Regulating Attorney Conduct: Past, Present, and Future

Steven Krane
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Steven Krane:

It has been my great pleasure to work with many of the people in this room on a wide variety of issues relating to legal ethics over the past several years. It is also nice to be back in Nassau County, the land of my birth. I called it home for twenty years and got my first exposure to the practice of law right down the street in Hempstead at Nassau/Suffolk Law Services where I worked as an intern between college and law school. So it is a homecoming for me to be back here in this part of the state. It is also an honor to be part of the Neil T. Shayne Memorial Lecture. I knew Neil Shayne—not nearly as well as a lot of people in this room—mainly by reputation. I did have the opportunity to work with Neil recently because he was one of the pioneers of the movement in New York State to amend the Code of Professional Responsibility to allow solo practitioners and small firm lawyers to sell their practices upon retirement. Neil felt strongly that solo practitioners and small firm lawyers should be entitled to receive compensation for the goodwill that they had generated over a lifetime of practice. Neil wrote extensively on that topic, promoted it and, with the right people in the right places, we were finally able to convince the State Bar House of Delegates and then the Appellate Divisions that it was the right thing to do. In 1996, a rule was adopted that can be found in the New York Code of Professional Responsibility as DR 2-111, and it is due in no small measure to the vision and the work of Neil Shayne. So it is an honor to be here and

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speak in his memory tonight and it is because Neil had that kind of
vision, and ability to think "outside the box," that I thought for my
remarks here tonight, I too would step "outside the box" a bit and follow
Neil's lead in not just speaking to you about where we are or where we
have come in the last few years in the field of ethics. There are many
people who are competent and perhaps more competent than I am to
review the current status of the Code, given my personal interest in a lot
of the amendments as they became law. The other speakers will more
likely give you a more objective view.

What I would like to speak to you about is where we are in terms of
ethical regulation of the profession and where I think we may be going.
So to do that, why not take a step back and think about codes of
professional conduct. We tend to act as if codes of conduct have been
part of the framework of our profession for as long as there have been
lawyers on this planet and yet for the most part, codes of conduct are a
creature of the twentieth century. While there have been codes of
conduct developed by other professions, not surprisingly, none have
been as extensive as those that lawyers have crafted for themselves. But
let us take a step back and think about why we need the codes. Why do
we need rules; why do we need all these people; and most of all, why do
you need two continuing legal education credits every year to talk about
ethics? What is the purpose of all of this? Well, there are a number of
reasons why we need codes or at least why codes have been developed
over time. One is to provide us, as a profession, with a unitary sense of
morality.

3. See Colin Croft, Note, Reconceptualizing American Legal Professionalism: A Proposal
shifting contours of the tensions [present in] ... legal practice ... found expression in the
articulation and development of professional codes of conduct in the twentieth century"); see also
Brenda Smith, Comment, Civility Codes: The Newest Weapons in the "Civil" War over Proper
Attorney Conduct Regulations Miss Their Mark, 24 U. DAYTON L. REV. 151, 156-57 (1998) ("The
three model codes of conduct promulgated by the ABA [during the twentieth century] show a
movement from a mere 'aspirational guide' in the [1908] Canons, to a combination of aspiration
and discipline in the [1969] Code, to finally, a more rigid 'ethical framework' in the [1983]
Rules.").

4. See, e.g., CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 2.6.1 (1986) ("Today a
code of ethics is required regalia for an occupational group that aspires to professional status. Codes
can be found among such disparate occupations as lawyers, physicians, psychologists, accountants,
and landscape architects.") (footnotes omitted).

5. See Vincent R. Johnson, The Virtues and Limits of Codes in Legal Ethics, 14 NOTRE
DAME J.L. ETHICS & PUB. POL'y 25, 27-28 (2000) ("As viewed from many perspectives, legal
ethics is now focused heavily on uniform compliance with codified rules, rather than on individual
decision-making based on moral principles.").
ourselves, as Roscoe Pound assured us in the 1950s, that the organized legal profession is not the same as a retail grocers’ association.\(^6\) We have higher aspirations and higher goals than just functioning as a trade with trade association rules. A second reason we have the rules that we are discussing tonight is to enhance our public image, which certainly needs enhancing.\(^7\) We want to let the public know that we, as a profession, will not tolerate miscreants among us and the recent Code amendments stand as an example. I obtained the press clippings from around the state on the July 1999 amendments and they took a uniform position that these were positive steps by the profession. Lawyers are not going to tolerate bad apples in their midst: tightening the rules on solicitation,\(^8\) tightening the rules on sexual relations with clients,\(^9\) taking care of the problems where they exist, or taking care of their own. The press reviews of these amendments were overwhelmingly positive, which I think helped bolster the image of the profession.\(^10\)

So not only do we have to say that we are not going to tolerate bad apples in our midst, we have to be able to do something about it. We need a means of getting rid of the bad apples so that they do not stay bad, so that they do not hurt clients again and again, and so that we can deter other apples from turning bad. We have a set of codes of conduct and every time we discipline a lawyer, we reaffirm that we are capable as a profession of self-regulation and of taking care of our own.

