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Behind Closed Doors: Shedding Light on Lawyer Self-Regulation--What Lawyers Do When Nobody's Watching

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Behind Closed Doors: Shedding Light on Lawyer Self-Regulation—*What Lawyers Do When Nobody's Watching*†

JOHN SAHL*

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I. INTRODUCTION

Professor Fred C. Zacharias was a prolific scholar in the professional responsibility field.¹ At the close of each summer, I expected to receive

† The complete title and citation of the article is Fred C. Zacharias, *What Lawyers Do When Nobody's Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules*, 87 IOWA L. REV. 971 (2002).

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one or more new articles written by him, with a personal note requesting comments about his work. It was always a humbling way to begin a new school year because it often reminded me of my unfinished projects. But, the more meaningful message for me was that here was a well-known scholar in the professional responsibility field interested in my thoughts. I often responded, in part, because Zacharias was a special colleague. He supported my efforts as a new professor to teach and write in the professional responsibility field. In subsequent years, we became close colleagues.

I want to thank Professor Bruce Green for inviting me to contribute to this publication honoring Zacharias by discussing one of Zacharias's articles.² I immediately volunteered to comment upon *What Lawyers Do When Nobody's Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules (Nobody's Watching)*.³ *Nobody's Watching* examines two topics of interest to me: the

1. The term *professional responsibility* for the purpose of this Article encompasses a broad range of topics, including lawyer and judicial ethics, professional discipline, lawyer malpractice, legal education and training, and the general study of the legal and judicial professions. Zacharias has written on all of these topics. A recent search of Professor Zacharias's writings produced a long list of articles contained in Appendix A, *see infra* Appendix A, some of which, including this Article, are discussed in a tribute to Zacharias in this issue, Memorial Issue, *In Memoriam to Professor Fred C. Zacharias*, 48 SAN DIEGO L. REV. 1 (2011). Zacharias published at least one, often two, and sometimes more, articles each year since 1988 with the lone exception of 1990. *See id.* This is an extraordinary achievement for any author, and this figure does not take into account that he authored numerous articles before he began his string of annual publications in 1988—some twenty-two years ago. The following articles provide a truncated picture of Zacharias's long history of scholarship, in chronological order: Fred C. Zacharias, *Standing of Public Interest Litigating Groups To Sue on Behalf of Their Members*, 39 U. PITTS. L. REV. 453 (1977); Fred C. Zacharias, *The Uses and Abuses of Convictions Set Aside Under the Federal Youth Corrections Act*, 1981 DUKE L.J. 477; Fred C. Zacharias, *The Politics of Torts*, 95 YALE L.J. 698 (1986); Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989); Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335 (1994) [*hereinafter* Zacharias, *Federalizing Legal Ethics*]; Fred C. Zacharias, *Forward: The Quest for a Perfect Code*, 11 GEO. J. LEGAL ETHICS 787 (1998); Fred C. Zacharias, *Waiving Conflicts of Interest*, 108 YALE L.J. 407 (1998); Fred C. Zacharias, *Understanding Recent Trends in Federal Regulation of Lawyers*, PROF. LAW., Symp. Issue, 2003 at 15; Fred C. Zacharias & Bruce A. Green, *Rationalizing Judicial Regulation of Lawyers*, 70 OHIO ST. L.J. 73 (2009); Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147 (2009) [*hereinafter* Zacharias, *The Myth of Self-Regulation*]; Fred C. Zacharias, *Steroids and Legal Ethics Codes: Are Lawyers Rational Actors?*, 85 NOTRE DAME L. REV. 671 (2010) [*hereinafter* Zacharias, *Steroids and Legal Ethics Codes*].

2. Bruce Green is the Louis Stein Professor of Law and Director of the Louis Stein Center for Law & Ethics at Fordham University School of Law. ASS'N OF AM. LAW SCH., THE AALS DIRECTORY OF LAW TEACHERS 2009–2010, at 707–08 (2010). He is a well-known authority in the professional responsibility field.

3. *See* Zacharias, *supra* note †.

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profession's advertising rules and lawyer discipline.⁴ These topics obviously interested Zacharias, given his multiple works on lawyer advertising and lawyer discipline.⁵ I also selected *Nobody's Watching* because a former colleague and I had considered writing about lawyer advertisements in telephone books shortly before Zacharias's work.⁶

4. In chronological order, see, for example, John P. Sahl, *Secret Discipline in the Federal Courts—Democratic Values and Judicial Integrity at Stake*, 70 NOTRE DAME L. REV. 193 (1994), which discusses the disciplining of federal judges and argues for greater transparency in the process; Jack P. Sahl, *From Grievance and Complaint to Sanction: Attorney Misconduct in Ohio*, 23 U. DAYTON L. REV. 303 (1998), which examines Ohio cases applying the clear and convincing evidence standard for sanctioning lawyers and suggests that the Ohio Supreme Court should better explain the facts and reasoning it uses in disciplining lawyers to thereby promote public confidence in the profession and its ability to self-regulate; John P. Sahl, *The Public Hazard of Lawyer Self-Regulation: Learning from Ohio's Struggle To Reform Its Disciplinary System*, 68 U. CIN. L. REV. 65 (1999), which evaluates Ohio's lawyer discipline system and recommends reforms; John Sahl, *Helping Clients with Living Expenses: "No Good Deed Goes Unpunished"*, 13 PROF. LAW., no. 2, 2002 at 1, 4–13, which analyzes states' ethics rules, disciplinary cases, and related policies barring lawyers from advancing certain costs—the cost of medical care, rent, food, and other “humanitarian assistance”—to clients; and argues that such assistance is a laudable goal for the bar and the public; Jack P. Sahl, *The Cost of Humanitarian Assistance: Ethical Rules and the First Amendment*, 34 ST. MARY'S L.J. 795 (2003) [hereinafter Sahl, *The Cost of Humanitarian Assistance*], which reviews lawyer conduct codes and cases that prohibit lawyers from advancing funds to indigent clients to cover certain costs, such as transportation and housing expenses; and in states where humanitarian assistance is permitted, argues that lawyers should be free to advertise such assistance under the First Amendment's commercial speech doctrine.

5. Some of Professor Zacharias's writings on lawyer advertising and discipline are as follows: Fred C. Zacharias, *A Word of Caution for Lawyer Assistance Programming*, 18 GEO. J. LEGAL ETHICS 237 (2004) [hereinafter Zacharias, *A Word of Caution*]; Fred C. Zacharias, *Effects of Reputation on the Legal Profession*, 65 WASH. & LEE L. REV. 173 (2008); Fred C. Zacharias, *Reform or Professional Responsibility as Usual: Whither the Institutions of Regulation and Discipline?*, 2003 U. ILL. L. REV. 1505; Fred C. Zacharias, *The Fallacy that Attorney-Client Privilege Has Been Eroded: Ramifications and Lessons for the Bar*, PROF. LAW., Symp. Issue, 1999 at 39; Fred C. Zacharias, *The Future Structure and Regulation of Law Practice: Confronting Lies, Fictions, and False Paradigms in Legal Ethics Regulation*, 44 ARIZ. L. REV. 829 (2002); Fred C. Zacharias, *The Legal Profession in the Year 2050*, 15 WIDENER L.J. 253 (2006); Zacharias, *The Myth of Self-Regulation*, *supra* note 1; Fred C. Zacharias, *The Preemployment Ethical Role of Lawyers: Are Lawyers Really Fiduciaries?*, 49 WM. & MARY L. REV. 569 (2007); Fred C. Zacharias, *The Purposes of Lawyer Discipline*, 45 WM. & MARY L. REV. 675 (2003); Fred C. Zacharias, *What Direction Should Legal Advertising Regulation Take?*, PROF. LAW., Symp. Issue, 2005 at 45.

6. The colleague, Professor William C. Becker, and I were examining lawyer advertisements on the covers and spines of telephone books in addition to advertisements in the yellow pages.

Part II of this Article summarizes *Nobody's Watching*. It also examines some of the consequences of failing to enforce ethical rules for lawyer conduct and offers some lessons for future rule development and enforcement. Part III considers some of the academic and practical significance of *Nobody's Watching*. The Article concludes by noting that *Nobody's Watching* offers academics, lawyers, and regulators a valuable tool to better understand and improve the regulation of the profession.

II. *NOBODY'S WATCHING: LAWYER ADVERTISING AND THE YELLOW PAGES*

A. *Brief Summary*

In *Nobody's Watching*, Zacharias explores the “ramifications of maintaining unenforced or underenforced rules” in lawyer codes of professional conduct.⁷ He examines this multifaceted topic in the particular context of lawyer advertising in the “yellow pages” of telephone directories.

Zacharias begins the article by describing a hypothetical young solo practitioner in San Diego who decides to advertise in the local yellow pages.⁸ The lawyer researches the pertinent sections of the *California Rules of Professional Conduct*.⁹ Then the lawyer peruses the yellow

7. Zacharias, *supra* note †, at 973. Zacharias uses the terms *unenforced* and *underenforced* interchangeably. *Id.* at 973 n.1. These terms “refer to rules that either are never enforced or are severely underenforced (as opposed to being selectively enforced so as to deter violations thorough random prosecutions).” *Id.*

8. *Id.* at 973.

9. See CAL. RULES OF PROF'L CONDUCT R. 1-400 (1999). This rule was in effect and provided, in part:

- (D) A[n advertising] communication . . . shall not:
 - (1) Contain any untrue statement; or
 - (2) Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public; or
 - (3) Omit to state any fact necessary to make the statements made, in light of circumstances under which they are made, not misleading to the public; or
 - . . .
 - (6) State that a member is a “certified specialist” unless the member holds a current certificate as a specialist issued by the [California] Board of Legal Specialization, or any other entity accredited by the State Bar . . . and states the complete name of the entity which granted certification.

CAL. RULES OF PROF'L CONDUCT R. 1-400(D). See also Zacharias, *supra* note †, at 976 (quoting CAL. RULES OF PROF'L CONDUCT R. 1-400(D)); *id.* at 975–76 (recognizing that California significantly revised its advertising rule in 1988 and that the revised rule was similar to the earlier rule adopted in 1979).

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pages to look for ideas in creating an advertisement. The lawyer is surprised to see many violations of the *California Rules of Professional Conduct*. Some advertisements are misleading and others identify lawyers as specialists without referring to a certifying agency, as is required by the rules.¹⁰ Some advertisements are anonymous and approximately one out of every seven fails to identify a particular lawyer responsible for the advertisement, again required by the rules.¹¹ The lawyer consults Westlaw and learns that there are only three reported cases that resulted in lawyer discipline for advertising under the current California advertising rules that had been in place for thirteen years.¹² Two of the cases involved targeted solicitation by lawyers.¹³ The third case concerned a lawyer's "unintentional false statements in advertising letters to present and former clients" and "constituted conduct 'aggravating' other code violations and therefore justified enhanced discipline."¹⁴ Thus, the three cases involved more than simple advertising violations.

