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# When Ethics Rules Don't Mean What They Say: The Implications of Strained ABA Ethics Opinions

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# When “Ethics Rules” Don’t Mean What They Say: The Implications of Strained ABA Ethics Opinions

LAWRENCE K. HELLMAN\*

## INTRODUCTION

Lawyers in virtually every American jurisdiction are required to practice in conformity with an enforceable “ethics code” that is based on a model set of rules promulgated by the American Bar Association (ABA). It is somewhat misleading, however, to refer to these documents as “ethics codes,” for they contain a good deal of positive law that can be enforced much like statutes. Part I of this Article establishes how important it is for lawyers to be aware of the content and the intended interpretation of the code in force in their jurisdiction. The ABA Standing Committee on Ethics and Professional Responsibility regularly issues formal opinions which expound upon the “proper” interpretation and application of the ABA models upon which the states’ rules are based. Part II explores the role played by these opinions and explains how they can sometimes be a source of confusion. Part III illustrates how this is indeed likely to be the case when, as sometimes happens, ABA ethics opinions take strained positions that flout the language of the rules they purport to interpret. This section suggests that, besides fomenting uncertainty regarding specific issues, the cavalier approach to interpretation employed over time by the ABA Ethics Committee threatens to undercut the Bar’s respect for the legitimacy of the “ethics rules” as binding constraints on the practice of law. Part IV offers two proposals that might protect against these tendencies. First, it advocates that the states should become more active in issuing and relying on jurisdictionally-specific ethics opinions. Second, it recommends that the mission of the ABA Ethics Committee should be more narrowly and emphatically defined as one that is strictly to interpret the ABA’s existing model standards. By removing from the Committee its present authority to recommend legislative changes to the ABA’s influential “ethics rules,” its members may become more inclined, in exercising their remaining interpretive responsibilities, to treat the language of those rules with the respect that is customarily accorded to statutes. It is postulated that if the ABA Ethics Committee adheres more closely to conventional canons of statutory construction, and if

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the states become more attentive about responding to ABA Ethics Opinions, the integrity of the “ethics codes” as obligatory legal instruments will be enhanced.

# I. THE NEED TO KNOW THE LAW OF “LEGAL ETHICS”

An attorney’s course of conduct is often a topic of conversation, either prospectively or retrospectively. In evaluating a situation confronted by an attorney, it is common for lawyers as well as nonlawyers to refer to it as presenting a “question of legal ethics.” But the use of the term “legal ethics” can be a source of “[i]ntellectual and [m]oral [c]onfusion,”<sup>1</sup> for it has two quite different connotations in modern discourse.

Sometimes the term “legal ethics” is used to suggest that the attorney in question confronts a choice that is essentially a matter of discretion, where the attorney can make an “ethical” or “unethical” choice, depending on the attorney’s values, sensitivity, and moral awareness. Moral philosophers, and many others who have been schooled in moral philosophy, claim this should be the exclusive nature of any inquiry into “questions of legal ethics.”<sup>2</sup> Some who

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1. John Ladd, *The Quest for a Code of Professional Ethics: An Intellectual and Moral Confusion*, in R. CHALK ET AL., PROFESSIONAL ETHICS ACTIVITIES IN THE SCIENTIFIC AND ENGINEERING SOCIETIES (AAAS Professional Ethics Projects, December 1980), reprinted in GEOFFREY C. HAZARD, JR. & DEBORAH L. RHODE, *THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION* 122 (3d ed. 1994).

2. See *id.* at 122-23 (arguing against the codification of ethical principles because it “contradicts the notion of ethics itself, which presumes that persons are autonomous moral agents”); see also DANIEL R. COQUILLETTE, *LAWYERS AND FUNDAMENTAL MORAL RESPONSIBILITY* xv (1995) (“Teaching professional responsibility wholly outside the context of ethical philosophy is . . . simply unrealistic.”); Maura Strassberg, *Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics*, 80 IOWA L. REV. 901, 901 (1995) (“The modern articulation of legal ethics as positive law . . . unnecessarily constrains the moral content of legal ethics.”).

From the perspective of moral philosophy, positive law, while frequently decisive, is but one factor to be considered by a person choosing an ethical course of conduct. See Ted Schneyer, *Moral Philosophy’s Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529, 1538 & nn.37-39 [hereinafter Schneyer, *Moral Philosophy*] (many moral philosophers, at least in the present era, view written ethics codes as obstacles rather than facilitators to “ethical” conduct). For example, numerous moral philosophers contend there are some circumstances in which it would constitute a highly ethical act to consciously disregard a rule of law, even though such circumstances should be viewed as exceptional. See, e.g., 2 ST. THOMAS AQUINAS, *THE SUMMA THEOLOGICA* 235 (Fathers of the English Dominican Province trans. 1952) (stating that “if a case arise[s] in which the observance of that law would be hurtful to the general welfare, it should not be observed”); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 213 (1978), quoted in Theodore C. Falk, *Tax Ethics, Legal Ethics, and Real Ethics: A Critique of ABA Formal Opinion 85-352*, 39 TAX LAW. 643, 655 n.52 (1986) (arguing for rejection of the proposition that, where the law is unclear, a citizen may only follow his own judgment of what is right until the highest court rules otherwise, because, such a view fails to acknowledge that a court may overrule itself); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 594-600 (1958) (discussing the Utilitarian’s insistence on the need to distinguish what the law is from what it ought to be); Lon L. Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630, 644 (1958) (observing that law does not necessarily correspond to the demands of justice). Careful commentators on “legal ethics” recognize the distinction between, and the equal relevance of, legal and moral considerations. See, e.g., DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 3 (2d ed. 1995) (“[L]egal codes of personal conduct that ignore the moral commitments of the people they govern are doomed to irrelevance.”); 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* ix-ixi (2d ed. Supp. 1996) (noting the potential for disharmony between positive law and moral

are less versed in the intellectual discipline of ethics might well conceptualize the question similarly. In commenting on a publicized account of an attorney's actions, they might suggest that the attorney made a choice that reflected the "kind of person" the attorney is or wants to be. Such persons feel comfortable judging whether the attorney's chosen course of action responsibly balanced the competing values that were at stake in the decisions that were made.<sup>3</sup>

This sort of "open-ended, reflective and critical intellectual activity"<sup>4</sup> may constitute the epitome of traditional ethical analysis,<sup>5</sup> but it is frequently *not* the question that people — especially lawyers — have in mind when they wish to talk about "legal ethics." Often, when a lawyer poses a "question of legal ethics," he is not proposing an inquiry into the sound exercise of moral discretion; rather, he wants to know if there is some source of law that prescribes a required course of conduct.<sup>6</sup> Under this view, the term "legal ethics" describes a body of enforceable, mandatory and prohibitory rules that *constrict* the discretion of licensed attorneys in the practice of law. Based on this definition, many "questions of legal ethics" involve genuine ethical analysis only in the sense that one would consider it a matter of ethical discretion to decide whether to rob a bank or slug someone she dislikes. Technically, she has a choice, but the choice is whether to comply with the law or break the law. We would not typically say, "Gosh, Sue did an unethical thing when she robbed the bank!" We would be more likely to say, "Sue broke the law when she robbed the bank."<sup>7</sup>

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obligation); GEOFFREY C. HAZARD, JR., *ETHICS IN THE PRACTICE OF LAW* 11 (1978) ("[P]ositive legislation is inevitably simplistic to some degree, and thus an incomplete guide in delicate situations. A truly conscientious and self-confident practitioner would not feel bound to follow the letter of the law when his personal judgment dictated a different course."). For systematic ethical inquiries into the work of lawyers, see generally THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* (1994); DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988).

3. The volume of published commentary on the ethical propriety of the actions of attorneys is enormous. It comes from both within and outside the legal profession. A recent noteworthy example is ROBERT L. SHAPIRO, *THE SEARCH FOR JUSTICE* 339, 347 (1996) (commenting on the conduct of the author's co-counsel, Johnnie Cochran, during the O.J. Simpson murder trial, and asserting that Cochran's comparison of prosecution witness Mark Fuhrman to Adolf Hitler "was gratuitous, inflammatory, and just plain wrong," and that appeal to possible racial prejudice of jurors was inappropriate).

4. Ladd, *supra* note 1, at 122.

5. See *id.* (arguing that "ethics consists of issues to be examined, explored, discussed, deliberated, and argued").

6. See Schneyer, *Moral Philosophy*, *supra* note 2, at 1530-31 (pointing out that practicing lawyers look to "legal ethics" when "wondering . . . whether a certain course of action would be forbidden, permitted or required under the prevailing rules").

7. Of course, for a moral philosopher, such an analysis would be incomplete. As suggested earlier, traditional ethical analysis holds that, even when confronted with a clear, directive legal standard, individuals must still exercise moral discretion, at some fundamental level, in deciding whether to comply with that standard. See *supra* note 2. A thorough ethical inquiry would consider, therefore, whether the bank robber had a compelling justification for robbing the bank. Many contend that compliance with provisions of positive law explicitly enacted for the purpose of controlling the conduct of lawyers should depend on the exercise of this sort of moral scrutiny. See Heidi L. Feldman, *Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?*, 69 S. CAL. L. REV. 885, 885 (1996) ("Regardless of its specific contents, any black letter statutory codification

Such is the case with much of what is loosely referred to as “legal ethics.” The field deals with numerous enforceable rules of law<sup>8</sup> — rules that apply to lawyers with much the same force that a criminal statute outlawing bank robbery applies to the population at large.<sup>9</sup> Rules specifically addressed to lawyers are promul-

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regulating lawyers' conduct will be flawed as an instrument of ethics for lawyers.”); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J., 613, 632-33 (arguing that in “extreme cases,” moral justification may exist for “conscientious objection” to black letter rules); David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 509 (1990) [hereinafter Wilkins, *Legal Realism*] (arguing that even when operating in a “rule-based” system, an individual lawyer “must ultimately decide if, all things considered, it is best to follow the requirements of her role”). See also MODEL RULES OF PROFESSIONAL CONDUCT scope [hereinafter MODEL RULES] (“The Rules do not . . . exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rule.”). While the world (and the legal profession) would be better served if more lawyers understood and accepted the broad perspective of moral philosophy in devising codes of positive law and deciding how to respond to such codes, the premise of this Article is that, especially on questions regarding compliance with enacted codes, many lawyers take the narrower, more positivistic view of “legal ethics” described in the text accompanying this note. See Schneyer, *Moral Philosophy*, *supra* note 2, at 1531 n.11 (“The belief that moral conduct is a matter of following rules . . . may be particularly prominent among lawyers.”).

8. See Falk, *supra* note 2, at 653 (“[L]egal ethics . . . comprise a body of positive provisions adopted by various bar associations and made binding with variations in particular jurisdictions.”); Geoffrey C. Hazard, Jr., *Legal Ethics: Legal Rules and Professional Aspirations*, 30 CLEV. ST. L. REV. 571, 574 (1982) (“The Rules . . . seek to be rules of the lawyer's legal obligations and not expressions of hope as to what a lawyer ought to do.”); James Kraus, *Ethical and Legal Concerns in Compelling the Waiver of Attorney's Fees by Civil Rights Litigants in Exchange for Favorable Settlement of Cases Under the Civil Rights Attorney's Fees Award Act of 1976*, 29 VILL. L. REV. 597, 627 (1984) (stating that the *Model Code* “has become a set of authoritative legal restrictions on the behavior of [lawyers].”); L. Ray Patterson, *The Function of a Code of Legal Ethics*, 35 U. MIAMI L. REV. 695, 695 (1981) (“The function of a code of legal ethics . . . is to define the duties and obligations of lawyers in the representation of clients.”); Schneyer, *Moral Philosophy*, *supra* note 2, at 1556 (“The Code's disciplinary rules are designed to be legally binding.”); Ted Schneyer, *Policymaking and the Perils of Professionalism: The ABA's Ancillary Business Debate as a Case Study*, 35 ARIZ. L. REV. 363, 363 (1993) [hereinafter Schneyer, *Perils of Professionalism*] (positing that ethics rules “are designed today to regulate lawyers, not just to guide or inspire them”); David B. Wilkins, *Who Should Regulate the Bar*, 105 HARV. L. REV. 799, 821 (1992) [hereinafter Wilkins, *Bar Regulation*] (arguing that the entire professional disciplinary apparatus is premised on the understanding that there is a cadre of “unambiguous professional norms” that can be enforced fairly and rationally); Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 223 (1993) (“Over time, the professional codes governing lawyer behavior have become statutory in form. Modern codes increasingly tell lawyers how they must act.”). Even those who seek to demonstrate that considerations of law and ethics are equally relevant to an assessment of the professional conduct of lawyers, see RHODE & LUBAN, *supra* note 2, at 1-8, concede that, “[i]n one sense, the term ‘legal ethics’ refers narrowly to the system of professional regulations governing the conduct of lawyers.” *Id.* at 3.

9. These rules were drafted with the intent that they should be enforced exclusively through a state's regime for administering lawyer discipline. See MODEL RULES scope (“The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies.”); MODEL CODE OF PROFESSIONAL RESPONSIBILITY preliminary statement (1980) [hereinafter MODEL CODE] (“The Model Code is designed to be adopted by appropriate agencies as a basis for disciplinary action . . .”). Disciplinary systems entail the imposition of state enforced penalties through proceedings that the United States Supreme Court has characterized as “quasi-criminal.” See *In re Ruffalo*, 390 U.S. 544, 551 (1968) (characterizing disciplinary proceedings as “adversary proceedings of a quasi-criminal nature”). It is not uncommon for courts to disclaim that the purpose of professional discipline is to punish, but there is little doubt that punishment is in fact the result of such processes. See Ted Schneyer, *From Self-Regulation to Bar Corporatism: What the S&L Crisis Means for the Regulation of Lawyers*, 35 S. TEX. L. REV. 639, 664 & n.104 (1994) [hereinafter Schneyer, *Bar*

gated and enforced by the highest court in most states.<sup>10</sup> Thus, when a state supreme court issues an order officially adopting a set of rules of professional conduct, it is establishing legally binding standards of conduct just as a state legislature does when it passes a law proscribing bank robbery. While the official title of such a set of standards — be it "Canons of Ethics," "Code of Professional Responsibility," or "Rules of Professional Conduct" — may suggest that the standards are meant to be non-binding, and the colloquial term "ethics code" frequently associated with such sets of standards might lead one to surmise that they lack legal authority, "the enforcement of the provisions of lawyer codes in disciplinary and other proceedings demonstrates clearly that the codes are legal prescriptions in every conventional sense."<sup>11</sup> The approach taken by the American Law Institute in its mammoth project of assembling a restatement of what it calls "the law governing lawyers" confirms that it is unrealistic today to think of "ethics codes" as being concerned primarily with questions of discretion, decorum, or etiquette.<sup>12</sup>

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*Corporatism*] (explaining that disciplinary targets are often afforded procedural protections reminiscent of the criminal process).

10. For a discussion of the authority of state supreme courts to adopt binding rules applicable to the practice of law, see CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 22-24 (1986); 1 HAZARD & HODES, *supra* note 2, § 206 (2d ed. 1990 & 1996 Supp.). "In New York, unlike other states, the intermediate appellate courts, not the state's highest court, issue court rules." GEOFFREY C. HAZARD, JR. ET AL., *THE LAW AND ETHICS OF LAWYERING* xix (2d ed. 1994).

11. WOLFRAM, *supra* note 10, at 67. Indeed, some have observed that lawyers are attracted to the predictability of unambiguous, binding rules of behavior. See, e.g., Wilkins, *Legal Realism*, *supra* note 7, at 498 (discussing a proposed "set of solutions that concentrates on curing the gaps, conflicts and ambiguities in the current system of professional regulation.").

12. "The term 'ethical codes' has become familiar usage within the legal profession . . . . However, it must be kept constantly in mind that these regulations are rules of law and not merely admonitions of the legal profession to its members. . . . [T]he Codes and the Rules, as adopted in various states, are a form of legislation with attendant authoritative significance." Geoffrey C. Hazard, Jr., *Forward* to RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS xxi-xxii (Am. Law Inst. Tent. Draft No. 8, 1997).

In 1987, the American Law Institute commenced a project that undertook to assemble a complete and clear statement of the legal rules and doctrines that primarily and directly regulate the work that lawyers do when acting "within the distinct and legally defined role of lawyer." Charles W. Wolfram, *The Concept of a Restatement of the Law Governing Lawyers*, 1 GEO. J. LEGAL ETHICS 195, 205 (1987). After a decade of work and numerous volumes of tentative drafts, the statement is still incomplete. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS xxxv (Am. Law Inst. Proposed Final Draft No. 1, 1996) (noting that only four of the anticipated eight chapters are ready for final approval); *ALI Approves Almost Half of Restatement on Lawyers*, [12 Current Reports] *Laws. Man. on Prof. Conduct* (ABA/BNA) 170-76 (May 29, 1996) (acknowledging that the American Law Institute has approved only half of the proposed *Restatement of the Law Governing Lawyers*). The Reporters for this project have taken pains to emphasize that there is an enormous body of positive law, much of it derived from and reflected in the "ethics codes," directed at the practice of law. See Geoffrey C. Hazard, Jr., *Foreword* to RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS xxii-xxiii (Am. Law Inst. Proposed Final Draft No. 1, 1996). This body of law is distinct from other, more normative considerations that may influence an attorney's course of conduct. To emphasize the legal enforceability of this corpus of legal doctrine, the following disclaimer appeared in Proposed Final Draft No. 1 as well as in recent volumes of the tentative drafts of the Restatement:

Because this is a Restatement of the law, the black letter and commentary do not discuss other important subjects, such as considerations of sound professional practice or personal or professional

To be sure, lawyers confront many decisions which the "ethics codes" consign to the realm of professional discretion.<sup>13</sup> Lawyers must know their options and learn to evaluate their choices intelligently and responsibly. However, there are many issues where the law is directive: it tells lawyers that they must do this and they must not do that.<sup>14</sup> There is no reason to doubt that, most of the time, most lawyers want to do what the law governing lawyers requires them to do.

And so, lawyers try to educate themselves about the law governing lawyers. Unfortunately, such an educational mission is not easily attained. A popular standards supplement used in law school legal ethics courses<sup>15</sup> now contains 999

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morality or ethics. Such nonlegal considerations may be referred to in the Reporter's Notes, but those discussions do not, as is traditional, constitute the position of the Institute.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS xxxvi (Am. Law Inst. Proposed Final Draft No. 1, 1996); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS xxiii (Am. Law Inst. Tent. Draft No. 7, 1994); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS xxiii-xxiv (Am. Law Inst. Tent. Draft No. 6, 1993); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS xxiii-xxiv (Am. Law Inst. Tent. Draft No. 5, 1992). "The Restatement, as we have often had occasion to insist, is about law, and nothing else." Charles W. Wolfram, *Legal Ethics and the Restatement Process — The Sometimes-Uncomfortable Fit*, 46 OKLA. L. REV. 13, 13 (1993). Professor Wolfram is the Reporter for this project. For an overview of the emerging Restatement and its scope, see generally *Symposium: The Evolving Restatement of the Law Governing Lawyers*, 46 OKLA. L. REV. 1 (1993).

13. See MODEL RULES pmb. ("Within the framework of these Rules, many difficult issues of professional discretion can arise."). For example, *Model Rule* 1.6(b), authorizing certain disclosures of adverse confidential information about a client, is cast expressly in discretionary terms. See MODEL RULES Rule 1.6(b)(1) (granting a lawyer the discretion to reveal confidential information necessary to prevent a client from committing certain criminal acts). The comment to this provision emphasizes the discretionary aspect of this provision: "A lawyer's decision not to take preventive action permitted by paragraph (b)(1) does not violate this Rule." MODEL RULES Rule 1.6 cmt. An official codification of discretion can also be found in several other *Model Rules*. See, e.g., MODEL RULES Rule 1.16(b) (granting a lawyer the discretion to withdraw from representing a client in some circumstances); MODEL RULES Rule 6.1 (encouraging, but not requiring, lawyers to render 50 hours per year of pro bono services); MODEL RULES Rule 6.4 (giving a lawyer the discretion to serve with an organization involved in law reform even though it might affect the interest of a client); MODEL RULES Rule 7.2 (leaving questions of taste in advertising to the discretion of attorneys). Such rules contemplate that "[n]o disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion." MODEL RULES scope.

