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The State of Self-Regulation of the Legal Profession: Have We Locked the Fox in the Chicken Coop?

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THE STATE OF SELF-REGULATION
OF THE LEGAL PROFESSION: HAVE WE LOCKED
THE FOX IN THE CHICKEN COOP?

Randy Lee*

In their papers for this symposium, both Professor John Gedid¹ and Professor Patricia Salkin² have established the need for a set of ethical standards for administrative law judges (ALJs). Professor Salkin goes on to present a comprehensive discussion of what those standards could be.³ Professor Gedid, meanwhile, chooses to show what those standards cannot be.⁴ While the question that their two papers appears to leave open is what the standards governing the ethical conduct of ALJs should be, this paper attempts to draw attention to a more basic question suggested by these two fine papers: Who should decide what the standards governing the ethical conduct of ALJs should be, and should these standards come from lawyers themselves or from the political process?

The papers of Professor Salkin and Professor Gedid shed some light on this matter. As both authors indicate to varying degrees, many ALJs are clearly members of an executive branch,⁵ and the rest are at least ambiguously a part of an executive branch.⁶ Thus, the traditional

* Professor of Law, Widener University School of Law, Harrisburg, Pennsylvania. The author would like to thank Robert H. Davis, Jr., former president of the National Organization of Bar Counsel, for helpful discussions on this topic. The author would also like to thank Paula Heider for her most patient work on this article and Shannon Whitson for technical assistance. The author would finally like to thank his family for their support.

¹ John L. Gedid, *ALJ Ethics: Conundrums, Dilemmas, and Paradoxes*, 11 WIDENER J. PUB. L. 33 (2002).

² Patricia E. Salkin, *Judging Ethics for Administrative Law Judges: Adoption of a Uniform Code of Judicial Conduct for the Administrative Judiciary*, 11 WIDENER J. PUB. L. 7 (2002).

³ *Id.* at 36-53.

⁴ Gedid, *supra* note 1, at 33-36.

⁵ Gedid, *supra* note 1, at 34; Salkin, *supra* note 2, at 8.

⁶ Gedid, *supra* note 1, at 37-43.

justification for lawyer self-regulation, the need for a vigorous bar immune to government manipulation,⁷ seems out of place in a discussion of the regulation of ALJs, who are already integrated into the political branches.⁸ In addition, since one need not be a lawyer to be an ALJ,⁹ one cannot insist that lawyers are uniquely able to understand the job and regulate those who perform it.

Professor Salkin goes so far as to suggest that "[t]he most efficient manner of achieving ethics reform [in this area] is to designate a committee or commission to study the issue, examine the options (typically the model codes and the activities in other states), and charge the committee with making a recommendation for the

⁷ MODEL RULES OF PROF'L CONDUCT pmb1. [10] (2001).

⁸ See *Developments in the Law - Conflicts of Interest in the Legal Profession: VI Conflicts of Interest and Government Attorneys*, 94 HARV. L. REV. 1413, 1443-44 (1981) (hereinafter *Conflicts*):

Insofar as conflict-of-interest rules for government lawyers are based on judgments about public policy and effective government rather than professional regulation alone, such choices are more appropriately made within the government as a part of the normal public policymaking process. Thus, while professional standards that apply to all attorneys are the proper province of the bar associations, rules applicable to government attorneys alone are more appropriately formulated by the government entity.

One might argue that separation of powers concerns would be implicated by a disciplinary system that covered executive branch employees but was formulated and administered exclusively by the judiciary branch. Such concerns, however, have never prevented the judiciary from having authority over district attorneys, attorney generals, and other executive branch lawyers. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.11 (2001) (establishing conflict of interest requirements for government lawyers); see *id.* at R. 3.8 (applying to government prosecutors). In fact, in Pennsylvania, only recently had the Pennsylvania Supreme Court acknowledged that the political branches can regulate the ethical behavior of government lawyers. *P.J.S. v. Pa. State Ethics Comm'n*, 723 A.2d 174, 178 (Pa. 1999).

