

## Oklahoma City University School of Law

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# A Better Way to Make State Legal Ethics Opinions

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# A BETTER WAY TO MAKE STATE LEGAL ETHICS OPINIONS

LAWRENCE K. HELLMAN\*

*Most states have in place a committee of the bar that issues "ethics opinions" intended to give guidance on how enforceable rules governing the conduct of lawyers apply in specific fact situations. However, courts rarely treat state ethics opinions as authoritative, and judicial opinions sometimes impose results that are directly contrary to ethics opinions. If lawyers cannot confidently rely on ethics opinions for guidance, obvious questions arise as to their utility. This Article illustrates the problems associated with a state regime that produces non-authoritative ethics opinions. It then describes the ethics opinion process implemented by the New Jersey Supreme Court, which puts the process directly under the control of the state supreme court. Confident of its ultimate control of the process, the New Jersey Supreme Court is willing to treat ethics opinions generated by it as controlling, at least in disciplinary contexts. The Article concludes with an analysis of the benefits offered by such a regime and a proposal that other states consider adopting a system based on the New Jersey model.*

## DEDICATION

Marj Downing has never taught a course on professional responsibility, but she has been an excellent professional responsibility teacher. Much of what law students learn about

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legal ethics and the responsibilities that come with being a lawyer is learned from modeling. All teachers are role models, not just through their classroom demeanor, but also in the ways in which they relate to students and conduct themselves in their community. Marj has dealt with students openly, honestly, and respectfully, the way lawyers should deal with clients, courts, and adversaries. Marj has made a huge commitment to help students in their extra-curricular activities and their placement efforts, showing the care and concern that a lawyer should have for clients and colleagues. Marj has demonstrated the responsibilities and satisfactions that can be associated with pro bono work and extending oneself for the bar and the broader community. In all of these ways, Marj has shown her students how to be a responsible lawyer.

A student could not go wrong by emulating Marj Downing. Such a student would be honest, forthright, well-informed, well-prepared, unpretentious, unsusceptible to overstatement, a good listener, pragmatic, courageous, and generous. Such a student would deplore injustice and be willing to expend no little effort to do something about it.

More than a role model for students, Marj has been a role model for teachers. I have learned valuable lessons about the many dimensions of being a law professor from her. These lessons include: You shouldn't take yourself too seriously if you want to be perceived as serious. Students have a need – and a right – to talk with professors outside of class, and professors have to go out of their way to break down the barriers of accessibility. You can sometimes be unkind by being too kind. Lawyers sometimes have to tell clients something they do not want to hear, and a good law professor is someone who has the courage and the ability to convey an unpleasant message to a student or colleague without being unpleasant. Actions communicate better than words when it comes to teaching about a lawyer's pro bono responsibility. Law professors can disagree without being disagreeable. Helping students become responsible lawyers is important work.

A law school whose faculty understand their responsibilities, as Marj Downing has understood hers, is going to produce more than its fair share of good lawyers.

A classic question of professional responsibility asks whether one can simultaneously be a good lawyer and a good person. One who has been fortunate enough to know Marj Downing would conclude that this is not the right question. Rather, it should be asked whether one can be a good lawyer if she is not *also* a good person. The answer to that question is: No, you cannot be a really good lawyer if you are not also a good person. Marj Downing is a really good lawyer *because* she is a really good person. It has been my good fortune to work along side her for many years.

This article is offered in the spirit of providing service to the bar, as Marj Downing has done throughout her career.

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The vast majority of all lawyers practice in a jurisdiction that has put into force the American Bar Association's Model Rules of Professional Conduct ("Model Rules").<sup>1</sup> However, most states that have patterned their rules after the Model Rules have adopted provisions that vary substantially from the model.<sup>2</sup> The differences from jurisdiction to jurisdiction

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1. See MODEL RULES OF PROFESSIONAL CONDUCT (1997). The Model Rules of Professional Conduct ("Model Rules") were first promulgated by the American Bar Association in 1983. STEPHEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS: STATUTES AND STANDARDS 3 (1997 ed.). The ABA has since amended the Model Rules several times. See *id.* at 4 (noting that there were amendments in each year from 1988 through 1995). See also 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT 16 n.3 (2d ed. Supp. 1998) (detailing a number of amendments adopted between 1987 and 1989). The Model Rules now form the basis for the enforceable rules of legal ethics in forty states and the District of Columbia. See [13 Current Reports] Laws. Man. on Prof. Conduct (ABA/BNA) 181 (June 25, 1997).

2. See [13 Current Reports] Laws. Man. on Prof. Conduct (ABA/BNA) 181 (June 25, 1997) (summarizing differences between Massachusetts' Rules of Professional Conduct, adopted in June of 1997, and the Model Rules); see also Laws. Man. on Prof. Conduct (ABA/BNA) 01:11-46 (misc. dates) (noting significant differences between each state's version of the Model Rules and the Model Rules themselves); THOMAS D. MORGAN & RONALD D. ROTUNDA, SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 133-53 (1998 ed.) (detailing, state by state, variations in rules pertaining to client confidences, imputed disqual-

have become so numerous and important that the American Bar Association has felt it necessary to incorporate into the Model Rules a choice of law roadmap to be used in disciplinary cases.<sup>3</sup> Choice of law analysis will sometimes result in a lawyer's conduct being evaluated under the rules of a jurisdiction other than the one where the lawyer normally practices.<sup>4</sup> A lawyer who anticipates this possibility will have

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ification of lawyers, and requirements regarding reducing fee agreements to writing). Differences between state rules and the Model Rules have proliferated as the ABA has amended the Model Rules with increasing frequency. *See supra* note 1 (noting frequency of amendments to Model Rules).

3. *Choice of Law.* In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and

(2) for any other conduct,

(i) if the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, and

(ii) if the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.5(b) (1997).

Rule 8.5 (b) was added to the MODEL RULES in 1993, ten years after the ABA first promulgated them. *See GILLERS & SIMON, supra* note 1, at 405. Few states have adopted Rule 8.5(b) or any formal choice of law rule. *See H. Geoffrey Moulton, Jr., Federalism and Choice of Law in the Regulation of Legal Ethics*, 81 MINN. L. REV. 73, 160 & n.402 (1997) (noting that only the District of Columbia, Pennsylvania, and Illinois have adopted the ABA's 1993 amendment to Rule 8.5). Oklahoma is among the states that have yet to adopt a choice of law provision. In the absence of a codified choice of law rule, general principles of conflict of laws will be available to resolve choice of law questions. *See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* § 5 cmt. h (Preliminary Draft No. 13 1997) (noting choice of law problems in lawyer disciplinary proceedings and suggesting that they be resolved by reference to general conflict of laws principles).

4. *See MODEL RULES OF PROFESSIONAL CONDUCT* Rule 8.5(b)(1) (1997) (lawyer admitted *pro hac vice* by a tribunal outside the lawyer's home jurisdiction is subject to discipline for violating rules in force in that tribunal's jurisdiction); *see also id.* Rule 8.5(b)(2)(ii) (lawyer admitted to practice in more than one jurisdiction is subject to discipline for violating the rules in force in the admit-

occasion to do some research to become familiar with that other jurisdiction's rules. Even more often, lawyers who have no risk of being subjected to the rules of another jurisdiction have reason to do research on the rules in force in the state where they primarily practice. Whether a lawyer is conducting legal ethics research on the lawyer's home jurisdiction or an unfamiliar one, the careful researcher will not want to stop the inquiry once an apparently applicable rule has been found, for even when the rules in force in the states are identical and conform precisely to the Model Rules, they are not necessarily interpreted the same way from jurisdiction to jurisdiction.<sup>5</sup> Thus, it is often insufficient for lawyers to know the content of an applicable jurisdiction's Rules of Professional Conduct; they need to know how that jurisdiction's rules are interpreted.

Discovering a state's interpretation of its ethics rules can be difficult. The first source one might consider would be the reported disciplinary decisions of the state's highest court. For example, the Oklahoma Supreme Court recently held in a disciplinary decision that Oklahoma's Rule 3.3(a)(4), establishing a duty to take "reasonable remedial measures" when a lawyer comes to know that the lawyer has (even inadvertently) presented false evidence to a tribunal, only applies when the false evidence is "material" to the proceeding in question.<sup>6</sup> The Court found this "materiality" requirement only by reading the text of Rule 3.3 in the

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ting jurisdiction where the lawyer's conduct has its predominant effect, even if that is not the jurisdiction in which the lawyer primarily practices).

5. Compare, e.g., *Robertson's Case*, 626 A.2d 397 (N.H. 1993) (threatening criminal charges to gain advantage in civil proceeding violates rules patterned after Model Rules despite absence of specific prohibition against such conduct), with *West Virginia State Bar Comm'n on Legal Ethics v. Printz*, 416 S.E.2d 720 (W. Va. 1992) (threatening criminal charges to gain advantage in civil proceeding does not violate rules patterned after Model Rules). It is similarly not uncommon for states to interpret language contained in the Model Rules differently than the ABA Standing Committee on Ethics and Professional Responsibility. 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, 329 & nn.41-42 (1997) (noting examples of state autonomy in construing rules patterned after Model Rules).

6. See *State ex rel. Oklahoma Bar Ass'n v. Brooks*, 68 OKLA. B.J. 294 (1997).

Oklahoma Rules of Professional Conduct in conjunction with the comment accompanying that rule.<sup>7</sup> Prior to this decision, the language of the rule left sufficient doubt about the "materiality" requirement to have caused a Trial Panel of the Oklahoma Bar Association's Professional Responsibility Tribunal to conclude that it did not exist.<sup>8</sup> Until the Oklahoma Supreme Court spoke on the matter, other lawyers may have reached the same conclusion. This case illustrates that, to know what a state's ethics rules really mean, lawyers need to be familiar with the decisional law of that state's courts.

It will often be the case, however, that there is not a reported judicial interpretation in the relevant state concerning the particular application of an ethics rule about which a lawyer has a question. When this is so, an attorney might then look to see if there is a published ethics opinion in that state to provide guidance. Almost every state bar association and many of the larger metropolitan bar associations have in place a committee with the authority to issue advisory opinions on the proper interpretation of the rules in force in the various jurisdictions.<sup>9</sup> But a search for an ethics opinion on point in the relevant state will often come up empty, as many states' ethics committees have issued very few opinions in the Model Rules era.<sup>10</sup> For example, the Oklahoma Bar Association has published only seven opinions since the Oklahoma Supreme Court adopted its version of the Rules of Professional Conduct in 1988.<sup>11</sup> Unable to find an ethics

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7. *See id.* at 296.

8. Although the "materiality" requirement adopted in *Brooks* is strongly supported by the comment to the rule in question, judicial reliance on the comments cannot be taken for granted: "The Comments are intended as guides to interpretation, but the text of each Rule is authoritative." MODEL RULES OF PROFESSIONAL CONDUCT scope (1997).

