Diagnosis and Prescription: Illusory Lawyer Disiplinary Reform and the Need for a Moratorium

Burnele Venable Powell
DIAGNOSIS AND PRESCRIPTION: ILLUSORY LAWYER DISCIPLINARY REFORM AND THE NEED FOR A MORATORIUM

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The Supreme Court recently upheld the State of Florida's 30-day prohibition on direct-mail solicitation of accident victims by lawyers.1 By that decision, the Court simultaneously endorsed junk science and provided the green light long-sought by proponents more interested in the illusion of lawyer disciplinary reform than measurable attainment of its benefits for the public.2 The decision ostensibly involved only a judicial nod of approval for one state's attempt to combat an allegedly growing public dissatisfaction with the image of lawyers. It will more likely have broader ramifications. Under the guise of enhancing lawyer professionalism and lawyers' public image,3 expect similar illusory reforms to spur states to still greater experimentation with regulations that ulti-

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1. Florida Bar v. Went For It, Inc., 115 S.Ct. 2371, ___ U.S. ___ (1995) (Kennedy, J., dissenting). An action filed by a lawyer referral service (Went For It, Inc.) and an individual attorney (John T. Blakely) for declaratory and injunctive relief, the respondents challenged Florida Bar rules prohibiting lawyers from sending targeted direct-mail solicitations to accident victims or their families within 30 days of the accident as violating their First and Fourteenth Amendment rights. The Court held that direct-mail solicitations were commercial speech and could be regulated under the "intermediate" scrutiny framework espoused in Central Hudson Gas & Electric Corp. v. Public Service Comm’n of New York, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980). Relying on a Florida Bar generated report concerning the public perception of attorneys, the Court upheld the constitutionality of the Florida Bar Rules stating that the solicitations were considered an invasion of privacy by the citizens of Florida and the state could regulate such commercial speech within the established guidelines. See Also, Committee on Professional Ethics & Conduct of the Iowa State Bar Association v. Humphrey, 355 N.W. 2d 565 (Iowa 1984), judgment on appeal vacated, remanded, 475 U.S. 1114 (1986) (for want of a federal question) (approving the constitutionality of Iowa's regulation of lawyer advertising on the basis of an Iowa Bar generated report concerning the negative public perception of lawyer advertising on television.).

2. A.B.A. Commission on Advertising, Lawyer Advertising at the Crossroads, American Bar Association p. 71-73 (1995). (hereinafter Crossroads) indicating that the Florida State Bar study may have slanted the results.

mately provide no measurable gains for either the public or the profession.

My purpose here is to question the wisdom of the drift toward illusory lawyer disciplinary reform. I begin with some diagnoses of the legal professions’ current fascination with what I describe as narcissistic lawyer disciplinary reform measures, viewing the approach as largely traceable to the profession’s self-indulgent willingness to do almost anything to promote the appearance of professional self-regulation. However, the willingness to appear to self-regulate while placing few, if any, meaningful limits on lawyer conduct is rooted in yet another professional failing—an unwillingness to understand that as regards public perceptions, any regulation of lawyers by lawyers will, at best, be viewed with suspicion and less sympathetically as detrimental.

I turn in Part III, therefore, to an examination of the limits of illusory lawyer disciplinary reform and urge that, despite diagnoses using the rhetoric of reform—the preferred therapy is to do nothing. In short, because much of what is currently proposed as lawyer regulatory reform (or the reassertion of professional values) is flawed in theory (or in likely application) all concerned—the public, the courts, and the profession—will be better off over the next twenty-four months under a moratorium on reform than under any likely future reform proposal.

In this regard, I wish, first, to emphasize a distinction and then to make an observation. The distinction I urge is that neither the Report of the ABA Commission on Evaluation of Disciplinary Enforcement, popularly known as the McKay Report, nor recommended changes that have come about because of it are part of my call for a two-year moratorium on new lawyer disciplinary reform proposals. The McKay Report, which the ABA House of Delegates endorsed at its February 1992 Midyear Meeting, has proven to be precisely the catalytic agent for reform discussions across the nation that proponents predicted. Its impact has not been illusory lawyer disciplinary reform, but real reform. It represents


5. Writing in 26 Bar Leader (Spring 1995), Becky Stretch, Regulation Counsel for the ABA Center for Professional Responsibility reported that following release of the McKay Report, she conducted an informal national survey to determine where jurisdictions stood with respect to implementation of some of its recommendations. She noted that McKay’s most controversial recommendation had urged that discipline systems be opened at the time of the filing of a complaint. That recommendation was amended by the ABA House of Delegates, however, to continue longstanding ABA’s policy supporting the opening of proceedings after the filing and service of a complaint. Stretch reported that, “When the McKay Report was released in 1991, approximately twenty-six states had open hearings. As of January 1995, thirty-five states have open hearings, and seven states indicate they are studying the issue.” Id. at ___.
an exhaustive three-year study by a multi-partisan national panel of disciplinary experts (including lawyers, judges, academicians, and public representatives). Of equal importance, the Commission conducted many public hearings, and spawned inter- and intra jurisdictional debates about the purpose and means of systemic lawyer disciplinary reform. The breadth and depth of these considerations contrast sharply with illusory reform measures—efforts that can generally be characterized as parochial in sponsorship, biased toward the legal profession in outlook, and ultimately costly to the public interest.

The relevant observation, then, is with respect to Justice Kennedy's dissent, in *Went For It, Inc. v. Florida*. Justice Kennedy forthrightly described the symptoms of illusory disciplinary reform—parochialism, self-dealing, and economic overreaching:

> [T]he Court now orders a major retreat from the constitutional guarantees for commercial speech in order to shield its own profession from public criticism. Obscuring the financial aspect of the legal profession from public discussion through direct mail solicitation, at the expense of the least sophisticated members of society, is not a laudable constitutional goal. There is no authority for the proposition that the Constitution permits the State to promote the public image of the legal profession by suppressing information about the profession's business aspects. If public respect for the profession erodes because solicitation distorts the idea of the law as most lawyers see it, it must be remembered that real progress begins with more rational speech, not less. . . . The guiding principle, however, is that full and rational discussion furthers sound regulation and necessary reform. The image of the profession cannot be enhanced without improving the substance of its practice.\(^6\)

Like Justice Kennedy, we must be leery of so-called reforms that cannot be divorced from the self-interested concerns of their proponents.\(^7\) Pause is required for reflection when proponents cannot see the contradiction inherent in initiatives to promote greater public respect for lawyers by depriving the public of information because the provision of such infor-

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\(^6\) *Went For It Inc.*., 115 S.Ct. at 2386.