The young lawyer considered three possible explanations for the lack of enforcement. "First, the advertising rules do not mean what they say. Second, the advertising rules mean what they say, but are not enforceable. Third, the rules mean what they say and are enforceable, but the regulators do not deem violations important enough to prompt disciplinary action."¹⁵

In addressing these explanations and related concerns, Zacharias first reviews California's rules and standards regulating lawyer advertisements. He then discusses his empirical research of the 1999–2000 "attorneys" section of the yellow pages in San Diego and other major California cities to assess lawyer compliance with the state's advertising regulations.¹⁶

Zacharias concluded that San Diego lawyers "frequently violated" the advertising rules and that if the lawyers had read the rules, they would

10. See CAL. RULES OF PROF'L CONDUCT R. 1-400(D)(6).

11. See *id.* at R. 1-400 standard 12 (stating that an advertisement violates the rules if it "does not state the name of the member responsible for the communication").

12. Zacharias, *supra* note †, at 973. According to Professor Zacharias's survey of the yellow pages, 114 advertisements out of a total of 857—or 1 of every 7.41 advertisements—failed to identify a responsible lawyer. *Id.* at 978.

13. *Id.* at 973.

14. *Id.* at 973–74, 986–87 & n.75 (citing Gadda v. State Bar of Cal., 787 P.2d 95, 100 (Cal. 1990)).

15. *Id.* at 974.

16. *Id.* at 977 & n.18 (contending that San Diego's experience is not unique based on comparative data from San Francisco, Los Angeles, and Sacramento in their respective yellow page advertisements for 2000–2001).

have readily appreciated the impropriety of their conduct.¹⁷ He found “835 discursive advertisements” in San Diego’s 110 pages of yellow pages devoted to lawyer advertisements.¹⁸ At least 257 contained actual or presumptive violations of ethics rules because they failed to identify a lawyer responsible for the advertisement,¹⁹ made “misleading claim[s] [of] ‘no recovery, no fee,’”²⁰ or suggested improper “claims of special expertise.”²¹ These were clear violations of unambiguous rules—requiring no interpretation by Zacharias about the rules’ applicability.²²

Other rule violations were not as obvious and Zacharias had to interpret the applicability of the advertising rules to each advertisement. Zacharias eliminated from his analysis those advertisements where a reasonable argument could be advanced to support the inapplicability of the rules—or stated differently, presumed the advertisement’s validity.²³ The nonobvious violations ranged from misleading claims of prior success²⁴ and reliance on testimonials²⁵ to implied “connection[s] with governmental agencies or nonprofit legal service organizations.”²⁶

17. *Id.* at 984.

18. *Id.* at 977.

19. *Id.* at 978 & nn.23–25, 979 n.26 (identifying 114 advertisements that failed to include the name of a lawyer responsible for the communication, of which 60 were anonymous); *see CAL. RULES OF PROF’L CONDUCT R. 1-400 standard 12 (1999)* (requiring the identification of one lawyer in the firm responsible for the advertisement); Zacharias, *supra* note †, at 978.

20. Zacharias, *supra* note †, at 979–80 & nn.27–30 (discerning that seventy-six advertisements promised “no recovery, no fee,” that only two of these addressed responsibility for costs, and that there were only two others that really focused on the issue of costs); *see CAL. RULES OF PROF’L CONDUCT R. 1-400 standard 14 (1999)* (requiring that the lawyers who use “no recovery, no fee” also disclose whether client is responsible for costs).

21. Zacharias, *supra* note †, at 980–81 & nn.31–36 (observing that only 60 of 145 lawyer advertisements involving a claim of special expertise complied with California’s ethics rules); *see CAL. RULES OF PROF’L CONDUCT R. 1-400(D)(6) (1999)* (requiring lawyers, certified as specialists by the California Bar Association or another organization approved by it, to identify the certifying entity’s complete name).

22. It is important to note that Zacharias found it unnecessary “to inquire into the existence of the potentially biggest and most dangerous category of violations—advertisements that are factually false or deceptive.” Zacharias, *supra* note †, at 984. A significantly greater investment of time and other resources would be required to discern factually false or deceptive advertisements. For example, Zacharias might have to directly contact lawyers to check the factual accuracy of advertisements communicating lawyers’ practice areas and years of practice.

23. Zacharias, *supra* note †, at 982.

24. *Id.* at 982–83 nn.37–45 (finding at least forty advertisements that violated the California advertising rules by providing information about prior successes “without stating that these statistics could not serve as a predictor of future results”); *see CAL. RULES OF PROF’L CONDUCT R. 1-400(D)(2) (1999)* (prohibiting any advertisements that contain information that is “false, deceptive, or which tends to confuse, deceive, or mislead the public,” or that “present or arrange” information in such a manner).

25. *See* Zacharias, *supra* note †, at 983 & nn.46–53 (noting that a number of advertisements seemed to violate the rule against testimonials by including various

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Zacharias's research demonstrates that unethical lawyer advertising in the yellow pages is a statewide problem of meaningful proportion. Yet there are only three reported disciplinary cases in California involving improper lawyer advertising in the thirteen-year period preceding the 1999–2000 yellow pages, and they involved lawyer solicitation rather than "simple legal advertising."²⁷

Zacharias examined reported cases for lawyer advertising violations from the five states, other than California, with the largest populations of lawyers.²⁸ These states—New York, Illinois, Texas, New Jersey, and Florida—are all considered to be bellwether jurisdictions regarding the legal profession's state of affairs, and yet they yielded results similar to California. Lawyer advertising proscriptions were underenforced or simply not enforced.²⁹

He also surveys the remaining forty-four jurisdictions and the District of Columbia regarding the enforcement of advertising violations. The findings for these remaining jurisdictions are consistent with the data concerning California, New York, Illinois, Texas, New Jersey, and

"titles or awards," for example "'Best Advocate'"); *see CAL. RULES OF PROF'L CONDUCT R. 1-400 standard 2 (1999)* (stating that an advertisement that "contains testimonials about or endorsements of a member" must also "contain[] an express disclaimer such as 'this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter'").

26. Zacharias, *supra* note †, at 983–84; *see id.* at 984 nn.54–60 (identifying some advertisements that appear to "skirt" the boundaries of the California ethics rules by using names such as "'Family Law Clinic of San Diego'"); *CAL. RULES OF PROF'L CONDUCT R. 1-400 standard 6 (1999)* (prohibiting the use of "a firm name, trade name, fictitious name, or other professional designation which states or implies a relationship between any member in private practice and a government agency or instrumentality or a public or non-profit legal services organization").

27. Zacharias, *supra* note †, at 985–86 & n.65. Although not found in official state, regional, or national reporters, Zacharias noted that there are several other disciplinary actions against lawyers for violating advertising rules contained in "[a]bbreviated announcements" in the *California Bar Journal*, the *Los Angeles Daily Journal*, and the *California Lawyer*. *Id.* at 985–86 & n.66–73.

28. *Id.* at 988.

29. *See id.* at 988–91. Zacharias observes that "Florida is one of the few states that aggressively continues to press the constitutionally permissible limits of advertising regulation" and that the state reports the most disciplinary cases for lawyer advertising of any jurisdiction: a total of only ten during the post-*Bates* period. *Id.* at 990–91; *see infra* note 31. Only three of the forty-five jurisdictions reported as many as seven disciplinary cases—the same number as Texas, which ranked second after Florida in that part of Zacharias's survey examining the five states other than California with the largest lawyer populations. *See* Zacharias, *supra* note †, at 989, 991.

Florida.³⁰ “For the post-*Bates* period, the forty-five jurisdictions reported a total of only sixty-six cases, or an average of 0.06 cases per state per year,” and twenty of the jurisdictions did not report a single disciplinary case involving advertising.³¹ The survey’s “statistics strongly suggest that most jurisdictions share California’s tendency to overlook violations of the [advertising] rules.”³²

Zacharias observes that lawyer advertising rules are generally “concrete,” informing both lawyers and regulators about the ethical boundaries of permissible advertising.³³ He also notes that many of San Diego’s yellow-pages advertisements clearly violate the state’s advertising rules.³⁴ Thus, California’s lack of enforcement of its rules cannot be explained away because of “vagueness in, or unenforceability of, the rules.”³⁵ Zacharias also effectively refutes any notion that lawyers are unaware of the ethical significance of and professional risks associated with improperly advertising in the yellow pages.³⁶ As a result, he contends that disciplinary authorities intentionally decide against enforcing the advertising rules, prompting some lawyers to “flout[]” the rules.³⁷ Zacharias acknowledges that the large number of advertising violations might also reflect the failure of lawyers to check or understand the rules, although these are unlikely reasons for the numerous violations and nonenforcement.³⁸

30. Zacharias, *supra* note †, at 988.

31. *Id.* at 991–92. Perhaps more starkly stated: “[T]he forty-five jurisdictions have reported an average of 1.5 cases every twenty-four years.” *Id.* at 992 n.101; *see Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

32. Zacharias, *supra* note †, at 994–95.

33. *See id.* at 995. For example, standard 12 of the California Rules of Professional Conduct Rule 1-400 requires an advertising communication to “state the name of the member responsible for the communication. When the communication is made on behalf of a law firm, the communication shall state the name of at least one member responsible for it.” *Id.* at 977 & n.17 (quoting CAL. RULES OF PROF’L CONDUCT R. 1-400 standard 12 (1999)). Standard 14 also provides that it is a violation for an advertising “communication” to state or imply “‘no fee without recovery’ unless such communication also expressly discloses whether or not the client will be liable for costs.” *Id.* (quoting CAL. RULES OF PROF’L CONDUCT R. 1-400 standard 14 (1999)).

34. *Id.* at 995.

35. *Id.*

36. *See id.* at 995–96 (commenting that news was widely disseminated concerning recent United States Supreme Court jurisprudence broadening the scope of the commercial speech doctrine to protect some lawyer advertising, and that some states had recently revised their lawyer advertising rules). The topics of lawyer advertising and discipline are also covered in the required law school professional responsibility or legal ethics course, so reasonable lawyers would consult their jurisdiction’s advertising rules like the “new lawyer” at the beginning of *Nobody’s Watching*. *See id.* at 973–74, 995–96.