There is a darker side to the codes of conduct that we hold so dear and that darker side is rooted in the history of the codes. Some of it is for the best and some of it is not. The principal reason for codes coming into existence in the first place, as you will shortly learn, was to guard against competition within the profession. It was the elite members of the bar who in the early part of the twentieth century decided that we needed a code to live by, and a code to which only elite lawyers could possibly adhere.\(^11\) The codes, consequently, have been used by the

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7. See Deborah L. Rhode, The Professionalism Problem, 59 Wm. & Mary L. Rev. 283, 285-289 (1998) (chronicling the negative perception and disdain that the public generally has for lawyers).
8. See Doug Johnson, State Bar Association Amends Rules Governing Lawyer Ethics, Associated Press Newswires, July 15, 1999 (“New ethics rules announced ... by the New York State Bar Association attempt to put an end to ... aggressive solicitation.”).
9. See id. (“The rules [announced by the New York State Bar Association] also clarify that bar will not tolerate lawyers who demand sex from clients as a condition for representing them.”).
10. See supra notes 8-9.
11. See Wolfram, supra note 4, § 2.6.2 (“The Canons were not originally adopted in order to serve as a regulatory blueprint for enforcement through disbarment and suspension actions. Instead,
establishment of the bar over time as a way of preventing new groups of lawyers from encroaching on their turf.\textsuperscript{12} There is, however, a flipside to which there is a positive aspect and that is protecting against outside forces—guarding against intrusions into the legal profession by people who are not competent to practice law, by people who are not subject to the regulation of the bar or to any regulation or oversight whatsoever, and who might otherwise hold themselves out as being able to provide services that we would view as legal services. That, too, is a reason why we have codes of conduct.

When we began looking at codes in the 1800s, the early codes were really just matters of etiquette—we were talking about personal dignity.\textsuperscript{13} We then moved into the debate in the 1800s about whether the justness of the client’s cause was any business of the lawyer. Specifically, whether the lawyer was supposed to be the so-called “hired gun,” or have a broader perspective on the client’s goals and act as a societal buffer, as some mechanism to stop clients from acting in ways that were really not socially appropriate and had no social utility.\textsuperscript{14} We quickly took a step away from that and by the time the first generally recognized code of lawyer conduct came about—Judge George Sharswood’s essay on professional ethics in 1854\textsuperscript{15}—we were well entrenched in the view that lawyers were not responsible for the social utility of their client’s cause and united in recognition of the view that the lawyer’s paramount duty was to his client.\textsuperscript{16} This view has remained at the core of codes of conduct for lawyers for the past century and a half and although now and then someone calls that into question again, it nevertheless, has stayed as the foundation on which all other rules are based.

they seem to have been a statement of professional solidarity—an assertion by elite lawyers in the ABA of the legitimacy of their claim to professional stature.”) (footnote omitted).

12. See id. (stating that the Code was “intended [by its drafters] primarily to celebrate the ancient lineage of the bar’s professional stature”).

13. See Croft, supra note 3, at 1304; cf. Johnson, supra note 5, at 27 (“The professional standards which at the beginning of the 1900s took the form of aspirational principles for good deportment [and] had by the end of the century been transformed into hard-edged rules of law.”). By personal dignity, I am talking about notions that we should not be involved in self-promotion, we should be nice, we should be civil, and we should not engage in what we would call today sharp practice.

14. See Justice Hugh Maddox, Lawyers: The Aristocracy of Democracy or “Skunks, Snakes, and Sharks”? , 29 CUMB. L. REV. 323, 329 (1999) (stating that some “believed that a lawyer should act morally responsible, but yet give his client his ‘entire devotion;’ whereas, [others] believed that a lawyer’s moral responsibility to the public was paramount to that owed to his clients”).