9. More than 200 such committees have been identified. *See* David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 502 (1990).

10. *See* Hellman, *supra* note 5, at 331 & n.47 (noting that several states have issued few ethics opinions since the Model Rules were put in place).

11. *See id.* (noting only five Oklahoma opinions had been published between 1988 and 1997); *see also infra* note 109 (noting two Oklahoma opinions approved in 1998). The Oklahoma Rules of Professional Conduct became effective on July 1, 1988. *See In re Adoption of Oklahoma Model Rules of Professional Conduct*, 59 OKLA. B.J. 846 (1988). The Oklahoma rules are found at OKLA.

opinion in the controlling state, a lawyer looking for guidance may consider an ABA ethics opinion that seems to be on point, opinions from other states, the position taken by the American Law Institute in the Restatement of the Law Governing Lawyers, or even (should this be the last resort?) a law review article or treatise on legal ethics.<sup>12</sup> But an attorney would have no confidence that such extra-jurisdictional sources of guidance would be followed in the relevant state.<sup>13</sup>

Now, one would think that if an ethics opinion on point *has* been found in the appropriate state, any further inquiry would be unnecessary. However, a 1997 ruling handed down by the Federal District Court for the District of Maryland demonstrates that this is not necessarily the case. The court's decision in *Zachair v. Driggs*<sup>14</sup> shows that reliance on a state ethics opinion can be a big mistake.

*Zachair* involved a private antitrust complaint that the court found to be so weak on the merits that it granted defendants' 12(b)(6) motion.<sup>15</sup> But that was not the end of it. The district judge also disqualified plaintiff's counsel and suppressed material determined to have been wrongfully obtained through informal discovery, so that the lawyer and some of his valuable work product would be unavailable should the plaintiff pursue an appeal.<sup>16</sup>

The disqualification stemmed from a seven-hour, transcribed interview conducted by plaintiff's counsel with the primary corporate defendant's former general counsel, who had recently been fired after nine years with the compa-

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STAT. ANN. tit. 5, Ch. 1, App. 3-A (1996 & Supp. 1998).

12. Informal advice is available from many state bars. For example, the Oklahoma Bar Association's General Counsel's Office offers non-binding, informal advice. OKLAHOMA B. ASSN, ANNUAL REPORT OF PROF. RESP. COMM'N AND PROF. RESP. TRIBUNAL, S.C.B.D. No. 4239, 68 OKLA. B.J. 439, 442 (1997) [hereinafter ANNUAL REPORT].

13. See Hellman, *supra* note 5, at 329-30 & n.42 (giving numerous examples demonstrating that "it is not at all unusual for state authorities to adopt interpretations that conflict with ABA ethics opinions addressing [state rules with] the very same language [as is found in the ABA's Model Rules]").

14. 965 F. Supp. 741 (D. Md. 1997).

15. See *id.* at 746-49.

16. See *id.* at 754-55.



ny.<sup>17</sup> A local rule of the federal district court essentially disallowed any depositions prior to resolution of preliminary matters (such as a 12(b)(6) motion).<sup>18</sup> To avoid the local rule's limitation, the interview with the former general counsel was conducted informally, rather than as a deposition.<sup>19</sup>

The former general counsel was not happy about being fired,<sup>20</sup> and he apparently vented his anger by giving plaintiff's counsel a lot of confidential information adverse to his former client.<sup>21</sup> The disqualification motion filed against plaintiff's counsel was based, in part, on his having "aided and abetted" the former general counsel's unauthorized disclosure of confidential client information,<sup>22</sup> but its primary focus was on Maryland's Rule 4.2, which limits *ex parte* contact by the lawyer for one side in a matter with a represented opposing party, or certain employees of a represented opposing party.<sup>23</sup> The district court's local rules made

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17. See *id.* at 745-46.

18. See *id.* at 746.

19. *Id.* at 745-46.

20. See *id.* at 745.

21. See *id.* at 753. The former general counsel later sought to justify his disclosures on the authority of the "self-defense" exception to confidentiality obligations, as provided in Maryland's Rule 1.6(b)(3) (similar to MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2)). See *id.* at 754-55. Although plaintiff had threatened to name the former general counsel as a defendant, the court found, after reviewing the transcript of the interview, that the disclosures went far beyond anything self-defense could legitimate. See *id.*

22. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(a) (1997) (stating that knowingly assisting or inducing another lawyer to violate a rule of professional conduct is itself defined as misconduct).

23. "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." MARYLAND RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1997). The comment to this rule notes that, when the opposing party is an organization, the rule's prohibitions extend to communications with "persons having managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization." *Id.* Rule 4.2 cmt. The quoted language is from the Maryland version of Rule 4.2. The ABA recently amended Model Rule 4.2 in a manner not material to this discussion. For a description of the ABA amendment, see *ABA Amends Rules 4.2, 3.8; Moves on Internal Governance*, [11 Current Reports] Laws. Man. on Prof. Conduct (ABA/BNA) 248-49 (1995).

Maryland's Rule 4.2 applicable in this federal court litigation.<sup>24</sup>

Of course, when he was interviewed, the former general counsel was no longer an employee of a represented party; he was a *former* employee. There was no opinion from Maryland's highest state court commenting on whether that court viewed its Rule 4.2 to bar *ex parte* contact with *former* employees of a represented organizational adversary,<sup>25</sup> and the text of the rule was silent on the issue.<sup>26</sup> However, the Ethics Committee of the Maryland State Bar Association had issued an opinion in 1986,<sup>27</sup> just as the Maryland Supreme Court was considering the adoption of the Model Rules,<sup>28</sup> concluding that "counsel is not forbidden from speaking *ex parte* with former employees of a corporate adverse party."<sup>29</sup> Although the district court did not note these additional developments, the Maryland Ethics Committee had reiterated its 1986 position in an opinion issued in 1990,<sup>30</sup> the ABA Ethics Committee had concurred in that view in 1991,<sup>31</sup> and an article in the Maryland Law Review had noted these developments and judged them to be sound.<sup>32</sup>

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24. See *Zachair*, 965 F. Supp. at 750. It is common, but not universal, for a federal district courts' local rules to incorporate the rules of professional conduct of the state in which the district court sits. See Hellman, *supra* note 5, at 327-28 n.35 (noting exceptions to the common federal district court practice of adopting the ethics rules of state in which federal court sits). The adoption of ethics rules that are inconsistent from district to district has led to consideration of proposed uniform ethics rules for the federal courts. See [14 Current Reports] Laws. Man. on Prof. Conduct (ABA/BNA) 78, 82-86 (Mar. 4, 1998) (describing and reproducing proposed "Federal Rules of Attorney Conduct").

25. See *id.* at 752.

26. See *supra* note 23 (setting out language of Maryland's Rule 4.2).

27. See Maryland State Bar Ass'n Comm. on Ethics, Op. 86-13 (1986).

28. Maryland's version of the Model Rules became effective on January 1, 1987. See Laws. Man. on Prof. Conduct 01:3 (May 25, 1995).

29. *Zachair*, 965 F. Supp. at 752.

30. See Maryland State Bar Ass'n Comm. on Ethics, Op. 90-29 (1990).

31. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-359 (1991) ("The prohibition of Rule 4.2 with respect to contacts by a lawyer with employees of an opposing corporate party does not extend to former employees of that party.").

32. See Susan J. Becker, *Conducting Informal Discovery of a Party's Former Employees: Legal and Ethical Concerns and Constraints*, 51 MD. L. REV. 239 (1992). (This article was not written with exclusive reference to the Maryland

Surprisingly, this line of authority did not prevent the federal district court in *Zachair* from finding that the interview with the former general counsel violated Maryland's Rule 4.2.<sup>33</sup> The district court felt free to disregard the one contrary Maryland ethics opinion, which it did acknowledge, because the Maryland Court of Appeals, the highest state court in Maryland, once opined that Maryland State Bar ethics opinions are not binding on it.<sup>34</sup> If Maryland ethics opinions were not binding on the Maryland Court of Appeals, the federal court reasoned, then they should not be treated as part of Maryland law, to which the federal court would have to defer under either *Erie*<sup>35</sup> or its own local rule.<sup>36</sup> The issue was thus treated as one "of first impression," where the court felt "at liberty to examine authority from other jurisdictions and adopt that [view] which the Court finds most persuasive."<sup>37</sup>

The "most persuasive" opinion the judge found, apparently, was one delivered in 1996 by another federal district judge from the same district in *Camden v. Maryland*.<sup>38</sup> *Camden* had rejected the contrary Maryland and ABA ethics opinions<sup>39</sup> and relied, instead, on selected law review articles placed in publications outside of Maryland, a legal treatise, cases decided in other jurisdictions, and the then-unapproved preliminary draft of the American Law Institute's Restatement of the Law Governing Lawyers to fashion a construction of Maryland's Rule 4.2 that bars *ex parte* con-

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rules and Maryland bar.)

33. *Zachair*, 965 F. Supp. at 754. The court also found that Zachair's counsel had aided and abetted the former general counsel's confidentiality violations. See *id.* at 755.

34. See Attorney Grievance Comm'n of Md. v. Gregory, 536 A.2d 646, 651 (Md. 1988).

35. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

36. See *Zachair*, 965 F. Supp. at 750.

37. *Id.* at 752.

38. 910 F. Supp. 1115 (D. Md. 1996).

39. See *supra* notes 27 and 30-32 and accompanying text.

tact with an opposing organization's former employees who have confidential information relating to the matter in controversy.<sup>40</sup> The court in *Zachair* chose to follow *Camden*.<sup>41</sup>

Perhaps the most remarkable aspect of *Zachair* was the district court's criticism of plaintiff's counsel for having been unaware of *Camden*'s repudiation of the Maryland ethics opinions that condoned what the lawyer had done. In response to counsel's claim that he had been unaware that Maryland ethics opinions could not be relied on by lawyers participating in federal litigation in Maryland, the judge in *Zachair* proclaimed that "Zachair's counsel cannot assert ignorance of the law as an excuse for violating caselaw that *unequivocally governs* his conduct as a practicing attorney in a case pending before this Court."<sup>42</sup> This was quite a bold statement. While the Maryland Court of Appeals may indeed not be bound by Maryland ethics opinions, neither is it bound by a federal court's opinion on an unsettled issue of Maryland law.<sup>43</sup> Even different judges sitting in the same federal district have been known to take opposing views as to the proper interpretation of a state ethics rule.<sup>44</sup> It thus seems a bit harsh for the federal court in *Zachair* to have presumed that the lawyer had no option but to acquiesce in the opinion of another federal judge in a case that had been reviewed by no Maryland court.

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40. See *Camden*, 910 F. Supp. at 1119-22.

41. See *Zachair*, 965 F. Supp. at 753.

42. *Id.* at 752-53 (emphasis added).