37. *Id.* at 996.

38. *See id.*

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In examining possible reasons for the underenforcement of the profession's ethical rules, Zacharias explains that some rules are underenforced because they are purely hortatory.³⁹ These rules are susceptible to several meanings and, therefore, are inhospitable to easy interpretation and enforcement.⁴⁰ He resorts to one of his more frequent topics to provide an example—the professional responsibility and regulation of prosecutors.⁴¹ Prosecutors have a duty to “do justice.”⁴² This mandate is susceptible to several reasonable interpretations and complicates ready enforcement, especially from a regulator’s perspective who may be confronting budgetary constraints and a high caseload.

Unlike hortatory rules, advertising rules provide “fairly distinct commands” and generally involve transparent violations.⁴³ It is also

39. *Id.* 974, 997.

40. See Quintin Johnstone, *Bar Associations: Policies and Performances*, 15 YALE L. & POL’Y REV. 193, 211–12 (1996) (“Questions have arisen in a host of situations as to what the Rules [of Professional Conduct] . . . mean and how they should be applied. . . . [I]t is a common practice for the professional ethics committees of bar associations to give written interpretive opinions.”); see also Arthur F. Greenbaum, *The Attorney’s Duty To Report Professional Misconduct: A Roadmap for Reform*, 16 GEO. J. LEGAL ETHICS 259, 273 (2003) (contending that the mandatory duty of lawyers to report professional misconduct under ABA Model Rule 8.3 is ambiguous and may lead to underreporting and that the lack of enforcement actions for nonreporting may reflect a conscious deterrence strategy—perhaps we do not want lawyers reporting all the misconduct they observe).

41. Zacharias often wrote about prosecutorial ethics, as evidenced by the following list: Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors’ Ethics*, 55 VAND. L. REV. 381 (2002); Bruce A. Green & Fred C. Zacharias, “*The U.S. Attorneys Scandal*” and the Allocation of Prosecutorial Power, 69 OHIO ST. L.J. 187 (2008); Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121 (1998); Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223 (1993) [hereinafter Zaharias, *Specificity in Professional Responsibility Codes*]; Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45 (1991); Fred C. Zacharias & Bruce A. Green, *The Duty To Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1 (2009) [hereinafter, Zacharias & Green, *Duty To Avoid Wrongful Convictions*]; Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721 (2001); Fred C. Zacharias, *The Role of Prosecutors in Serving Justice After Convictions*, 58 VAND. L. REV. 171 (2005); Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207 (2000); Fred C. Zacharias, *Who Can Best Regulate the Ethics of Federal Prosecutors, or, Who Should Regulate the Regulators?: Response to Little*, 65 FORDHAM L. REV. 429 (1996).

42. Zacharias, *supra* note †, at 998, 1013, 1014, 1018 (internal quotation marks omitted).

43. *Id.* at 1002; see *id.* n.33 & accompanying text (providing examples of “distinct commands”).

unlikely that any other institution but the bar will enforce advertising rules.⁴⁴ Thus, any examination concerning the underenforcement of ethics rules necessarily involves an examination of the bar.

Zacharias provides a helpful, global analytical framework for conceptualizing professional regulation. One conceptualization is that ethical codes primarily provide guidance to help lawyers avoid the “pitfalls” of practice—the kind of conduct that results in sanctions because it seriously offends the public or threatens the bar’s image.⁴⁵ Under this view, regulators believe that the rules successfully serve their guidance function if most lawyers follow the advertising rules without full enforcement.

A second and perhaps more classic conceptualization is that ethical rules are not intended merely to guide lawyer behavior but instead are designed to compel certain conduct.⁴⁶ For example, within this conceptualization fall the admonitions about lawyers not making false statements of fact or law to tribunals or engaging in ex parte contact with opposing lawyers’ clients about the subject matter of the representation without the opposing lawyers’ consent.⁴⁷ Under both conceptualizations—whether the rules are viewed primarily as serving a guidance function or alternatively viewed as compelling specific conduct—the specter of underenforcement and its effects exist.⁴⁸

B. The Unintended Consequences of Underenforcement

The ramifications of the underenforcement of ethical rules fall into four broad categories: (1) the effects on lawyers contemplating a violation of an underenforced rule,⁴⁹ (2) the effects on lawyers in general,⁵⁰ (3) the “[e]ffects on [c]lients and [o]bservers,”⁵¹ and (4) the “[e]ffects on [r]ulemakers and [r]egulators.”⁵² Zacharias artfully weaves

44. For example, it is unlikely that lawyers in the state prosecutor or attorney general offices will enforce lawyer-advertising rules.

45. Zacharias, *supra* note †, at 1003, 1005–06.

46. *Id.* at 1003–04.

47. See MODEL RULES OF PROF’L CONDUCT R. 3.3 (2010) (“Candor Toward the Tribunal.”); *id.* R. 4.2 (“Communication With Person Represented by Counsel.”).

48. Zacharias notes that under the first conceptualization, where the rules serve a guidance function, the rules may be successful as such “even without full enforcement.” Zacharias, *supra* note †, at 1003. Moreover, even under the second conceptualization, which forces lawyers to act in certain ways and warrants greater or full enforcement, Zacharias concedes that there may be valid reasons for underenforcement. *Id.* For example, the regulatory authorities may decide to spend their limited resources enforcing more serious rule violations, such as lawyer theft of client funds. *See id.*

49. *Id.* at 1005–06.

50. *Id.* at 1006–07.

51. *Id.* at 1007–09.

52. *Id.* at 1009–12.

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the discussion concerning the first category with his quandary at the beginning of the article of the hypothetical new lawyer who sees an advertising landscape full of rule violations. According to Zacharias, several consequences flow from this scenario for the new lawyer: confusion regarding the meaning and significance of the rules and the possible inference that other rules are also underenforced—undermining her willingness to follow other rules and her faith in the value of professional regulation.⁵³ Worse yet, this scenario may cause the new lawyer to question the basic role as a professional able to balance personal interests with those of the public and the profession.⁵⁴ The ultimate effect of underenforcement is that the lawyer is likely to question the rule's importance and risk possible noncompliance.⁵⁵

Underenforcement produces another effect. Not surprisingly, it “breeds disrespect” among the bar for professional regulation.⁵⁶ Why follow the rules if there are no consequences?

Underenforcement also promotes stratification within the bar.⁵⁷ Solo practitioners and small firms often engage in yellow page, newspaper, and other media advertising, whereas “elite” lawyers, often working in large firms, compete on a different level.⁵⁸ For example, elite attorneys

53. *Id.* at 1005.

54. *Id.*

55. *Id.* at 1005–06.

56. *Id.* at 1006.

57. *Id.*

58. See *id.* at 1005–06. Zacharias notes that solo practitioners “are the main target of discipline.” *Id.* at 1006 n.158 (citing *Discipline: California Bar Report Finds Lack of Bias Against Small Practices in Discipline Matters*, 17 ABA/BNA LAW. MANUAL ON PROF. CONDUCT 434, 435 (2001)). In a footnote, Zacharias quotes Professor Leslie C. Levin, who writes that “‘talk’ of an ethical culture in small firm practice . . . stands in contrast to reports by large law firm associates that those firms may not have distinctive ethical cultures.” *Id.* at 1007 n.159 (quoting Leslie C. Levin, *Preliminary Reflections on the Professional Development of Solo and Small Firm Practitioners*, 70 FORDHAM L. REV. 847, 890 (2001)). See generally Brant T. Lee, *The Network Economic Effects of Whiteness*, 53 AM. U. L. REV. 1259, 1279–80 (2004).

Professor Brant T. Lee similarly writes about distinctive cultures, race, and competition in the marketplace. He notes the following about the effect of race on networking:

Some kinds of employment might combine a direct or indirect communicative effect with a stereotype communicative effect. Consider, for instance, the corporate lawyer. Lawyers must communicate effectively with staff, with colleagues, with their counterparts at other firms with whom they do business, with clients, and with the clerks, judges and juries within the judicial system. They must employ the direct language communication tools of prose, idiom, and metaphor. They must also master the cultural references, such as conferences, drinks, golf, and gender dynamics. The message that their race sends is unavoidable.

rely on membership on charitable boards or corporate and other referral networks to generate business. An unintended consequence of this stratification is that large law firm lawyers may feel insulated from professional regulation and conclude that such constraints only apply to “lower order” lawyers.⁵⁹ This kind of feeling and unconstrained conduct corrodes lawyer morale and impedes the development of bar consensus. It also poses a risk to consumer welfare if some lawyers feel that they may deal with clients and others in ways unconstrained by professional norms of behavior—essentially a belief that their conduct is beyond reproach.

Another disturbing effect is that the public may believe that unethical lawyer advertising represents the “ethos” of the profession and the character or type of persons in the profession.⁶⁰ The bar’s failure to enforce advertising rules confirms the public’s worst suspicions about the character of lawyers and the profession’s ability to self-regulate.⁶¹ Underenforcement undermines the notion that the profession is seriously committed to high ethical standards—standards that are designed, in part, to protect the public. Underenforcement also makes “[p]otential clients . . . less willing to rely on the professional rules in forming relationships with lawyers.”⁶² For example, the underenforcement of the professional rules could lead potential clients to conclude that lawyers will not protect client confidences, will not be held accountable for the failure to protect these confidences, or both.⁶³

Zacharias assumes that the bar has decided intentionally, and behind closed doors, not to enforce the advertising rules.⁶⁴ The lack of

Id.

59. Zacharias, *supra* note †, at 1006–07 (internal quotation marks omitted).

60. *Id.* at 1008. As Zacharias is apt to do in his scholarship, he is masterful in highlighting his message with language, stories, and real cases that resonate with the reader. He does exactly this with reference to a real case underscoring the potential harm to the public’s perception about the kinds of persons who are lawyers. He cites an article reporting that an admiralty lawyer in Hawaii “passed out packages of condoms with the tag line ‘Saving Seamen the Old-Fashioned Way.’” *Id.* at 1008 n.163 (quoting Maria Shao, *Dial-a-Suit: Lawyers’ Battle over Advertising Heats up as Mass. Bar Jumps into Fray*, BOS. GLOBE, Oct. 10, 1995, at 37). Zacharias also cites to a book by William E. Hornsby, which critically describes “a lawyer who drove a hearse with side panels that carried the message ‘No-frills wills—10 bucks.’” *Id.* (quoting WILLIAM E. HORNSBY, JR., MARKETING AND LEGAL ETHICS: THE BOUNDARIES OF PROMOTING LEGAL SERVICES 39 (3d ed. 2000)).

