Establishing National Rules of Lawyer Conduct In Federal District Courts

Judith A. McMorrow, Boston College Law School

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Federal courts are envisioned as the place where, among other things, parties bringing federal questions can proceed in a forum that provides expertise in federal issues and offers uniform application of the law. Inherent in this notion is that the rules for bringing cases should be consistent, whether suit is brought in Kalamazoo, San Francisco, or Boston. While the Federal Rules of Civil Procedure are uniform, local rules—particularly the rules that govern lawyer conduct in federal courts—have been far from uniform. This causes asymmetry within the federal court system, and also raises issues of procedural fairness when lawyers are governed by inconsistent rules. Agreement on who should articulate the rules of lawyer conduct in federal court raises significant federalism concerns, however, because of the traditional preeminence of the states in the regulation of lawyer conduct. Even if one believes that lawyer conduct in federal courts is an overriding federal concern, separation of powers issues make it unclear as to whether the judicial, executive, or congressional branch should articulate the rules of conduct for lawyers in federal court. Practical considerations such as who might enforce rules shape the result. Buried within all these structural, procedural, institutional and enforcement concerns is the substance: what should be the content of the rules governing lawyer conduct?

* Associate Professor, Boston College Law School. B.A., B.S., Nazareth College; J.D., University of Notre Dame. My thanks to George Brown, Daniel R. Coquillette, Joan Shear, Aviam Soifer, Mark Spiegel and Mary Squiers for their insights and to Anna F. Katz for her excellent research assistance. This summary represents my own interpretation and analysis of the Reports to the Committee on Rules of Practice and Procedure of the Judicial Conference.


2. See generally Bruce A. Green, Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules be Created?, 64 GEO. WASH. L. REV. 101 (1996) (examines executive agency and judicial rulemaking); Fred C. Zacharias, Federalizing Legal Ethics, 73 TEXAS L. REV. 335 (1994) (examines whether Congress should develop a national code of ethics applicable to all lawyers in all courts).

3. Much of the current discussion concerning rules of ethics in federal court and choice of law has focused on structural issues that assume neutrality on content. But at the heart is a
The issue of which rules should govern lawyer conduct has come to the forefront largely because of the Local Rules Project of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (Rules Committee). The Rules Committee began an extensive study of federal court local rules in 1987. No area was more fraught with inconsistencies and controversy than the regulation of lawyer conduct. The topic was quickly recognized by the Rules Committee as complex and quite controversial and was left to the end of the study.

The Rules Committee has now pushed the issue to the forefront, aided in part by pressure from federal court practitioners, including the Department of Justice. The purpose of this article is to provide readers with an overview of the problems and proposed solutions regarding what rules should govern lawyer conduct in federal courts. Part I is largely descriptive: it examines the data presented to the Rules Committee, supplemented with a brief overview of some of the excellent, growing literature that has helped develop these issues. Part II analyzes possible solutions in some detail.

recognition that neither federal court judges nor states want to abandon the power to make the substantive judgments about the content of the rules. See David Luban, A Friendly Amendment to Model Rule 8.5, 36 S. Tex. L. Rev. 1015 (1995) (choice of law discussions surrounding ABA Model Rule 8.5 focus on providing bright-line test—the nonambiguity principle—and remaining neutral on controversial judgments of content—the neutrality principle).


5. Coquillette Report, supra note 4. In the words of Professor Bruce Green "the regulation of lawyers has been characterized by uncertainty and disharmony" in federal judicial proceedings. Green, supra note 2, at 104.


8. This brief overview does not provide opportunity for a full review of the literature. Some excellent resources include: Stephen B. Burbank, State Ethical Codes and Federal Practice: Emerging Conflicts and Suggestions For Reform, 19 Fordham Urb. L. J. 969 (1992) (panel remarks); Green, supra note 2; Linda S. Mullenix, Multiform Federal Practice: Ethics and Erie, 9 Geo. J. Legal Ethics 89 (1995); Eli J. Richardson, Demystifying the Federal Law of Attorney Ethics, 29 Ga. L. Rev. 137 (1994); Zacharias, supra note 2.