⁹ Salkin, *supra* note 2, at 8; Christopher B. McNeil, *The Model Act Creating a State Central Hearing Agency: Promises, Practical Problems, and a Proposal for Change*, 53 ADMIN. L. REV. 475, 509 (2001). Although in the federal government ALJs must be lawyers, the federal system employs administrative judges who carry on similar adjudicative functions but need not be lawyers. FED. PUBL'NG INC., *ACUS Report Discusses Immigration Adjudicators*, 69 INTERPRETER RELEASES 765, 775 (June 29, 1992).

state."¹⁰ Professor Salkin appears comfortable both with these commissions being accountable to the political process and with their members being drawn not only from the bar and from amongst the ranks of ALJs, but even from among "the good government groups (e.g., League of Women Voters, Common Cause, Public Interest Research Groups, etc.) who arguably represent the public interest."¹¹

While the answer to who should decide what standards should govern ALJs seems to rest almost casually in Professor Salkin's paper, its implications come down like a jack-hammer on the conventional wisdom that only lawyers can regulate the ethical behavior of legal functionaries. Not only does Professor Salkin include non-lawyers in her model commission, but she does so to protect the public interest. In fact, as she envisions the commission, the lawyers and ALJs involved will be there to protect their own interests rather than the public's.¹² Thus, in Professor Salkin's view, lawyers are to be involved in creating ethics rules for legal functionaries because they are interested constituencies.¹³ The public interest, however, is to be protected by special interest groups rather than by the bar.

Given the current trend toward an increasingly negative perception of lawyers,¹⁴ Professor Salkin's view is not surprising. Still,

¹⁰ Salkin, *supra* note 2, at 30.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ John A. Humbach, *Abuse of Confidentiality and Fabricated Controversy: Two Proposals*, 11 PROF. LAW., 1,1 (Summer 2000).

Public faith in the legal profession is not merely low but, according to recent polling, it has been declining at a disturbing rate. . . . During the past decade the percentage of people willing to rate lawyers' honesty and ethical standards as "high" or "very high" has dropped from 22% to 13%, an average decline of nearly 1% per year. According to the pollsters, lawyers are ranked among "the five professions and occupations considered least honest by the American public," and the legal profession is among the three that had "lost the most in the ratings over the last ten years."

Id. (quoting Leslie McAneny, *Nurses Displace Pharmacists at Top of Expanded Honesty and Ethics Pool*, GALLUP POLL MONTHLY, Nov. 16, 1999, at 41). See also Randy Lee, *Legal Ethics for Government Lawyers: Straight Talk for Tough Times*, 9 WIDENER J. PUB. L. 199, 200 (2000) ("Yet, during the 1990s the image of government lawyers was tarnished. In a series of high-profile legal

it is far removed from the picture of lawyer regulation portrayed in the preamble of the American Bar Associations (ABA) Model Rules of Professional Conduct. There, the ABA has insisted that "[a]n independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice."¹⁵ The ABA, however, conditions this independence on the bar embracing "a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar."¹⁶

Given the ABA's view, attorney self-regulation seems particularly necessary in the context of ALJs. After all, ALJs function primarily to curb abuse of legal authority within their agencies, and that function increases in difficulty as ALJs become increasingly dominated by the political branches. Yet, one can infer from Professor Salkin's call for commissions that include lay special interest groups to represent the public interest that she does not believe that lawyers have successfully embraced their responsibility to cast aside self-interest and regulate themselves purely in the public interest.