\(^7\) *Id.* at 2383-86.

Similarly, wrote Stretch, "Before the McKay Report was considered by the House, over two-thirds of the states already had nonlawyer involvement on their disciplinary boards or hearing panels. . . . Currently, only four states, Kansas, Kentucky, Mississippi, and Tennessee, do not have nonlawyer involvement in the disciplinary system."

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7. Id. at 2383-86.
mation might cause some segment of the public to think less of the legal profession. The moral compass of those who would justify such expediency is seriously out of kilter. By such logic, they might also persuade themselves of the need to eliminate lawyer discipline proceedings altogether, since such proceedings simply confirm the public’s worst fears about lawyers.

The continuing preoccupation with illusory disciplinary reform represents a sad state of affairs, but the legal profession did not arrive at this stage through sheer happenstance. The tragedy, moreover, is that even now many do not recognize that the world of the lawyer disciplinary system that fostered and allowed rationalization of illusory disciplinary reform is today no more than an artifact. In its place, is now emerging the lawyer regulatory system. Having evolved from the lawyer disciplinary system, however, Went For It, Inc. makes clear that, vestigial organs remain. Periodically, we will see atavistic lurching, suggesting that deep within the professional physiology lies the gene of an attitude that will be with us for some time. Thus, as surprising as may be the suggestion that the means for addressing lawyer ethics today ought to be those that controlled in the nineteen fifties and sixties, there will continue to be lawyers, judges, and members of the public who urge just that. Part II, a pathography, examines the demise of the lawyer disciplinary

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8. Crossroads, supra note 2 at 92 (1995). In the 1995 ABA study conducted by the Commission on Advertising, the Commission points out the empirical evidence that minorities and low-income individuals who had difficulty finding a lawyer 20 years ago are using impersonal methods of finding lawyers that include advertising.

9. See Powell, Open Doors, Open Arms, and Substantially Open Records: Consumerism Takes Hold in the Legal Profession, 28 Val. L. Rev. 709, 710-720 (1994) (Hereinafter: Open Doors) (noting the three principles of the now emerging lawyer regulatory system: judicial regulation of the legal profession, public empowerment (including access to proceedings and information), and public accountability).

10. See earlier calls for broader system of regulation in Marks, F. Raymond & Cathcart, Darlene, Discipline within the Legal Profession: Is It Self-Regulation? 1974 Ill. L. Forum 193 (professional system of self-regulation must reach beyond reliance on client complaints about conduct to professional review of performance); Steele, Eric H., Nimmer, Raymond, Lawyers, Clients and Professional Regulation, 1976 Am. Bar. Found. Res. J. 919 (the regulatory focus on normative deviance is functional in the context of image consciousness but does not exhaust the range of activities that might be encompassed within such systems, e.g. monitoring the quality of specific services, periodically monitoring competence, preventing overreaching, responding to characteristics of the practice of law that lead to client and public dissatisfaction, or responding to contractual problems).

system and argues that it expired from competing social, economic and political concerns.

**PART II: A PATHOLOGY OF NARCISSISM**

Although the exact time and place have yet to be established, what is popularly known as the lawyer disciplinary system is an ancien régime, having died sometime around 1980. Scattered decomposing remains found through the 1980s and ‘90s suggest that the cause was degenerative, probably beginning painlessly in the mid 1970’s with little more than numbness in the extremities. The first symptom was *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* Indeed, it is likely that the initial signs were thought of more as mere irritations than as symptoms. Deterioration continued, however, until

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12. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S. Ct. 1817, 48 L.Ed. 2d 346 (1976) (Rehnquist, J., dissenting). The Supreme Court held unconstitutional a Virginia State Board of Pharmacy regulation ban on advertisement of prescription drug prices. The suit was brought by consumers claiming a First Amendment right to receive the information. The Court reasoned that the right to receive the information was critical and protected by the First Amendment without answering directly the question of the pharmacist’s right to disseminate such information. Three states had previously struck down prohibitions on advertising of prescription prices: *Florida Board of Pharmacy v. Webb’s City, Inc.*, 219 So. 2d 681 (Fla. 1969); *Maryland Board of Pharmacy v. Sav-A-Lot, Inc.*, 270 Md. 103, 311 A.2d 242 (1971); *Pennsylvania State Board of Pharmacy v. Pastor*, 441 Pa. 186, 272 A.2d 487 (1971).

13. See S. Gillers, *REGULATION OF LAWYERS: PROBLEMS OF LAW ETHICS* 671-673 (1995) for helpful compilation reflecting the legal profession’s long-running battle to maintain its monopoly on legal services while staying within constitutional limits.

The Massachusetts School of Law at Andover brought suit against the American Bar Association in 1993, charging the ABA with anticompetitive practices in restraint of trade and conspiring to create a monopoly in the accreditation of law schools and licensing of lawyers. *Massachusetts School of Law v. American Bar Ass’n*, 946 F. Supp. 374, 376 (E.D. Pa. 1994). The suit was brought by MSL after the ABA failed to accredit the law school founded in 1988. ABA accreditation is important to law schools because it allows graduates to sit for the bar in 41 states plus the District of Columbia. [Also, ABA accreditation allows free-standing schools (i.e., non-university affiliated) to qualify for federal student loans though the Dept. of Education. Ken Myers, *Do Law Schools Measure Up? Top-tier Deans and a Rebel’s Lawsuit Shake Up the Debate Over ABA Accreditation*, Nat’l L. J., Vol. 17, No. 25 (col. 2). Although the MSL lawsuit has generated some five opinions in skirmishes over discovery, personal jurisdiction, and the qualifications of the trial judge to hear the case, the suit is still pending. See 853 F. Supp. 837, discovery order, 857 F. Supp. 455, order for reconsideration of discovery order, 846 F. Supp. 374 and 855 F. Supp. 108, motions to dismiss and 872 F. Supp. 1346, denial of motion requesting judge to recuse.

