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# ETHICAL DECISIONMAKING AND THE DESIGN OF RULES OF ETHICS

*John S. Dzienkowski\**

## I. INTRODUCTION

Much of what American lawyers know about legal ethics comes from the rules of professional responsibility. Law school courses are organized around the Model Code of Professional Conduct (“Model Code”)<sup>1</sup> and the Model Rules of Professional Conduct (“Model Rules” or “Rules”)<sup>2</sup> (together, “Codes”),<sup>3</sup> a majority of states require that bar applicants pass the Multistate Professional Responsibility Examination (“MPRE”),<sup>4</sup> and the continuing education of lawyers often focuses on application of the Codes and their state law variations.<sup>5</sup> Even though the

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1. MODEL CODE OF PROF'L RESPONSIBILITY (1980).

2. MODEL RULES OF PROF'L CONDUCT (2012).

3. Most of the casebooks on professional responsibility cover the ABA Model Rules of Professional Conduct either through a topic-based approach, a rules-based approach, or a problems-based approach. *See generally, e.g.*, STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS (8th ed. 2009) (using an approach based upon topic organization); MORTIMER D. SCHWARTZ ET AL., PROBLEMS IN LEGAL ETHICS (9th ed. 2010) (using an approach based upon the organization of the rules); THOMAS D. MORGAN, RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY: PROBLEMS AND MATERIALS (11th ed. 2011) (using an approach based upon the problems raising ethics issues in law practice).

4. *See* THE MPRE, NAT'L CONFERENCE OF BAR EXAMINERS, <http://www.ncbex.org/about-ncbe-exams/mpre> (last visited Nov. 23, 2013) (describing the scope of the MPRE).

5. Many states require that ethics Continuing Legal Education (“CLE”) presentations contain material that discusses the codes of ethics. *See, e.g.*, *Rules of the Minnesota State Board of Continuing Legal Education*, MINN. BOARD OF CONTINUING LEGAL EDUC., [http://www.mbcle.state.mn.us/MBCLE/pages/user\\_documents/CLE%20RULES%207-2013%20booklet.pdf](http://www.mbcle.state.mn.us/MBCLE/pages/user_documents/CLE%20RULES%207-2013%20booklet.pdf) (last updated July 1, 2013) (showing that mandatory Minnesota CLE requirements include ethics).

Rules expressly seek to limit their application,<sup>6</sup> courts routinely rely upon the Codes for analysis and answers to problems about conflicts of interest, candor to the court, and other ethical issues.<sup>7</sup>

As a model code that states are to follow, the Model Code and the Model Rules have been widely adopted and influential in shaping the regulation of American lawyers.<sup>8</sup> Essentially, the American Bar Association (“ABA”) has set the agenda for debate at both the state and federal levels for how governing bodies should choose to regulate lawyers. As a voluntary group of lawyers,<sup>9</sup> the ABA has become a dominant force in establishing and maintaining lawyer self-regulation.<sup>10</sup>

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6. See MODEL RULES OF PROF’L CONDUCT scope (2012).

7. See Douglas R. Richmond, *Why Legal Ethics Rules Are Relevant to Lawyer Liability*, 38 ST. MARY’S L.J. 929, 939-40 (2007); Note, *The Evidentiary Use of the Ethics Codes in Legal Malpractice: Erasing a Double Standard*, 109 HARV. L. REV. 1102, 1104-05 (1996).

8. See MODEL CODE OF PROF’L RESPONSIBILITY (1980); see also MODEL RULES OF PROF’L CONDUCT (2012). The Model Code was adopted by states in a shorter period of time after its approval by the ABA House of Delegates and with fewer variations than the Model Rules. See GILLERS, *supra* note 3, at 10. However, the vast majority of states have patterned their ethics rules to a significant extent after the Model Rules. *Id.*

9. *About the ABA*, ABA, [http://www.americanbar.org/utility/about\\_the\\_aba.html](http://www.americanbar.org/utility/about_the_aba.html) (last visited Nov. 23, 2013). Even though ABA membership is voluntary, many lawyers and judges involved in regulating lawyers on a state level choose to become involved in the ABA efforts at the national level. See News Release, ABA, Delegations from 37 State-Level Jurisdictions Combine Forces to Preserve Justice Systems as the ‘Business of Government’ (Apr. 16, 2009), available at [http://www.apps.americanbar.org/abanet/media/release/news\\_release.cfm?releaseid=642](http://www.apps.americanbar.org/abanet/media/release/news_release.cfm?releaseid=642) (discussing ABA members convening nationally to address government reform). Of course, it would make sense that lawyers interested in regulation also become involved on a national stage. Additionally, the ABA has sought the involvement of many key players in their regulatory efforts. *Id.* (listing Justice O’Connor as well as others as participants of ABA efforts). Moreover, the ABA is a key source of information for many of the states. See *About the ABA*, *supra*.

10. This dominant position arises, in part, from the fact that the ABA became involved in drafting codes so early in the history of codes. See Richmond, *supra* note 7, at 935 (discussing the ABA adoption of the Canons of Professional Ethics in 1908 and the Model Code of Professional Responsibility in 1970). Although it was not the first body to develop ethics codes, it did realize soon thereafter the value of such codes in establishing self-regulation. See *id.* at 935-36. The ABA also sought to update the Canons of Professional Conduct on a regular basis and reacted to criticisms of the Canons in establishing several committees to revise the Canons. *Id.* Eventually, an ABA committee drafted the Model Code. *Id.* at 935. Many states deferred to the ABA simply because they did not have the resources to draft different standards and because the arguments for uniformity were persuasive. Interestingly, over the years, three large states, New York, California, and Texas, departed from the ABA in significant ways. See Press Release, N.Y. State Courts, New Attorney Rules of Professional Conduct Announced (Dec. 16, 2008), available at [http://www.nycourts.gov/press/pr2008\\_7.shtml](http://www.nycourts.gov/press/pr2008_7.shtml) (announcing New York’s adoption of new Disciplinary Rules and a “transition to the ABA Model Rules format”); *About the Model Rules*, ABA, [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html) (last visited Nov. 23, 2013) (noting California as the only state with rules of professional conduct that do not follow the format of the ABA Model Rules of Professional Conduct); *Status of State Review of Professional Conduct Rules*, ABA, [http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/ethics\\_2000\\_status\\_chart.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/ethics_2000_status_chart.authcheckdam.pdf) (last visited Nov. 23, 2013) (showing that Texas did not adopt the revised Model Rules).

Despite its success in influencing rules that govern the profession, in recent years the ABA has had difficulty in effecting revision of the Rules to account for changes in law practice. Many of the Model Rules have largely remained static for three decades despite the fact that modern law practice has changed dramatically in this time period for all lawyers. In 2009, the ABA empowered a commission to review the Model Rules in light of the changes in the profession, but the commission's efforts have been criticized as failing to address many of the fundamental ethical problems of the twenty-first century.<sup>11</sup>

It is important to acknowledge that law, as a profession, is difficult to regulate because of the nature of lawyering, the different interests at stake in many legal representations, and the agency relationship that lawyers hold with respect to each of their clients. Attempts to regulate such fluid relationships must necessarily be flexible enough to accommodate differences in the facts of each case, but precise enough to offer lawyers substantive and concrete guidance. The profession's adherence to several core values of lawyering helps to inform the Model Rules,<sup>12</sup> but, in the end, many provisions are the result of a careful compromise between applying those core values and taking into account various competing considerations such as facilitating client choice and lawyers' ability to have economically viable law practices.

The problems inherent in today's Rules can be divided into several broad categories. First, the Rules do not properly take into account the fact that many functions of a modern lawyer no longer fit within the traditional model of zealous advocacy.<sup>13</sup> Lawyers and clients work in a hybrid adversary system, yet many Rules assume that lawyers continue to be bound to a duty of zealous advocacy. Second, the very nature of lawyering encourages lawyers to interpret ethical rules to their benefit.<sup>14</sup> This adversarial interpretation of ethics codes leads to disparate answers

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However, in recent years, each of these states has taken steps to conform its legal ethics rules to the ABA standards.

11. See generally Letter from Thomas D. Morgan, Professor, George Wash. Univ. Sch. of Law, to ABA Comm'n on Ethics 20/20 (Jan. 30, 2012), available at [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/ethics\\_20\\_20\\_comments/morgan\\_alpsdiscussiondraft.1.uthcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/morgan_alpsdiscussiondraft.1.uthcheckdam.pdf) (discussing the view that law practice is now institutional and not individual); Joan C. Rogers, *Ethics 20/20 Commission Airs Proposals on Conflicts-Checking, Choice of Rules Pacts*, BLOOMBERG BNA (Sept. 14, 2011), <http://www.bna.com/ethics-2020-commission-n12884903471> (discussing an interview with Anthony E. Davis, Esq. about the limited scope of the Ethics 20/20 Commission's recommendations).

12. See James W. Jones & Bayless Manning, *Getting at the Root of Core Values: A "Radical" Proposal to Extend the Model Rules to Changing Forms of Legal Practice*, 84 MINN. L. REV. 1159, 1186-90 (2000) (describing core values of lawyering).

13. See discussion *infra* Part III.A.

14. See discussion *infra* Part III.B.

to identical ethics problems. The drafters need to be mindful of such interpretative approaches when they write an ethics rule to narrow the range of possible outcomes from reading the language of the particular rule. Third, the economic pressures of law practice affect how lawyers choose to interpret the Rules.<sup>15</sup> A well-designed system of regulation must necessarily take such pressures into account. Finally, the lack of effective enforcement mechanisms for a vast majority of the Rules affects compliance.<sup>16</sup> If lawyers are unlikely to face consequences for the violation of a rule, they may choose a path of noncompliance if that path achieves other goals in their practice of law.

Despite the ABA's success in promulgating three ethics Codes that achieved wide acceptance, its structure for making changes to the Codes has proven unworkable and ineffective as a vehicle for adopting broad-based reform. Some have advocated for other bodies to become involved in the broad-based regulation of the legal profession.<sup>17</sup> However, Congress, state legislatures, and other agencies simply do not offer viable options for comprehensive, rather than piecemeal, regulation of lawyers.<sup>18</sup> And, unfortunately, with fifty states and the District of Columbia involved in regulating lawyers in the United States at the state level, it is difficult for states to adopt fundamental reforms of the legal profession that have a nationwide effect. Thus, the ABA, despite its problems, continues to be the only viable option for reforming the regulation of the profession. This Article argues that the ABA should rethink the manner in which it drafts, considers, and promulgates ethical rules.<sup>19</sup>

Part II of this Article examines the origin of the ABA Codes and focuses, in particular, upon issues relevant to how such Codes were drafted. Part III examines the specific problems that exist in the current

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15. See discussion *infra* Part III.C.

16. See discussion *infra* Part III.D.

17. See generally Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures or the Market?*, 37 GA. L. REV. 1167 (2003) (comparing and contrasting the bodies that currently regulate lawyers to other institutions that could regulate lawyers).

18. In some specialized areas of practice such as tax law, the regulatory agencies have developed their own contextual rules for regulating practitioners. See 31 C.F.R. § 10.0 (2012). And, lawyers in the banking and securities areas are governed by laws and regulations enacted by Congress and promulgated by federal administrative agency regulators. See 17 C.F.R. § 205.1 (2012). However, for a variety of reasons, a national system for regulating all lawyers in general is unlikely to develop at the federal level at this time.

19. For another scholar's views on this topic, see Stephen Gillers, *How to Make Rules for Lawyers: The Professional Responsibility of the Legal Profession*, 40 PEPP. L. REV. 365 (2013) [hereinafter Gillers, *How to Make Rules for Lawyers*] (discussing how professional responsibility rules for lawyers should be improved).

Model Rules. Part IV presents several modest suggestions for improving the design of ethics codes. Some of those suggestions relate to restructuring the way in which the ABA considers, drafts, and promulgates ethics rules. This Part then examines how such a rulemaking process could focus on clarifying concepts in the Model Rules that are important for their application. The drafting process must more clearly focus on the interests at stake and anticipate how such rules will be interpreted and enforced. In addition, the ABA must make serious efforts to obtain empirical data about the operation of the current Rules, the existence of law firm practices that cause harm to clients, third parties, or the legal system, and the mechanisms used by firms to comply with the Rules. Taking into account such data would improve the drafting, deliberation, and rulemaking processes of the ABA.

## II. THE ORIGIN OF THE CURRENT RULES

Many scholars have written excellent works on the history of the regulation of lawyers in the United States and around the world. This Article will focus only on the historical background that is important to identifying various aspects of the problems that exist today regarding the implementation of the Codes.

### A. Early Beginnings

As a group seeking to expand its power over the legal profession, the ABA viewed the promulgation of codes as a core function in leading the states into the regulation of lawyers.<sup>20</sup> The primary purpose for regulating lawyers was to establish a system that would ultimately protect the public—consumers of legal services.<sup>21</sup> Thus, the ABA became involved in the way in which individuals entered the legal profession by controlling educational standards and requirements for bar membership.<sup>22</sup> It also became involved in establishing a state-by-state system for controlling the practice of law.<sup>23</sup> This decentralized approach was more manageable and allowed the ABA to influence and address the states' need for guidance. The ABA also became involved in regulating

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20. See RICHARD L. ABEL, *AMERICAN LAWYERS* 46-47 (1989); Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 640-41 (1981).

21. See John S. Dzienkowski, *The Regulation of the American Legal Profession and Its Reform*, 68 TEX. L. REV. 451, 483 (1989) [hereinafter Dzienkowski, *Regulation of the American Legal Profession*] (reviewing ABEL, *supra* note 20).

22. See *id.* at 461. A key feature to this control was the establishment of integrated bar associations, whereby all lawyers in a jurisdiction had to become a member of the bar. ABEL, *supra* note 20, at 46.

23. See ABEL, *supra* note 20, at 49.

the manner in which lawyers practiced law and the way in which states established disciplinary systems.<sup>24</sup> By controlling entry and influencing the delivery of legal services, as well as the discipline of lawyers, the ABA managed to establish a system of regulation for professionals that the ruling powers in the states largely were willing to adopt. And, in a sense, this system of self-regulation had the effect of forestalling other governmental entities from becoming involved in the regulation of lawyers.<sup>25</sup>

Many scholars have examined the reasons why a profession seeks to regulate itself. Those who rely on the Weberian approach to market regulation explain acts of a profession under a view of controlling competition.<sup>26</sup> The ABA has long sought to manage competitive pressures within the legal profession under the belief that everyone (including clients) would be better off in such a system.<sup>27</sup> Some of these acts included efforts to limit the number of practicing lawyers, efforts to limit lawyers to geographic boundaries, efforts to establish minimum price control, and efforts to keep nonlawyers out of quasi areas of law practice.<sup>28</sup> Of course, many of these acts have been criticized as anticompetitive and have been dismantled over time.<sup>29</sup>

The dominance of the Codes was central to the ABA's goal of controlling lawyers. The ABA, in essence, did the work for the state bar authorities, and the general concept of uniformity was so appealing to the states that eventually the ABA models developed a life of their own. These models set the agenda for how states chose to regulate the lawyers within their borders.

### *B. From the Canons to the Code to the Model Rules*

Much has been written about the history of the drafting of the 1908 Canons of Professional Ethics,<sup>30</sup> the 1969 Model Code of Professional Responsibility,<sup>31</sup> and the Model Rules.<sup>32</sup> Key individuals involved in the

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24. See, e.g., STANDARDS FOR LAWYER DISCIPLINARY ENFORCEMENT R. 1 (2002); STANDARDS FOR LAWYER DISCIPLINARY & DISABILITY PROCEEDINGS R. 1.1 (1979).

25. David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 810 n.36 (1992).

26. See ABEL, *supra* note 20, at 15, 49.

27. See Dzienkowski, *Regulation of the American Legal Profession*, *supra* note 21, at 454-57.

28. See *id.* at 460-61, 465-68.

29. See *id.* at 461-62, 467.

30. CANONS OF PROF'L ETHICS (1908); see generally, e.g., James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 FORDHAM L. REV. 2395 (2003) (discussing the history of the 1908 Canons of Professional Ethics).

31. MODEL CODE OF PROF'L RESPONSIBILITY (1969); see generally, e.g., John F. Sutton, Jr., *The American Bar Association Code of Professional Responsibility: An Introduction*, 48 TEX. L.

drafting process played important roles in shaping these documents, and in addressing the needs of the profession at the time of their drafting.

The original thirty-two Canons began as an attempt to state the core values of lawyering and to prohibit clearly wrongful conduct.<sup>33</sup> Additions to those Canons demonstrated that the profession sought many answers to basic questions of ethics. Between 1908 and 1969, the ABA added Canons 33 through 47.<sup>34</sup> And, as those additions continued to delineate clear guidelines for conduct, the ABA realized that a change was needed in order to more methodically address ethics issues that arose in the practice of law.<sup>35</sup>

Beginning in 1924, the ABA created four committees to study the 1908 Canons and to propose a revision.<sup>36</sup> Those committees found deficiencies in the existing ABA Model Code, but could not formulate concrete proposals to replace the Canons.<sup>37</sup> In 1964, a fifth committee was formed to evaluate the Canons and to provide guidance on how they could be reformed.<sup>38</sup> That committee, known as the Wright Committee for its chair, Edward Wright, first presented the ABA House of Delegates with a short critique of the Canons in 1965, but then went on to reorganize and improve the structure of the document.<sup>39</sup> That effort expanded into the complete drafting of an entirely new code, known as the Model Code of Professional Responsibility.<sup>40</sup>

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REV. 255 (1970) (discussing the history of the 1969 Model Code of Professional Responsibility).

32. See, e.g., Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385, 1429, 1443-49 (2004) (discussing the development and evolution of the Model Rules of Professional Conduct); Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243, 245-75 (1985) [hereinafter Gillers, *A Critical View of the Model Rules*] (discussing the development of the Model Rules and criticizing those Rules as lawyer-centered, rather than client-centered).

33. PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES 399 (John S. Dzienkowski ed., abr. ed. 2013-2014) [hereinafter STANDARDS, RULES & STATUTES]. Canon 33 addressed the topic of "Partnerships—Names," Canon 38 dealt with "Compensation, Commissions and Rebates" from third persons, and Canon 41 covered "Discovery of Imposition and Deception," where a lawyer discovers fraud and deception. See *id.* at 407, 409.

34. *Id.* at 399.

35. Geoffrey Hazard viewed the profession's movement from the 1908 Canons to the 1969 Model Code as a significant legalization and transformation of ethical norms. See Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1251-52 (1991).