9. I had the opportunity to observe a presentation by a Special Study Conference to the Judicial Conference, and I participated in the 1996 ABA National Conference on Professional Responsibility panel on Federalizing Legal Ethics. Unless expressly stated otherwise, the opinions stated in this article are entirely my own, but they were shaped by helpful conversations at these events.
This article urges that the Judicial Conference, through its Rules Committee, should balance the competing federal and state interests by developing specific rules of conduct to govern the most common ethical issues in federal courts, such as conflict of interests and contact with represented parties, and leaving all other ethical issues to be governed by state rules. The federal rules could be structured in two ways: the Rules Committee and the Judicial Conference could develop local rules governing lawyer conduct through the Rules Enabling Act; alternatively, the Rules Committee and Judicial Conference could incorporate relevant rules into the federal procedural rules. However the reader balances the range of concerns discussed in this article, the question of what rules will govern lawyer conduct in federal court is still open. Readers have an opportunity to make an important contribution to that debate.

I. REGULATING LAWYER CONDUCT IN FEDERAL COURT: BACKGROUND AND HISTORY OF RULES COMMITTEE ANALYSIS

After having dealt with most of the issues surrounding local rules in federal court, the Rules Committee of the Judicial Conference of the United States could avoid the issue no longer. In 1994, it authorized an in-depth analysis of the local rules regulating lawyer conduct. The Committee's chief author, Professor Daniel R. Coquillette, has overseen two research projects in his role as Reporter for the Rules Committee. The first reviewed the current state of lawyer regulation in federal courts (Coquillette Report); the second examined recent federal cases involving rules of lawyer conduct (Supplemental Report). These two Reports to the Rules Committee, along with recent scholarly work, provide an overview of the range of problems and proposed solutions.

A. WHAT IS THE STATUS QUO?

After a detailed review of 94 different district court rules, the Coquillette Report found that U.S. district courts follow seven fundamentally different approaches in deciding which rules govern lawyers' conduct in the district courts. Typically a local rule incorporates the relevant standards of the jurisdiction in which the district is located. While the form of this approach is consistent, it produces a wide range of results. Some district court local rules adopt the state standard based on: (1) the ABA Model Rules (with local variations) (48 district courts); (2) the ABA Model Code (with local variations) (12 district courts); or (3) "the unique California Rules of Professional Conduct, either


exclusively or in connection with the ABA models” (2 California district courts).\footnote{Id. at 3-4.} Four other approaches involve more independent actions by the federal district courts. Some district courts have, by local rule, adopted the ABA models directly (10 district courts); others have adopted both an ABA model and state standards (10 district courts); some districts have no local rule at all (11 district courts); and, finally, one district has adopted its own rules that vary substantially from the ABA models and the relevant state standards.\footnote{Id. at 4-5 (Northern District of Illinois).} There is also diversity among the federal circuit courts, but fewer reported problems.\footnote{Id. at p. 6 and Appendix III. As Professor Coquillette notes in his report, although theoretically the Circuit Courts of Appeals reflect as much diversity as the district courts, at least the Circuit Court rules are easier to follow and to update. Id. at 8. As Professor Mullenix has noted, lawyers today may be subject to conflicting district and circuit court standards. Mullenix, \textit{supra} note 8, at 102. For purposes of this article, I focus primarily on District Court rules.}

Compiling this data has been challenging for the researchers, but keeping the research up-to-date is even more difficult. The researchers found that “the local rules picture changes monthly, and it is very difficult for loose leaf services to remain accurate.”\footnote{Local Rules Project, \textit{supra} note 5, at 7.} Even more discouraging for the researchers has been that “there is no uniform trend in these changes.”\footnote{Id.}

The overall picture of the rules governing lawyers in federal court is one of structural chaos. Lawyers who do not practice regularly in a particular district court face a challenge in simply finding out which rules apply to their conduct. Lawyers practicing in the 11 districts with no local rules at all “must rely on informal communication or case law. Not surprisingly, this has led to confusion in practice and a variety of solutions when ethical problems do arise.”\footnote{Id. at 8-9. To further complicate the picture, “[s]ome Districts have standing orders that govern attorney conduct.” Id. at 10. Some local rules are so difficult to find that in fact they are essentially “phantom” rules. Mullenix, \textit{supra} note 8, at 104-05.}