43. Cf. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78-79 (1938) (noting that federal courts must defer to state court construction of state law); *Kansas Pub. Employees Retirement Sys. v. Reimer & Koger Assoc.*, 941 P.2d 1321 (Kan. 1997) ("Federal court decisions on issues of state law are not binding on and have limited precedential effect in state courts."); *Majors v. Good*, 832 P.2d 420, 422 (Okla. 1992) (noting that state courts "not restrained by federal cases" on matters of state law); *Commerce Union Bank v. Coors*, 7 Media L. Rep. 2204 (Tenn. Ch. Ct. 1981) (noting that state court may disregard "erroneous" federal court interpretation of state law).

44. See *Becker*, *supra* note 32, at 280-85 (comparing *Public Serv. Elec. & Gas Co. v. Associated Elec. & Gas Ins. Servs. Ltd.*, 745 F. Supp. 1037 (D.N.J. 1990) (Politan, J.) (stating that New Jersey's Rule 4.2 bars *ex parte* contacts with any former employee), and *Curley v. Cumberland Farms*, 134 F.R.D. 77 (D.N.J. 1991) (Brotman, J.) (stating New Jersey's Rule 4.2 does not bar contacts with all former employees)).

Indeed, just six months after *Zachair* was decided, yet another federal district judge sitting in the District of Maryland was called upon to construe Maryland's Rule 4.2. In *Davidson Supply Co. v. P.P.E., Inc.*,<sup>45</sup> *ex parte* communications with former employees of a corporate adversary were found *not* to violate the Maryland ethics rule.<sup>46</sup> The *Davidson* court rejected the contrary holdings of *Zachair* and *Camden* because it could find no sound basis to predict that the Maryland Court of Appeals would disagree with the Maryland State Bar Association's interpretation of Rule 4.2.<sup>47</sup> Until Maryland's highest court expressed its disagreement with Maryland ethics opinions directly on point, the federal judge in *Davidson* thought Maryland lawyers ought to be able to rely on those opinions.<sup>48</sup> Because it deemed the earlier federal court interpretations of Maryland's Rule 4.2 to be wrong, the *Davidson* court held them not to be controlling, even in another federal court proceeding in the same district.<sup>49</sup> *Davidson* therefore demonstrates that, contrary to *Zachair's* claim, Maryland lawyers practicing in federal court in Maryland are not "unequivocally governed"<sup>50</sup> by a prior federal district court interpretation of a Maryland ethics rule.<sup>51</sup>

Regardless of one's opinion on the proper construction of Rule 4.2, these conflicting federal court decisions from Maryland expose a most serious problem of uncertainty that surrounds the law governing lawyers in many states: lawyers cannot confidently rely on the guidance of state ethics opinions. While *Zachair* and *Camden* were federal proceedings

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45. 1997 WL 778353 (D. Md. Dec. 16, 1997).

46. *See id.* at \*2.

47. *See id.*

48. *See id.*

49. *See id.* As an alternative ground for its holding, *Davidson* held that the interpretation of Maryland's Rule 4.2 in *Zachair* and *Camden* would not condemn the particular *ex parte* communications challenged in *Davidson*. *See id.*

50. *See supra* note 42 and accompanying text.

51. In a fourth Maryland District Court opinion interpreting Maryland's Rule 4.2, another federal district judge has stated that "*Camden* is not . . . binding upon . . . the District Court as a whole." Plan Comm. in the Driggs Reorganization Case v. Driggs, 217 B.R. 67, 1998 WL 88575 at \*5 (D. Md. Feb. 18, 1998).

that resulted in disqualification and not discipline, they were premised on the stated position of the Maryland Court of Appeals that one cannot necessarily use a state ethics opinion to fend off state disciplinary charges.<sup>52</sup> Maryland's stance on the status of ethics opinions is typical.<sup>53</sup> A recent analysis of state ethics opinions noted, "[i]n most states, compliance with an ethics opinion does not provide immunity from disciplinary action."<sup>54</sup> If opinions are not binding in disciplinary or disqualification contexts, how much value can

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52. "We point out that an opinion of the Ethics Committee of the Bar Association is advisory, and is not binding on this Court." Attorney Grievance Comm'n of Md. v. Gregory, 536 A.2d 646, 651 (Md. 1988) (footnote omitted). This statement might be considered to be dictum, as the Maryland Court noted that the opinion respondent relied on in *Gregory* was not on point and, in any event, it had been superceded. See *id.* Nevertheless, the force of the statement seems quite strong, as it was referred to as a "general principle" that could be modified only "by rule or statute." *Id.* at 651 n.6.

53. For another example of the non-binding character of state ethics opinions in both state and federal courts, see *Instituform of N. Am. v. Midwest Pipeliners, Inc.*, 139 F.R.D. 622, 625 (S.D. Ohio 1991) (noting that because Ohio Bar ethics opinions are not binding on Ohio Supreme Court, they are not binding on federal district court sitting in Ohio).

54. Whitney A. McCaslin, Note, *Empowering Ethics Committees*, 9 GEO. J. LEGAL ETHICS 959, 975 n.117 (emphasis added). See also *id.* at 977-78 (noting that while there are exceptions, the opinions of most state ethics committees "have no binding effect on the discipline system"). Some states even explicitly declare that bar ethics opinions are "nonbinding." See, e.g., OHIO REVISED CODE ANN. tit. 19 – SUPREME COURT RULES FOR THE GOVERNMENT OF THE BAR Rule V, § 2(C) (Page Supp. 1996) (stating that ethics opinions are "nonbinding").

Only a few states make published bar ethics opinions binding in some contexts. Among these are New Jersey, see *infra* note 125 and accompanying text (state supreme court rule makes published opinions of New Jersey Supreme Court Advisory Committee on Professional Ethics binding in state lawyer disciplinary proceedings); Rhode Island, see RHODE ISLAND RULES OF COURT – RULES OF THE RHODE ISLAND SUPREME COURT ETHICS ADVISORY PANEL Rule 5 (West 1997) (attorney who acts in accordance with advisory opinion explicitly solicited by that attorney "shall be conclusively presumed to have abided by the Rules of Professional Conduct"); Tennessee, see TENNESSEE COURT RULES ANN. 1992-1993 Rule 9, § 26.5 (Michie 1992) ("A formal Ethics Opinion issued and published by the Supreme Court Ethics Committee shall bind the Committee, the person requesting the Supreme Court Board of Professional Responsibility, and shall constitute a body of principles and objectives upon which members of the bar can rely for guidance in many specific situations."); and Minnesota, see MINNESOTA RULES OF COURT, LAWYERS PROFESSIONAL RESPONSIBILITY BOARD OPINIONS Opinion 1 (1972, amended 1987) ("Failure to comply with the standards set forth in these [ethics] opinions may subject the lawyer to discipline. See, e.g., *In re Pearson*, 352 N.W. 2d 415, [418] (Minn. 1984).").

they have in securing the "understanding and voluntary compliance" on which the legal profession's self-regulatory system depends?<sup>55</sup> Moreover, if state ethics opinions cannot be relied on even in the issuing state, they become dangerous "traps for the wary and unwary alike,"<sup>56</sup> since a lawyer, like the one in *Zachair*, is as likely to err by being aware of an opinion as by being unaware of it. One wonders whether lawyers might be better off without them.

It would surely be an overstatement to claim that state ethics opinions, even in a regime like Maryland's, are without value. In pronouncing Maryland ethics opinions to be non-binding on it, the Maryland Court of Appeals observed that, "as a practical matter," a supportive state ethics opinion "is likely to have a significant effect" on the exercise of prosecutorial discretion by state disciplinary authorities.<sup>57</sup> It also speculated that, if the prediction of prosecutorial restraint should prove to be erroneous, "reasonable reliance upon an ethics opinion" is likely to be taken into account in "the determination or disposition" of any disciplinary charges that are filed.<sup>58</sup> Whatever comfort these assurances may provide for practitioners, the Maryland court's approach to ethics opinions inevitably undercuts their practical influence. For ethics opinions to be of optimal value, courts must give lawyers a significant incentive to take them seriously.

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55. See MODEL RULES OF PROFESSIONAL CONDUCT scope (1997) (stating, "[c]ompliance with the Rules [of Professional Conduct], as with all law in an open society, depends primarily upon understanding and voluntary compliance [rather than disciplinary enforcement]").

56. Cf. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1051 (1991) (Kennedy, J.) (stating that excessively vague ethics rules governing pre-trial publicity characterized as creating "a trap for the wary as well as the unwary").

57. *Attorney Grievance Comm'n of Md. v. Gregory*, 536 A.2d 646, 651 (D. Md. 1988).

58. *Id.*; see also ABA Standards for Imposing Lawyer Sanctions § 9.32(b) (1986) (indicating that an absence of a dishonest or selfish motive may warrant mitigation of sanction); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 67 (1986) ("Most jurisdictions . . . seem to defer to ethics opinions to the extent that a lawyer who has acted in accordance with a recent ethics committee recommendation is ordinarily given the benefit of the doubt in disciplinary proceedings."). But see McCaslin, *supra* note 54, at 975 ("the persuasive force [state ethics] opinions may have with [disciplinary] committees or judges varies from none to considerable" (footnote omitted)).

An empirical study published in 1992 sought to measure the degree of deference accorded to ethics opinions by both federal and state courts.<sup>59</sup> It concluded: "In spite of their nonbinding character, the bar's ethics opinions are frequently referred to by the courts. The courts treat these opinions with great deference, and, in fact, attribute to them a degree of attention similar to that usually found in the treatment of judicial opinions."<sup>60</sup> However, these conclusions are not entirely justified by the data collected in the study.

With respect to the frequency of judicial citations to bar ethics opinions, the study's analysis of all reported decisions from all American courts (state and federal) between 1924 and 1990 found only 639 opinions mentioning any ethics opinion for any purpose.<sup>61</sup> Of these opinions, 171 were rendered by federal courts and 468 by state courts.<sup>62</sup> These numbers are not impressive. They indicate that, during the sixty-six years covered by the study, all of the federal courts combined cited an ethics opinion of any bar association fewer than three times per year and all of the state courts combined cited an ethics opinion fewer than eight times per year.<sup>63</sup> References to state and local ethics opinions were even less common than these numbers suggest, for a substantial portion of the ethics opinions cited by the courts were those of the American Bar Association. The 468 state court cases containing references to ethics opinions cited a total of 881 opinions, but 386 of the cited opinions (43%) were promulgated by the American Bar Association.<sup>64</sup> Similarly, 71 of the 162 opinions (44%) cited by federal district

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59. Jorge L. Carro, *The Ethics Opinions of the Bar: A Valuable Contribution or an Exercise in Futility?*, 26 IND. L. REV. 1 (1992). The study utilized a computer-assisted survey of all federal and state judicial opinions in the LEXIS® database for the years 1924 through 1990. *See id.* at 16 & n.87.