The MSL lawsuit precipitated an inquiry into antitrust allegations by the Department of Justice. Myers, at ___. The ABA entered into a consent decree with the D.O.J. on ________________, and it is scheduled to be heard in district court ________________ (newspaper articles).

Myers, *supra*, also discusses the letter-petition signed by fourteen deans from top law schools questioning the ABA accreditation process. Myers quotes Dean Ronald A Cass of Boston University School of Law who sees the ABA’s process as leaning more toward self serving goals, such as protecting the financial status of lawyers, rather than the benevolent goal of safeguarding the
the profession was noticeably slowed in its gait. Sporadic shortness of breath, headaches, and loss of attention followed, but probably went little noticed. The subsequent convulsions, blindness, and eventual paralysis, however, were impossible to ignore.

In the final stages death was slow and painful. The profession was psychologically despondent—questioning even whether it had ever deserved to be called a profession. To restore its balance, it overdosed on all manners of drugs and herbs, failing with first one then another nostrum, quick-fix or miracle cure. The indulgence of quackery served not only to hide the symptoms but to provide a period of incubation for the underlying contamination. Thus, a downward spiral of deadly consequence was set in motion. Having been diverted from treatment that, if applied earlier, might have proven effective, the profession was too weak to benefit from even the heroic measures to which it eventually turned.

As tragic as was the death, the agony of the period preceding it was decidedly more intense. The increased pace of deterioration of the lawyer disciplinary system was matched only by the increased pain that accompanied it. Writhing in agony, the profession turned to self-mutilation—frequently cutting and wrenching at its flesh in deranged spasms. In one convulsive seizure, it actually succeeded in plucking out a supposed offending part. Curiously, though it was the accumulation of wounds—mostly self-inflicted—that was listed as the immediate cause of death. That cause was thought more dignified—more in line with the honor to be accorded one of the original professions—than noting that as a result of having become immobilized, others feasted so vigorously that the body’s defenses simply shut down in a self-induced coma. The viruses and opportunistic infections simply followed.

public. Cass is both one of the deans who signed the letter to the ABA and is also a member of the Wahl Commission. The Wahl Commission was organized in April 1994 by the ABA Section of Legal Education and Admission to the Bar to study accreditation. The commission has held hearings and is expected to issue its report and recommendations for revising the accreditation process following its year-long study of the problem to the Section in August. The early 1970's was the last time any substantial changes were suggested for the accreditation process and school standards. M.A. Stapleton, ABA Evaluates Accreditation Process. CHI. DAILY L. BULL., Feb. 17, 1995, Vol. 141, No. 34, at 3. See also, Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed. 2d 572 (1975) (minimum-fee schedule published by the county bar and enforced by the State Bar violated the Sherman Act).

14. Ohralik v. Ohio State Bar Association, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed. 2d 444 (1978), reh’g denied 439 U.S. 883, 89 S.Ct. 226 (1978)(holding that in-person solicitations could be prohibited because the potential for exerting undue influence and attorney abuse was different than merely informing the public with regard to routine pricing.).

15. R. Simon, Jr. and M. Schwartz, LAWYERS AND THE LEGAL PROFESSION: CASES AND MATERIALS 604 (1994), recently asked the questions that has been asked for many years: “Could nonlawyers perform these routine services competently but at lower cost?”
In retrospect, one of the early signals that the legal profession might be critically ill came in 1976 in Arizona.\textsuperscript{16} There, the Arizona State Bar challenged the efforts of a little-known attorney who sought to wholesale representation of the under served middle-class through a storefront legal services operation. The charge was more subtly stated, but the essential claim was that attorney John R. Bates (and his partner) had assaulted, if not insulted, the legal profession by advertising his willingness to provide certain routine legal services at standardized below-market prices. The ability to prohibit such advertising, according to the State Bar of Arizona, went to the very essence of what was meant by the term \textit{profession}.

The rhetoric framed around the contention that a \textit{profession} is concerned with the delivery of services, not with the market-oriented pricing of commercial enterprises.\textsuperscript{17} Rather than money, the profession’s members share a common allegiance expressed in their oaths to deliver defined services.\textsuperscript{18} Far from being in pursuit of crass commercial objectives, they act as officers of the courts and by ultimate extension, as instruments of the public interest. Therefore, advertising is incompatible with the duties of a professional.\textsuperscript{19} By its very nature, advertising involves the calculated manipulation of symbols to shape consumer preferences. As to whether such preferences reflect real needs or merely reflect desires that the media promotes until individuals finally come to

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\textsuperscript{16} Bates \textit{v.} State Bar of Arizona, 433 U.S. 350, 90 S.Ct. 2691, 53 L.Ed.2d 810 (1977), \textit{reh’g} denied, 434 U.S. 881, 98 S.Ct. 242 (1977)(held for the first time that advertising by lawyers could not be banned as commercial speech, but could only be subject to regulation if it were false, deceptive, or misleading and restricted as to time, place and manner.).

\textsuperscript{17} The bar has lamented the decline of professionalism and the increase of commercialism within the practice of law throughout the 20th century. In relevant part, the perceived decline over the past 20 years in lawyer professionalism can be attributed to social and intellectual trends following Watergate and the accountability that consumers now demand of their public officials, and not surprisingly, their lawyers. Roger C. Cramton, \textit{Delivery of Legal Services to Ordinary Americans}, 44 Case W. Res. L. Rev. 531, 605-607 (1994). \textit{See also}, Bates \textit{v.} State Bar of Arizona, 433 U.S. at 390-91 (Powell, J., dissenting)(distinguishing the services of physicians and lawyers from standard product merchants.).

\textsuperscript{18} \textit{Id.} at 603.

\textsuperscript{19} Although 87\% of lawyers surveyed in an ABA Journal-sponsored Gallup Poll believed that advertising had a negative impact on the image of lawyers, studies and polls measuring public perceptions of lawyer advertising revealed that it had little negative impact on the public’s attitude toward lawyers. \textit{Crossroads, supra} note 2 at 71-72.
view them as necessities, the marketplace is indifferent. Equally so, when legal representation is fostered by advertising, the market is indifferent to whether the requested services are pursued to vindicate that which the public has defined as good or what an individual rationalizes as desirable.