Even when a rule is identified, the lawyer often discovers that some local rules have amplified the structural chaos through “bad draftsmanship or by providing ambiguous guidance.” Many local rules are so poorly drafted that they do not clearly identify the applicable standard. In other instances the relevant rule prescribes a standard, but it is unclear whether the standard is the ABA version or the state’s amended version. In yet other cases, the state standard to
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which the local rule refers is ambiguous or poorly drafted, or the local rule refers to multiple rules.\(^\text{19}\)

Even when the local rule is clearly identified and relatively clear in content, federal courts have compounded the lack of clarity through their methods of interpretation. Some federal district courts have incorporated the ABA Model Code or Model Rules into the local rule, even though the local rule fails to mention the ABA models, or have referred to the ABA models to "interpret" the local rules.\(^\text{20}\) *In Re Dresser Industries* provides an illuminating example.\(^\text{21}\) In *Dresser*, the Fifth Circuit reviewed, on writ of mandamus, a district court decision denying defendant's motion to disqualify plaintiff's counsel. The law firm representing the plaintiff was simultaneously representing the defendant in two other matters. The District Court looked to its local rule, which directed the court to look to the Texas Disciplinary Rules of Professional Conduct. The Fifth Circuit could have concluded simply that the District Court misread the Texas Rules and erred in its interpretation.\(^\text{22}\) Instead, the Fifth Circuit concluded that "although the district court should determine rules for the conduct of attorneys for the purpose of identifying conduct subject to sanctions, its local rules alone cannot regulate the parties' rights to counsel of their choice."\(^\text{23}\) This was so, the Fifth Circuit concluded, because motions to disqualify are "substantive motions."\(^\text{24}\) Were there a clear "substantive" body of law, this might have made sense. But the Fifth Circuit concluded in this case that the motion was governed "by the ethical rules announced by the national profession in the light of the public interest and the litigants' rights."\(^\text{25}\) The Court went on to cite federal conflict of interest cases, the ABA Model Code and Model Rules, and drafts of the American Law Institute's Restatement of the Law Governing Lawyers.\(^\text{26}\) Such a flexible process of interpretation has added to the inherent confusion created by the existing local rules.

The tendency to look beyond the precise rule identified is understandable. The majority of jurisdictions rely on some version of the Model Code or Model Rules. The ABA models were drafted, in theory at least, to apply to lawyers in a wide range of practice areas. Consequently, they are often phrased in general

\(\text{19. } \text{Id. at 12-15.}\)

\(\text{20. } \text{Id. at 16-17.}\)

\(\text{21. 972 F. 2d 540 (5th Cir. 1992).}\)

\(\text{22. Id. at 545 note 12.}\)

\(\text{23. Id. at 543.}\)

\(\text{24. This raises the old "substance-procedure" debate, discussed briefly at § II(B)(3).}\)

\(\text{25. Id. at 543.}\)

\(\text{26. Id. at 544-45.}\)
language that leaves ample room for interpretation in a particular litigation context. The district courts often must draw upon any available interpretive tool to make sense of the rules as applied in a particular context.

This wide range of approaches within the supposedly unified federal system is, at best, conceptually annoying. Inconsistent rules on unimportant subjects can be tolerated. The existence of a variety of rules governing lawyers in federal courts, however, is more than an issue of intellectual aesthetics. The Coquillette Report captures the problem:

Recent experience, particularly in the form of a growing number of reported cases, shows that all is not well with the practical application of lawyer conduct rules in the Districts. Ambiguously drafted rules have led to unnecessary litigation, wasting the time of courts and lawyers alike. In addition, some courts have ignored even unambiguous local rules and applied standards from many other sources . . . . In turn, these ambiguities have led to due process and "void for vagueness" challenges in increasing numbers and also litigation over Erie, Supremacy Clause, and conflict of laws issues. In frustration, many federal agencies have begun to promulgate their own lawyer conduct rules, adding yet another layer of complexity and potential conflict.27