60. *Id.* at 35.

61. *See id.* at 16-17.

62. *See id.* at 17, 22.

63. Since no judicial citation to any ethics opinion was found prior to 1946, *see id.* at 17 n.88, one might consider the survey period to consist of the forty-four years between 1946 and 1990. Even then, neither the state court citation rate of eleven per year nor the federal court citation rate of four per year seems susceptible to being characterized as "frequent."

64. *See id.* at 22.



courts, 56 of the 84 ethics opinions (67%) cited by the United States Courts of Appeals, and nine of the 31 opinions (30%) cited by the United States Supreme Court were ABA opinions.<sup>65</sup> When an ABA opinion is cited with approval, it is only for its persuasive force, for ABA opinions have no binding authority in any jurisdiction.<sup>66</sup> Moreover, because ABA opinions are sometimes followed and sometimes ignored or rejected by courts and state disciplinary authorities,<sup>67</sup> it is impossible for attorneys to know in advance which ABA opinions will be treated as even persuasive authority by the relevant body. These circumstances limit the influence of ABA opinions in practice. State ethics opinions fare no better. Considering the wide range of matters to which published ethics opinions might be relevant — disciplinary proceedings, disqualification motions, fee disputes, sanctions orders, review of challenged trial conduct, discovery disputes, unauthorized practice allegations — it seems that, in fact, state and local ethics opinions are only rarely cited by the courts for any purpose.

As for the impact of ethics opinions on judicial decision-making when they *are* cited, the study's conclusion seems also to have been overly enthusiastic. No comprehensive analysis of the cases containing citations to ethics opinions was attempted,<sup>68</sup> and those cases that were examined were not always accurately described with respect to their use of ethics opinions.<sup>69</sup> While it was acknowledged that courts sometimes cite ethics opinions with disapproval,<sup>70</sup> no effort was made to measure the portion of all citations where this

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65. See *id.* at 17-20.

66. See Hellman, *supra* note 5, at 326-28 (noting that ABA opinions are non-binding); McCaslin, *supra* note 54, at 976-77 (same).

67. See Hellman, *supra* note 5, at 328-31 (noting that ABA opinions are of uneven influence, both from opinion to opinion and from jurisdiction to jurisdiction).

68. See Carro, *supra* note 59, at 23-33 (containing only selective illustrations of judicial treatment of cited ethics opinions).

69. For example, the United States Supreme Court was described as having cited certain ethics opinions in *Evans v. Jeff D.*, 475 U.S. 717, 728 n.15 (1986), "to reinforce its holding," Carro, *supra* note 59, at 29, when the court actually did not follow the position taken in those opinions.

70. See Carro, *supra* note 59, at 32.

was the case.<sup>71</sup> Nor was it conceded that the fact that ethics opinions are not followed even in a minority of the cases referring to such opinions undermines the authority of all opinions, since a lawyer cannot know in advance which ethics opinions will be followed and which ones will be disregarded.

How are ethics opinions treated by Oklahoma courts? Although the Oklahoma Supreme Court has not spoken directly to the question of how much authority Oklahoma Bar Association opinions carry, nothing in its practice suggests that they are considered to be very influential. This approach is not particularly surprising, given the Oklahoma Supreme Court's understanding of its exclusive authority to regulate the practice of law in Oklahoma.<sup>72</sup> The Oklahoma Supreme Court has been resolute in declaring its independence from the machinery of the Oklahoma Bar Association, which, after all, the Court created,<sup>73</sup> in matters of bar admissions<sup>74</sup> and discipline.<sup>75</sup> Still, the failure of Oklahoma's ap-

71. The report of the study contained only the following unsupported estimates: "It appeared in the great majority of cases surveyed that the courts have treated the ABA ethics opinions with great deference," *id.* at 23, and "[state and local] opinions were given the same deferential treatment as their counterparts from the ABA." *Id.* at 29. These generalizations appeared not to have been based on a thorough assessment of all of the cases citing ethics opinions.

72. See *In re Integration of State Bar of Okla.*, 95 P.2d 113, 116 (1939) (noting that Oklahoma Supreme Court has inherent and exclusive power to regulate bar).

73. See *id.* at 116-20 (promulgating Rules Creating, Controlling and Regulating the Oklahoma State Bar Association).

74. See, e.g., *In re Sanger*, 865 P.2d 338, 343 (Okla. 1993) ("In a proceeding to review the [Board of Bar Examiners'] decision that an applicant lacks ethical fitness to practice law this court will examine the entire record tendered and . . . will consider *de novo* the applicant's quest for admission.").

75. See Rules Governing Disciplinary Proceedings, OKLA. STAT. tit. 5, Ch. 1, App. 1-A, Rule 1.1 (West 1996) ("This Court declares that it possesses original and exclusive jurisdiction in all matters involving admission of persons to practice law in this State, and to discipline for cause, any and all persons licensed to practice law in Oklahoma . . ."). See also *State ex rel. Oklahoma Bar Ass'n v. Raskin*, 642 P.2d 262, 265 (Okla. 1982) (noting that in attorney disciplinary proceedings, the Supreme Court exercises exclusive original jurisdiction and is not bound by the findings of the trial authority or its assessments with respect to the weight of the evidence and the credibility of witnesses).

pellate courts to accord much weight to ethics opinions is noteworthy.

In fact, legal ethics opinions have been cited by Oklahoma appellate courts so infrequently that one can only conclude that their status is unimportant. A WESTLAW®<sup>76</sup> search found that, since 1944, Oklahoma Bar Association ethics opinions have been cited by the majority in a reported opinion of an Oklahoma court in only seven cases, and in three of those cases the position taken in the cited ethics opinion was not followed by the court.

The Oklahoma Supreme Court has only twice used Oklahoma ethics opinions as persuasive authority.<sup>77</sup> On two other occasions, the Oklahoma Supreme Court has treated the advice contained in Oklahoma ethics opinions as virtually irrelevant.<sup>78</sup> The Oklahoma Court of Criminal Appeals has also been as likely to disregard Oklahoma ethics opinions as to treat them as significant. In two cases, Oklahoma ethics opinions were cited as persuasive authority (along

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76. Terms and connectors searches were employed in the OK-CS database seeking all reported opinions of Oklahoma state courts including the phrase "Opinion No." (Oklahoma ethics opinions have been titled by "Opinion Number" since the first one was issued in 1931. See OKLAHOMA BAR ASSOCIATION, OKLAHOMA OPINIONS ON PROFESSIONAL RESPONSIBILITY (1991) [hereinafter OKLAHOMA OPINIONS].) Additional searches asked for all opinions including "opinion number," "Advisory Op.," "Advisory Opinion," "Legal Ethics," "Ethics Opinion," "Ethics Op.," "opinion" /7 ethics advisory, "OBA" /7 opinion, or "Oklahoma Bar Association" /7 opinion. A review of the "hits" generated by these queries yielded nine opinions mentioning OBA ethics opinions, but two of these opinions were dissents. The OK-CS database only includes opinions reported after 1944.

77. See *State ex rel. Oklahoma Bar Ass'n v. Fagin*, 848 P.2d 11, 16 (Okla. 1992) (citing OBA Advisory Opinion No. 41, rendered in 1932, to demonstrate the long-standing position of the Legal Ethics Committee that state statute does not override ethics code); *Estate of Brown v. Shears*, 653 P.2d 928, 930-31 (Okla. 1982) (approving attorney's receipt of legal fee in addition to executor's commission after considering OBA Opinion No. 298 (1981) condoning such practice, and noting OBA Opinion No. 274 (1973) (disallowing attorney to indicate other business or profession on business card in "see also" citation)).

78. See *Willoughby v. City of Oklahoma City*, 706 P.2d 883, 888 (Okla. 1985) (holding that OBA Advisory Opinion No. 248 (1967), disapproving contacting jurors after discharge, should not impede attorneys' legitimate inquiry of jurors regarding possible extraneous influences); *Heirs of Payne v. Seay*, 478 P.2d 889, 894 (Okla. 1970) (noting that fact that opposing counsel failed to heed OBA Advisory Opinion No. 114 (1936), "emphatically" disapproving of lawyers' serving simultaneously as counsel and witness, does not justify reversal).

with case authority).<sup>79</sup> But on two other occasions, a Court of Criminal Appeals Judge argued in a dissent that the Court's majority was disregarding two Oklahoma ethics opinions that should have been controlling.<sup>80</sup> The Oklahoma Court of Appeals has mentioned an Oklahoma ethics opinion only once. In that case, the court directed the lower court to disqualify an attorney from a case despite the fact that the cited opinion appeared to support the attorney's continued participation in the matter.<sup>81</sup> These cases thus tend to indicate that Oklahoma's appellate courts, like those in most states,<sup>82</sup> do not view Oklahoma ethics opinions as providing authoritative guidance.<sup>83</sup> Perhaps the Oklahoma courts'

79. See *Howerton v. State*, 640 P.2d 566, 567 (Okla. Crim. App. 1982) (citing OBA Advisory Opinion No. 254 (1968), which relied on ABA Opinion No. 142 (1938), for proposition that a part-time state prosecutor cannot appear for defendant being prosecuted by state); *Sontag v. State*, 629 P.2d 1269, 1271 (Okla. Crim. App. 1981) (citing OBA Advisory Opinion No. 256 (1969) to support affirmance of contempt citation against attorney who declined appointment as counsel for indigent defendant).

80. See *Brown v. State*, 506 P.2d 1396, 1400 (Okla. Crim. App. 1973) (Brett, J., dissenting) (noting that prosecutor's disregard of OBA Advisory Opinions Nos. 9 (1931) and 114 (1936), condemning lawyer's participation as witness and advocate, should have resulted in reversal); *Pitman v. State*, 487 P.2d 716, 734 (Okla. Crim. App. 1971) (Brett, J., dissenting) (same).

81. See *Estate of Seegers v. Combrink*, 733 P.2d 418, 424 (Okla. Ct. App. 1986) (noting that although OBA Advisory Opinion No. 280 (1974) holds that attorney who prepared will may represent testator's estate even when it is likely that attorney may be called as a witness in will contest, district court erred in allowing estate's attorney to testify in will contest proceeding without withdrawing from representation of estate).