36. Edward L. Wright, *The Code of Professional Responsibility: Its History and Objectives*, 24 ARK. L. REV. 1, 3-5 (1970) (describing the four efforts to revise the Canons).

37. See *id.*

38. *Id.* at 4.

39. See Judith L. Maute, *Pre-Paid and Group Legal Services: Thirty Years After the Storm*, 70 FORDHAM L. REV. 915, 919 (2001); Wright, *supra* note 36, at 4-7.

40. See Wright, *supra* note 36, at 6; see also MODEL CODE OF PROF'L RESPONSIBILITY (1969).



The 1969 Model Code was a document drafted primarily by litigators, but it purported to contain rules that apply to all areas of practice.<sup>41</sup> And, the advocates used their skills to clearly set forth many of their best practices. The Model Code reflected the view of Dean John F. Sutton, the Model Code's Reporter, that pronouncements should be classified into broad principles in the form of canons, mandatory disciplinary rules, and aspirational concepts called "ethical considerations."<sup>42</sup> In part, this was a philosophical stance, but it also reflected a belief that classifying rules into categories would make them easier to draft and enforce.<sup>43</sup> This belief was grounded in the view that the profession should be able to define standards of practice that are distinct from standards used in tort cases and in regulating lawyers in court. And, many of the concepts introduced in the Model Code were accompanied by detailed footnotes and citations so that scholars and lawyers could gain a better understanding of what the drafters meant in the text.<sup>44</sup>

The drafters of the Model Code made substantial progress in defining standards of practice. The disciplinary rules and ethical considerations under Canon 7's advocacy material were extremely detailed and progressive.<sup>45</sup> Canon 5's discussion of independent professional judgment and the details under the disciplinary rules and ethical considerations similarly addressed several bright-line attorney conflicts situations that had not been previously regulated.<sup>46</sup> The Model Code also served as a document that permitted percolation of different viewpoints throughout the states. It also demonstrated to the ABA that even a radical departure from the 1908 Canons could be successfully implemented, and the ABA could persuade the states to adopt this Code.

Once it became clear that text from all three categories—Canons, Disciplinary Rules, and Ethical Considerations—would end up being used outside of the regulatory and disciplinary process, however, the

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41. The Model Code did not have many provisions directed at non-litigation practices. See Andrews, *supra* note 31, at 1445-46. Thus, the Model Rules were later described as a document that took into account the other non-litigation roles of lawyers in our society. See *id.* at 1447.

42. John Sutton, the reporter for the Model Code, firmly believed that a code for regulating lawyers needed more than just bright-line rules. See John F. Sutton, *Re-Evaluation of the Canons of Professional Ethics: A Reviser's Viewpoint*, 33 TENN. L. REV. 132, 134 (1966). Rather, in his view, the Code needed aspirational standards that set forth core principles. See *id.* at 137-39.

43. See generally John M. A. DiPippa, *Lon Fuller, the Model Code, and the Model Rules*, 37 S. TEX. L. REV. 303 (1996) (arguing that the structure of the Model Code was influenced by the jurisprudence scholarship of Lon Fuller).

44. Wright, *supra* note 36, at 2.

45. STANDARDS, RULES & STATUTES, *supra* note 33, at 362-83.

46. See *id.* at 350-60.

Model Code became unworkable as a code of legal ethics.<sup>47</sup> Two Canons were particularly troublesome and subject to overly broad interpretations. Canon 7 required lawyers to represent their clients “zealously within the bounds of the law,”<sup>48</sup> and Canon 9 required lawyers to “avoid even the appearance of professional impropriety.”<sup>49</sup> The expansive language used in both Canon 7 and Canon 9 caused much concern because such standards had the potential to be used outside of the context of lawyer discipline.

In 1977, the ABA formed what became known as the Kutak Commission to consider a revision of the Model Code, which had gone into effect just seven years earlier.<sup>50</sup> Professor Ted Schneyer has argued that the rush to propose a new set of rules was related to the litigation defeats that the ABA had suffered in the Supreme Court on the prohibitions against lawyer advertising, and the states’ resistance to adopting ABA interim changes to the Model Code.<sup>51</sup> Clearly, the ABA sought to change the Model Code in a process that would overcome the objections that had developed to a widely adopted system of regulation.<sup>52</sup>

The drafters of the Model Rules turned to the familiar text and comment approach used in model statutes and restatements. The text was binding and the commentary was explanatory, enabling many of the broader concepts to be put into comments.<sup>53</sup> The Model Rules appeared to set clearer standards for lawyer conduct, but the clarity was elusive as many concepts were never defined. By leaving the definitions out, the ABA, in a sense, left much to the state courts and disciplinary authorities to interpret and decide in ultimately applying the Rules.

The Model Rules’ Reporter, Professor Geoffrey Hazard, was a force in making many of the decisions that were designed to solve the

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47. One could argue that the judicial use of the Model Code to disqualify law firms involved in conflicts of interest was a death knell for the Canons and Ethical Considerations. However, Canon 9’s requirement that lawyers should avoid even the appearance of professional impropriety also caused concern once the Code’s language was used outside of the disciplinary context. See Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677, 688-89 (1989) [hereinafter Schneyer, *Professionalism*].

48. STANDARDS, RULES & STATUTES, *supra* note 33, at 362.

49. *Id.* at 386.

50. See Schneyer, *Professionalism*, *supra* note 47, at 688.

51. See *id.* at 688-90.

52. See *id.* at 693-94 (noting that the major difference in the composition of the Kutak Commission and the Wright Committee was the reduced representation of sole practitioners and members of the American College of Trial Lawyers).

53. See MODEL RULES OF PROF’L CONDUCT scope (2012) (“Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.”).

problems found in the Model Code.<sup>54</sup> Some of those problems were dealt with explicitly, but others, such as the need to temper the duty of zeal, were not directly addressed, thus leaving a gap in enforcement. Although these decisions may have been warranted as a response to the Model Code, they continue to exist in the current enforcement mechanisms and they impose significant costs on the system.

The Model Rules' structure for the conflicts of interest rules was innovative and comprehensive.<sup>55</sup> The introduction of a lawyer as intermediary came from Hazard's work on the Brandeis confirmation hearings and similarly addressed a novel role of the lawyer that Hazard thought would benefit clients.<sup>56</sup> In some provisions, the Model Rules contained vague language but the choices could be viewed as transitional to a new regulatory structure. Some scholars, however, viewed the Model Rules as too lawyer-centric and thus failing to serve the function of protecting the interests of clients.<sup>57</sup>

During the drafting and adoption process, the American Trial Lawyers Association objected to the way in which the new Rules expressly rejected some of the advocacy concepts contained in the Model Code.<sup>58</sup> These objections were so strong that it caused them to draft an alternative code.<sup>59</sup> However, this battle was short lived, as the objections did not gain traction in the subsequent deliberations regarding the adoption of the Model Rules in the states.<sup>60</sup> Although eventually a majority of states did revise their state codes to conform to the Model Rules, this process took longer than that of the Model Code, and many states refused to adopt the exact language of the new Model Rules.<sup>61</sup>

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54. See David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 46-47 (1995) (describing the influence of Professor Hazard on the Kutak Commission).

55. See MODEL RULES OF PROF'L CONDUCT R. 1.7 (2012) (outlining present client conflicts); *id.* R. 1.8 (outlining prohibited transactions); *id.* R. 1.9 (outlining former client conflicts); *id.* R. 1.10 (outlining imputed disqualification); *id.* R. 1.11 (outlining government lawyer conflicts); *id.* R. 1.12 (outlining conflicts involving judges and similar officers).

56. GEOFFREY C. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW 58, 60-62, 64 (1978). MODEL RULES OF PROF'L CONDUCT R. 2.2 (1983), containing the lawyer as intermediary provisions, was repealed by the ABA in 2002. For a comprehensive discussion of the lawyer as intermediary concept, see generally John S. Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, 1992 U. ILL. L. REV. 741.

57. See Gillers, *A Critical View of the Model Rules*, *supra* note 32, at 245 (noting that the Model Rules is "an astonishingly parochial, self-aggrandizing document, which favors lawyers over clients, other persons, and the administration of justice in almost every line, paragraph, and provision that permits significant choice").

58. See Schneyer, *Professionalism*, *supra* note 47, at 684, 710-12.

59. *Id.* at 710.

60. *Id.* at 691 n.76.

61. See *id.*

### C. *The Model Rules and Beyond*

At some point, the ABA realized that modernization of the Model Rules would prove to be a complicated task. As a model for states to adopt, the Model Code had been a major success.<sup>62</sup> The Model Rules experiment, by contrast, demonstrated that implementing uniform change across the states from that point on would be difficult to accomplish. Variance in language across jurisdictions inevitably leads to a patchwork of different rules throughout the United States. And, given that many federal courts deferred to state ethics rules, further complications result when standards of ethics vary across the jurisdictions.<sup>63</sup>

Initially, the ABA decided that the Model Rules would become a living document that would be modified by the ABA House of Delegates when changes were needed.<sup>64</sup> Of the first fifteen years after the adoption of the Model Rules, the ABA made changes in five of those years.<sup>65</sup> Most of the changes related to modifications of comments, but in one case, sale of a law practice, a new rule was adopted.<sup>66</sup> This piecemeal approach made the passage of amendments a more routine task for the ABA.<sup>67</sup> But, the problem with the piecemeal approach is that few of those minor amendments were adopted by many (let alone a majority) of the states until the ABA completed a major revision of the Model Rules in 2002.<sup>68</sup>

Efforts to revise the Model Rules between 1983 and 1997 provide an instructive perspective on the ABA's ability to implement fundamental reform. In 1990, the ABA House of Delegates considered and adopted a new Model Rule 1.17 on the sale of a law practice.<sup>69</sup> In many jurisdictions at that time, lawyers were not permitted to sell their law practice.<sup>70</sup> However, lawyers would effectively transfer their client

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62. See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 56-57 (1986); see also W. BRADLEY WENDEL, *PROFESSIONAL RESPONSIBILITY: EXAMPLES AND EXPLANATIONS* 10 (3d ed. 2011).

63. See, e.g., Ryan E. Mick, *The Federal Prosecutors Ethics Act: Solution or Revolution*, 85 IOWA L. REV. 1251, 1286-87 (2001) (discussing deviations in the no-contact rule across state lines).

64. See MODEL RULES OF PROF'L CONDUCT preface (2012).

65. See *id.*

66. See STANDARDS, RULES & STATUTES, *supra* note 33, at 55-56 (citing MODEL RULES OF PROF'L CONDUCT R. 1.17 (2012)).

67. See MODEL RULES OF PROF'L CONDUCT preface (2012).

68. See *id.*; Comm'n on Evaluation of the Rules of Prof'l Conduct ("Ethics 2000"), chair's intro. Although a piecemeal modification process was easy to accomplish for an ABA that had two meetings each year and many standing committees, state supreme courts and bar authorities did not have mechanisms in place to make annual changes to their rules.

69. See STANDARDS, RULES & STATUTES, *supra* note 33, at 61.

70. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 300 (1961) (announcing

workload to other lawyers by bringing on additional partners and by retiring and receiving compensation through a plan implemented upon retirement.<sup>71</sup> One major reason to allow lawyers to sell a law practice was the detrimental effect of the old rule upon solo practitioners.<sup>72</sup> Rule 1.17 addressed the important topics of notice to clients and the conditions upon which such a sale was permissible to implement some significant reform.<sup>73</sup> Many states considered Rule 1.17 and adopted some variation of it even before the Ethics 2000 Commission ("Ethics 2000") created its version of the Model Rules.<sup>74</sup> However, many states made significant variations to the text of this Rule.<sup>75</sup> Thus, although fundamental reform by the ABA House of Delegates was accomplished, the ABA's success in establishing a national standard was mixed as the variations at the state level are significant. One could speculate whether the state variations would be as substantial if the Rule had been introduced at the time of Ethics 2000, when the entirety of the Model Rules was subject to review.

In 1991, the ABA House of Delegates rejected an effort to amend the confidentiality rule, Rule 1.6, permitting disclosure of client information to prevent a financial crime or fraud.<sup>76</sup> This proposal was similar to one rejected in 1982 when the House considered the adoption of the Model Rules.<sup>77</sup> Despite the fact that a majority of states permitted disclosure in such situations, the drafters of the ethics Codes could not persuade the ABA House of Delegates to adopt the provision at this

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that the practice of law is not a business or commercial enterprise to be bought or sold); see generally Stephen E. Kalish, *The Sale of a Law Practice: The Model Rules of Professional Conduct Point in a New Direction*, 39 U. MIAMI L. REV. 471 (1985) (arguing for a change in the prohibition against the sale of a law practice).

71. Kalish, *supra* note 70, at 473 (using an example to show how lawyers could effectively sell a law practice under existing ethics rules).

72. MODEL RULES OF PROF'L CONDUCT R. 1.17 cmt. (2012). It is important to note that uniformity is less important with a rule directed at the issue of whether law firms practicing within the borders of the jurisdiction can be bought and sold than, for example, with the topic of conflicts rules in general. However, lack of uniformity still creates transaction costs in that lawyers must interpret language that has little or no counterpart in other jurisdictions.

73. See *id.* R. 1.17.

74. By 1997, thirty-seven states had adopted a version of this Rule. See generally John H. Maville, *Sale of a Law Practice: Out of the Shadows and into the Rules*, ILL. B.J., June 2003, at 292 (discussing the consequences of the Illinois Supreme Court's refusal to adopt Model Rule 1.17).

75. *Variations of the ABA Model Rules of Professional Conduct*, ABA, [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_1\\_17\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_17_authcheckdam.pdf) (last updated Sept. 6, 2012) (examining the versions of Rule 1.17 adopted by the states).

76. See STANDARDS, RULES & STATUTES, *supra* note 33, at 1098.

77. See *id.*

time.<sup>78</sup> The ABA leadership did not want to impose a national standard of permissive disclosure in the area of financial crimes and frauds.<sup>79</sup>

In 1991, the ABA House of Delegates added a new Rule addressing lawyer involvement in providing clients with ancillary business practices.<sup>80</sup> The new provision prohibited lawyers from offering such services to non-clients, and such services had to be related to the legal services provided to the lawyer's clients.<sup>81</sup> The new provision, which effectively banned many existing ancillary practices, created so much controversy that the ABA repealed the rule in August 1992.<sup>82</sup> In 1994, the ABA added a new Rule 5.7 that broadened the ability of lawyers to offer ancillary business services to clients and essentially gave lawyers a choice whether such services would fall within the protection of the Model Rules.<sup>83</sup> The new provision left open many questions about disclosure to clients because of the recognition that lawyers wanted to be free to offer ancillary services to clients and non-clients.<sup>84</sup> The original provision was enacted without any serious study of existing practices and reflected a reaction against large firm involvement in ancillary businesses.<sup>85</sup> Once it became clear that the Rule was ill-advised, in the revision, the ABA chose to stay silent on some key questions rather than to confront them directly.<sup>86</sup>

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78. *See id.*

79. *See id.* In later years, all of the opposition in the ABA had to bow to pressure from Congress and the SEC to modify the confidentiality rules after it became clear that lawyers had participated in various well-publicized corporate frauds. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2012) (reflecting that the Model Rules now includes language permitting disclosure of a crime or fraud).

80. Henry J. Reske & Don J. DeBenedictus, *Ethics Proposal Draws Fire: House Restricts Ancillary Businesses, Rejects Confidentiality Change*, A.B.A. J., Oct. 1991, at 34, 34.

81. *See id.*

82. Don J. DeBenedictus, *House of Delegates: Close Vote Rescinds Provision Against Ancillary Business*, A.B.A. J., Oct. 1992, at 110, 110; *see generally* Ted Schneyer, *Policymaking and the Perils of Professionalism: The ABA's Ancillary Business Debate as a Case Study*, 35 ARIZ. L. REV. 363 (1993) [hereinafter Schneyer, *Policymaking*] (examining the arguments for and against ancillary business practices and, in particular, the strained use of professionalism to justify policymaking).

83. *See* MODEL RULES OF PROF'L CONDUCT R. 5.7 (2012).

84. *See* Schneyer, *Policymaking*, *supra* note 82, at 376-77.

85. *See id.* at 367-70. Professor Schneyer examines in detail the lobbying efforts of the litigation section that led to the passage of the original Rule 5.7. *See id.* at 364-66. This case study casts the policymaking role of the ABA as seriously flawed on an important issue that relates to client services. *See id.* This debate did not in any way focus on the true protection of client interests, but instead was lawyer-centered in its approach.

86. Rule 5.7 does not discuss whether lawyers who own an ancillary business practice must disclose the extent of ownership to their clients. *See id.* at 376-77. It also does not address how a law firm should handle referrals of non-law clients of the ancillary business to the law firm. And, it does not require the firm to warn the client that checking competing ancillary service providers might produce less expensive services or higher quality services.

In 1997, the ABA appointed the Ethics 2000 Commission with a charge to modernize the Model Rules and examine the growing disparity in the states' ethics rules, the lack of clarity in some existing Rules, and changes in technology and in law firm organization.<sup>87</sup> During this time, the ABA had also created a task force to address lawyer involvement in corporate scandals and a commission to address multijurisdictional practice of law.<sup>88</sup>

The drafters of the Ethics 2000 revision, led by Professor Nancy Moore as the Chief Reporter, did a methodical substantive review of the Rules and, ultimately, made many important changes. First, the revisions included major changes to the conflicts of interest rules.<sup>89</sup> Rule 1.7 was redrafted, and Rule 2.2 was deleted and the subject was placed in the comments to the revised Rule 1.7.<sup>90</sup> A comment on advanced consent was added to the conflicts of interest rule.<sup>91</sup> The drafters removed automatic imputation of personal conflicts to the other lawyers in the law firm.<sup>92</sup> And, Rule 6.5 permitted lawyers to offer limited legal services in pro bono clinics without having to perform conflicts checks.<sup>93</sup> Second, the concept of "informed consent, confirmed in writing" was introduced to many of the rules.<sup>94</sup> Finally, the drafters added substantial clarity to the Rules with an expanded definitional section and with additional commentary throughout the document.<sup>95</sup> The Ethics 2000 efforts to implement substantial reform were very successful as forty-six states adopted a majority of the changes proposed by Ethics 2000.<sup>96</sup> Of course, the success was not uniform. Some states, such as Texas, took this as an opportunity to examine de novo a number of fundamental

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87. See Steven Krane, *Regulating Attorney Conduct: Past, Present, and Future*, 29 HOFSTRA L. REV. 247, 257-58 (2000) (noting the stated goals of Ethics 2000, but also lamenting that it was a narrow approach of the Commission to simply refresh, but not comprehensively reexamine, the Model Rules).