Professor Salkin would not be the first commentator to have come to such a conclusion. Noting this same perception of the bar as just another self-interested group, Professor William Braithwaite reported in a 1990 ABA Journal:

Much of the political activity by lawyers and bar groups today makes it appear that many lawyers, who should know better, share the corrupted modern notion of politics as simply the use of power to get what you want. Actions thus motivated can contribute to a public perception that lawyers are just another interest group, like banks or the tobacco industry. The profession itself is thereby encouraged to believe it has no interest in, much less any obligation toward, the common good.¹⁷

confrontations from Los Angeles, California to Washington, D.C., government lawyers found themselves characterized as inept, overzealous, and even unethical.").

¹⁵ MODEL RULES OF PROF'L CONDUCT pmb. [10] (2001).

¹⁶ *Id.* at pmb. [11].

¹⁷ William T. Braithwaite, *Hearts and Minds: Can Professionalism Be*

Professor Russell Pearce, meanwhile, would seek even to preempt this discussion of whether the bar can be, or needs to be, self-regulating by challenging the very notion that the bar is self-regulating. Professor Pearce has pointed out first that much law, such as "tort law, criminal law, agency law, and securities law" regulates lawyers, and all of this law is promulgated by the political branches of government.¹⁸ Second, even ethics rules promulgated and enforced by the judiciary are not an example of lawyer self-governance because the courts themselves "are still a government entity independent of the bar."¹⁹

While Professor Pearce's observations help to strip away the illusion that the bar is absolutely self-regulating, they do not foreclose the entire discussion. After all, just as Professor Pearce is correct in observing that although the judiciary is made up of lawyers, it remains a branch of government independent of the bar; it is equally enlightening to note that although the judiciary is a branch of government, it is a branch made up of lawyers. Thus, judicial regulation of lawyers remains lawyers regulating lawyers. Furthermore, while it is true that the political branches of government do pass laws that affect lawyer behavior, it is also true that laws that apply to everyone else in society often cannot be applied to lawyers.²⁰

We are forced then to confront what Professor Salkin seems to imply and what Professor Braithwaite says explicitly: that lawyers may

Taught?, 1990 A.B.A. J. 70, 71. See also Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 361 (1989):

The extent to which the profession's personal or economic interests have influenced the scope of confidentiality rules can never be known. Yet their mere existence leads one to wonder whether the attorney-drafters of the strict codes – perhaps even unintentionally – have overemphasized the systemic justification for confidentiality or undervalued the social benefits of less restrictive rules.

Id. (citations omitted).

¹⁸ Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1275 (1995).

¹⁹ *Id.*

²⁰ See, e.g., *People v. Belge*, 372 N.Y.S.2d 798 (Onondaga County Ct. 1975), *aff'd*, 376 N.Y.S.2d 771 (N.Y. App. Div. 1975) (holding attorney-client privilege excused lawyer from reporting death as required by State Public Health Law). See also *infra* text accompanying note 50.

not be capable of acting with selflessness, which the bar has conceded the authority to self-regulate requires. Not all commentators, of course, concede that lawyers are incapable of setting aside their personal interests to pursue the public good, nor are all willing to excuse those lawyers who do not. For example, the Inspector General of Pennsylvania, Robert J. DeSousa, has described lawyers in government service as a group who perceive their work as "a vocation" and aspire to "honor, duty, pride, self-satisfaction, and justice."²¹ In addition, Professor Bruce Green, who has chaired the Professional Ethics Committee of the New York State Bar Association,²² has recounted how close some government offices have come to realizing these aspirations.²³ Professor Robert Rodes, meanwhile, has extended this view to private lawyers, pointing out that all lawyers bind themselves by oath to work to avoid unjust results as a condition of joining the bar.²⁴

Despite these endorsements, one cannot help but notice in the Model Rules of Professional Conduct that the bar has done much to undermine its credibility in this area. For example, the Center for Professional Responsibility reported that the policies that underlie Model Rule of Professional Conduct 1.11, regulating conflicts of interest for government lawyers, can be traced to a 1975 ABA Committee on Ethics and Professional Responsibility advisory opinion.²⁵ In that opinion, the Committee on Ethics and Professional Responsibility indicated one of the values to which ethics rules must conform is "the professional benefit from avoiding the appearance of evil."²⁶ Ultimately, however, in drafting the comments to Rule 1.11,

²¹ Robert J. DeSousa, *Opening Remarks: Legal Ethics for Government Lawyers: Straight Talk for Tough Times*, 9 WIDENER J. PUB. L. 207, 210 (2000).