61. Zacharias, *supra* note †, at 1008.

62. *Id.* at 1009.

63. *Id.*; see MODEL RULES OF PROF’L CONDUCT R. 1.6 (2010) (“Confidentiality of Information.”).

64. See Zacharias, *supra* note †, at 1009; see also Edward C. Brewer, III & Kelly S. Wiley, *Professional Responsibility*, 29 N. KY. L. REV. 35, 51 (2002) (discussing the Kentucky rule prohibiting “public claims to a ‘specialty’”). Brewer and Wiley state that the Kentucky rule:

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transparency around that decision “reinforces the bar’s authority to choose not to enforce other rules” and sets additional policy without an open and democratic dialogue about the merits of such action.⁶⁵ A closed and secretive process for creating and enforcing regulatory standards creates the risk of overlooking helpful information and of delegitimizing the standards, if not the entire regulatory regime. Less input from bar members in the creation and implementation of ethical rules increases the likelihood that members will not feel invested in the process or the governing ethical principles. For Zacharias, “[g]reater transparency in agency decisionmaking could shed significant light on the appropriateness, or inappropriateness, of a jurisdiction’s implementation of the professional rules.”⁶⁶

C. Underenforcing Ethics Rules—Some Lessons

Zacharias ultimately concludes that there are some important lessons to be learned from California’s experience with regulating advertising. First, California failed to “consider the multiple purposes of professional regulation.”⁶⁷ “Hortatory and guidance rules envision less enforcement than rules that are designed to control behavior.”⁶⁸ Rules that are primarily designed for “public relations or image-enhancement may or may not require a significant level of enforcement.”⁶⁹

[S]hould be enforced, or . . . amended to permit advertisements of the sort presented in the Yellow Pages. The current situation of a rule that apparently is not enforced, but rather is widely violated, runs a risk of misleading lawyers into a view that the advertising rules do not mean what they say, creating a public perception that lawyers do not properly regulate their own profession, and of contributing to erosion of respect for the rule of law.

Id.

65. Zacharias, *supra* note †, at 1009.

66. *Id.* at 1010. Zacharias recognizes that when the discretion to enforce a rule is made behind closed doors, this creates de facto “second-line policymakers” who get to determine what the rule means outside the public purview. *Id.* at 1011. Zacharias also notes:

For example, the adoption of a strict rule forbidding lawyers ever to engage in sexual relations with their clients may depend on an expectation that disciplinary authorities will implement the rule only with respect to coercive conduct. This tacit expectation has the dual effect of allowing rulemakers to adopt an inartfully drafted provision and of shielding the second-level policy decision from full and open debate.

Id. 1011–12 (footnotes omitted).

67. *Id.* at 1016.

68. *Id.* at 1015 (footnote omitted); see *supra* notes 39–45 and accompanying text.

69. Zacharias, *supra* note †, at 1015 (footnote omitted).

Second, Zacharias concludes that underenforcement of the rules undermines both the public's and bar's trust in the profession's commitment to high ethical standards and serious self-regulation.⁷⁰ The risk of undermining the public's and bar's trust occurs irrespective of the particular rule's purpose—the public expects enforcement.

Zacharias discerns several other lessons from his empirical work in *Nobody's Watching*. For example, he contends that some underenforcement results from poorly drafted rules.⁷¹ The drafters have to more clearly “identify[] the function, or functions, of each rule.”⁷² When the function is “to guide rather than control behavior,” the drafters should acknowledge the “unlikelihood of enforcement” and recognize that the impetus for shaping lawyer conduct must then flow from the professional standards themselves.⁷³ Zacharias suggests that there may be a need for “implementing information rules that educate lawyers and clients about the force of the rules”—clearly outlining their mutual responsibilities and discretion.⁷⁴ The information rules would assist regulators in deciding when a rule is intended primarily as a “guidance” standard where full enforcement may be unnecessary.

Zacharias believes that some underenforcement occurs because of the “unilateral policy choices” of disciplinary agencies.⁷⁵ The disciplinary authorities need to determine when their enforcement policies “effectively change the substance or force of the rules,” reflect on whether this is their choice to make, or determine if this should be a choice rulemakers make.⁷⁶ Zacharias cautions that the “most conspicuous lesson to be learned is that disciplinary agencies should not be self-satisfied” and “assume that the status quo is justified simply because they believe their enforcement decisions to be reasonable.”⁷⁷ Finally, Zacharias generously notes that “[p]rofessional regulation is still a young venture,” and that rules “[d]rafters and disciplinary authorities have much to learn about their relative roles and responsibilities.”⁷⁸

70. *Id.* at 1012–14.

71. *Id.* at 1016–19.

72. *Id.* at 1017.

73. *Id.*

74. *Id.* at 1018. The informational rule can still provide lawyers and regulators with some sense about the kind of values involved with a guidance standard and the nature of the choices available to the lawyer. *Id.* at 1018–19.

75. *Id.* at 1021.

76. *Id.* at 1019. Even “pure guidance rules should express the criteria lawyers must consider and the nature of the decisions that the drafters expect the lawyers to make.” *Id.* at 1017. When rules are intended to be enforced to compel or constrain behavior, then a drafter should make this clear too. *Id.*

77. *Id.* at 1019.

78. *Id.* at 1022. Zacharias’s characterization that “[p]rofessional regulation is still a young venture” is fair and accurate. *Id.* It may be a generous characterization too.

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Nobody's Watching is noteworthy for a number of reasons. First, the empirical work in the article was part of an ever-growing effort in professional responsibility and other fields to conduct more empirical research and writing.⁷⁹ Zacharias—who often displayed a willingness to challenge conventional thinking about issues⁸⁰—was an adventurous scholar in terms of the substance of his work, his style, and his methodology.⁸¹ Zacharias's academic boldness is exemplified in his

The bar and the academy had seriously studied for some time some of the regulatory issues addressed in *Nobody's Watching*. See generally Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 704 (1977) (suggesting that “lawyers’ ethics are consistently self-serving and that pressure for revision of several basic concepts of professional responsibility is both sound and inevitable”). For example, the lesson concerning the risk that rules underenforcement poses to public trust in the lawyer self-regulatory system and the related need for greater transparency in the regulatory system are not new topics. See AM. BAR ASS’N, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 1–2 (1970) (discussing underenforcement of ethics rules through the discipline system and the need for recognizing that there is “public dissatisfaction with the bar and the courts”). The bar’s failure to properly address or resolve these matters may involve more than the fact that “[p]rofessional regulation is a new venture.” Zacharias, *supra* note †, at 1022. For example, another possible reason for the failure of drafters and disciplinary authorities to appreciate more fully their respective roles may be the bar’s self-interest in preserving maximum control and discretion in the marketplace for the delivery of legal services. See William Hornsby, *Clashes of Class and Cash: Battles from the 150 Years War To Govern Client Development*, 37 ARIZ. ST. L.J. 255, 260 (2005) (highlighting the profession’s monopoly in the delivery of legal services market and stating: “We in the law must never forget that the legal profession has a monopoly in the practice of law, and it is an article of faith in America that monopolies must be strictly regulated to protect the public interest” (quoting Warren E. Berger, Address, *The Decline of Professionalism*, 137 PROC. AM. PHIL. SOC’Y 481, 485 (1993))).

79. See ROBERT M. LAWLESS ET AL., EMPIRICAL METHODS IN LAW 4 (2010); see also Zaharias, *Specificity in Professional Responsibility Codes*, *supra* note 41, at 236 n.39 (recognizing the need for more empirical research concerning professional responsibility issues).

80. See, e.g., Zacharias, *A Word of Caution*, *supra* note 5, at 237–38 (recognizing the benefits of substance abuse programs for lawyers but cautioning that they may be harmful to clients); Zacharias & Green, *Duty To Avoid Wrongful Convictions*, *supra* note 41 (advocating the use of the disciplinary process to encourage prosecutors to use reasonable care to avoid convicting the innocent); Zacharias, *Steroids and Legal Ethics Codes*, *supra* note 1, at 671.

81. Empirical research requires special training and knowledge. A failure to obtain such training and to abide by accepted conventions for conducting such research can result in criticism by academic peers and worse. See generally Nicholas Wade, *Harvard Researcher May Have Fabricated Data in Monkey Study*, N.Y. TIMES, Aug. 28, 2010, at A13 (reporting that a star researcher at Harvard University was on leave because

empirical study of lawyer advertising violations and the lack of reported disciplinary cases in *Nobody's Watching*. His empirical work in *Nobody's Watching*, published in 2002, occurred before the explosion of attention to empiricism in United States law schools.⁸² Empirical analysis differs from classical legal analysis and requires special effort and training in techniques for obtaining data.⁸³ Although not endemic to the field of empirical research, legal scholars undertaking such nontraditional work recognize the ever-present specter of a misstep and resulting criticism.⁸⁴ Zacharias's empirical work concerning the controversial topic of lawyer advertising represented a special undertaking for even an established scholar.

of possible fabrication of data, and noting that “[s]ome forms of scientific error . . . or even mistaken results are forgivable, but [not] fabrication of data”).

82. See LAWLESS ET AL., *supra* note 79, at 4 (reporting that although empirical research has been conducted for decades at law schools, the pace has quickened in recent years, citing a well-attended 2006 empirical conference at the University of Texas in Austin and similar subsequent conferences). See generally Robert C. Ellickson, *Trends in Legal Scholarship: A Statistical Study*, 29 J. LEGAL STUD. 517 (2000) (tracking the trends in legal scholarship that occurred between 1982 and 1996). The authors of *Empirical Methods*, the first textbook providing a “synoptic view of empirical methods in law,” assert “that the changes that have marked the last several decades of legal education have been bigger and more far-reaching than in the past 130 years.” LAWLESS ET AL., *supra* note 79, at 2–3. They claim that there has been “one common aspect [to these changes]: they involve reaching outside the traditional confines of the law to other academic disciplines and adopting and adapting techniques from those other disciplines [economics, philosophy, network theory, and computer science] . . . for the purpose of studying legal topics.” *Id.* at 3. The recruitment of faculty with interdisciplinary backgrounds, sometimes without any legal training, is evidence of the movement to reach beyond the confines of law to other disciplines. For a recent example of interdisciplinary scholarship, see Cassandra Burke Robertson, *Judgment, Identity, and Independence*, 42 CONN. L. REV. 1, 5 (2009), which uses identity theory from social psychology to develop an explanatory hypothesis for why lawyers in certain situations fail to provide “fully independent advice to their clients.”