88. See *American Bar Association Adopted by the House of Delegates*, ABA, available at <http://www.americanbar.org/content/dam/aba/migrated/leadership/2003/journal/119c.authcheckdam.pdf> (last visited Nov. 23, 2013) (reporting on the formation of a task force addressing corporate responsibility); *Commission on Multijurisdictional Practice: About the Commission*, ABA, [http://www.americanbar.org/groups/professional\\_responsibility/committees\\_commissions/commission\\_on\\_multijurisdictional\\_practice.html](http://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission_on_multijurisdictional_practice.html) (last visited Nov. 23, 2013) (introducing the Commission on Multijurisdictional Practice).

89. See STANDARDS, RULES & STATUTES, *supra* note 33, at 25-26.

90. See *id.* at 25-32, 60; see also MODEL RULES OF PROF'L CONDUCT R. 1.7 (2002).

91. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. (2002); see STANDARDS, RULES & STATUTES, *supra* note 33, at 298.

92. See STANDARDS, RULES & STATUTES, *supra* note 33, at 40-42.

93. See *id.* at 92.

94. See, e.g., *id.* at 32, 38.

95. See, e.g., *id.* at 9-12.

96. See *Status of State Review of Professional Conduct Rules*, *supra* note 10.

issues in the regulation of lawyers within their borders; this, of course, was discouraged by the ABA.<sup>97</sup>

One unusual aspect about Ethics 2000 was that the passage of wholesale modifications excluded major changes to the confidentiality and entity rules that had been prompted by the corporate scandals and the passage of the Sarbanes Oxley Act of 2002.<sup>98</sup> Instead, in 2003, one year after the 2002 passage of the Ethics 2000 revisions, the ABA made major changes to the confidentiality rules and the entity as client rules.<sup>99</sup> Did the leadership of the ABA fear that changes in confidentiality might doom the entire redraft and they, therefore, decided to present those changes separately? Did they seek to avoid a controversial debate on the floor of the ABA House of Delegates? The two modifications to the Ethics 2000 version of the Model Rules established a precedent that revisions would be expected to take place periodically.

Between 2003 and 2009, the ABA amended the Model Rules three times with mixed success.<sup>100</sup> In 2007, a comment to Rule 5.5 was amended to reflect the ABA's efforts to accommodate temporary legal practice in a jurisdiction that suffers a disaster.<sup>101</sup> In 2008, the ABA added Rule 3.8(g) and 3.8(h) to address the duties of prosecutors who learn information about a wrongful conviction in light of the hundreds of DNA exonerations that have arisen in recent times.<sup>102</sup> However, only a small minority of states has adopted the new provisions, and many prosecutors have expressed concern about the wisdom of imposing the burdens of these new rules on their offices.<sup>103</sup> In February 2009, the ABA amended Rule 1.10 to address the important issue of migratory lawyers and firm disqualification.<sup>104</sup> New language was adopted to allow

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97. See *id.* The ABA Center for Professional Responsibility has a Policy Implementation Committee that is responsible for helping to obtain state adoption of the model documents approved by the ABA House of Delegates.

98. Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 15 and 18 U.S.C.).

99. Compare MODEL RULES OF PROF'L CONDUCT R. 1.6, 1.13 (2002), with MODEL RULES OF PROF'L CONDUCT R. 1.6, 1.13 (2003).

100. See MODEL RULES OF PROF'L CONDUCT (2009); MODEL RULES OF PROF'L CONDUCT (2008); MODEL RULES OF PROF'L CONDUCT (2007).

101. MODEL RULES PROF'L CONDUCT R. 5.5 cmt. (2007); see ABA, MODEL COURT RULE ON PROVISION OF LEGAL SERVICES FOLLOWING DETERMINATION OF MAJOR DISASTER (2007), reprinted in ABA, COMPENDIUM OF CLIENT PROTECTION RULES (2007) (following the experiences of Louisiana after Hurricane Katrina).

102. MODEL RULES PROF'L CONDUCT R. 3.8(g)-(h); see Wayne D. Garriss, Jr., Note, *Model Rule of Professional Conduct 3.8: The ABA Takes a Stand Against Wrongful Convictions*, 22 GEO. J. LEGAL ETHICS 829, 830-31, 836-37 (2009).

103. See Bruce A. Green, *Prosecutors and Professional Regulation*, 25 GEO. J. LEGAL ETHICS 873, 889-93 (2012) (examining the debate over state enactment of Rule 3.8(g) and 3.8(h)).

104. Compare MODEL RULES OF PROF'L CONDUCT R. 1.10 (2008), with MODEL RULES OF



a firm to use screening when hiring a lateral lawyer to avoid disqualification.<sup>105</sup> However, criticism that the adopted language did not limit screening to migratory lawyers caused the ABA to amend its language in August 2009.<sup>106</sup> Two of these experiences illustrate failures in the ABA drafting process: one being a failure of precise drafting and the other being a failure of effective consultation with the prosecutors who ultimately would be regulated by the Rule.

In 2009, ABA President Carolyn Lamm formed the Ethics 20/20 Commission ("Ethics 20/20") in order to study the many changes in the legal profession in the United States and around the world, and to propose changes to the Model Rules.<sup>107</sup> The topics of focus would include the impact of technology upon the practice of law as well as the many fundamental differences in modern law practice.<sup>108</sup> Ethics 20/20 formed many subcommittees, and these groups produced working papers on many different topics.<sup>109</sup>

In 2012, Ethics 20/20 issued concrete proposals to amend the Model Rules in a piecemeal fashion over a period of several ABA meetings.<sup>110</sup> Ultimately, Ethics 20/20 decided that, despite all of the changes in the legal profession, the Ethics 2000 version of the Model Rules remained "relevant and valid," thus Ethics 20/20 would only propose "clarifications and expansions" of the existing Rules.<sup>111</sup> To be more precise, the Ethics 20/20 amendments represent the least substantial revision of the four major revisions of the ethics Codes, despite the dramatic changes in the legal profession that have occurred in the past decade in the United States and around the world.

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PROF'L CONDUCT R 1.10 (2009).

105. See MODEL RULES OF PROF'L CONDUCT R 1.10 (2009).

106. Compare MODEL RULES OF PROF'L CONDUCT R. 1.10 (2009), with MODEL RULES OF PROF'L CONDUCT R 1.10 (2010).

107. News Release, ABA, ABA President Carolyn B. Lamm Creates Ethics Commission to Address Technology and Global Practice Challenges Facing U.S. Lawyers (Aug. 4, 2009), available at [http://www.apps.americanbar.org/abanet/media/release/news\\_release.cfm?releaseid=730](http://www.apps.americanbar.org/abanet/media/release/news_release.cfm?releaseid=730) (announcing the creation of the Ethics 20/20 Commission).

108. See *id.*

109. *Work Product*, ABA, [http://www.americanbar.org/groups/professional\\_responsibility/aba\\_commission\\_on\\_ethics\\_20\\_20/work\\_product.html](http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/work_product.html) (last visited Nov. 23, 2013).

110. See *ABA Commission on Ethics 20/20*, ABA, [http://www.americanbar.org/groups/professional\\_responsibility/aba\\_commission\\_on\\_ethics\\_20\\_20.html](http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html) (last visited Nov. 23, 2013) (explaining the process for adoption of proposals of Ethics 20/20). This approach is curious given that it does not give the states a new entire set of changes to consider at one time.

111. ABA COMM'N ON ETHICS 20/20, INTRODUCTION AND OVERVIEW 1, 7 (2013) [hereinafter INTRODUCTION AND OVERVIEW], available at [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/20120508\\_ethics\\_20\\_20\\_final\\_hod\\_introduction\\_and\\_overview\\_report.uthcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_hod_introduction_and_overview_report.authcheckdam.pdf).

Most observers viewed Ethics 20/20 as a major opportunity to examine and consider changes that recently have taken place in the legal professions of the United States and other countries. The resulting work product, however, has disappointed many scholars and lawyers because the results do not match the promises.<sup>112</sup> Many difficult issues were considered simply too political to tackle.<sup>113</sup> Other issues were forced into the Comments of existing Rules, thereby downplaying the need to make amendments to the Rules themselves.<sup>114</sup> Many view the transformation of Ethics 20/20, from a major overhaul of the Model Rules to a meager set of proposed changes, to be a stark illustration of politics within the ABA operating to prevent the organization from making fundamental and necessary changes to the Model Rules.<sup>115</sup>

Until now, the ABA has been at the forefront of promulgating ethics codes that address many issues that lawyers confront. Although some may disagree with the language and judgments, the ABA has undertaken fundamental reform of the legal ethics codes on three occasions.<sup>116</sup> Ethics 20/20 is a failure of the ABA to confront issues that law firms and lawyers are now facing on a daily basis.<sup>117</sup> Ethics 20/20's decision to avoid these issues does not mean that they will disappear. It means that the ABA has failed to fulfill its responsibility of reforming the Model Rules to provide the guidance needed regarding the modern issues in the practice of law.

### III. LAW FIRM AND LAWYER DECISIONMAKING IN PROBLEMS OF ETHICS

Lawyering as a profession is difficult to regulate, possibly more so than other professions, because a fundamental role of a lawyer is to serve as an agent representing the interests of a client-principal with the

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112. See, e.g., Letter from Thomas D. Morgan to ABA Commission on Ethics 20/20, *supra* note 11 (expressing disappointment in the failure of Ethics 20/20 to recognize the institutionalization of law practice).

113. See, e.g., News Release, ABA, ABA Commission on Ethics 20/20 Will Not Propose Changes to ABA Policy Prohibiting Nonlawyer Ownership of Law Firms (Apr. 16, 2012), available at [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/20120416\\_news\\_release\\_re\\_nonlawyer\\_ownership\\_law\\_firms.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120416_news_release_re_nonlawyer_ownership_law_firms.authcheckdam.pdf).

114. See generally INTRODUCTION AND OVERVIEW, *supra* note 111 (providing examples of Comments added to existing Rules).

115. See, e.g., Rogers, *supra* note 11 (discussing an interview with Anthony E. Davis, Esq. about the scope of Ethics 20/20's recommendations relating to choice of law).

116. These three major ABA reforms were the adoption of the Model Code of Professional Responsibility in 1969, the adoption of the Model Rules of Professional Conduct in 1983, and the adoption in 2002 of the major amendments proposed by the Ethics 2000 Commission.

117. See Rogers, *supra* note 11.

duty of zeal.<sup>118</sup> Stated differently, the very nature of lawyering involves advocating for a client's interest and interpreting law and policy in such a way that benefits the representation. Despite the efforts of the profession to limit the effect of economic pressures, few will deny that the economics of law practice significantly influence lawyer behavior. And, the increase of economic pressures has accentuated pressures upon law firms and their members. All of this is, of course, complicated by the fact that few lawyers ever face the consequences of rule violations. And, many lawyers pay lip service to legal ethics rather than embrace the system of regulation in a meaningful way. This Part will examine the difficulties inherent in lawyering that affect the ability of the Model Rules to regulate lawyer conduct.

### A. Representation of Client Interests with Zeal

The duty of zealous representation has always been a source of concern for those who wish to enforce rules of professional conduct in a consistent manner. The Model Code contained an express canon imposing the duty of zeal, and the Model Rules put the concept of zeal into the preamble.<sup>119</sup> Some have argued that the Model Rules significantly tempered the duty of zeal, and, thus, that the problem is less pronounced today.<sup>120</sup> Nevertheless, in several fundamental areas, the duty of zeal continues to lead to under-enforcement of ethics rules and to disparate behavior by lawyers.

The duty of zeal problem is most evident in the litigation context. Lawyers rely upon the duty of zeal in asserting that it is their obligation to play as close to the line as possible in litigation so as to provide their clients with effective representation. They use the duty of zeal to justify strained interpretations of what is a proper answer to discovery or what constitutes appropriate preparation of witnesses who are called to testify.<sup>121</sup> Lawyers use the duty of zeal to justify nondisclosure in the candor to the court context.<sup>122</sup> Some believe that settlement can avoid

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118. See Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707, 1712-14 (1998). This is in no way intended to denigrate the difficulty of regulating professionals in general. Each profession has its own set of challenges and the regulation of professional services often can be difficult. Lawyering is so related to facts and context that best practices may be difficult to spell out in detail, at least in certain areas of law practice.

119. See MODEL RULES OF PROF'L CONDUCT pmbl. (2012); MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1980).

120. See Carol Rice Andrews, *Ethical Limits on Civil Litigation Advocacy: A Historical Perspective*, 63 CASE W. RES. L. REV. 381, 432 (2012).

121. See Charles Yablon, *Stupid Lawyer Tricks: An Essay on Discovery Abuse*, 96 COLUM. L. REV. 1618, 1620 (1996).

122. See Eugene R. Gaetke, *Expecting Too Much and Too Little of Lawyers*, 67 U. PITT. L.

disclosure to the court when an issue of candor to the court arises.<sup>123</sup> They use the duty of zeal to justify the overly aggressive examination of witnesses in depositions and in trial.<sup>124</sup> Some lawyers argue that every litigant deserves a day in court even if the merits of the case border on the frivolous.<sup>125</sup> Codes of civility that were largely viewed as a solution to the failures of the ABA Model Codes have similarly had difficulty in controlling zeal.<sup>126</sup>

In the litigation area, Model Rule 3.3 imposes an obligation of candor to the court upon lawyers that requires disclosure when a client commits perjury or a fraud on the court. Criminal lawyers abide by this obligation that was affirmed under the guidance of *Nix v. Whiteside*,<sup>127</sup> but lawyers in civil litigation often try to avoid such obligations when clients engage in similar conduct.<sup>128</sup> Also, lawyers, under the guise of the duty of zeal, impose significant costs upon opposing parties in order to gain an advantage in litigation. Some judges and magistrates do not tolerate such behavior and have managed to control this with various measures, but the ABA's failure to adequately address this problem in ethics Codes has made the litigation-related provisions of these codes less effective in regulating lawyer behavior. Moreover, alternative efforts to control overly zealous behavior in lawyering through codes of professionalism have failed.<sup>129</sup>

In litigation and non-litigation, the duty of zeal plays a role in justifying adversarial tactics in phases such as negotiation and mediation.<sup>130</sup> The Comments to the Model Rules contemplate half-truths

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REV. 693, 724 (2006) (discussing the requirement of disclosure even when it is harmful to a client's case and the failure of the Model Rules to temper overly zealous advocacy).

123. See Brian C. Haussmann, Note, *The ABA Ethical Guidelines for Settlement Negotiations: Exceeding the Limits of the Adversarial Ethic*, 89 CORNELL L. REV. 1218, 1237-38 (2004).

124. See Patrick T. O'Rourke, *Enforcing Civility: The Rules of Professional Conduct in Deposition Settings*, COLO. LAW., Mar. 2004, at 75, 76.

125. See Samuel D. Zurier, *Order in the Court: Deterring Frivolous Lawsuits in Rhode Island's Federal District Court*, R.I. B.J., Apr. 1997, at 7, 7.

126. See Gaetke, *supra* note 122, at 724-25.

127. 475 U.S. 157, 166 (1986); see Raymond J. McKoski, *Prospective Perjury by a Criminal Defendant: It's All About the Lawyer*, 44 ARIZ. ST. L.J. 1575, 1601-02 (2012) (discussing the effects of *Nix v. Whiteside* on representing a criminal defense client who wants to give perjured testimony). *Nix* held that it was not ineffective assistance of counsel for a lawyer to tell the criminal defense client about the lawyer's duty to inform the court if the client commits perjury in testifying during the trial. *Nix*, 475 U.S. at 190-91.

128. See RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, *LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY* § 3.3-5(g) (2013).

129. See Adam Owen Glist, *Enforcing Courtesy: Default Judgments and the Civility Movement*, 69 FORDHAM L. REV. 757, 769-70 (2000) (discussing attorneys using the duty of zealous advocacy as a defense to violations of codes of professionalism).

130. See Carrie Menkel-Meadow, *The Limits of Adversarial Ethics*, in *ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION* 123, 123-24 (Deborah L. Rhode ed.,

on matters of value and opinion.<sup>131</sup> And, the ABA issued a Formal Opinion that permits lawyers to misrepresent settlement values to the opposing side in negotiation.<sup>132</sup> Adversarial tactics in negotiation are well known and even taught as part of negotiation training, and the ABA has done little to discourage such behavior.<sup>133</sup> Similarly, in mediation, lawyers have adopted zealous representation tactics to gain advantages for their clients.<sup>134</sup>

The duty of zeal also plays a significant role in lawyer interpretation of confidentiality and disclosure obligations. Lawyers justify nondisclosure as necessary to protect the client.<sup>135</sup> And, often such interpretations have led to pushback in cases such as *Tarasoff v. Regents of the University of California*,<sup>136</sup> establishing a duty to disclose a client confidence to prevent the death or substantial bodily harm of a third person, and have also appeared when lawyers represent clients in regulated industries.<sup>137</sup> In the area of tax returns and tax opinions, the U.S. Treasury Department has had to develop its own rules on lawyer and accountant conduct.<sup>138</sup> Issues have also arisen in the lawyer's role as an evaluator when the client asks the lawyer to prepare an opinion for use by a third person.<sup>139</sup> Again, these efforts, in part, are an attempt to limit lawyers' use of zeal in the representation of clients.

Essentially, I argue that the ABA and state ethics authorities have failed to properly deal with the harms resulting from misuse and

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2000).

131. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt. 2 (2012).

132. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 439 (2006).

133. Most of the casebooks on this subject discuss adversarial tactics, and often conclude that lawyers use such behavior to gain advances in negotiation. See, e.g., STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, ARBITRATION, AND OTHER PROCESSES 67-71, 74-77 (6th ed. 2012).

134. See Bette J. Roth, *Ethical Considerations for Advocates in Mediation*, BETTE J. ROTH, ESQ. 2-5, <http://www.rothadr.com/pages/publications/ethics%20reprint.pdf> (last visited Nov. 23, 2013).

135. The argument has been advanced that, once a lawyer may disclose, the range of cases requiring disclosure will increase over time. See, e.g., Lisa M. Kurcias, Note, *Prosecutor's Duty to Disclose Exculpatory Evidence*, 69 FORDHAM L. REV. 1205, 1222 (2000).

136. 551 P.2d 334 (Cal. 1976); see Davalene Cooper, *The Ethical Rules Lack Ethics: Tort Liability When a Lawyer Fails to Warn a Third Party of a Client's Threat to Cause Serious Bodily Harm*, 36 IDAHO L. REV. 479, 518-19 (2000).