14. See *supra* note 8 and accompanying text.

15. Law school courses focusing on the appropriate behavior of lawyers have been labeled with a variety of titles, including: "Legal Ethics," "Professional Responsibility," and "Legal Profession." See ASSOCIATION OF AMERICAN LAW SCHOOLS, THE AALS DIRECTORY OF LAW TEACHERS 1167 (1995-96). Regardless of the name of the course, it is common for instructors today to stress that there is a body of positive law that purports to confine the range of permissible discretion for lawyers and that much of this law, including aspects of it that are codified in professional codes of conduct, is concerned only indirectly with general ethical analysis. See generally ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, A SURVEY ON THE TEACHING OF PROFESSIONAL RESPONSIBILITY 8-13 (1986) [hereinafter ABA TEACHING SURVEY] (describing the substance of professional responsibility education). See also THOMAS D. MORGAN & RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY: PROBLEMS AND MATERIALS 16 (6th ed. 1995) ("It is not 'immoral' for a lawyer to form a law partnership with a non-lawyer, for example, but it would violate current professional standards in almost every jurisdiction."). The message that the study of legal ethics requires the mastery of a large body of substantive law, derived from traditional sources of law, is conveyed by the very titles of some of the newer coursebooks published for use in law schools. See, e.g., HAZARD ET AL., *supra* note 10; L. RAY PATTERSON & THOMAS B. METZLOFF, LEGAL ETHICS: THE LAW OF

pages of statutes, codes, and regulations.<sup>16</sup> A good portion of this supplement consists of a presentation of the American Bar Association's *Model Rules*,<sup>17</sup> which form the basis for almost every state's mandatory rules governing lawyers.<sup>18</sup> While there may be a formal difference of status, at least in some situations, between "rules of law" and the "ethics rules" in force in a particular jurisdiction,<sup>19</sup> and while the ABA professes that this distinction should be respected by the courts,<sup>20</sup> the reality is that lawyers can be disciplined, disbarred,

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PROFESSIONAL RESPONSIBILITY (3d ed. 1989); STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS (4th ed. 1995).

16. See STEPHEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS: STATUTES AND STANDARDS (1996).

17. The *Model Rules*, standing alone, consist of 103 pages of text. See MODEL RULES OF PROFESSIONAL CONDUCT 5-108 (ABA Center for Professional Responsibility ed. 1995). The *Model Rules*, a set of regulations adopted by the House of Delegates of the American Bar Association, were first approved by that private, voluntary association of lawyers in 1983. In approving the *Model Rules*, the ABA House of Delegates acted to replace the *Model Code*, first adopted by the ABA in 1969 and most recently published by the ABA in 1980. The *Model Rules* have been amended from time to time (as had the *Model Code* before it), most recently in February 1997. As the product of a private body, the *Model Rules* (as was true of the *Model Code*) have no controlling force unless adopted by a court or other entity vested with law-making authority regarding the practice of law. In the United States, this law-making power is most commonly exercised by the highest court of each state or territory. See *supra* note 10 and accompanying text. For a discussion of the history, background, and status of the *Model Rules* and *Model Code*, see generally ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES (1987); GILLERS, *supra* note 15, at 1-8; 1 HAZARD & HODES, *supra* note 2, §§ 200-205; MORGAN & ROTUNDA, *supra* note 15, at 11-13.

18. "By 1994 . . . the District of Columbia and all but six states had adopted some form of the Model Rules as their own rules of conduct. Five states, Illinois, New York, North Carolina, Oregon and Virginia, base their rules on both the Model Code and Model Rules. And one state, California, which had never adopted the Model Code, also chose not to adopt the Model Rules, preferring instead to revise its own system of codification in 1989." RICHARD A. ZITRIN & CAROL M. LANGFORD, LEGAL ETHICS IN THE PRACTICE OF LAW 7 (1995) (footnote omitted); see also ROBERT F. COCHRAN, JR. & TERESA S. COLLETT, CASES AND MATERIALS ON THE RULES OF THE LEGAL PROFESSION 7 (1996) (pointing out that approximately 40 jurisdictions have adopted some form of the *Model Rules*); *Model Standards*, Laws. Man. on Prof. Conduct (ABA/BNA) §§ 1:3-1:4 (May 29, 1995) (listing jurisdictions that have adopted new ethics rules since approximately August, 1983, when the ABA adopted the *Model Rules*). Although every state except California thus has in place a set of rules based on one of the two ABA "model" regimes, most states have adopted the ABA models with alterations, those alterations being often numerous and significant. See GILLERS & SIMON, *supra* note 16, at xix ("The Model Rules are influential, but they continue to generate considerable disagreement."); see also THOMAS D. MORGAN & RONALD D. ROTUNDA, SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 132-151 (1996) [hereinafter MORGAN & ROTUNDA, SELECTED STANDARDS] (detailing state by state variations in rules pertaining to client confidences, imputed disqualification of lawyers, and requirements regarding reducing fee agreements to writing); PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES 143-235 (John S. Dzienkowski ed., 1996-97 ed. 1996) (reproducing "selected significant state modifications to the ABA Model Rules") [hereinafter PROFESSIONAL RESPONSIBILITY STANDARDS].

19. See GILLERS, *supra* note 15, at 5-6 (noting that courts have accorded the *Model Rules* and *Model Code* varying degrees of force and status); WOLFRAM, *supra* note 10, at 51-53 (1986) (pointing out that modern lawyer codes are adopted primarily for the purpose of application in a regime of professional self-regulation, not expressly for establishing standards of civil liability).

20. See MODEL RULES scope (stating that "violation of a Model Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached"). But see Ted Schneyer, *The ALI's Restatement and the ABA's Model Rules: Rivals or Compliments?*, 46 OKLA. L. REV. 25, 32-33 (1993) [hereinafter Schneyer, *Rivals or Compliments*] (noting the inconsistency in the ABA's stance on this issue).



disqualified, or sued on the basis of these rules.<sup>21</sup> If one wishes to avoid such calamities, he or she had better know what the rules provide and how they are interpreted.

## II. WHY ABA ETHICS OPINIONS MATTER

One widely available source of interpretive guidance regarding the *Model Rules* is the published opinions of the American Bar Association's Standing Committee on Ethics and Professional Responsibility (hereinafter ABA Ethics Committee).<sup>22</sup> This ten-person committee<sup>23</sup> periodically issues interpretations of

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21. See WOLFRAM, *supra* note 10, at 51-53, 57-58 (discussing the legal effect of the *Model Code* and the relevance and judicial application of the *Model Rules* and the *Model Code* beyond lawyer discipline). The role of the *Model Rules* in both reflecting and influencing the substantive law has been well described by Professor Ted Schneyer. He notes how some *Model Rules* provisions were formulated in such a way that their "chief applications are widely understood to be nondisciplinary." Schneyer, *Rivals or Compliments*, *supra* note 20, at 33. Numerous other provisions in the *Model Rules* "piggyback" on statutory law. *Id.* at 45-48. This occurs so much that, in many respects, the *Model Rules* constitute a "Restatement-in-Fact." *Id.* at 37-41. In his Foreword to the Proposed Final Draft of the *Restatement of the Law Governing Lawyers*, American Law Institute Director Geoffrey Hazard, Jr. confirms that the lawyer codes have significant independent legal effect. Geoffrey C. Hazard, Jr., *Foreword to RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* xxii-xxv (Am. Law Inst. Proposed Final Draft No. 1, 1996). The ABA has even sought to fend off prospective regulation by arguing that the *Model Rules* reflect currently-existing substantive law that appropriately and adequately governs a type of activity. See Schneyer, *Rivals or Compliments*, *supra* note 20, at 28 n.15 (discussing the ABA's contention that its ethics code obviates the necessity of various regulatory initiatives under consideration by state supreme courts, Congress, and the United States Department of Justice).

22. The ABA Ethics Committee issues formal and informal opinions. Formal opinions are on subjects "determined by the committee to be of widespread interest." ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY RULES OF PROCEDURE Rule 3 (1996). Opinions are compiled and published as follows: ABA Comm. on Ethics and Professional Responsibility, Recent Ethics Opinions (looseleaf) (Formal and Informal Opinions issued from 1983 to present); ABA Comm. on Ethics and Professional Responsibility, Formal and Informal Ethics Opinions (1985) (Formal Opinions 316-348, issued from 1967 to 1982, and Informal Opinions 1285-1495, issued from 1974 to 1982); ABA Comm. on Ethics and Professional Responsibility, Informal Ethics Opinions (2 vols. 1975) (Informal Opinions C230(a)-1284, issued from 1961 to 1973); ABA Comm. on Professional Ethics, Opinions on Professional Ethics (1967) (Formal Opinions 1-315, issued from 1924 to 1965). Formal opinions released from 1990 through 1995 are also published in Ethics Opinions 1991-1995 Transfer Binder, LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) §§ 1001:101 et. seq. ABA opinions issued after 1995 are published in Ethics Opinions, LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) §§ 1001:101 et. seq. Summaries of new opinions are published in the *American Bar Association Journal*, a monthly publication received by each member of the ABA, currently more than 300,000 lawyers. See, e.g., Joanne Pelton Pitulla, *Clearing Up Before Moving On*, A.B.A. J., April 1996, at 91 (discussing Formal Opinion 96-400, issued on January 24, 1996); James Podgers, *Time-Barred Case May Still Proceed*, A.B.A. J., April 1996, at 92 (discussing Formal Opinion 94-386R, issued on October 15, 1995, and Formal Opinion 94-387, issued on September 26, 1994).

In recent years, the ABA Ethics Committee has ceased issuing informal opinions. Telephone conversation between Patti Monk, Assistant Director of Oklahoma City University Law Library, and George Kulhman, Counsel to the ABA Ethics Committee (April 22, 1996).

23. See ABA BYLAWS § 31.7 (1995-96). The composition, jurisdiction, and rules of procedure of the ABA Ethics Committee can be found in MORGAN & ROTUNDA, *SELECTED STANDARDS*, *supra* note 18, at 617-619 (1996). For a thorough examination of the history, composition, selection, procedures, and work of this Committee, see generally Ted Finman & Theodore Schneyer, *The Role of Bar Association Ethics Opinions in*

the *Model Rules* and *Model Code*<sup>24</sup> by applying their provisions to concrete factual situations posed as hypothetical problems. These opinions, especially those designated as "formal opinions,"<sup>25</sup> are quite influential; they are "frequently cited by courts and other [rule] enforcement tribunals, by state and local ethics committees, and in treatises and law school casebooks."<sup>26</sup> Because most states' ethics rules are derived from an ABA-promulgated document, either the *Model Rules* or the *Model Code*,<sup>27</sup> state ethics authorities frequently rely on the ABA Ethics Committee's construction of the rules.<sup>28</sup> When state and local

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*Regulating Lawyer Conduct: A Critique of the Work of the ABA Committee on Ethics and Professional Responsibility*, 29 UCLA L. REV. 67 (1981).

24. Prior to the ABA's promulgation of the *Model Rules*, the dominant ethics code was the ABA's *Model Code*, first approved in 1969. Even though the ABA House of Delegates voted in 1983 to supplant the *Model Code* with the *Model Rules*, see *supra* note 17, the ABA Ethics Committee's Rules of Procedure mandate that the Committee's opinions should construe, besides the *Model Rules*, the *Model Code*, at least so long as "a significant number of jurisdictions continue to base their professional standards on the predecessor Model Code." ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY RULES OF PROCEDURE Rule 1 (1996), reprinted in MORGAN & ROTUNDA, SELECTED STANDARDS, *supra* note 18, at 617 (1996); see also, e.g., ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94-389 (1994) (analyzing the appropriateness of contingent fees in light of both the *Model Rules* and the *Model Code*).

25. See *supra* note 22 (describing the nature of formal ABA Ethics Committee opinions).

26. Finman & Schneyer, *supra* note 23, at 71. The ABA Committee on Ethics and Professional Responsibility has been described as "[t]he country's most important ethics committee." *Id.*; see also Stephen E. Kalish, *The Sale of a Law Practice: The Model Rules of Professional Conduct Point in a New Direction*, 39 U. MIAMI L. REV. 471, 475 n.13 (1985) (asserting that the ABA Ethics Committee is a "more authoritative body" than state and local ethics committees); Wilkins, *Legal Realism*, *supra* note 7, at 501 n.146 (stating that ABA ethics opinions are by far "the most important" advisory opinions). While there is disagreement as to whether such opinions have "the force of law," 1 HAZARD & HODES, *supra* note 2, at lix n.4 (2d ed. 1990 & Supp. 1993), there is no doubt that they frequently serve as a "source of law." Finman & Schneyer, *supra* note 23, at 83-88.

Professor Wolfram, in his leading treatise, reaches a conclusion contrary to that expressed in the text regarding the prominence of the role played by ABA ethics opinions: "Bar ethics opinions have not played a large role in the discipline of lawyers or in judicial rulings on such matters as the disqualification of a lawyer for a conflict of interest." WOLFRAM, *supra* note 10, at 67. However, the view of Professors Finman and Schneyer, quoted in the text, is amply supported by examples they supply on the cited pages. It is also supported by an empirical study designed "to measure the impact of ethics opinions on courts that decide matters relating to the legal profession." Jorge L. Carro, *The Ethics Opinions of the Bar: A Valuable Contribution or An Exercise in Futility*, 26 IND. L. REV. 1, 1 (1992). Professor Carro 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." *Id.* at 35. The study showed that the tendency of courts to give weight to bar ethics opinions is increasing, *id.* at 17, and that federal appellate courts cite ABA opinions more commonly than they do state and local opinions, *id.* at 17-20; federal district courts rely on them considerably, *id.* at 20, and state courts "have shown a preference for the ABA [opinions], followed by those issued by their own state bars." *Id.* at 23.

27. See *supra* note 18 and accompanying text.

28. Finman & Schneyer, *supra* note 23, at 83; see, e.g., Mich. State Bar Comm. on Professional and Judicial Ethics, Op. RI-191 (1994) (relying on ABA Formal Opinion 90-358); Minn. Lawyers Professional Responsibility Board, Op. 3 (1986) (following ABA Formal Opinion 337 (1974)); Advisory Comm. of the Neb. State Bar Ass'n, Ops. 92-3, 93-2, 93-5, 94-3, and 94-5 (undated) (relying on ABA Formal Opinions 90-357, 342, 342, 338 and 91-359, respectively); Comm. on Professional Ethics of the Bar Assoc. of Nassau County, N.Y., Op. 94-25 (1994) (relying on ABA Formal Opinion 93-379); Ohio State Bar Ass'n Comm. on Legal Ethics and Professional Conduct [hereinafter Ohio St. B. Ass'n. Comm.], Op. 95-7 (1995) (relying on ABA Formal

authorities have not officially construed a particular rule, lawyers are taught to treat ABA ethics opinions as one of the best sources of guidance available.<sup>29</sup>

In actuality, however, ABA opinions are binding upon no one. ABA opinions represent the views of a small committee<sup>30</sup> of a private association,<sup>31</sup> and they construe that private association's *Model Rules* and *Model Code*. The power to determine whether and to what extent either of these model documents will be put into force in any state is exercised by a state authority, most commonly the state's highest court.<sup>32</sup> It is typical for a state's set of rules, even when based on

Opinion 94-389); Ohio St. B. Ass'n. Comm., Op. 95-6 (1995) (relying on ABA Informal Opinion 85-1512); Ass'n of the Bar of the City of N.Y. Comm. on Professional and Judicial Ethics, Op. 1995-10 (1995) (following ABA Formal Opinion 337); Board of Professional Responsibility of the Supreme Court of Tenn., Op. 86-F-14 (1986) (following ABA Formal Opinion 337); Va. State Bar Comm. on Legal Ethics, Op. 1610 (1994) (relying on ABA Formal Opinion 91-361); see also *American Express v. Accu-Weather, Inc.*, 1996 WL 346388 (S.D.N.Y. June 25, 1996) (relying on ABA Formal Opinion 92-368 to impose sanctions).

29. Since 1974, ABA-accredited law schools have been required to provide instruction in legal ethics. See ABA SECTION OF LEGAL EDUC. AND ADMISSION TO THE BAR, STANDARDS FOR THE ACCREDITATION OF LAW SCHOOLS § 302(a)(iv) (1995) (stating the requirement for professional responsibility instruction); William Barrett, *Law Schools Stress Ethics*, N.Y. TIMES, Sept. 22, 1974, at 69 (reporting on the ABA mandate regarding ethics instruction in law schools). Most accredited law schools (for noteworthy exceptions, see Roger C. Cramton & Susan P. Koniak, *Rule, Story, and Commitment in the Teaching of Legal Ethics*, 38 WM. & MARY L. REV. 145, 147 n.14 (1996)) comply with this standard by offering required courses in professional responsibility. See ABA TEACHING SURVEY, *supra* note 15, at 3. ABA ethics opinions receive at least some treatment in the majority of these courses. See *id.* at 10. Many law school coursebooks used in these required courses stress the significance of ABA ethics opinions as sources of guidance. See, e.g., NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION 13 (1996); GILLERS, *supra* note 15, at 6; HAZARD, ET AL., *supra* note 10, at 16; MORGAN & ROTUNDA, *supra* note 15, at 13; ZITRIN & LANGFORD, *supra* note 18, at 7. The ABA's influential *Statement of Fundamental Lawyering Skills and Professional Values* suggests that such opinions should be studied carefully. ABA SECTION OF LEGAL EDUC. AND ADMISSION TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT — AN EDUCATIONAL CONTINUUM 203-04 (1992).

30. See ABA BYLAWS § 31.7 (1995-96). Historically, the composition of the ABA Ethics Committee has been far from diversified. Its members, appointed by the ABA President for (renewable) three-year terms, see ABA BYLAWS §§ 31.2 and 31.3 (1995-96), have been "nearly exclusively . . . lawyers from the most prestigious level of the profession." Finman & Schneyer, *supra* note 23, at 151.

31. For a discussion of the history, structure, and representativeness (or lack thereof) of the membership of the American Bar Association, see WOLFRAM, *supra* note 10, at 34-35.

32. The judiciary's authority to regulate the legal profession is often said to be "inherent" in the judicial power assigned to the courts, either expressly or implicitly, by the state constitutions. See, e.g., WOLFRAM, *supra* note 10, at 22-27 (tracing the origins of the affirmative inherent powers doctrine to the English legal tradition, explicit state constitutional provisions, and the necessity of the court system to ensure its proper functioning). However, some nagging questions regarding the breadth of authority claimed to be supported by the "inherent powers doctrine" have been raised. See *id.* at 23-24 (explaining that most courts assert a "negative inherent powers doctrine," which holds that only the courts, and not the other branches of government, may regulate the practice of law, and warning of the extremes to which this doctrine can be taken); Wilkins, *Bar Regulation*, *supra* note 8, at 856-58 (asserting that both formalist and functionalist separation of powers arguments do not provide compelling reasons for why enforcement actions against lawyers cannot be taken by other branches of the government as well as the judiciary); Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 665, 666-67 (1995) [hereinafter Wolfram, *Sneaking Around*] ("Although one still finds the rhetoric of judicial exclusivity [over the source of lawyer code pronouncements on lawyer disciplinary regulation], the reality is that lawyer regulation is increasingly found in the form of legislation or administration."). In addition, there have been increasingly frequent skirmishes between the legislative and judicial branches in various states. See Wilkins, *Bar Regulation*,

one of the ABA models, to contain material variations from the relevant ABA document.<sup>33</sup> Indeed, it is fair to say that, because most states have comprehensively revised their rules since the ABA's approval of the *Model Rules* in 1983,<sup>34</sup> these variations have grown both in number and significance.<sup>35</sup> Consequently,

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*supra* note 8, at 858 n.258 (citing various cases where state courts have struck down legislation under the inherent powers doctrine); WOLFRAM, *supra* note 10, at 29 (providing examples of invalidation by the courts of legislative and administrative attempts to regulate the practice of law). Nevertheless, there has been no serious assault on the power of the highest court of each state to adopt a code of conduct that will be treated as binding on those who practice law in the relevant jurisdiction. *See supra* notes 10 and 17 (listing sources affirming the authority of state supreme courts to adopt rules governing the practice of law); *see also* Wilkins, *Bar Regulation*, *supra* note 8, at 858 (stating that critiques of the "negative aspects" of the "inherent powers doctrine" do not call into question "affirmative aspects" of the doctrine — justifying state court-standard setting).

33. For a thorough display of the extent to which state rules have diverged from the ABA models, see GILLERS & SIMON, *supra* note 16, at 7-414; MORGAN & ROTUNDA, *SELECTED STANDARDS*, *supra* note 18, at 132-151; PROFESSIONAL RESPONSIBILITY STANDARDS, *supra* note 18, at 143-235 (showing state departures from the ABA model standards).

34. At least 42 states and the District of Columbia have revised their rules since 1983. *See Model Standards, Laws. Man. on Prof. Conduct (ABA/BNA) §§ 1:3-1:4* (May 29, 1995) (listing jurisdictions that have adopted new legal ethics rules since the ABA approved the *Model Rules* in August 1983).