For the Court in Bates, however, the diagnosis was different. The practice of law is not simply a professional undertaking. To be sure, it involves the delivery of a service, but to recognize that as a dimension of the practice does not preclude the existence of other dimensions. The practice of law is also a business. As such, those delivering legal services are just as entitled to present their message about the quality of their merchandise as, say, the local optician. Furthermore, the connection to the judiciary, although conceded as an aspect of the delivery of legal services by lawyers, is no obstacle to the business of layering. Brand differentiation, product positioning, price competition, and consumer services are no less significant to the delivery of legal services than they are to baby shampoos, breath deodorants, and the "cola wars."

Indeed, the Court recognized in the special role that lawyers play as officers of the court, an even stronger rationale for emphasizing the business aspects of the profession: Publicly defined needs may go unmet when the public's access to the legal system is denied. In a nation in which 60% of the lawyers service 20% of the public, people's access to information about lowcost legal services is critical. Moreover, even as

20. In a 1918 speech to the Harvard Ethical Society, Louis B. Brandies, paraphrasing Bryce observed: "Lawyers are not to a greater extent than formerly business men, a part of the great organized system of industrial and financial enterprise."[cite to Hazard & Rhode's book containing speech at p. 16].

21. See Crossroads, supra note 2 at 82, that the main conclusions from studies designed to rate reaction to different kinds of advertising by lawyers indicated that the content of different types of commercials affected the impression about the specific law firm that advertised (but did not impact their impression of lawyers generally) and that consumers were able to differentiate between layers in general and those whose advertisements they had viewed.

22. Need for Legal Services: Proposed ???, pg 23-27. Approximately 1/2 of low to middle income households have one or more situations that could be addressed by the civil justice system. Of those, 71% of low-income families and 61% of middle income families do not bring their problems to the system for resolutions. In both cases, the most common response is to attempt to resolve the matters on their own. Among middle income households the second most common response is to turn to the justice system. Low income households' second response however, is to simply do nothing. Low income families perceive that the legal system is either 1) unable to help them, or 2) too expensive to help.

In his article reviewing status of mandatory pro bono requirements in Nevada and other states, James Baillie points out that the issue of mandatory pro bono becomes inextricably intertwined with the issue of the unauthorized practice of law. In Nevada, [Greenwall] pointed out that, as scriveners, they were filling a need by providing legal services that Nevada lawyers were unable or unwilling to provide. Although the court upheld the injunction, it ordered the state bar to investigate the
to the high-end consumers of legal services, competition in the marketplace delivers greater access, cost-savings, and servicing.

Still, the wounds to the regime inflicted by advertising might have been contained had it not been for other factors. After all, even in the 1990's few lawyers advertise. Of the lawyers who do, fewer still represented those on the Cravathian side of the professional social crevasse—i.e., those firms that has become so adept at representing the "Masters of the Universe" that they too can be counted among their elite ranks.

No, advertising by lawyers was not so much a fatal wound as it was a shock to the system. That the profession was susceptible to so foreign an infection and that the source of the contagion could be those who, themselves, had sworn to uphold the ideals of professionalism, was a more significant cause for the devastating impact of the disorder than the wound itself. To allow advertising was inevitably to invite an associated list of possible infections. Loss of the prohibition on price-competition was the loss of the proverbial nail for want of which the kingdom would be lost. How the profession defined, performed and evaluated itself would have to change once lawyers accepted the truth of advertising's implicit rationale: Placement of a commodity in a changing, but competitive market is as central to an exchange as the commodity itself.

Given the acceptance, too, it was inevitable that a change in the demographic make up of the profession would occur. Resources would have to be diverted or streamlined to meet the strategic use of advertising by law firm competitors who would operate increasingly like no-service warehouses and fast-food restaurants. Such firms—short on experience, capital, and perhaps ethics—could operate with all the ease of Captain John Luc Picard on a Hollywood back lot: ready upon request (and the right price) to go "where no one has gone before." The ubiquitous lawyer on the television screen amid the stylized backdrop of a Cravath-like library could suggest the authority of a history in service to the rich and powerful, but at a vastly cheaper price if not commensurately inferior results.

But the changes would not all be cosmetic nor internal. National competition among law firms would increase in response to the need for the expanded client-base brought on by increased competition in the

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availability of affordable services to low and middle income individuals. BUSINESS LAW TODAY, vol. 4, no. 4, May/June 1995 p. 52-3.

traditional local market. And price competition would, itself, be accelerated. Increased competition for clients would result from offers of cheaper representation made by nonlawyers. Permission for fee-splitting among lawyers would be expanded,\(^2\) and even rationalized,\(^2\) as the need to show profits for clients paralleled the lawyers' own needs to measure a successful representation in terms of its profitability.\(^2\) Partnerships between lawyers and nonlawyers would eventually have to be allowed so that law firms might achieve sufficient diversification of their product to assure economic stability in good and bad markets. But, of course, if lawyers are simply sellers vying for attention in the marketplace, there is no justification for their self-regulation. Like drug-manufacturers, electricians, and beauticians, rather than being answerable to their peers, they would be better regulated by politically sensitized persons answerable to the representatives of the people.\(^2\)

\(^{24}\) Compare ABA Model Code of Professional Responsibility D.R. 2-107(A) (1981) ("A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless: . . . the client consents . . . . The division is . . . in proportion to the services performed and responsibility assumed by each [and] . . . [i]f the total fee of the lawyers does not clearly exceed reasonable compensation for all legal services. . . .") and the superceding ABA Model Rules for Professional Conduct, Rule 1.5(e) (1983) ("a division of fee between lawyers who are not in the same firm may be made only if: . . . the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation.") (Emphasis added.)

\(^{25}\) See, e.g., R. Aronson, J. Devine and W. Fisch, PROBLEMS, CASES AND MATERIALS IN PROFESSIONAL RESPONSIBILITY 221(1985) (discussing the reasons favoring fee-splitting urging by the Roscoe Pound—American Trial Lawyers Foundation, Annual Chief Justice Earl Warren Conference on Advocacy in the United States—i.e., flagrant violations of the prohibition, and creation of an incentive for lawyers to refer clients to more competent attorneys).