137. See generally William H. Simon, *The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology*, 23 LAW & SOC. INQUIRY 243 (1998) (examining the lawyer's duty of candor in the Kaye Scholer matter).

138. See 31 C.F.R. §§ 10.34-.35 (2012); see also *The Avoidance Dynamic: A Tale of Tax Planning, Tax Ethics, and Tax Reform*, 80 COLUM. L. REV. 1553, 1582-83, 1586-87 (George Cooper ed., 1980).

139. See MODEL RULES OF PROF'L CONDUCT R. 2.3 (2012); Charles E. McCallum & Bruce C. Young, *Ethics Issues in Opinion Practice*, 62 BUS. LAW. 417, 418-21 (2007).

misinterpretation of the duty of zeal and this failure has undercut the implementation of many aspects of regulating lawyers' behavior. The ABA should examine the Rules that are affected by zeal and make clear how they should be interpreted by lawyers so that uniformity may result. Of course, in criminal cases, the duty of zeal has an especially important place and the Rules are quite explicit on how that should work in terms of requiring the government to prove every element of the case against the defendant.<sup>140</sup> Yet, the Rules also are quite clear on the limits of zeal when candor to the court is involved in criminal cases. This same level of detailed guidance should be added to the Rules regarding the appropriate balance between zealous representation of a client and the duty of candor in the civil litigation context.

Our legal system has evolved from a primarily adversarial system to a hybrid system without an equivalent evolution in the ethics rules governing lawyer behavior.<sup>141</sup> The lawyer still has a duty to zealously advocate for the client's interest and position, but the duty of zeal should not be allowed to be a justification for lawyer behavior that imposes significant costs on the legal system and society in general. It is time that the ABA more fully recognize the hybrid nature of the system and implement appropriate limitations in the Rules.<sup>142</sup>

### B. *The Nature of Lawyering*

Beginning in law school and carrying forward to legal practice, lawyers learn how to argue all sides of a case. In criminal cases, defense attorneys argue cases to ensure that criminal defendant clients have their day in court and that the prosecution bears the burden of proving its case beyond a reasonable doubt. In civil cases, lawyers craft arguments in favor of their clients and they often lose perspective on the relative value of the positions. Sometimes this is referred to as the notion that a lawyer is taught to make any argument with a straight face so as to properly

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140. See MODEL RULES OF PROF'L CONDUCT R. 3.1 (2012).

141. See John S. Dzienkowski, *Lawyering in a Hybrid Adversary System*, 38 WM. & MARY L. REV. 45, 49-50 (1996).

142. One prominent example arose in the context of collaborative lawyering in family law cases. A Colorado opinion raised questions about whether lawyers could properly participate in representing clients in collaborative lawyering. See Colo. Bar Ass'n Ethics Comm., Formal Op. 115 (2007). An ABA opinion had to be issued to clarify the issue of whether collaborative lawyering conflicted with the duty of zeal. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 447 (2007); see generally Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 ARIZ. L. REV. 289 (2008) (discussing the lawyering and ethics issues raised by collaborative law). For a detailed examination of how the ABA House of Delegates rejected the adoption of a model collaborative law statute, see Gillers, *How to Make Rules for Lawyers*, *supra* note 19, at 388-96.

represent their client.<sup>143</sup> Adversarial justice, which lies at the heart of the nature of lawyering, as well as legal reasoning of authorities from both sides, leads to similar deliberations when interpreting codes of ethics.<sup>144</sup>

One aspect of adversarial justice derives from the hired gun model of lawyering where a client hires a lawyer to advocate the client's best arguments without the lawyer accepting any moral consequences for taking the positions.<sup>145</sup> The moral detachment of lawyers from client interests is appealing on many levels, but, in a sense, it does end up creating circumstances in which lawyers can say, "I do not morally support this position, but I am obligated to make it with zeal on behalf of my client."<sup>146</sup>

Thus, in any of the areas where the Rules require interpretation, lawyers often use legal reasoning to arrive at a result that most benefits their interests or their client's interests. In conflicts, lawyers examine the materiality of the conflict and often downplay its significance.<sup>147</sup> In examining whether the lawyer can provide competent and diligent representation, lawyers often come to the conclusion that they can continue in the representation, notwithstanding even glaring potential conflicts of interest.<sup>148</sup> In determining whether a matter is substantially related, lawyers often take aggressive positions that two matters are not substantially related.<sup>149</sup> When lawyers seek to obtain advance consent from clients, they choose to draft the language describing the conflict more broadly because specific and detailed information about the conflict would discourage the client from signing the advance consent.<sup>150</sup> Adversarial justice has an appropriate and important place, but, when

143. See Jonathan R. Cohen, *The Culture of Legal Denial*, 84 NEB. L. REV. 247, 301-02 (2005).

144. See David Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 83, 89 (David Luban ed., 1983).

145. See Camille A. Gear, Note, *The Ideology of Domination: Barriers to Client Autonomy in Legal Ethics Scholarship*, 107 YALE L.J. 2473, 2493 (1998) (explaining the hired gun model of lawyering).

146. See Luban, *supra* note 144, at 89.

147. See Dan Bressler, *Conflicts of Interest + Interesting Conflicts*, L. FIRM RISK MANAGEMENT BLOG (Dec. 5, 2012, 3:14 PM), <http://www.lawfirmrisk.com/2012/12/conflicts-of-interest-interesting.html>. So lawyers often will take on the representation of the client without obtaining consent to the possible conflict on the grounds that the representation is not "materially limited" by the conflict within the meaning of Rule 1.7(a) when the safer and wiser move would be to seek the client's informed consent to the possible conflict.

148. See Kurt Eichenwald, *Another Inquiry: Company Hobbles Investigation by Its Law Firm, Report Says*, N.Y. TIMES, Feb. 4, 2002, at A19 (describing Vinson & Elkins LLP's reasons for accepting as an engagement the internal investigation prompted at Enron by Sharron Watkins).

149. See, e.g., *In re Am. Airlines, Inc.*, 972 F.2d 605, 607-11 (5th Cir. 1992) (discussing the arguments set forth to disqualify counsel).

150. See, e.g., N.Y.C. Bar Ass'n Comm. on Prof'l and Judicial Ethics, Formal Op. 1 (2006) (discussing the consequences of different ways of drafting advance waivers for clients).

lawyers adopt extreme positions to interpret ethics rules, the rules are not followed in a consistent manner.<sup>151</sup>

What is the alternative to having lawyers use their adversarial skills to interpret the rules? More carefully crafted rules could avoid some of these interpretive issues. Lawyers could develop principles of best practices that would temper some of the more extreme positions. They could implement loss prevention and risk management programs to limit their exposure to liability. And, law firms could use in-house ethics counsel to implement a uniform interpretation of ethics rules for all lawyers in the firm.<sup>152</sup> Accountability through more effective enforcement could similarly force lawyers to apply the rules without using the arguments that they employ on behalf of their clients. The cost of disparate interpretations of identical ethics provisions is significant and should be addressed explicitly.

### C. *The Economic Pressures*

The economic pressures on law practice have always been present; however, effective competition was less evident in the early years of law practice. Some could attribute the lack of effective competition to the efforts of the organized bar in limiting advertising, controlling entry, and seeking to establish minimum prices.<sup>153</sup> Others could argue that competition in the legal profession is always less intense when the number of lawyers in a geographical area is small.<sup>154</sup> Of course, lawyers in some markets were able to overcome those early efforts to deter competition. And, the Supreme Court's decision in *Bates v. Arizona State Bar*,<sup>155</sup> which opened the door to widespread attorney advertising, accelerated the entry into the market of small law firms providing routine legal services. Today, advances in technology have played an important role in increasing access to legal services across state lines, providing potential clients with access to lawyers, and reducing the cost of legal services.<sup>156</sup>

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151. I acknowledge that some law firms and lawyers are more risk averse and embrace a professional culture of careful interpretation and application of ethical standards.

152. See Ronald D. Rotunda, *Why Lawyers Are Different and Why We Are the Same: Creating Structural Incentives in Large Law Firms to Promote Ethical Behavior—In-House Ethics Counsel, Bill Paddling, and In-House Ethics Training*, 44 AKRON L. REV. 679, 702-11 (2011).

153. ABEL, *supra* note 20, at 111.

154. See *id.* at 40-41.

155. 433 U.S. 350, 383-84 (1977) (protecting truthful advertising under the First Amendment).

156. The impact of advances and changes in technology upon the delivery of legal services has been substantial. From the concept of digitized documents, to the Internet, to cloud computing, electronic discovery, and electronic filing, law practice has been significantly streamlined by technology. See generally James E. Cabral et al., *Using Technology to Enhance Access to Justice*,



In 1986, the ABA acknowledged the pressures that competition was placing upon its efforts to regulate law practice.<sup>157</sup> It called for drastic measures to address these issues.<sup>158</sup> However, few would predict that, less than twenty years later, technology and developments in the global legal profession would have a profound impact upon the way in which lawyers practice law and are regulated by bar authorities.

Professor Thomas D. Morgan, in his book, *The Vanishing American Lawyer*, provides a detailed examination of the competition that lawyers face today and the inability of law schools, state bars, and lawyers to adjust to the new competitive order.<sup>159</sup> Professor Morgan analyzes in detail the many stresses upon lawyers including, among others, technology, growth of in-house counsel, global competition, the increase in the number of lawyers, and the shift of the profession away from representing individual clients to representing entity clients.<sup>160</sup> The depth and breadth of the changes that have occurred in the legal profession have altered the nature of practice for virtually all lawyers in this country in a twenty-five year time span.<sup>161</sup>

Law firms and lawyers are addressing “trends like increased pricing competition, more commoditization of legal work, more non-hourly billing, fewer equity partners, more contract lawyers, reduced leverage, and smaller first year classes as permanent trends going forward.”<sup>162</sup> These trends, along with increasing use of laterals, are influencing the way in which firms train and monitor lawyers.<sup>163</sup> They are also putting even more of a premium on client acquisition and retention.<sup>164</sup> As firms and lawyers face the major restructuring of their practices, the way in which they interact with the professional codes is evolving. And, the drafters of the ethics codes must consider such factors in order to continue to effectively regulate the practice of law.

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26 HARV. J.L. & TECH. 241, 247-56 (2012) (describing specific advances in technology).

157. See ABA, Comm’n on Professionalism, “... In the Spirit of Public Service:” *A Blueprint for the Rekindling of Lawyer Professionalism*, 112 F.R.D. 243, 306 (1986).

158. See *id.* at 263-64.

159. See THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* 207-13 (2010) (discussing ways to think about legal education in the twenty-first century).

160. Thomas D. Morgan, *Economic Reality Facing 21st Century Lawyers*, 69 WASH. L. REV. 625, 631-35 (1994).

161. MORGAN, *supra* note 159, at 78-80.

162. GEORGETOWN LAW CTR. FOR THE STUDY OF THE LEGAL PROFESSION, *REPORT ON THE STATE OF THE LEGAL MARKET* 14 (2013).

163. See *id.* at 11 (discussing lateral movements and firm management of partner expectations).

164. See *id.* at 14 (discussing how firms must adapt to market realities to effectively respond to client demands).

Sophisticated clients are demanding that lawyers and the legal profession accommodate their needs by creating special rules or exceptions.<sup>165</sup> In the public comment process of the Ethics 20/20 debate, general counsels prepared a submission arguing that the current Rules did not properly address the needs of their clients.<sup>166</sup> The corporate clients asked the ABA to consider a contractarian perspective on conflicts rules so that their lawyers can make reasonable exceptions to imputation and automatic application of the Rules.<sup>167</sup> For the most part, Ethics 20/20 chose not to incorporate such contractarian-based exceptions to the conflicts rules.<sup>168</sup>

The increased profit motive focus of modern law firms and the resulting efforts to maximize revenues and minimize costs<sup>169</sup> has led to many decisions that are purely made on the economics of the choices.<sup>170</sup> For example, some have argued that several of the more prominent conflicts and disclosure cases involved law firms that had a significant percentage of their business with the client in question.<sup>171</sup> The pressures of competition also have reduced the supervision and training of associates even though partners may be responsible for the mistakes of such lawyers within the firm.<sup>172</sup> One can surmise that lawyers today

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165. See generally ABA COMM'N ON ETHICS 20/20, PROPOSALS OF LAW FIRM GENERAL COUNSEL FOR FUTURE REGULATION OF RELATIONSHIPS BETWEEN LAW FIRMS AND SOPHISTICATED CLIENTS (2011) [hereinafter PROPOSALS OF LAW FIRM GENERAL COUNSEL], available at [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/ethics\\_20\\_20\\_comments/lawfirmgeneralcounsel\\_issuespaperconcerningmultijurisdictionalpractice.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/lawfirmgeneralcounsel_issuespaperconcerningmultijurisdictionalpractice.authcheckdam.pdf).

166. See *id.* (noting that the rules of legal practice do not address the needs of sophisticated clients).

167. See James W. Jones & Anthony E. Davis, *In Defense of a Reasoned Dialogue About Law Firms and Their Sophisticated Clients*, 121 YALE L.J. ONLINE 589, 592-97 (2012), <http://www.yalelawjournal.org/2012/03/27/jones&davis.html>; see also PROPOSALS OF LAW FIRM GENERAL COUNSEL, *supra* note 165. For an opposing view, see generally Lawrence Fox, *The Gang of Thirty-Three: Taking the Wrecking Ball to Client Loyalty*, 121 YALE L.J. ONLINE 567 (2012), <http://www.yalelawjournal.org/2012/03/27/fox.html> (criticizing the suggestion that conflict rules should be altered in regards to sophisticated clients).

168. See Rogers, *supra* note 11 (discussing the scope of Ethics 20/20's proposals concerning conflicts checking). Ethics 20/20 did, in its modifications to the Comments to Model Rule 8.5, contemplate client and lawyer agreement to choose the ethics rules that would apply in a cross-border representation. See MODEL RULES OF PROF'L CONDUCT R. 8.5 cmt. 4 (2002). This client agreement feature, however, is far short of what many have demanded because it appears in the Comments and not in the text of Rule 8.5, it is only a short reference without detail, and it applies only for the purpose of choosing a jurisdiction under the Rule 8.5 analysis.

169. See Ward Bower, *Law Firm Economics and Professionalism*, 100 DICK. L. REV. 515, 519-20, 522 (1996) (discussing law firm concerns with economic prospects).

170. See *id.* at 518-19.

171. See Edward A. Bernstein, *Structural Conflicts of Interest: How a Law Firm's Compensation System Affects Its Ability to Serve Clients*, 2003 ILL. L. REV. 1261, 1263-66.

172. See Robert V. Hillman, *Professional Partnerships, Competition, and the Evolution of Firm Culture*, 26 J. CORP. L. 1061, 1076-79 (2001) (discussing how law firms have changed their

view ethics rules in a very different light when the rules reduce lawyers' ability to represent clients and thereby reduce their law business profits. Thus, the economic realities of the modern legal profession need to be taken into account by the ABA and state bar authorities in formulating sensible reforms of ethics rules.

#### *D. The Lack of Accountability*

One serious problem with the current system of regulation is the fact that few lawyers face scrutiny for violating many of the rules governing legal practice. Few lawyers and judges report other lawyers for violating the rules. Many of the rules do not lend themselves to enforcement, and state bar disciplinary systems are directed at enforcing violations of a few specific rules. The consequences of violating many rules of professional conduct are simply too remote, and even if implemented, too lenient to have any serious deterrent effect such that lawyers do not properly monitor compliance.

Lawyers and judges have long resisted the duty to report other lawyers to disciplinary authorities. Rule 8.3 is clear, but as a practical matter, few lawyers comply with the requirement.<sup>173</sup> Every so often, a court imposes a penalty against a lawyer for failure to report another lawyer, but the cases involve extreme fact situations in which few would disagree that the reporting obligation would have prevented future harms.<sup>174</sup> When the lawyer commits a wrong against a corporate client and the matter is confidential, many corporations choose not to report because the disclosure of the incident would harm investor opinion of corporate management and the corporation's internal controls.<sup>175</sup> Thus, the "honor code" of Rule 8.3 that was designed to bring more cases to disciplinary authorities is only invoked in rare circumstances.<sup>176</sup>

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training policies due to economic pressures).

173. See MODEL RULES OF PROF'L CONDUCT R. 8.3 (2012); Vincent R. Johnson, *Legal Malpractice and the Duty to Report Misconduct*, 1 ST. MARY'S J. LEGAL MAL. & ETHICS 40, 46-47 & n.19 (2011).

174. See, e.g., *In re Riehlmann*, 891 So. 2d 1239, 1241-42 (La. 2005) (involving a lawyer who did not report to the state bar authorities a prosecutor friend who confessed privately that he had fabricated blood evidence in a case that led to a capital sentence); *In re Himmel*, 533 N.E.2d 790, 791-92 (Ill. 1988) (involving a lawyer, James J. Himmel, who agreed not to report another lawyer to the state bar authorities if that lawyer agreed to repay money he had misappropriated).

175. See 2 GEOFFREY C. HAZARD, JR. ET AL., *THE LAW OF LAWYERING* § 64.8-9 (3d ed. 2012 & Supp. 2013).

176. See generally Nikki A. Ott & Heather F. Newton, Note, *A Current Look at Model Rule 8.3: How Is It Used and What Are Courts Doing About It?*, 16 GEO. J. LEGAL ETHICS 747 (2003) (discussing the difficulties faced by lawyers in deciding when and how to comply with Rule 8.3).

The ABA has collected information about the types of cases that appear before disciplinary committees and the resulting discipline.<sup>177</sup> Disciplinary action overwhelmingly impacts small practitioners in the criminal and family law areas.<sup>178</sup> Most lawyers simply do not view violations of the rules as leading to any significant risk of discipline.<sup>179</sup> The failure of the regulatory system to impose accountability upon lawyers who violate the rules affects the profession's attitude towards such rules.