35. Whereas state adoptions of the 1969 *Model Code* were relatively swift and uniform, state adoptions of the 1983 *Model Rules* have been slower and more idiosyncratic. *Compare* WOLFRAM, *supra* note 10, at 56 ("Counting adoptions by state bar associations, by 1972 . . . every jurisdiction had taken steps to adopt the [Model] Code except three states . . .") and Schneyer, *Moral Philosophy*, *supra* note 2, at 1533 n.21 (noting that the *Model Code* "was quickly adopted by court rule in nearly all states, with only minor amendments") with GILLERS, *supra* note 15, at 5 ("Whereas state adoption of the . . . Model Code[] was fairly quick, adoption of the *Model Rules* is still in process over a decade later. As of early 1995, 37 states had adopted the *Model Rules*, with much variation."). State adoptions of ABA amendments to the *Model Code* and *Model Rules* have been neither prompt nor uniform. *See* WOLFRAM, *supra* note 10, at 50 (noting the diminishing influence of the ABA "over the shape of local regulation . . ." (footnote omitted)); *see also* Duncan T. O'Brien, *Multistate Practice and Conflicting Ethical Obligations*, 16 SETON HALL L. REV. 678, 678-92 (1986) (finding that many states did not adopt controversial 1974 amendments to the *Model Code*). The *Model Rules* were amended 21 times between 1983 and 1995, and at least once in each year between 1989 and 1995. *See* MODEL RULES OF PROFESSIONAL CONDUCT 109-12 (ABA Center for Professional Responsibility ed. 1995). State amendments have been idiosyncratic. "[G]one is the at-one-time widely acknowledged hegemony of the American Bar Association as the exclusive source of lawyer code pronouncements on lawyer disciplinary regulation." Wolfram, *Sneaking Around*, *supra* note 32, at 666.

One reflection on the extent and significance of rule variations from state to state is found in the serious attention recently given to "choice of law" questions arising in the context of professional discipline. The original position of the *Model Rules* on this issue, *see* MODEL RULES Rule 8.5 (1983), has been deemed inadequate by the ABA House of Delegates, which voted in 1993 to substantially amend *Model Rule* 8.5. The amendments were adopted "to bring some measure of certainty and clarity to the frequently encountered, and often difficult, decisions a lawyer must make when encountering a situation in which the lawyer is potentially subject to differing ethical requirements of more than one jurisdiction." Report of the Standing Comm. on Ethics and Professional Responsibility in Support of Amended Rule 8.5 (1993), *reprinted in part in* GILLERS & SIMON, *supra* note 16, at 410-12. *See generally* Symposium: *Ethics and the Multijurisdictional Practice of Law*, 36 S. TEX. L. REV. 657-1105 (1995) (detailing inconsistent professional standards from state to state and the uncertainties that confront lawyers, even under amended *Model Rule* 8.5, when their practices subject them to the disciplinary jurisdiction of more than one state). For a discussion of the declining influence of the *Model Rules* and the consequent proliferation of rule variations from state to state, *see* Schneyer, *Bar Corporatism*, *supra* note 9, at 664-66 (1994); Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 L. & SOC. INQUIRY 677 (1989) [hereinafter Schneyer, *Bar Politics*]; Wilkins, *Legal Realism*, *supra* note 7, at 488 n.92; WOLFRAM, *supra* note 10, at 50.

numerous ABA ethics opinions consist of interpretations of *Model Rules* that are substantively different from the rules in force in many states. Obviously, an ABA opinion interpreting a *Model Rule* that has not been adopted in a particular state would not necessarily be viewed as authoritative in that state.

This is not to say that an ABA opinion will be utterly without influence in states whose rules do not conform to the model provisions that the ABA opinion interpreted. For example, it is possible that the reasoning employed in an ABA opinion could have persuasive influence on the construction of state rules that, although different from the ABA model provision interpreted in the ABA opinion, address the same issues as the model provision.<sup>36</sup> Such an impact is particularly likely when an ABA opinion focuses on overarching policies sought to be advanced by the *Model Rules* as a whole or expounds upon the relationship between two or more different *Model Rules*, all of which have corollaries in the states. Where there is no contrary authority in a state or local bar ethics opinion or state judicial decision, as may often be the case,<sup>37</sup> an ABA ethics opinion, even one addressing a differently-worded rule, may still command attention.<sup>38</sup>

Yet, lawyers have reason to be cautious regarding the amount of weight they give to ABA opinions. Even when an ABA opinion construes a model provision that a state has adopted verbatim, the ABA opinion has no legal force in that state. Just as state authorities exercise plenary power with respect to rule *adoption*,<sup>39</sup> so

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The rules of conduct that govern in a federal tribunal may vary from both the ABA models *and* the rules in force in the state in which the federal court is located. For a discussion of the authority of federal tribunals to adopt their own regulatory regimes, see WOLFRAM, *supra* note 10, at 32. Although Professor Wolfram states that “[t]he federal courts almost invariably incorporate the same version of the Code [or Rules] that applies in the state in which the federal court sits,” *id.* at 58, federal courts sometimes treat the *Model Code* or *Model Rules* as binding with respect to proceedings before them regardless of the applicability of differing rules in tribunals of the state in which the federal courts are located. For example, even though a version of the *Model Rules* was adopted by the Oklahoma Supreme Court effective July 1, 1988, *see* Oklahoma Supreme Court Order dated April 1, 1988, 59 OKLA. B.J. 718 (1988), prior to 1997 Rule 4(j) of the Local Court Rules of the United States District Court for the Eastern District of Oklahoma provided: “Any member of the Bar of this Court guilty of a violation . . . of the disciplinary rules of the Code of Professional Responsibility of the American Bar Association . . . shall be subject to . . . disciplinary action as the Court deems appropriate.” LOCAL RULES OF U.S. D. CT. FOR E.D. OF OKLA. Rule 4(j) (1996) (superceded in 1997 by Local Rule 1.3); *see also* Panel Suggests Federal Court Should Not Follow ABA Rules, [12 Current Reports] Laws. Man. Prof. Conduct 382-383 (ABA/BNA) (Nov. 13, 1996) (discussing proposal to conform — for the first time — ethical standards in force in federal courts in New York to those contained in the New York Code of Professional Responsibility). For an earlier example of incongruity between active federal and state rules, *see* Martin Riger, *The Model Rules and Corporate Practice — New Ethics for a Competitive Era*, 17 CONN. L. REV. 729, 759-60 n.138 (1985).

36. *See* Finman & Schneyer, *supra* note 23, at 93 (“Even when a [state] Code enforcer feels obliged to resolve value conflicts for himself and, therefore, would not defer to [an ABA opinion’s] holding, he may well rely on the reasoning in [the ABA] opinion to identify the relevant issues.”).

37. *See infra* note 48 and accompanying text.

38. Professors Finman and Schneyer noted one state disciplinary opinion in which a state supreme court actually relied upon an ABA ethics opinion’s *silence* on an issue to undercut the force of explicit language in an earlier ethics opinion issued in the same state. *See In re A*, 554 P.2d 479 (1976), *discussed in* Finman & Schneyer, *supra* note 23, at 90.

39. *See supra* note 32 and accompanying text (discussing the judiciary’s authority to regulate the legal profession).

too do they exercise plenary power with respect to rule *interpretation*.<sup>40</sup> Although a state's rule may be textually identical to an ABA model provision, there is no obligation for state authorities — ethics committees, disciplinary tribunals, or state courts — to give the rule the same construction as that offered by the ABA Ethics Committee.<sup>41</sup> In fact, it is not at all unusual for state authorities to adopt interpretations that conflict with ABA Ethics opinions addressing the very same language.<sup>42</sup> Departures from positions taken in ABA opinions have become so

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40. State supreme courts promulgate "ethics codes" with the expectation that they will be enforced principally in lawyer disciplinary proceedings, which, pursuant to the inherent powers doctrine, *see supra* note 32, fall under the exclusive control of the adopting state court. *See, e.g.,* OKLA. RULES GOVERNING DISCIPLINARY PROCEEDINGS Rules 1.1 & 1.5, OKLA. STAT. ANN. tit. 5, ch. 1, App. 1-A §§ 1.1 & 1.5 (West 1996) (declaring that the Oklahoma Supreme Court possesses "original and exclusive jurisdiction" to discipline lawyers and that the Oklahoma Rules of Professional Conduct constitute "the standard of professional conduct" that the court will interpret and apply in exercising that jurisdiction). Even when such codes are made relevant in civil legal proceedings, it is the state's highest court that has the last word on the meaning and weight to be attached thereto. *See* WOLFRAM, *supra* note 10, at 51-52 (asserting that the codes serve as a possible source of guidance for courts in a civil case).

41. The principle of state autonomy with regard to the interpretation of state law is well-recognized in the field of constitutional law. Even though the language of a provision in a state constitution may be identical to that found in the United States Constitution, a state supreme court has the power to give the provision an interpretation that is at odds with a United States Supreme Court opinion. *See generally* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (discussing new state court activism in granting greater protection on state constitutional grounds than the Supreme Court has granted on parallel United States constitutional grounds); Jeffrey M. Croasdel, *Regulation of Attorney Advertising Under State Constitutional Freedom of Speech Provisions*, 68 TEMP. L. REV. 1457 (1995) (discussing the level of protection granted to various types of free speech, including attorney advertising, under state constitutions). For an example of state court independence in this regard, *see* Johnson v. Bd. of Gov. of Reg'd. Dentists, 913 P.2d 1339, 1346 (Okla. 1996) (holding that the construction of the Due Process Clause in the Oklahoma Constitution is not dependent on the U.S. Supreme Court's construction of the Due Process Clause in the federal Constitution). Obviously, opinions issued by a non-governmental body such as the ABA carry less force in the states than do opinions of the United States Supreme Court.

Interpretations in conflict with ABA ethics opinions may be adopted by either a state or local bar ethics committee or a state court. State courts may construe ethics rules in the context of considering a disciplinary proceeding, a disqualification motion, a motion to suppress evidence in a criminal prosecution, a fee dispute, or conventional civil litigation in which an attorney's conduct has been placed in issue. Most state and local ethics opinions are issued by committees operating under the auspices of a bar association, many of which are voluntary organizations. Even when an ethics committee has been appointed by a unified bar association or directly by a state supreme court, its opinions are usually deemed to be advisory only (i.e., without legally binding authority). *See* Carro, *supra* note 26, at 9 (stating that opinions of special advisory ethics committees appointed by state supreme courts are usually non-binding). *But see* Finman & Schneyer, *supra* note 23, at 70 n.4 ("The opinions of a few state bar association ethics committees are binding on the grievance committees in their states . . ."). While state ethics committee opinions are thus less authoritative than opinions offered by state courts in the course of judicial proceedings, they are certainly intended to have influence on the behavior of lawyers, and there is no empirical evidence to suggest that they do not have this effect. At least until a state ethics opinion is disregarded, disagreed with, or explicitly repudiated by a court in the state of issuance, there is every reason to believe that it is regarded as authoritative by the practicing bar. Indeed, "[m]ost jurisdictions . . . seem to defer to ethics opinions to the extent that a lawyer who has acted in accordance with an ethics committee recommendation is ordinarily given the benefit of the doubt in disciplinary proceedings." WOLFRAM, *supra* note 10, at 67; *see also* Finman & Schneyer, *supra* note 23, at 88-90 (giving examples of cases in which lawyers successfully relied on ethics opinions to avoid disqualification or discipline in state and federal courts).

42. *Compare, e.g.,* N. M. State Bar Advisory Comm., Op. 1987-5 (undated) (holding that state rules that conform to the ABA Model Rules preclude even the subtle threat of possible criminal prosecution in connection

common that a disclaimer now accompanies the published summaries of ABA opinions appearing in the widely-circulated *American Bar Association Journal*.<sup>43</sup>

Because ABA opinions are sometimes followed and sometimes rejected by

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with a civil matter) *with* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-363 (1992) (holding that threatening criminal prosecution does not violate the *Model Rules* unless the threat constitutes a crime in the governing jurisdiction). States with rules virtually identical to the relevant ABA models have reached interpretations at odds with ABA ethics opinions regarding, *inter alia*: (1) whether "positional conflicts" are presumptively disqualifying, *compare* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-377 (1993) (holding that such conflicts raise a rebuttable presumption for disqualification under Model Rule 1.7(b)) *with* Maine Bd. of Bar Overseers Professional Ethics Comm'n, Op. 155 (1997) (holding that such conflicts do not create a rebuttable presumption for disqualification under Maine's similarly worded conflict of interest provision contained in Maine Bar Rule 3.4(b)); (2) the proper response upon receiving confidential documents accidentally furnished by an adversary, *compare* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-368 (1992) (holding that, if an attorney accidentally receives confidential documents from an adversary, that attorney should not examine the documents; rather, the attorney should notify opposing counsel and follow his or her instructions) *with* Mass. Bar Ass'n Ethics Comm., Op. 94-6 (1994) (holding that an attorney may continue to possess and use confidential documents) *and* State Bar of Mich. Comm. on Professional and Judicial Ethics, Op. RI-179 (1993) (holding that an attorney need not return confidential documents upon a claim they are privileged) *and* Aerojet-General Corp. v. Transport Indemnity Ins., 22 Cal. Rptr. 2d 862 (Cal. Ct. App. 1st Dist. 1993) (holding that an attorney could not be faulted for examining confidential documents and failing to notify opposing counsel in a timely manner); (3) the classification of represented individuals who may not be contacted by an opposing lawyer without consent of counsel, *compare* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-396 (1995) (holding that prosecutors and their agents may contact a represented party in certain circumstances) *with* Utah State Bar Ethics Advisory Opinion Comm., Op. 95-05 (1996) (holding that prosecutors and their agents may not communicate with represented parties); (4) the propriety of secretly tape-recording conversations, *compare* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 337 (1974) (holding that attorneys should not secretly tape-record conversations except when necessary for law enforcement) *with* New York County Lawyers Ass'n Comm. on Professional Ethics, Op. 696 (undated) (holding that secret tape recording is not per se unethical) *and* Attorney M v. Mississippi Bar, 621 So. 2d 220 (Miss. 1992) (holding that a secret recording did not violate a rule of professional conduct) *and* Okla. Bar Ass'n Legal Ethics Comm., Op. 307 (1994) (holding that a secret recording is not per se deceptive and unethical) *and* Utah State Bar Ethics Advisory Opinion Comm., Op. 90 (1988) (holding that a secret recording is not unethical) *and* Alaska Bar Ass'n Ethics Comm., Op. 95-5 (1995) (holding that it is not unethical for a criminal defense attorney or his agent to secretly record a witness); (5) the availability of "screening" to avoid certain conflicts of interest, *compare* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975) (screening available in the case of former government attorney) *with* Neb. State Bar Ass'n, Op. 94-4 (screening not available even in the case of former government attorney); and (6) the propriety of participating in a bar related title insurance company "owned and managed by attorneys who would retain a portion of premium paid by client as part of fee," *compare* ABA Comm. on Ethics and Professional Responsibility, Op. 331 (1972) (allowing such conduct with client consent) *with* N.J. Supreme Court Advisory Comm. on Professional Ethics, Op. 682, 1996 WL 74060 (N.J. Supreme Court Advisory Comm. on Professional Ethics Feb. 5, 1996), *upheld in* In re Op. 682 of the Advisory Committee on Professional Ethics, 687 A.2d 1000 (N.J. 1997) (disallowing such conduct even with client consent; relying, only in part, on unique New Jersey ethics rule). *See also* In re Himmel, 533 N.E.2d 790 (Ill. 1988) (interpreting the term "privileged" as used in the *Model Code* much more restrictively than suggested by ABA Formal Opinion 341).

43. "Opinions by the ABA Standing Committee on Ethics and Professional Responsibility . . . are advisory only; results may differ by jurisdictions [sic]." A.B.A. J., April 1996, at 93; *see also* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1420 (1978), *reprinted in* ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, FORMAL AND INFORMAL OPINIONS 312, 317 (1978) ("[T]he interpretive opinions of the [ABA Ethics] committee are not directly applicable [in state disciplinary proceedings]."); J. Michael Medina, *Ethical Concerns in Civil Appellate Advocacy*, 43 Sw. L.J. 677, 687 n.44 (1989) (identifying ten opinions issued by state ethics committees and state courts that conflict with one ABA opinion).

state authorities, lawyers in a particular jurisdiction cannot know whether to rely on a published ABA opinion until the subject that it addresses is taken up by that state's ethics committee or the courts of that state.<sup>44</sup> While almost every state bar association and many of the larger metropolitan bar associations have in place an "ethics" committee with the authority to issue advisory opinions,<sup>45</sup> and while the combined output of these committees has been described as "prodigious,"<sup>46</sup> the ethics committees in many states are relatively inactive,<sup>47</sup> and no state or local

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44. Ultimately, only the highest court in a state can definitively construe that state's rules because it is that court that exercises the exclusive authority to regulate the practice of law. See *supra* notes 32 and 40 and accompanying text. However, courts address ethics issues only through the case by case process of resolving formal disciplinary charges or reviewing lower court disqualification and sanctions orders and like rulings that arise in the course of civil and criminal adjudication. This is a cumbersome and incomplete method for expounding upon the rules. On many issues, lawyers can find guidance beyond the text of the rules in ethics opinions rendered by a state or local bar association. Though such opinions are treated as binding in only a handful of jurisdictions, there is reason to believe they are consulted by lawyers with interest and that they influence behavior everywhere — if for no other reason than one would not expect the harshest forms of discipline to be imposed upon lawyers who consciously conformed their conduct to the guidance of an ethics opinion issued by the governing bar association. See *supra* note 41; see also ABA Standards for Imposing Lawyer Sanctions § 9.31 (1986) (directing attention to "any considerations or factors that may justify a reduction in the degree of discipline to be imposed"). Most law school coursebooks used in required legal ethics courses counsel consideration of available ethics opinions from state and local authorities as well as from the American Bar Association. See sources cited *supra* note 29.

45. More than 200 such committees have been identified. Wilkins, *Legal Realism*, *supra* note 7, at 502. Digests of ethics opinions issued by 59 different bar associations and jurisdictions are published in the *Lawyers' Manual on Professional Conduct* (ABA/BNA). Digests of hundreds of state and local ethics opinions since 1980 are maintained in transfer binders compiled by the *Lawyers' Manual on Professional Conduct* (ABA/BNA). Earlier state and local opinions (as well as ABA opinions) are digested in OLAVI MARU, DIGEST OF BAR ASSOCIATION ETHICS OPINIONS (1970); OLAVI MARU, 1970 SUPPLEMENT TO THE DIGEST OF BAR ASSOCIATION ETHICS OPINIONS (1972); OLAVI MARU, 1975 SUPPLEMENT TO THE DIGEST OF BAR ASSOCIATION ETHICS OPINIONS (1977); OLAVI MARU, 1980 SUPPLEMENT TO THE DIGEST OF BAR ASSOCIATION ETHICS OPINIONS (1982).

46. Finman & Schneyer, *supra* note 23, at 81, n.53 (noting an average of 500 plus opinions (including ABA opinions) were published annually from 1971 to 1975). More than 700 state and local ethics opinions were released in 1995. See Laws. Man. on Prof. Conduct (ABA/BNA) tab 1001 (1996) (containing digests of most opinions, although "informal opinions" are sometimes not published and are therefore not digested).

47. Eleven states each issued more than 20 opinions in 1995: Connecticut (31), Illinois (21), Iowa (46), Maryland (32), Michigan (26), North Carolina (31), Pennsylvania (169), Rhode Island (61), South Carolina (37), South Dakota (20), and Virginia (31). *Id.* However, no opinions were reported from six state bar associations (Idaho, Massachusetts, Minnesota, Oklahoma, Vermont, and Washington), and two others published only one opinion (Georgia and Hawaii). *Id.* In the author's home state of Oklahoma, only five ethics opinions have been published since the *Model Rules* went into effect there in 1988, and two of these opinions have been withdrawn. See Okla. Bar Ass'n Comm. on Legal Ethics and Unauthorized Practice [hereinafter Okla. B. Ass'n Comm.], Op. 304, in 57 OKLA. B. J. 272 (1989) (permitting *ex parte* communication with adversary's physician); Okla. B. Ass'n Comm., Op. 305, in 63 OKLA. B. J. 3729 (1992), corrected in 64 OKLA. B. J. 64 (1993), withdrawn in 64 OKLA. B. J. 1319 (1993), reaff'd in 65 OKLA. B. J. 1749 (1994), withdrawn in 65 OKLA. B. J. 3903 (1994) (addressing representations adverse to a municipality that employs a firm member on a part-time basis); Okla. B. Ass'n Comm., Op. 306, in 64 OKLA. B. J. 66 (1992) (discussing contingent fee issues); Okla. B. Ass'n Comm., Op. 307, in 65 OKLA. B. J. 755 (1993) (permitting clandestine tape-recording); Okla. B. Ass'n Comm., Op. 308, in 65 OKLA. B. J. 4083 (1994), withdrawn in 66 OKLA. B. J. 1009 (1995) (addressing attorney-client sexual relations). Interestingly, one of the three surviving Oklahoma opinions issued during the *Model Rules* era expressly rejected the ABA's formal opinion on the same issue. Compare Okla. B. Ass'n Comm., Op. 307, in 65 OKLA. B. J. 755 (1993) (holding that clandestine tape-recording of conversations



committee routinely opines on the validity of ABA opinions as they are issued.<sup>48</sup> Thus, there are numerous questions of rule interpretation that have been addressed by ABA opinions where the position of many state and local bars will be in doubt because of the failure of the state or local committees to deal with them. Even when there is an existing state ethics opinion on the same topic as an ABA opinion, there is always the possibility that the state's ethics committee or the state's courts will find the state's ethics opinion not to be controlling when it is in conflict with a prior ABA opinion on the same topic.<sup>49</sup> This risk is enhanced when the most recent state or local opinion predates the most recent re-codification of that state's rules.<sup>50</sup> Hence, given that the states are free to depart from ABA interpretations, and frequently do so, the publication of each new ABA opinion presents lawyers everywhere with an unavoidable question: Will this opinion be followed by enforcement authorities in my jurisdiction? Recent years have witnessed an acceleration in the publication of formal opinions by the ABA Ethics Committee, and over fifty formal opinions construing the *Model Rules* have been released since that influential set of standards was first adopted by the ABA in 1983.<sup>51</sup> How many of these should lawyers in a particular state disregard?