\(^{26}\) Although it is difficult to identify which economic interest—the so-called silk-stocking firms or the young lawyers and small firms—has most felt the need to advertise in order to maintain economic competitiveness, no one denies economics as the underlying motivation. See Greenhouse, "At the Bar; In the Longtime War Over Lawyer Advertising, the Latest Shot Leaves as Many Wounds as Ever," N. Y. TIMES, June 23, 1995, at A23, col. 1. (contrasting Alan B. Morrison's view that, "The people who are in charge of the bar don't need to advertise. . . . They've got their clients, and they didn't get them through advertising. They met them at the country club" and the views of P. Cameron DeVore, that the opposition is not the big firms, but the young lawyers and small firms scrambling in the marketplace to get clients).

\(^{27}\) See Report of the Commission on Evaluation of Disciplinary Enforcement, Recommendation 1, 1-6 (1992)(examining historical bases for judicial regulation of lawyers (as contrasted with "self-regulation" of lawyers) and finding the former essential to both the courts and the profession because of the courts' needs to assure the quality of those admitted to the practice of law, the failure of state legislatures to act to protect the public, the lack of evidence that legislative regulation of other professions has been superior to judicial regulation of lawyers, and, most important, because "legislative regulation will impair the independence of lawyers." Id. at 5.
The legal profession's reaction to the suggestion that it allow lawyers to advertise, therefore, was not surprising. Feeling the onset of what was thought to be, at least, a massive upper-respiratory infection, the profession coughed and wheezed in a fruitless effort to clear itself. The inevitable redrafting of its prohibitions against advertising followed Bates v. Arizona, but even now apparently many in the profession never really heard the Court. Besides, for some jurisdictions the word came so late that the auditory passages had already closed.

Ohio, which had fought strenuously in Ohio v. Ohio State Bar Association to limit the scope of Bates, had to be told in Zauderer that the Court really had meant that commercial speech was protected by the First Amendment. If the speech was clearly true, it could not be regulated. And interference for deceptive and misleading speech, while permitted, as the Court said in In Re R.M.J., had to be narrowly circumscribed and no more restrictive than necessary. This rule was true for political forms of speech, for communications through the mails, for professional self-promotions, and for self-reporting professional recognitions conferred by others. Nor should it matter that the communication is by letter, telephone, radio, or television.

28. See D.D. Hill, Balancing the Interests of Lawyers and Non-Lawyers in Regulating Lawyer Conduct, 43 Rutgers L. Rev. 245 (1991)(proposing that attorney regulation be vested in disciplinary boards appointed by the governor and composed of equal numbers of lawyer and nonlawyer members).
32. "That our citizens have access to their civil courts is not an evil to be regretted; rather it is an attribute of our system of justice in which we ought to take pride. The State is not entitled to interfere with that access by denying its citizens accurate information about their legal rights. . . ." Id. at 643, 105 S.Ct. at 2277.
33. In Re R.M.J., 455 U.S. 191, 102 S.Ct. 929, 71 L.Ed. 2d 64 (1982), the Court was both dismissive and ambiguous: "In sum, none of the three restrictions in the Rule upon appellant's First Amendment rights can be sustained in the circumstances of this case. There is no finding that appellant's speech was misleading. Nor can we say that it was inherently misleading, or that restrictions short of an absolute prohibition would not have sufficed to cure any possible deception. We emphasiae, as we have through out the opinion, that the States retain the authority to regulate advertising that is inherently misleading or that has proved to be misleading in practice. There may be other substantial state interests as well that will support carefully drawn restrictions." (Italics added.)
Only in *Ohralik* and its progeny, did the Court accept a distinction based upon in-person solicitation, but even there ambiguity remains. To prevent the overreaching likely to result when a trained advocate confronts a layperson, the Court has generally prohibited in-person solicitation. But where the person is a family member, a continuing client, or a corporate representative who is an expert in his or her own right, the situation is not yet fully resolved. What is more, a determination of what constitutes in-person solicitation remains far from clear. The lawyer apparently remains free to dazzle a group of laypersons in a lecture hall, to hold a press conference at the scene of a mass tort disaster, or to place an advertisement in a newspaper inviting persons known to be in need of legal representation to make contact.

Despite the ambiguity and the Court’s warnings to the contrary, however, in the early 1990’s Florida rewrote its professional standards to “protect the privacy and tranquillity of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers.” Such protection, factored into what the Court described as, “the Bar’s paramount (and repeatedly professed) objective of curbing activities that ‘negatively affect the administration of justice.’” Armed with its own polls showing a decline in the public’s perception of lawyers because of undignified advertising by lawyers, Florida convinced the Court that *Bates* could not have meant for the profession to say to the public “Just say no,”

34. See *supra* note 23.
35. *Id.*
36. ABA Model Rule 7.3 provides: “A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in-person or otherwise, when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain.” ABA Model Rules of Professional Conduct (1983).
37. “The term "solicit" includes contact in person, by telephone directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.” *Id.*
38. See Powell, “The Problem of the Parachuting Practitioner,” 1992 III. L. Rev. 105, 132-134 (1992)(Hereinafter Parachuting Practitioner) (arguing that the reality of attorneys engaging in soliciting-related conduct as they practice interstate in connection with mass disasters should be accepted, but that regulators should emphasize mechanisms for enforcing standards of professional responsibility).
40. *Id.*, citing The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar—Advertising Issues, 571 So. 2d at 455; see also Brief for Petitioner 7, 14, 24; 21 F.3d at 1043 (describing the Florida Bar’s effort “to preserve the integrity of the legal profession”).
41. Said the Court, in an appallingly weak defense of what was obviously the best science the Florida Bar could buy: “. . . we do not read our case law to require that empirical data come to us accompanied by a surfeit of background information.” *Went For It, Inc.*, 115 S.Ct. ___.
when confronted with mailings during a time that they are too physically or psychologically vulnerable to deal with receipt of advertising materials. The surprise, however, was that the Court responded positively, accepting the Florida Bar’s 30-day ban as “an effort to protect the flagging reputations of Florida lawyers by preventing them from engaging in conduct that, the Bar maintains, ‘is universally regarded as deplorable and beneath common decency because of its intrusion upon the special vulnerability and private grief of victims or their families.’”

