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LAWYER ETHICS CODE DRAFTING IN THE TWENTY-FIRST CENTURY

*Nancy J. Moore**

I. INTRODUCTION

In 1997, the American Bar Association (“ABA”) created the Commission on the Evaluation of the Rules of Professional Conduct,¹ otherwise known as the Ethics 2000 Commission (“Commission”).² The Commission was charged with conducting a comprehensive review of the *Model Rules of Professional Conduct* (“Model Rules”) to determine what changes were necessary to update the Model Rules and make them relevant to the practice of law in the twenty-first century.³ In August 2001, the Commission issued a 300-page report recommending numerous changes to the Rules.⁴ These recommendations have been considered by the ABA House of Delegates and were largely approved.⁵

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1. See E. Norman Veasey, *Chair’s Introduction and Executive Summary* to COMM’N ON EVALUATION OF THE RULES OF PROF’L CONDUCT, ABA, REPORT WITH RECOMMENDATION TO THE HOUSE OF DELEGATES xi (2001) [hereinafter REPORT WITH RECOMMENDATION], available at http://www.abanet.org/cpr/e2k-whole_rpt.doc (last visited Mar. 22, 2002).

2. See *id.*

3. See *id.*

4. For the complete Commission Report which includes the Reporter’s Explanation of Changes, see generally REPORT WITH RECOMMENDATION, *supra* note 1. See also Margaret Colgate Love, *ABA Ethics 2000 Commission: Final Report—Summary of Recommendations* (2001) [hereinafter *Summary of Recommendations*], at http://www.abanet.org/cpr/e2k-mlove_article.html (last visited Mar. 22, 2002). The Ethics 2000 Commission (“Commission”) Report can be downloaded in its entirety or by individual rule.

5. The House of Delegates met last August and considered the Preamble and Scope, as well as Rules 1.0 through 1.10. See Ctr. for Prof’l Responsibility, ABA, Summary of House of Delegates Action Taken at the August 2001 Annual Meeting, at http://www.abanet.org/cpr/e2k-summary_2001.html (last visited Jan. 30, 2002) [hereinafter August 2001 Summary]. The House considered the remainder of the *Model Rules of Professional Conduct* (“Model Rules”), except for Rules 5.5 and 8.5, at the American Bar Association (“ABA”) mid-year meeting in February, 2002. For the

As Chief Reporter to the Commission, I have had the privilege of participating in this recent effort to enact comprehensive revisions to the ABA's model ethics code. It has been a fascinating and educational experience for me, and I welcome the opportunity to reflect on what I have learned about ethics code drafting for lawyers in the twenty-first century.

Even before I became associated with the Commission, I published my views on the function of ethics codes in general and ethics codes for lawyers in particular.⁶ In my view, a profession's code of ethics is one aspect of a contract between society and the profession—a contract that results when society agrees to give the profession a legal monopoly in return for a promise that professional practice will be performed in the public interest.⁷ Under this contract account, a professional code of ethics serves both ideological and regulative functions.⁸ As ideology, a code establishes standards by which the profession (and the professional) can be held to public account.⁹ In other words, society has delegated responsibility to professions, but it can also relieve them of this responsibility if they do not live up to their public pronouncements.¹⁰ The regulatory function of codes is not limited to the use of coercive sanctions like attorney discipline, but also includes “both the ‘internal sanction of professional conscience’ and the ‘informal external sanction of peer criticism’ to promote compliance with professional norms” as part of the socialization of lawyers and other professionals.¹¹

outcome of these deliberations see *Ethics 2000—February 2002 Report*, at http://www.abanet.org/cpre/e2k-202report_summ.html (last visited Mar. 20, 2002). Rules 5.5 and 8.5 will be considered along with the forthcoming report of the ABA Commission on Multijurisdictional Practice, which is scheduled to be considered at the annual meeting in August 2002.

6. See generally Nancy J. Moore, *Professionalism Reconsidered*, 1987 AM. B. FOUND. RES. J. 773 [hereinafter Moore, *Professionalism Reconsidered*]; Nancy J. Moore, *Professionalism: Rekindled, Reconsidered or Reformulated?*, 19 CAP. U. L. REV. 1121 (1990); Nancy J. Moore, *The Usefulness of Ethical Codes*, 1989 ANN. SURV. AM. L. 7 [hereinafter Moore, *Ethical Codes*].

7. See Moore, *Ethical Codes*, *supra* note 6, at 12-14; Moore, *Professionalism Reconsidered*, *supra* note 6, at 784.

8. See Moore, *Ethical Codes*, *supra* note 6, at 13.

9. See *id.*; see also Moore, *Professionalism Reconsidered*, *supra* note 6, at 784.

10. See Moore, *Ethical Codes*, *supra* note 6, at 13.

11. *Id.* at 14 (quoting John Kultgen, *Evaluating Codes of Professional Ethics*, in PROFITS AND PROFESSIONS 225, 251 (Wade L. Robison et al. eds., 1983)). According to sociologist Talcott Parsons, professionals are motivated to achieve “objective achievement and recognition,” in ways that are determined by the particular norms adopted by each profession. See Moore, *Professionalism Reconsidered*, *supra* note 6, at 783 (quoting TALCOTT PARSONS, *A Sociologist Looks at the Legal Profession*, in ESSAYS IN SOCIOLOGICAL THEORY 34, 44 (1954)).

Nothing in my experience with the Commission has changed these views. I continue to believe that the best explanation of the validity of professional codes is the contract account outlined above. Although I continue to believe that codes serve both ideological and regulatory functions, this Article will not discuss the ideological functions of ethics codes.¹² Nor will I comment in any detail on the substance of the various changes the Commission proposed.¹³ Rather, my remarks will focus on the types of regulatory changes that the Commission thought were necessary in order to bring the Model Rules into the twenty-first century. Before I discuss the changes, however, I want to comment briefly on the significance of revising an existing code rather than creating an entirely new code, as was done both in 1969 with the ABA *Model Code of Professional Responsibility*¹⁴ (“Model Code”) and again in 1983 with the Model Rules themselves.¹⁵

II. REVISING AN EXISTING ETHICS CODE

In 1908 the ABA adopted its first model ethics code for lawyers—the ABA *Canons of Ethics* (“Canons”).¹⁶ The Canons were primarily exhortatory and were regarded by courts as advisory at most.¹⁷

[T]he Canons were not law. . . . [T]heir syntax was exhortatory as often as it was obligatory and they made no pretence at precision or completeness. They did not have the authority of law, for they were not legislatively adopted as such and were regarded by the courts as advisory at most.¹⁸

12. For an interesting account of the Kutak Commission’s interest in press coverage during the drafting and adoption of the 1983 Model Rules, as well as its vision of the Rules as a “professional covenant with the public,” see Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677, 723-24 (1989).

13. For an excellent summary of the Commission’s proposals, see *Summary of Recommendations*, *supra* note 4.

14. MODEL CODE OF PROF’L RESPONSIBILITY (1983) [hereinafter MODEL CODE]. The Model Code was adopted in 1969, to be effective on January 1, 1970. See, e.g., Chris G. McDonough & Michael L. Epstein, *Regulating Attorney Conduct: Specific Statutory Schemes v. General Regulatory Guidelines*, 11 Touro L. REV. 609, 610-11 (1995). For a detailed discussion of the history of the Model Code, see Edward L. Wright, *The Code of Professional Responsibility: Its History and Objectives*, 24 ARK. L. REV. 1 (1970). See also Geoffrey C. Hazard, Jr., *Rules of Legal Ethics: The Drafting Task*, 36 REC. ASS’N B. CITY N.Y. 77 (1981).

15. See generally MODEL RULES OF PROF’L CONDUCT (2001) [hereinafter MODEL RULES]. For a discussion of the history of the Model Rules, see generally Schneyer, *supra* note 12.

