2003) (on file with author).

terrogatories or requests for production.”³³ More activity of this kind could significantly expand the range of choice and the potential for ethical competition.

The Academy, however, does not directly respond to the enforcement problem. It does not sanction members for violation of its norms. There is no practical obstacle to its doing so. Private associations have the power of expulsion, as well as fines and reprimands, that can be effective deterrents. It would also be possible for the existing public enforcement agencies to enforce private codes to the extent that lawyers have made particular commitments to them.

IV. CONCLUSION

Lest my suggestion that we may not need “the bar” be taken as an aspersion on lawyer associational activity in general, I want to emphasize that I think there is a lot of valuable associational activity going in many areas, including that of professional responsibility. The work of the American Academy of Matrimonial Lawyers ethics code is just one example. We need more of this kind of work, as well as other kinds fostering pro bono representation, public education, peer support, and law reform. Such activities could be, and to a large extent are, undertaken by voluntary bar associations without the direct assistance of monopolistic state power. The “bar,” the need for which is now in doubt, is the monopolistic bar that seeks to occupy a broad field exclusively with a single set of mandatory standards.

33. AM. ACAD. OF MATRIMONIAL LAWYERS, BOUNDS OF ADVOCACY: GOALS FOR FAMILY LAWYERS R. 7.8 cmt. (Nov. 2000), at <http://www.aaml.org/Bounds%20of%20Advocacy/Bounds%20of%20Advocacy.htm>.