²² Lee, *supra* note 14, at 201.

²³ Bruce A. Green, *Why Should Prosecutors Seek Justice*, 26 FORDHAM URB. L. J. 607, 607-09 (1999) (describing his experience as an assistant prosecutor in the office of the United States Attorney for the Southern District of New York).

²⁴ Robert E. Rodes, Jr., *Government Lawyers*, 9 WIDENER J. PUB. L. 281, 281-82 (2000).

²⁵ ABA CENTER FOR PROF'L RESPONSIBILITY, ANNOTATED MODEL RULES OF PROF'L CONDUCT 178 (4th ed. 1999) (hereinafter CENTER FOR PROF'L RESPONSIBILITY).

²⁶ ABA Comm. on Ethics and Prof'l Responsibility, *Formal Op.* 342, 113 (1975).

the ABA chose to omit this policy from its list of policies underlying the rule.²⁷ In its place the ABA stated, "the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards."²⁸ Thus, although the ABA had articulated in the preamble to the Model Rules their recognition that self-regulation required a transcendence of self-interest,²⁹ the organization drafted Rule 1.11 with a greater sensitivity to lawyer financial interests than to fostering public confidence in an honest bar.

The redrafting of Rule 1.11, as recommended by the Ethics 2000 Commission formed to review the Model Rules, indicates that the bar continues to embrace this shift toward weighing the interests of lawyers more heavily than public confidence in the bar. In fact, in the Reporter's Explanation of Changes to Rule 1.11 adopted during Ethics 2000, one finds two references to the need to prevent lawyers from suffering any "fear that their [government] service will unduly burden their future careers in the private sector."³⁰ There is, however, no acknowledgment given in the Reporter's Explanation of any need to draft the Rules to prevent the public from having to live with a fear of impropriety among their lawyer public servants.³¹

This shift from a concern for public confidence to a concern for lawyer self-interest is not a function of accident or oversight. Rather, the Center for Professional Responsibility has acknowledged a longstanding effort, reflected in both the Model Rules and Model

²⁷ MODEL RULES OF PROF'L CONDUCT R. 1.11 cmt. [3] (2001).

²⁸ *Id.*

²⁹ *Id.* at pmb1. [11].

³⁰ ABA CTR. FOR PROF'L RESPONSIBILITY, ETHICS 2000 COMM'N, MODEL RULE 1.11 REPORTER'S EXPLANATION OF CHANGES ¶ 6 (2000) (hereinafter "REPORTER'S EXPLANATION"). *See also id.* at ¶ 2 ("In order not to inhibit transfer of employment to and from the government, the Commission believes that disqualification resulting from representation adverse to the former government client should be limited . . .").

³¹ *See generally* Reporter's Explanation, *supra* note 30. For a discussion of how this change in values has affected the application of Rule 1.11, see Randy Lee, *Related Representations in Civil and Criminal Matters: The Night the D.A. Ditched His Date for the Prom*, 29 N. KY. L. REV. 281, 291-301 (2002).