The ABA has sought to expand compliance with the Model Rules. In 1983, the ABA added Rules that impose disciplinary responsibility upon partners and supervisory lawyers.<sup>180</sup> These Rules stopped short of implementing a vicarious disciplinary responsibility, but did impose a duty to deal with ethics problems that are discovered at a time when the misconduct could be avoided or mitigated.<sup>181</sup> These provisions took one important step in implementing accountability in the enforcement of ethics rules; however, few disciplinary committees have used these Rules to actually discipline lawyers.<sup>182</sup> Two states have expanded this concept to include firm responsibility,<sup>183</sup> but similarly, those jurisdictions do not end up actually holding many law firms accountable for their lawyers' misconduct.<sup>184</sup>

The lack of accountability for lawyers who violate ethics rules has had an effect upon the extent to which lawyers follow these rules. Some might argue that little can be done about this problem, but one solution is reform of the lawyer disciplinary process. Many scholars have argued for peer review of law firms or performance ratings.<sup>185</sup> Of course, the ABA could finally explicitly acknowledge that disciplinary systems cannot be the only source of accountability for violations

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177. See Leslie C. Levin, *The Ethical World of Solo and Small Firm Practitioners*, 41 HOUS. L. REV. 309, 312-13 & n.14 (2004).

178. See *id.*

179. Ott & Newton, *supra* note 176, at 754.

180. See MODEL RULES OF PROF'L CONDUCT R. 5.1-3 (1983).

181. See *id.*

182. See *id.*; Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 4, 8-10 (1991) [hereinafter Schneyer, *Professional Discipline*] (identifying the trend of large law firms and individuals in large firms not being held accountable by disciplinary proceedings).

183. See *id.* at 15 n.91.

184. See *id.* at 15-16, 19.

185. See Susan Saab Fortney, *Am I My Partner's Keeper? Peer Review in Law Firms*, 66 COLO. L. REV. 329, 363-70 (1995) (suggesting a system for peer review); Susan Saab Fortney, *Are Law Firm Partners Islands unto Themselves? An Empirical Study of Law Firm Peer Review and Culture*, 10 GEO. J. LEGAL ETHICS 271, 306-08 (1995) (discussing accountability within law firms).

of the Rules, and encourage courts to enforce these rules in appropriate circumstances.<sup>186</sup>

*E. The ABA's Fear that the Rules Will Be Used Outside of the Disciplinary Process*

The ABA initially maintained that its Rules should be used only in disciplinary cases and not in any other context.<sup>187</sup> In part, this argument was based upon a view that the language used by the ABA was designed for the disciplinary context and not for other purposes.<sup>188</sup> Of course, other sources of regulation, such as the judiciary in malpractice cases, were free to create their own standards of conduct for lawyers. But the very nature of professional malpractice and negligence liability cases involves upon an inquiry into whether the professional acted reasonably under the circumstances. The inquiry of reasonableness, in turn, necessarily involves a consideration of norms of practice that professionals must follow.

Not surprisingly, when an organization such as the ABA establishes a set of norms for lawyer professionals, those standards after years of use become part of the definition of a reasonable lawyer under the circumstances. Courts in many circumstances began to allow litigants to admit the Rules as evidence of a standard of conduct.<sup>189</sup> Commonly, experts use the Rules in opining on standards of care. Similarly, courts, as regulatory bodies over litigation, began to refer to the ethics codes to set standards for conduct in court.<sup>190</sup> Rules, such as the provision dealing with communication with persons represented by counsel and the provision governing candor to the court, were relevant to the standards that judges began to apply.<sup>191</sup> The most significant development occurred when the Model Code was used by courts to establish conflicts of interest rules.<sup>192</sup> This development essentially made the Model Code

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186. See Wilkins, *supra* note 25, at 802-03 (presenting the view that the ABA believes that disciplinary agencies should maintain primary responsibility for monitoring lawyers and their professional obligations).

187. See MODEL RULES OF PROF'L CONDUCT scope (2012) ("[The rules] are not designed to be a basis for civil liability.").

188. See *id.*

189. See Charles L. Wolfram, *The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation*, 30 S.C. L. REV. 281, 285-86 (1979).

190. See *id.* at 289-90. Many federal courts adopted the Model Rules as their rules of conduct in litigation.

191. See *id.* at 309-10 (discussing the prohibition against direct or indirect communication with a party represented by counsel).

192. See Kenneth L. Penegar, *The Loss of Innocence: A Brief History of Law Firm Disqualification in the Courts*, 8 GEO. J. LEGAL ETHICS 831, 852-53 (1995).

extremely relevant in an important area of conflicts that had a concrete impact on whether lawyers could represent clients in litigation.

The ABA today is often influenced by collateral uses of its Codes in drafting the Model Rules, and often such influences lead to less than optimal results. For example, in Rule 1.5 on fees, the ABA refused to require that all fee agreements be in writing because of the fear that lawyers who did not have a written fee agreement would be unable to collect their fee.<sup>193</sup> Thus, the Rule was drafted to say “preferably in writing,” rather than making it an absolute requirement.<sup>194</sup> Another example is the original Rule 2.2 on intermediation.<sup>195</sup> That Rule had many bright-line tests before a lawyer could accept an intermediation and continue the representation of the multiple clients.<sup>196</sup> One of those bright-line tests required a lawyer to withdraw once the lawyer could no longer meet the underlying requirements.<sup>197</sup> That mandatory withdrawal, along with the other bright-line tests, caused Rule 2.2 to be a frequent source of malpractice litigation.<sup>198</sup> Ethics 2000 deleted Rule 2.2 and placed many of the concepts underlying that Rule in the comments for the current client conflicts Rules.<sup>199</sup>

The expanded use of the ethics Codes in other contexts has had an effect on the ABA. In a sense, it is sensitive to the ways in which these Rules are used outside of the disciplinary context when it creates new ethics Rules. Thus, in addressing a cutting edge issue such as alternative litigation funding, for example, one might fear the implications that limiting standards would create, therefore causing hesitation in addressing problems that otherwise might be examined. This fear of

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193. Gillers, *How to Make Rules for Lawyers*, *supra* note 19, at 403-04. Professor Gillers notes two additional reasons why the ABA may not wish to impose a writing requirement upon fee agreements. *See id.* First, lack of clarity benefits lawyers because they can prevail in disputes with less sophisticated clients. *Id.* at 405. Second, it is too difficult for lawyers to determine the fee at the outset when the scope of the representation remains unclear. *See id.* at 403-04.

194. *See* MODEL RULES OF PROF'L CONDUCT R. 1.5 (2012); Gillers, *How to Make Rules for Lawyers*, *supra* note 19, at 403-04.

195. Richard W. Painter, *Rules Lawyers Play By*, 76 N.Y.U. L. REV. 665, 679-80 (2001) (discussing Rule 2.2).

196. *See id.*

197. *See id.*

198. *See* Model Rule 2.2: Reporter's Explanation of Changes, ABA, [http://www.americanbar.org/groups/professional\\_responsibility/policy/ethics\\_2000\\_commission/e2\\_k\\_rule22rem.html](http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2_k_rule22rem.html) (last visited Nov. 23, 2013) (discussing the potential risks of Rule 2.2 outweighing the potential benefits).

199. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. (2012); David W. Raack, *The Ethics 2000 Commission's Proposed Revision of the Model Rules: Substantive Change or Just a Makeover?*, 27 OHIO N.U. L. REV. 233, 250 (2001); Model Rule 2.2: Reporter's Explanation of Changes, *supra* note 198.

addressing important issues because of the potential collateral effects has proven to be a major obstacle to fundamental reform of the Model Rules.

### *F. The Lack of Respect Towards Efforts to Regulate the Practice of Law*

One serious problem in implementing ethics rules is the fact that many lawyers simply do not respect the current system for regulating lawyers. Society in general finds the notion of lawyers' ethics to be a less than serious subject. But lawyers in particular have only been influenced by the areas where the ethics rules directly impacted their law practice. Before the courts imposed disqualification as a sanction for violation of conflicts of interest rules, legal ethics was viewed as a theoretical subject best left to academics.<sup>200</sup> After the introduction of disqualification as a trial tactic, law firms began to manage conflicts much more precisely to ensure that they could continue to represent their clients.<sup>201</sup> But lawyers often view the rules of professional responsibility as nuisances, rather than as an effort by the bar authorities to meaningfully regulate a profession.<sup>202</sup>

The ABA, the state bars, and law schools have sought to raise the level of respect for legal ethics and the professionalism of lawyers.<sup>203</sup> This effort began with the mandated instruction in legal ethics in all ABA accredited law schools and the introduction of professionalism programs.<sup>204</sup> Despite these requirements, some schools continue to treat ethics and professionalism as less than serious subjects, and thereby foster this lack of respect.<sup>205</sup>

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200. See Wilkins, *supra* note 25, at 828 & n.115. The disqualification of law firms on the grounds of a conflict of interest forced firms to implement structures to ensure that conflicts were properly discovered and managed. See *id.* at 828.

201. See *id.* at 828 & n.114.

202. See Edward D. Re, *The Causes of Popular Dissatisfaction with the Legal Profession*, 68 ST. JOHN'S L. REV. 85, 115-16 (1994).

203. See *id.* at 124-26.

204. See Kathleen Clark, *Legacy of Watergate for Legal Ethics Instruction*, 51 HASTINGS L.J. 673, 673-75 (2000) (noting that the requirement of instruction in professional responsibility arose after the involvement of lawyers in the Watergate scandal).

205. Some schools satisfy the ethics requirement through mini-courses offered between semesters. E.g., *Law-Related Courses Offered in Winter of 2010*, WASH. & LEE U., <http://www.wlu.edu/x36336.xml> (last visited Nov. 23, 2013). Others offer this through a series of lectures where students simply indicate attendance. E.g., *Ethics for the Wisconsin Lawyer – 2012*, U. WISC. L. SCH., <http://www.law.wisc.edu/clew/ethics.html> (last visited Nov. 23, 2013). Interestingly, New York and California now require that L.L.M. students who seek to take the bar examination take a full course in professional responsibility. See, e.g., *California Bar Examination Requirements for LLM Students – 2012-2013*, BERKLEY L., U. CAL., [http://www.law.berkeley.edu/files/California\\_Bar\\_Examination\\_Requirements\\_for\\_Professional\\_LLM\\_Students.pdf](http://www.law.berkeley.edu/files/California_Bar_Examination_Requirements_for_Professional_LLM_Students.pdf) (last visited Nov. 23, 2013); *LLM Degree Requirements*, N.Y. L. SCH., <http://www.nyls.edu/academics/>

In my opinion, a set of ethics rules that provides concrete guidance and clearer requirements would, in fact, raise the level of respect paid to the subject of legal ethics, similar to the way in which litigators respect the rules of civil procedure and evidence. Moreover, lawyers must be made aware of the policies that underlie specific ethics rules. This must be part of a larger process of educating lawyers and the public about the importance of ethical standards to maintaining and improving the quality of legal representation. When lawyers do not take the ethics rules seriously, the case for self-regulation is significantly undermined and it becomes easier for nonlawyers to treat law as just another business, which should be regulated by the normal governmental authorities (rather than self-regulated).

#### IV. IMPROVING THE DESIGN OF OUR ETHICS RULES

The design of an effective system for regulating lawyers must take into account the justifications for and objectives of such regulation. The ABA and the state bar authorities, however, have failed to articulate a coherent and complete statement of objectives for regulating lawyers' conduct.<sup>206</sup> An underlying assumption of this Article is that it is desirable for society to regulate lawyers under a code of ethics that guides lawyers to make consistent decisions when confronted with the same ethical issues; thus, consistency is an important objective of ethics rule design. In addition, there are a number of other objectives that need to be taken into account in drafting appropriate ethics rules.<sup>207</sup>

First, many regulations are designed to protect the public as potential consumers of legal services.<sup>208</sup> There are some decisions that lawyers make and actions they engage in that may injure clients, and this regulation is designed to protect the broad category of the public when they engage lawyers.<sup>209</sup> In part, some rules create duties to clients, while others impose disclosure obligations to allow clients to make informed

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graduate-and-certificate-programs/tax-ll-m/l-l-m-degree-requirements (last visited Nov. 23, 2013).

206. See Laurel S. Terry et al., *Adopting Regulatory Objectives for the Legal Profession*, 80 FORDHAM L. REV. 2685, 2719 (2012) ("[W]e submit that the United States has not adopted regulatory objectives for the legal profession.").

207. In a recent article on the topic of drafting ethics codes, Professor Gillers argues that the drafters must consider three constituencies when presenting courts with an ethics code: (1) "clients as a group"; (2) lawyers, because of their "agency status" in representing clients; and (3) "the justice system itself." Gillers, *How to Make Rules for Lawyers*, *supra* note 19, at 373-74. Professor Gillers argues that when the interests of these constituencies clash, the justice system should prevail above all, and client interests should prevail over the interests of lawyers. *Id.* at 374.

208. See *id.* at 382 (discussing the ability of minimum fee schedules to help ensure competent representation).

209. *Id.* at 374-75.



decisions.<sup>210</sup> Lawyers work in a learned profession, and the profession must maintain a high quality of legal services that are provided to clients because the clients themselves may not understand what constitutes quality.<sup>211</sup>

Second, some regulations protect third persons from injury caused by a client represented by a lawyer.<sup>212</sup> These rules address disclosure obligations when the client is using the lawyer in a crime or fraud, or when the lawyer knows that substantially certain death or bodily harm may result.<sup>213</sup> Other rules address fairness to third persons in negotiation, or when lawyers deal with third parties on behalf of clients in litigation or non-litigation situations.<sup>214</sup>

Third, some regulations protect the legal system from harm caused by clients who are represented by a lawyer.<sup>215</sup> In this context of regulation, lawyers are governed by obligations to the tribunal or legislature in situations in which clients may seek to use lawyers in inappropriate ways that inflict harm on the institutions themselves or third parties.<sup>216</sup> Ethics rules that do not protect the legal system would threaten the existence of the very judicial and legislative institutions that lawyers rely upon for the administration of justice.

Finally, some rules are designed to protect the legal profession and its efforts to regulate lawyers.<sup>217</sup> One could begin with the lawyer's duty to disclose another lawyer's misconduct.<sup>218</sup> But it also includes broader duties to core principles of lawyering such as loyalty, confidentiality, and communication in light of a lawyer's fiduciary duties to the client.<sup>219</sup> Rules that protect the profession also include obligations to provide access to the legal system in light of the profession's insistence that only lawyers offer legal services.<sup>220</sup> In examining the Codes promulgated by the ABA, one can usually find one or more of these justifications;

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210. See *id.* at 368-69.

211. Wright, *supra* note 36, at 9 (explaining the primary purpose as protecting clients).

212. See Gillers, *How to Make Rules for Lawyers*, *supra* note 19, at 370 (discussing rules concerning lawyer participation in a client fraud or crime).

213. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2012).

214. *Id.* R. 4.2-4.

215. See, e.g., *id.* R. 3.3.

216. See, e.g., *id.* (regarding candor to the court); *id.* R. 3.9 (regarding obligations to legislative bodies or administrative agencies).

217. See *id.* R. 8.1-5.

218. *Id.* R. 8.3.

219. Professor Carol Rice Andrews identifies the core duties of the legal profession that the Codes have sought to protect: litigation fairness, competence, loyalty, confidentiality, reasonable fees, and public service. See Andrews, *supra* note 32, at 1386.

220. See MODEL RULES OF PROF'L CONDUCT R. 6.1 (2012) (stating the responsibility to provide legal services free of charge).

however, such objectives are often not articulated and are usually presumed to underlie our system of lawyer regulation.

The focus of this Article has been to examine the way in which the ABA's Model Rules can be improved as a system of rules to regulate lawyers' conduct.<sup>221</sup> There are several important changes that could significantly improve rule design by the ABA.<sup>222</sup>

### A. Rule Design in the ABA

Under the current structure, amendments or revisions to the Rules can arise in two settings. When a president of the ABA has proposed a major revision of the Rules, the ABA forms a commission or committee to study and propose revisions to the Rules.<sup>223</sup> Such groups usually examine the entire body of rules in a systematic manner and then make a coordinated proposal that could be presented to the ABA House of Delegates at a single meeting or over the course of several meetings.<sup>224</sup> Between the times when the Model Rules undergo major revisions, the ABA has a process by which proposals can be made to the ABA House of Delegates.<sup>225</sup> The standing committees of the ABA can propose modifications to a provision of the Model Rules.<sup>226</sup> These committees often work with the Standing Committee on Professional Responsibility

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221. For an examination of rulemaking at the state level, see Lynn A. Baker, *The Politics of Legal Ethics: Case Study of a Rule Change*, 53 ARIZ. L. REV. 425, 438-39 (2011) (examining the rulemaking process in Texas regarding a change to the referral fee rule). Ultimately, state rulemaking is as important as ABA rulemaking because the state bar processes and the state supreme courts ultimately decide whether to adopt the ABA model provisions.

222. I acknowledge that the infrastructure needed to produce continuous and systematic rulemaking will require significant resources and the ABA has been under financial stress in recent times. However, regulation of the profession is one of the most important functions of the organization. Thus, the leadership should properly fund the efforts to study the legal profession and properly craft rules for inclusion in the Model Codes. The ABA could also partner with research institutions such as universities and nonprofit organizations (such as the Association of Corporate Counsel) in order to coordinate their efforts and save resources. Many academics and researchers could obtain funding from their institutions for collaborative work with the ABA, and, although ideally the ABA could do this on its own, it is clear that the ABA resources needed may not be available.

223. See, e.g., *ABA Commission on Ethics 20/20*, *supra* note 110 (discussing the reason for the creation of the Commission on Ethics 20/20); see also Schneyer, *Professionalism*, *supra* note 47, at 688.

224. See MODEL RULES OF PROF'L CONDUCT, Comm'n on Evaluation of Prof'l Standards, chair's intro. (2012) (discussing the process by which proposed changes are presented to the ABA House of Delegates).

225. See *id.*

226. AM. BAR ASS'N, CONSTITUTION AND BYLAWS: RULES OF PROCEDURE HOUSE OF DELEGATES 2012-2013 § 31.7 (2012) [hereinafter ABA CONSTITUTION], available at [http://www.americanbar.org/content/dam/aba/administrative/house\\_of\\_delegates/aba\\_constitution\\_and\\_bylaws\\_2012.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/aba_constitution_and_bylaws_2012.authcheckdam.pdf).

and the Center for Professional Responsibility to ensure that the proposal has broad support within the ABA structure.<sup>227</sup>

The decisionmaking body of the ABA is the House of Delegates.<sup>228</sup> No new Rule or amendment to an existing Rule will be adopted unless it can receive support of a majority of the members in the ABA House of Delegates.<sup>229</sup> A majority of the 560 members of the ABA House of Delegates is chosen by the states and state and local bar association members.<sup>230</sup> In a sense, this ensures that changes have broad support across the country and will more likely be adopted by the states. However, the voting process often resembles what happens in the U.S. House of Representatives. A majority of the ABA House of Delegates appears to represent lawyers who practice in medium and small law firms in law practices outside of the major metropolitan centers.<sup>231</sup> These representatives tend to be resistant to change and they tend to not have experience with some of the more aggressive abuses of the Rules. They also are resistant to adopting Rules that may change longstanding practices in their states.