15. GEORGE SHARSWOOD, ESSAY ON PROFESSIONAL ETHICS (1854).

Around the turn of the twentieth century, it became apparent that the legal practice was changing in its structure as it has continued to do over the past hundred years. But the fear among the leaders of the elite bar was that the ethics of the marketplace were going to take over our profession. Competition was going to increase. There were upstarts who were new to the profession. Immigrants, for example, had become lawyers and had begun to use aggressive techniques—like advertising—to get clients and to get a message across to potential clients that maybe they had a need for legal services.

The Brahmins wondered what to do about this. We are going to come up with a set of Canons of Ethics, they decided. We are going to establish a committee of elite lawyers to create elite rules to keep out the riff-raff and indeed, that was the principal impetus behind the American Bar Association’s development from 1905 to 1908 of the Canons of Ethics, the very same Canons we refer to with such reverence today. It was a protectionist document designed, frankly, to keep people like us out of the practice of law. The highlights of the Canons were that all advertising and all forms of solicitation were prohibited—absolutely prohibited—across the board.

How is a working class lawyer going to make his presence known to a working class client or otherwise educate potential clients as to their need for legal services? He cannot—that was the idea. The bans on advertising and solicitation perpetuated the ability of lawyers whose partners and social contacts made advertising unnecessary to keep a hold over their business and the clients.

We drifted along here for about fifty years in an era that I view as kind of high-minded and fuzzyheaded on the part of our ethics regulation. We have these canons of ethics, vague and pithy at the same time if that is possible, and we occasionally added canons or amended existing canons and looked at the canons to see if maybe they should be changed periodically. But one of the great consequences of the canons was a need for greater explanation, the result

17. See id. at 6-10 (discussing in detail the changing structure of legal practice and the bar during the early 1900s when the 1908 Canons were adopted).
18. See id. at 8.
19. See id.
20. See id.
24. See id.
of which was the creation of bar association ethics committees of which there are now more than one hundred nationwide. These committees are out there trying to make some sense of the existing rules, just as they tried to do for many years with respect to the Canons of Ethics. They try to figure out how to apply a particular rule to a particular state of facts and, in the process, develop a fair amount of law. The celebrated treatise on ethics, published by Henry S. Drinker in 1953, compiled that law. Until a few years ago, that was all we had. We had the canons and we had Drinker, and that was our guidance as far as ethics was concerned.

Eventually, we concluded that there were important areas about the conduct of lawyers that were not covered in the Canons, that a lot of the Canons needed revisions, and that many of the Canons were not really appropriate for disciplinary sanctions because they were too vague to satisfy due process requirements. With these factors in mind and because of changing conditions in our legal system and our society, we decided that we needed some new statements of ethical principles. So in 1964, then-American Bar Association (“ABA”) President Lewis Powell started a process of reevaluating our ethical standards. What emerged from this process was the Model Code of Professional Responsibility, adopted by the ABA House of Delegates in 1969. New York adopted the Model Code in 1970 and continues to use its framework to a great extent.

First, I will discuss the structure because I think the structure of the Model Code is one of its strongest points. It has two tiers although people often say it has three because it contains the “Canons.” Somebody thought that we should still pay some tribute to the Canons so they came up with nine chapter headings and called them Canons, but you can ignore them. No one has ever been disciplined for violating a

26. See id.
27. See id. at 969.
30. See id.
31. See id.
33. See Lesley E. Williams, The Civil Regulation of Prosecutors, 67 FORDHAM L. REV. 3441, 3443 n.20 (1999) ("The Model Code contains three tiers of norms: 'Canons,' which are short statements of general principle; 'Ethical Considerations,' which are 'should' rules and aspirational in nature; and 'disciplinary rules,' which are 'must' rules, imposing minimum standards of conduct.

http://scholarlycommons.law.hofstra.edu/hlr/vol29/iss1/7
Canon. No one has ever cited a Canon standing alone as a basis for anything and so you should pay no attention to those Canons standing behind the curtain. They are not worth your time.

What are worth your time are the other two tiers. The "Disciplinary Rules" ("DRs") are the mandatory rules that you must follow. They establish the floor: the minimum standards of conduct for purposes of professional discipline. The idea behind these rules was to have clear enforceable requirements for grievance committees to apply. Again, the due process notion, which by 1969 the Supreme Court had already declared, clearly applied to attorney disciplinary proceedings. The DRs, as they are commonly known, addressed a broader scope of situations than the Canons did and did so in much greater detail. The fuzzyheaded aspect of the Canons was separated out, distilled into a more usable format, and included in the Code of Professional Responsibility as "Ethical Considerations" ("ECs"). These are not actions for which lawyers can be disciplined—we are not discussing the floor anymore.