16. CANONS OF PROF’L ETHICS (1908).

17. See Hazard, *supra* note 14, at 81.

18. *Id.*

This format corresponded to what has been characterized elsewhere as a typical first level professional ethics code, i.e., “a simple set of ideals to which adherents aspire.”¹⁹ In 1964 the Wright Committee was appointed to review the Canons.²⁰ It concluded that the Canons were incomplete, ambiguous, impractical for enforcement, insufficient as a guiding and teaching tool, and not up to the challenges of a more complex legal community and society.²¹ In 1969, the ABA adopted the Model Code,²² which transformed the legal character of the rules of lawyer ethics.²³ Divided into three interdependent parts—Canons, Ethical Considerations, and Disciplinary Rules—the DRs were intended to be adopted by courts as a basis for enforcement through attorney discipline, with the Canons and ECs serving both as interpretive guidance and as inspirations to ideals beyond the minimum requirements of the DRs.²⁴ This format corresponded to what has been described elsewhere as a typical “second-level” professional ethics code, i.e., one containing more stringent language than a first-level code and designed to be enforced.²⁵

In 1977, less than ten years after ABA adoption of the Model Code, the Kutak Commission was appointed to correct what were perceived as serious defects in the Code.²⁶ The work of this Commission led to the adoption by the ABA, in 1983, of the Model Rules.²⁷ Unlike the Model Code, the Model Rules did not accomplish a transformative structural innovation.²⁸ Rather, the Rules reaffirmed and consolidated the prior transformation from rules of ethics as internal professional norms to rules of ethics as public law.²⁹ This was accomplished by removing the

19. Moore, *Ethical Codes*, *supra* note 6, at 15 (discussing literature in which various professional codes of ethics are distinguished by their stage of development).

20. See McDonough & Epstein, *supra* note 14, at 610 (discussing the appointment by the President of the ABA Special Committee on Evaluation of Ethical Standards, better known as the Wright Committee).

21. See *id.*; see also Hazard, *supra* note 14, at 85-93 (discussing various deficiencies in the Model Code).

22. See *supra* note 14 and accompanying text.

23. See Hazard, *supra* note 14, at 81.

24. See *id.* at 81-82.

25. See Moore, *Ethical Codes*, *supra* note 6, at 15.

26. See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 2.6.4, at 60-61 (1986).

27. See Schneyer, *supra* note 12, at 677-78.

28. See Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1251 (1991) (“In retrospect, it is clear that the crucial step in the ‘legalization’ process occurred in the change from the 1908 Canons to the 1970 Code, rather than from the Code to the 1983 Rules.”).

29. See *id.* at 1254. Professor Hazard notes that “[t]he Rules of Professional Conduct . . . implied that the normative definition of the profession could be expressed only using the medium of legally binding rules Correlatively, the Rules affirmed that the standards of professional conduct were legal obligations and not merely professional ones.” *Id.*

Canons and EC's and adopting the Restatement format of black letter rules and interpretive comments.³⁰ This format corresponds somewhat to what has been characterized elsewhere as a "third-level" code, i.e., one in which "the standards for proper practice are so clearly laid out that '[w]hat is left is little more than a quasi-criminal code.'"³¹

Although the Model Rules did not effect the same degree of structural innovation as did the Model Code, the Model Rules did incorporate an entirely new format, along with the addition of a number of entirely new rules addressing subject areas not previously addressed by the Code.³² Even in Rules covering ground previously trod, there is no sense that the drafters felt constrained to adhere to either the substance or even the language of the Code. Indeed, according to one commentator, the membership of the Kutak Commission was dominated by "reformist lawyers and legal educators" who "intended a bold reworking of the Code."³³

Drafting for the Ethics 2000 Commission has been a significantly different experience than drafting must have been for either the Wright Committee or the Kutak Commission. One of the first conclusions the Ethics 2000 Commission drew was that the Model Rules were generally working quite well.³⁴ As a result, the Commission's goal was not to completely overhaul the Model Rules, but rather to update them in light of a number of important developments since the Rules were first adopted, including: (1) the adoption of the Rules by forty-three jurisdictions, most with significant variations from the Model Rules; (2) the completion of the American Law Institute's *Restatement of the Law Governing Lawyers*, which identified and clarified the legal

30. Cf. *id.* (describing the text of the Rules as "statutory" in format).

31. Moore, *Ethical Codes*, *supra* note 6, at 15 (alteration in original) (internal quotations omitted). The Model Rules are less "penal" than the Model Code because the Rules contain constitutive provisions, (e.g., "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." MODEL RULES, *supra* note 15, R. 1.13(a)), whereas all provisions in the Code are prohibitory (e.g., lawyer may not charge "in excess of a reasonable fee." MODEL CODE, *supra* note 14, DR 2-106(b)). See Hazard, *supra* note 14, at 90-92. I have elsewhere argued that the Model Rules may constitute a "fourth level" code status, unattainable by other professional codes, given their unique status as law enacted by the highest courts of the various jurisdictions. See Moore, *Ethical Codes*, *supra* note 6, at 15. I do not believe, however, that all of the standards either in the current Model Rules or in the Commission's proposed amendments are so clear that they constitute merely a "quasi-criminal code."

32. See, e.g., MODEL RULES, *supra* note 15, R. 1.13, 2.2, 2.3, 3.2, 5.1-5.3, 8.5.

33. WOLFRAM, *supra* note 26, § 2.6.4, at 61 & n.72. For a more detailed and chronological account of the movement from the early drafts that prompted much hostility within the bar to adoption of a revised set of rules by the ABA House of Delegates, see generally Schneyer, *supra* note 12.

34. See Veasey, *supra* note 1, at xi.

framework in which lawyers work; and (3) the dramatic changes in the organization and practice of law that have taken place over the last twenty years, including the growth in the size of law firms, the greater mobility of lawyers, and sea changes in the technologies available to both lawyers and clients.³⁵

What is the significance of the more limited nature of the review undertaken by the Commission? The guiding motto of the Commission was one of minimalism: "If it ain't broke, don't fix it."³⁶ Many times the Reporters would suggest ways in which an existing rule could be improved, but absent a demonstration that there was some *problem* that needed to be solved, we were told simply to forget about it.³⁷ For example, Rule 1.2(b) states that "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities."³⁸ The Reporters suggested deleting this statement, or at least moving it to the Preamble, because although it stated a truism, it did not appear to be appropriately included either in the black letter rules themselves or in this rule in particular.³⁹ The Commission's response, however, was that lawyers would view removal of the statement as a symbolic backing away from the sentiments contained in Rule 1.2(b); therefore, it remained as is.⁴⁰

Similarly, the Commission spent a great deal of time wrestling with a statement in the Comment to Rule 3.6—the rule on trial publicity—which states that publicizing the fact that a defendant has been charged with a crime will more likely than not have a materially prejudicial effect on a proceeding unless the prosecutor includes a statement explaining that the charge is merely an accusation and that the defendant

35. *See id.*

36. *Cf. id.* at xii ("[W]hen a particular provision was found not to be 'broken' we did not try to 'fix' it."). With a great deal of affection and respect, I attribute the more colloquial quotation to Commission member Lucian Pera, a commentator for this conference. I believe I am correct that the expression originated with Lucian, although it was quickly picked up and often recited by virtually all the members of the Commission.

37. *See id.*

38. MODEL RULES, *supra* note 15, R. 1.2(b).

39. *See* Ethics 2000 Commission, Proposed Rule 1.2—Draft No. 2, Reporter's Observations (July 29, 1999).

40. The Commission initially agreed that paragraph (b) should be moved to the Preamble. *See* Minutes, Commission on Evaluation of the Rules of Professional Conduct (Aug. 6-8, 1999), available at <http://www.abanet.org/cpr/080699mtg.html> (last visited Mar. 22, 2002). Later, however, the Commission reversed its decision. *See* Minutes, Commission on Evaluation of the Rules of Professional Conduct (Dec. 10-12, 1999), available at <http://www.abanet.org/cpr/121099mtg.html> (last visited Mar. 22, 2002).

is presumed innocent until and unless proven guilty.⁴¹ Not only is this statement inconsistent with the black letter of the Rule,⁴² but it would also be absurd to require a prosecutor to repeat the presumption of innocence in every statement referring to an indicted defendant, even when there are multiple statements issued within a short period of time.⁴³ Nevertheless, the Commission agreed to leave the comment alone, once again because of the “symbolism” of any attempt to delete it.⁴⁴ The negative symbolism of removing or changing existing language was a theme that stymied many of the Reporters’⁴⁵ efforts to rid the Rules of similar anomalies.