Regrettably, however, the death rattle represented by the Court’s withholding of First Amendment protection to commercial speech on the facts, is not likely to be the last act of self-indulgence by the legal profession (or the Court). Seemingly, having disregarded evidence of the growing ineffectiveness of systems premised on the idea that rectitude follows from punishing bad lawyers, it now appears that several recent state initiatives are likely to provide the Supreme Court with opportunities to clarify whether Went For It, Inc., was aberrational or truly a nostalgic expression of longing for a bygone era. The three initiatives discussed below suggest the thrust of some of those opportunities without exhausting the potential list.

**PART III: AN ILLUSION OF REFORM**

Consider, first, the proposal of the South Dakota State Bar’s Lawyer Competency Committee to re-institute a program that has not generally been a part of the legal profession for over a half century—lawyer apprenticeship.

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42. Lawyer advertising has generated relatively few complaints, but of those lodged most seem to be the “result of direct mail solicitation, which may have embarrassed or offended the recipient.” *Crossroads*, supra, note 2 at 88-9.
44. See infra note 9 and accompanying text (what I have previously described as an artifact).
45. The Lawyer Competency Committee, chaired by Thomas J. Welk (and former member of the State Bar Disciplinary Board) made policy recommendations only; it acknowledged that implementation would in some instances require further State Bar and South Dakota Supreme Court action. *South Dakota State Bar Lawyer Competency Committee Report* (Hereinafter: Competency Report), 47-48 and Endnote 1.
46. The Competency Report’s second recommendation was that: “Those entering the private practice of law would be required to participate in a mentorship program except law clerks and full-time government employees who have no private practice. During such time, a supervising attorney would meet with the new attorney to review certain predetermined items. The supervising attorney would be provided civil immunity for the supervision from the attorney and third party claims but receive no compensation. The supervising attorney would be selected and approved by the Secretary-Treasurer of the State Bar.”
A. Mentoring and Means

Ostensibly the purpose of the proposed program is to teach new lawyers how to practice law competently. Particular attention would be given to the new lawyer's knowledge of the law, level of performance, efficiency, ability to identify primary and related issues, preparation and capacity (i.e., intellectual, emotional and physical ability).\textsuperscript{47} Thus, the Lawyer Competency Committee proposal would provide new bar admit-tees the basic practice skills that went untaught (or unlearned) during three years of law school (and presumably, as well, during any summer or judicial clerkship).\textsuperscript{48} Upon being admitted to the bar exam, every new South Dakota lawyer would for three years "be assigned a mentor except law clerks and full-time government employees with no private practice." Thus, the basic design remains strongly tilted in favor of the guild aspects of commerce. Incumbent lawyer-mentors are expected to provide assistance to new lawyers and to assure that they obtain such assistance based upon reporting forms prepared for the mentor's review.\textsuperscript{49} If problems arise with respect to a new lawyer, the threat is implicit. The Committee proposes that problems be dealt with during a proposed character, fitness and competence recertification before the South Dakota Board of Bar Examiners.\textsuperscript{50}

True, it can be asserted that the program is narrowly directed at beginning attorneys because that is where the need for representational improvements benefiting the public and profession is most apparent. Anecdotal evidence from South Dakota suggests that lawyers perceive absolute declines in the level of civility among their colleagues (and similar accounts are heard across the nation). Logically, too, it can be inferred that large parts of that decline must certainly be because law schools have failed to teach law as it relates to the real-world practice of law. Add to this the growing numbers of law graduates needing to overcome economic and social entry-barriers to an increasingly competitive and cutthroat lawyer marketplace.

If Florida's response to discrete acts of lowered professionalism and declining public confidence was to curtail certain speech, can it be any

\textsuperscript{47} Id. at 39.
\textsuperscript{48} The Competency Committee's own views were shaped, at least in part, by experience: "The Committee also acknowledged that while law students have always complained about a lack of practice skills being offered in law schools there is currently a more concerted effort to integrate those practical skills into the law school curriculum than in years past. No member of the Committee could candidly acknowledge that upon their graduation from law school they felt comfortable being able to handle the practical aspects of the practice of law." Id. at 41.
\textsuperscript{49} Id. at 45 and 46.
\textsuperscript{50} Id.
wonder that South Dakota might choose to curtail the associational protections also inherent in the First Amendment? Consider, moreover, that many apprentices themselves reported to the South Dakota State Bar that the voluntary programs on which the apprenticeship program is modeled have proved invaluable networking experiences for them over the course of their careers.

Given these considerations, there can hardly be much wonder about why South Dakota thinks an apprenticeship program is worth considering. The real wonder is why apprenticeship programs have taken so long to reappear, given their cheap sources of labor, largely unrestrained supervisory discretion, low responsibility to report empirically to the profession or public, tacit (and sometimes expressed) support by some lawyer candidates, and substantial control of would-be competitors.

Then, too, there is the narcissism factor. Looked at from the standpoint of the practicing bar and judiciary, proponents have yet another opportunity to admire handiwork that allows them publicly to promote efforts to improve lawyer ethics and professionalism while in actuality, giving up little or nothing. They can say forthrightly to the public that they have seized the initiative; they have sought to elevate lawyer standards and practices by giving selflessly of their time and energy to train, enlighten, and cultivate the profession. But for the harsh reality, these contentions might be laudable. The actuality, however, is that South Dakota's apprenticeship program, like Florida's "cooling-off period," is hardly altruistic.

To begin with, one wonders why, given the supposed support by new admittees and mentors alike, the program was not made mandatory for all South Dakota lawyers. If the need for such a program is observable from deficiencies apparent in the practicing bar, surely the logical remedy would be to target the deficient group, as opposed to targeting new admittees with no record of deficiencies. Not only does the lack of a targeted response suggest that other motives underlie the mentoring/apprenticeship program, but it serves to highlight the paucity of evidence relied upon to support calls for implementation of the program.51 Self-

51. In an appallingly weak attempt to establish a legislative record justifying its call for a mandated apprenticeship, the Competency Committee simply went for it, garbling its facts and giving no clue about the existence, if any, of a causal connection between the phenomenon it reported:

The Committee received evidence of a growing concern by the State Bar Disciplinary Board . . . about an increasing number of complaints against relatively new members of the Bar in solo practice. Secretary-Treasurer Barnett reported that the statistics of the Disciplinary Board demonstrate vividly that (1) over the last ten years the most serious complaints against the members of our Bar were against sole practitioners; and (2) within
serving anecdotes aside, there is no evidence that newly admitted attorneys to the practice of law lack professionalism, ethics, or competence to any greater degree than the general bar membership.