83. See LAWLESS ET AL., *supra* note 79, at 10. “Legal analysis places a premium on argumentation and appeals to authority, is frequently geared toward proving a particular view, is often focused on the particulars of an individual case, and is directed at reaching a definitive conclusion.” *Id.* In contrast, empirical research focuses on observation, the description of patterns of data in the aggregate, the testing of hypotheses, and “is a continuing enterprise in which new work builds on that which came before and generates even more questions for further investigation.” *Id.*

84. See *id.* Lawless and his coauthors describe the empirical approach as a “rigorous approach” involving a host of complexities. *Id.* at 20. They also caution that the inappropriate manipulation of data can produce untrustworthy results and criticism. See *id.* The rigorous nature of the empirical research and the attending risks of criticism may provide, in part, an answer to the following quandary of some empirical experts: “Why legal scholars have sometimes paid so little attention to empirical evidence about the law is a mystery that we leave to others to solve.” *Id.* at 21–22; see also JOEL BEST, DAMNED LIES AND STATISTICS: UNTANGLING NUMBERS FROM THE MEDIA, POLITICIANS, AND ACTIVISTS 5 (2001) (“Other statistics mutate; they become bad after becoming mangled (as in the case of the Author’s creative rewording).”).

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Second, Zacharias's empirical findings revealed a striking gap between California's ethical rules governing lawyer advertising and actual lawyer compliance with these rules when advertising in the yellow pages. Although it was not surprising that *Nobody's Watching* reported that some lawyers violated the state's advertising rules, both the magnitude of the number and the blatant nature of the violations were unexpected and unsettling. Moreover, Zacharias noted that California's experience was not unique. Lawyers nationwide were violating ethical rules concerning advertising with little consequence.⁸⁵ It "appear[ed] to confirm that enforcing advertising rules [was] not a priority anywhere in the United States."⁸⁶

Third, *Nobody's Watching* appreciated the interplay of the various internal and external forces affecting the decision to take disciplinary action. Regulators of lawyer conduct in the United States and abroad have broad discretion to initiate disciplinary charges.⁸⁷ Their decision to enforce or not enforce rules takes into consideration a variety factors, "including the economic and political climate in which regulators and lawyers operate at any given time."⁸⁸ Zacharias states: "[T]he severity of the offense, the deterrent effect of prosecution on this and [future]

85. See Zacharias, *supra* note †, at 988. See generally Johnstone, *supra* note 40, at 211–18 (providing a general discussion about the involvement of bar associations in the regulation of professional conduct).

86. Zacharias, *supra* note †, at 988. Zacharias acknowledges that his survey "is not definitive" because "[t]he research techniques had limitations." *Id.* at 988 & n.81. He further wrote that "[m]y student researchers and I examined only officially reported cases that appeared on Westlaw or Lexis and limited ourselves to cases reported in the relevant topical areas in each state by the computerized data providers." *Id.*; see also Johnstone, *supra* note 40, at 217 ("The contributions of the major comprehensive bar associations . . . in drafting and interpreting standards of lawyer professional conduct have been very creditable. . . . [However,] [t]he associations' record in enforcing the standards is less commendable . . .").

87. Linda Haller, *Professional Discipline for Incompetent Lawyers? Developments in the UK and Australia*, 17 INT'L J. LEGAL PROF. 83, 85 (2010). This Author has come to appreciate firsthand the significance of the discretion exercised by disciplinary bodies as a member of Ohio Legal Ethics and Professional Conduct Committee (OLEPC) since 1994. The OLEPC is one of a number of certified grievance committees in Ohio authorized to investigate and present cases involving ethical rule violations by lawyers and judges.

88. *Id.* Conveniently overlooked at times, the "political climate" affects the creation, interpretation, and enforcement of ethical rules as well as other aspects of the nation's legal system. See A.G. Sulzberger, *Voters Moving To Oust Judges Over Decisions*, N.Y. TIMES, Sept. 25, 2010, at A1 (reporting that the political climate in the fall of 2010 shows that voters want to remove judges, including three Iowa Supreme Court justices, because they voted in favor of same-sex marriage).

offenders, the likely cost of prosecution, the nature of the offender, and the effect of enforcement or lack of enforcement” on the bar’s image, are all factors in determining whether to discipline a lawyer.⁸⁹ Any conclusions regarding enforcement policy or the profession based on the large number of advertising violations and the few reported advertising cases should take these factors into account.

Zacharias accounted for these factors at the very beginning of and throughout *Nobody’s Watching*. For example, he states: “[A]s a practical matter, limited resources do prevent disciplinary authorities from addressing all violations of the professional rules.”⁹⁰ The topic of lawyer regulation, combined with the related issues of limited resources and public trust, is an area of scholarship that still needs much mining if the profession hopes to respond to consumer demands for greater professional accountability and access to legal services.⁹¹ The bar’s ability to continue to engage in self-regulation is at stake. The regulatory system as we once knew it is already unraveling as the delivery of legal services is being increasingly regulated by interests outside the profession,⁹² especially in this era of new technologies and increasing cross-border practice.⁹³

There is a fourth reason why *Nobody’s Watching* is noteworthy. It effectively uses the advertising narrative to focus attention on the potentially serious “secondary effects” of underenforcing ethical rules and not just on the “direct” effect of failing to prohibit discrete conduct—here improper advertising in the yellow pages.⁹⁴ The secondary effects are promoting stratification in the bar, diminishing

89. Zacharias, *supra* note †, at 997 (footnotes omitted); *see id.* at 997 & nn.118–24.

90. *Id.* at 974, 997, 1016; *see also* Zacharias, *Specificity in Professional Responsibility Codes*, *supra* note 41, at 225–39 (providing an analysis of various functions of legal ethics codes).

91. The ABA Commission on Ethics 20/20 was created in 2009 in part to address these and other issues. *See* Jack P. Sahl, *Foreword: The New Era—Quo Vadis?*, 43 U. AKRON L. REV. 641, 642 & n.3 (2010) (citing Pamela Atkins, *ABA Launches New Initiative To Revamp Lawyer Ethics Rules*, 25 ABA/BNA LAWS. MANUAL ON PROF. CONDUCT 418 (2009)).

92. *See* John Leubsdorf, *Legal Ethics Falls Apart*, 57 BUFF. L. REV. 959 (2009) (providing a comprehensive discussion of the fragmentation of the rules governing lawyers); Zacharias, *The Myth of Self-Regulation*, *supra* note 1, at 1153 (proposing “an amendment to the Model Rules that would eliminate all reference to self-regulation and replace it with a more accurate statement of the status of the professional codes”).

93. Sahl, *supra* note 91, at 674 (reporting that the increase in domestic and international multijurisdictional practice and advances in technology are affecting the profession dramatically, and because of “the ‘high [financial] stakes’ involved in the international legal services market . . . more lawyers . . . will run the risk of crashing on the shoals of an increasingly fragmented regulatory framework” (citing Carole Silver, *What We Don’t Know Can Hurt Us: The Need for Empirical Research in Regulating Lawyers and Legal Services in the Global Economy*, 43 AKRON L. REV. 1009 (2010))).

94. Zacharias, *supra* note †, at 1016.

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lawyer respect for professional regulation, and undermining public trust in the profession and its ability to self-regulate.⁹⁵

Bar stratification and its deleterious effects—creating resentment among lower order lawyers and impeding profession-wide consensus—have characterized the legal profession for some time.⁹⁶ Selective enforcement or nonenforcement of ethics rules leads to bar stratification; for example, elite lawyers in larger law firms may believe that they are immunized from any fear of discipline.⁹⁷

95. *Id.* For the discussion concerning secondary effects, see *infra* Part III(A) and accompanying notes. See also Zacharias, *supra* note †, at 1005–12 (identifying “the ramifications” and the various “aspects of underenforcement”).

96. Zacharias, *supra* note †, at 1007 (internal quotation marks omitted). Zacharias describes the “lower order” class of lawyers as those lawyers “who ostensibly engage in unseemly practices (like mass advertising).” *Id.* at 1006–07. They are viewed with contempt and are seen as “a breed apart” from elite lawyers. *Id.* at 1007. Stratification has been an enduring characteristic of the legal profession. For example, some of the earliest restrictions on lawyer advertising were aimed, in part, at restricting new entrants into the marketplace for the delivery of legal services. See Sahl, *The Cost of Humanitarian Assistance*, *supra* note 4, at 831 (stating that advertising “rules appear to have been created to preserve the profession’s size and demographics and to promote [the] monopoly on the delivery of legal services” (citing William E. Hornsby, Jr., *Ad Rules Infinitum: The Need for Alternatives to State-Based Ethics Governing Legal Services Marketing*, 36 U. RICH. L. REV. 49, 55 (2002)); see also ABA COMM’N ON ADVER., LAWYER ADVERTISING AT THE CROSSROADS 32 (1995) (discussing how Lincoln was “reported to have been ‘an absolute hustler’ as a lawyer who wanted to make money,” and how “the image of Lincoln as a lawyer was submitted to the Commission on Advertising both in support of and in opposition to lawyer advertising”); JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 50 (1976) (stating that “[t]he ethical crusade that produced the Canons concealed class and ethnic hostility,” and “Jewish and Catholic new-immigrant lawyers of lower-class origin were concentrated among the urban solo practitioners whose behavior was unethical because established Protestant lawyers said it was”); Hornsby, *supra* note 78, at 292 (asserting that when the original ABA *Canons* were promulgated, prohibitions on lawyer advertising “handicapped the lawyer[s]” serving “the urban poor, new immigrants, and blue-collar workers” while benefitting the “corporate law firms that could leverage the notions of professionalism and dignity with their corporate clients”). See generally Claude R. (Chip) Bowles, Jr., et al., *Lawyers in a Fee Quandary: Must the Billable Hour Die?*, 6 DEPAUL BUS. & COM. L.J. 487, 493 (2008) (addressing stratification in the context of law firm hiring and in the provision of legal services—at the top of the “value pyramid” is high value or “bet the company work,” and at the bottom of the pyramid is “commodity work” with “[v]ery few . . . firms . . . willing to admit that a lot of their work—in virtually all law firms—is in the bottom of the value pyramid”).

97. See Zacharias, *supra* note †, at 1006–07; see also Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657, 665–67 (1994) (examining “diversity and stratification” in the legal profession, and arguing that “membership of voluntary bar associations is not representative, and lawyers from large firms—a minority of American lawyers—dominate committee membership in those organizations” (footnote omitted)).