82. See *supra* note 54 and accompanying text.

83. ABA ethics opinions have received similarly scant attention from the Oklahoma courts. Although the courts of many states have tended to attach significant weight to some published opinions of the American Bar Association's Committee on Ethics and Professional Responsibility, see Hellman, *supra* note 5, at 325 & n.26, the Oklahoma Supreme Court has cited ABA ethics opinions in only five cases: *State ex rel. Oklahoma Bar Ass'n v. Green*, 936 P.2d 947, 952 (1997) (holding that attorney for partnership created attorney-client relationship with individual partner deemed not inconsistent with ABA Formal Op. 91-361, which concluded existence of attorney-client relationship with partner turns on "facts and circumstances of the particular situation"); *Travis v. Travis*, 795 P.2d 96, 98 (Okla. 1990) (citing ABA Formal Op. 266 (1945) (frowning on sale of going law practice) to support holding that a law practice has no "goodwill" for purposes of property division in divorce); *State ex rel. Oklahoma Bar Ass'n v. Pearson*, 767 P.2d 420, 426 (Okla. 1989) (holding attorney's two year delay in filing brief in support of federal habeas corpus petition does not

infrequent use of ethics opinions is attributable to lawyers' failure to cite them in their briefs and arguments, but this survey demonstrates that the courts have provided attorneys with little incentive to do so.

When the process by which Oklahoma ethics opinions are generated is examined, the Oklahoma courts' apparent disregard for them seems not unreasonable. The formulation of Oklahoma ethics opinions begins with the Oklahoma Bar Association's Legal Ethics Committee.<sup>84</sup> This committee

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constitute "neglect" as defined in ABA Informal Opinion No. 1273 (1973)); *State ex rel. Oklahoma Bar Ass'n v. Stubblefield*, 766 P.2d 979, 982 (Okla. 1988) (citing ABA Informal Op. 87-1523 (1987) (holding attorney may not simultaneously represent both adoptive and biological parents in adoption to support holding that attorney may not personally adopt child of client who has retained attorney to assist with adoption)); *State ex rel. Oklahoma Bar Ass'n v. Peveto*, 620 P.2d 392, 394 (Okla. 1980) (holding attorney's failure to carry out representation constitutes "neglect" as defined in ABA Informal Op. 1273 (1973)). In one other case, the Oklahoma Supreme Court cited an opinion of the ABA's Committee on Unauthorized Practice of Law to support its holding that a suspended lawyer had engaged in the unauthorized practice of law. *See Houts v. State ex rel. Oklahoma Bar Ass'n*, 486 P.2d 722, 724 (Okla. 1971). The Oklahoma Court of Criminal Appeals has taken note of an ABA ethics opinion but once, in *Fritz v. State*, 730 P.2d 530, 535 (Okla. Crim. App. 1986) (indicating ABA Formal Op. 340 (1975) (declining to foreclose all representations against party represented by attorney's spouse) supports conclusion that brief appearance for state by spouse of criminal defense attorney did not create such a severe conflict of interest as to constitute ineffective assistance of counsel). On the one occasion that the Oklahoma Court of Appeals has mentioned an ABA ethics opinion, the court went out of its way to announce that such opinions "are not binding on this court." *Church v. Hofer, Inc.*, 844 P.2d 887, 888 (Okla. App. 1992) (referring to ABA Informal Opinion 1476C (1981), which states, "[w]hen a liability insurer retains a lawyer to defend an insured, the insured is the lawyer's client.>").

The Federal district courts in Oklahoma also have shown little interest in utilizing the guidance of the ethics opinions of the bar. An "Allfeds" WESTLAW® search similar to that described in note 76, *supra*, produced only one opinion that mentioned an Oklahoma ethics opinion (without discussion). *See Stark v. Secretary U.S. Dep't. of Hous. and Urban Dev.*, 454 F. Supp. 477, 482 (W.D. Okla. 1976) (referring to the citation in the record of OBA Opinion No. 195 (1958) (allowing the sending of notices regard opening of new office to designated persons)).

84. *See* 67 OKLA. B.J. 303 (1996) (stating that "aims and objectives" of Legal Ethics and Unauthorized Practice Committee include preparation of advisory opinions); *see also* Rules of the Legal Ethics Committee of the Oklahoma Bar Association pmbl. (Nov. 4, 1988) [hereinafter Ethics Comm. Rules] (on file with Oklahoma Bar Association).

The official name of the Oklahoma Bar Association standing committee em-

presently consists of thirty-eight lawyers serving staggered, three-year terms. Each incoming bar president appoints a new class of members to replace the members whose terms expire with the commencement of the president's term.<sup>85</sup> The large size of the committee allows it to be divided into several "Response Teams" (currently there are four teams) among which the work of the committee can be distributed.<sup>86</sup>

Although the Ethics Committee has the responsibility of drafting ethics opinions, it does not have the authority to approve or promulgate them. That authority resides in the Oklahoma Bar Association's Board of Governors, a seventeen-person body that is elected by the bar's membership.<sup>87</sup>

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powered to draft ethics opinions has been changed from time to time. In 1988, when the committee's current internal rules were adopted, it was known as the Legal Ethics Committee. See 59 OKLA. B.J. 272 (1988) (noting that Oklahoma Bar Association's Committee roster includes a "Legal Ethics Committee"). A separate Unauthorized Practice of Law Committee had been established by the OBA Board of Governors on August 21, 1987. See 58 OKLA. B.J. 2325 (1987). However, the Unauthorized Practice of Law Committee was merged into the Legal Ethics Committee in early 1990. See Telephone Interview with Gary Rife, Esq., Former Chair of Legal Ethics Committee and Unauthorized Practice of Law Committee (March 3, 1998). Thus, beginning in 1990, the committee's name began appearing on the Oklahoma Bar Association's committee roster as the "Legal Ethics and Unauthorized Practice Committee." See, e.g., 61 OKLA. B.J. 497 (1990). Although the annual committee roster of the Oklahoma Bar Association continues to so identify the committee, see, e.g., 69 OKLA. B.J. 377 (1998) (containing 1998 roster), in October of 1997 the Board of Governors of the Oklahoma Bar Association approved the committee's request to change its name back to the "Legal Ethics Committee" and eliminate its responsibility regarding unauthorized practice. See 68 OKLA. B.J. 3386 (1997).

85. The membership of the Ethics Committee for 1998 appears at 69 OKLA. B.J. 377 (1998). There appears to be no prescribed size for the committee, as each year's OBA president has appointed a different number of members. For example, fifteen members were appointed for terms running from January 1998 through December 2000, see *id.* (listing 1998 committee roster), while the terms of only six members whose service began in 1995 expired at the end of 1997. See 68 OKLA. B.J. 217 (1997) (listing committee members whose terms expired at the end of 1997). Just as the size of the committee is not regulated, there is no rule governing the question of whether members can serve multiple terms. Reappointments have, in fact, been common.

86. See Ethics Comm. Rules, *supra* note 84, Rule 4.

87. See Rules Creating and Controlling Oklahoma Bar Association Art. IV, 69 OKLA. B.J. 314-15 (1998). In fact, the earliest Oklahoma ethics opinions were drafted by the Board of Governors. See Oklahoma Opinions, *supra* note 76, Op. 2 (July 24, 1931) (indicating Board of Governors drafted opinion).

The Ethics Committee's rules require committee draft opinions to be "submitted to and approved by the Board of Governors of the Association before promulgation,"<sup>88</sup> and only the Board of Governors is authorized to "procure their publication."<sup>89</sup> The Board of Governors has recently acted to underscore its exclusive power to approve opinions by adopting a procedure that assures Board of Governors members will have an ample opportunity to review Ethics Committee-generated proposed opinions (and the bar's reaction to them!) before the Board of Governors votes on the proposed opinions. At its meeting of March 17, 1995, the Board of Governors adopted a new procedure which the Ethics Committee was instructed to follow:

At least four weeks before a proposed Legal Ethics Opinion is to be presented to the Board of Governors for its initial consideration, the Legal Ethics and Unauthorized Practice Committee will submit to the Executive Director of the [Oklahoma Bar] Association the ethics opinion which it proposes to be adopted. Upon submission by the Committee, within seven days, the Executive Director will cause the proposed opinion to be mailed to each member of the Board [of Governors] and cause the proposed opinion to be published at least twice in the Oklahoma Bar Journal. The publication of the proposed opinion will invite comments from members of the bar, which comments

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88. Ethics Comm. Rules, *supra* note 84, pmbl. ¶ 2.

89. *Id.*; see also *id.* Rule 3.1 ("A legal ethics advisory opinion is a formal written opinion of the Committee intended for submission to the Board of Governors of the [Oklahoma Bar] Association for approval and general publication to all members of the Association."). Similarly, the committee's rules seem to recognize that the Board of Governors might order the Ethics Committee to produce an opinion that the committee deems inadvisable. See Ethics Comm. Rules, *supra* note 84, Rule 3.5 ("In the event a request for a legal ethics advisory opinion is declined by the Committee, the requesting member shall be advised of his privilege to ask the Board of Governors of the Association for reconsideration of the request and the Committee shall abide by the decision of the Board of Governors."). The preamble to the committee's rules was last published at 67 OKLA. B.J. 303 (1996).

will be provided to the Board at least five days prior to consideration of the proposed opinion.<sup>90</sup>

In recent years, the Board of Governors' power to review proposed opinions has been exercised aggressively. In March of 1995, the Board of Governors "withdrew" Opinion No. 308,<sup>91</sup> which it had approved and published in December of 1994.<sup>92</sup> Opinion 308 had concluded that it is "unethical" for an attorney to engage "in a sexual relationship with his [sic] client [other than a spouse], or client's representative, during his [sic] professional attorney/client employment."<sup>93</sup> The Board of Governors' withdrawal action was accompanied by a "request" that the Ethics Committee "restudy" the issue.<sup>94</sup> Just a few months before the withdrawal of Opinion No. 308, the Board of Governors had withdrawn Opinion No. 305. That opinion had concluded that no lawyer in a law firm may "represent clients in connection with matters pending before [a] municipality or its departments, agencies or courts" if another lawyer from the same firm "is either an elected official or an employee (full or part-time) of [the] municipality or one of its departments, agencies or courts."<sup>95</sup>

90. 66 OKLA. B.J. 1009 (1995).

91. *See id.* (reporting action of OBA Board of Governors withdrawing Legal Ethics Opinion No. 308).

92. *See* 65 OKLA. B.J. 4083 (1994).

93. Oklahoma B. Ass'n, Legal Ethics Opinion No. 308, 65 OKLA. B.J. 4083 (1994), *withdrawn*, 66 OKLA. B.J. 1009 (1995). The "unethical" label was applied on the basis of the assumption that an attorney's sexual relationship with a client inevitably would result in the violation of one or more of the following provisions in the Oklahoma Rules of Professional Conduct: Rules 1.1 (competence), 1.7(b)(2) (conflict of interest), 1.8(b) (abuse of confidential information), and 2.1 (disinterested counseling). *See id.*

94. *See* 66 OKLA. B.J. 1009 (1995). It would be incorrect to interpret the Board of Governors' remand of this issue to the Ethics Committee as indicating that the Board condones sexual relations between attorneys and their clients in all circumstances. Nevertheless, by rejecting the absolutist stance of Opinion 308, the remand suggests that the Board believes there are some circumstances where sexual relations between a lawyer and a client who is not the lawyer's spouse are not inappropriate. While this position is not without responsible advocates, *see, e.g.,* Linda Fitts Mischler, *Reconciling Rapture, Representation, and Responsibility: An Argument Against Per Se Bans on Attorney-Client Sex*, 10 GEO. J. LEGAL ETHICS 209 (1996) (advocating against per se ban on lawyer-client sexual relations), the fact that a revised version of Opinion 308 has not yet appeared leaves Oklahoma lawyers (and their clients) in an uncertain state.