In this respect, the process of revising an existing code, rather than writing on a clean slate, has not been an entirely satisfactory one. In other respects, however, the opportunity to build on the solid framework of existing rules enabled the Commission to not only focus on identifying particular substantive revisions necessary to bring the Rules into the twenty-first century, but also to reflect more deeply on the special and evolving nature of lawyer ethics codes.⁴⁶

41. See MODEL RULES, *supra* note 15, R. 3.6 cmts. 5-6 (explaining that there are certain subjects that are more likely than not to have a materially prejudicial effect on a proceeding including “the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty”).

42. The text of the Rule provides that a lawyer may state “the offense or claim or defense involved.” *Id.* R. 3.6(b)(1). The Comment however states that it is more likely than not that a statement will have a material prejudicial effect on a proceeding if it includes “the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.” *Id.* R. 3.6 cmt. 5.

43. Cf. Ethics 2000 Commission, Proposed Rule 3.6—Public Discussion Draft, Reporter’s Explanation of Changes (Feb. 21, 2000) (“Although the Commission thinks it is an excellent practice for prosecutors to remind public audiences that criminal charges are only accusations, the Commission does not think that the failure to do so each time the prosecutor makes a public statement is likely to materially prejudice an adjudicative proceeding.”).

44. The Commission’s initial decision was to delete the offending statement in the Comment because it is inconsistent with the text. See *id.* After some commentators and members of the Commission objected to the deletion of subparagraph (6) of Comment 5, however, the Commission decided to retain it even though it is inconsistent with the text. See Minutes, Commission on Evaluation of the Rules of Professional Conduct (May 5-7, 2000), available at <http://www.abanet.org/cpr/050500mtg.html> (last visited Mar. 22, 2002). This issue was discussed at numerous Commission meetings.

45. The other Reporters for the Ethics 2000 Commission are Professor Carl Pierce of the University of Tennessee College of Law and Professor Thomas Morgan of The George Washington University School of Law.

46. See *supra* notes 16-30 and accompanying text (discussing progression of the ABA legal ethics code from the 1908 Canons to the 1969 Code and then to the 1983 Model Rules). For a more general discussion of the typical evolution of professional ethics codes through various stages, see Moore, *Ethical Codes*, *supra* note 6, at 15-16.

For example, early in its deliberations, the Commission considered whether it was desirable to make the ethics code more “ethical”—rather than strictly “legal”—by incorporating some form of “best practices” or “professionalism” concepts, perhaps in the comments.⁴⁷ The Commission quickly concluded that, given the regulatory sophistication of the Model Rules, it was simply impossible to return to the exhortatory or aspirational nature of the earlier codes.⁴⁸ Indeed, at this point, any attempt to give such guidance clearly would be misperceived as having a regulatory dimension.⁴⁹

At the same time, however, the Commission refused to view the Rules as having only a narrow disciplinary function,⁵⁰ i.e., one more akin to a criminal, or quasi-criminal code. Mindful of the educational role of the Rules,⁵¹ the Commission proposed a number of changes designed primarily to give greater guidance for lawyers, thus enhancing the likelihood of compliance with the Rules as professional norms.⁵² For example, the Commission transformed the Terminology section into an entirely new black letter rule, Rule 1.0, and then added to it comments designed to expand upon the black letter definitions.⁵³ Indeed, the

47. See, e.g., Minutes, Commission on Evaluation of the Rules of Professional Conduct (Aug. 4, 1997) (discussing “whether it would be possible to add some discussion of ‘better practice’ back into the Commentary to the Rules”). Initially, the Reporters were asked to include “Principles of Better Practice” in their proposed revisions of the various Rules. See, e.g., Memorandum from Nancy Moore, to Commission on Ethics 2000 (Oct. 3, 1997) (regarding Proposed Rule Revision: Rule 1.8(f)). This request was made in response to a flurry of activity aimed at implementing the recommendations of a 1986 ABA report urging lawyers to abide by higher standards of conduct than the minimum required by disciplinary rules. See generally Moore, *Ethical Codes*, *supra* note 6, at 7 (discussing reactions to report of ABA Commission on Professionalism entitled “. . . In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism”). Numerous state and local bar associations had enacted various “‘creeds,’ ‘pledges,’ ‘statements,’ and ‘codes’ of professionalism,” reflecting not only a desire to enhance the public image of lawyers, but also “a genuine longing to recapture the pride of ‘professionalism,’ coupled with an assumption that a lofty code of ethics is a central component of any true profession.” *Id.* at 8, 11.

48. See Veasey, *supra* note 1, at xii (“We have also retained the primary disciplinary function of the Rules, resisting the temptation to preach aspirationally about ‘best practices’ or professionalism concepts.”); see also *Summary of Recommendations*, *supra* note 4 (“[The Commission] decided early on not to include aspirational ‘good practice’ notes following each rule, concerned that these would be out of place in a disciplinary code.”).

49. See Veasey, *supra* note 1, at xii (“Valuable as the profession might find such guidance [from best practices or professionalism concepts], it would not have—and should not be misperceived as having—a regulatory dimension.”).

50. See *id.*

51. See *id.* (“We were however, always conscious of the educational role of the Model Rules.”).

52. See *supra* note 11 and accompanying text (promoting compliance with professional norms is a regulatory function of codes).

53. See REPORT WITH RECOMMENDATION, *supra* note 1, at 8 (R. 1.0); see also *Summary of Recommendations*, *supra* note 4.

Commission significantly expanded the comments throughout the Rules, giving more explanations of the rationales for the Rules, adding cross-references to other Rules, and even providing guidance on other applicable law.⁵⁴ Rule 1.7—the basic conflicts of interest rule—was entirely rewritten and reorganized, primarily to clarify its meaning and help practitioners understand the application of the Rule in commonly encountered situations.⁵⁵

Finally, the Commission constantly struggled with the tension between specificity and generality in rule drafting.⁵⁶ In some respects, the Commission has continued the modern trend toward specificity in code drafting.⁵⁷ A good example is the new definition of “writing,” which is designed to clarify that electronic records are included and is modeled after the Uniform Electronic Transactions Act.⁵⁸ In other respects, however, the Commission opted for a more general regulatory approach. For example, unlike many state rules,⁵⁹ the Commission’s ban on sexual relationships between lawyers and clients does not contain a definition of what constitutes a “sexual relationship.”⁶⁰ Nor does the new definition of “screening” specify the institutional mechanisms that must be adopted to protect the confidentiality of client information.⁶¹ In these instances, the Commission was less concerned with clarity and notice to lawyers and more concerned with flexibility, recognizing that the terms of disciplinary rules are (and should be) increasingly subject to case-by-

54. See generally REPORT WITH RECOMMENDATION, *supra* note 1.

55. See REPORT WITH RECOMMENDATION, *supra* note 1, at 54, 65 (R. 1.7 & Reporter’s Explanation of Changes). The only substantive change in the text of the rule is the new requirement that the informed consent of the client be “confirmed in writing.” *Id.* at 54 (R. 1.7(b)(4)). For a detailed explanation of the changes made to this Rule, see *id.* at 65-74 (Reporter’s Explanation of Changes).

56. For discussions of specificity and generality in ethics code drafting, see generally McDonough & Epstein, *supra* note 14; Fred C. Zacharias, *Foreword: The Quest for a Perfect Code*, 11 GEO. J. LEGAL ETHICS 787 (1998); Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223 (1993) [hereinafter Zacharias, *Theory, Practice, and the Paradigm of Prosecutorial Ethics*].

57. See McDonough & Epstein, *supra* note 14, at 609.

58. See REPORT WITH RECOMMENDATION, *supra* note 1, at 9, 13 (R. 1.0(n) & Reporter’s Explanation of Changes); see also *Summary of Recommendations*, *supra* note 4.

59. See, e.g., MINN. RULES OF PROF’L CONDUCT R. 1.8(k)(1) (2001) (“‘Sexual relations’ means sexual intercourse or any other intentional touching of the intimate parts of a person or causing the person to touch the intimate parts of the lawyer.”); N.Y. CODE OF PROF’L RESPONSIBILITY DR 5-111(A) (2001) (“‘Sexual relations’ means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, sexual gratification, or sexual abuse.”).