Nonenforcement of the advertising rules will lead some lawyers to risk violating those rules. This conduct ultimately diminishes respect for the integrity of the ethical code and the profession. The consequence of observing others violate rules has been described by legal scholars in other contexts. In one article, Professor Richard Lavoie writes the following about violators of the tax code: “While this fact is easily grasped at a gut level, empirical studies consistently demonstrate that perceptions about whether others are complying with their tax obligations strongly impact tax compliance.”⁹⁸ Relying on the field of social psychology in another article, Professor Lavoie further notes that society—and by way of analogy the legal profession—“must develop moral precepts and a system of laws to serve as situational constraints on unethical behavior.”⁹⁹ However, for such restraints to be effective, “the society’s citizens must identify with, endorse, and respect the relevant strictures”—society’s and the legal profession’s rules must grow “out of and reflect the values of the society” and profession.¹⁰⁰

Of course, the public is already highly sensitive, if not suspicious, about the ethical motivations of lawyers.¹⁰¹ Public observance that the bar is underenforcing its ethical rules may confirm the public’s worst fears about the profession’s commitment to high ethical standards. Compounding this suspicion is the concern that some of the profession’s decisionmaking regarding enforcement is occurring behind closed doors.¹⁰²

There is another noteworthy aspect to *Nobody’s Watching*. Zacharias’s findings and discussion track some of the work in the field of sociology.

98. Richard Lavoie, *Flying Above the Law and Below the Radar: Instilling a Taxpaying Ethos in Those Playing by Their Own Rules*, 29 PACE L. REV. 637, 655–56 (2009).

99. Richard Lavoie, *Subverting the Rule of Law: The Judiciary’s Role in Fostering Unethical Behavior*, 75 U. COLO. L. REV. 115, 200 (2004).

100. *Id.*

101. See William G. Hyland, Jr., *Creative Malpractice: The Cinematic Lawyer*, 9 TEX. REV. ENT. & SPORTS L. 231, 236 (2008) (discussing “the precipitous drop in the public’s perception of the character, prestige and ethics of lawyers that began during the 1970s,” and “trac[ing] the history of lawyer portrayals in film, concentrating on the sharp negative trial imagery during the 1970s and 1980s that continues to the present”); see also Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1, 9 (2007) (“The secrecy surrounding the discipline process . . . affects the general public’s perception of the fairness and legitimacy of the lawyer discipline system and how well that system actually protects the public.”); Thomas W. Overton, *Lawyers, Light Bulbs, and Dead Snakes: The Lawyer Joke as Societal Text*, 42 UCLA L. REV. 1069, 1090 (1995) (reporting that a poll commissioned by the ABA in 1993 to discern the public perception about lawyers listed the top five complaints against them as: “1) Too expensive (17%), 2) [g]reedy; money hungry (11%), 3) [n]ot honest; crooks (9%), 4) [t]oo many lawyers (5%), and 5) [s]elf-serving; don’t care about clients (5%)”).

102. See *infra* notes 63–77 and accompanying text (discussing the need for more transparency in the drafting, legislating, and enforcing of rules).

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Sociologists have long studied the ideology and rise of professions.¹⁰³ Their work provides a valuable interdisciplinary perspective on the role and significance of professions in the nation's social and economic structure.¹⁰⁴

Sociological insights about the dynamics of professional behavior provide a rich basis for improving both the operation and regulation of the legal profession. Sociologists argue that there are two hallmarks to a profession, including the legal profession: first, education or professional training, and second, an ethical code that manifests a higher calling to act in the public's interest—to aspire beyond one's own personal interests.¹⁰⁵ “The professional maintains his neutrality against

103. See TALCOTT PARSONS, *The Professions and Social Structure*, in ESSAYS IN SOCIOLOGICAL THEORY 34, 34 (rev. ed. 1954) (“Comparative study of the social structures of the most important civilizations shows that the professions occupy a position of importance in our society which is, in any comparable degree of development, unique in history.”).

104. See MAGALI SARFATTI LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS xviii (1977) (noting that “[t]he persistence of profession as a category of social practice suggests that the . . . movements of professionalization [have] become *an ideology*—not only an image which consciously inspires collective or individual efforts, but a mystification which unconsciously obscures real social structures and relations,” and “exploring [the] passage” of the profession from a “predominantly economic function—organizing the linkage between education and the marketplace—to a predominantly ideological one—justifying inequality of status and closure of access in the occupational order”). See generally PARSONS, *supra* note 103, at 34–49. Parsons writes:

The importance of the professions to social structure may be summed up as follows: The professional type is the institutional framework in which many of our most important social functions are carried on, notably the pursuit of science and liberal learning and its practical application in medicine, technology, law and teaching. This depends on an institutional structure the maintenance of which is not an automatic consequence of belief in the importance of the functions as such, but involves a complex balance of diverse social forces.

Id. at 48, quoted in LARSON, *supra* at xii. The forces at play in maintaining a profession include the members' interest in earning income, maintaining a monopoly for the delivery of their services, and maximizing their independence in how they perform their service. See LARSON, *supra* at x–xviii.

105. See LARSON, *supra* note 104, at 40–52 (examining the standardization of knowledge and market control and contending that “professional markets are radically different from those in the laissez-faire commodity markets; in the latter, *caveat emptor* is the rule, while in the former, professional work ethics and the ideal of service justify consumer's trust”). Philip Elliott stated that:

The ideology of liberal education, public service and gentlemanly professionalism was elaborated in opposition to the growth of industrialism and commercialism. . . . It incorporated such values as personal service, a dislike of competition, advertising and profit, a belief in the principle of payment in order to work rather than working for pay and in the superiority of the motive of service.

encroachment by insisting as a fundamental proposition that his motivation is altruistic.”¹⁰⁶ The legal profession’s autonomy to control the creation, development, and regulation of these two hallmarks of the law field is critical to the profession’s dominance in the market for the delivery of legal services and its ability to engage in self-regulation.

Zacharias’s empirical work and detailed analysis in *Nobody’s Watching* addresses the workings and the legitimacy of the legal profession’s self-regulatory status. The profession’s self-regulatory status ultimately rests upon the public’s faith in the profession’s ability to establish and enforce high ethical standards.¹⁰⁷ One prominent sociologist raises many of the concerns touched upon by Zacharias:

Self-regulation . . . is not a simple matter. Aside from the circumstance that standards must be established and codes adopted, a professional body is not a universal mutual-policing organization. . . . When an organized association becomes involved, not all members will be equally concerned about standards of competence and performance; some will benefit by being off-grade. Codes of conduct may be promulgated by a minority, and accepted with less than total enthusiasm by the relevant electorate; by some, the acceptance may be tactical or cynical, designed to assuage the anxieties of dubious clients or professed for

These values closely resemble many of the characteristic which later commentators and sociologists have taken to be the defining characteristics of professions.

PHILIP ELLIOTT, THE SOCIOLOGY OF THE PROFESSIONS 52–53 (1972); see also, ELIOT FREIDSON, PROFESSIONAL DOMINANCE: THE SOCIAL STRUCTURE OF MEDICAL CARE 96 (1970). In discussing Talcott Parsons’s definition of the term *professional*, Freidson writes:

[S]omeone who is supposed to be recruited and licensed on the basis of his technical competence rather than his ascribed social characteristics, to use generally accepted rather than particularistic scientific standard in his work, to restrict his work activity to areas in which he is technically competent, to avoid emotional involvement and to cultivate objectivity in his own work, and to put his client’s interests before his own. These normative expectations are intended by Parsons to apply to all professions, not only to medicine, since he treats the medical practitioner as the archetype of the professional.

Id. See generally William E. Hornsby, Jr., *Ad Rules Infinitum: The Need for Alternatives to State-Based Ethics Governing Legal Services Marketing*, 36 U. RICH. L. REV. 49, 53–54 (2002) (reporting that in the latter part of the nineteenth century the legal profession created a system of formal education—a bar examination to test competence—and a system of ethics and discipline “to limit its ranks and secure its position as a monopoly in America”).

106. JETHRO K. LIEBERMAN, THE TYRANNY OF THE EXPERTS: HOW PROFESSIONALS ARE CLOSING THE OPEN SOCIETY 57 (1970) (“He professes a desire to serve all and to serve to the maximum of his ability, regardless of the size of his compensation or other material reward. . . . Of course, the professional can say this without believing it, but it is important that he act on it.”); see ROBERT K. MERTON, SOME THOUGHTS ON THE PROFESSIONS IN AMERICAN SOCIETY 11 (1960) (“[T]he social invention of the professions institutionalizes altruistic behavior.”).

107. Zacharias, *supra* note †, at 1008–09 (commenting that the “very notion of self-regulation of the bar” is called into question when the public learns about the profession not enforcing its “advertising prohibitions . . . perhaps from elite lawyers distinguishing themselves from the ‘lower strata’ of the profession”).

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the benefit of prestigious brethren with the full intention of pursuing a “practical,” less-than-ideal course of action.¹⁰⁸

No matter what reason underlies the creation of a professional code of ethical conduct, Zacharias and his counterparts in the sociology of the professions field agree that public trust is the lynchpin to self-regulation and market control.¹⁰⁹ The public clamor for lawyers to be accountable to authority external to the profession may ultimately limit their professional independence and market domination of the delivery of legal services.¹¹⁰

108. WILBERT E. MOORE, THE PROFESSIONS: ROLES AND RULES 127 (1970) (footnote omitted); *see also* Zacharias, *supra* note †, at 1008–09 (cautioning that “[a]n uninformed observer might reasonably assume that the bar does not enforce its rules, preferring to protect the economic interests of lawyers instead”).

109. *See* Neil Hamilton, *Assessing Professionalism: Measuring Progress in the Formation of an Ethical Professional Identity*, 5 U. SAINT THOMAS L.J. 470, 492 (2008) (“If members of a peer-review profession seek self-advantage to the same degree as individuals in other occupations, then society has no reason to grant the profession authority to regulate itself, and society would rely on the competitive market’s control of work by management.” (footnote omitted)); *see also* Gail B. Agrawal & Mark A. Hall, *What if You Could Sue Your HMO? Managed Care Liability Beyond the ERISA Shield*, 47 ST. LOUIS U. L.J. 235, 291–92 (2003) (discussing regulation in the context of the medical field). Agrawal and Hall observe:

Reliance on professional custom and self-regulation is based on public trust that the self-regulating profession will set high standards and that the risk of professional sanction will cause individuals to comply voluntarily with professional norms to avoid social sanction. The managed care industry is not afforded the degree of public or individual trust that characterizes the medical profession. Bureaucracy does not engender a sense of public confidence or individual trust. The individually unidentifiable corporate constituents that determine corporate conduct have less to fear from individual social sanction than to personal physicians and, therefore, are likely to be less motivated by these psychological and reputational forces.