One problem with the current structure is its failure to effect major reform in light of important developments in the legal profession. The ABA has had difficulty addressing issues such as: (1) ancillary business practices,<sup>232</sup> (2) multidisciplinary services involving lawyers,<sup>233</sup> (3) advertising in light of the Supreme Court decisions,<sup>234</sup> (4) defining unauthorized practice of law,<sup>235</sup> (5) outsourcing,<sup>236</sup> (6) pretexting and

227. See *CPR Policy Implementation Committee*, ABA, [http://www.americanbar.org/groups/professional\\_responsibility/policy/aboutUs.html](http://www.americanbar.org/groups/professional_responsibility/policy/aboutUs.html) (last visited Nov. 23, 2013).

228. See ABA CONSTITUTION, *supra* note 226, § 6.1.

229. *Id.* § 30.1.

230. *House of Delegates – General Information*, ABA, <http://www.americanbar.org/groups/leadership/delegates.html> (last visited Nov. 23, 2013).

231. See generally Alan E. DeWoskin, *Five Decades of Service*, GPSOLO, Mar.–Apr. 2012, at 10, available at [http://www.americanbar.org/publications/gp\\_solo/2012/march\\_april/five\\_decades\\_service.html](http://www.americanbar.org/publications/gp_solo/2012/march_april/five_decades_service.html) (describing the growth of the General Practice, Solo and Small Firm Division of the ABA).

232. See generally Schneyer, *Policymaking*, *supra* note 82 (discussing the ABA's difficulty in addressing the issue of ancillary businesses).

233. See generally John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 FORDHAM L. REV. 83 (2000) [hereinafter Dzienkowski & Peroni, *Multidisciplinary Practice*] (discussing the ABA's difficulty in addressing the issue of multidisciplinary practices like tax).

234. See generally Jan L. Jacobowitz & Gayland O. Heathcoat II, *Endless Pursuit: Capturing Technology at the Intersection of the First Amendment and Attorney Advertising*, 17 J. TECH. L. & POL'Y 63 (2012) (discussing the difficulty the ABA has had with regulating attorney advertising).

235. See Dzienkowski & Peroni, *Multidisciplinary Practice*, *supra* note 233, at 107-08, 110.

236. See Eileen Libby, *A Qualified Yes: U.S. Lawyers Must Manage Outsourcing Arrangements to Avoid Ethics Concerns*, A.B.A.J., Nov. 2008, at 32, 32.

dissemblance,<sup>237</sup> and (7) alternative litigation finance.<sup>238</sup> Each of these developments presents difficult issues of professional responsibility, and the structure of the ABA rulemaking process makes it difficult to enact meaningful reform.<sup>239</sup> One cannot be surprised that a senior lawyer in a law firm or a senior administrator in a bar association has little incentive to innovate. These lawyers already have their established practices and workload. Change brings uncertainty. The competitive atmosphere in the legal profession impedes change because small firms and those in more rural communities are at risk of competition from larger entities. So entrenchment and support for the status quo make sense from the perspective of the members who hold positions in the ABA House of Delegates.

It is important to note that, although support for the status quo may be in the interest of a senior lawyer who may have less than a decade of practice left, it may not make sense from the perspective of the law firms as ongoing institutions or the more junior lawyers in those firms. The short-term view causes the profession to lose control over the regulation of new practices. The status quo may result in a situation in which the profession cannot, at a later date, guide the practices that they refuse to acknowledge at this time.

An example from the 1990s involves the regulation of lawyers' involvement in providing ancillary business services to clients. In 1991, the ABA House of Delegates enacted a new Model Rule 5.7 that sought

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237. See generally Kathryn M. Fenton, *Ethical Implications of Lawyer Pretexting*, ABA, [http://www.americanbar.org/content/dam/aba/publications/antitrust\\_law/at311550\\_fenton\\_ethical\\_implications.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/antitrust_law/at311550_fenton_ethical_implications.authcheckdam.pdf) (last visited Nov. 23, 2013) (discussing the ethical implications that arise concerning pretexting).

238. See James Podgers, *On the Lookout: Ethics 20/20 Commission Issues White Paper About Alternative Litigation Financing*, A.B.A. J., Dec. 2011, at 61, 61 (discussing the ABA's decision that the growing use of alternative litigation financing did not require an adjustment to professional conduct rules).

239. The ABA, through its Multijurisdictional Practice of Law Commission, did propose and adopt in the ABA House of Delegates a new Model Rule 5.5 as well as several Model provisions in order to promote a national practice of law. See MODEL RULES OF PROF'L CONDUCT R. 5.5 (2012). Unfortunately, some states refused to follow the Model Rules, and, in fact, enacted more stringent controls on out-of-state lawyers practicing law within their jurisdictions. *State Implementation of ABA MJP Policies*, ABA, [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/recommendations.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/recommendations.authcheckdam.pdf) (last visited Nov. 23, 2013) (showing state policies on multijurisdictional practice). The rules for in-house counsel ended up far worse off after the ABA efforts than before the ABA efforts. See Arthur F. Greenbaum, *Multijurisdictional Practice and the Influence of Model Rule of Professional Conduct 5.5 – An Interim Assessment*, 43 AKRON L. REV. 729, 758-61 (2010) (discussing unintended consequences of Rule 5.5). In part, the ABA did not properly educate the state bars and the state supreme courts in an effort to obtain wider adoption of the ABA positions. See Greenbaum, *supra*, at 737-42 (discussing state variations to Rule 5.5).

to deal with lawyer-provided ancillary business services.<sup>240</sup> It expressly required that such services be provided only to the clients of the law firm and it required disclosure to the clients.<sup>241</sup> But, in 1994, the ABA House of Delegates replaced this Rule with a provision that resembles what exists today.<sup>242</sup> The existing practices of law firms that provided ancillary business services such as title work, real estate brokerage services, and lobbying were significantly threatened by the 1991 version of the Rule.<sup>243</sup> Thus, the new version made several compromises that simply ignored key questions about ancillary business services.<sup>244</sup> Must a client be told about a lawyer's investment in an ancillary business? If the client is told that the services are distinct from legal services, must they be given an opportunity to obtain those business services from another provider? Can lawyers accept referral fees from nonlawyers for sending clients to the nonlaw business provider without disclosure?<sup>245</sup> The point is that important issues continue to be left unresolved because of the problems with addressing fundamental reform in the ABA House of Delegates.

Another example in the 2000s involved the consideration of multidisciplinary practice ("MDP") of law.<sup>246</sup> A very important MDP Commission led by Sherwin Simmons and Mary Daly was unable to persuade the ABA House of Delegates to accept any meaningful reform on alternative ways of delivering legal services.<sup>247</sup> Thus, the ABA chose to ignore developments in this area and fell behind in regulating such lawyer and nonlawyer partnerships in delivering legal services. Some in the ABA viewed this as a major victory for the core principles of lawyering, especially after the involvement of Arthur Andersen in the Enron scandal.<sup>248</sup> However, this "victory" ignores the existence of MDPs

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240. See MODEL RULES OF PROF'L CONDUCT R. 5.7 (1992); Dennis J. Block et al., *Model Rule of Professional Conduct 5.7: Its Origin and Interpretation*, 5 GEO. J. LEGAL ETHICS 739, 800-02 (1992).

241. See MODEL RULES OF PROF'L CONDUCT R. 5.7 (1992).

242. See MODEL RULES OF PROF'L CONDUCT R. 5.7 (1994).

243. See Block et al., *supra* note 240, at 797-801.

244. Compare MODEL RULES OF PROF'L CONDUCT R. 5.7 (1994) (containing the new Rule 5.7), with MODEL RULES OF PROF'L CONDUCT R. 5.7 (1992) (containing the old Rule 5.7).

245. See John S. Dzienkowski & Robert J. Peroni, *Conflicts of Interest in Lawyer Referral Arrangements with Nonlawyer Professionals*, 21 GEO J. LEGAL ETHICS 197, 206 (2008) (stating that the Model Rules do not address the issue of a lawyer making referrals to a nonlawyer).

246. See Paul D. Paton, *Multidisciplinary Practice Redux: Globalization, Core Values, and Reviving the MDP Debate in America*, 78 FORDHAM L. REV. 2193, 2203-04 (2010) (discussing the ABA debates concerning MDP).

247. See Dzienkowski & Peroni, *Multidisciplinary Practice*, *supra* note 233, at 127-28, 146-47.

248. See Paton, *supra* note 246, at 2205-06 (discussing the argument that lawyers would continue to "expand multidimensional professional service offerings").

in this country that go unregulated.<sup>249</sup> And, it simply let other countries move into a leadership role in regulating MDPs.<sup>250</sup> In retrospect, the ABA's decision was extremely shortsighted and shows a significant weakness in how lawyers are regulated in this country.

In 2009, many welcomed with great hope ABA President Lamm's announcement of the creation of Ethics 20/20 in order to conduct a comprehensive review of the Model Rules in light of developments in technology and global law practice.<sup>251</sup> Some of the promise came from the fact that Lamm had an international law practice background and realized that the regulation of lawyering could no longer be contained within national borders.<sup>252</sup> However, the Commission, faced with the political pressures of advancing change in the ABA, abandoned efforts to change Rules dealing with multijurisdictional practice, nonlawyer ownership in law firms,<sup>253</sup> and alternative litigation financing.<sup>254</sup> Excellent working papers were produced, but no effort was made to address these issues within the regulatory structure of the Model Rules.<sup>255</sup> Instead of presenting a comprehensive set of changes that fundamentally reformed the entire document, Ethics 20/20 proposed a few piecemeal Model Rules changes to the ABA House of Delegates, which were ultimately adopted.<sup>256</sup> It is an understatement to say that the final work product of Ethics 20/20 was a major disappointment to those who believed that the Model Rules needed significant revision in light of the changes in the legal profession.

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249. See Dzienkowski & Peroni, *Multidisciplinary Practice*, *supra* note 233, at 149.

250. See Sydney M. Cone, III, *International Legal Practice Involving England and New York Following Adoption of the United Kingdom Legal Services Act of 2007*, 28 NW. J. INT'L L. & BUS. 415, 422, 424 (2008) (stating that the United Kingdom studied alternative business arrangements and implemented a system for regulating them in delivering legal services to the public).

251. See Gillers, *How to Make Rules for Lawyers*, *supra* note 19, at 397-98.

252. See Carolyn Lamm Named to the National Law Journal's 2013 "100 Most Influential Lawyers in America" List, WHITE & CASE (Mar. 25, 2013), <http://www.whitecase.com/awards-03262013/#.Ui5avvZxvBw> (recognizing Lamm for her work in the field of international law).

253. Gillers, *How to Make Rules for Lawyers*, *supra* note 19, at 400-01 (discussing the decision of Ethics 20/20 to abandon consideration of any Rule that would allow nonlawyer ownership in a law firm).

254. James Podgers, *Ethics 20/20 Commission Suspends Campaign to Draft a Proposal on Nonlawyer Ownership of Law Firms*, A.B.A. J. (Apr. 16, 2012, 1:06 PM), [http://www.abajournal.com/news/article/ethics\\_20\\_20\\_commission\\_suspends\\_campaign\\_to\\_draft\\_a\\_proposal\\_on\\_nonlawyer](http://www.abajournal.com/news/article/ethics_20_20_commission_suspends_campaign_to_draft_a_proposal_on_nonlawyer).

255. See *Work Product*, *supra* note 109 (providing numerous drafts, proposals, and papers regarding changes to the Model Rules).

256. See *House of Delegates Filings*, ABA, [http://www.americanbar.org/groups/professional\\_responsibility/aba\\_commission\\_on\\_ethics\\_20\\_20/house\\_of\\_delegates\\_filings.html](http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/house_of_delegates_filings.html) (last visited Nov. 23, 2013) (summarizing that various reports and resolutions to the ABA House of Delegates have been filed over time).

Despite the ABA's dominance in the promulgation of the ethics codes over the years, the ABA has lost much effective power over fundamental reform. In other words, the structure of the ABA is such that few, if any, fundamental reforms have any chance of adoption by the ABA House of Delegates. Thus, the drafting committees are either left with preparing something that would be certain to be rejected, such as the efforts with MDP, or drafting piecemeal changes that can be adopted, but, in the end, do not address issues of fundamental reform. Some may argue that the changes made in 2003 with respect to confidentiality and corporate entity fraud constituted fundamental reform that undercuts this analysis.<sup>257</sup> But, those changes were made under the threat of Securities and Exchange Commission ("SEC") rulemaking that would have preempted the effect of state ethics rules on confidentiality.<sup>258</sup> Thus, the ABA, faced with losing complete control over regulating the disclosure duties of corporate lawyers, chose to make changes that were likely to forestall more aggressive SEC action.

Some might argue that the changes adopted by the Multijurisdictional Practice of Law Commission ("MJP Commission") were another prominent example of fundamental reform.<sup>259</sup> The MJP Commission did address a growing problem of lawyers practicing across state lines and took a rather progressive approach to the issue.<sup>260</sup> The issue had existed for years, but lawyers had practiced in other jurisdictions with few consequences.<sup>261</sup> The issue of out-of-state practice was raised to a crisis level when the California Supreme Court decided that an out-of-state law firm could not collect a fee for representing a client in an arbitration proceeding conducted in California.<sup>262</sup> This decision gave the ABA a national imperative to produce quick and

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257. See Lonnie T. Brown, Jr., *Foreword: Ethics 2000 and Beyond: Reform or Professional Responsibility as Usual*, 2003 ILL. L. REV. 1173, 1176-77 (supporting the ABA's adoption of revisions to Rules 1.6 and 1.13).

258. See *id.* (noting that ABA revisions of Rules 1.6 and 1.13 were consistent with related SEC rules).

259. Professors Gillers and Green were instrumental in producing an excellent report and advocating the need for change with the ABA. See *Commission on Evaluation of the Rules of Professional Conduct – Meeting Minutes*, ABA (Feb. 2, 2012), [http://www.americanbar.org/groups/professional\\_responsibility/policy/ethics\\_2000\\_commission/02\\_02mtg.html](http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/02_02mtg.html).

260. See Stephen Gillers, *Lessons from the Multijurisdictional Practice Commission: The Art of Making Change*, 44 ARIZ. L. REV. 685, 712-16 (2002) [hereinafter Gillers, *Lessons from the Multijurisdictional Practice*].

261. See Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, S. TEX. L. REV., Nov. 1995, at 665, 685-86 (noting that many lawyers are not disciplined for practicing law in jurisdictions in which they are not admitted).

262. See *Birbrower, Montalbano, Conon & Frank, P.C. v. Superior Court*, 949 P.2d 1, 3, 13 (Cal. 1998).

effective reform,<sup>263</sup> and the MJP Commission produced a revision of Rule 5.5 and several other pronouncements on an expedited schedule.<sup>264</sup> Rule 5.5 has been adopted in many states; however, some states have imposed their own special rules to restrict some types of out-of-state presence within their borders.<sup>265</sup> Most of these efforts have been directed at in-house counsel. And, some have imposed limits on pro hac vice and other types of representations.<sup>266</sup> The MJP Commission sought to accomplish fundamental reform in an area of significant confusion; however, localized anticompetitive sentiments led some states away from the ABA mission to liberalize cross-border practice.<sup>267</sup> Such state efforts threaten the power of the ABA and demonstrate why fundamental reform will be difficult to achieve.

In my view, the ABA should examine its rulemaking in a systematic way and create a structure that is able to implement effective change. Currently, Model Rules are developed and adopted the same way the ABA adopts all changes—through the House of Delegates structure.<sup>268</sup> The key is to reform the process of promulgating Rules so that interest politics are lessened, and the resulting ethics Code reflects significant thought and research to achieve a consensus.<sup>269</sup> Perhaps, the Center for Professional Responsibility could undertake a more active

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263. Gillers, *Lessons from the Multijurisdictional Practice*, *supra* note 260, at 686-89 (speculating on whether *Birbrower* was the perfect storm in terms of holding, state, and implications across the country). *Birbrower* involved an out-of-state arbitration agreed upon by the parties, handled by New York lawyers for a California corporation (whose major shareholder was a New York citizen) and a New York client. *See Birbrower, Montalbano, Conon & Frank, P.C.*, 949 P.2d at 3; Gillers, *Lessons from the Multijurisdictional Practice*, *supra* note 260, at 689 n.22.

264. The ABA issued model guidelines on topics such as admission, admission on motion, licensing of a legal consultant, and temporary practice by foreign lawyers. *See Commission on Multijurisdictional Practice: About the Commission*, *supra* note 88.

265. *See* Carol A. Needham, *The Changing Landscape for In-House Counsel: Multijurisdictional Practice Considerations for Corporate Law Departments*, 43 AKRON L. REV. 985, 997-98 (2010).

266. *See, e.g.*, Jane Hawthorne Merrill, Note, *Multijurisdictional Practice of Law Under the Revised South Carolina Rules of Professional Conduct*, 57 S.C. L. REV. 549, 557-60 (2006) (discussing South Carolina's limiting of pro hac vice admission).

267. Wolfram, *supra* note 261, at 681.

268. Gillers, *How to Make Rules for Lawyers*, *supra* note 19, at 410.

269. Gillers has proposed that the drafting and approval process include a burden of proof concept. *See id.* at 408-10. Gillers proposed:

[B]urden of proof should be identified and defended when the wisdom of a rule is based on predictions about future harm. Furthermore, when a proposed rule interferes with the economic liberty of lawyers and clients, the proponents should presumptively have some, even if modest, obligation to justify the interference.

*Id.* at 410. Such a standard would limit somewhat attacks on proposed changes based upon self-interest and anti-competitiveness by requiring the opponents to demonstrate that the proposal undercuts legitimate core interests of lawyer regulation.



role in the reform process by making a systematic and periodic review of the Rules and formulating draft proposals for change.

Obviously, empowering key individuals within the ABA structure would go a long way towards implementing change. Much of the work of the ABA committees is driven by the personalities of the leaders. A strong leader with a clear agenda can push through much work, while a less focused leader will not be able to put much on the agenda. Personalities make a great deal of difference in the way in which rulemaking can take place. Professor Stephen Gillers has proposed that the drafting committees include nonlawyers so as to represent the interests of the public and to aid in drafting Rules that can be understood by nonlawyers.<sup>270</sup> Aside from changes in structure, the ABA needs to create a vehicle for educating its House of Delegates about the need for Rule changes, and how the proposals address those needs.