What we are discussing is a desire that still existed in the 1960s to exhort lawyers to do better than just adhere to the minimum—to try to be a little better than just ethical enough. We also found to a great extent that the ECs were intended to inform the DRs by providing a degree of interpretation and elaboration for those trying to figure out just what the DRs meant. At least the intention of the ECs was, in part, to provide some basis for the practitioner to figure out what to do in particular settings.

This sounds like it was a great leap forward, but within a year or two of its adoption by the ABA, the Code—which quickly became the

34. See WOLFRAM, supra note 4, § 2.6.3.
35. See MODEL CODE OF PROF'L RESPONSIBILITY Preliminary Statement (1980) ("The Disciplinary Rules... are mandatory in character. [They] state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.").
37. See WOLFRAM, supra note 4, § 2.6.3.
38. See id.
39. See id. While most jurisdictions hold that the Ethical Considerations ("ECs") are nonbinding, some jurisdictions, such as Iowa, consider them a binding part of the Code. See id.
40. See MODEL CODE OF PROF'L RESPONSIBILITY Preliminary Statement (1980) ("The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive.").
41. See id. (suggesting that the ECs may provide "interpretive guidance" for interpreting ambiguous disciplinary rules ("DRs").
42. See id.
national standard—was already subject to criticism. Everyone was using it and yet people started saying, well, this Code is all well and good but it really focuses exclusively on the professional responsibilities of litigating attorneys. What about the lawyers who are perfectly happy never to see the inside of a courtroom? There certainly were lots of them. Where were the rules that told them how to conduct themselves? The Code barely touched on the obligations of lawyers representing organizational clients or those who worked in large bureaucratic public and private law firms. It continued to proceed in large measure from the outdated paradigm of one lawyer, one client, which by 1969 clearly was no longer the norm. Now these deficiencies in the Code might have been enough by themselves eventually to bring a change to a new sort of system of regulation, but then the legal profession suffered the cataclysm of Watergate, a constitutional crisis of tremendous magnitude in which lawyers had played key roles. Needless to say, the image of the profession in the post-Watergate era was perhaps at an all time low. There was a view espoused by many that the time had come to crack down on lawyers, to deal with the complicated situations that were presented by many practice settings and many circumstances that were not addressed by the Code. So in 1977, the ABA set to work again and formed the Special Commission on Evaluation of Professional Standards known as the Kutak Commission. I do not know why these ethics commissions tend to come to be known by the names of their chairs, but as the chair of the “Krane Committee” I am not complaining. This work

43. See Spaeth, supra note 29, at 1219; see also Johnson, supra note 5, at 43 ("The Code was widely adopted in the early 1970s, but soon attracted criticism on a number of grounds.").
44. See Rosenberg, supra note 21, at 426 ("The codes of conduct were originally based upon a litigation paradigm and a conception of the lawyer’s role as zealous advocate . . ."); see also 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, 930 (1992) ("[T]he term ‘lawyering’ is a euphemism for a variety of professions. The codes fail to acknowledge differences between a law firm, corporate counsel, and sole practitioner.").
45. See Zacharias, supra note 44, at 930.
46. See Rosenberg, supra note 21, at 426-27.
48. See id. (stating that after the Watergate affair, “there was a perception that more needed to be done about the unethical behavior of lawyers”).
began in 1977.\(^{51}\) Discussion Drafts were issued in the early 1980s and debated by the House of Delegates of the ABA over the course of four meetings in 1982 and 1983.\(^{52}\) The debates were heated and there were some substantive hot spots that emerged, such as whether lawyers for corporations should be required to blow the whistle on internal wrongdoing\(^{53}\) and whether lawyers should even be permitted to reveal confidential information relating to the clients' intentions to commit crimes or frauds.\(^{54}\) While we see these same issues being debated again and again, finally, in 1983, the Model Rules of Professional Conduct were released.\(^{55}\)

The Model Rules, which are now in effect in over forty disciplinary jurisdictions around the country, not including New York, is no longer a code.\(^{56}\) We do not have a code anymore coming out of the ABA. We have a set of rules with official commentary.\(^{57}\) It is called a restatement structure.\(^{58}\) We now have a black letter rule followed by a comment, hopefully explaining what the black letter rule you just read meant.\(^{59}\) That is it. The "aspirational" standards are gone. There is no hint of morality, fundamental honesty, fair play, professionalism, or civility anywhere in the Model Rules of Professional Conduct.\(^{60}\) It is a sterile, austere document that is designed solely for purposes of providing a basis for professional discipline for those lawyers who have hit bottom.\(^{61}\) So what we have come to, as Professor Deborah Rhode said in 1985, is a "socialization to the lowest common denominator of conduct that a highly self-interested constituency will publicly brand as deviant."\(^{62}\) Those are the Model Rules of Professional Conduct.