95. Oklahoma B. Ass'n, Legal Ethics Opinion No. 305, 63 OKLA. B.J. 3729



Opinion No. 305 was initially approved by the Board of Governors in 1992,<sup>96</sup> subsequently corrected<sup>97</sup> and then withdrawn<sup>98</sup> in 1993, then reaffirmed again<sup>99</sup> and withdrawn again<sup>100</sup> in 1994. Agitation from the rank and file of the bar apparently accounted for the Board of Governors' erratic course on this issue.<sup>101</sup> The Board of Governors followed this see-saw path notwithstanding the Ethics Committee's reaffirmation of the original opinion when it was asked by the Board of Governors to reconsider it.<sup>102</sup> The Board's second (and, apparently, final) withdrawal of the opinion did not refer the matter back to the Ethics Committee.<sup>103</sup> Twenty-three months passed between the Board's initial approval and final withdrawal of Opinion No. 305.<sup>104</sup>

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(1992) (subsequently withdrawn, *see infra* notes 98-100 and accompanying text). This result was based on an application of Rule 1.7, the general conflict of interest provision, and Rule 1.10, the imputed disqualification provision, in the Oklahoma Rules of Professional Conduct. *See id.*

96. *See* 63 OKLA. B.J. 3729 (1992) (reporting OBA Board of Governors' approval of Legal Ethics Opinion No. 305).

97. *See* 64 OKLA. B.J. 64 (1993) (reporting corrections to previously-published Legal Ethics Opinion No. 305).

98. *See* 64 OKLA. B.J. 1319 (1993) (reporting action of OBA Board of Governors withdrawing Legal Ethics Opinion No. 305).

99. *See* 65 OKLA. B.J. 1751 (1994) (reporting OBA Board of Governors' renewed approval of Legal Ethics Opinion No. 305).

100. *See* 65 OKLA. B.J. 3903 (1994) (reporting action of OBA Board of Governors withdrawing Legal Ethics Opinion No. 305).

101. *See* 64 OKLA. B.J. 1319 (1993) (noting Board Of Governors' meeting minutes reflect that "[s]everal OBA members were present to comment on Legal Ethics Opinion No. 305" and that "briefs" had been filed with the Board on the matter); *see also* 64 OKLA. B.J. 640 (1993) (reporting that notice is published stating that "Board of Governors has been requested to reconsider Legal Ethics Opinion No. 305 . . . and 306" and noting that "[a]nyone having comments, arguments or legal briefs on the two opinions may submit them to the Board of Governors . . .").

102. The opinion submitted by the Ethics Committee in 1994 after the first withdrawal was identical to the opinion first recommended by the Ethics Committee in 1992. *Compare* Oklahoma B. Ass'n, Legal Ethics Opinion No. 305, 63 OKLA. B.J. 3729 (1992) (as corrected at 64 OKLA. B.J. 64 (1993)), *with* Oklahoma B. Ass'n, Legal Ethics Opinion No. 305, 65 OKLA. B.J. 1751 (1994).

103. *See* 65 OKLA. B.J. 3903 (1994) (reporting action of OBA Board of Governors withdrawing Legal Ethics Opinion 305). Of course, there is no rule that prohibits the Ethics Committee from re-proposing the withdrawn opinion or a modification of it for consideration by the Board of Governors.

104. Oklahoma Bar Association Legal Ethics Opinion No. 305, as drafted by the OBA's Legal Ethics and Unauthorized Practice Committee, was approved

If the Board of Governors is willing to exercise a non-expiring power to withdraw ethics opinions long after they have been approved, any published ethics opinion takes on a tentative status that undermines its authority.<sup>105</sup> Moreover, by actively involving itself in the opinion-approval process and inviting the entire membership of the bar to register opposition to proposed opinions before the Board of Governors acts on them,<sup>106</sup> a system has been established

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and adopted by the OBA Board of Governors on December 26, 1992. See 63 OKLA. B.J. 3729 (1992) (reporting OBA Board of Governors' approval of Legal Ethics Opinion 305). The final withdrawal of the opinion occurred on November 18, 1994. See 65 OKLA. B.J. 3903 (1994) (reporting action of OBA Board of Governors withdrawing Legal Ethics Opinion 305).

For another example of the OBA Board of Governors' active review of opinions proposed by the Legal Ethics Committee during this same period, see 60 OKLA. B.J. 2162 (1989) (noting action of OBA Board of Governors to table proposed Legal Ethics Opinion No. 304 (concerning *ex parte* communications with an adversary's physician) with request that Legal Ethics Committee reconsider the proposed opinion). Legal Ethics Opinion No. 304 (1989) was in fact revised and ultimately approved. See 60 OKLA. B.J. 2944 (1989).

105. The concern expressed here is with respect to the potential withdrawal of recently-issued opinions, as illustrated by the episodes involving Opinions No. 305 and 308. See *supra* notes 91-104 and accompanying text. Similar unsettling effects would not accompany a systematic purge of outdated or overruled opinions. The Oklahoma Bar Association's Legal Ethics Committee has recently proposed Legal Ethics Opinion No. 1998-1 which would, in effect, withdraw dozens of old Legal Ethics Opinions on the subject of lawyer advertising and solicitation that "predate significant changes in the law governing lawyer advertising and solicitation." See Proposed Legal Ethics Advisory Opinion No. 1998-1, 69 OKLA. B.J. 709-10 (1998). Purging out-of-date opinions is consistent with the goal of the Ethics Committee to provide accurate guidance to lawyers. If Opinion No. 1998-1 is ultimately approved, however, it will leave Oklahoma lawyers on their own to determine *which* of the old opinions are "inconsistent with current law." *Id.*

106. See *supra* notes 90 and 101 and accompanying text. Inviting bar input does not mean that every proposed opinion will be beaten back. Upon receiving criticism of Legal Ethics Opinion No. 306 (prohibiting contingent fees in certain circumstances) after it had been approved and published, see 64 OKLA. B.J. 66 (1992) (setting out approved Legal Ethics Opinion No. 306), the Board of Governors invited the submission of arguments with respect to that opinion, see *supra* note 101; yet, that opinion has not (at least as yet) been withdrawn.

The publication of proposed ethics opinions before their adoption has been advocated as a reform measure designed to contribute to better-reasoned opinions. See McCaslin, *supra* note 54, at 981-82; Ted Finman & Theodore Schneyer, *The Role of 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, 161 (1981). While this procedure may produce sounder opinions, it seems equally likely to produce meek opinions

that, at least potentially if not in fact, discourages the Ethics Committee from proposing opinions that are anticipated to be unpalatable to influential segments of the bar. Indeed, this system tends simultaneously to marginalize the status of the Ethics Committee and limit the influence of any published ethics opinion in Oklahoma. Some may even question the value of their service on the Ethics Committee.<sup>107</sup> It is noteworthy that no ethics opinions were even proposed by the Ethics Committee to the Board of Governors between March of 1995, when the Board of Governors withdrew Opinion No. 308,<sup>108</sup> and November of 1997.<sup>109</sup>

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that provoke little opposition from influential sectors of the bar. Cf. Ted Scheyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 L. & SOC. INQUIRY 677 (1989) (suggesting "bar politics" inevitably drives lawyer self-regulatory efforts toward those resolutions of issues that are palatable to influential segments of the bar). In any event, open political processes are more appropriate for the legislative aspects of the self-regulatory process than the interpretive aspects of that process. If ethics opinions are viewed as interpretations of existing rules rather than a vehicle for amending existing rules, the costs of opening the opinion-writing process to political forces may frequently outweigh the benefits of doing so.

107. The prevalence of this sort of cynicism or pessimism will depend on the extent to which the Board of Governors' prerogative tends to be exercised, and that is a factor that could change as the membership of the Board of Governors changes. At a well-attended meeting of the Committee on Ethics and Unauthorized Practice on June 20, 1997, there was cautious optimism that appropriate deference from the Board of Governors could be earned.

108. See *supra* note 91 and accompanying text.

109. At the Board of Governors' meeting in November of 1997, proposed Legal Ethics Opinion 1997-1, authorizing in-house lawyers employed by an insurer to represent insureds subject to certain requirements, was submitted by the Legal Ethics Committee for Board of Governors' approval. See 68 OKLA. B.J. 4069 (1997) (summarizing the meetings of the OBA Board of Governors held on November 7, 1997, and December 12, 1997. The Board of Governors expressed concerns with the draft and requested that the proposed opinion be revised and resubmitted. See Letter from Harry A. Woods, Jr., Chair, OBA Legal Ethics Committee, to Jack S. Dawson, Esq. (Jan. 27, 1998) (on file with author). A revised Proposed Opinion 1997-1 and Proposed Opinion 1998-1 (cautioning against reliance on old ethics opinions regarding lawyer advertising and solicitation, see *supra* note 105 (describing Proposed Legal Ethics Opinion 1998-1)) were presented to the OBA Board of Governors at its meeting of February 20, 1998. The Board of Governors approved publication of these two proposed opinions for the purpose of soliciting comment pursuant to the procedure described *supra* in the text accompanying note 90. See 69 OKLA. B.J. 707-10 (1998) (setting out Proposed Legal Ethics Opinions 1997-1 and 1998-1). Both opinions were formally approved by the Board of Governors on March 27, 1998. The committee's Opinion 1997-1 was adopted as Legal Ethics Opinion No. 309,

It is impossible to know the extent to which the system by which Oklahoma ethics opinions are adopted explains the Oklahoma courts' negligible reliance on them.<sup>110</sup> It is similarly difficult to say just how much the judicial system loses by disregarding the opinions. After all, the Oklahoma Supreme Court certainly need not rely on an ethics opinion to apply the Rules of Professional Conduct in adjudicating disciplinary charges or resolving other issues turning on a construction of those rules.<sup>111</sup> Nevertheless, there may be unfortunate costs associated with a system that produces ethics opinions of doubtful significance. General compliance with the Rules of Professional Conduct "depends primarily upon [the bar's] understanding and voluntary compliance."<sup>112</sup> It must be assumed that most lawyers want to conform their conduct to the rules. Yet, lawyers can err in their professional responsibilities by being either too aggressive or too timid. Reliable ethics opinions can help the conscientious attorney and perhaps induce those who may be less conscientious to understand specific applications of the general rules and seek to comply with those expectations. A system that generates a steady stream of published ethics opinions that carry some real authority would contribute to greater visibility of the rules, enhance general discourse about legal ethics, and promote better understanding about

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and the committee's Opinion 1998-1 was adopted as Legal Ethics Opinion No. 310. See 69 OKLA. B.J. 1133-35 (1998) (setting out Legal Ethics Advisory Opinion No. 309 (previously identified as No. 1997-1) and Legal Ethics Advisory Opinion No. 310 (previously identified as No. 1998-1)). While these developments reflect a renewed energy on the part of the OBA Legal Ethics Committee, which has eleven other opinions under consideration (including a revised opinion on lawyer-client sexual relations), see Letter from Harry Woods, Jr., Chair, OBA Legal Ethics Committee, to OBA Ethics Committee Members (February 9, 1998) (on file with author), the fact remains that, as this is written in March of 1998, only seven ethics opinions have been approved in Oklahoma since the ethics code was substantially re-written in 1988, and two of those have been withdrawn. See *supra* text accompanying notes 11 and 91-104 (noting the withdrawal of OBA Legal Ethics Opinions Nos. 305 and 308 in 1995).