Up to this point, this discussion has focused upon the design of codes of ethics for all lawyers. Some scholars have argued that some legal ethics issues that arise in specific contexts of law practice cannot be adequately addressed in general ethics codes.<sup>271</sup> As the argument goes, such issues require regulations that are context specific.<sup>272</sup> In other words, a well-designed ethics rules system for regulating lawyers could impose specific and different rules for tax lawyers, banking lawyers, and securities lawyers.<sup>273</sup> In some cases, those rules are codified into statutes and regulations, but in other cases, they may simply be part of projects that produce guidelines.<sup>274</sup> In the area of legal ethics, the ABA has been involved in drafting and presenting to its House of Delegates for approval Standards for the Administration of Criminal Justice.<sup>275</sup> Such

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270. *Id.* at 410-11. Ronald Minkoff, a partner in the firm of Frankfurt, Kurnit, Klein, & Selz, P.C. and a leading lawyer involved in legal ethics committees in New York and in the ABA, makes a powerful and persuasive argument for the inclusion of client perspectives in the drafting process. As Minkoff states, the only client present at the table is the Association of Corporate Counsel organization that represents, through their in-house lawyers, the corporate clients that receive legal services on a continual basis.

271. See generally David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye*, *Scholar*, 66 S. CAL. L. REV. 1145 (1993) (discussing the inability of general ethics rules to address the needs of certain firms in specific contexts).

272. See *id.* at 1151-54.

273. See *id.* (supporting context based regulation). But see Thomas D. Morgan & Robert W. Tuttle, *Legal Representation in a Pluralist Society*, 63 GEO. WASH. L. REV. 984, 998 n.77 (1995) (examining some of the costs of context specific regulation of lawyers).

274. See, e.g., ABA, STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION, intro., at xiii-xiv (3d ed. 1993) [hereinafter STANDARDS FOR CRIMINAL JUSTICE], available at [http://www.americanbar.org/content/dam/aba/publications/criminal\\_justice\\_standards/prosecution\\_defense\\_function.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/prosecution_defense_function.authcheckdam.pdf) (providing guidance to prosecutors and criminal defense attorneys).

275. See *Criminal Justice Section: Criminal Justice Standards Committee*, ABA,

standards are extremely detailed guidelines for prosecutors and defense lawyers in the practice of criminal law.<sup>276</sup> They form best practices through the creation of “soft,” nonbinding legal principles, rather than codes of conduct adopted by state bars.<sup>277</sup> Such standards have become extremely valuable in criminal law practice.<sup>278</sup> One can see that this form of contextual regulation, utilizing the soft law approach, should be expanded to other areas of the law.

### *B. Improving Clarity of the Concepts*

Rule drafting is a difficult task, particularly when rules are written in light of past practices but then must be interpreted in a changing legal profession. Language written in the early 1980s is tested thirty years later. It is difficult to find a code that would not need change during that length of time.

Before I examine a few specific Rules where open terms and vague concepts hinder uniform interpretation, one should consider carefully two important lines of scholarship that have examined the Model Rules in detail. In one of these lines of scholarship, Professor Nancy Moore eloquently discusses how many provisions in the Model Rules fail to address whether scienter is needed to prove a violation.<sup>279</sup> Scienter, or mens rea, of the actor is included in some of the Rules, but its absence in other Rules raises questions, such as whether the drafters intended a strict liability standard.<sup>280</sup> Although this article generated much discussion and debate,<sup>281</sup> Ethics 20/20 failed to methodically examine the Rules to implement a systematic consideration of lawyer scienter. Such an effort would have signaled to the profession that the ABA is concerned about enforcement and would resolve the serious questions raised by Moore’s article.<sup>282</sup> Instead, I count this as another important failure of the Ethics 20/20 project.

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<http://www.apps.americanbar.org/dch/committee.cfm?com=CR105000> (last visited Nov. 23, 2013).

276. See STANDARDS FOR CRIMINAL JUSTICE, *supra* note 274, intro., at xiii-xiv.

277. See *id.*

278. See *Criminal Justice Section: Criminal Justice Standards Committee*, *supra* note 275.

279. See generally Nancy J. Moore, *Mens Rea Standards in Lawyer Disciplinary Codes*, 23 GEO. J. LEGAL ETHICS 1 (2010) (discussing the fact that many of the Model Rules do not require a specific mental state in order for a lawyer to be in violation of the Rule).

280. *Id.* at 11-25 (examining arguments for strict liability).

281. See, e.g., Donald R. Lundberg, *Mental State Under the Rules of Professional Conduct*, RES GESTAE, Sept. 2010, at 23, 23.

282. See Moore, *supra* note 279, at 31 (discussing how Ethics 20/20 failed to discuss the use of strict liability for Rule 1.7).

Under the other line of scholarship, several scholars have advocated a contractarian approach to legal ethics,<sup>283</sup> and argued that the Rules should be subject to modification by lawyer-client agreement. For example, some argue that corporate clients and sophisticated parties have better information about which conflicts of interest rules are important to them and which can be changed by contract.<sup>284</sup> In several places in the Rules, lawyers and clients can agree to change the default rules, but scholars have argued that the ABA should expand the number of Rules that could be subject to modification by contract.<sup>285</sup> Professor Richard W. Painter contends that the Model Rules could be substantially improved by making clear which Rules are default-based standards, subject to opt-out by agreement, and which Rules are immutable.<sup>286</sup> Additionally, he argues that lawyers and law firms could have opt-in rules that bridge the gap in areas where the current Codes do not adequately protect clients.<sup>287</sup> In other words, clients and lawyers could agree to increase the standards based upon their particular circumstances.<sup>288</sup>

Some have argued that, even under the current Rules, lawyers should feel free to modify rules that are not expressly restricted from modification.<sup>289</sup> In other words, if the current language of the Rule does not prohibit agreement with the client, the lawyer should be able to use reasonable agreements to implement the rules. An example of such an argument involves Rule 1.8(g), which requires a lawyer who participates in an aggregate settlement agreement to inform each client about the details of the settlement received by the other clients.<sup>290</sup> Some scholars argue that clients should be able to delegate the power to accept an aggregate settlement agreement in advance to a lawyer, and the lawyer's division of the proceeds could be done in accordance with a predetermined formula.<sup>291</sup> In light of these arguments, one would think

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283. See generally Painter, *supra* note 195 (advocating for a contractarian approach to legal ethics). Professor Richard W. Painter advocates additional default and opt-in rules, along with law firms developing their own codes of ethics to govern their law practices. See *id.* at 732-34.

284. See Jones & Davis, *supra* note 167, at 591-92, 595-96; Painter, *supra* note 195, at 683-84.

285. See Painter, *supra* note 195, at 684, 718 (advocating for an expansion of the number of rules that could be subject to modification by contract).

286. *Id.* at 670, 731. Professor Larry E. Ribstein advocates that many ethics rules should be default rules capable of modification. See Ribstein, *supra* note 118, at 1753-56.

287. Painter, *supra* note 195, at 734.

288. For example, some clients could insist that their law firms adopt a higher standard on conflicts of interest during their representation and memorialize such language in the retainer agreement. See *id.* at 682.

289. See *id.* at 674-78.

290. See MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (2012).

291. See Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rules*,

that the ABA would address these situations in its review of the Rules, and make considered judgments about when a contractarian model might be desirable. However, except for the amendment of the Comments to Rule 8.5 involving choice-of-ethics law,<sup>292</sup> Ethics 20/20 largely ignored this model in its review and revision of the Rules. Although I am somewhat skeptical that the contractarian model should occupy a dominant role in the regulation of lawyers,<sup>293</sup> Ethics 20/20's failure to address these questions leaves open arguments that lawyers can contract around individual ethics Rules.

Since its adoption, the Model Rules has contained a section of definitions. Currently, the terminology section defines fourteen terms.<sup>294</sup> In some of the Comments throughout the Rules, the drafters have sought to include definitional concepts.<sup>295</sup> However, the Rules often leave important concepts open and thus subject to interpretation. This allows lawyers and law firms to argue that Rules do not apply to their situation.

The most obvious examples arise in the conflicts of interest rules. In the 1983 version of the Model Rules, the ABA included Model Rule 2.2 on the lawyer as intermediary.<sup>296</sup> The first Comment stated that a lawyer acts as an intermediary when representing conflicting interests.<sup>297</sup> The problem was that very few lawyers ever admitted to practicing intermediation.<sup>298</sup> The definition was sufficiently overbroad and vague that lawyers effectively could choose whether or not they fell within its requirements.

Other problems exist in the conflicts of interest rules. The courts have developed different interpretations of the concept of "substantially

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32 WAKE FOREST L. REV. 733, 763-64 (1997). *But see* Thomas D. Morgan, *Client Representation vs. Case Administration: The ALI Looks at Legal Ethics Issues in Aggregate Settlements*, 79 GEO. WASH. L. REV. 734, 741-43 (2011) (discussing cases and ethics opinions discouraging aggregate settlement agreements); Carol A. Needham, *Advance Consent to Aggregate Settlements: Reflecting on Attorneys' Fiduciary Obligations and Professional Responsibility Duties*, 44 LOY. U. CHI. L.J. 511, 513-16 (2012) (discussing the shortcomings of aggregate settlements).

292. See MODEL RULES OF PROF'L CONDUCT R. 8.5 cmt. (2012).

293. In my view, the application of the contractarian approach may be workable in at least some circumstances when the only interests at stake in a Rule are client interests and the client provides informed consent to the variance in the Rule to be applied to the lawyer's conduct. But, when other important interests are at stake, such as protecting the legal system or third persons, the varying standards resulting from a contractarian approach would impose costs upon those outside of the bargain and makes that approach seem far less workable and appropriate in those circumstances.

294. See MODEL RULES OF PROF'L CONDUCT R. 1.0 (2012).

295. See, e.g., *id.* R. 4.2 cmt. (referring to Rule 1.0(f) to define what knowledge means as applied to Rule 4.2).

296. See MODEL RULES OF PROF'L CONDUCT R. 2.2 (1983).

297. See *id.* R. 2.2 cmt.

298. See Dzienkowski, *supra* note 56, at 768-70 (discussing the failure of Rule 2.2 to include a coherent definition of the word "intermediary").

related” matters, and the Model Rules define the concept but take no position on which interpretation should govern.<sup>299</sup> The Ethics 2000 revision of the Model Rules introduced the concept of a personal conflict of interest into Model Rules 1.7 and 1.10; however, the term “personal conflict of interest” is not adequately defined.<sup>300</sup> When the Rules fail to define such a term precisely, lawyers are essentially left to develop and apply their own interpretations of the concept to determine whether a conflict exists or whether imputation of the conflict to the firm must occur.

There are many other areas in which terms and concepts are not properly defined. The Rules dealing with contingent fees largely presume the typical or standard personal injury contingent fee, but do not recognize the many other types of contingent and hybrid fee structures that have been developed in recent years.<sup>301</sup> The failure of the ABA to monitor and keep current a Rule on such a basic issue as fees demonstrates the ABA’s view that either change is too difficult to adopt and implement through the ABA’s regulatory structure, or that basic concepts can be reinterpreted by lawyers and others, without any change needing to be made in the language of the rules, when developments occur in practice.

Apart from the drafting of ethics Codes, the ABA has used its Standing Committee on Ethics and Professional Responsibility to draft formal ethics opinions.<sup>302</sup> In a typical year, this committee issues three or four opinions on a wide-ranging array of topics.<sup>303</sup> Some of the topics address how new technology interacts with the application of Model

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299. See Marnie Smith, Comment, *Recent Attitudes Toward the “Substantial Relation” Test Where There Are Multiple Clients in Successive Relationships*, 16 J. LEGAL PROF. 301, 306-10 (1991) (discussing the substantial relationship test).

300. See STANDARDS, RULES & STATUTES, *supra* note 33, at 25-26, 40-41. Comments 10, 11, and 12 give examples of financial interests, personal relationships, and sexual relationships as personal conflicts of interest, respectively. See MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. (2012). If an affected lawyer’s conflict resulted from a business partnership that the lawyer had with another lawyer or witness, is that a personal conflict or a professional conflict? Suppose the conflict arises from a remote ownership in real estate, such as a potential beneficiary—is that a personal or professional conflict?

301. See MODEL RULES OF PROF’L CONDUCT R. 1.5 (2012).

302. See generally ABA, AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY: COMPOSITION, JURISDICTION, AND RULES OF PROCEDURE (1971), reprinted in THOMAS D. MORGAN & RONALD D. ROTUNDA, MODEL CODE OF PROFESSIONAL RESPONSIBILITY, MODEL RULES OF PROFESSIONAL CONDUCT, AND OTHER SELECTED STANDARDS INCLUDING CALIFORNIA RULES ON PROFESSIONAL RESPONSIBILITY 457 (1991) (tasking the ABA Standing Committee on Ethics and Professional Responsibility with drafting ethics opinions).

303. See *Ethics Opinions: Latest Opinions*, ABA, [http://www.americanbar.org/groups/professional\\_responsibility/publications/ethics\\_opinions.html](http://www.americanbar.org/groups/professional_responsibility/publications/ethics_opinions.html) (last visited Nov. 23, 2013) (showing the latest ethics opinions issued).

Rules.<sup>304</sup> In some cases, the ethics opinions seek to expand upon concepts in the Codes, but in other cases, they attempt to resolve questions that have been left open by the drafters.

Ethics opinions can play an important role in the development of the law of lawyering. New practices and new technology can fall within existing Rules, and the issuance of an ethics opinion can give lawyers comfort in how to resolve a particular problem.<sup>305</sup> However, it is dubious to use ethics opinions to fill in clarity when the drafters chose to leave language that is open to interpretation. And, of course, it is improper for the drafters of ethics opinions to reinterpret Rules to say what they clearly do not say, as this essentially gives the opinion drafters the power to change the meaning of the Codes without going through the ABA rulemaking procedures.<sup>306</sup>

The ABA, either through the Center for Professional Responsibility or through another body, should keep track of when ethics opinions and judicial opinions address interpretive issues that are not answered within the Rules.<sup>307</sup> And, it should add interpretive comments that improve the clarity and the application of the Rules for regulating lawyers. Of course, the ABA could decide to let a particular Rule percolate in terms of options for interpretation in the courts and ethics committees. And, in such cases, those Rules could make clear that the ABA is not making a choice on an interpretive question at that particular time, and that a decision will be made in the future. The choices on drafting need to be made with intellectual rigor, backed by high standards of analysis, research, and scholarship.<sup>308</sup>

With all of the resources available to the ABA, it should be able to keep track of developments, and, instead of simply reporting on them, use such developments in methodically improving the Rules. The

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304. See, e.g., ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 459 (2011) (discussing a lawyer's duty of confidentiality under the Model Rules in light of new smartphone technology).

305. See *id.*

306. See Lawrence K. Hellman, *When "Ethics Rules" Don't Mean What They Say: The Implications of Strained ABA Ethics Opinions*, 10 GEO. J. LEGAL ETHICS 317, 334-36 (1997) (arguing that the committee should use a more principled view of interpreting ethics codes when issuing opinions). For an excellent article critiquing the analysis of ABA ethics opinions interpreting the Model Code, see Ted Finman & Theodore Schneyer, *The Role of the Bar Association Ethics Opinions in Regulating Lawyer Conduct: A Critique of the Work of the ABA Committee on Ethics and Professional Responsibility*, 29 UCLA L. REV. 67, 67-90 (1981).

307. Professor Gillers calls for the creation of a permanent committee to "foresee issues when or even before they appear above the horizon and to gather the data that will assist the organization before it is imperative to respond." Gillers, *How to Make Rules for Lawyers*, *supra* note 19, at 412.

308. Professor Gillers refers to this as a requirement of intellectual quality. See *id.* at 406.

regulation of lawyers is a seamless web that needs careful monitoring and the ABA should facilitate a careful study of the Rules in action.

*C. Focusing on Interests at Stake and Anticipating  
Enforcement of the Provisions*

In the 1990s, David Wilkins and others wrote powerful articles examining the regulation of the legal profession.<sup>309</sup> Those articles examined the Rules from the perspective of the interests at stake.<sup>310</sup> Is a particular ethics rule seeking to protect the client, the court, the legal profession, or third persons? Interest stake analysis would help significantly in the development of the Model Rules.

In drafting Rules for regulating lawyers' conduct, the ABA should anticipate how such Rules would be enforced. In other words, is it likely that the Rules will be enforced through the disciplinary process, the malpractice lawsuit, or in a litigation forum? Each forum in which the rule is likely to be enforced has different evidentiary rules and requires different standards of proof. Disciplinary cases in most states are processed through an administrative tribunal, and the inquiry is quite often limited to the narrow question of whether the lawyer violated a provision of the state ethics code.<sup>311</sup> Malpractice cases that involve direct adversity between the lawyer and the former client or injured person could eventually end up before a jury.<sup>312</sup> Litigation sanctions fall under the power of the judge to manage litigation and enforce the rules of the tribunal.<sup>313</sup> On the most basic level, these sanctions will include conflicts of interest disqualification motions, where the interests of the current client and the lawyer are usually aligned, but they could involve other matters as well.

Malpractice and disciplinary cases typically arise months and years after the conduct in question. Some of the documentary evidence may no longer be available. Issues of proof are important, but much of the proof may be present only in the memories of the witnesses (which may be hazy after the passage of years). In malpractice cases, plaintiffs will use the discovery process to gain access to law firm records and the testimony of the responsible actors.<sup>314</sup> In the disciplinary case, the power

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309. See, e.g., Wilkins, *supra* note 25, at 803-04.

310. See, e.g., *id.* at 815-17.

311. See Schneyer, *Professional Discipline*, *supra* note 182, at 3-4.

312. See, e.g., Note, *supra* note 7, at 1105-06 (giving an example of a malpractice case in which there was a jury verdict).

313. See, e.g., Fred C. Zacharias & Bruce A. Breen, *Rationalizing Judicial Regulation of Lawyers*, 70 OHIO ST. L.J. 73, 99-100 (2009).

314. See generally Thomas P. McGarry & Robert A. Chapman, *Litigating the Legal*

of the state bar prosecutor to compel production of records will be the primary means of gaining access to the information.<sup>315</sup> In drafting Rules that are likely to be enforced in the discipline and malpractice context, the ABA should take such factors into account.