So it was not surprising that the country proceeded with greater caution in evaluating the Model Rules. Only a handful of states joined

\(^{51}\) See id.

\(^{52}\) See id. at 1193-94.


\(^{54}\) See id. at 754-55.

\(^{55}\) See Jones & Manning, supra note 50, at 1194.

\(^{56}\) See GILLERS & SIMON, supra note 32, at xxiv-xxv.

\(^{57}\) See Johnson, supra note 5, at 44.

\(^{58}\) See id.

\(^{59}\) See id.

\(^{60}\) See id.

\(^{61}\) See id.

\(^{62}\) Deborah L. Rhode, Ethical Perspectives on Legal Practice, 37 STAN. L. REV. 589, 647 (1985).
the ranks of Model Rule states each year.\textsuperscript{63} It was not nearly as widely and immediately embraced as was the Code.\textsuperscript{64} In fact, still, sixteen years after the ABA came out with this product, there are several regulatory jurisdictions that have not adopted the Rules of which New York is one of them.\textsuperscript{65} Indeed, the Model Rules of Professional Conduct is not even a standard for the nation. Regardless of what the ABA may tell you, there are no two states in this country that have precisely the same set of ethics rules today. Those states adopting the Model Rules have done so in each instance with local amendments, be they one, fifty, or more.\textsuperscript{66} States take the rules and modify them to make them their own.\textsuperscript{67} Thus, we have a patchwork quilt of lawyer regulation in this country today, so do not be led to believe that the Model Rules of Professional Conduct are uniform. You will not find a state out there that has in effect today the ABA Model as promulgated by the ABA.\textsuperscript{68}

Now we have the Model Rules and everybody is happy. You would think that the people who are the leading ethicists in the country would be satisfied, but no, we had to undergo the fifteen-year process of the Restatement of the Law Governing Lawyers.\textsuperscript{69} This is not a digression. This is another step in the chain of attorney regulation. The American Law Institute ("ALI") was, by the mid 1980s, dominated by a number of individuals who had been intimately involved in the work of the Kutak Commission.\textsuperscript{70} They took up the idea of having a Restatement of the Law Governing Lawyers to re-debate some of the issues that the Kutak Commission had aired, which had been shot down with perhaps the goal of getting them some prominence in a different format, because they were unable to get through the more conservative ABA House of

\textsuperscript{63} See generally ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 01:3-4 (2000) [hereinafter LAWYERS' MANUAL] (identifying by state those states that have adopted the Model Code and the years in which they did so).

\textsuperscript{64} See Smith, supra note 3, at 156.

\textsuperscript{65} See GILLERS & SIMON, supra note 32, at xxv (stating that "[s]everal states, including California, New York, Oregon, and Vermont, have rejected the Model Rules").

\textsuperscript{66} See id.

\textsuperscript{67} See id.; WOLFRAM, supra note 4, § 2.6.4.

\textsuperscript{68} See WOLFRAM, supra note 4, § 2.6.4 (opining that "[i]t seems apparent . . . that the ABA no longer has the capacity to generate a single set of standards of lawyer conduct that lawyers will generally accept").


\textsuperscript{70} Professor Geoffrey C. Hazard, Jr., the Director of the American Law Institute, for example, served as the reporter to the Kutak Commission, which drafted the American Bar Association ("ABA") Model Rules. See Ted Schneyer, The ALI's Restatement and the ABA's Model Rules: Rivals or Complements?, 46 OKLA. L. REV. 25, 25 n.5 (1993).
Delegates. What emerged after years of work in the ALI is a document that is in large part a restatement and in a large part a monumental work that is going to be of tremendous value to practitioners. But to a great extent it is not a restatement at all. It is legislative insofar as in parts, it does not restate anything. It makes new law. It takes positions that are directly contrary to the majority rule—or the only rule—on ethical issues in this country. It suffers from a fundamental flaw—it oversteps its purpose and will always have to be read with a great degree of skepticism to the extent that it claims that its black letter rules are representative of the prevailing rule on each issue. The ALI Restatement was finished in 1998 and is now available in newsstands and bookstores everywhere. I urge you to get it because it is really going be a great resource for lawyers, although it has to be taken with a grain of salt for its black letter rules.