Fifteen years ago, Professors Ted Finman and Ted Schneyer undertook a thorough analysis of all the ABA formal opinions issued between the ABA's adoption of the *Model Code* in 1969 and the completion of their study in 1979.<sup>52</sup> Twenty-one opinions containing forty-eight distinct holdings were promulgated during that period.<sup>53</sup> These scholars concluded that a large proportion of the Committee's holdings were based on seriously flawed reasoning.<sup>54</sup> Perhaps the most disturbing flaw they exposed was the tendency of the ABA Ethics Commit-

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is presumptively permissible) with ABA Comm. on Ethics and Professional Responsibility, Formal Op. 337 (1974) (holding that clandestine tape-recording of conversations presumptively constitutes misconduct).

48. But see Finman & Schneyer, *supra* note 23, at 83 n.65 (noting that the official position of the ethics committee of the Arizona State Bar recognizes ABA opinions as having "highly persuasive authority" in Arizona).

49. See, e.g., *In re A*, 554 P.2d 479, 487 (Or. 1976) (declining to follow state ethics opinion because of arguably conflicting guidance contained in an earlier ABA opinion).

50. This risk exists even if the re-codification does not appear on its face to change the substance of the rule governing the issue in question.

51. ABA Formal Opinion 84-349 was issued in 1984, and the most recent ABA Formal Opinion, 96-404, was issued in August of 1996. Although this would suggest that approximately four opinions are issued per year, nine formal opinions were released in 1995, 10 were released in 1994, and nine were issued in 1993. This compares to the 10-year period from 1970-79 when the ABA Ethics Committee issued a total of 21 formal opinions. See Finman & Schneyer, *supra* note 23, at 92.

52. Finman & Schneyer, *supra* note 23.

53. *Id.* at 97.

54. After a methodical analysis, the authors concluded that the reasoning in 18 of the 21 opinions was "deficient in one or more respects." *Id.* at 105. Common deficiencies included the failure to identify a tenable rationale, *id.* at 105-07; insufficient clarity, *id.* at 112-14; failure to identify "problems of interpretative choice," *id.* at 109-11; poor analysis of "problems of choice," *id.* at 111-12; and the failure to identify and apply relevant authority (including provisions of the *Model Code* and prior formal opinions). *Id.* at 107-09.

tee to ignore relevant provisions in the *Model Code* that the Committee's opinions purported to construe, a phenomenon identified in eight of the twenty-one opinions reviewed.<sup>55</sup> The combination of these problems accounted for what Professors Finman and Schneyer classified as seven fundamentally erroneous holdings.<sup>56</sup> They deemed one such holding to be so patently erroneous that it was unlikely to have much influence, since most lawyers and disciplinary committees readily would perceive it as recommending conduct forbidden by the express language and, equally importantly, fundamental policies reflected in the then-controlling *Model Code*.<sup>57</sup> But the other six holdings judged to be erroneous were seen as likely to influence lawyers toward conduct that was at odds with both the text and the underlying policies of the *Model Code*.<sup>58</sup> In short, in these seven instances of erroneous holdings, the ABA Ethics Committee was found to have concluded that the rules it was construing did not actually mean what they said.<sup>59</sup>

Believing that ABA formal opinions are meant to, and do in fact, exert significant influence on the behavior of lawyers,<sup>60</sup> and also believing that the flawed reasoning employed in the vast majority of those opinions caused that influence to be generally undesirable,<sup>61</sup> Professors Finman and Schneyer evaluated a number of possible reforms to improve the quality of the ABA Ethics Committee's decision-making.<sup>62</sup> Assuming the good faith and competence of the ABA Ethics Committee members,<sup>63</sup> they concluded that fundamental changes in the composition, mission, or authority of the decision-makers was both unnecessary and unlikely to engender "better" decisions.<sup>64</sup> Professors Finman and Schneyer did suggest, however, that the ABA Ethics Committee would produce

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55. *Id.* at 108 & n.149.

56. *Id.* at 101 & nn.126-27.

57. *Id.* Indeed, that pronouncement, contained in Formal Opinion 324, was overruled by the ABA Ethics Committee itself just four years after its issuance. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 334 (1974), *overruling* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 324 (1970).

58. See Finman & Schneyer, *supra* note 23, at 101-02 & n.127 (identifying and summarizing six opinions classified as "clearly wrong").

59. The ABA Ethics Committee's attitude toward the text of the then-reigning *Model Code* was characterized as "cavalier," *id.* at 107, and "lawless[]." *Id.* at 146.

60. *Id.* at 73-92.

61. *Id.* at 167. It should be noted that Professors Finman and Schneyer concluded only seven of the 48 reviewed holdings were "clearly wrong." *Id.* at 101. They took no issue with 21 of the holdings, which they deemed to be "correct." *Id.* at 97. As for the other 20 holdings (about 40% of all those produced over a 10-year period), Professors Finman and Schneyer characterized the holdings simply as "debatable." *Id.* at 102. With regard to these debatable holdings, the reviewers took issue, not with the holdings themselves, but with the reasoning process used by the ABA Ethics Committee in reaching the holdings. *Id.* at 104-14. Conceding that there are many difficult questions of rule interpretation whose resolution inevitably will be debatable, Professors Finman and Schneyer advocated, not that their own value preferences should prevail, but simply that the ABA Ethics Committee should exercise more care in identifying and resolving the choices that must be made in expounding on the rules. *Id.* at 163-67.

62. *Id.* at 145-67.

63. *Id.* at 72 & n.16.

64. *Id.* at 145-56.

qualitatively superior decisions if procedures calculated to engender more careful reasoning could be put in place.<sup>65</sup> Toward this end, they proposed that the ABA Ethics Committee adopt aspects of the adversarial system of decision-making.<sup>66</sup> In particular, they urged that, before drafting an opinion, the Committee should undertake consideration of opposing briefs crafted by persons charged with performing the role of competing “partisans.”<sup>67</sup> These “designated advocates” would be charged with identifying issues, authority, and policy considerations that might reasonably be advanced by practitioners with identified points of view relevant to the responsible resolution of the interpretive questions that the Committee undertook to answer.<sup>68</sup> These recommended procedures would approximate those employed by appellate courts in preparing to resolve questions of statutory interpretation presented in legal proceedings.<sup>69</sup>

The only other positive recommendation to emerge from Professor Finman and Schneyer’s exhaustive analysis was a call for more regular and methodical professional evaluation and criticism of the ABA Ethics Committee’s work.<sup>70</sup> This recommendation was based on the theory that, just as is presumed to be the case for the work of judges, a steady stream of published critiques will foster in ABA Ethics Committee members the healthy habits of self-evaluation, care, sensitivity, and precision regarding their work.<sup>71</sup> This Article responds to that call and is offered as an update to Professor Finman and Schneyer’s groundbreaking study.

Whatever changes in procedure that may have been implemented by the ABA Ethics Committee since the 1981 publication of Professors Finman and Schneyer’s review of the Committee’s work, the last fifteen years have not witnessed any decrease in the Committee’s penchant for concluding that the words used in the influential model codes do not always mean what they say. The Committee is still producing opinions that, rather than engaging in a straightforward exercise of interpretation according to accepted canons of statutory construction, set forth the Committee’s view of what the rules *should* say or were *meant* to say. This tendency presents a problem that is even more ominous than the one exposed by

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65. *Id.* at 159-63.

66. *Id.* at 163-67.

67. *Id.* at 163.

68. *Id.* at 163-67. Professors Finman and Schneyer recommended the appointment of two independent advocates to approach each issue from “contrary positions.” *Id.* at 163. The public and the bar in general might also be invited to submit views, assuming roles analogous to *amici*. *Id.*

69. Professors Finman and Schneyer did not comment on the utility of oral argument. The essence of their proposal was that the Committee members, as decision-makers, should follow procedures designed to help them “keep an open mind” until all relevant arguments have been marshaled by assigned advocates and presented to the Committee. *Id.* at 159-63.

70. *Id.* at 150.

71. *Id.* In particular, Professors Finman and Schneyer thought published professional criticism would contribute to needed improvements in the ABA Ethics Committee’s work in terms of its “clarity, internal consistency, consistency with other decisions, identification of relevant authorities and policies, and fidelity to controlling statutory provisions.” *Id.*

Professors Finman and Schneyer. They focused primarily on the undesirable effect on conduct that conformity to misguided ABA opinions might foster.<sup>72</sup> While that effect is still to be decried, circumstances today provide reason to be concerned that the "cavalier attitude toward the text of the rules"<sup>73</sup> may also be contributing to an unfortunate cynicism among lawyers concerning the importance of even *attempting* to conform their conduct to the relevant code. With the states' rules becoming increasingly idiosyncratic,<sup>74</sup> and the proper interpretation of the ABA models becoming ever more uncertain,<sup>75</sup> it would be completely understandable if lawyers began to view the rules of legal ethics in their own jurisdiction as being "up for grabs" (i.e., legal standards that are manipulable and the proper object of adversarial argumentation rather than good faith compliance).<sup>76</sup> In this sense, the refusal of the ABA Ethics Committee, heretofore the most authoritative voice on the interpretation of ethics rules, to consider itself bound by the text employed in those rules threatens simultaneously to marginalize the status of the American Bar Association as an architect of professional norms<sup>77</sup> and to diminish the Bar's respect for whatever rules are in place in a particular jurisdiction. To the extent that, for many lawyers, rule conformity is the

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72. "[E]rroneous holdings are likely either to inhibit conduct the Code allows or allow conduct the Code prohibits, and we count that influence as unfortunate." *Id.* at 102.

73. *Id.* at 107.

74. See *supra* notes 33-35 and accompanying text. Differences between the *Model Rules* and the rules adopted by the states are proliferating as the pace of ABA amendments to the *Model Rules* is accelerating. See *supra* note 35.

75. Besides the doubt cast by strained ABA ethics opinions, declining agreement on the proper interpretation of the *Model Rules* is revealed by the increasingly common appearance of dissenting and concurring statements in ABA ethics opinions. Dissents and concurrences were non-existent during the *Model Code* era. See Finman & Schneyer, *supra* note 23, at 147-48 (noting that no dissents or concurrences were reported between Formal Opinion 315 in 1965 and Formal Opinion 345 in 1979, which marked the conclusion of their study). In contrast, at least one dissenting opinion has been filed in five different ABA formal opinions issued during the 1990s. Concurrences were filed in two of the opinions that provoked dissents. ABA Comm. on Ethics and Professional Responsibility, Ops. 95-396, 95-390, 94-387, 93-374, and 92-366. Further evidence of disagreement is found in state and local ethics opinions and judicial decisions that decline to follow the interpretations offered by ABA opinions. See *supra* note 42 and accompanying text.

76. See Feldman, *supra* note 7, at 892 ("skilled technocratic lawyering can produce a perfectly defensible, if not outstanding, legal argument in favor of actions apparently disfavored by black letter rules"); Wilkins, *Legal Realism*, *supra* note 7, at 484 & n.73, 497, 502, 503 (noting that lawyers often have an incentive to manipulate ethics rules and exploit ambiguities in a way that eases the constraints meant to be imposed by the rules, so that even comments meant to be "clarifying" in an ethics opinion "can be turned to partisan advantage;" indeterminacy of rules generates an "argumentative nihilism" in which "it is impossible for anyone to claim that any legal argument is better than any other legal argument"); see also Schneyer, *Moral Philosophy*, *supra* note 2, at 1556 (a rule's prohibition, if unenforced, may make lawyers less respectful of other rules); Schneyer, *Perils of Professionalism*, *supra* note 8, at 390 ("as it becomes apparent that the ABA is willing to adopt ethics rules for expressive rather than regulatory purposes, the prospects for local adoption and enforcement of ABA rules may dim").

77. "It seems apparent, after three-quarters of a century, that the ABA no longer has the capacity to generate a single set of standards of lawyer conduct that lawyers will generally accept [or that states will adopt]." WOLFRAM, *supra* note 10, at 63; see also *id.* at 62-63 & n.85 (discussing the lack of uniformity in the way the *Model Rules* have been adopted); Schneyer, *Perils of Professionalism*, *supra* note 8, at 396 ("If the ABA wishes to be taken seriously as a policymaker for the practice of law, then it must approach the task more seriously.").

accepted understanding of what is required to be an "ethical" lawyer,<sup>78</sup> such tendencies are unfortunate.

### III. FOUR STRAINED ABA OPINIONS

This section consists of an examination of four ABA formal opinions that have taken positions not supported by the text of the ABA model provisions they purported to interpret. Two of these opinions, issued in 1975, are from the *Model Code* era. The remaining two were published in 1995 and purport to interpret the newer *Model Rules*. Each of these opinions concluded that a specific rule does not *really* mean what it says, thus generating uncertainty and undercutting respect for the rules in general. Subsequent developments have ameliorated some of the confusion spawned by these opinions; in other respects, the confusion has only been compounded. The analysis presented here demonstrates that, despite Professors Finman and Schneyer's sound criticisms,<sup>79</sup> there is still a need for improvement in the quality of the ABA Ethics Committee's decision-making.

#### A. FORMAL OPINION 339 (1975)<sup>80</sup>

##### SERVING SIMULTANEOUSLY AS LAWYER AND WITNESS

In 1975, the *Model Code's* Disciplinary Rule (DR) 5-101(B)<sup>81</sup> and DR 5-102(A)<sup>82</sup> addressed the circumstances in which a lawyer might be allowed to

78. See *supra* note 6 and accompanying text.

79. See *supra* notes 52-71 and accompanying text.

80. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 339 (1975) [hereinafter Formal Op. 339], in COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, FORMAL AND INFORMAL OPINIONS 99 (1985). Page citations to passages in this Opinion will be based on this official ABA publication.

Formal Opinion 339 was one of the opinions found by Professors Finman and Schneyer to have been "clearly wrong." Finman & Schneyer, *supra* note 23, at 101 & n.127. For their brief treatment of Formal Opinion 339, see Finman & Schneyer, *supra* note 23, at 109.

81. Part (B) of *Model Code* DR 5-101, entitled "Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment," provides:

(B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:

- (1) If the testimony will relate solely to an uncontested matter.
- (2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.
- (3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.
- (4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

MODEL CODE DR 5-101(B).

82. Part (A) of *Model Code* DR 5-102, entitled "Withdrawal as Counsel When the Lawyer Becomes a Witness," provides:

(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall

serve simultaneously as a lawyer and a witness in a contested proceeding. DR 5-101(B) set out a presumption *against* assuming the dual positions, stating that ordinarily a lawyer should decline a representation where it is obvious the lawyer will be called as a witness at trial.<sup>83</sup> In cases where the necessity for the lawyer's testimony did not appear until after representation commenced, DR 5-102(A) repeated the presumption that the dual roles were inappropriate and stated that the proper response would be for the attorney to withdraw from representation.<sup>84</sup> The relevant Ethical Considerations (ECs) in the *Model Code* explained that serving simultaneously as counsel and witness would weaken the lawyer's credibility as a witness for the client.<sup>85</sup> Fidelity to the best interests of the client, therefore, dictated that the lawyer should forego the remuneration that might be gained by serving as counsel in order to make the lawyer's testimony as helpful as possible to the client.<sup>86</sup> The problem was identified as one involving a potential conflict between the interests of clients and the interests of their lawyers.<sup>87</sup> The text of these rules made it clear that the presumption against accepting or continuing a representation applied whenever any lawyer in the firm would be called as a witness, even if the testifying lawyer was not serving as counsel in the case.<sup>88</sup> DR 5-105(D)<sup>89</sup> also provided that the disqualification of any member of a law firm to be called as a witness would be imputed to disqualify the entire firm from representing the client.

Despite the presumption against assuming the dual roles of counsel and witness, *Model Code* DR 5-101(B) provided a list of four circumstances in which the presumption could be rebutted. Most problematic from an interpretive standpoint was the fourth exception, which stated that a law firm could accept or

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withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).

MODEL CODE DR 5-102(A).

83. See *supra* note 81.

84. See *supra* note 82.

85. MODEL CODE EC 5-9, 5-10.

86. *Id.* There was also a suggestion that it might "handicap" opposing counsel to place her in a position of having to "challenge the credibility" of the lawyer on the other side. MODEL CODE EC 5-9. Whether lawyers today would consider this to be a "handicapped" position is doubtful.

87. Indeed, DR 5-101(B) was published as part of the conflict of interest section of the *Model Code* under the caption: "Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment." MODEL CODE DR 5-101(B).

88. See MODEL CODE DR 5-101(B), reproduced *supra* note 81; MODEL CODE DR 5-102(A), reproduced *supra* note 82.

89. Part (D) of *Model Code* DR 5-105, entitled "Refusing to Accept or Continue Employment If the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer," provides:

(D) If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment.

MODEL CODE DR 5-105(D).

continue a representation, despite the possibility that the lawyer might be called as a witness, if declining representation or withdrawal “would work a *substantial hardship* on the client because of the unique value of the lawyer or his firm as counsel in the particular case.”<sup>90</sup> EC 5-10 suggested that application of the “substantial hardship” exception should turn on an analysis of the “unfairness” to the client or the “personal or financial sacrifice” of the client that would flow from a testifying lawyer’s withdrawal from representation.<sup>91</sup> ABA Formal Opinion 339 was issued in 1975 to clarify the circumstances when this exception might apply. As part of its analysis, Formal Opinion 339 addressed the question of whether the “substantial hardship” exception applied even in cases where the lawyer-witness’s testimony might be adverse to the testifying lawyer’s client.

With regard to anticipated *adverse* testimony by a client’s lawyer, the *Model Code* contained a special provision. DR 5-102(B) stated:

If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation *until* it is apparent that his testimony *is or may be prejudicial* to his client.<sup>92</sup>

This appeared to be a reasonable corollary to the lawyer as witness rule. If there is a presumption against serving simultaneously as a witness for a client when a lawyer’s testimony will be *supportive* of the client’s position, the presumption against assuming the dual roles should be even stronger when the testimony threatens to be *prejudicial*. Surely it is inappropriate to create a situation where opposing counsel will be able to point out to the jury, “Even my opponent’s own lawyer testified against him.” What could a testifying lawyer do in such a situation? Should he argue to the jurors that they should not believe the lawyer’s own testimony? Thus, it is understandable why DR 5-102(B) created what appeared to be an absolute rule against serving as lawyer and witness when the lawyer’s testimony would be prejudicial to the client. Unlike DR 5-101(B) and DR 5-102(A), DR 5-102(B) incorporated no exceptions.<sup>93</sup>

Amazingly, however, Formal Opinion 339 did not even refer to DR 5-102(B). Instead, the ABA Ethics Committee approached the question as if it presented a judgment call, subject to exception number four in DR 5-101(B):

In the Committee’s opinion, if it can be anticipated that the lawyer’s testimony will be adverse to the client there will be very few situations in which accepting employment as trial counsel could be justified under the controlling standard of DR 5-101(B)(4). Because there are degrees of ‘adverse’ evidence, however, we are not prepared to hold that it would never be ethically permissible.<sup>94</sup>

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90. MODEL CODE DR 5-101(B)(4) (emphasis added).

91. See MODEL CODE EC 5-10.

92. MODEL CODE DR 5-102(B) (emphasis added).

93. See *id.*

94. Formal Op. 339, *supra* note 80, at 102.

While the opinion went on to suggest that attorneys should be reluctant to accept the dual roles of advocate and adverse witness for a client, it is remarkable that the *Model Code* was interpreted to permit even the possibility of allowing an attorney to continue as counsel in such circumstances. DR 5-101(B) listed four circumstances where the presumption against serving simultaneously as lawyer and witness can be rebutted,<sup>95</sup> and these four circumstances were incorporated into the text of DR 5-102(A),<sup>96</sup> yet the language of DR 5-102(B), dealing with cases where the lawyer's testimony "is or *may* be prejudicial to [that lawyer's] client," mentioned absolutely no exceptions that would justify continuing as counsel.<sup>97</sup>

How could the ABA Ethics Committee conclude that the exceptions found in DR 5-101(B) could also apply in the very narrow circumstances described in DR 5-102(B)? The *Model Code*'s authors indicated in DR 5-102(A) that they knew how to incorporate the exceptions of DR 5-101(B) into another provision if they wanted to do so. Accepted canons of statutory construction would suggest that the omission from DR 5-102(B) of any reference to the exceptions found in DR 5-101(B) was purposeful — *Expressio unius est exclusio alterius*.<sup>98</sup> Rather than attempting to reconcile DR 5-102(A)'s textual incorporation of the exceptions found in DR 5-101(B) with DR 5-102(B)'s failure to incorporate those same exceptions, Formal Opinion 339 simply disregarded the existence of DR 5-102(B) entirely.