60. See REPORT WITH RECOMMENDATION, *supra* note 1, at 75 (R. 1.8(j)).

61. See REPORT WITH RECOMMENDATION, *supra* note 1, at 9, 11 (R. 1.0(k) & cmts. 8-10); see also *Summary of Recommendations*, *supra* note 4.

case interpretation by ethics committees or courts,⁶² both in disciplinary and in other types of cases.⁶³ Thus, once again, the Commission insisted that ethics codes are not merely criminal codes for lawyers, but rather serve a far broader function in the regulation of the legal profession.⁶⁴

III. BRINGING THE RULES INTO THE TWENTY-FIRST CENTURY

Limited to “fixing” what was “broke,”⁶⁵ the sorts of changes we recommended can be categorized along the lines of the three important developments previously mentioned—(1) the adoption of significant variations of the Rules by the states; (2) the completion of the *Restatement of the Law Governing Lawyers*; and (3) recent and dramatic changes in the organization and practice of law.⁶⁶

A. State Variations

The fact that forty-three jurisdictions have adopted the Model Rules, but with significant variation in a number of Rules,⁶⁷ is both bad news and good news. The bad news is that state variation is a serious problem in a world increasingly dominated by the multijurisdictional (or cross-border) practice of law.⁶⁸ In addition to addressing

62. Professor Zacharias believes that ethics codes differ from other legislation because professional code provisions are rarely fleshed out in ethics or judicial opinions. See Zacharias, *Theory, Practice, and the Paradigm of Prosecutorial Ethics*, *supra* note 56, at 237-38. This may once have been true, but as Professor Bruce Green concludes in his paper for this Symposium, clarifying ethics opinions have become both more prevalent and more accessible. See Bruce A. Green, *Bar Association Ethics Committees: Are They Broken?*, 30 HOFSTRA L. REV. 731, 732 (2002); see also Nancy J. Moore, *Restating the Law of Lawyer Conflicts*, 10 GEO. J. LEGAL ETHICS 541, 542 (1996) [hereinafter Moore, *Restating the Law of Lawyer Conflicts*] (noting “the ever-burgeoning number of ethics opinions and court decisions that interpret and apply the code provisions (or their common law equivalents) in a wide variety of contexts”).

63. See, e.g., Moore, *Restating the Law of Lawyer Conflicts*, *supra* note 62, at 542-44 (discussing various contexts in which conflicts of interest rules are enforceable, including fee forfeiture, disqualification, lawsuits seeking damages for breach of fiduciary duties, rescission of gifts to lawyers and business deals between lawyers and clients, and even the imposition of criminal sanctions).

64. See Veasey, *supra* note 1, at xii.

65. See *supra* note 36 and accompanying text.

66. See *supra* note 35 and accompanying text.

67. At the time the Commission was appointed, thirty-eight states and the District of Columbia had adopted some version of the Rules, with significant variations in particular rules from jurisdiction to jurisdiction. See *Summary of Recommendations*, *supra* note 4. Since that time an additional four states have adopted a version of the Model Rules. See *State Ethics Rules*, Laws. Man. on Prof. Conduct (ABA/BNA), at 01:03-4 (2001) (indicating four state adoptions between 1998 and 2001).

68. The primary problem posed by multijurisdictional practice concerns the scope and application of unauthorized practice of law restrictions on lawyers traveling on behalf of their

multijurisdictional practice directly in Rules 5.5⁶⁹ and 8.5,⁷⁰ the Commission wanted to see which of the Model Rules were most subject to variation, with a view toward offering a version of these Rules that might persuade the states to move towards greater uniformity.⁷¹

The good news is that the states have been experimenting with a variety of approaches to both age-old and new regulatory dilemmas, and the Commission was fortunate to be able to draw upon their experience in formulating its own recommendations.⁷² For example, although the ABA had refused to endorse written fee agreements in 1983,⁷³ seven states have done so in the interim.⁷⁴ Talking with the lawyers in those

clients to jurisdictions in which they are not licensed to practice. *See generally* BRUCE A. GREEN, CTR. FOR PROF'L RESPONSIBILITY, ABA, ASSISTING CLIENTS WITH MULTI-STATE AND INTERSTATE LEGAL PROBLEMS: THE NEED TO BRING THE PROFESSIONAL REGULATION OF LAWYERS INTO THE 21ST CENTURY, (2000), available at http://www.abanet.org/cpr/mjp-bruce_green_report.html (last visited Jan. 30, 2002). An additional problem, however, is the choice of law question that arises when a lawyer's services affect more than one jurisdiction and the jurisdictions' rules would produce different results in determining whether the lawyer has committed misconduct. For a general discussion of the conflict of laws issues arising in multijurisdictional practice, including choice of law, see William L. Reynolds & William M. Richman, *Multi-Jurisdiction Practice and the Conflict of Laws*, (2000), Ctr. for Prof'l Responsibility, ABA, at <http://www.abanet.org/cpr/mjp-wreynolds.html> (last visited Feb. 4, 2002).

69. In its proposed amendments to Rule 5.5, the Commission did not purport to address all aspects of multijurisdictional practice, but rather created four "safe harbors" affording out-of-state lawyers some latitude in interstate and international travel, for purposes of disciplinary action. *See* REPORT WITH RECOMMENDATION, *supra* note 1, at 214, 217-19 (R. 5.5 & Reporter's Explanation of Changes). This Rule, along with Rule 8.5, *see infra* note 70, was not considered by the ABA House of Delegates in February 2002, but will be considered along with the forthcoming report of the ABA Commission on Multijurisdictional Practice, which is scheduled to be considered in August 2002. *See supra* note 5.

70. In its proposed amendments to Rule 8.5, the Commission recommends: (1) broadening a jurisdiction's authority to discipline lawyers not licensed in the jurisdiction who nevertheless render or offer to render legal services in this jurisdiction, and (2) revising the choice of law provisions to permit application of the rules of the jurisdiction where the misconduct occurs or where the predominant effect of the lawyer's conduct will occur. *See* REPORT WITH RECOMMENDATION, *supra* note 1, at 274, 277-78 (R. 8.5 & Reporter's Explanation of Changes). This Rule, along with Rule 5.5, *see supra* note 69, was not considered by the ABA House of Delegates in February 2002, but will be considered along with the forthcoming report of the ABA Commission on Multijurisdictional Practice, which is scheduled to be considered in August 2002. *See supra* note 5.

71. *Cf.* Veasey, *supra* note 1, at xiii (discussing the Commission's review of Rules with significant state variation). This was a particular concern of the Commission's Chair, Chief Justice E. Norman Veasey of the Supreme Court of Delaware, who was also Chair of the Conference of Chief Justices during much of the tenure of the Commission.

72. *See id.* at xii-xiii (pointing out the disparity in the states' ethics codes).

73. *See* WOLFRAM, *supra* note 26, § 9.2 at 502.

74. All but one of the states provide that the writing requirement applies only when the lawyer has not regularly represented the client. *See* CONN. RULES OF PROF'L CONDUCT R. 1.5(b) (1998); D.C. RULES OF PROF'L CONDUCT R. 1.5(b) (1998); N.J. RULES OF PROF'L CONDUCT R. 1.5(b) (1999); PA. RULES OF PROF'L CONDUCT R. 1.5(b) (1998); R.I. RULES OF PROF'L CONDUCT R. 1.5(b) (1997); UTAH RULES OF PROF'L CONDUCT R. 1.5(b) (2001). *But see* CAL. BUS. & PROF.

states, the Commission learned that the requirement has proved to be workable, even for small firms and solo practitioners.⁷⁵ Thus, the Commission was comfortable in proposing that lawyers be required to communicate their fees in writing, although the Commission was also persuaded to fashion a de minimis fee exception,⁷⁶ as several of the states have done.⁷⁷

Similarly, the Commission drew upon the experience of three states—California,⁷⁸ Washington,⁷⁹ and Wisconsin⁸⁰—in proposing that conflicts waivers be confirmed in writing.⁸¹ The proposed writings

CODE § 6148(a) (West Supp. 2002). This was also the approach taken by the Commission. See REPORT WITH RECOMMENDATION, *supra* note 1, at 34 (R. 1.5(b)).

75. See, e.g., Written Testimony of Richard A. Zitrin (May 29, 1998) [hereinafter Zitrin Testimony], available at <http://www.abanet.org/cpr/zitrin.html> (last visited Feb. 4, 2002) (noting that requiring written fee agreements in all but de minimis matters has worked well in California). Two members of the Commission—Lawrence J. Fox of Pennsylvania and Laurie D. Zelon of California—were practicing lawyers in states requiring written fee agreements.