Around the time that the ALI was wrapping up the Restatement, the ABA announced the formation of a commission to undertake the first comprehensive review in nearly twenty years of the ethics rules governing lawyers nationwide. President Shestack created a commission and expressed that the committee that he was forming would “not just examine [the] rules of conduct but [would] help bring us to a higher moral ground.” It sounded encouraging. He expressed the view that “[e]thics is not a system to look for loopholes or ways out but a system of right conduct that is part of the calling of a . . . noble and learned profession.” This sounded better by the minute and was very exciting. Appointed to this commission were members who are distinguished lawyers and professors, nationally recognized experts on ethical issues, but some of whom could track their genealogy, and trace their lineage, right back to the Kutak Commission, the Model Rules of

73. See Stanley, supra note 69, at 23-24.
74. See id. at 22.
76. Id. (quoting then-A.B.A. President, Jerome J. Shestack).
77. Id. (quoting then-A.B.A. President, Jerome J. Shestack).
Professional Conduct, 79 and the Restatement (Third) of the Law Governing Lawyers. 80 A few of the “usual suspects” were approached to stock the commission as members or reporters. 81 So anybody, who hoped as I did, that this group was going to take a fresh look at the fundamental nature of the rules governing attorney conduct and engage in the creation of a framework for attorney conduct that would be reflective of the realities of the practice of law today and sufficiently progressive to provide a workable structure to govern the legal profession well into the twenty-first century, was set up for disappointment. Early on, it became very apparent that there was going to be nothing of the kind going on. The Ethics 2000 Commission intended to do nothing more than tinker and fine tune the existing platform. The fact is that in some of the early minutes the mantra was spoken: “if it ain’t broke, don’t fix it.” 82

So we are getting an updating, a redecorating of the Model Rules. We are not going to get thinking outside the box, we are going to get fine tuning and this fine tuning, not surprisingly, is being driven to a great extent by the view that the substance of the Restatement should be imported into the Model Rules. Well, is that a surprise? We are retrofitting our ethics rules to legitimize the Restatement. That is what is going on with Ethics 2000 which, by the way, has no plans whatsoever to add back any aspirational standards to its regulatory structure.

Let us take a look at New York. Remember New York? That is where we all are. That is what we are here to talk about. We had the Canons and we jumped on the bandwagon early on and adopted the Code and when the Model Rules came out, we said, okay, let us take a look. A committee known as the Halpern Committee, named after Ralph Halpern of Buffalo, proposed the adoption of the Model Rules with twenty-five amendments. 83 It was a modest number of proposed amendments, given what we have seen other states do subsequently. The State Bar House of Delegates considered the proposal in November of 1985 and rejected the Model Rules by a vote of 73-59 (about a 55/45 split). 84 The format was viewed as an impediment to the adoption of the

79. See MODEL RULES OF PROFESSIONAL CONDUCT 2 (1980).
81. See supra notes 78-80.
84. See id.
Model Rules. That was really one of the main points raised in opposition. Not just the lack of aspirational provisions, which is, I think, one of the main shortcomings of the Model Rules, but there was a view that we had just learned all these new numbers—we learned the DRs, the ECs—and now we would have to learn numbers of rules and mix ourselves up. The thought was to take a pass on this new framework. Maybe the fact that it was early on in the consideration nationwide of the Model Rules—only a handful of states had adopted the rules by 1985—had an impact. But maybe it was a little lucky that we took that view and stuck with the Code framework.

What we did start doing in 1985 was to embark on a process of engrafting. We took the good aspects out of the Model Rules and stuck them in appropriate places in the Model Code framework. The Jones Committee—named after former Court of Appeals Judge Hugh Jones—was formed and did its work in the mid-1980s. Based on the Jones Committee report, the New York State Bar Association ("NYSBA") proposed a series of amendments to the Code in 1987, which were ultimately adopted by the appellate divisions in 1990. We had a comprehensive set of amendments to the Code, which, to a great extent, superimposed Model Rule concepts over the Code of Professional Responsibility. Like any good set of lawyers, by 1992, it was decided that it was time to do it all over again. We decided to take a second look at the Model Rules and at what other states had done, to see what other ideas should be addressed in our Code, and to identify those things that we had not covered in our regulatory framework that we believed were necessary for providing at least some guidance for lawyers. Thus, we embarked in 1992 on a second reexamination of our Code. After three meetings of the House of Delegates, votes, debates, comments, and so on, what emerged in 1997 was a set of proposed amendments that the appellate divisions reviewed in a highly constructive way and you now have before you the product of that work.