Id. (footnotes omitted).

110. *See* Judith L. Maute, *Bar Associations, Self-Regulation and Consumer Protection: Whither Thou Goest?*, 2008 PROF. LAW. 53, 65–66 (cautioning that “[i]f we lawyers in the U.S. do not get our houses in order, we may find that others will wrest control from us, creating powerful external regulatory structures over which we have little control”); *see also* Zacharias, *supra* note †, at 1009 (suggesting another possible limitation on the ability of lawyers to deliver legal services: that “[a]ctual clients may be less willing to believe in or honor the rules when receiving their lawyers’ advice” (citing Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1362–63 (1995) (discussing the impact of rules in reinforcing the lawyer’s ability to resist client misperceptions about proper lawyer conduct))).

A. Nobody's Watching—*Casting a Long Shadow in Lawyer Regulation*

The relevancy and importance of *Nobody's Watching* continues today. Its message about the risks involved with the nonenforcement or underenforcement of ethics rules is reflected in contemporary scholarly and nonscholarly articles.¹¹¹ For example, Professor Margaret Raymond recently examined the failure of states to enforce their advertising rules against out-of-state lawyers whose advertisements violate a state's rules.¹¹² She relies, in part, on some of Zacharias's work in *Nobody's Watching* and notes that there are several problems with the nonenforcement or underenforcement of advertising rules. It "reduces respect for [the] law"¹¹³—a key point advanced by Zacharias.¹¹⁴ Underenforcement also "undermines any goal of shielding the consumer from misleading communications or communications that undermine the observer's respect . . . for lawyers and the legal profession"—concerns also raised in *Nobody's Watching*.¹¹⁵ Raymond further argues that

111. See, e.g., Margaret Raymond, *Inside, Outside: Cross-Border Enforcement of Attorney Advertising Restrictions*, 43 AKRON L. REV. 801, 801 (2010) (addressing the "puzzling" problem of cross-border enforcement—or the lack of it—of attorney advertising regulations); Frank Davies, *Congress' Ethics Rules Showing Few Teeth*, ORLANDO SENTINEL (Apr. 23, 2006), http://articles.orlandosentinel.com/2006-04-23/news/HARRIS23_1_ethics-ornstein-harris (noting that a decline in public trust of Congress in the mid-1990s led to tough ethics rules that were being ignored because "the rules are rarely enforced"); R. Jeffrey Smith, *For Judges, Inconsistent Use of Ethics Rules Is Evident*, WASH. POST, Dec. 24, 2010, at A10 (reporting about Douglas Kendall, head of the Constitutional Accountability Center, who questions a "judicial ethics process that is 'completely self-policing and unenforceable'" and allows judges to "'violate [a code of conduct] with impunity.'"). Professor Raymond incorporates some of Zacharias's work in *Nobody's Watching* and his article, Zacharias, *Federalizing Legal Ethics*, *supra* note 1, in *Inside, Outside*. See Raymond, *supra* at 813 & n.53, 815 & n.60, 821 & n.84. Professor Raymond concludes: "[I]t is not surprising that states do little cross-border enforcement of advertising rules" in light of Zacharias's "scholarly work suggesting that states do little enforcement of advertising rules even against in-state lawyers." Raymond, *supra* at 821 & n.84 (citing Zacharias, *supra* note †, at 999); see Michael R. McCunney & Alyssa A. DiRusso, *Marketing Wills*, 16 ELDER L.J. 33, 35 (2008) (positing "that one reason for the disappointing number of individuals who execute wills is a wholesale failure of the legal industry to effectively market them"). McCunney and DiRusso cite to Zacharias and *Nobody's Watching* to show that some scholars "have argued that despite the appearance of a strict rule on lawyer advertising, the level of activity that is actually tolerated is quite high." *Id.* at 70 (citing Zacharias, *supra* note †, at 988); see also Benjamin H. Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?*, 59 ALA. L. REV. 453, 465 (2008) (noting that "enforcement of the Rules of Professional Conduct has been notoriously lax" (citing Zacharias, *supra* note †)).

112. Raymond, *supra* note 111, at 803.

113. *Id.* at 822.

114. Zacharias, *supra* note †, at 1005–06.

115. Raymond, *supra* note 111, at 822.

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underenforcement also “disadvantages in-state lawyers” who may feel “some pressure to comply” with a state’s advertising rules while out-of-state lawyers are free to ignore such rules in competing for a larger share of the legal services market.¹¹⁶

The relevance of *Nobody’s Watching* was also poignantly illustrated by a recent American Bar Association (ABA) article discussing legal services outsourcing and the fly in, fly out rule (FIFO).¹¹⁷ Both topics arose in the context of a public hearing by the ABA Commission on Ethics 20/20. Peter Ehrenhaft of Washington, D.C., has practiced transactional law for almost fifty years and speculated that there are several hundred lawyers like him doing FIFO work around the world. The article, quoting Ehrenhaft, reported:

“Not once during [my 50 years] has any question been raised by any regulatory body overseeing the delivery of legal services in this country or overseas about either my services or those of counsel” working on my side or on the opposite side of the table.

That is true despite the fact “none of the ‘foreign’ lawyers in the room (either I or another) had in, any way, been authorized to provide such services in the jurisdiction in which we were working.”¹¹⁸

116. *Id.* at 822–23.

117. See *Legal Process Outsourcing and “Fly In/Fly Out” Lawyering Addressed at Ethics 20/20 Commission Hearing in San Francisco*, ABA Now (Aug. 8, 2010), <http://www.abanow.org/2010/08/legal-process-outsourcing-and-%E2%80%98fly-in-fly-out%E2%80%99-lawyering-addressed-at-ethics-2020-commission-hearing-in-san-francisco>.

118. *Id.* Ehrenhaft then “cite[s] the example of a meeting at the Amsterdam Airport between the CEOs of a Swiss firm and the Italian client he represented, during which the Italian client’s acquisition of a division of the Swiss company operating in Germany was discussed.” *Id.* “The terms ‘fly-in, fly-out’ and ‘FIFO’ are sometimes used to refer to temporary practice by a lawyer in a foreign jurisdiction in which the lawyer is not admitted.” Laurel S. Terry et al., *Transnational Legal Practice 2009*, 44 INT’L L. 563, 576 n.87 (2010). The ABA Model Rule for Temporary Practice by Foreign Lawyers states:

[A] lawyer does not engage in the unauthorized practice of law . . . when on a temporary basis the lawyer performs services in this jurisdiction that:

- (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
- (2) are in or reasonably related to a pending or potential proceeding before a tribunal held or to be held in a jurisdiction outside the United States if the lawyer, or a person the lawyer is assisting, is authorized by law or by order of the tribunal to appear in such proceeding or reasonably expects to be so authorized;
- (3) are in or reasonably related to a pending or potential arbitration, mediation or other alternative dispute resolution proceeding held or to be held in this or another jurisdiction, if the services arise out of or

Ehrenhaft's comments suggest that lawyers are providing legal services in jurisdictions where they are not licensed—essentially engaging in the unauthorized practice of law (UPL).¹¹⁹ The three conclusions drawn by the young lawyer in *Nobody's Watching* concerning the few reported cases for violations of California's advertising rules are instructive in considering the conduct of lawyers who engage in transnational legal work in jurisdictions where they are not licensed.

are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice;

- (4) are not within paragraphs (2) or (3) and
 - (i) are performed for a client who resides or has an office in a jurisdiction in which the lawyer is authorized to practice to the extent of that authorization; or
 - (ii) arise out of or are reasonably related to a matter that has a substantial connection to a jurisdiction in which the lawyer is authorized to practice to the extent of that authorization; or
- (5) are governed primarily by international law or the law of a non-United States jurisdiction.

AM. BAR ASS'N, CLIENT REPRESENTATION IN THE 21ST CENTURY: REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE 67 (2002).

119. Under the *ABA Model Rules*:

- (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
- (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
 - (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
 - (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.
- (c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in the jurisdiction that:
 - (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
 - (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
 - (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or
 - (4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

MODEL RULES OF PROF'L CONDUCT R. 5.5(a)–(c) (2010). The ABA created the Ethics 20/20 Commission in part in response to the increase in multijurisdictional practice in order to “better educate lawyers about developments involving the globalization of the legal services market and their ethical significance.” Sahl, *supra* note 91, at 674.

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First, the rules regarding multijurisdictional work do not mean what they say.¹²⁰ Second, the rules mean what they say but are not enforceable.¹²¹ Third, the multijurisdictional rules mean what they say and are enforceable, but the bar does not “deem violations important enough to prompt disciplinary action.”¹²²

An in-depth discussion of UPL is beyond the scope of this Article, but the third conclusion raised by Zacharias’s young lawyer regarding the violation of advertising rules arguably applies to the UPL problem raised by Eherenhaft. Although there may be some gray area regarding what constitutes UPL, UPL rules are analogous to advertising rules because they are sufficiently clear to prohibit the type of cross-border legal work that Ehrenhaft discussed at the recent 20/20 hearing.¹²³ If the UPL rule means what it says and is capable of enforcement, the question then becomes: why have the regulators of the delivery of legal services elected not to enforce the rule? This may be because regulators believe the ethical standards are wrong or unrealistic, or simply because the bar decided against enforcement for other reasons, including inadequate enforcement resources.

The same consequences of intentional underenforcement discussed by Zacharias in *Nobody’s Watching* arguably apply here in the UPL context. For example, the underenforcement of UPL rules may encourage other lawyers to violate the rules and raise broader questions about the efficacy or integrity of the regulatory process.¹²⁴ One expert in economic sociology notes that social reinforcement of behavior “may be more important [for

120. Zacharias, *supra* note †, at 974.

121. *Id.*

122. *Id.*

123. See MODEL RULES OF PROF’L CONDUCT R. 5.5. Model Rule 5.5 states:

- (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
- (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
 - (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
 - (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

Id.; see also BLACK’S LAW DICTIONARY 1291 (9th ed. 2009) (defining the “unauthorized practice of law” as “[t]he practice of law by a person, typically a nonlawyer, who has not been licensed or admitted to practice law in a given jurisdiction”).

124. See *supra* notes 15–17 and accompanying text.

promoting conduct] than who is encouraging them.”¹²⁵ Thus, if there are numerous lawyers freely violating the profession’s UPL rules, then it is likely that other lawyers will also violate those rules. This cascading dynamic is problematic for the lawyer regulatory system, which is already grappling with the issues of limited resources and the public and bar’s negative perceptions of lawyer self-regulation.