Code, to end the judiciary's use of the "appearance of impropriety" test.³² The Center laments, however, that "the test apparently refuses to die."³³

The history of Rule 1.11 is not the only aspect of the Model Rules undermining the notion that the bar can rise above self-interest in its mission of self-regulation. The bar's treatment of confidential information is, for example, even more damaging to that notion. Since its adoption, Model Rule 1.6 has prohibited lawyers from revealing confidences related to representations even when it was necessary to prevent a client from committing an act the lawyer believes is likely to result in a crime, fraud, or even serious financial loss to a third party.³⁴ The lawyer has been free, however, to use these confidences to his own benefit

to establish a claim or defense on behalf of the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon the conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.³⁵

Thus, the lawyer is free to reveal confidential information to protect her own interests, but not the financial interests of others. In addition, although the comments to Rule 1.6 advise that "disclosure should be no greater than the lawyer reasonably believes necessary to vindicate innocence,"³⁶ the lawyer is not required "to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion."³⁷ Thus, on the heels of the comment's exhortation that lawyers try to minimize the damage from disclosure,

³² CENTER FOR PROF'L RESPONSIBILITY, *supra* note 25, at 176-77.

³³ *Id.* at 177.

³⁴ MODEL RULE OF PROF'L CONDUCT R. 1.6 (2001). Some jurisdictions have allowed these disclosures. *See, e.g.*, PA. RULES OF PROF'L CONDUCT R. 1.6 (c)(1)(2002).

³⁵ MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2) (2001). Rule 1.6, as amended, also permits attorney disclosure "to secure legal advice about the lawyer's compliance with these rules," and "to comply with other law or a court order." MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2),(4) (amended 2002).

³⁶ MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [18] (2001).

³⁷ *Id.*

the comment gives the lawyer the green light, at the first sign of smoke, to use the client's confidences to extinguish even the lawyer's potential fires.

Lest the point of all this be missed, the Model Rules were also drafted to allow lawyers to use confidential information relating to a representation to their own gain without the client's awareness or consent. This position consistently has survived attack and remains unchanged after Ethics 2000.³⁸ Although the bar has been willing to limit this privilege by requiring that the client may not be disadvantaged while the lawyer is profiting from the client's confidential information,³⁹ one still sees here that the bar weighs confidentiality above financial loss to innocent third parties, but not above financial benefits for lawyers.

The treatment of confidential information in the Model Rules also reflects preferential treatment for lawyers in other ways beyond merely financial. In another privileged comparison, lawyers are permitted to reveal "information to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."⁴⁰ However, at least one jurisdiction chose to make this permissive disclosure mandatory when the danger was to a judge rather than a nonlawyer.⁴¹

The recent experience of New Jersey in keeping alive the goal of avoiding the appearance of impropriety undermines the bar's insistence that ethics rules must be designed to foster the interests of lawyers if the public is to be served by a vibrant bar.⁴² When the Supreme Court of New Jersey held that a "municipal prosecutor shall not represent any defendant in any other municipal court in that county or in the Superior Court located in that county" in which the

³⁸ MODEL RULES OF PROF'L CONDUCT R. 1.8(b) (amended 2002).

³⁹ MODEL RULES OF PROF'L CONDUCT R. 1.8(b) (2001).

⁴⁰ *Id.* at R. 1.6(b)(1). Rule 1.6(b)(1), as amended in the course of Ethics 2000, now reads "to prevent reasonably certain death or substantial bodily harm." MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (amended 2002).

⁴¹ *State v. Hansen*, 862 P.2d 117 (Wash. 1993). Some jurisdictions have made such disclosures mandatory regardless of the victim's status. *See, e.g.*, TEXAS RULES OF PROF'L CONDUCT R. 1.05(e) (2001).

⁴² *Conflicts*, *supra* note 8, at 1428-30.

prosecutor holds office,⁴³ "many in the legal community predicted mass resignations by municipal prosecutors across the state, that seasoned prosecutors would be replaced by inexperienced newcomers and that the entire municipal court system would be thrown into chaos."⁴⁴ Three months later bar associations around the state tried to use the work of the Ethics 2000 Commission to convince the Supreme Court that this "proscription be deemed to be personal to the lawyer serving as municipal prosecutor, and should not be extended to colleagues in his or her law firm."⁴⁵ Allegedly in an attempt to head off the mass resignation of municipal prosecutors, "the Supreme Court quietly informed municipal prosecutors that their law partners could continue to handle criminal defense work in the same county until at least the end of 2002."⁴⁶ Yet, despite the court's concerns and the bar's predictions of chaos, the decision to place public confidence over lawyer financial interests did not harm New Jersey's criminal justice system.⁴⁷ In fact, though some prosecutors did resign, both William J. Kearns, counsel for the New Jersey League of Municipalities,⁴⁸ and John Dangler, immediate past president of the County Prosecutors Association of New Jersey, noted no shortage of qualified applicants eager to replace them.⁴⁹