If the ABA Ethics Committee could disregard the relevant standard of DR 5-102(B), could a practicing attorney safely disregard it as well? If the attorney did ignore it, satisfied that continued representation was justified by, for example, the substantial hardship withdrawal would impose on her client,<sup>99</sup> could she depend on her state bar's disciplinary committee and her state supreme court to follow the lead of Formal Opinion 339 and treat DR 5-102(B) as irrelevant to the

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95. See *supra* note 81.

96. See *supra* note 82.

97. See text accompanying *supra* note 92 ("he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client").

98. "This maxim of statutory interpretation means that the expression of one thing is the exclusion of another. The canon is applicable only where in the natural association of ideas the contrast between a specific subject matter which is expressed and one which is not mentioned leads to an inference that the latter was not intended for inclusion in the statute." *Greenberg v. Wolfberg*, 890 P.2d 895, 906 n.54 (Okla. 1995) (citations omitted). For recent illustrations of the application of this principle, see *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993) (explaining that the heightened pleading requirement of Fed. R. Civ. P. 9(b) applies only to those causes of action mentioned in the Federal Rule and to no others); *Parker v. Indep. Sch. Dist. No. I-003 of Okmulgee County*, No. 95-7081, 1996 U.S. App. LEXIS 9991, at \*12 (10th Cir. Apr. 30, 1996) (stating that the list of particularized exemptions included in a statute is exhaustive, not illustrative).

99. If DR 5-102(B) is irrelevant when a lawyer/witness is contemplating the likelihood of being forced to give testimony that may be prejudicial to her client, she would be left only with the guidance of DR 5-101(B) or DR 5-102(A), both of which (unlike DR 5-102(B)) would condone continued representation when withdrawal would work a "substantial hardship" on the client.



issue? Should litigators expect trial judges, in ruling on disqualification motions premised on DR 5-102(B), to rely on the “reasoning” of Formal Opinion 339?<sup>100</sup>

In a roundabout way, much of the confusion generated by Formal Opinion 339 was rectified in 1983 when the American Bar Association adopted the *Model Rules* to replace the *Model Code*, although one must read carefully to understand the *Model Rules’* position on this issue. *Model Rule 3.7* now deals with the problem of the “Lawyer as Witness.”<sup>101</sup> It retains the presumption created by the

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100. On the tendency of courts to be guided by the relevant “ethics” code in disposing of disqualification motions, see *supra* note 26 and accompanying text (explaining how courts tend to be guided by the relevant “ethics” code as construed in ethics opinions). For examples of courts relying heavily on ethics rules in disposing of disqualification motions, see *Oklahoma ex rel. Macy v. Owens*, 1997 WL 100892 (Okla. Crim. App. Jan. 21, 1997) (District Judge’s disregard of Rule 3.7 in ruling on disqualification motion justifies issuance of writ of prohibition, reversing disqualification order); *McFeely v. Treadway*, 816 P.2d 575, 579 (Okla. Ct. App. 1990) (remanding a case for consideration after the court adopted *Model Rule 3.7*, when the trial judge had relied on *Model Code* provision DR-502(A)); *Graham v. Wyeth Lab.*, 906 F.2d 1419, 1421 (10th Cir. 1990) (analyzing a disqualification motion based on both the *Model Code* and Kansas ethics rules).

101. *Model Rule 3.7*, entitled “Lawyer as Witness,” provides:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer’s firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

MODEL RULES Rule 3.7 (1995).

The ABA comments to *Model Rule 3.7* provide as follows:

[1] Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client.

[2] The opposing party has proper objection where the combination of roles may prejudice that party’s rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[3] Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer’s testimony, and the probability that the lawyer’s testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer’s client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The principle of imputed disqualification stated in Rule 1.10 has no application to this aspect of the problem.

[5] Whether the combination of roles involves an improper conflict of interest with respect to the client is determined by Rule 1.7 or 1.9. For example, if there is likely to be substantial conflict

*Model Code* against serving in the dual roles of lawyer and witness,<sup>102</sup> and, like the earlier provisions, it affords a broad exception to the presumption when the lawyer's disqualification would work "substantial hardship on the client."<sup>103</sup> Unlike the separate provisions that were found in the *Model Code*, however, *Model Rule 3.7* does not make the propriety of a representation turn directly on whether the testifying lawyer's testimony will favorably or unfavorably impact the client. Although this might suggest that the view put forth in Formal Opinion 339 prevailed and is now textually incorporated into the *Model Rules*, that would be an over-generalization. Significantly, *Model Rule 3.7(b)* injects a conflict of interest analysis into the calculus.<sup>104</sup> It is clear that there are some conflicts that may not be waived, even with client consent.<sup>105</sup> The comment to *Model Rule 3.7* demonstrates how the general conflict of interest provisions of *Model Rule 1.7*<sup>106</sup> sometimes operates to create a mandatory bar to representation in the case of prospective adverse testimony by *any* member of the client's law firm:

[I]f there is likely to be substantial conflict between the testimony of the client and that of the lawyer *or a member of the lawyer's firm*, the representation is improper. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. . . . If a lawyer who is a member of a firm may not act as both advocate and witness by reason of conflict of interest, Rule 1.10 disqualifies the firm also.<sup>107</sup>

So, the text of *Model Rule 3.7* is slightly more flexible than the old *Model Code* provisions interpreted (or ignored) in Formal Opinion 339. The possibility of

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between the testimony of the client and that of the lawyer or a member of the lawyer's firm, the representation is improper. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. See Comment to Rule 1.7. If a lawyer who is a member of a firm may not act as both advocate and witness by reason of conflict of interest, Rule 1.10 disqualifies the firm also.

MODEL RULES Rule 3.7 cmt.

102. MODEL RULES Rule 3.7(a).

103. MODEL RULES Rule 3.7(a)(3).

104. *Model Rule 3.7(b)* refers to the possibility that *Model Rule 1.7*, the general conflict of interest provision, might preclude a law firm from continuing with a representation when one of its members will be a necessary witness at trial. For example, *Model Rule 1.7(b)* forecloses representation when "the representation of that client may be materially limited by . . . the lawyer's own interests." MODEL RULES Rule 1.7(b).

105. See MODEL RULES Rule 1.7 cmt. (noting that, for conflicts of interest as described in Rules 1.7(a) and (b), client consent will be insufficient to waive the conflict "when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances"); see also MODEL RULES Rules 1.8(a) and 2.2 (both of which hold that a conflict is unwaivable unless the lawyer in question has an objectively reasonable belief that a client's waiver of the conflict of interest is not imprudent).

106. See *supra* note 104 (reading *Model Rule 3.7(b)* together with *Model Rule 1.7* to impute disqualification to a law firm when one member is a material adverse witness).

107. MODEL RULES Rule 3.7 cmt. (emphasis added).

unusual circumstances justifying continued representation even in the face of adverse testimony by a lawyer is theoretically acknowledged. But the incorporation of conflict of interest principles into the text of the rule focuses attention on what is really at stake in these decisions. It tells us, however, that when there will be "a substantial conflict" in the testimony of the lawyer and her client, as well as in other circumstances as noted in the comment to *Model Rule 3.7*,<sup>108</sup> assuming the dual roles of advocate and witness "is improper." Moreover, when, but *only* when, a lawyer's prospective testimony forecloses a representation because of the operation of the general conflict of interest rules, the disqualification extends to the testifying lawyer's entire law firm.<sup>109</sup>

This may be the regime that Formal Opinion 339 sought to implement twenty years ago when it referred to "degrees of 'adverse' evidence,"<sup>110</sup> but at least now the result is supported by the language of the "ethics" rules in *Model Rules* jurisdictions. However, in jurisdictions still operating under a version of the *Model Code*,<sup>111</sup> in the absence of a clarifying state ethics opinion, a definitive ruling by the state's highest court, or a formal amendment of the state's version of the *Model Code*, lawyers, judges, and disciplinary authorities still confront a serious question when addressing a situation textually governed by DR 5-102(B): Does this rule mean what it says? This is a question that was created, not resolved, by Formal Opinion 339.

#### B. FORMAL OPINION 342 (1975)<sup>112</sup>

##### IMPUTED DISQUALIFICATION ATTRIBUTABLE TO FORMER GOVERNMENT ATTORNEY

During the era in which the *Model Code* was the centerpiece of the law

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108. See *supra* text accompanying note 107.

109. In a significant change of position, *Model Rule 3.7* eliminates the *automatic* application of the imputed disqualification rule in the context of lawyer/witness problems that was incorporated into the *Model Code*. See *supra* notes 85 and 86 and accompanying text (discussing the application of imputed disqualification in the context of lawyer/witness problems under the *Model Code*). Thus, in most circumstances, *Model Rule 3.7* allows one lawyer in a firm to serve as trial counsel when another member of the firm will be called as a witness. See MODEL RULES Rule 3.7 cmt. (describing imputed disqualification principles as inapplicable to most lawyer/witness situations). But, even though the automatic presumption of firm-wide disqualification has been abandoned, the imputed disqualification principle, now found in *Model Rule 1.10*, still applies when the testimony to be elicited from a member of a law firm creates a conflict of interest between the law firm and its client. *Id.*

110. See *supra* note 91 and accompanying text (describing a lawyer's ability to sometimes serve as an adverse witness against his client under Formal Opinion 339).

111. Five states, including New York, still base their rules on the *Model Code*. See *supra* note 18 (summarizing status of *Model Rules* and *Model Code* in several states).

112. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975) [hereinafter Formal Op. 342], in ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, FORMAL AND INFORMAL OPINIONS 110 (1985). Page citations to passages in this Opinion are based on this official ABA publication.

Formal Opinion 342 was criticized by Professors Finman and Schneyer, primarily for its failure to identify and carefully analyze problems of interpretive choice. Finman & Schneyer, *supra* note 23, at 108-09, 140-44. They classified Formal Opinion 342 as "debatable" rather than clearly wrong. *Id.* at 103-04 n.128. This was a charitable characterization, for they did observe that the language of the *Model Code* section there interpreted

governing lawyers,<sup>113</sup> DR 9-101(B) stated, "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."<sup>114</sup> This was one of three concrete prohibitions articulated in Canon 9 of the *Model Code* seeking to bring into focus the vague norm that lawyers should avoid "even the appearance of professional impropriety."<sup>115</sup> In essence, DR 9-101(B) held that there would be a per se appearance of impropriety if a former government lawyer was allowed to assume a position in which he or she might privately profit on account of something that the lawyer had done while a public employee. The prohibition contained in this provision allowed for no exceptions.

During the 1970s, with the growth of government and the concomitant growth of law firms whose practices concentrated in advocacy before and against government agencies, the bite of DR 9-101(B) began to afflict more and more lawyers. The rule's reach was dramatically illustrated in a 1974 opinion authored by Chief Judge Irving Kaufman of the Second Circuit Court of Appeals.<sup>116</sup> George Reycraft, while working as a trial attorney in the Antitrust Division of the Department of Justice in the 1950s, had been a lead attorney in the government's investigation of General Motors with respect to the company's alleged monopolization of the manufacture of buses.<sup>117</sup> In 1972, long after entering private practice with the Wall Street firm of Cadwalader, Wickersham & Taft, Reycraft represented the City of New York in a private treble damage antitrust suit against General Motors that was premised on many of the same monopolization theories that Reycraft had pursued in the name of the federal government while at the Department of Justice.<sup>118</sup> The Second Circuit, relying on DR 9-101(B), held that Reycraft's representation of the City of New York was forbidden.<sup>119</sup> Even though he had not "switched sides" from the federal government to the private party he had opposed as a government attorney, his representation of the City of New York constituted "private employment," because New York was considered to be a private party for purposes of the treble damages action it was pursuing under the federal antitrust laws,<sup>120</sup> and Reycraft and his firm would be paid on the basis of a

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"seems to allow only one answer," *id.* at 141, and that was *not* the answer given by the ABA Ethics Committee. *Id.* at 141. *But see* Wilkins, *Legal Realism*, *supra* note 7, at 502 n.149 (characterizing the rule interpreted in Formal Opinion 342 as "ambiguous" and the opinion itself as "clarifying").

113. The *Model Code* was approved by the ABA House of Delegates in 1969, and it was the dominant model for state disciplinary codes until the ABA approved the *Model Rules* in 1983. "Shortly after its adoption by the ABA in 1969, almost all jurisdictions adopted the Model Code without amendment." COCHRAN & COLLETT, *supra* note 18, at 7.

114. MODEL CODE DR 9-101(B).

115. MODEL CODE Canon 9. The Disciplinary Rules and Ethical Considerations in the *Model Code* were organized under nine Canons, defined as "statements of axiomatic norms." MODEL CODE preliminary statement.

116. *General Motors Corp. v. City of New York*, 501 F.2d 639 (2d Cir. 1974).

117. *Id.* at 642.

118. *Id.* at 642, 650.

119. *Id.* at 648-52.

120. 15 U.S.C.A. § 15 (West Supp. 1996).

contingent fee arrangement with the City of New York.<sup>121</sup> The court was satisfied that prohibiting Reycraft's private employment here was absolutely consistent with the policy underlying DR 9-101(B): ensuring that decisions made by attorneys while acting as governmental employees could not possibly be influenced by considerations of the possible future private employment opportunities that those decisions might create.<sup>122</sup>

Here the Second Circuit's opinion stopped, but its impact traveled further. Judge Kaufman's opinion was released in June of 1974. Just four months earlier, the ABA House of Delegates had approved an amendment to DR 5-105(D) in the *Model Code*.<sup>123</sup> The amendment had been advanced by the ABA Ethics Committee.<sup>124</sup> As amended, the rule stated, "If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment."<sup>125</sup> This rule, known as the imputed, or vicarious, disqualification rule, previously had a much narrower reach. As first promulgated in 1969, DR 5-105(D) applied only when an individual attorney's disqualification was mandated by one of the general conflict of interest provisions found elsewhere in DR 5-105 itself.<sup>126</sup> After the 1974 amendment, firm-wide imputed disqualification was expanded to apply when *any* rule caused an individual attorney in the firm to be disqualified. If the newly amended DR 5-105(D) meant what it said, Mr. Reycraft's disqualification under DR 9-101(B) would be automatically imputed to the entire Cadwalader firm under the 1974 version of DR 5-105(D).<sup>127</sup>

On its face, there was no reason to suspect that DR 5-105(D) meant anything other than what it said: if one member of a firm is disqualified for any reason, the whole firm is disqualified. Beyond the textual command of the rule, as a matter of policy, the purposes meant to be served by rules demanding individual attorney disqualification could too easily be circumvented if the imputed disqualification rule did not apply across the board. In Mr. Reycraft's case, for example, the court had found that there would be a per se appearance of impropriety if Mr. Reycraft were allowed to put himself in a position to profit on account of decisions he had made as a government attorney, or if he were in a position to use for the private advantage of himself or his client information that had come to his attention only

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121. *General Motors Corp. v. City of New York*, 501 F.2d 639, 650 (2d Cir. 1974).

122. *Id.* at 649.

123. See WOLFRAM, *supra* note 10, at 394 ("[T]he ABA amended DR 5-105(D) in 1974 in a series of 'housekeeping' amendments.").

124. See Finman & Schneyer, *supra* note 23, at 146 n.292 (stating that the 1974 amendment to DR 5-105(D) was initiated by the ABA Committee on Ethics and Professional Responsibility).

125. MODEL CODE DR 5-105(D).

126. See WOLFRAM, *supra* note 10, at 394 ("Originally the rule . . . applied only to a lawyer who was required to decline employment or to withdraw 'under DR 5-105.'").

127. See *supra* text accompanying note 125.

because of the unique investigatory tools that had been at his disposal as a Justice Department attorney. To assure the suppression of any temptation he might have to improperly profit from his governmental work, it would be necessary to remove the possibility that he might seek to do so indirectly by assisting his law firm with its handling of the matter from which he was personally disqualified. If Mr. Reycraft's law firm could continue the representation that was foreclosed to him personally, he would still be in a position to misuse (purposely or accidentally) and personally profit from the fruits of his government service.<sup>128</sup> A literal reading of the new imputed disqualification rule would, therefore, have the salutary effect of discouraging attorneys from attempting to abuse the "revolving door" between government service and private employment. Thus, it appeared that disqualifying Mr. Reycraft effectively disqualified his entire firm.

Enter the ABA Ethics Committee. About a year after the Second Circuit's opinion in the Reycraft matter, the ABA Ethics Committee issued Formal Opinion 342,<sup>129</sup> which was said to have been prompted by the "concern of many government agencies as well as . . . many former government lawyers now in practice" about the reach of DR 5-105(D) following its expansive amendment in 1974.<sup>130</sup> The opinion essentially declared that DR 5-105(D) doesn't really mean what it says and, in particular, does not always apply in the case of a personal disqualification attributable to DR 9-101(B). Or, put differently, the opinion implicitly asserts that the House of Delegates made a mistake when it approved (ironically, on the recommendation of the ABA Ethics Committee) the categorical expansion of DR 5-105(D). Formal Opinion 342 explained that DR 5-105(D) was meant to say that a disqualification on account of DR 9-101(B) would be imputed to an entire firm *only* when the personally disqualified lawyer "has not been screened, to the satisfaction of the government agency concerned, from participation in the work and compensation of the firm on the matter" for which the individual lawyer is personally disqualified.<sup>131</sup> The ABA Ethics Committee reached this conclusion, not as the result of statutory analysis of the words the Committee had caused to be inserted into DR 5-105(D),<sup>132</sup> but rather on the basis of "policy" concerns regarding what the rule *should* say.<sup>133</sup> There was no

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128. "The [expanded imputed disqualification] rule is based upon the close, informal relationship among law partners and associates and upon the incentives, financial and otherwise, for partners to exchange information freely among themselves when the information relates to existing employment." Formal Op. 342, *supra* note 112, at 110 n.2.

129. *Id.* at 110.

130. *Id.*

131. *Id.* at 120.

132. See Finman & Schneyer, *supra* note 23, at 141 (arguing that the ABA Ethics Committee "disregard[ed] the unambiguous command — the plain meaning — of DR 5-105(D)"); see also *supra* note 124 and accompanying text.

133.

[I]nflexible application of DR 5-105(D) would actually thwart the policy considerations underlying DR 9-101(B). The question of the application of DR 5-105(D) to the situation in which a former

consideration of the “plain meaning” canon of statutory construction,<sup>134</sup> the legislative history of the 1974 amendment,<sup>135</sup> or the use of similar statutory phraseology in other sections of the *Model Code*.<sup>136</sup> Rather, the ABA Ethics Committee simply said it was “unthinkable”<sup>137</sup> that the drafters of the 1974 amendment to DR 5-105(D) meant for the new rule to be interpreted “inflexibly.”<sup>138</sup> In other words, the Committee considered it “unthinkable” that the rule really meant what it said.

More than twenty years later, the ABA Ethics Committee’s confidence in the efficacy of “screening” techniques and the appropriateness of allowing government officers to set the standards by which their future employment possibilities

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government employee would be in violation of DR 9-101(B) should be considered in the light of . . . policy considerations, viz: opportunities for government recruitment and the availability of skilled and trained lawyers for litigants should not be unreasonably limited in order to prevent the appearance of switching sides . . . . A realistic construction of DR 5-105(D) should recognize and give effect to the divergent policy considerations when government employment is involved.

Formal Op. 342, *supra* note 112, at 119.

134. See *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989). In his concurring opinion, Justice Scalia wrote:

The meaning of terms on the statute books ought to be determined . . . on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* [body] which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated.

*Id.* (emphasis added); see also *Myers v. Maxey*, 915 P.2d 940, 947 (Okla. Ct. App. 1996) (“When a court interprets a statute, it must adhere to the plain and ordinary meaning of the terms employed by the legislature, unless a contrary intent appears from consideration of the statute as a whole.”); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) (stating that words of a statute should be given their “plain meaning” unless a “literal construction of the statute . . . would produce an absurd and unjust result,” which the legislative body that created the statute “could not have intended”); *United States v. Am. Trucking Ass’n, Inc.*, 310 U.S. 534, 543 (1940) (“There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.”); *Finman & Schneyer*, *supra* note 23, at 141 (arguing that a satisfactory justification must be made for disregarding the plain meaning of a rule).