Lawyers who practice exclusively in a single federal court have an easier task in identifying the applicable code of conduct that applies in their practice. Lawyers who practice in multiple federal courts are primarily concerned with "horizontal" uniformity among the federal district courts,28 although they are still subject to discipline from the state in which they initially were licensed to practice.29 Lawyers who switch between federal and state courts are more concerned with vertical uniformity. Lawyers who handle litigation that involves both multiple state courts and several federal district courts are faced with even more difficult problems as they confront both horizontal and vertical uniformity issues.30 Finally, lawyers who engage in multijurisdictional practice, but who are concerned primarily about sanctions from the state bar, have looked to "choice of law" provisions contained in the state bar codes or rules for a balm.

27. Coquillette Report, supra note 4, at 11.

28. The distinctions between horizontal and vertical uniformity are made frequently among those who discuss issues of uniformity of ethics rules. See, e.g., Mullenix, supra note 8, at 106.

29. See, e.g., Attorney Grievance Comm' of Md. v. Hopp, 623 A.2d 193 (Md. 1993) (lawyer licensed in Maryland subject to discipline in Maryland for misconduct committed in California 17 years after lawyer stopped practicing in Maryland).

if not a cure. In addition, many federal agencies have developed additional specific rules of conduct with which practitioners must comply as a condition for practicing before the particular agency, creating yet another source of law.31

Incorporating state ethics rules into federal court only cures the vertical uniformity issue and offers little help to lawyers who practice in a variety of federal courts. The practice of state incorporation has been roundly criticized by the Department of Justice, other federal agencies and many national legal organizations (both business and civil rights) that litigate in a variety of federal courts.32 Most litigants would be powerless in the face of this variety of local rules. The Department of Justice (DOJ) is such a dominant actor in the federal courts that it can and has taken action by using its power to create its own rules. While the history of the DOJ position has been addressed at length elsewhere, a brief summary is necessary to describe this major stakeholder in the current debate over what rules should govern lawyer conduct in federal courts.33

Both ABA models prohibit contact with a represented party except with the consent of the party's lawyer or if authorized by law.34 These rules, adopted in every state, began to be applied to undercover investigations directed by Department of Justice lawyers. In 1989, Attorney General Richard Thornburgh issued a memorandum asserting that contact with a represented party by a DOJ lawyer in the course of authorized law enforcement activity does not violate the no-contact rule.35 Courts initially resisted this seeming encroachment on their power to regulate the conduct of lawyers appearing before them. In 1992, the DOJ adopted a new approach, using the regulatory process to craft a regulation that would govern DOJ lawyers, both prosecutors and civil-side counsel, in federal court. After notice, comments, and redrafting, the Department promulgated a new rule in 1994.36 The new rule allows DOJ lawyers to do things that would otherwise be prohibited under the ABA Model Code or Model Rules. In

32. Id. at 1, and 13-32.
33. See, e.g., Rory K. Little, Who Should Regulate the Ethics of Federal Prosecutors, 46 FORD. L. REV. (forthcoming) (concludes Attorney General has the power to preempt state and local authority over ethical rules for federal prosecutors but should not exercise that power); Amy R. Mashburn, A Clockwork Orange Approach to Legal Ethics: A Conflicts Perspective on the Regulation of Lawyers by Federal Courts, 8 GEO. J. LEGAL ETHICS 473 (1995) (concludes Attorney General does not have the power to preempt); Green, supra note 2.
criminal matters, the regulation allows prosecutors and their agents to pursue investigations by communicating with individuals even if represented, with some limits on the ability of prosecutors to engage in negotiations for pleas, immunity, and similar matters in certain circumstances. After an individual is arrested or charged, the regulation becomes more restrictive. The regulation purports to preempt both court and state rules that are more restrictive, although it is not at all clear that federal courts will honor this claim of preemption. This path of preemption sets a pattern for other areas in which the DOJ has a significant interest.\textsuperscript{37} The DOJ's position has increased the stakes significantly in the current debate over who decides the standards for lawyer conduct in federal court.