For example, where the Model Rules call for lawyers to conduct an analysis or evaluation, the Rules should require that such evaluation be supported by research and a lawyer's affirmation that the analysis has been conducted and the applicable standard has been met. In the current conflicts of interest area, a law firm should be required to conduct a careful review to determine whether it can provide competent and diligent representation to all affected clients. Best practices could require that such a determination be supported by research, and the lawyers in question must personally sign off on this analysis.<sup>316</sup> Another safeguard would be to have another lawyer, not involved in the representation, to sign off on the decision.<sup>317</sup> Additionally, such documentary proof should be kept in the firm's records for at least five years after the representation. The ABA has started down this path in adopting its modifications to Model Rule 1.10 regarding migratory lawyers.<sup>318</sup> The screening under Model Rule 1.10 is far more rigorous than the screening under Model Rules 1.11 or 1.18.<sup>319</sup> Heightened screening with a certification requirement is something that needs to be put into place in all of the screening contexts. And, the failure of Ethics 20/20 to recommend such an important but modest modification to the Rules is disappointing.

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*Malpractice Case*, in ATTORNEYS' LEGAL LIABILITY ch. 6 (2012) (describing the discovery process in a malpractice case).

315. ELIZABETH SIMON ET AL., FINAL REPORT TO THE NYSBA PROFESSIONAL DISCIPLINE COMMITTEE: DISCOVERY, SUBPOENA POWER AND EVIDENCE RULES IN DISCIPLINARY PROCEEDINGS (2009) (providing a state-by-state summary of discovery procedures in disciplinary proceedings), available at [http://www.nysba.org/AM/Template.cfm?Section=Discovery\\_Subpoena\\_Power\\_and\\_Evidence\\_Rules\\_in\\_Disciplinary\\_Proceedings](http://www.nysba.org/AM/Template.cfm?Section=Discovery_Subpoena_Power_and_Evidence_Rules_in_Disciplinary_Proceedings).

316. Certification by the lawyers who make the decision will provide evidentiary evidence of who analyzed the legal problem and made the determination, and will force those individuals to take the analysis more seriously. It will broaden law firm concern about ethics issues to topics other than conflicts of interest.

317. This would work in all firms except when the lawyer is a solo practitioner.

318. See MODEL RULES OF PROF'L CONDUCT R. 1.10 (2012) (requiring (1) prompt written notice, (2) written description of the screening procedures, (3) acknowledgement that judicial review may examine the screening procedures, (4) agreement to respond promptly to inquiries about screening, and (5) certifications by the screened lawyer and a partner at reasonable intervals affirming compliance with the screen).

319. Compare *id.* (noting the rigorous screening procedure for imputation of conflicts of interest with current clients), with *id.* R. 1.11 (noting the less rigorous screening procedure for conflicts of interest concerning former clients), and *id.* R. 1.18 (noting the less rigorous screening procedure concerning prospective clients).



Some might be concerned that this effort to establish access to evidence is likely to expose lawyers to much more liability. However, both malpractice law and disciplinary law would acknowledge a profession's efforts to establish best practices. Identifying the types of common cases in which lawyers may encounter disciplinary and malpractice exposure and proposing standards of best practices would help to guide lawyers in these areas.

In situations in which a Rule is likely to be enforced in the context of litigation as well as the disciplinary process, the drafters of the Rules should acknowledge the regulatory context in formulating the text and Comments of the Rule. In some cases, the client's and the lawyer's interests are aligned and in other circumstances they are in tension, and that factor should affect the design of the particular rule. For the ABA to continue to insist that the Model Rules are only to be used for enforcement in the disciplinary context simply ignores the realities of practice and results in less effective lawyer regulation.

#### *D. Acquiring Empirical Data to Support Analysis in Rules Drafting*

Drafting ethics Codes is a challenging task because the Rules are drafted based upon assumptions that the drafters have about the practice of law. The ABA sought to create committees with adequate representation of different aspects of law practice. Collectively such committees were given the task of drafting Rules that would apply in every single context of lawyering.<sup>320</sup> Academic reporters were used in order to provide the drafters with access to the research scholarship in professional responsibility.<sup>321</sup> Of course, the committees sought to protect certain core values of legal practice, but, in the end, the task was an application of rough justice.

In more recent years, commissions have held hearings across the country and received written and verbal testimony about various issues.<sup>322</sup> The hearings process, however, has become an advocacy session for the various interested parties who have a stake in either a change in the Code or the status quo. Thus, hearings that were designed to investigate lawyer practices turned into advocacy sessions. I do not mean to suggest that hearings be discontinued; however, I do believe that their usefulness is often overstated. At the present time, hearings on

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320. See *id.* scope (noting that the Model Rules take into account the larger context shaping lawyers' roles).

321. The Wright Committee that was responsible for drafting the Model Code used the American Bar Foundation for its research concerning ethics issues. See Wright, *supra* note 36, at 2-3.

322. See *ABA Commission on Ethics 20/20*, *supra* note 110.

changes in ethics Codes involve the collection of information from those with the most to gain or lose from a change in the current Code. Perhaps the leadership of the committees could mitigate this problem by requiring disclosure of self-interest and representation of clients in such hearings.<sup>323</sup> It could also separate presentations involving factual information about topics from those involving advocacy in favor of or opposed to change of the current Rules. Thus, the ABA should try to minimize the role of interest groups in shaping the evidence gathering process that is needed to properly draft changes to the ethics Codes.

In the Ethics 20/20 process, the Commission has produced working papers with significant information about cutting edge ethics issues in law practice.<sup>324</sup> The working papers on alternative litigation financing, outsourcing, and cloud computing have put together significant research on these practices.<sup>325</sup> But, as research papers, these documents are limited in their usefulness. The Ethics 20/20 Commission needed access to data about current law firm practices and the extent to which law firms are already engaged in such efforts. They also needed access to the contracts and experiential information about these practices.

Law firms are private entities that do not disclose their methods of practice or detailed information about their financial operations. The attorney-client relationship is a confidential one and few incentives exist for lawyers or clients to disclose information.<sup>326</sup> There is often no incentive for law firms to disclose information regarding their practices or issues. In fact, practices can grow and thrive under the radar for decades.<sup>327</sup> This leads to the conclusion that the ABA and the states cannot effectively regulate a profession where the information about the

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323. Model Rule 6.4 permits lawyers to belong to the ABA and to work on the reform of its Rules; however, it requires disclosure that a position will materially benefit the interests of a client. See MODEL RULES OF PROF'L CONDUCT R. 6.4 (2012).

324. See INTRODUCTION AND OVERVIEW, *supra* note 111, at 1 (submitting various resolutions and reports to the ABA House of Delegates).

325. See *id.*

326. See MODEL RULES OF PROF'L CONDUCT R. 1.6 (2012) (defining the scope of confidentiality within the attorney-client relationship).

327. Law firm equity investments in clients existed in the 1950s and 1960s. See Christine Hurt, *Counselor, Gatekeeper, Shareholder, Thief: Why Attorneys Who Invest in Their Clients in a Post-Enron World Are "Selling Out," Not "Buying In,"* 64 OHIO ST. L.J. 897, 913 & n.96 (2003). Outsourcing has been going on for decades. See Steve Homan, *Legal Outsourcing Summarized: New Business Paradigm in the 2d Decade of 21st Century*, YAHOO! VOICES (Sept. 21, 2012), <http://www.voices.yahoo.com/legal-outsourcing-summarized-business-9138769.html?cat=3>. And, alternative litigation financing similarly has existed under the radar for many years. See Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1271, 1277-78 (2011).

practices and the stresses they place on lawyers and law firms is not used to craft the Rules.<sup>328</sup>

The Center for Professional Responsibility is an excellent resource for studying the legal profession.<sup>329</sup> However, it is more of a repository for information than a research arm. The Center for Professional Responsibility puts on some excellent conferences and it publishes several books that provide invaluable information to the profession.<sup>330</sup> The American Bar Foundation has, in the past, sponsored many research efforts in the legal profession.<sup>331</sup> However, resource issues have constrained funding directed at discovering information about the legal profession. Many academics have conducted impressive empirical work in numerous areas of legal ethics, and these projects show the benefits that could be obtained if the ABA backed a systematic plan for empirical research about the legal profession and important legal ethics issues.<sup>332</sup>

The ABA and the legal profession would benefit significantly from a coordinated effort to conduct empirical research about lawyer and law firm practices in action.<sup>333</sup> To be effective, such research requires the cooperation of law firms and their lawyer members. The ABA should strongly encourage its members to assist the organization in conducting

328. Professor Gillers argues about the need for empirical research, and he states that in many areas the different rules in the states provide the real world in which to test assumptions. See Gillers, *How to Make Rules for Lawyers*, *supra* note 19, at 375-77. He uses as an example the different confidentiality rules across the states, and posits that empirical work could test many guesses that we currently make about how confidentiality rules work in practice. *Id.* Gillers also states that the profession should be honest about the assumptions it makes, and, if they are not based upon empirical evidence, the profession should indicate that fact. See *id.*

329. See *Center for Professional Responsibility: Resources*, ABA, [http://www.americanbar.org/groups/professional\\_responsibility/resources.html](http://www.americanbar.org/groups/professional_responsibility/resources.html) (last visited Nov. 23, 2013).

330. See *Center for Professional Responsibility: Events & CLE*, ABA, [http://www.americanbar.org/groups/professional\\_responsibility/events\\_cle.html](http://www.americanbar.org/groups/professional_responsibility/events_cle.html) (last visited Nov. 23, 2013); *Center for Professional Responsibility: Publications*, ABA, [http://www.americanbar.org/groups/professional\\_responsibility/publications.html](http://www.americanbar.org/groups/professional_responsibility/publications.html) (last visited Nov. 23, 2013).

331. See *Research: Current Projects*, AM. BAR FOUNDATION, <http://www.americanbarfoundation.org/research/project/index.html> (last visited Nov. 23, 2013) (listing current and past projects of the American Bar Foundation).

332. See, e.g., JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* 1-6 (rev. ed. 1994) (describing the scope of the research and the data set presented within the book); see also Susan Saab Fortney, *Taking Empirical Research Seriously*, 22 GEO. J. LEGAL ETHICS 1473, 1475-76 (2009) (describing the growth of the prevalence of empirical research on the legal profession).

333. Professor Gillers proposes that “[a]ny factual prediction of dire or beneficial consequences if a rule is or is not adopted should be supported with credible empirical research if possible.” Gillers, *How to Make Rules for Lawyers*, *supra* note 19, at 407. If the answers are not capable of being obtained through empirical research, Gillers argues that the proponents must indicate that no evidence exists and make persuasive arguments that bear a substantial burden of proof. See *id.* at 408.

meaningful research studies in lawyering. The requirement for cooperation would be accompanied by an ABA obligation of anonymity and confidentiality so as to help gather accurate information. Some of the information that is needed is factual, other information involves a study of firm culture and lawyer opinions, and some information would help researchers study lawyers from a behavioral economics perspective.<sup>334</sup>

Although the current process has gathered significant anecdotal evidence about law practice, it has not put together the kind of concrete information needed to help the drafting commissions. Such a coordinated effort would substantially improve ABA efforts to regulate lawyers. Although it is impossible to list all of the projects that would help with the drafting of effective ethics rules, one could easily identify topics in conflicts, ancillary business practices, MDP, pro bono efforts, advertising, and fees as ones that would provide important information to the drafters.

#### *E. Acknowledging the Way in Which Law Firms Make Decisions*

Many scholars have turned to researching the way in which law firms comply with codes of ethics.<sup>335</sup> This work has examined the role of management committees, ethics counsel, firm discipline, malpractice, and conflicts disqualification in law firm decisionmaking.<sup>336</sup> The scholarship in this area examines firms as organizations that are important players in the regulation of lawyers.<sup>337</sup> In firms, the infrastructure to manage firm compliance has become known as risk management.<sup>338</sup> And therefore, a comprehensive and careful study of these organizations must be central to the proper design of the Model Rules.<sup>339</sup>

Different rules come into play at different times in a representation. Some are directed at the formation of the attorney-client

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334. See, e.g., Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry into Lawyers' Responsibility for Client Fraud*, 46 VAND. L. REV. 75, 77-79 (1993) (presenting a behavioral economics inquiry into lawyer complicity with client fraud).

335. See, e.g., Elizabeth Chambliss & David Wilkins, *Promoting Effective Ethical Infrastructure in Large Law Firms: A Call for Research and Reporting*, 30 HOFSTRA L. REV. 691, 702-04 (2002) (presenting research on the ethical infrastructure of law firms).

336. See *id.* at 705-07.

337. See *id.* at 692.

338. Anthony E. Davis, *Legal Ethics and Risk Management: Complementary Visions of Lawyer Regulation*, 21 GEO. J. LEGAL ETHICS 95, 99 (2008).

339. See *id.* at 102-03; Milton C. Regan, Jr., *Nested Ethics: A Tale of Two Cultures*, 42 HOFSTRA L. REV. 143, 149-52 (2013) (examining the way in which empirical research could assist in affecting lawyer decisionmaking about ethical conduct).

representation,<sup>340</sup> others at discovering conflicts,<sup>341</sup> and others at the termination of the representation.<sup>342</sup> Some rules address litigation practice, while others address all law practice.<sup>343</sup> Law firms effect compliance with different rules through different decisionmaking structures. For certain rules, law firms vest the authority in a management committee.<sup>344</sup> In recent years, some law firms have used an ethics partner or an ethics committee.<sup>345</sup> Still, other law firms decentralize compliance with ethics rules into an intake partner for new matters, and then the partners in charge from that point on.<sup>346</sup> These compliance structures should inform both the design of a rule and the education that needs to follow enactment of a rule.<sup>347</sup>

The study of firm structure is important for several reasons. The drafting of the Model Rules can be significantly improved if the ABA had data on how small, medium, and large firms have complied with the current Rules.<sup>348</sup> The data would include law firm attitudes towards a particular Rule, as well as the costs of compliance. And, the data would enable the ABA to share information in broad ways that would help firms to develop better compliance structures. The study of firm culture on many levels is an important inquiry that could significantly improve the drafting of Model Rules.<sup>349</sup>

## V. CONCLUSION

The regulation of lawyers has progressed significantly in the last century. The ABA has been active in trying to respond to the changes in the legal profession and must be commended for its efforts at innovation. The problem is that the current ABA structures, which have worked

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340. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.1 (2012) (providing the Model Rule that covers "Competence").

341. See, e.g., *id.* R. 1.7 (providing the Model Rule that covers "Conflict of Interest: Current Clients").

342. See, e.g., *id.* R. 1.16 (providing the Model Rule that covers "Declining or Terminating Representation").

343. See, e.g., *id.* R. 8.3 (providing the Model Rule that covers "Reporting Professional Misconduct").

344. See Chambliss & Wilkins, *supra* note 335, at 705-06 (discussing the roles of ethics advisors and committees in law firms).

345. See *id.* at 698.

346. See Davis, *supra* note 338, at 100-01, 117.

347. See *id.* at 107, 109-10.

348. Much more research work needs to be done with respect to solo and small law firm practitioners and the ways in which these lawyers comply with the ethics Rules. The costs of compliance and the attitudes of the lawyers play an important role in determining whether the Rules are followed in practice.

349. See generally Regan, *supra* note 339 (examining the influence of various spheres of culture and values upon a law firm infrastructure).

reasonably well in the past, can no longer support the kinds of changes that need to be made in today's globalized law practice world.<sup>350</sup>

The success of the ABA has, in turn, become a major reason why change is difficult to implement. When the ABA examines a Rule, it must ask whether the Rule is working well enough that the costs of changing the Rule exceed the benefits of such change. The problem with such an analysis is that Rules become entrenched and cannot possibly address the developments in practice. For example, Rule 1.5 on fees<sup>351</sup> has been in place since 1983 and has purported to govern issues relating to all attorneys' fees. There is no doubt that billing practices have changed dramatically in the last thirty years. Yet, the Rule stands without substantial modification. Questions exist about hybrid fee arrangements, expense account reimbursement, alternative financing issues, and different ways in which law firms protect their fees. The current ABA structures are not designed to learn about problems that arise in practice, the harms that clients are exposed to, or the best manner in which to design guidance in the attorneys' fees area.

In the last thirty years, there have been many prominent examples of lawyers who have "over-lawyered" their interpretation of rules out of client pressure and for their own financial gain. Some have argued that Wilson Sonsini did this with the pretexting advice given to Hewlett Packard,<sup>352</sup> that Kaye Scholer did it with respect to the advice given to Lincoln Savings,<sup>353</sup> and that Vinson & Elkins LLP did it with regards to Sharren Watkins and Enron.<sup>354</sup> There are undoubtedly countless other cases that have gone undiscovered. The lesson is that the ABA should seek to obtain reliable and comprehensive information about how the ethics Rules work in practice, should use such information in reform of the Rules, and should lead the profession into following best practices that are commensurate with the core values of lawyering.

When the ABA chooses to stay silent in an area that has undergone substantial change in practice, lawyers and law firms choose to act without consideration of the Rules. Such actions are made by individuals who weigh costs and risks, as well as the consequences of being too ethical. The result is a patchwork of disparate practices that treat different clients in different ways in similar situations. This behavior

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350. See *supra* Part III.

351. MODEL RULES OF PROF'L CONDUCT R. 1.5 (2012).

352. See Miriam Hechler Baer, *Corporate Policing and Corporate Governance: What Can We Learn from Hewlett-Packard's Pretexting Scandal?*, 77 U. CINN. L. REV. 523, 528-31, 580 (2008).

353. See Dennis E. Curtis, *Old Knights and New Champions: Kaye, Scholer, The Office of Thrift Supervision, and the Pursuit of the Dollar*, 66 S. CAL. L. REV. 985, 988-89, 1001 (1993).

354. See Eichenwald, *supra* note 148, at A19 (describing Vinson & Elkins LLP's reasons for accepting as an engagement the internal investigation prompted at Enron by Watkins).

becomes vested in a culture of lawyer customs that can be difficult to change. Subsequent involvement by the ABA is unlikely to affect the experience that lawyers develop in the absence of regulation. And, when developments in the practice of law overshadow the regulatory system, the ABA's Codes become obsolete.

Although the ABA has just completed a relatively modest revision of the Model Rules with Ethics 20/20, the ABA should establish a new independent structure to consider more substantial and fundamental reform of the Model Rules as well as to the manner in which it regulates the legal profession.<sup>355</sup> It should embrace a comprehensive review of the current provisions and a broad agenda for a systematic empirical study of lawyer practices.<sup>356</sup> With meaningful reform of the drafting and adoption process for ethics Rules of the profession, the ABA can continue to be an influential force in shaping the regulation of American lawyers in the modern legal profession.

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355. *See supra* Part IV.

356. *See supra* Part IV.