135. For a classic illustration of the use of legislative history as an aid to statutory interpretation, see *Brown Shoe Co. v. United States*, 370 U.S. 294, 311-23 (looking to the legislative history of the 1950 amendments to Section 7 of the Clayton Act for interpretative guidance).

136. This is a common convention of construction used by the federal courts in interpreting the Federal Rules of Civil Procedure. See, e.g., *Mosley v. Gen. Motors Corp.*, 497 F.2d 1330 (8th Cir. 1974) (relying on cases construing language in Fed. R. Civ. P. 23 as persuasive authority for deriving appropriate construction of Fed. R. Civ. P. 20). This interpretive aid was not employed by the ABA Ethics Committee in Formal Opinion 342.

137. Formal Op. 342, *supra* note 112, at 121.

138. *Id.* at 120. Interestingly, a number of states did not adopt the House of Delegates’ expansion of DR 5-105(D) to cover disqualifications premised on rules other than DR 5-105. See Martin Riger, *The Model Rules and Corporate Practice — New Ethics for a Competitive Era*, 17 CONN. L. REV. 729, 759-60 n.138 (1985) (noting that some states declined to adopt the ABA’s 1974 amendment extending the imputed disqualification provision of DR 5-105(D) to disqualifications mandated by rules outside of Canon 5). In those states, an ethics opinion would not have to strain to ignore the plain language of DR 5-105(D) in order to reach the result presented in Formal Opinion 342, since the plain language of the 1969 version of the rule limited its scope to disqualifications mandated by the conflict of interest rules codified in Canon 5. See *supra* note 125 and accompanying text.

might be constrained is still controversial.<sup>139</sup> Nevertheless, Formal Opinion 342 offered considerable policy analysis as to possible justifications for the application of a special, more flexible imputed disqualification rule in former-government attorney situations.<sup>140</sup> These arguments proved to be persuasive to the ABA House of Delegates when, in 1983, it approved replacement of the *Model Code* with the *Model Rules*. *Model Rule* 1.11 does indeed endorse "screening" as a device for avoiding imputed firm-wide disqualification in cases of individual disqualifications attributable to a lawyer's "successive government and private employment."<sup>141</sup> The comment to the general imputed disqualification provision found in *Model Rule* 1.10 emphasizes that rule's inapplicability in the case of former-government lawyer conflicts.<sup>142</sup>

But between 1975, when Formal Opinion 342 was issued, and the late 1980s, when most states replaced the *Model Code* with the *Model Rules*, how was a lawyer or law firm to know what DR 5-105(D) meant in a particular jurisdiction? In those states whose lawyers are *still* governed by a version of the *Model Code*,<sup>143</sup> this indeterminacy persists. In the absence of a formal amendment to a state's rule, a defining state court judicial opinion, or an ethics opinion from a state accepting or rejecting Formal Opinion 342, practitioners in those states can only guess as to the appropriate behavior. Such uncertainty is conducive to neither compliance with the ethics code nor respect for it.

### C. FORMAL OPINION 95-394 (1995)<sup>144</sup>

#### SETTLEMENT AGREEMENTS RESTRICTING A LAWYER'S RIGHT TO UNDERTAKE OTHER REPRESENTATIONS AGAINST A GOVERNMENT AGENCY

Settlement of legal controversies without the necessity of a trial is a goal toward which all attorneys are encouraged to strive.<sup>145</sup> Given this proposition, it

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139. See, e.g., RHODE & LUBAN, *supra* note 2, at 531-32 (pointing out that "[b]y the mid-1990s, only eight states permitted screening as a cure for imputed disqualification"); *Approval of Screening*, [12 Current Reports] Laws. Man. on Prof. Conduct (ABA/BNA) 173-74 (May 29, 1996) (stating that recent approval of screening in narrowly defined circumstances in Restatement of the Law Governing Lawyers was controversial); Finman & Schneyer, *supra* note 23, at 143-44 (questioning efficacy and enforceability of screening mechanisms). For a discussion of why screening raises integrity questions, see RHODE & LUBAN, *supra* note 2, at 538-44.

140. Formal Op. 342, *supra* note 112, at 119-20.

141. MODEL RULES Rule 1.11.

142. MODEL RULES Rule 1.10 cmt.; see also MODEL RULES Rule 1.11.

143. See *supra* notes 18 and 111.

144. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-394 (1995) [hereinafter Formal Op. 95-394], in ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, RECENT ETHICS OPINIONS, Formal Op. 95-394 (looseleaf 1995). Page citations to passages in this Opinion are based on this official ABA presentation.

145. See Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 2-3 (1996) ("We prefer settlements and have designed a system of civil justice that embodies and expresses that preference in everything from the rules of procedure and evidence, to appellate opinions, to legal scholarship, to the daily work of our trial judges." (footnotes omitted)); see also Kent D. Syverud, *The Duty to Settle*, 76 VA. L. REV. 1113, 1116 (1990) ("For seventy-five years, courts have invoked a



might seem incongruous that widely-adopted professional regulations treat *some* settlement offers as unethical and impermissible.

An important limitation on settlement offers appears in *Model Rule 5.6(b)*, which states, "A lawyer shall not participate in offering or making an agreement in which a restriction on the lawyer's right to practice is a part of the settlement of a controversy between private parties."<sup>146</sup> The comment to this *Model Rule* explains that it is intended to "prohibit[] a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client."<sup>147</sup>

This restriction sometimes comes into play when a defendant in a pending lawsuit, seeking to curtail the possibility of additional, similar claims by other potential plaintiffs, may offer attractive settlement terms to the current plaintiff. The offer might even include handsome attorneys' fees for plaintiff's counsel. One condition of the offer, however, is that plaintiff's counsel agree not to represent other potential plaintiffs in asserting claims similar to those being resolved in the settlement.<sup>148</sup>

In 1993, ABA Formal Opinion 93-371<sup>149</sup> considered the propriety of the making and acceptance of such practice-restricting settlement offers. Ordinarily, the decision whether to accept a tendered settlement is exclusively one for the client to make, and a lawyer is obligated to promptly inform and impartially advise the client whenever an offer is received.<sup>150</sup> The ABA Ethics Committee concluded, however, that these obligatory precepts are modified when the terms

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doctrine known as 'the duty to settle' to impose liability on insurance companies who fail to settle lawsuits against the people they insure." (footnote omitted)). Cf. ABA, Section on Torts and Insurance Practice, Lawyer's Creed of Professionalism §§ A.3., A.6, C.2. (1988), which states:

In appropriate cases, I will counsel my client with respect to mediation, arbitration and other alternative methods of resolving disputes; . . . While I must abide by my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation . . . Where consistent with my client's interests, I will communicate with opposing counsel in an effort to avoid litigation and to resolve litigation that has actually commenced.

This non-binding Creed of Professionalism is reproduced in MORGAN & ROTUNDA, SELECTED STANDARDS, *supra* note 18, at 620-22.

146. MODEL RULES Rule 5.6(b).

147. MODEL RULES Rule 5.6(b) cmt.

148. See 2 HAZARD & HODES, *supra* note 2, at 825 (2d ed. 1990 & 1994 Supp.) (describing circumstances at which *Model Rule 5.6(b)* is directed). Such offers are common in the context of mass tort litigation, where practice-restricting settlement terms may be extended to parties represented by "lead counsel" to foreclose the possibility of their representation of additional claimants. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-371 (1993) [hereinafter Formal Op. 93-371], in ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, RECENT ETHICS OPINIONS, Formal Op. 93-371 (looseleaf 1993). Page citations to passages in this Opinion are based on this official ABA publication.

149. Formal Op. 93-371, *supra* note 148.

150. See, e.g., MODEL RULES Rule 1.2 (requiring attorneys to abide by a client's decision whether to accept an offer); MODEL RULES Rule 1.4 (requiring lawyers to keep clients informed about their cases' status and to explain matters sufficiently for clients to make informed decisions); MODEL RULES Rule 2.1 (requiring lawyers to render candid advice based on relevant circumstances); see also *supra* note 145 (detailing the duty to foster settlement when in client's best interest).

of an offer include a limitation on the subsequent practice of an attorney.<sup>151</sup> The Committee concluded that *Model Rule 5.6(b)* "trumps" the autonomy of clients and precludes attorneys from even allowing their clients to consider improperly restrictive settlements.<sup>152</sup> Moreover, on the basis of *Model Rule 8.4(a)*,<sup>153</sup> which declares it to be disciplinable misconduct for a lawyer to "assist or induce" another lawyer to violate any rule, including *Model Rule 5.6(b)*, Formal Opinion 93-371 concluded that it is impermissible to present to the other side an offer containing the type of limitation that the opposing lawyer could not consider because of *Model Rule 5.6(b)*.<sup>154</sup>

There is no reason to quarrel with the outcome of Formal Opinion 93-371. The text of *Model Rule 5.6(b)*, which states a prohibition that contemplates no exceptions, at least with respect to private litigation, clearly stands for this proposition. In the absence of any textual exceptions in the body of the rule, it is reasonable to interpret it as placing limits on the applicability of other, more general rules, like *Model Rules 1.2(a)* and 1.4, that require attorneys to present settlement offers to clients and then accede to the clients' decisions concerning such offers.<sup>155</sup>

There is, however, one textual qualification on the reach of *Model Rule 5.6(b)*. By its terms, the rule prohibits practice-limiting agreements only with respect to the settlement of controversies "*between private parties.*"<sup>156</sup> This suggests that the rule does not apply when one of the parties to a dispute is a *public* entity, such as the state or some other governmental unit. It would follow that an attorney for a public entity might be permitted to propose, and an attorney for a private plaintiff suing a public entity might participate in, a settlement that is favorable to that particular plaintiff, but that is conditioned on an agreement by that plaintiff's lawyer not to represent any similarly situated party against the same public body in the future.

At least one would think such a result would follow from the apparently limiting phrase, "between private parties," placed at the conclusion of the text of

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151. Formal Op. 93-371, *supra* note 148, at 23.

152. *Id.*

153. MODEL RULES Rule 8.4(a).

154. Formal Op. 93-371, *supra* note 148, at 3.

155. See *supra* note 150 and accompanying text. The ABA Ethics Committee was inclined to give a broad reading to *Model Rule 5.6(b)* because it recognized strong policy justifications for its existence. These were explained as follows:

First, permitting such agreements restricts the access of the public to lawyers who . . . might be the very best available talent to represent these individuals. Second, the use of such agreements may provide clients with rewards that bear less relationship to the merits of their claims than they do to the desire of the defendant to 'buy off' plaintiff's counsel. Third, the offering of such restrictive agreements places the plaintiff's lawyer in a situation where there is conflict between the interests of present clients and those of potential future clients.

Formal Op. 93-371, *supra* note 148, at 3-4.

156. See MODEL RULES Rule 5.6(b).

*Model Rule 5.6(b)*. Nevertheless, when the question of this rule's application to cases involving public entities was put to the ABA Ethics Committee in 1995, that body concluded that *Model Rule 5.6(b)* *does* apply to restrictive settlement agreements involving public as well as private litigants.<sup>157</sup>

How could such a result be reached? The ABA Ethics Committee did not completely ignore the Rule's apparent textual limitation to private disputes. The Committee simply concluded that the words in the limiting phrase do not really mean what they say. First, the Committee noted that the predecessor rule on this issue, DR 2-108(B),<sup>158</sup> contained no limitation to controversies "between private parties."<sup>159</sup> The Committee then pointed out that there is utterly no explanation in the legislative history, official comment, or scholarly discussion of *Model Rule 5.6(b)* as to why a limitation with respect to litigation involving public entities was added to the text of a rule that was otherwise unchanged from its earlier codification.<sup>160</sup> In the absence of an explanation for *why* the language of DR 2-108(B) was changed, the Committee concluded that *Model Rule 5.6(b)* must be interpreted as if it had *not* been changed. But, wishing not to ignore completely the textual limitation that had been added to DR 2-108 when it was converted into *Model Rule 5.6(b)*, the ABA Ethics Committee offered the following explanation:

We conclude, then, that the phrase in question ["between private parties"] is sensibly to be read as merely descriptive rather than prescriptive: i.e., as referring to the circumstances where such a provision, as a condition of settlement, is most likely to be proposed; rather than as limiting the kinds of settlements to which the prohibition is applicable.<sup>161</sup>

The only situation the Committee could imagine where the "between private parties" phrase would actually work an exception to the rule's prohibition would be where an attorney was personally a *party* to a proceeding before a public entity, as when a bar disciplinary proceeding is proposed to be settled with a stipulation that the respondent attorney may not practice for a period of time.<sup>162</sup> In such a situation, the Committee thought, a practice-limiting settlement should not be deemed to violate Rule 5.6(b). Other than that, the ABA Ethics Committee held that lawyers should treat the "between private parties" limitation at the end of *Model Rule 5.6(b)* as if it were not really there. The Committee stated that "[i]f the drafters of Rule 5.6(b) . . . had intended an exception for circumstances where

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157. Formal Op. 95-394, *supra* note 144, at 1, 4.

158. MODEL CODE DR 2-108(B) (1980). Under DR 2-108(B), practice-restricted settlements were forbidden without regard to the public or private status of the litigants. DR 2-108(B) states, "In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice law." *Id.*

159. Formal Op. 95-394, *supra* note 144, at 2.

160. *Id.* at 2-3.

161. *Id.* at 4.

162. *Id.* at 3.

the government is a party to the controversy, they would clearly have said so."<sup>163</sup> For the ABA Ethics Committee, apparently, injecting limiting language into the text of a pre-existing rule containing no such limitation does not constitute "saying" that an exception was intended.

While few would argue that the principle of *Model Rule* 5.6(b) should not apply in controversies where a governmental entity is one of the parties, some might suggest that the ABA Ethics Committee's method for accomplishing this result was somewhat heavy-handed. The same Committee that issued Formal Opinion 95-394 has the authority to recommend amendments to the *Model Rules*.<sup>164</sup> A formal amendment of *Model Rule* 5.6(b) would have been a tidier — and more appropriate — way to address what may well have been an accident of legislative draftsmanship. The failure of the ABA Ethics Committee to pursue a legislative solution to this interpretive problem now imposes on the states the burden of clarifying the law governing lawyers on this subject. In each *Model Rules* jurisdiction,<sup>165</sup> unless there is an amendment of that state's version of *Model Rule* 5.6(b), or at least a clarifying state ethics opinion ratifying or rejecting the strained position put forth by the ABA Ethics Committee in Opinion 95-394, practitioners and disciplinary authorities will face confusion and uncertainty.<sup>166</sup>

#### D. FORMAL OPINION 95-396 (1995)<sup>167</sup>

##### COMMUNICATIONS WITH PERSONS REPRESENTED BY COUNSEL

ABA *Model Rule* 4.2 states, "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

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163. *Id.* at 4.

164. ABA BYLAWS art. 31.7 (1995-96). See *supra* note 124 and accompanying text (describing how the ABA Ethics Committee initiated the amendment by the ABA House of Delegates of DR 5-105(D) in the *Model Code*); see also *infra* note 213 and accompanying text (noting the ABA Ethics Committee's successful efforts to have *Model Rule* 4.2 amended so that the text of the *Model Rule* now corroborates the Committee's interpretation of the unamended version of *Model Rule* 4.2).

165. Lawyers in jurisdictions still adhering to the *Model Code*, which does not contain the phrase "between private parties," will not be troubled by the confusion spawned by Formal Opinion 95-394.

166. Because Formal Opinion 95-394 is abundantly clear and it is the product of careful analysis of what the ABA Ethics Committee approached as a problem of interpretive choice, Professors Finman and Schneyer might have labeled this Opinion "debatable," as opposed to clearly wrong. Cf. Finman & Schneyer, *supra* note 23, at 102 n.128, 141-47 (describing how Formal Opinion 342 was classified as "debatable" despite its creation of an exception to a rule whose terms suggested the existence of no exceptions). Yet, even a merely "debatable" ABA ethics opinion that brushes aside as virtually meaningless the textual language of a *Model Rule* can spawn uncertainty and undermine the law-giving authority of the regime of the *Model Rules* in general.

167. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-396 (1995) [hereinafter Formal Op. 95-396], in ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, RECENT ETHICS OPINIONS, Formal Op. 95-396 (looseleaf 1995). Page citations to passages in this Opinion are based on this official ABA publication.

the consent of the other lawyer or is authorized by law to do so.”<sup>168</sup> The purpose of this rule, the substance of which has long been a part of the law governing lawyers,<sup>169</sup> is clear enough: to prevent overreaching by an opposing lawyer, who may seek to exploit an uninformed layperson who, having retained counsel, does not realize his or her vulnerabilities when dealing with an opposing lawyer.<sup>170</sup>

Despite the clarity of the rule’s purpose, for a long time there was a lack of congruity between its text, which addressed communications with a represented party, and its heading, which stated that the rule’s subject was “Communication with *Person* Represented by Counsel.” The use of different terms in the text and caption produced interpretive difficulties. For example, a few courts held that *Model Rule* 4.2 (or its *Model Code* predecessor) is inapplicable to lawyers and their agents working with a public prosecutor’s office in connection with a pre-indictment investigation.<sup>171</sup> Some courts reached this result by reasoning that, literally, the text of the rule only forbids unauthorized contact with a “party,” and a “person” does not become a “party” until a proceeding is officially commenced and the players are named in a pleading or indictment.<sup>172</sup>

Of course, it is not unusual for a “person” to seek representation concerning a matter in anticipation of subsequent litigation, as, for example, when one becomes aware that a criminal investigation has been opened but formal charges

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168. MODEL RULES Rule 4.2.

169. See MODEL CODE DR 7-104(A) (prohibiting communication between a lawyer and a party of adverse interest who is represented by a lawyer); see also CANONS OF PROFESSIONAL ETHICS Canon 9 (1908) (prohibiting communication and negotiation between a lawyer and the opposite party if that party is represented by counsel). *Model Code* DR 7-104(A), like *Model Rule* 4.2, invited some confusion by the use of the term “party” in the text of the rule and the use of a more general term — “one of adverse interest” — in the caption to the rule. MODEL CODE DR 7-104 (1980).

170. “The prohibition is founded upon the possibility of treachery that might result if lawyers were free to exploit the presumed vulnerable position of a represented but unadvised party.” WOLFRAM, *supra* note 10, at 611. Among the Rule’s objectives is protecting the “client-lawyer relationship from interference by opposing counsel.” Formal Op. 95-396, *supra* note 167, at 7. For example, but for this rule, an opposing lawyer might seek to induce an adversary to make an improvidently damaging statement. *Id.* at 7-8. Properly understood, *Model Rule* 4.2 is a key component in the structure of the adversary system of justice, which assumes, as expressed in *Model Code* EC 7-18, that “[t]he legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel.” MODEL CODE EC 7-18.

171. See, e.g., *United States v. Heinz*, 983 F.2d 609, 613 (5th Cir. 1993); *United States v. Ryans*, 903 F.2d 731, 740 (10th Cir.), *cert. denied*, 498 U.S. 855 (1990), *cited in* Formal Op. 95-396, *supra* note 167, at 9 n.23; *Grievance Comm. for S. Dist. of N.Y. v. Simels*, 48 F.3d 640 (2d Cir. 1995), *cited in* Formal Op. 95-396, *supra* note 167, at 6 n.11. Some opinions have rested on an implied exemption to the entire rule for lawyers engaged in the criminal justice system. See Formal Op. 95-396, *supra* note 167, at 5.

172. See, e.g., *United States v. Ryans*, 903 F.2d 731, 740 (10th Cir.), *cert. denied*, 498 U.S. 855 (1990), *cited in* Formal Op. 95-396, *supra* note 167, at 10 n.26; *Gaylord v. Homemakers of Montgomery, Inc.*, 675 So. 2d 363, 367 (Ala. 1996). Current United States Department of Justice regulations distinguish between “represented persons” and “represented parties,” condoning certain contacts with “represented persons” without the consent of their counsel that are forbidden with respect to “represented parties.” See 28 C.F.R. §§ 77.3, 77.5 (1995). In the view of these regulations, a “represented person” does not become a “represented party” until he or she has been arrested, charged, or made a “defendant” in a civil law enforcement proceeding. 28 C.F.R. § 77.3 (1995).

have yet to be filed.<sup>173</sup> If an adverse attorney could — directly or through an agent<sup>174</sup> — freely communicate with such a person, the protection sought to be achieved by retaining counsel might easily be nullified.<sup>175</sup> Seeking to preclude this possibility, the ABA Ethics Committee issued Formal Opinion 95-396 in the summer of 1995.