This does not suggest that rudimentary practices and procedures do not need to be learned by novice attorneys. Rather, it is to assert that such skills as are involved in mastering the proper heading for a pleading, establishing the proper time-frame for a filing, instituting a file tickler system, keeping adequate time records, maintaining a client trust account, and the like, are important, but important in the sense that most jobs require some amount of on-the-job training.

Moving from the role of student to that of practitioner certainly involves the learning of new skills, but the difficulty of acquiring them should be kept in perspective. For lawyers, the transition from academic study to the actual application of knowledge should be viewed in the same way that one views a medical student’s mastery of the skills involved in finding a vein to draw blood with a hypodermic needle. There can be great discomfort even for such a relatively low-risk procedure, but the more you do it, the better you get at it.

No, the reality is that neither the public, the courts nor the profession has suffered in any documented way as a result new admittees’ lack of ethics, professionalism or competence. This suggests, therefore, that one must look beyond the proffered explanation fully to understand mandatory mentoring programs. More specifically, consistent with the illusory disciplinary reform thesis, we should decide whether, as in Went For It, Inc., there are indirect benefits accruing to lawyer-competitors that are at least as valuable as any benefits allegedly accruing to the public. Considered from this perspective, we can see that Justice Kennedy’s implicit warning in response to Florida’s First Amendment attack is equally applicable to South Dakota’s mentoring initiative: “Obscuring the financial aspects of the legal profession form public discussion . . . , at the expense of the least sophisticated members of society, is not a laudable constitutional goal.”

the last several years there has been a growing number of complaints (albeit not serious) against younger lawyers in sole practice.” Competency supra note 46.

The Competency Committee went on to add: “Disciplinary Board statistics reveal that lawyers admitted less than six years account for one-third of all admonitions and private reprimands in the past five years.” Id. at note 6.

The questions begged are endless: What percentage of attorneys are represented by the new admits? How does their rate of disciplinary actions compare to the rest of the bar? What is the significance of the solo-practice variable? What percentage of new admits are in solo practice? How do new admits in solo practice compare with those in solo practice for longer than five years? Is the rate of disciplinary actions rising or falling for new admits? How about longtime solo practitioners? And on, and on, and on . . . .
What the public is offered as a mentoring program might as easily be described as an old fashioned guild admission program. Involuntary mentoring—an oxymoron if ever there was—ressembles nothing, if not the maintenance of authority that historically allowed guilds to control competition by controlling the numbers of those allowed to practice a craft. Under the guise of avoiding the evils of cutthroat competition, including the short-changing clients through reductions in the quality of legal services and the undermining public confidence in the integrity and commitment of the profession, the South Dakota model chooses to look tough on ethics and professionalism while simultaneously increasing the economic leverage of those already practicing law. Like Narcissus, however, a persistent South Dakota State Bar will ultimately find that there are grave risks to being the central object of one's own affections.

B. Drunk-driving Ethics

Another example of illusory, disciplinary reform is illustrated by California's latest creation, Ethics School. The program is modeled on California's so-called drunk-driving schools, the alternative process for dealing with, for example, first-time charges of driving while under the influence of alcohol. Offenders with otherwise innocuous records (e.g., no loss of life or major property damage) get an opportunity to keep their records clean, rather than be prosecuted to the fullest extent of the law. The choice is an easy one: Rather than face criminal charges or other severe penalties (e.g., license revocations, fines, point deductions, or incarceration), remorseful drivers are offered the option of attending day-long driver education sessions. There, they are, in effect, reeducated about the risk of drunk driving. Instead of the traditional battery of judicial sanctions, the motor vehicle regulators pursue a pedagogical approach involving lectures punctuated with graphic photos of accidents caused by drunk drivers and their victims. The hoped for result is a cathartic reassessment of past behavior that leads thereafter to law-abiding and safer drivers.

Although analogously modified for lawyer discipline, ethics schools rest upon many of the same assumptions as drunk driver Schools. Here too, the traditional pursuit of sanctions has evolved in California to include the idea of diversion. Instead of relying solely on sanctions, the expanded process offers a two-track option under which education or increased supervision (or some combination of them) can be pursued.

Like the drunk driver schools, too, for cases involving acts of minor misconduct, ethics schools include mandatory, all-day reeducation programs, complete with appropriate lectures about such things as the evils of unethical legal practice or the importance of good law office management techniques.

Assuming, however, that there is little disagreement about the need for greater flexibility in dealing with lawyer misconduct and that the need for flexibility is even greater with respect to acts of minor misconduct, it is legitimate to ask why ethics Schools warrant description as illusory, disciplinary reform. Hence, the short response is that despite California’s good intentions, the theory that underlies the ethics schools is one shared by both Went For It, Inc., and South Dakota’s Mandatory Mentoring proposal: in all three instances, the underlying premises are based upon speculation—less knowledge for the public promotes respect for the legal profession in Went For It, mandatory mentoring improves the efficiency, ethics and professionalism of newly admitted attorneys in South Dakota; and confrontational reeducation leads to catharsis and transformation in California.

More onerous than being untried and untested however, is the fact that in each instance the benefit of the doubt for this dubious science rests with the legal profession. Under Went For It, Inc., it is the public that is deprived of information that is concededly neither false, deceptive nor misleading. It is the public that pays the additional costs arising from the economic entry-barriers associated with mentoring. And it is primarily the public that will bear the risk if the effect of California’s ethics schools turns out to be more symbolic than real.

Conversely, as the illusory disciplinary reform thesis predicts, in all three instances the benefits to the lawyers involved (i.e., the guild dividends) are manifest: entry barriers for lawyer-competitors and increased transaction costs for would-be clients as in Went For It, Inc.; entry barriers and resulting higher costs as with South Dakota’s mandatory mentoring proposal; and inefficiencies arising from resource diversion and duplication stemming from California’s ethics schools.