110. See *supra* notes 76-83 and accompanying text.

111. See *supra* notes 73-75 and accompanying text.

112. MODEL RULES OF PROFESSIONAL CONDUCT scope ¶ 2 (1997).

and compliance with the professional responsibilities of lawyers.

The Oklahoma Supreme Court assumes the exclusive authority — and, hence, exclusive responsibility — for regulating the practice of law.<sup>113</sup> The Court's regulatory interests could be advanced by designing a system that yields ethics opinions that command more respect than is presently the case. If a better system is available, the Court can put it in place through the exercise of its inherent rule-making authority.<sup>114</sup> There is little doubt that the bar would acquiesce in the exercise of that authority.<sup>115</sup>

The New Jersey Supreme Court has, by rule, created a system which is worthy of consideration. It begins with an opinion-writing committee that is appointed by, and accountable to, the New Jersey Supreme Court.<sup>116</sup> The committee,

113. See *supra* note 75 and accompanying text.

114. See Rules Creating and Controlling Oklahoma Bar Association pmbl., 68 OKLA. B.J. 152, 152 (1997) (indicating that the Oklahoma Supreme Court creates, empowers, and controls the Oklahoma Bar Association by rules promulgated under the authority of "police powers vested in it by the Constitution of [Oklahoma]" so as to further more effective and efficient discharge of the legal profession's responsibilities).

115. See Ethics Committee Rules, *supra* note 84, Rule 1.1 (stating "No act of the [Ethics] Committee . . . shall be contrary to any provision of the Rules Creating and Controlling the Oklahoma Bar Association . . . and any act of the [Ethics] Committee shall be subject to any opinion or order issued by the Supreme Court of the State [of] Oklahoma."). Recall that the Maryland Supreme Court contemplated the possibility of modifying Maryland's ethics opinion system by exercising its rule-making authority. See *Attorney Grievance Comm'n v. Gregory*, 536 A.2d 646, 651 n.6 (Md. 1988) (noting that status of state legal ethics opinions "may be modified by [court] rule or statute").

116. Unlike Oklahoma's bar, New Jersey's is not unified. This fact may account for the New Jersey court's more direct assumption of responsibility for ethics opinions as compared with the Oklahoma Supreme Court's historical approach. However, the fact that the Oklahoma Supreme Court has created a unified bar does not preclude the Court from establishing a more independent body to assist it in exercising its inherent and exclusive authority to regulate the practice of law.

The bar committees responsible for drafting ethics opinions in Ohio, Tennessee, and Texas are also appointed by the Supreme Court in each of those states. See McCaslin, *supra* note 54, at 971 n.74. See also OHIO REV. CODE ANN. tit. 19 — SUPREME COURT RULES FOR THE GOVERNMENT OF THE BAR OF OHIO Rule V, § 1 (Page Supp. 1996); TENN. CT. RULES ANN. 1992-1993 Rule 9, § 5.1 (Michie 1992); VERNON'S TEXAS COES ANN. — GOV. CODE subtit. G, § 81.091 (1988). The Texas bar is unified. See *id.* § 81.102.

known as The Advisory Committee on Professional Ethics,<sup>117</sup> consists of eighteen members, fifteen lawyers and three laypersons, all of whom are appointed directly by the Court.<sup>118</sup> The New Jersey Bar Association, a voluntary bar, has no role in the appointment of the committee or the promulgation of ethics opinions, thus minimizing the possibility that bar politics could play a role in the opinion-making process.<sup>119</sup>

Inquiries can be directed to the New Jersey committee by any state, county, or local bar association in New Jersey, or by any member of the New Jersey bar.<sup>120</sup> In addition, the New Jersey Supreme Court itself can submit questions to the committee.<sup>121</sup> The committee may decline to issue an opinion in response to any inquiry from the bar,<sup>122</sup> but it must respond to inquiries initiated by the Supreme Court.<sup>123</sup> If an inquiry is assigned to a subcommittee of the full committee, the subcommittee's opinion must be unanimous; however, if an opinion is taken up by the full commit-

117. See NEW JERSEY RULES OF COURT Rule 1:19 (1996).

118. See *id.* Rule 1:19-1. Five lawyers and one layperson are appointed each year to serve a three year term. Although the New Jersey rules do not speak to the question of reappointment of members, the practice is that one may be reappointed three times to serve a total of twelve years. See Telephone Interview with Israel Dubin, Counsel to the New Jersey Advisory Committee on Professional Ethics (July 9, 1997).

A characteristic of the ethics committees in other states, where the state supreme court directly exercises the power of appointment, is that the committees are smaller than Oklahoma's. Ohio's Board of Commissioners on Grievances and Discipline of the Supreme Court has twenty-eight members, see OHIO REV. CODE ANN. tit. 19 – SUPREME COURT RULES FOR THE GOVERNANCE OF THE BAR OF OHIO Rule V, § 1 (Page Supp. 1996); Tennessee's Board of Professional Responsibility of the Supreme Court has nine members, see TENN. CT. RULES ANN. 1992-1993 Rule 9, § 5.1 (Michie 1992); and Texas' Committee on Professional Ethics has nine members, see VERNON'S TEXAS CODES ANN. – GOV. CODE § 81.091 (1988). In contrast, Oklahoma's Legal Ethics Committee now has thirty-eight members. See *supra* notes 85 and 86 and accompanying text.

119. The opportunity for political pressures to be brought to bear on the opinion-making process in Oklahoma was noted *supra* at notes 90, 101, and 106 and accompanying text.

120. See NEW JERSEY RULES OF COURT Rule 1:19-2 (1996).

121. See *id.* Rule 1:19-5. A court-initiated inquiry shall not result in a published opinion without the court's approval. See *id.*

122. See *id.* Rule 1:19-4.

123. See *id.* Rule 1:19-5.

tee, an opinion can be issued if as few as eleven of the eighteen members of the committee approve it.<sup>124</sup>

The Rules establishing the New Jersey committee make opinions that the committee chooses to publish binding in that state's regional bar disciplinary agencies, known as the Ethics Committees,<sup>125</sup> thus avoiding the enfeeblement of authority that now afflicts many states' ethics opinions, including those of Oklahoma and Maryland.<sup>126</sup> New Jersey's rules do not explicitly make that state's ethics opinions binding on the state's courts (for example, in their exercise of the equitable power to dispose of disqualification motions), but by making the opinions binding on the state's regional Ethics Committees, the rules guarantee that the New Jersey Supreme Court will not uphold a disciplinary sanction that flies in the face of a published ethics opinion. To this extent, unlike Maryland and Oklahoma lawyers, New Jersey lawyers can rely on the letter of their state's opinions rather than the exercise of prosecutorial restraint by disciplinary authorities.<sup>127</sup>

The centerpiece of the New Jersey system is a "review procedure" established by court rule. The soundness of a New Jersey ethics opinion can be challenged by "any aggrieved member of the [New Jersey] bar, bar association or ethics committee."<sup>128</sup> The challenge may be initiated by fil-

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124. See *id.* Rule 1:19-4.

125. See *id.* Rule 1:19-6. However, the New Jersey rules provide that no opinion shall be issued that "might affect the interests of the parties to any pending action." *Id.* Rule 1:19-2; see also *id.* Rule 1:19-3 (requiring party requesting an opinion to certify that any forthcoming opinion will not affect a pending action).

126. See *supra* notes 34, 54, and 77-83 and accompanying text (discussing limited force of most states' ethics opinions).

127. See *supra* text accompanying note 57. A few other states besides New Jersey have made ethics opinions binding in disciplinary proceedings. See *supra* note 54. Where this is so, the opinions are normally given no legal force in non-disciplinary judicial proceedings. See, e.g., *O'Rourke v. Power*, 690 A.2d 342, 344 (R.I. 1997) (opinions of Ethics Advisory Panel, though binding in disciplinary proceedings, are not binding in non-disciplinary judicial proceedings, such as disqualification disputes); *State v. Jones*, 726 S.W.2d 515 (Tenn. 1987).

128. NEW JERSEY RULES OF COURT RULE Rule 1:19-8(a) (1996). The "aggrieved" limitation establishes a sort of "standing" requirement for challengers. See Telephone Interview with Israel Dubin, Counsel to the New Jersey Advisory Committee on Professional Ethics (July 9, 1997).

ing a "petition for review" with the New Jersey Supreme Court.<sup>129</sup> Notice of a petition for review must be filed within twenty days from the date of publication of a challenged opinion.<sup>130</sup> The New Jersey review procedure is cast as an adversarial proceeding, thereby avoiding any constitutional limitations on the state supreme court's jurisdiction.<sup>131</sup> The party seeking review is treated as a petitioner, and the Rules of Court designate the state Attorney General to oppose the petition.<sup>132</sup> The review process operates like a *certiorari* procedure. If the petition for review is not granted, the opinion stands as binding.<sup>133</sup> If the petition for review is granted, the New Jersey system contemplates that the New Jersey Supreme Court will accept briefs in support of and opposition to a challenged opinion and either affirm, reverse, or modify the challenged opinion.<sup>134</sup>

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129. NEW JERSEY RULES OF COURT Rule 1:19-8(a) (1996).

130. *See id.*

131. By assuring an adversarial presentation of views, the New Jersey system avoids any "case or controversy" limitation on the court's authority. *Cf.* Uniform Certification of Questions of Law Act, OKLA. STAT. ANN. tit. 20, §§ 1601-11 (1991) (authorizing Oklahoma Supreme Court to issue opinions declaring Oklahoma law when requested to do so by a federal district court that is required to apply Oklahoma law when exercising diversity jurisdiction and complying with the requirements of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938)).

132. Whether the Oklahoma Supreme Court has the authority to impose this sort of burden on the Oklahoma Attorney General is beyond the scope of this article. There is little doubt, however, that the Oklahoma Supreme Court could require the General Counsel of the Oklahoma Bar Association to perform the functions assigned to the New Jersey Attorney General.