If the New Jersey experience proves that disciplinary standards need not be determined by attorney self-interest, Pennsylvania's recent experience may indicate a judiciary tired of waiting for the state bar to recognize that fact. In 1980, the Supreme Court of Pennsylvania held that even state government lawyers are immune from ethics laws

⁴³ State v. Clark, 744 A.2d 109, 112 (N.J. 2000).

⁴⁴ Mark Hansen, *Weathering the Fallout: N.J. prosecutors adjust to court decision barring defense work*, A.B.A. J., May 2001, at 24.

⁴⁵ Rocco Cammarere, *State Bar to Justices: Don't Disqualify Entire Firm; Court Weighs Extension of Dual-Role Ban*, N.J. LAW., Apr. 24, 2000, at 8.

⁴⁶ Tom Hester & Lawrence Ragonese, *Many local prosecutors calling it a career-Dual practice mandate forcing them to choose*, THE STAR-LEDGER (NEWARK, N.J.), Dec. 26, 2000, at 35.

⁴⁷ Hansen, *supra* note 44, at 24 ("But none of those dire predictions has come to pass.").

⁴⁸ Hester & Ragonese, *supra* note 46, at 35 ("When any prosecutor steps aside, there are usually several applicants for the position.").

⁴⁹ Hansen, *supra* note 44, at 24. ("There doesn't seem to be any shortage of people willing to do the job.").

passed by the political branches.⁵⁰ That view changed recently, however, when the Pennsylvania Supreme Court held in *P.J.S. v. Pennsylvania State Ethics Commission*⁵¹ that such ethics laws could indeed apply to government lawyers.⁵² This time the rhetoric of Justice Cappy's majority opinion left little doubt about the court's amenability to regulation of at least government lawyers by the political branches:

[I]t is ludicrous to suggest that employers be . . . precluded from imposing ethical and professional requirements on their employees, some or all of who may be attorneys. This is equally true where the employer is the commonwealth or one of its subdivisions. . . . [A] lawyer who contracts his or her services to an employer is like any other employee subject to the terms and rules of that employment, provided that they are in no way inimical to the ethical standards prescribed by this Court.⁵³

Justice Cappy's majority opinion in *P.J.S.* followed a short but scathing concurrence he wrote in *Commonwealth v. Eskridge*.⁵⁴ In *Eskridge* the court was content to hold that when an actual conflict of interest affecting a prosecutor exists in a case, that conflict must be removed; apparently either by the prosecutor removing himself, or his firm, from the related civil case, or by substituting the Attorney General's office to prosecute the criminal case.⁵⁵ Justice Cappy concurred to point out that such substitutions by the Attorney General's office are both "extremely costly in terms of public dollars" and an "inappropriate" abrogation of the district attorney's public responsibility.⁵⁶ Justice Cappy stressed that in situations presenting potential conflicts of interest, the district attorney's responsibility is to avoid conflicts that might disqualify him as a prosecutor rather than to

⁵⁰ *Wajert v. State Ethics Comm'n*, 420 A.2d 439, 442 (Pa. 1980).

⁵¹ 723 A.2d 174 (Pa. 1999).

⁵² *Id.* at 177.

⁵³ *Id.* at 178 (quoting *Maunus v. State Ethics Comm'n*, 544 A.2d 1324, 1326-27 (Pa. 1988)). The commonwealth court read this holding to apply only to lawyers currently employed by the government but not to former government lawyers. *Shaulis v. Pa. State Ethics Comm'n*, 739 A.2d 1091, 1103 (Pa. Commw. Ct. 1999), *appeal granted*, 749 A.2d 910 (Pa. 2000).