76. See REPORT WITH RECOMMENDATION, *supra* note 1, at 34 (R. 1.5(b)) (“This paragraph does not apply in any matter in which it is reasonably foreseeable that total cost to a client, including attorney fees, will be [\$500] or less.”).

In August 2001, the ABA House of Delegates rejected the Commission’s proposal to require that lawyers communicate fees and expenses in writing. See August 2001 Summary, *supra* note 5. Nevertheless, the Commission’s proposal is important because it may influence some states to make the recommended change, just as the Kutak Commission’s defeated proposal to require written fee agreements prompted a few states to require them when initially adopting the Model Rules. See e.g., CAL. BUS. & PROF. CODE § 6148(a) (West Supp. 2002). This is also true of other proposals that have been rejected by the House of Delegates, such as the screening proposal in Rule 1.10. See *infra* notes 96-101 and accompanying text.

77. See CAL. BUS. & PROF. CODE § 6148(a) (West Supp. 2002) (writing requirement applies when “it is reasonably foreseeable that total expense to a client, including attorney fees, will exceed one thousand dollars (\$1,000)”); UTAH RULES OF PROF’L CONDUCT R. 1.5(b) (2001) (writing requirement applies only when “it is reasonably foreseeable that total attorneys fees to the client will exceed \$750.00”).

78. See CAL. RULES OF PROF’L CONDUCT R. 3-310(C) (1996) (requiring the “informed written consent of each client”).

79. See WASH. RULES OF PROF’L CONDUCT R. 1.7(a)(2) (2002) (requiring that “[e]ach client consents in writing after consultation and a full disclosure of the material facts”); see also *id.* Terminology (“‘Consents in writing’ or ‘written consent’ means either (a) a written consent executed by a client, or (b) oral consent given by a client which the lawyer confirms in writing in a manner which can be easily understood by the client and which is promptly transmitted to the client”).

80. See WIS. RULES OF PROF’L CONDUCT R. 1.7(a)(2) (2002) (requiring that “each client consents in writing after consultation”).

81. See REPORT WITH RECOMMENDATION, *supra* note 1, at 54 (R. 1.7(b)). The Commission had initially proposed that the client’s consent be obtained in a writing signed by the client, but subsequently adopted the Washington approach of requiring only that an oral consent be confirmed in writing, after hearing from numerous commentators that the signed writing requirement might be too onerous a burden to impose on lawyers. See Minutes, Commission on Evaluation of the Rules of Professional Conduct (Feb. 11-13, 2000), available at <http://www.abanet.org/cpr/021100mtg.html> (last visited Mar. 22, 2002).

requirements are among a number of changes designed to respond to the number one complaint about lawyers—that they do not adequately communicate with their clients.⁸²

B. *The Restatement of the Law Governing Lawyers*

In 2000, the American Law Institute published an entirely new *Restatement of the Law Governing Lawyers* (“Restatement”)—a project that was more than ten years in the making.⁸³ The Restatement has identified and clarified the legal framework within which lawyers work, forcing the Commission to confront the increasingly complex relationship between disciplinary law and “other law.”⁸⁴ This “other law” includes not only sanctions for disciplinary violations in the form of fee forfeiture,⁸⁵ but also legal sources as wide ranging as criminal law and procedure, civil procedure, evidence law, agency law, tort law, contract law, securities law and corporation law.⁸⁶

First and foremost, the Model Rules serve as a basis for lawyer discipline⁸⁷ and self-regulation.⁸⁸ Nevertheless, members of the Commission were cognizant, as are most lawyers, that the rules are often used in other contexts; for example, as a basis for disqualification or as

82. See Nancy J. Moore, *Written Communications*, A.B.A. J., May 2001, at 62, 62. Other changes designed to clarify and strengthen a lawyer’s duty to communicate with the client include: (1) replacing “consents after consultation” with “informed consent” through the Rules; (2) clarifying the allocation of authority between client and lawyer; (3) combining all aspects of a lawyer’s duty to communicate with a client into a single rule; and (4) adding a requirement that a lawyer communicate the scope of the representation and the basis for charging expenses, along with the basis for the lawyer’s fee. See Veasey, *supra* note 1, at xiii-xiv.

83. See Charles W. Wolfram, *Reporter’s Preface to RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* xxiii (2000) [hereinafter *RESTATEMENT*].

84. See Roger C. Cramton & Lisa K. Udel, *State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules*, 53 U. PITT. L. REV. 291, 311-15 (1992) (discussing tension between “bar’s law” and states’ “other law”); cf. Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1390 (1992) (“The state and the profession have different understandings of the law governing lawyers—they have in effect different ‘law.’”). The *Restatement* has brought together various sources of law, including both “ethics law” and “other law,” in a single document. See Nancy J. Moore, *Intra-Professional Warfare Between Prosecutors and Defense Attorneys: A Plea for an End to the Current Hostilities*, 53 U. PITT. L. REV. 515, 516 n.8 (1992) [hereinafter Moore, *A Plea for an End to the Current Hostilities*].

85. See *RESTATEMENT*, *supra* note 83, § 37 (“A lawyer engaging in clear and serious violation of duty to a client may be required to forfeit some or all of the lawyer’s compensation for the matter.”).

86. See Moore, *A Plea for an End to the Current Hostilities*, *supra* note 84, at 516.

87. See WOLFRAM, *supra* note 26, § 2.6, at 51 (“Modern lawyer codes plainly are adopted by courts and legislatures for the purpose of authoritatively measuring a lawyer’s liability to professional discipline.”).

88. See *supra* notes 29-33 and accompanying text.

evidence of the applicable standard of conduct in civil liability lawsuits.⁸⁹ Indeed, one change proposed by the Commission was to clearly acknowledge, as the current Model Rules do not, that while violation of a Rule should not itself give rise to a cause of action against a lawyer, the Rules do establish standards of conduct by lawyers; therefore, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct in civil liability cases and other nondisciplinary proceedings involving a lawyer.⁹⁰

Given what we now know about the law governing lawyers, the Commission found it useful to make greater use of the comments⁹¹ to alert lawyers to their obligations under other law, particularly when such obligations are more extensive than is reflected in the disciplinary rules. For example, as amended, the text of Rule 1.8(c) provides:

A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client.⁹²

The Comment, however, goes on to note that although lawyers will not be disciplined for accepting unsolicited gifts, such a gift "may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent."⁹³ Similarly, a new Comment to Rule 1.5 on legal fees alerts lawyers to the possibility that applicable law may impose additional limitations on contingent fees, such as a ceiling on the percentage allowed, or on other fees, such as government regulations regarding fees in certain tax matters.⁹⁴ Here the goal is not to

89. See, e.g., RESTATEMENT, *supra* note 83, § 52(2) & cmt. f.

90. See REPORT WITH RECOMMENDATION, *supra* note 1, at 4, 7 (Scope ¶ 20 & Reporter's Explanation of Changes).

91. In its Final Report, the Commission substituted the term "commentary" for "comment." See REPORT WITH RECOMMENDATION, *supra* note 1. That change was widely criticized, and the term has been changed back to "comment" throughout the Rules. See generally ETHICS 2000 COMM'N, ABA, REPORT 401 (AS PASSED BY THE HOUSE OF DELEGATES) (2002), available at http://www.abanet.org/cpr/e2k-202report_summ.html (last visited Apr. 8, 2002).

92. REPORT WITH RECOMMENDATION, *supra* note 1, at 74 (R. 1.8(c)). The current rule prohibits only "prepar[ing] an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift." MODEL RULES, *supra* note 15, R. 1.8(c).

93. REPORT WITH RECOMMENDATION, *supra* note 1, at 77, 84 (R. 1.8 cmt. 6 & Reporter's Explanation of Changes). For a discussion of the law of undue influence, see RESTATEMENT, *supra* note 83, § 127 & cmt. a (citing RESTATEMENT (SECOND) OF TRUSTS § 343 cmts. 1 & m (1959) and RESTATEMENT (SECOND) OF CONTRACTS § 177 (1981)).