Formal Opinion 95-396 concluded that the use of the term "*party*" in the text of *Model Rule* 4.2 had been inadvertent.<sup>176</sup> It observed that the unexplained use of inconsistent terms in the caption and text of the *Model Rule* had created an ambiguity regarding the rule's proper interpretation. The ABA Ethics Committee then sought to resolve this perceived ambiguity by resorting to "the purposes intended to be served by the Rule"<sup>177</sup> and *Black's Law Dictionary*.<sup>178</sup> Selectively quoting from *Black's*, the ABA Ethics Committee noted that the term "*party*," as used in legal discourse, sometimes refers to persons who are not named litigants in a pending proceeding; there are times when the term "*party*" refers to "[a] person concerned or having or taking part in any affair, matter, transaction, or proceeding, considered individually."<sup>179</sup> A majority of the ABA Ethics Committee took the position that "*party*," as used in the original version of *Model Rule* 4.2, should be construed according to this broader understanding of the possible uses of the term.<sup>180</sup> According to the Committee, the term "*party*" should be read to refer to "any *person* known to be represented by a lawyer with respect to the matter to be discussed."<sup>181</sup> The Committee reasoned that any person who seeks the protection of counsel with respect to a particular matter should enjoy the protection sought to be afforded by the *Model Rule*, whether the matter is one involving "formal adjudicative proceedings" or simply a negotiation or some other transactional setting.<sup>182</sup> This reading is necessary, the Committee's major-

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173. Cf. FED. R. CIV. P. 26(b)(3); *Hickman v. Taylor*, 329 U.S. 495 (1947) (protecting from civil discovery, *inter alia*, documents prepared in anticipation of litigation by the lawyer for a person who, at the time of the documents' preparation, may not have been a party to litigation because litigation had not been commenced).

174. See MODEL RULES Rule 8.4(a) (stating that it is misconduct for a lawyer to violate or attempt to violate any *Model Rule* "through the acts of another"); see also MODEL RULES Rule 5.3(c)(1) (explaining that it is misconduct for a lawyer to order or ratify the acts of a nonlawyer under the lawyer's supervisory authority when the acts would be a violation of the *Model Rules* if engaged in by the lawyer).

175. For an overview of the evolution and history of *Model Rule* 4.2, see 2 HAZARD & HODES, *supra* note 2, at 730 (2d ed. 1990 & 1993 Supp.).

176. "The comprehensive record of the deliberations of the Kutak Commission [which drafted the ABA *Model Rules*] casts no light on the reason why the word 'person' was used in the caption of the Rule while 'party' was used in its text." Formal Op. 95-396, *supra* note 167, at 7 n.15.

177. *Id.* at 7.

178. BLACK'S LAW DICTIONARY (6th ed. 1990).

179. *Id.* at 1122, cited in Formal Op. 95-396, *supra* note 167, at 7 n.14.

180. Formal Op. 95-396, *supra* note 167, at 7-8.

181. *Id.* at 1 (emphasis added). Elaborating its holding, the Committee stated, "In sum, the Rule's coverage should extend to any represented person who has an interest in the matter to be discussed, *who is represented with respect to that interest*, and who is sought to be communicated with by a lawyer representing another party." *Id.* at 9 (emphasis added).

182. *Id.* at 8.

ity urged, to discourage courts from adopting the sort of overly-literal view<sup>183</sup> that can deprive people who have sought representation of the protection they rightly expect such representation to provide.<sup>184</sup> Taking this interpretation to its logical conclusion, the majority saw the term “party” as including even represented witnesses, who, though they are not the central participants in a transaction or proceeding, have interests in the matter that they perceive as sufficient to warrant the protection associated with legal representation.<sup>185</sup>

One wonders whether such a mighty struggle was required to marginalize a few unduly restrictive judicial precedents.<sup>186</sup> The official comment to *Model Rule* 4.2 has always said, “This rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.”<sup>187</sup> It seems that citation of this comment would have sufficed to accomplish the purpose of the ABA Ethics Committee’s majority, for the Scope section of the *Model Rules* explains that “[t]he Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule.”<sup>188</sup> In fact, it appears that most authorities have long accepted the comment’s broader notion of the term “party” as used in *Model Rule* 4.2, as Formal Opinion 95-396 is flush with citations of judicial opinions and other authorities that have interpreted the term “party” as the Committee’s majority recommended.<sup>189</sup> While Opinion 95-396 did quote the Comment’s clarifying language,<sup>190</sup> the ABA Committee was unwilling to rest its conclusion solely on this passage.

By eschewing reliance on the official comment in favor of a strained argument premised on highly selective passages from a general law dictionary, the ABA Ethics Committee created a needless controversy over just how much leeway courts and practitioners have in their interpretation of the term “party” as used in

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183. See *supra* note 172 and accompanying text.

184. Formal Op. 95-396, *supra* note 167, at 7-8.

185. *Id.* “Such persons would include targets of criminal investigations, potential parties to civil litigation, and witnesses who have hired counsel in the matter.” *Id.* at 8-9 (footnotes omitted); see also *id.* at 23 (Lawrence J. Fox & Kim Taylor-Thompson, concurring).

186. See *supra* notes 171 & 172 and accompanying text (explaining how a few courts have construed *Model Rule* 4.2 to allow lawyers to have access to persons involved in pre-indictment criminal investigations by limiting the definition of “party” only to those named in a pleading or indictment).

187. MODEL RULES Rule 4.2 cmt.

188. MODEL RULES scope.

189. Six different cases endorsing the position taken by the majority of the ABA Ethics Committee are cited in the footnotes in Part II of Formal Opinion 95-396. Formal Op. 95-396, *supra* note 167, at 7-9 nn.13 & 17-21. Moreover, the Committee was able to favorably cite the views of two of the most authoritative treatises on legal ethics, WOLFRAM, *supra* note 10, at 611 (1986), and 2 HAZARD & HODES, *supra* note 2, at 730 (2d ed. 1990 & 1996 Supp.). The Committee was also able to favorably cite ethics opinions from Florida, Mississippi, New York, and Texas, Formal Op. 95-396, *supra* note 167, at 7-8 nn.14 & 17, as well as a 1938 formal ABA ethics opinion (No. 187). *Id.* at 9, n.21. To the list of supporting authority may be added Utah State Bar Ethics Advisory Comm., Op. 95-05 (Jan. 26, 1996) (restricting unauthorized ex parte contacts with any person who is represented by counsel concerning the matter in question regardless of whether the person is a party to a formal legal proceeding).

190. Formal Op. 95-396, *supra* note 167, at 6-7.

the original version of *Model Rule 4.2*. If the meaning of "party" as used in the rule is to be controlled not by the official comment to the rule itself but by *Black's Law Dictionary*, should not the complete picture of "party" as painted by *Black's* be considered? This was the position of one member of the ABA Ethics Committee, who offered a vigorous dissent to Formal Opinion 95-396.<sup>191</sup>

Committee member Ralph Elliot characterized Formal Opinion 95-396 as legislation masquerading as interpretation.<sup>192</sup> He criticized his colleagues on the Committee for imagining an ambiguity in *Model Rule 4.2* where none existed<sup>193</sup> and for abandoning conventional canons of statutory construction<sup>194</sup> to reach an unjustifiably "expansive" result.<sup>195</sup> Relying himself on *Black's Law Dictionary*,<sup>196</sup> Mr. Elliot urged that the term "party" has a fixed meaning "as a common law term"<sup>197</sup> that is narrower than that endorsed by the majority opinion. He contended that, as defined by *Black's* and used in the common law, the term "party" encompasses *only the principals to a proceeding or transaction*.<sup>198</sup> Thus, in his view, the Committee's position that a "party" can be *any person connected with a matter who has retained counsel with respect to that matter* stretches the term beyond any recognizable boundaries. For Mr. Elliot, neither *Black's* nor common law tradition would consider witnesses, financiers, and other bystanders who may be indirectly affected by a matter to be "parties" to the matter, even if they were sufficiently concerned about it to have secured counsel with respect to it.<sup>199</sup> Yet, according to the majority in Formal Opinion 95-396, such persons *are* to be considered "parties" for purposes of *Model Rule 4.2*.

While Mr. Elliot suggested that the term "party" has a clear understanding which is at odds with the majority's interpretation of it in Formal Opinion 95-396, his own application of the term took on an air of arbitrariness. He considered the interests of represented children in a matrimonial case to be sufficiently "central" to the proceeding to justify treating the children as parties, "even though they are not formal parties to the litigation."<sup>200</sup> He thought, however, that the buyer's and seller's banks involved in a real estate transaction, even if represented, should not be treated as parties for purposes of *Model Rule 4.2*, because the banks' interests would be "qualitatively ancillary to the central interest of the buyer and the seller."<sup>201</sup> A concurring opinion fashioned by two other members of the Commit-

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191. *Id.* at 27 (Ralph G. Elliot, dissenting).

192. *Id.* at 32.

193. *Id.* at 29-30.

194. *Id.* at 28-29, 31.

195. *Id.* at 32. Another dissenter termed the majority's opinion "overbroad." *Id.* at 25 (Richard Amster, dissenting).

196. *Id.* at 30 (Ralph G. Elliot, dissenting).

197. *Id.*

198. *Id.* at 31.

199. *Id.*

200. *Id.* at 31.

201. *Id.* at 31-32.



tee pointed out this difficulty in Mr. Elliot's analysis.<sup>202</sup> Mr. Elliot's critique of the majority's position would have been stronger had he simply accepted as controlling those passages in *Black's Law Dictionary* that are inconsistent with the broad definition of "party" adopted by the majority.<sup>203</sup>

Despite Mr. Elliot's difficulty in cabining the concept of "party," his principal objection to the Committee's approach is valid. At the time of Formal Opinion 95-396, *Model Rule* 4.2 employed the term "party." If this term is not independently defined in the document being interpreted,<sup>204</sup> and if the official comment to the rule in which the term is used is not to be controlling,<sup>205</sup> the term's interpretation should be based on established "canons of statutory construction,"<sup>206</sup> like those that would be applied by courts in interpreting statutes. These canons teach that the chosen term of a rule should be construed to mean what it has come to mean in legal parlance, not what the rule might have said had it been more carefully drafted.<sup>207</sup> In legal usage, "parties" constitute a "subset" of "persons,"<sup>208</sup> and *Model Rule* 4.2 purports to protect "parties," not "persons." Yet, the ABA Ethics Committee has claimed the license to treat the terms as if they are essentially synonymous.<sup>209</sup> Mr. Elliot's point was simply that, in doing

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202. *Id.* at 23 (Lawrence J. Fox & Kim Taylor-Thompson, concurring).

203. "'Party' is a technical word having a precise meaning in legal parlance; it refers to those by or against whom a legal suit is brought . . . ; all others who may be affected by the suit, indirectly or consequently, are persons interested but not parties." BLACK'S LAW DICTIONARY 1122 (6th ed. 1990) (citation omitted). Elsewhere, *Black's* states that "party" is a term that "means one having [the] right to control proceedings, to make defense, to adduce and cross-examine witnesses, and to appeal from judgment." *Id.* If one turns to the dictionary's definition of the term "parties," a similar understanding is offered: "The persons who take part in the performance of any act, or who are directly interested in any affair, contract, or conveyance, or who are actively concerned in the prosecution and defense of any legal proceeding." *Id.* at 1119 (citation omitted). These passages present an understanding of "party" that is narrower than that urged by either the ABA Ethics Committee's majority or Mr. Elliot.

204. Neither "party" nor "person" is defined in the terminology section of the *Model Rules*. See MODEL RULES terminology (providing definitions of numerous terms but not for the terms "party" or "person").

205. It is unclear why neither the ABA Ethics Committee's majority nor Mr. Elliot in dissent viewed the official comment to *Model Rule* 4.2 as sufficient to resolve the question regarding the proper interpretation of the term "party" as used in that rule. As evidence that the comment does not get the job done, Mr. Elliot noted that a number of states that have adopted the *Model Rules* have pointedly used the term "person" instead of or in addition to the term "party" in their versions of *Model Rule* 4.2. Formal Op. 95-396, *supra* note 167, at 29 (Ralph G. Elliot, dissenting). But this does not explain why the comment should not control in those states which have adopted the original ABA version of *Model Rule* 4.2, which, after all, is what the Opinion was interpreting. Perhaps Mr. Elliot was reluctant to rely on the comment because of the following passage found in the scope section of the *Model Rules*: "The Comments are intended as guides to interpretation, but the text of each Rule is authoritative." MODEL RULES scope. But the language of this comment surely qualifies as a legitimate "guide to interpretation." As for the majority, there is no explanation as to why it found citation to the clarifying comment to be insufficient to support its interpretation.

206. *Accord* Formal Op. 95-396, *supra* note 167, at 28 (Ralph G. Elliot, dissenting) (arguing that the Committee's conclusion "violates basic and universally-applied canons of statutory construction").

207. See *supra* note 134.

208. Formal Op. 95-396, *supra* note 167, at 32 (Ralph G. Elliot, dissenting).

209. "To import synonymy where the drafters used *different* words is resolutely to close one's eyes to the obvious, and to flout the canons of construction that [should] govern our deliberations." *Id.* at 29 (emphasis added).

so, the majority was effectively changing the language of the *Model Rule* through the "*ipse dixit*"<sup>210</sup> of an opinion rather than through the more appropriate exercise of its authority to recommend changes to the *Model Rules* through legislation.<sup>211</sup>

In fact, Mr. Elliot took great delight in noting that the ABA Ethics Committee itself, at the very time it issued Formal Opinion 95-396, was awaiting action on the Committee's own proposal to the ABA House of Delegates that the text of *Model Rule* 4.2 be amended by replacing the word "party" with the word "person." If the words of *Model Rule* 4.2 already meant that, Mr. Elliot wondered, why had the Committee deemed it necessary to amend the Rule?<sup>212</sup>

Shortly after Formal Opinion 95-396 was released, the House of Delegates did indeed approve the Ethics Committee's proposed amendment.<sup>213</sup> Now, at least, one can be relatively confident that the words of the ABA's *Model Rule* 4.2 mean exactly what they say. Unfortunately, the nearly simultaneous<sup>214</sup> interpretation and amendment of *Model Rule* 4.2 by two different organs of the ABA leaves lawyers, judges, and disciplinary authorities in the forty-plus states whose no-contact rules still use the term "party"<sup>215</sup> wondering how the rule in place in their jurisdictions is to be construed.

In a jurisdiction where the unamended version of *Model Rule* 4.2 (or unamended DR 7-104(A)) is still in place, what does the no-contact rule mean? One could be forgiven for concluding that it does *not* necessarily mean what the amended *Model Rule* means, because the state's rule has not yet been amended. Yet, because the opinions of the ABA Ethics Committee are not binding on any state authority,<sup>216</sup> it does not necessarily follow that a state's unamended rule,

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210. *Id.*

211. See *supra* note 164 and accompanying text (providing that the ABA Ethics Committee can "recommend amendments to the *Model Rules*").

212. Formal Op. 95-396, *supra* note 167, at 29 (Ralph G. Elliot, dissenting).

213. 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).

214. Formal Opinion 95-396 was released on July 28, 1995. Formal Op. 95-396, *supra* note 167, at 1. The ABA House of Delegates approved the proposed amendment of *Model Rule* 4.2 on August 8, 1995. *ABA Amends Rules 4.2, 3.8; Moves on Internal Governance*, [11 Current Reports] *Laws. Man. on Prof. Conduct* (ABA/BNA) 248-49 (1995).

215. At the time Formal Opinion 95-396 was issued, whether its jurisdiction followed the *Model Rules* or the *Model Code*, every state except Alaska, Florida, Oregon, and Texas had in force a no-contact rule purporting to protect "represented parties." See Formal Op. 95-396, *supra* note 167, at 29 (Ralph G. Elliot, dissenting). The four states listed as exceptions had already structured the text of their rules to make it clear that the no-contact principle applied to all "represented persons." *Id.* DR 7-104(A) in the *Model Code* parallels *Model Rule* 4.2. See *supra* note 166. Mr. Elliot made the point that the decisions of Alaska, Florida, Oregon, and Texas to use the term "person" in their rules, despite the fact that both of the ABA model provisions used the term "party," corroborates his view that the two terms are understood to have different meanings. See Formal Op. 95-396, *supra* note 167, at 29 (Ralph G. Elliot, dissenting) ("Those [states] who wanted a more expansive protection have amended the rule. Amendment, not wish-fulfilling interpretation, is the way to pour the new wine of 'person' into the old bottle of 'party.'").

216. See *supra* notes 39-43 and accompanying text.

whose text still restricts the protection of the no-contact rule to “represented parties,” means what the ABA Ethics Committee said it means in Formal Opinion 95-396. It must be remembered that the reason the ABA Ethics Committee thought it important to “clarify” the meaning of the term “party” as used in *Model Rule 4.2* was that a number of courts had previously interpreted the term to mean something different than what the ABA Ethics Committee thought it meant.<sup>217</sup> If some authorities were unable or unwilling to read the no-contact rule as the ABA Ethics Committee thought it should be read before Formal Opinion 95-396 was issued, there is no assurance that those same authorities, or others, will accede to the ABA Ethics Committee’s view now that it is on table.<sup>218</sup> Formal Opinion 95-396 even acknowledged that, despite the position taken by the majority, contrary judicial precedent in any jurisdiction controls until it is reversed.<sup>219</sup>

Given the divisions exposed among the members of the ABA Ethics Committee itself, the prospective influence of Formal Opinion 95-396 is surely put in doubt. If a state has not formally amended its version of the no-contact rule since the ABA House of Delegates acted to amend *Model Rule 4.2* in August of 1995, does this signify that state’s purposeful determination to reject the change approved by the ABA House of Delegates? Or does it indicate that state’s

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217. See, e.g., Formal Op. 95-396, *supra* note 167, at 5 (“Although there have been holdings to the contrary, the Committee believes it is clear that Rule 4.2 [means something different than those judicial holdings].”); *id.* at 10 (“The Committee believes that to the extent those decisions suggest that the Rule has no application [in certain circumstances], they are not sound.”); *id.* at 23 (Lawrence J. Fox and Kim Taylor-Thompson, concurring) (“[A]lmost all of those cases rely on reasoning which this opinion rejects, reasoning which this Committee, in issuing this Opinion . . . hopes courts in the future will reject.”).

218. Virtually all of the opinions sought to be “overruled” by the ABA Committee’s interpretation of *Model Rule 4.2* involved applications of the no-contact rule to pre-indictment, pre-arrest contact with investigatory targets by persons associated with a public prosecutor’s office. See note 171 and accompanying text. Yet, many of those opinions would appear actually to have been approved in another section of Opinion 95-396, dealing with the textual “authorized by law” exception to the no-contact rule. See Formal Op. 95-396, *supra* note 167, at 9-12 (“III. The Bar [of Rule 4.2] May Have a More Limited Application to Criminal Investigations Prior to Arrest or the Filing of Criminal Charges); see also *id.* at 21-23 (“X. There Are Several Categories of Communications That Are ‘Authorized by Law’”). If pre-indictment contacts between law enforcement authorities acting under the direction of a lawyer are “authorized by law,” it seems to matter little whether the target of the contact is to be regarded as a “party” for purposes of the rule; “party” or not, the contact is not prohibited. The well-known controversy over just when contacts with represented individuals initiated by a prosecutor’s office — particularly a federal prosecutor’s office — should be deemed to be authorized by law is beyond the scope of this article. See generally Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules*, 53 U. PITT. L. REV. 291 (1992) (arguing that the uniform enforcement of federal criminal law is being threatened because the bar is shifting institutional decision-making to state courts, resulting in a decisional law that is confused and inconsistent).

219. Formal Op. 95-396, *supra* note 167, at 12. Noting that the text of *Model Rule 4.2* exempts from its prohibitions communications that are “authorized by law,” however they are defined, the Committee stated that, to the extent that judicial precedent in the controlling jurisdiction holds a particular type of communication not to be forbidden by that jurisdiction’s no-contact rule, the communication should be considered to be “authorized by law.” *Id.*

determination that an amendment is unnecessary because the interpretation offered in Formal Opinion 95-396 is correct? Or should one conclude that the rule in such a state means neither what the ABA House of Delegates has now decided it should mean nor what the ABA Ethics Committee has said the unamended rule means? Until either the highest court of a state formally amends its version of the no-contact rule,<sup>220</sup> or the ethics committee of that state renders a formal interpretation of the unamended rule in force there, there will be uncertainty as to the meaning of that state's rule. This is a direct result of the willingness of the ABA Ethics Committee to conclude that, sometimes, the ethics rules do not mean exactly what they say.<sup>221</sup>

#### IV. THE NEED FOR MORE EXPLICIT GUIDANCE FROM THE STATES AND A REASSESSMENT OF THE ROLE OF THE ABA ETHICS COMMITTEE

In recent years, the ABA Ethics Committee has become increasingly active,<sup>222</sup> but more commonly divided.<sup>223</sup> Some of its division reflect that Committee's tendency, demonstrated in Part III, to produce strained opinions that are unsupported by the language of the rules being interpreted.<sup>224</sup> Because "ethics rules" take on the force of positive law in many respects,<sup>225</sup> the existence of such strained opinions in the professional literature generates a level of confusion about the proper interpretation of ethics standards that is a matter of serious concern for lawyers as well as those who are charged with the task of regulating them.<sup>226</sup> ABA opinions still have the potential to influence the way the states

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220. A state supreme court also could resolve the question by publishing a definitive opinion in the course of resolving a disciplinary or judicial proceeding, as, for example, passing on the admissibility of evidence alleged to have been acquired in violation of the applicable no-contact rule. *See, e.g.,* Gaylord v. Homemakers of Montgomery, Inc., 675 So. 2d 363, 367 (Ala. 1996) (holding, without citation to Formal Opinion 95-396, that the trial court erred in excluding evidence allegedly acquired in violation of Rule 4.2 because Alabama Rule 4.2 (identical to the unamended *Model Rule*) does not prohibit contacts with a represented adversary before the commencement of legal proceedings).