IV. CONCLUSION

Nobody’s Watching provides an insightful discussion concerning the development and enforcement of the profession’s rules of ethical conduct. Zacharias offers academics, practitioners, and regulators a helpful roadmap for avoiding some of the adverse consequences associated with the underenforcement of ethics rules and for improving the lawyer regulatory system.

Scholars in organizational studies divide leaders into two categories: transactional and transformational.¹²⁶ Transactional leaders are “even-keeled managers . . . who know how to delegate, listen and set achievable goals.”¹²⁷ Transformational leaders, on the other hand, are “entrepreneurs [or persons] [who] must recruit and galvanize when a company is little more than a whisper of a big idea. Shouting ‘To the ramparts!’ with no ramparts in sight takes a kind of irrational self-confidence.”¹²⁸

Zacharias was a transformational scholar in the legal profession field as evidenced, in part, by *Nobody’s Watching*. He was “[s]houting [sometimes] ‘To the ramparts!’”—discovering and highlighting problems and calling for reforms in our profession or the legal system when no one else was doing it—when there were “no ramparts in sight.”¹²⁹ This kind of leadership takes a special kind of self-confidence, energy, and commitment to the profession that ensures Zacharias’s long-lasting legacy in the academy and the profession.¹³⁰ To be sure, Zacharias’s intellectual and moral presence will be missed.

125. Natasha Singer, *Better Health, with a Little Help from Our Friends*, N.Y. TIMES, Sept. 19, 2010, at BU3.

126. David Segal, *Just Manic Enough: Seeking the Perfect Entrepreneur*, N.Y. TIMES, Sept. 19, 2010, at BU1 (discussing traits of important leaders and recognizing that entrepreneurs require a special trait).

127. *Id.*

128. *Id.*

129. *Id.*

130. *See id.*

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APPENDIX A

Published Works of Fred C. Zacharias

- Fred C. Zacharias, *Steroids and Legal Ethics Codes: Are Lawyers Rational Actors?*, 85 NOTRE DAME L. REV. 671 (2010).
- Fred C. Zacharias & Bruce A. Green, *The Duty To Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1 (2009).
- Fred C. Zacharias, *Integrity Ethics*, 22 GEO. J. LEGAL ETHICS 541 (2009).
- Fred C. Zacharias, *Practice, Theory, and the War on Terror*, 59 EMORY L.J. 333 (2009).
- Fred C. Zacharias & Bruce A. Green, *Rationalizing Judicial Regulation of Lawyers*, 70 OHIO ST. L.J. 73 (2009).
- Fred C. Zacharias, *Effects of Reputation on the Legal Profession*, 65 WASH. & LEE. L. REV. 173 (2008).
- Fred C. Zacharias, *True Confessions About the Role of Lawyers in a Democracy*, 77 FORDHAM L. REV. 1591 (2009).
- Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147 (2009).
- Bruce A. Green & Fred C. Zacharias, “*The U.S. Attorneys Scandal*” and *the Allocation of Prosecutorial Power*, 69 OHIO ST. L.J. 187 (2008).
- Fred C. Zacharias, *Are Evidence-Related Ethics Provisions “Law”?*, 76 FORDHAM L. REV. 1315 (2007).
- Fred C. Zacharias, *Fitting Lying to the Court into the Central Moral Tradition of Lawyering*, 58 CASE W. RES. L. REV. 491 (2008).
- Fred C. Zacharias, *The Images of Lawyers*, 20 GEO. J. LEGAL ETHICS 73 (2007).
- Fred C. Zacharias, *The Preemployment Ethical Role of Lawyers: Are Lawyers Really Fiduciaries?*, 49 WM. & MARY L. REV. 569 (2007).
- Fred C. Zacharias & Bruce A. Green, “*Anything rather than a Deliberate and Well-Considered Opinion*”—Henry Lord Brougham, *Written by Himself*, 19 GEO. J. LEGAL ETHICS 1221 (2006).
- Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265 (2006).
- Fred C. Zacharias, *Who Owns Work Product?*, 2006 U. ILL. L. REV. 127.
- Fred C. Zacharias, *The Legal Profession in the Year 2050*, 15 WIDENER L.J. 253 (2006).

- Fred C. Zacharias, *Coercing Clients: Can Lawyer Gatekeeper Rules Work?*, 47 B.C. L. REV. 455 (2006).
- Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH L. REV. 1 (2005).
- Fred C. Zacharias, *The Role of Prosecutors in Serving Justice After Convictions*, 58 VAND. L. REV. 171 (2005).
- Fred C. Zacharias, *What Lawyers Do When Nobody's Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules*, 87 IOWA L. REV. 971 (2002).
- Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837.
- Fred Zacharias, *Lawyers as Gatekeepers*, 41 SAN DIEGO L. REV. 1387 (2004).
- Fred C. Zacharias, *A Word of Caution for Lawyer Assistance Programming*, 18 GEO. J. LEGAL ETHICS 237 (2004).
- Fred C. Zacharias, *The Purposes of Lawyer Discipline*, 45 WM. & MARY L. REV. 675 (2003).
- Fred C. Zacharias & Bruce A. Green, *Federal Court Authority To Regulate Lawyers: A Practice in Search of a Theory*, 56 VAND. L. REV. 1303 (2003).
- Fred C. Zacharias, *Why the Bar Needs Academics—And Vice Versa*, 40 SAN DIEGO L. REV. 701 (2003).
- Fred C. Zacharias, *Reform or Professional Responsibility as Usual: Whither the Institutions of Regulation and Discipline?*, 2003 U. ILL. L. REV. 1505.
- Fred C. Zacharias, *Understanding Recent Trends in Federal Regulation of Lawyers*, PROF. LAW., Symp. Issue, 2003 at 15.
- Fred C. Zacharias, *The Future Structure and Regulation of Law Practice: Confronting Lies, Fictions, and False Paradigms in Legal Ethics Regulation*, 44 ARIZ. L. REV. 829 (2002).
- Fred C. Zacharias, *The Humanization of Lawyers*, PROF. LAW. Symp. Issue, 2002 at 9.
- Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381 (2002).
- Fred C. Zacharias, *Five Lessons for Practicing Law in the Interests of Justice*, 70 FORDHAM L. REV. 1939 (2002).
- Fred C. Zacharias, *What Lawyers Do When Nobody's Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules*, 87 IOWA L. REV. 971 (2002).
- Fred C. Zacharias, *Limits on Client Autonomy in Legal Ethics Regulation*, 81 B.U. L. REV. 199 (2001).
- Fred C. Zacharias, *The Lawyer as Conscientious Objector*, 54 RUTGERS L. REV. 191 (2001).

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- Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721 (2001).
- Fred C. Zacharias, *The Fallacy that Attorney-Client Privilege Has Been Eroded: Ramifications and Lessons for the Bar*, PROF. LAW., Symp. Issue, 1999 at 39.
- Fred C. Zacharias, *Harmonizing Privilege and Confidentiality*, 41 S. TEX. L. REV. 69 (1999).
- Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207 (2000).
- Fred C. Zacharias, *Professional Responsibility, Therapeutic Jurisprudence, and Preventive Law*, 5 PSYCHOL. PUB. POL'Y & L. 909 (1999).
- Fred C. Zacharias & Shaun Martin, *Coaching Witnesses*, 87 KY. L.J. 1001 (1999).
- Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121 (1998).
- Fred C. Zacharias, *Waiving Conflicts of Interest*, 108 YALE L.J. 407 (1998).
- Fred C. Zacharias, *Reply to Hyman and Silver: Clients Should Not Get Less Than They Deserve*, 11 GEO. J. LEGAL ETHICS 981 (1998).
- Fred C. Zacharias, *Foreword: The Quest for a Perfect Code*, 11 GEO. J. LEGAL ETHICS 787 (1998).
- Fred C. Zacharias, *Limited Performance Agreements: Should Clients Get What They Pay For?*, 11 GEO. J. LEGAL ETHICS 915 (1998).
- Fred C. Zacharias, *The Civil-Criminal Distinction in Professional Responsibility*, 7 J. CONTEMP. LEGAL ISSUES 165 (1996).
- Fred C. Zacharias, *Reconceptualizing Ethical Roles*, 65 GEO. WASH. L. REV. 169 (1997).
- Fred C. Zacharias, *Who Can Best Regulate the Ethics of Federal Prosecutors, or, Who Should Regulate the Regulators?: Response to Little*, 65 FORDHAM L. REV. 429 (1996).
- Kevin Cole & Fred C. Zacharias, *The Agony of Victory and the Ethics of Lawyer Speech*, 69 S. CAL. L. REV. 1627 (1996).
- Fred C. Zacharias, *A Nouveau Realist's View of Interjurisdictional Practice Rules*, 36 S. TEX. L. REV. 1037 (1995).
- Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303 (1995).
- Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335 (1994).

- Fred C. Zacharias, *Privilege and Confidentiality in California*, 28 U.C. DAVIS. L. REV. 367 (1995).
- Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223 (1993).
- Fred C. Zacharias, *The Restatement and Confidentiality*, 46 OKLA. L. REV. 73 (1993).
- Fred C. Zacharias, *Fact and Fiction in the Restatement of the Law Governing Lawyers: Should the Confidentiality Provisions Restate the Law?*, 6 GEO. J. LEGAL ETHICS 903 (1993).
- Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45 (1991).
- Fred C. Zacharias, *A Critical Look at Rules Governing Grand Jury Subpoenas of Attorneys*, 76 MINN. L. REV. 917 (1992).
- Fred C. Zacharias, *Rethinking Confidentiality II: Is Confidentiality Constitutional?*, 75 IOWA L. REV. 601 (1990).
- Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989).
- Fred C. Zacharias, *Flowcharting the First Amendment*, 72 CORNELL L. REV. 936 (1987).
- Fred C. Zacharias, *The Politics of Torts*, 95 YALE L.J. 698 (1986).
- Fred C. Zacharias, *The Uses and Abuses of Convictions Set Aside Under the Federal Youth Corrections Act*, 1981 DUKE L.J. 477.
- Fred C. Zacharias, *Exhaustion of Administrative Remedies—A Synthesis of the Law and a Proposed Statute for Federal Prison Cases*, 4 NEW ENGLAND J. ON PRISON L. 5 (1977).
- Fred C. Zacharias, *Standing of Public Interest Litigating Groups To Sue on Behalf of Their Members*, 39 U. PITTSBURGH L. REV. 453 (1977).