86. See LAWYERS' MANUAL, supra note 63, at 01:3-4.
So, what do we have in New York? Some say it is really the Model Rules in Model Code clothing. With respect to the Disciplinary Rules, that is to a great extent true. We have, however, made up some of the rules in the Disciplinary Rules ourselves; having drafted them based on our own experiences and our own needs here in New York State. So really what we have is something that is sui generis. It looks like the Code, but it is very much our own New York creature. This is where we are right now; we are at the end of the process for a little while but we are always going to be looking at the Code. We are always going to be trying to take the next step, and maybe the next time we look at the Code, we'll take a little bit of a different approach. The next time we look at the Code will be after ABA Ethics 2000, which should really rename itself Ethics 2001 since they are going to be late. The Ethics 2000 Commission will present its report to the ABA House of Delegates during 2001. Figure it will take two to three years to get through the ABA House and that by 2003 or 2004 we will be forming the Gartner Committee to review the proposed changes to the Model Rules of Professional Conduct. Assume the NYSBA House of Delegates gets the rules to consider by 2006-07. You start counting and then drive yourself crazy trying to figure out when we might come to terms with this. But sometime in the next decade, we are going to have to deal in a major way with the ethics rules again.

What are we going to do with what Ethics 2000 is doing? We are going to look at it with some skepticism, because a lot of it is retrofitting as I mentioned, but there may be other forces at work. Let us take a look at two of Ethics 2000's issues. There is suddenly a strange change in the climate within the ABA among ethics people in that group, which had always rejected the concept that lawyers could cure conflicts of interest by unilaterally implementing screening measures, what in non-politically correct days we called "Chinese Walls." Unilaterally

90. See generally GILLERS & SIMON, supra note 32, at xxiii (opining that the recent amendments to the New York Code of Professional Responsibility "fill[] in several gaps and bring[] New York's ethics rules closer to the Model Rules of Professional Conduct").


Although our New York Code remains akin to its ABA progenitor, the New York Lawyer’s Code of Professional Responsibility has, subsequent to its adoption in New York, developed atypically to its ancestor. It has taken on a distinct flavor of its own, while at the same time remaining true to the Wright Committee’s intent to create an elastic document for the changing world of law.

Id.

92. For a background discussion on the concept and use of Ethical Walls, see How to Erect an Ethical Wall, 607 PLI/Lr 65, 68 (1999).
implemented screens with the objective of shielding the infected lawyer from the rest of the lawyers and eliminating conflicts of interest have generally been supported by large law firms and rejected by the ethics establishment. Indeed, the ABA has always been opposed to that. Suddenly, however, there has been a groundswell of support within the Ethics 2000 body for allowing screening. We are also revisiting once again the extent to which lawyers can be permitted to reveal information that would otherwise be protected as a confidence or secret of a client to cure the effects of past crimes or frauds by their client. We debated this in the 1960s, and with the Model Rules and the Kutak Commission of the 1980s, there was the Restatement again in the 1990s and now in the 2000s we are going to do it again. Is it only a coincidence that the two major ethical impediments to multi-disciplinary practice groups are (1) the imputation of conflicts of interest throughout a combined firm of lawyers and non-lawyers and (2) the conflicts between the lawyers’ duty to maintain the confidentiality of client information and the auditor’s duty to disclose information relating to the client to avoid fraud? Is this only a coincidence? Does it not seem odd, at least, that two of the core values of the profession touted by the ABA Committee on Multi-Disciplinary Practice are smack in the middle of the Ethics 2000 agenda and that there is a sudden change from opposition to support for changes in those rules? It would not be the first time that we have seen the rules of ethics used to control the way in which lawyers compete with other lawyers, with non-lawyers, or with people outside the profession.

What do we need? What should we be doing here in New York in this new millennium? New rules are needed. I think we would all agree that we need to have a code of conduct that insures that when hiring counsel, clients make an informed choice untainted by false and misleading statements, undue influence, or duress. We want to insure that clients are not gouged for unconscionably exorbitant fees. We want to insure that lawyers do not facilitate their clients’ frauds or illegal

93. See generally Neil W. Hamilton & Kevin R. Coan, Are We a Profession or Merely a Business?: The Erosion of the Conflicts Rules Through the Increased Use of Ethical Walls, 27 HOFSTRA L. REV. 57, 64-65 (1998) (analyzing the history of ethical walls and depicting the legal profession’s recent movement towards reversing its historical position against such walls).