221. In his dissenting opinion, ABA Ethics Committee member Richard L. Amster suggested that, once the fissures on the Committee were exposed during its deliberations regarding the no-contact rule, clarity would have been advanced if the Committee had *declined* to issue an opinion. He lamented that the majority's "massive" 22-plus page Opinion "creates more problems for the average practicing attorney than it solves," because it "does not show them the way; to the contrary, it will add to their confusion." Formal Op. 95-396 at 167 (Amster, dissenting).

222. *See supra* note 51 and accompanying text (noting the increasing number of ABA Ethics Committee opinions in recent years).

223. *See supra* note 75 (noting the increasing number of dissents and concurrences found in ABA Ethics Committee opinions concerning the *Model Rules*).

224. The four separate opinions published as part of Formal Opinion 95-396 illustrate such divisions. *See supra* Part III D.

225. *See supra* notes 18-24 and accompanying text (discussing the enforceable status of state "ethics rules").

226. *See supra* Part III (illustrating the confusion that can be generated by an ABA ethics opinion that disregards the language of the ethics rules).

apply their "ethics rules,"<sup>227</sup> but the continuing appearance of strained ABA opinions such as those highlighted in Part III can only contribute to a weakening of the authoritative status accorded to ABA opinions in general.<sup>228</sup> Compounding the problems presented by strained ABA opinions is the fact that the dominance of the ABA's model standards has measurably declined, as the states gradually have adopted more and more provisions that do not conform to the ABA's suggested language.<sup>229</sup> This combination of developments makes the need for explicit ethics guidance from the state bar regulatory authorities compelling. Each state must try to furnish clear interpretations of its own standards. Unfortunately, some states appear to be more willing or able to accept this burden than others.<sup>230</sup>

One possible state response would be to establish, through rule or advisory opinion, an articulated presumption that ABA formal opinions are (or are not) to be treated as controlling unless explicitly addressed by state authorities.<sup>231</sup> But given the variations between state rules and the ABA models, such a generalized position could be either unhelpful or misleading in many cases. An alternative would be to establish a mechanism through which the state ethics committees would routinely comment on the applicability in their states of existing ABA formal opinions and new opinions as they are issued. While this at first might seem to be an onerous job, where state standards simply incorporate one of the ABA models (which is still the norm on most issues), and when the ABA Ethics Committee's reasoning is sound (which, despite the critiques offered here and in Professors' Finman and Schneyer's article, is often the case<sup>232</sup>), it would not be an insurmountable task for a state committee or court to decide whether to ratify the ABA Ethics Committee's view.<sup>233</sup> Such a procedure would offer the prospect

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227. See *supra* notes 25-29 and accompanying text (discussing the importance of ABA ethics opinions and citing state ethics opinions and judicial rulings that rely on ABA opinions).

228. See *supra* notes 42-43 and accompanying text (providing examples of ABA ethics opinions that have not been followed by courts or state bar ethics committees).

229. See *supra* notes 33-35 and accompanying text (addressing numerous variations of ABA models that have been adopted by states and the difficulties encountered by lawyers subject to differing ethical rules in more than one jurisdiction or to differing rules in federal and state courts).

230. See *supra* note 47 (comparing states that have published over 20 ethics opinions in 1995 with states publishing no or relatively few ethics opinions).

231. Cf. COMM. ON RULES OF PROFESSIONAL CONDUCT, STATE BAR OF ARIZONA: RULES OF PROCEDURE Rule 5, in *Arizona Ethics Opinions*, ARIZ. B.J., Winter 1973-74 at 6, quoted in Finman & Schneyer, *supra* note 23, at 79 n.65 ("reasoning and conclusions expressed in the opinions of the A.B.A. Committee will, in general, be regarded as highly persuasive precedent in our resolutions of identical or analogous . . . questions").

232. Almost half of the holdings analyzed by Professors Finman and Schneyer (21 out of 48) were deemed to be "correct" and soundly reasoned. Finman & Schneyer, *supra* note 23, at 97. That many of these correct holdings (14 of the 21) dealt with rather simple, straightforward questions of rule construction, *id.* at 98, supports a conclusion that it would be manageable for a state committee routinely to pass on ABA opinions.

233. Similar mechanisms could be established with respect to legislative amendments to the *Model Rules* approved by the ABA House of Delegates, as such changes are responsible for no small portion of the growing confusion over substantive standards. They throw into question the reliability of former ABA opinions, on

of having a salutary effect on the energy displayed by some of the less active state committees. Whatever the burden of implementing an opt-out or opt-in procedure, that cost must be balanced against the benefit of reducing the uncertainty that would exist in its absence and the threat to the very efficacy of the regime of ethics codes such uncertainty presents.<sup>234</sup>

Of course, the likelihood of a state's departure from an ABA ethics pronouncement is greatest when the ABA Ethics Committee presents a strained opinion, like those reviewed in Part III, that disregards the text of the model standards being interpreted. Though this Article has demonstrated that the ABA Ethics Committee's propensity to issue such opinions has not abated over the last twenty years, it is not suggested that this defect in reasoning processes infects all of the Committee's work. Nor is it suggested that the Committee's exercise of flawed reasoning is inevitable. The best way to curtail the uncertainty generated by strained ABA ethics opinions would be to reduce the frequency of their appearance. Therefore, efforts to improve the ABA Ethics Committee's opinion-making process should be pursued.

Professors Finman and Schneyer thought the imposition of an adversary decision-making model on the Committee's work processes offered the most promise for eliminating the Committee's propensity to issue poorly reasoned opinions.<sup>235</sup> Their proposal has not been accepted by the Committee,<sup>236</sup> and this Article has shown that its decision-making is still often worthy of criticism. When Professors Finman and Schneyer made their proposal, they indicated that if it were not adopted, or, if adopted, it were not successful in improving "the Committee's unimpressive record in reaching correct holdings,"<sup>237</sup> they would

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which state authorities may have relied. See Finman & Schneyer, *supra* note 23, at 82-83 (discussing the frequency with which the ABA's ethics opinions have been relied on by the states and have ultimately guided lawyers who seek advice from state ethics committees). Thus, a clearer understanding of current state standards could be achieved by forcing each state to adopt or formally reject each such amendment as it comes along. This would heighten the attention given by the state bar associations and state supreme courts to the ABA legislative processes, perhaps contributing to better decision-making by the ABA House of Delegates. See Ted Schneyer, *Bar Politics*, *supra* note 35 at 677 (offering a political account of the ABA's legislative processes). If a state fails to adopt an ABA amendment within a prescribed period of time after ABA legislative action, that state's ethics committee should promulgate an opinion clarifying the interpretation of that state's unamended rule.

234. See *supra* notes 74-77 and accompanying text (discussing potential costs attributable to indeterminacy of the meaning of the rules); see also Wilkins, *Bar Regulation*, *supra* note 8, at 811 ("Until the rulemaker steps in . . . practicing lawyers may face multiple and perhaps conflicting interpretations of a given norm.").

235. See *supra* notes 65-69 and accompanying text (discussing Finman & Schneyer's adversary model for addressing ethics issues).

236. There have been instances where outsiders to the Ethics Committee have been given an opportunity to attempt to exert their influence on the opinion-making process, but there are no institutionalized procedures to implement the adversarial approach to decision-making advocated by Professors Finman and Schneyer. See Falk, *supra* note 2, at 644 & nn.4 & 8 (noting the ABA Tax Section's unsuccessful attempt to influence Formal Opinion 85-352); Martin Riger, *supra* note 138, at 760 & n.139 (describing how influential lawyers, including Lloyd Cutler and Antonin Scalia, successfully lobbied the ABA Ethics Committee regarding Formal Opinion 342).

237. Finman & Schneyer, *supra* note 23, at 167.

recommend that the Committee should simply stop issuing opinions.<sup>238</sup> Formal Opinions 95-394 and 95-396 compel us to renew the question of whether the ABA Ethics Committee should continue issuing opinions. With the breakdown in the uniformity of rules from jurisdiction to jurisdiction that has developed in the *Model Rules* era,<sup>239</sup> there is even further reason today than there was in 1981 to suggest that the ABA Ethics Committee may have outlived its usefulness. Suspending the issuance of ABA ethics opinions would certainly eliminate the possibility that the Committee's interpretations would contribute to the uncertainty of standards. But silencing the Committee would also eliminate the possibility that those interpretations would reduce uncertainty. Before casting aside a venerable institution<sup>240</sup> that possesses the potential to exert constructive influences on lawyers' conduct,<sup>241</sup> it may be appropriate to reconsider another possible reform that Professors Finman and Schneyer thought held little promise.

The rejected reform was a proposal to eliminate the ABA Ethics Committee's dual authority to both render opinions interpreting the existing rules and propose "amendments to or clarifications of" those rules.<sup>242</sup> Professors Finman and Schneyer wondered whether this combination of responsibilities "might impair the quality of [the ABA Ethics Committee's] interpretive opinions."<sup>243</sup> They hypothesized that "combining legislative and interpretive functions [in one body] blurs the distinction between these functions and may cause [the Committee] to treat its opinions as appropriate vehicles for changing the [rules]."<sup>244</sup> Moreover, "since the amendment process is more cumbersome and has less predictable results than writing an opinion, the Committee has some incentive to exceed the proper limits of interpretation in its opinions."<sup>245</sup> Yet, because they could find "no firm evidence that role confusion had anything to do with [the Committee's] lawlessness,"<sup>246</sup> they concluded that the dangers associated with the combination of legislative and interpretive functions was "too insubstantial to explain much of the inadequacy" they had found in the Committee's opinions.<sup>247</sup> This conclusion should be reassessed. Just as there was "no firm evidence" that the dual functions caused the Committee's reasoning inadequacies, neither was there firm evidence to the contrary.

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238. *Id.*

239. *See supra* notes 33-35 and accompanying text.

240. The ABA Ethics Committee began issuing opinions in 1924. It has issued 404 formal opinions and over 1,500 informal opinions. *See id.* at 71; *see also* ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, CURRENT ETHICS OPINIONS (looseleaf). On the earlier titles for the Committee, *see* Finman & Schneyer, *supra* note 23, at 71 n. 8.

241. *See supra* note 26 and accompanying text.

242. *See* ABA BYLAWS § 31.7 (1995-96).

243. Finman & Schneyer, *supra* note 23, at 145.

244. *Id.*

245. *Id.*

246. *Id.* at 146.

247. *Id.*

On reflection, it appears that each of the strained opinions discussed in Part III of this Article could be explained by the hypothesis rejected by Professors Finman and Schneyer. In each instance, the ABA Ethics Committee was struggling with an issue that lent itself quite easily to a legislative solution. Rather than exercising the patience required to allow the issue to be resolved by the ABA House of Delegates, the Committee plunged ahead by, in effect, seeking to impose, through the vehicle of an ethics opinion, its view of the appropriate legislative adjustments. In all four cases, House of Delegates action was either forthcoming or easily attainable.

The language in DR 5-102(B) that was ignored in Formal Opinion 339 was subsequently eliminated<sup>248</sup> by the ABA House of Delegates with the adoption of *Model Rule* 3.7. Similarly, the ABA Ethics Committee's creation, in Formal Opinion 342, of an exception to the broad imputed disqualification principle then contained in DR 5-105(D) was subsequently legislatively codified with the adoption of *Model Rule* 1.11.<sup>249</sup> Likewise, if the Committee had understood itself to be bound to an interpretive role, it might have felt itself constrained in Formal Opinion 95-394 to acknowledge, rather than disregard, the significance of the unexplained appearance in *Model Rule* 5.6(b) of the phrase "between private parties."<sup>250</sup> Finally, the substitution of the word "person" for "party" in *Model Rule* 4.2 wrought by the Committee's Formal Opinion 95-396 was — *at the impetus of the ABA Committee!* — in the process of being legislatively accomplished by the ABA House of Delegates as that Opinion was being fashioned.<sup>251</sup> A body solely concerned with interpretation might have either held back Opinion 95-396 until after the House of Delegates acted on the pending amendment to the Model Rule or rendered an opinion more respectful of the language of the unamended rule, with the expectation that this would influence the outcome of the legislative debate in the House of Delegates.

A decision-making tribunal that understood that its only power was to interpret, rather than to create, substantive standards might have concluded each of the four opinions treated in Part III by paraphrasing a statement once penned by Justice John Paul Stevens:

By respecting the language of the provision we are bound to interpret, we enhance the legislative prerogative to amend the law. The arguments against our interpretation which respects the language of the rule in question are better directed to the House of Delegates. That body may consider the exception that we are not free to read into the statute.<sup>252</sup>

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248. It might be more accurate to say the language was clarified, because a lawyer's testimony that is adverse to a client can still cause a (firm-wide) disqualification, but only when certain narrower circumstances obtain. See *supra* notes 104-07 and accompanying text.

249. See *supra* notes 140-43 and accompanying text.

250. See *supra* notes 157-60 and accompanying text.

251. See *supra* notes 212-13 and accompanying text.

252. Cf. *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 354 (1982) ("By articulating the rules of



A committee that understood that its only mission was to interpret the words chosen by those with the authority to legislate could also be expected to cite frequently the following Supreme Court guidance:

Laws enacted with good intention, when put to the test, frequently, and to the surprise of the lawmaker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts. *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930) . . . . Congress may amend the statute; we may not.<sup>253</sup>

It is noteworthy that many state bar associations have followed a separation-of-functions approach in assigning responsibilities with respect to the design of their ethics regimes. They have created one committee whose only task is to monitor legislative developments with respect to the ABA's *Model Rules* and consider possible changes to the state rules. These "rules" committees have the authority to initiate proposals for legislative changes on the state level. Another committee, commonly referred to as the "ethics committee," has the narrowly-prescribed role of rendering advisory opinions regarding the proper interpretation of the state rules that are in place. The "ethics committees" have no role in the rule-making process.<sup>254</sup> Under this dual-committee format, there may be less temptation for the ethics committee to attempt to re-write a rule through the guise of an "interpretive" opinion. Indeed, the co-existence of the two separate committees should create a "political" climate within the organized bar that would generate some of the beneficial effects of "checks and balances" commonly associated with the separation of powers in a governmental structure. With carefully defined functions, each committee is conscious of its own "turf," which it would be at pains to protect and deterred from overstepping.<sup>255</sup>

And so, it must be asked once again whether unbundling the interpretive and legislative powers now exercised by the ABA Ethics Committee might contribute

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law with some clarity and by adhering to rules that are justified in their general application, however, we enhance the legislative prerogative to amend the law. The respondents' arguments against application of the *per se* rule in this case therefore are better directed to the legislature. Congress may consider the exception that we are not free to read into the statute.").

253. *Griffin v. Oceanic Contractors, Inc.*, 490 U.S. 564, 575-76 (1982). Of course, a disciplined body should be able to hold and keep separate interpretive and rule-making authority. Compare *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120 (1989) with FED. R. CIV. P. 11 advisory committee note to 1993 amendment (explaining that the creation of law firm liability for sanctions under the Federal Rules of Civil Procedure Rule 11 required amendment of the rule, and could not be accomplished via exercise of Supreme Court's interpretive authority).

254. The Oklahoma Bar Association, for example, maintains a "Legal Ethics and Unauthorized Practice Committee," which is responsible for preparing advisory opinions that interpret the existing state rules, and a "Rules of Professional Conduct Committee," which is charged with recommending legislative changes to the rules. See 67 OKLA. B. J. 302, 306 (1996).

255. Cf. *Finley v. United States*, 490 U.S. 545, 556 (1989) ("Whatever we say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress. What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts.").

to sounder opinions. We live in an era of "statutory ethics." Amendments to the *Model Rules* are commonly on the table, and the ABA Ethics Committee has been actively involved in managing a legislative agenda. The four formal opinions criticized in Part III can all be as easily described as accomplishing an "amendment" of an unsatisfactorily drafted rule as an "interpretation" of an ambiguous rule. Perhaps formally separating the legislative and interpretive powers now enjoyed by the ABA Ethics Committee would foster in it a greater fidelity to the text of the rules in its opinion-making. A chastened ABA Ethics Committee might also reduce the incidence of the other common analytic faults pointed out by Professors Finman and Schnayer in 1981.<sup>256</sup>

Long ago, Roscoe Pound warned those who exercise the authority to interpret statutory rules that there are heavy costs associated with engaging in "judicial law-making under the guise of interpretation."<sup>257</sup> He used John Austin's term, "spurious interpretation,"<sup>258</sup> to describe this illicit practice:

The object of spurious interpretation is to make, unmake, or remake, and not to discover. It puts a meaning into the text as a juggler puts coins, or what not, into a dummy's hair, to be pulled forth presently with an air of discovery. It is essentially a legislative, not a judicial process . . . . [I]t becomes a source of confusion . . . . Spurious interpretation is an anachronism in an age of legislation. It is a fiction. . . . Spurious interpretation . . . (1) . . . tends to bring law into disrepute, (2) . . . subjects the [decision-making institutions] to political pressure, [and] (3) . . . reintroduces the personal element into [interpretive] administration.<sup>259</sup>

In short, Pound viewed "spurious interpretation" as threatening "serious and permanent injury to the legal system."<sup>260</sup> He concluded: "Over rigid constitutions, carelessly drawn statutes, and legislative indifference toward purely legal questions are not permanently remedied by wrenching the [interpretive] system to obviate their mischievous effects."<sup>261</sup> It is possible that removing all legislative aspects of the ABA Ethics Committee's historic role would eliminate its tendency to produce "spurious interpretations" that hold that the words of the rules do not mean what they say.

Of course, there is no certainty that such an apparently minor change in the description of the Committee's authority would materially improve the quality of its decision-making. Nevertheless, the fact that the outcome of each of the opinions criticized here was easily achievable through legislative amendment to the rule in question suggests that a clearer separation of legislative and interpre-

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

257. Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 380 (1907).

258. *Id.* at 380 (citing John Austin, *Essay on Interpretation*, in JURISPRUDENCE 1023, 1028 (3d ed.)).

259. *Id.* at 382-84.

260. *Id.* at 386.

261. *Id.* (footnote omitted).

tive functions within the American Bar Association would impress on the ABA Ethics Committee the limited powers of an interpretive tribunal.

In 1981, Professors Finman and Schneyer noticed that “the work of ethics committees has been largely neglected” by those who study the legal profession.<sup>262</sup> The examination presented here, some fifteen years later, suggests that, unfortunately, the work of Professors Finman and Schneyer has been largely neglected as well. One consequence of this neglect has been a continuation of flawed decision-making on the part of the ABA Ethics Committee. If the only cost of that trend were a loss of respect for and influence of that once-powerful Committee, we might conclude this Article with a shrug. But one senses that the costs may be much dearer, perhaps creating a generalized confusion<sup>263</sup> among practitioners in many jurisdictions regarding “ethics” standards and, even more disquieting, a weakening of the commitment of some lawyers to make the effort required to understand the regime sought to be established through the “ethics codes.” The confusion spawned by “spurious interpretations” also undercuts the ability of rule enforcement agencies to mete out strict sanctions,<sup>264</sup> thus weakening the deterrent effects sought to be generated by the disciplinary process.<sup>265</sup> The strained opinions of the ABA Ethics Committee thus present a problem that can stand no more neglect.

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262. Finman & Schneyer, *supra* note 23, at 70-71.

263. See *supra* note 221 (dissenting opinion of ABA Ethics Committee member Richard L. Amster stating that Formal Opinion 95-396 produced more problems than it solved for practitioners).

264. See WOLFRAM, *supra* note 10, at 67 (noting, for example, that “[b]ar ethics opinions have not played a large role in the discipline of lawyers or in judicial rulings on such matters as the disqualification of a lawyer for conflict of interest”). For an example of a disciplinary case in which the court declined to impose discipline in part because of confusion generated by an ABA ethics opinion that was in conflict with a pre-existing state ethics opinion, see *In re A*, 554 P.2d 479, 487 (Or. 1976) (fact that ABA Formal Opinion 341 (1975) did not require withdrawal upon discovery of client perjury was partly responsible for court’s failure to discipline a lawyer for failure to withdraw, as required by Oregon State Bar Ethics Opinion 227 (1972)).

265. See Eric H. Steele & Raymond T. Nimmer, *Lawyers, Clients and Professional Regulation*, 1976 AM. B. FOUND. RES. J. 917, 999-1000 (noting that a major goal of professional regulation is to deter deviance from articulated norms, with deterrence being a function of the probability that a sanction will be imposed for deviance and the likely seriousness of that sanction).