94. See REPORT WITH RECOMMENDATION, *supra* note 1, at 36, 40 (R. 1.5 cmt. 3 & Reporter's Explanation of Changes). For a discussion of some types of statutes and rules that regulate the size of lawyer fees, see RESTATEMENT, *supra* note 83, § 34 & cmt. g.

serve the disciplinary process, but rather to help practicing lawyers who may not be familiar with the wide scope of statutory and common law that, along with disciplinary rules, constitutes the law governing lawyers.⁹⁵

In these instances, the relationship between disciplinary law and other law is straightforward and complementary. In other situations, however, there may be tension between the two. For example, in crafting its proposed rule on the screening of lateral lawyers, the Commission understood that in a disqualification context, many courts would consider the extent to which the personally disqualified lawyer had been substantially involved in the matter before permitting that lawyer to be screened.⁹⁶ The Commission believed, however, that such an exception

95. The Scope section of the Commission Report concisely explains the purpose of the Comments:

The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. *The Comments are sometimes used to alert lawyers to their responsibilities under such other law.*

REPORT WITH RECOMMENDATION, *supra* note 1, at 3 (Scope ¶ 15) (italicized material added by Commission).

96. Current Model Rule 1.10 does not provide for screening to avoid imputation of a former client conflict of a lawyer who has moved laterally from one private firm to another. *See* MODEL RULES, *supra* note 15, R. 1.10. Over the last decade, however, a number of states have amended their codes to permit the use of screening in former private client representation. *See, e.g.,* Clinard v. Blackwood, No. 01A01-9801-CV-00029, 1999 WL 976582, at *12 (Tenn. Ct. App. Oct. 28, 1999) (citing amended rules in six jurisdictions: Illinois, Massachusetts, Michigan, Oregon, Pennsylvania and Washington), *aff'd*, 46 S.W.3d 177 (Tenn. 2001); *see also* KY. RULES OF PROF'L CONDUCT, R. 1.10(d)(1) (2001); MD. RULES OF PROF'L CONDUCT, R. 1.10(b) (2000); MINN. RULES OF PROF'L CONDUCT, R. 1.10(b) (2001); Proposed Rule 1.10(B), Tennessee Bar Ass'n Comm. for the Study of Standards of Professional Conduct (Nov. 1, 1997); Kala v. Aluminum Smelting & Ref. Co., 688 N.E.2d 258, 264-65 (Ohio 1998) (adopting screening by court decision). Regardless of whether a jurisdiction's disciplinary rules permit such screening, however, when the issue arises under a motion to disqualify, courts have discretion whether or not to require disqualification. *See* RESTATEMENT, *supra* note 83, § 124 cmt. d(i); *see also* Petrovich v. Petrovich, 556 So.2d 281, 282 (La. Ct. App. 1990) (upholding screening measures without reference to state's disciplinary code); Kassiss v. Teacher's Ins. & Annuity Ass'n, 717 N.E.2d 674, 677 (N.Y. 1999) (approving use of screening to avoid disqualification, stating that disciplinary rules do not establish a mandatory disqualification rule because "it is particularly important that the Code of Professional Responsibility not be mechanically applied when disqualification is raised in litigation" (quoting S&S Ventures Ltd. P'ship v. 777 S.H. Corp., 508 N.E.2d 647, 651 (N.Y. 1987))). Of the jurisdictions that provide screening to avoid imputed conflicts in the private practice setting, some permit screening irrespective of the amount of confidential information possessed by the personally disqualified lawyer, whereas other follow the *Restatement* approach of permitting screening only when any such information is unlikely to be significant in the subsequent matter. *See* RESTATEMENT, *supra* note 83, § 124. *Compare* Manning v. Waring, Cox, James, Sklar & Allen, 849 F.2d 222, 227 (6th Cir. 1988) (stating that a firm should be permitted to show that its screening had prevented disclosure of confidential information by newly hired lawyer with extensive exposure to confidential information), *with* Clinard, 46 S.W.3d at 184 (stating that a substantial relationship

to the screening rule could not realistically be enforced in a disciplinary proceeding.⁹⁷ As a result, the compromise proposed by the Commission was to reject a proposed “side-switching lawyer” exception to the black letter rule,⁹⁸ but to note in the Comment that “[l]awyers should be aware . . . that courts may impose more stringent obligations in ruling upon motions to disqualify a lawyer from pending litigation.”⁹⁹ However, some Commission members believed that such an exception should have been included in the disciplinary rule. These members argued that the rule was not likely to be enforced in a disciplinary context, and so it was better to take a position that would then influence courts to create such an exception in the disqualification context.¹⁰⁰ Under either view, it is clear that the proposed rules were being used not merely to reflect other law but rather to shape it.

The screening example is one where the tension exists between clarity and notice to the lawyer on the one hand and nuance and complexity on the other. A different sort of tension occurs in other contexts. For example, Rule 1.6, as amended, now provides that a lawyer *may* reveal information relating to the representation of a client when

exists when “the subsequent representation is adverse to the matters at issue in the previous relationship” or when “the lawyer was so involved in the matter that the subject representation can be justly regarded as a changing of sides in the matter in question.” (quoting Tenn. Bd. of Prof’l Responsibility, Formal Op. 89-F-118, 1989 WL 544365, at *3 (1989)).

97. See REPORT WITH RECOMMENDATION, *supra* note 1, at 96, 100-01 (R. 1.10 & Reporter’s Explanation of Changes).

98. The November 2000 Report of the Commission proposed amendments to Rule 1.10 would have permitted screening to avoid imputation of a former client conflict of a lateral lawyer only when “the matter does not involve a proceeding before a tribunal in which the personally disqualified lawyer had a substantial role.” CTR. FOR PROF’L RESPONSIBILITY, ABA, REPORT OF THE COMMISSION ON EVALUATION OF THE RULES OF PROFESSIONAL CONDUCT 220 (2000) (R. 1.10(c)(1)), available at <http://www.abanet.org/cpr/e2k-report.html> (last visited Mar. 20, 2002). The Commission indicated that it believed the exception was necessary to protect the interests of tribunals in the integrity of the proceedings before them. See *id.* at 225 (Reporter’s Explanation of Changes). Subsequently, however, the Commission heard testimony in opposition to the exception on the ground that it would require extensive litigation on the question of whether a lawyer’s involvement constituted a substantial relationship. The Reporter was persuaded that this was an exception that could be imposed by courts but that it was inappropriate for inclusion into a disciplinary rule and recommended deleting the exception. See Ethics 2000 Commission, Proposed Rule 1.10—Revised Final Draft, Reporter’s Observations (Mar. 2001). Thus, the exception did not appear in the Rule approved by the Commission for inclusion in the Final Report. See REPORT WITH RECOMMENDATION, *supra* note 1, at 96 (R. 1.10(c)). The ABA House of Delegates voted to delete the screening exception in paragraph (c). See August 2001 Summary, *supra* note 5.

99. REPORT WITH RECOMMENDATION, *supra* note 1, at 98, 102 (R. 1.10 cmt. 6 & Reporter’s Explanation of Changes).

100. The Commission voted by a vote of 6 to 4 to delete paragraph (c)(1) from Rule 1.10. See Minutes, Commission on Evaluation of the Rules of Professional Conduct (Mar. 16-17, 2001), available at <http://www.abanet.org/cpr/e2k-03-16mtg.html> (last visited Mar. 22, 2002).

necessary “to comply with other law or a court order.”¹⁰¹ In what respect is it proper to say that disclosure “to comply with other law or a court order” is merely permissive, as opposed to mandatory? As the Comment suggests, it is not always clear whether and when “other law” does in fact require a lawyer to disclose confidential information about a client.¹⁰² For example, in the famous “buried bodies” case, a public health law on its face required anyone knowing of the death of a person without medical attendance to report that death to the proper authorities.¹⁰³ Nevertheless, a New York court held that the statute did not apply to a criminal defense lawyer having information protected by the attorney-client privilege.¹⁰⁴ Even when the purported reach of a statute is clear, it may constitute an unconstitutional violation of the separation of powers doctrine, at least in jurisdictions that have adopted the more extreme version of the inherent power of courts to regulate the power of attorney.¹⁰⁵ Thus, the use of permissive disclosure here is not intended to reflect what Susan Koniak describes as the competition between the bar’s normative vision and that of the state’s,¹⁰⁶ but rather to give lawyers some leeway in determining precisely when the state’s law requires the disclosure of otherwise confidential information.