Still, if the effects of proposals like mentoring were limited to economic concerns, their cost might nevertheless be tolerable. Marginal gains by a few strategically placed lawyers might be a worthwhile trade-off for the heightened involvement of lawyers in the regulatory processes represented by these initiatives. However, the greater risk, injury to the public, was succinctly stated in a New York Times’ editorial in the wake of Went For It, Inc.:
"Judges and justices are often the last to understand that most ordinary citizens do not have easy access to lawyers when they need them. When the First Amendment right to speak is involved, they should get out of the way and let the information flow without censorship." 53

Illusory, disciplinary reforms are to be resisted, therefore, not simply because they improperly turn the lawyer regulatory power of the state to guild-like purposes, but equally because of their insidious impact on the legitimacy of the regulatory enterprise.54 By fostering the public perception that lawyers regulate themselves for the benefit of themselves, illusory, disciplinary reforms insidiously undermine public confidence in the profession. Over time, they cause even good regulations to be scrutinized by the public based upon suspicions about the advantages they fear are being carved out for the benefit of lawyers.

C. Disorienting the Innocent.

Consider, finally, as a third example, the recent initiatives at some law schools to establish first-year orientation programs focusing upon lawyer ethics and professionalism. Typically, such programs are organized along classic captive-audience principles. Since the students must be oriented to the law school, the assumption is that this is as good a time as any to begin talking to them about their forthcoming ethical obligations to clients, the judiciary, and the profession. Accordingly, students are subjected to addresses by various members of the local legal hierarchy (e.g., the state bar president, chair of the state's character and fitness committee, or the lawyer disciplinary counsel), asked to ponder traditional law school hypotheticals on questions of ethics and professionalism, and instructed about the operations of the school's Honor Code and Honor Court.

Unlike the prior examples, such law school orientation programs do not necessarily raise concern because of what they say or do. Their problem arises more as a function of opportunity cost. Although spurred by motivations to make the legal profession look and feel good, and to operate cost effectively, expectations for such programs cannot help but be modest. While admittedly such programs allow law schools early opportunities to imprint new and impressionable students with a recognition of the solemn obligations that they will soon be undertaking, the tragedy is that such mass education campaigns—usually compressed into a couple of days—run directly contrary to everything that modern learning tells us

54. See the excellent discussion in D. Rhode, The Rhetoric of Professional Reform, 45 Md. L. Rev. 274 (1986).
about an appropriate teaching/learning process. Large-scale, quixotic, and impersonal does not substitute for intimate, practical and interactive.

Law schools pursue mass orientation programs that increasingly focus on ethics and professionalism, therefore, for precisely the same reasons that the illusory, disciplinary model would suggest. Given the opportunity to appear to be engaged in protecting the public the public interest, an activity will always be undertaken. It is far better to act, even if without consequence, than to fail to act and leave oneself open to charges of indifference or, worse yet, neglect.\textsuperscript{55} Furthermore, with even a little dubious science, such as participant rating sheets, program coordinators are likely to be able to establish that such programs are enjoyed and deemed worthwhile by their participants.

As with \textit{Went For It, Inc.}, the California ethics schools and South Dakota’s mentoring programs, however, much of the true cost of such programs is hidden and possibly unknowable. Only the benefits to lawyers (including the institutional professionals) are clearly promoted. Like the bad money that drives out good, however, every investment made in such programs prevents us, for example, from creating programs in which 1) law school orientations are designed around small-group interactions with lawyers (and other relevant professionals), 2) students engage program participants in the context of the professional participant’s own work environment, or 3) the student-teacher exchange is interactive (viz., the students are able to ask questions and to follow-up).

The small-group orientation approach would, of course, be more expensive and probably more time-consuming. Like the other alternatives to illusory, disciplinary reform activity, however, this response begins first with the question that illusory disciplinary reform programs too often acknowledge only as a by-product: “How can we best benefit the public?”

\textbf{PART III: RX FOR THE LEGAL PROFESSION}

The death of the lawyer disciplinary system and the emergence of its evolutionary successor, the lawyer regulatory system, represent a profound and mostly positive change when measured from the vantage point of the public, the various judiciaries or lawyers, themselves.\textsuperscript{56} Over the century following Chief Justice Sharswood’s opinion in \textit{Ex}
parte Steinman and Hensel, what has evolved slowly from a profession with much akin to a gentleman's club, reflects major changes. The pace of change has been especially notable as a result of the reports of the Clark Committee and more recently the McKay Commission. Most notable about this evolution, however, are two things. First, the impetus for reform has primarily been lawyer-driven, as the ABA and the various jurisdictions have pressed the case. Second, and perhaps even more surprising, is that it has continued almost uninterruptedly and gained speed even as it has required the legal profession to relinquish or reassess positions once thought nonnegotiable.

Still, even as we have seen the full emergence of lawyer regulatory systems in the wake of the death of lawyer disciplinary regimes, the lesson is that vigilance will be required until the current period of consolidation has run its course. Despite the turn toward more open lawyer regulatory systems in which complainants are advised, assisted and informed, there will continue to be calls for retreat. Such calls can only be countered with forthright demands for complete, publicly stated, explanations, for it is only through candid discourse that a full understanding of what, if any, self-serving initiatives are being pushed by lawyers under the guise of lawyer regulatory reform.

What is certain at this stage is that, just as the public interest in truthful information was thwarted by competitors in Went For It, Inc., there will be further efforts to limit the capacity of the public to act independently and to enhance the prestige and power of lawyers. Moreover, nothing in Went For It, Inc., gives any reason to expect that the Supreme Court will necessarily be hostile to such a rollback. It is for this reason that I urge that over the next twenty-four months there be a moratorium on all pending and future proposals to reform lawyer regulatory stan-

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57. 95 Pa. 220 (1880), holding that an attorney can be disbarred for misconduct in his professional capacity or respecting his professional character upon the court's own motion — without petition or complaint — and requiring only that the attorney be given reasonable notice and opportunity to be heard. See also, Ex parte Wall, 107 U.S. 265 (1882), citing Steinman and Hensel with approval in upholding a district court judge's disbarment of an attorney for his participation in a lynching.


60. See, e.g. A. Mashburn, Professionalism As Class Ideology: Civility Codes and Bar Hierarchy, 28 Val. U. L. Rev. 657 (1994)(codes, developed by profession's power elite, regulate other non-elite lawyers and help avoid economic difficulties of providing legal services to the non-affluent).
dards and procedures. Instead of quickly attempting to sort-out illusory, disciplinary reform, the time is at hand for a full-scale discussion about how far we have come and a eulogy for the death of the old system that helped bring us here.