Other states that provide for judicial review of ethics opinions have found standing doctrine not to stand in the way of entertaining challenges by genuinely aggrieved parties. *See, e.g., In re Youngblood*, 895 S.W.2d 322, 326 (Tenn. 1995) (stating that attorneys directly impacted by legal ethics opinion have standing to challenge it); *In re Ethics Advisory Panel Opinion No. 93-41-M.P.*, 627 A.2d 317, 319-20 (R.I. 1993) (stating that bar disciplinary counsel charged with enforcing rules of professional conduct has standing to challenge formal ethics opinion condoning certain conduct by attorneys).

133. NEW JERSEY RULES OF COURT Rule 1:19-6 (1996).

134. *See id.* Rule 1:19-8(g). New Jersey's rules do not specifically provide for the receipt of *amicus* briefs, but the New Jersey Supreme Court's practice is to consider them. *See, e.g., In re Opinion No. 682 of the Advisory Committee on Professional Ethics*, 687 A.2d 1000, 1001 (N.J. 1997) (noting acceptance of *amicus* briefs).

Other states that provide, either expressly by rule or by common law, for state supreme court review of formal ethics opinions include Rhode Island and Tennessee. *See In re Ethics Advisory Panel Opinion No. 92-1*, 627 A.2d 317,



The New Jersey Advisory Committee on Professional Ethics need not produce a published opinion on every inquiry; it has the discretion to decline to issue any opinion<sup>135</sup> or to issue a private letter opinion instead of a published one.<sup>136</sup> Letter opinions are amenable to the same review process just described, as is a decision to decline to consider an inquiry.<sup>137</sup> As is true for published opinions, review of a letter opinion or a decision not to issue any opinion can be initiated by "any aggrieved member of the bar, bar association or ethics committee."<sup>138</sup> Typically, the aggrieved person would be the lawyer who requested the opinion. However, a disagreeing member of the bar who confronts or anticipates confronting the same issue addressed in an opinion might be sufficiently aggrieved by a letter opinion to seek review of it. Unlike published opinions, letter opinions are not explicitly made binding in disciplinary proceedings,<sup>139</sup> but it is unthinkable that a regional Ethics Committee would pursue discipline in defiance of a germane letter opinion.<sup>140</sup> Moreover, the fact that they are subject to the review procedure should accord letter opinions substantial weight in related contexts.

Although the New Jersey rules do not make ethics opinions binding in non-disciplinary contexts, it would seem to be within a state supreme court's rule-making authority to

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319-20 (R.I. 1993) (noting that despite absence of rule explicitly providing for judicial review of formal ethics opinions, state supreme court's supervisory power over legal profession implicit in state constitution's assignment of judicial power to state supreme court gives state supreme court discretion to review formal ethics opinions on petition by state disciplinary counsel who is charged with prosecuting attorney misconduct); *In re Youngblood*, 895 S.W.2d 322, 325-27 (Tenn. 1995) (noting that state supreme court has "inherent power" to review formal ethics opinions issued by state Board of Professional Responsibility on application by affected attorney or on court's motion *sua sponte*).

135. See NEW JERSEY RULES OF COURT Rule 1:19-2 (1996).

136. See *id.* Rule 1:19-4.

137. See *id.* Rule 1:19-8(a) (making "any final action" of the committee reviewable at the instance of an aggrieved member of the bar).

138. *Id.* Rule 1:19-8(a). Aggrieved parties have thirty days to seek review of committee action other than the issuance of a published opinion. See *id.*

139. See *id.* Rule 1:19-6 (making only published opinions binding in disciplinary proceedings).

140. See Telephone Interview with Israel Dubin, Counsel to the New Jersey Advisory Committee on Professional Ethics (Sept. 16, 1997).

provide for such respect. A court might be willing to take such a step if it preserved for itself the authority to initiate a petition for review *sua sponte*, appointing the General Counsel of the state bar and others to brief opposing positions. But at least in its present posture, the New Jersey system ensures that New Jersey lawyers can rely on ethics opinions in the disciplinary process. They also know that they must comply with those opinions or risk being subjected to a disciplinary proceeding.

A salutary by-product of the New Jersey system is that it gives New Jersey lawyers a strong incentive to attend to ethics opinions when they are published. Because published opinions are binding if not promptly modified on review, New Jersey lawyers will want to study each new opinion with care to decide whether to seek review. This is likely to stimulate broader discourse about legal ethics than otherwise would occur.<sup>141</sup> If review is not sought or results in affirmance of an opinion, the opinion's officially binding status is bound to enhance compliance with the Rules of Professional Conduct as construed in the opinion. If voluntary compliance with professional regulations is the goal,<sup>142</sup> New Jersey's system seems well designed to accomplish it. The New Jersey system stands in stark contrast to the present Oklahoma system, where lawyers have no time limit for seeking to prevail on the elected officials of the bar to alter an opinion<sup>143</sup> and where the Ethics Committee's own rules take the position that published opinions may be disregarded by the courts.<sup>144</sup>

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141. Professional discourse after an opinion has been issued is not fraught with the "political" difficulties that would accompany pre-promulgation discussion of ethics opinions, *see supra* note 106, since the ethics committee's deliberative processes, as well as the State Supreme Court's adversarial review proceedings, are insulated from "bar politics." Cf. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.5 (1997) (barring *ex parte* communications with tribunals).

142. *See supra* note 112 and accompanying text.

143. *See supra* note 96-104 and accompanying text (detailing prolonged pressure, ultimately successful, to obtain withdrawal of one OBA Legal Ethics opinion).

144. *See* Ethics Committee Rules, *supra* note 84, Rule 1.2 ("[L]egal ethics advisory opinions . . . shall only have such force and effect as they are given by the Supreme Court of the State of Oklahoma and shall not be construed as anything other than advisory in nature.").

One other virtue of a system like New Jersey's is that it should tend to make the state's highest court more active in exercising its regulatory authority over the practice of law. By exercising its power to appoint the ethics committee and review opinions, questions of legal ethics inevitably would be higher on the court's agenda. Rules establishing an ethics committee answerable directly to the state's highest court would give that court direct ownership of the system. The New Jersey rules allow the state supreme court itself to initiate a request for an opinion.<sup>145</sup> Even if the court is not directly involved in initiating an opinion or a review proceeding, the very availability of the review process provides the court with good reason to have confidence in the opinions that are generated by the system.

The New Jersey rules were amended in 1995 to authorize the ethics committee to operate a more informal advisory service via a 900-toll telephone number.<sup>146</sup> The amendments authorized the committee to hire a full-time attorney and a secretary to respond to inquiries.<sup>147</sup> Any advice provided through this procedure is accompanied by a disclaimer emphasizing that it is not binding.<sup>148</sup> Even though these telephonic opinions are non-binding, their availability is credited with lowering the need for more formal opinions.<sup>149</sup>

Oklahoma offers two systems for securing informal advice. The rules of the Oklahoma Bar Association's Committee on Legal Ethics authorize any single member of the committee to give an oral response to an inquiry.<sup>150</sup> Any such response is to be commemorated in a memorandum, which is to be transmitted to the chair or vice-chair of the committee.<sup>151</sup> An individual member of the committee may also give a written response to an inquiry, subject to approv-

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145. See NEW JERSEY RULES OF COURT Rule 1:19-5 (1996).

146. See *id.* Rule 1:19-9.

147. See *id.* Rule 1:19-9(a).

148. See *id.* Rule 1:19-9(c).

149. See Telephone Interview with Israel Dubin, Counsel to the New Jersey Advisory Committee on Professional Ethics (July 9, 1997).

150. See Ethics Committee Rules, *supra* note 84, Rules 2.1-2.4.

151. See *id.* Rule 2.3.

al of the chair or vice-chair.<sup>152</sup> If the chair or vice-chair disagrees with the written advice proposed by a committee member, the matter is to be submitted to the full committee.<sup>153</sup> Because any advice given on the authority of this rule will not have been approved by even a subcommittee of the full committee, it will be of limited value. In fact, this informal process seems to have fallen into disuse.

Another source of informal, non-binding advice for Oklahoma lawyers is the Office of General Counsel of the Oklahoma Bar Association.<sup>154</sup> That office stands ready to respond to inquiries. However, the General Counsel's Office prosecutes disciplinary complaints in Oklahoma, a fact that could discourage some lawyers from taking advantage of the free advice. By separating the opinion-making process from the disciplinary enforcement process, the New Jersey system of providing informal advice affords many of the benefits of the system of checks and balances that accompanies the separation of powers in state governments, and it also seems well calculated to reduce lawyers' reluctance to ask for advice. By encouraging more lawyers to ask for advice, New Jersey's investment in its informal advisory system promises to enhance compliance with professional regulations.

A practical aspect of the New Jersey system must be addressed: budget. As an arm of the New Jersey Supreme Court, the New Jersey Advisory Committee on Professional Ethics is funded through a line item in the state judiciary's budget. The annual appropriation covers the cost of staff counsel, which makes the hotline feasible and facilitates the work of the members of the committee. The chronic underfunding of the Oklahoma judiciary is well-known,<sup>155</sup> and a separate line item for an ethics advisory committee may not easily be attained. But it should be remembered that Oklahoma's current advisory committee system operates through a committee of volunteers, who, miraculously, seem

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152. *See id.*

153. *See id.*

154. *See* ANNUAL REPORT, *supra* note 12, at 442.

155. *See* John Greiner, *Chief Justice Seeks More Money; Courts Deserve Better She Says*, DAILY OKLAHOMAN, Mar. 13, 1997, at 27, available in 1997 WL 2441415.

not to be in short supply notwithstanding the disrespectful treatment the committee's work has received in the 1990's.<sup>156</sup> It is unlikely that the Oklahoma Supreme Court would find it difficult to find qualified and dedicated volunteers to accept the honor of being appointed to a more independent ethics committee established on the New Jersey model. In the context of Oklahoma's unified bar, the Court might cause the Oklahoma Bar Association to provide some measure of financial support for the work of an independent committee.

As is true for most states,<sup>157</sup> if Oklahoma is to have the benefit of legal ethics opinions on which both bar regulators and attorneys can rely, some changes are in order. A model based on the New Jersey system would better serve Oklahoma's lawyers and the public that depends on them.

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156. See *supra* notes 90-104 and accompanying text (detailing OBA Board of Governors' outright rejection of two opinions proposed by Legal Ethics Committee and its insistence that another opinion be revised as a condition of approval). See also *supra* note 109 (noting OBA Board of Governors' request that proposed Legal Ethics Opinion 1997-1 be revised to respond to "concerns" before Board of Governors would agree to consider approval of the opinion).

157. Only a few other state supreme courts have put into place systems that resemble New Jersey's. These include Minnesota, Rhode Island, and Tennessee. See *supra* notes 54 and 134.