Before leaving the subject of the relationship between disciplinary law and other law, there is another aspect of the problem that should be mentioned—determining which issues are appropriate for treatment in disciplinary rules and which issues are best left to other law. Richard Zitrin proposed that the Commission adopt a rule prohibiting lawyers from participating in confidential settlements when the public safety is involved.¹⁰⁷ The Commission declined to do so, believing that the

101. REPORT WITH RECOMMENDATION, *supra* note 1, at 42 (R. 1.6(b)(6)).

102. *See id.* at 46 (R. 1.6 cmt. 12) (“Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules.”).

103. *See People v. Belge*, 372 N.Y.S.2d 798, 799 (County Ct.) (citing N.Y. PUB. HEALTH LAW §§ 4200(1), 4143 (n.d.)), *aff’d*, 376 N.Y.S. 2d 771, 771 (App. Div. 1975).

104. *See id.* at 803 (granting defendant’s motion to dismiss the indictment on the grounds that the attorney-client evidentiary privilege excused the attorney from making full disclosure to the authorities).

105. For a discussion of the negative aspect of the inherent powers doctrine, see WOLFRAM, *supra* note 26, § 2.2.3, at 27-28.

106. *See Koniak*, *supra* note 84, at 1391.

107. *See Zitrin Testimony*, *supra* note 75. His proposal was to amend Rule 3.2 to add a new provision (labeled “B”), which was modeled on current Rule 5.6(b):

(B) A lawyer shall not participate in offering or making an agreement, whether in connection with a lawsuit or otherwise, to prevent or restrict the availability to the public of information that the lawyer reasonably believes directly concerns a substantial danger to the public health or safety, or to the health or safety of any particular individual(s).

problem was one that was best left to courts or legislatures.¹⁰⁸ Zitrin, and other proponents of this rule, have been disappointed with the Commission's decision, pointing to other rules that impose obligations on lawyers beyond those required by other law.¹⁰⁹ For the Commission, however, the issue was not whether disciplinary rules *can* go beyond other law—surely they can and indeed they do in many instances;¹¹⁰ rather, the question is whether the disciplinary rules should impose prohibitions on *lawyers* that unfairly impinge on a *client's* ability to obtain the lawyer's advice on conduct that is perfectly lawful on the part of the client. The difference then between Rule 5.6(b) and the Zitrin proposal is this: Rule 5.6(b) prohibits lawyers from participating in settlement agreements that restrict *the lawyer's* right to represent other clients in similar matters.¹¹¹ Clients have no independent legal right to require *the lawyer* to make such agreements in order to facilitate settlements that are favorable for the client.¹¹² But as long as clients have the legal right to enter into settlements that require *the client* to keep information confidential,¹¹³ then clients ought to be able to have their

Id.; see also Richard A. Zitrin, *The Case Against Secret Settlements (Or, What You Don't Know Can Hurt You)*, 2 J. INST. STUD. LEGAL ETHICS 115, 116 (1999) (making the same proposal).

108. See Minutes, Commission on Evaluation of the Rules of Professional Conduct (Feb. 16-17, 2001), available at <http://www.abanet.org/cpr/e2k-02-16mtg.html> (last visited Mar. 22, 2002):

The Commission next considered Richard Zitrin's proposal to add a new Rule 3.2(b). The Reporter noted that when the Commission previously discussed this matter it felt that it was better to have a court rule regulating the parties.

After discussion the Commission unanimously agreed that the ethics rules were not the vehicle for solving this problem.

Id.

109. For example, Richard Zitrin notes that:

Rule 5.6(B) [sic] currently prevents a lawyer from participating in offering or assisting in an agreement to restrict the lawyer's right to practice, such as agreeing not to take any more cases against X Co. The language of proposed rule 3.2(B) parallels Rule 5.6's language ("shall not participate in offering or making an agreement . . .").

E-mail from Richard Zitrin, to Various Recipients (Feb. 6, 2001) (on file with Author).

110. Cf. Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243, 247 (1985) (criticizing the Model Rules for merely restating, in many instances, what other law already requires and not placing additional, purely "ethical" obligations on lawyers in these situations).

111. See MODEL RULES, *supra* note 15, R. 5.6 ("A lawyer shall not participate in offering or making . . . an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.").

112. Absent Rule 5.6(b), a lawyer could lawfully agree not to represent future claimants in return for a more favorable settlement for an existing client, but the lawyer would not be required to do so simply because such an agreement would benefit that client. See *id.*

113. But see generally Susan P. Koniak, *Are Agreements to Keep Secret Information Learned in Discovery Legal, Illegal, or Something in Between?*, 30 HOFSTRA L. REV. 783 (2002).

lawyers advise them and even participate in making such settlements.¹¹⁴ If these agreements are bad for society—and I agree that they are—then *no one* should be entitled to make them.¹¹⁵ And if the clients themselves are banned from making them, then the prohibition on lawyer assistance necessarily follows.¹¹⁶ It is regrettable that most courts and legislatures do not have the political will to enact such legal restrictions, but that lack of political will should not put pressure on the disciplinary system to accomplish indirectly what cannot be accomplished directly in the political arena.

C. *Changes in the Organization and Practice of Law*

Let me turn now to the third and final category of changes proposed by the Commission, i.e., those that respond to dramatic changes in the practice of law over the last twenty years. Among other changes, the Commission proposed greater use of screening in recognition of the

114. The same point is made in an addition to the Comment to Rule 8.4(a), which forbids lawyers from violating the Rules “through the acts of another.” REPORT WITH RECOMMENDATION, *supra* note 1, at 271 (R. 8.4 cmt. 1). The Commission proposed to amend the Comment to add the following paragraph:

Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer’s behalf. *Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is lawfully entitled to take.*

Id. (emphasis added). A related proposed amendment to the Comments following Rule 4.2 is: Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, *and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make.*

Id. at 195 (R. 4.2 cmt. 2) (emphasis added).

115. See Koniak, *supra* note 113, at 787-88. Susan Koniak wants to outlaw secret settlements, and says she is indifferent to whether the prohibition is contained in an ethics rule or in a court rule or statute directed to both the parties and their attorneys. See Susan P. Koniak, Remarks at Legal Ethics: What Needs Fixing? (Sept. 9, 2001). According to her, such settlements are not effective unless the lawyer agrees to be personally bound. See *id.* If Zitrin’s rule had been directed solely to prohibiting lawyers from making themselves bound by such agreements (thus permitting them to advise their clients regarding settlements in which the client alone is bound), the analogy to Rule 5.6 would have been more apt. Of course, lawyers would still be bound to keep the information confidential under Rule 1.9(c), but at least they would be permitted to reveal information when necessary to prevent reasonably certain death or substantial bodily injury. See MODEL RULES, *supra* note 15, R. 1.9(c); REPORT WITH RECOMMENDATION, *supra* note 1, at 42 (R. 1.6(a)).

116. See MODEL RULES, *supra* note 15, R. 1.2(d) (“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . .”).

increased mobility of lawyers and the growth in the size of law firms.¹¹⁷ In addition, the Commission responded to changing technology by clarifying the application of the advertising and solicitation rules to lawyers' extensive use of the Internet, including lawyer web pages, participation in live chat rooms and use of e-mail.¹¹⁸ Also, in Rule 4.4(b), the Commission proposed a rule that would address the now ubiquitous problem of the inadvertent fax.¹¹⁹ As for other important changes in law practice, the Commission did not play an active role in the ABA debate on multidisciplinary practice.¹²⁰ It did participate, however, in the debate

117. See *supra* notes 96-100 and accompanying text. As noted earlier, the ABA House of Delegates did not approve the Commission's recommendation to permit screening to avoid imputation of the former client conflicts of laterally hired lawyers. See *supra* note 98. Nevertheless, it is my belief that the Commission's recommendation is important because it may influence some states to make the recommended change. See *supra* note 98.

118. See REPORT WITH RECOMMENDATION, *supra* note 1, at 243 (R. 7.2) (amending text of advertising rule to reference permissive advertising through electronic communication and revising Comment to include references to electronic media, such as the Internet); *id.* at 249 (R. 7.3) (amending text of solicitation rule to generally prohibit real-time electronic contact, but to permit other electronic communication to the same extent as other written or recorded communications and revising the Comment to include references to electronic communication); *id.* at 259 (R. 7.5) (amending text of rule regulating firm names and letterheads to include regulation of professional designation such as distinctive website addresses).