⁵⁴ 604 A.2d 700, 702 (Pa. 1992) (Cappy, J., concurring).

⁵⁵ *Id.* at 702.

⁵⁶ *Id.* at 702 (Cappy, J., concurring).

abandon his responsibility to prosecute so he can pursue personal profits to be gained by representing clients in related civil matters.⁵⁷ As Justice Cappy reasoned, once a lawyer enters government service, the "public servant's obligation is to the public interest, which must take precedence over any private interest that may be at stake."⁵⁸ Thus, Justice Cappy gave judicial voice to the sentiment that it is indeed "inappropriate" for expectations of legal conduct to be formed according to lawyer self-interest rather than public responsibility.

The thoughtful papers of Professor Gedid and Professor Salkin confront us with the need to produce a code of ethics for ALJs, and that need in turn requires us to come to grips with whether lawyers actually can regulate lawyers. The name of the ABA's most recent attempt to direct the behavior of its members, Ethics 2000, implied a promising answer to this question. Caught up in the excitement of a millennial change, Ethics 2000 promised to be the ethics code of a new millennium, a new vision for a new age. A cursory look at that effort, however, suggests only more of the same: a profession of great promise and responsibility struggling against the allure of its own self-interest.⁵⁹

Both the importance of the question to be derived from the work of Professor Gedid and Professor Salkin and the efforts that were invested in Ethics 2000, however, are entitled to a determination based on more than a cursory look. Rather than the answer, Ethics 2000 should be viewed as an opportunity for careful examination. We must use the work of the Ethics 2000 Commission, both the results they came to and the arguments they entertained, to judge whether lawyers are up to regulating themselves. We, as lawyers, must be prepared to invest this examination with a great deal of time, energy, and objectivity,⁶⁰ because much rides on this judgment. Much good can be done by a bar immune to the pressures of the political

⁵⁷ *Id.* (Cappy, J., concurring).

⁵⁸ *Id.* For a fuller discussion of district attorney conflicts of interest, see Lee, *supra* note 31.

⁵⁹ See *supra* text accompanying notes 25-41.

⁶⁰ The Preamble of the Model Rules of Professional Conduct requires lawyers to "seek improvement in the law, the administration of justice and the quality of legal service rendered by the legal profession." MODEL RULES OF PROF'L CONDUCT pmb1. [5] (2001).

branches,⁶¹ but much harm can be done by a bar freely pursuing its own self-interest at public expense.

Recent events in New Jersey⁶² indicate that the bar is capable of regulating itself, even in spite of itself, but events in Pennsylvania⁶³ and declining public regard for lawyers⁶⁴ suggest a growing impatience with the bar's efforts to do so. While it may be fair to say that Ethics 2000 missed its opportunity to be the new vision, it is also probable that ten years from now we will look back at the work of the Ethics 2000 Commission as a defining moment in the regulation of lawyers. What remains to be determined is when we do look back at Ethics 2000, will we see what became the catalyst for a new beginning, or the beginning of the end of lawyer self-regulation.

⁶¹ Criticism has been leveled against the bar of Vichy France, for example, for failing to more zealously oppose the anti-semitic policies of the occupational government. RICHARD WEISBERG, *THE FAILURE OF THE WORD* 1-2 (Yale University Press) (1984). For an example closer to home of the political branches trying to wreak havoc within the legal system, see *Ex parte McCardle*, 74 U.S. 506 (1869), where Congress used its constitutional power to alter the appellate jurisdiction of the federal courts to protect the Reconstruction Acts from being declared unconstitutional.

⁶² See *supra* text accompanying notes 42-49.

⁶³ See *supra* text accompanying notes 50-58.

⁶⁴ See *supra* note 14.