95. See Hamilton & Coan, supra note 93, at 60.


97. See supra notes 11-12 and accompanying text.
conduct and that lawyers maintain the sanctity of information that they receive from their clients. These are core values that are worth preserving. We also want to make sure that lawyers do not run roughshod over the rights of litigants, participants in legal proceedings of judges, juries, or government officials—you name it. We want to make sure that lawyers comport themselves honorably and with professionalism and a sense of the profession. We need to tell lawyers where the floor is. We will continue to do that and set minimum standards of conduct below which they may not fall without the risk of professional discipline and losing the privilege of practicing law or suffering other forms of professional discipline.

But what do we do about professionalism? Much has been said about it, even by the ABA. The ABA has a professionalism committee and a commission who do a lot of talking about it and yet it does not show up anywhere in the regulatory structure that they put forth. Professionalism means a lot of different things to different people. To some people it is just as simple as courtesy and civility. To other people, it is as basic as the axiom that we have obligations to our clients that must always be placed ahead of our self-interest. Then there are some people who interpret it as lofty as the phrase “officer of the court” and all of what that means to us. But ethics codes can do more than keep lawyers away from the bottom of the barrel. We can push lawyers to a higher plane of conduct by advising them that certain actions or inactions, while not so horrible as to warrant professional discipline, are nonetheless simply not acceptable for members of our profession. We need a second tier of rules like the ECs to help send a clear message to lawyers and the public that we take our special role in society seriously and that we do not believe that it is good enough to comport ourselves in a way that falls on just this side of the line. So perhaps for the next century we need to make some greater efforts as a profession to restore our own dignity at least through the continued promulgation of aspirational standards. We are going to need to do this ourselves because the ABA certainly is not going to help us. At a bare minimum, we need to have a comprehensive examination of our rules.

What about those rules? Is there anything wrong with our fundamental approach to attorney regulation? Our approach, going back to the 1800s, proceeds on a fundamental fallacy: the fallacy of the monolithic attorney-client relationship. Each of our rules purports to

address one issue for all walks of lawyers, regardless of the nature of their practice or of the clients they represent. Commentary sometimes diverges but the DRs treat all lawyers the same and all clients the same. But all lawyers are not the same, all clients are not the same, and all factual situations are not the same. Lawyers work in a broad variety of practice settings. Clients are very different. They have different needs, different expectations, and different relationships with their lawyers. Does it make any sense to treat all of these lawyers, clients, and relationships the same way? True, there is a nucleus of common ethical precepts: loyalty, honesty, confidentiality. You need to have clients trust you, because without trust there cannot be much of an attorney-client relationship. But is the relationship between a large firm and the legal staff of a Fortune 500 corporation the same as between a legal services lawyer and an elderly client suffering from the early stages of Alzheimer's disease? It is night and day. Do we need separate rules that govern the criminal defense and criminal prosecution function? We certainly have had enough of a debate over the last several years about the extent to which criminal prosecutors can contact witnesses and people who are represented by counsel prior to the formalization of an indictment. You just have to look at the extent of the literature that commentators have generated over the last hundred years attempting to fill the gaps left by the monolithic model to realize that we need to take a step beyond. We need to think "outside the box." I am not saying that every specialty and every lawyer should have a separate code of conduct, but we might be able to deal with differences among practice areas and clients through a hub and spokes structure. You could, for example, have the core values at the hub surrounded by subsidiary rules applicable in a particular context of practice settings. We need to tighten, or relax as may be, rules that have been revealed as unworkable, unnecessary, or anachronistic, to address the particular needs of lawyers

99. See Fred C. Zacharias, Reconciling Professionalism and Client Interests, 36 Wm. & Mary L. Rev. 1303, 1344 n.142 (1995) (stating that "commentators have urged reconsideration of uniform ethical analysis of lawyers engaging in different types of practice").

100. See id.; In re McLennon, 443 N.E.2d 553, 556 (Ill. 1982) ("And, while absolute uniformity in the imposition of discipline, realistically viewed, may not be achievable, similar cases ought to receive similar treatment.").

and clients as we go forward into the next century. Perhaps, regardless of what the ABA does, that is what we in New York should be doing: taking the lead and formulating a Code of Professional Responsibility that we can truly take with us into the next millennium.

So, in closing, I offer you the following thoughts. The best time to prepare for the future is before it arrives. We should be seizing the opportunity to establish a direction for our own profession before our ability to control our own destiny is supplanted by market forces and other factors or other professions. Instead of continuing a glacial, reactive process of evolution that has brought about subtle changes in standards of attorney conduct, let us take a look at what our profession really needs, not just for now, but for the future. The future, after all, is in our own hands.