119. Under the Commission's proposed rule, a lawyer who receives a document, including e-mail or other electronic modes of transmission, and "knows or reasonably should know that the document was inadvertently sent" need only "promptly notify the sender." REPORT WITH RECOMMENDATION, *supra* note 1, at 202 (R. 4.4(b)); see also *id.* at 195 (R. 4.2 cmt. 2). Whether more is required, such as returning the original document, is considered to be a matter of law beyond the scope of the Rules. See *id.* at 202 (R. 4.4 cmt. 2). This is an issue that has been resolved differently by the various ethics committees that have addressed the question. See, e.g., *Kondakjian v. Port Auth.*, No. 94 Civ. 8013, 1996 WL 139782, at *8 (S.D.N.Y. Mar. 28, 1996) (including full text of report by the Association of the Bar of the City of New York which discusses differing approaches taken by various bar associations). I personally would have preferred an earlier proposed version of Rule 4.4(b), which would have provided as follows:

(b) A lawyer who receives a document and knows, before reading the document, that it has been inadvertently sent, shall not examine the document, but shall notify the sending person and abide by the instructions of the sending person regarding the return or destruction of the document. A lawyer who receives a document and does not know, before reading the document, that it has been inadvertently sent, but later has reason to believe the document was inadvertently sent, shall notify the sending person and, if requested to do so, shall return the original document.

Ethics 2000 Commission, Proposed Revised Rule 4.4—Draft No. 2 (July 15, 1999). This proposal was based on the rule proposed by the Association of the Bar of the City of New York. See *Kondakjian*, 1996 WL 139782, at *7-8.

120. For a discussion of the work of the ABA Commission on Multidisciplinary Practice, see ABA Comm'n on Multidisciplinary Practice, Ctr. for Prof'l Responsibility, Report to the House of Delegates (May 11, 2000), available at <http://www.abanet.org/cpr/mdpfinalrep2000.html> (last visited Jan. 30, 2002). For the reaction of the ABA House of Delegates, see Ctr. for Prof'l Responsibility, ABA, Recommendation (July 2000), available at <http://www.abanet.org/cpr/mdprecom10F.html> (last visited Jan. 30, 2002) (rejecting the

on multijurisdictional practice¹²¹ by proposing in Rule 5.5 the creation of four safe harbors for lawyers engaged in certain forms of cross-border practice.¹²² Also, in Rule 8.5, the Commission proposed that disciplinary authorities assert their authority to discipline any lawyer who commits misconduct in the jurisdiction—not just lawyers admitted to practice there—and also proposed a more appropriate choice of law rule, including a safe harbor for lawyers who attempt in good faith to conform their conduct to what they believe is the applicable rule.¹²³

Even in this last category—response to changes in law practice—the Commission not only has been guided by the wisdom of the states, but also was forced yet again to confront the increasingly complex process of integrating disciplinary law and other law.¹²⁴ Thus, the Commission drew largely upon the states' experiences with screening rules¹²⁵—including specification of the institutional mechanisms that are necessary to implement a proper screen¹²⁶—as well as individual state

Commission's proposal and disbanding the Commission). For the adoption of resolution 10F, see ABA House of Delegates Report 10F (June 2000), *available at* <http://www.abanet.org/cpr/mdp-report10f.html> (last visited May 15, 2002).

121. For a discussion of the work of the ABA Commission on Multijurisdictional Practice, see generally COMM'N ON MULTIJURISDICTIONAL PRACTICE, ABA, INTERIM REPORT (2001), *available at* http://www.abanet.org/cpr/mjp-final_interim_report.pdf (last visited Mar. 22, 2002).

122. See REPORT WITH RECOMMENDATION, *supra* note 1, at 214 (R. 5.5). This proposal states that a lawyer admitted to practice in another jurisdiction but not in the adopting jurisdiction does not engage in the unauthorized practice of law when: (1) the lawyer has been authorized or expects to be authorized by a tribunal or other agency for purposes of a particular proceeding; (2) the lawyer is in-house counsel and is acting on the client's behalf; (3) the lawyers is acting with respect to a matter arising out of or reasonably related to the lawyer's otherwise proper representation of a client; or (4) the lawyer associates in the matter with local counsel. See also *supra* notes 68-69 and accompanying text.

123. See REPORT WITH RECOMMENDATION, *supra* note 1, at 274 (R. 8.5). The Commission proposes adding to paragraph (a) that "A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer renders or offers to render any legal services in this jurisdiction[.]" and further proposes to amend paragraph (b), *inter alia*, to include the following safe harbor provision: "A lawyer is not subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur." *Id.*; see also *supra* note 70 and accompanying text.

124. See discussion *supra* Part III.B (discussing complex relationship between disciplinary rules and the "other law").

125. See *supra* note 96 (noting states that have recently amended their codes to permit the use of screening in former private client representation).

126. See OR. CODE OF PROF'L RESPONSIBILITY DR 5-105(I) (2001) (providing for service of affidavit by personally disqualified lawyer and firm attesting to personally disqualified lawyer's lack of participation and, at request of former client, attesting to actual compliance with screening procedures); WASH. RULES OF PROF'L CONDUCT R. 1.10(b) (2001) (providing for execution of affidavit, including notice of specific screening measures being employed). Compare, e.g., PA. RULES OF PROF'L CONDUCT R. 1.10(b) (2001) (failing to provide any specification of effective screening measures required under the Rule), with, e.g., MASS. RULES OF PROF'L CONDUCT

rules¹²⁷ and ethics committee opinions¹²⁸ on marketing lawyers services on the Internet. At the same time, the Commission was challenged to justify its use of Rule 5.5 to create safe harbors from the application of unauthorized practice of law statutes, given that the disciplinary rules have not previously been used to define what does and does not constitute the unauthorized practice of law.¹²⁹

IV. CONCLUSION

Serving as Chief Reporter to the Commission on the Evaluation of the Rules of Professional Conduct has been both an honor and a pleasure. I even had my fifteen minutes of fame in the short-lived media blitz that surrounded the ABA Annual Meeting in Chicago.¹³⁰ But I am an academic at heart, and I am delighted to leave the real world of ABA politics and return to my ivory tower in Boston. I am grateful to Hofstra Law School for sponsoring this Symposium and for giving me the opportunity to reflect on the significance of my real world experience in

R.1.10(e) (2001) (detailing elaborate screening measures including isolation of personally disqualified lawyer, notice to former client of screening procedures, and affidavit executed by personally disqualified firm). The Commission chose to provide some additional guidance to the practicing lawyer but without an elaborate specification of required procedures or any required affidavits from either the personally disqualified lawyer or the firm. *See* REPORT WITH RECOMMENDATION, *supra* note 1, at 9 (R.1.0(k)) (including in the new terminology Rule the definition of the term “screened” to denote “the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law”); *id.* at 11 (R.1.0 cmts. 8-10) (suggesting various measures that might be used to create reasonably adequate screening measures).

127. *See, e.g.*, FLA. RULES OF PROF'L CONDUCT R. 4-7.1(a) (2001) (permitting lawyers to advertise through “computer-accessed communications”); TENN. CODE OF PROF'L RESPONSIBILITY DR 2-104 (2001) (providing that solicitation rules apply to direct contact with prospective clients through the internet).

128. *See, e.g.*, Iowa Ethics Op. 95-21 (1996) (providing that lawyers with websites must comply with the state's ethics rules on advertising, including publication of mandatory disclosures); Pa. Ethics Op. 96-17 (1996) (advising that website communications are subject to state's ethics rules on advertising, including disclosure and record-keeping requirements; further advising that a website does not constitute prohibited in-person solicitation).

129. *See, e.g.*, E-mail from George A. Riemer to Sue Campbell (June 15, 2000) (on file with Author) (expressing concern that a lawyer not subject to discipline under the proposed Rule 5.5 might still be subject to sanction under express rules or statutes prohibiting the unauthorized practice of law).

130. *See, e.g.*, William Glaberson, *Lawyers Consider Easing Restriction on Client Secrecy*, N.Y. TIMES, July 31, 2001, at A1. As a result of the *New York Times* article, I received a number of calls from reporters and was invited to appear on several radio and television programs. I quickly learned, however, about the fleeting nature of fame, when several scheduled appearances on various television interview programs were cancelled because of developments in the Gary Condit-Chandra Levy story, then prominent in the news.

drafting a lawyers' ethics code at the beginning of the twenty-first century.