B. THE SCOPE OF THE PROBLEM

To identify the ethical issues raised in federal courts, the Rules Committee directed Professor Coquillette to undertake an analysis of how frequently issues involving problems of lawyer conduct have arisen in reported federal cases and what category of rules were involved. To allow for a manageable body of data, the researchers analyzed reported cases from 1990-1995.\textsuperscript{38} They found 851 cases involving lawyer conduct, 443 of which dealt with the local rules governing lawyer conduct. (The remaining 408 cases involved issues of lawyer conduct governed by Rule 11 of the Federal Rules of Civil Procedure and other standards.) The results were "unmistakable and simple."\textsuperscript{39}

- Conflict of interest rules presented by far the largest category of cases involving lawyer conduct, representing 46\% of reported federal disputes (204 of 443 cases), of which 163 were civil and 41 criminal disputes.

- In a distant second place came rules involving communication with represented parties (Model Rule 4.2 or equivalent), reflected in

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\textsuperscript{37} See Little, supra note 33 at § I (A).


\textsuperscript{39} Id. at 3. But cf. Mary C. Daly, Resolving Ethical Conflicts in Multijurisdictional Practice—Is Model Rule 8.5 the Answer, An Answer, or No Answer At All?, 36 S. TEX. L. REV. 715, 764-66 (1993) (in her analysis of choice of law issues arising in conflicts between or among the professional ethics standards of two or more states, Professor Daly found "[t]he universe of judicial decisions and state bar association opinions addressing how to resolve ethical conflicts in multijurisdictional practice is strikingly small: approximately three cases and eleven opinions, totally fewer than one hundred pages").
10.6% of the reported cases (47 of 443 cases). The majority of these cases (65.9% or 31 of 47 cases) involved civil disputes, while 34.1% (16 of 47) were criminal—14 of which involved the Department of Justice.

- Issues involving the lawyer as witness were raised in 10.1% (45 cases) (Model Rule 3.7)—with 80% civil (36 of the 45 cases) and 20% (9 of 45) criminal.

- The fourth most common issue involved fees (Model Rule 1.5 type issues), which was raised in 4.8% of the cases (21 cases), all but one civil.

The remaining cases dealt with a wide range of rules. Only 14 of the reported cases involved Model Rule 1.6 confidentiality issues (9 civil and 5 criminal). Only two cases involved issues of corporate confidentiality (Model Rule 1.13). As the Supplemental Report makes clear, "[t]his is not to say that issues of professional confidence do not arise frequently in federal cases, but rather that such problems are not resolved in the federal courtroom." The Supplemental Report also discovered that the majority of rules played little or no role in reported decisions. "Sixteen Model Rule categories never occurred in 5 years, despite the substantial number of federal cases involving attorney conduct. Many other categories were represented by no more than 4 cases, (or less than 1%)." There were only a handful of reported decisions concerning declining or terminating representation, candor toward the tribunal, or fairness to an opposing party.

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40. Coquillette, supra note 38, at 3-4.

41. While only 14 of the 443 reported federal cases during this period involve confidentiality issues, the possibility of conflicting disclosure obligations is a commonly-cited example of the problem with disparate rules of ethics. See, e.g., Daly, supra note 39, at 717; Roach, infra note 125, at 911-12; Luban, supra note 3, at 1016; Susanna Pelleman, Note, Ethical Dilemmas and the Multistate Lawyer: A Proposed Amendment to the Choice-of-Law Rule in the Model Rules of Professional Conduct, 95 COLUM. L. REV. 1500 (1995). To the extent that the lawyer elects non-disclosure, in most cases the court will never discover the dilemma and there is no opportunity for a reported decision.

42. Coquillette, supra note 38, at 4.

43. Id. at 5.

44. Professor Coquillette later updated this report with a study of reported cases from July 1, 1995 – March 23, 1996, which closely tracked the original study. This update found an additional 77 cases. Conflict of interest issues dominated with 33 of the 77 cases (28 civil). Four cases involved the organization as a client and corporate confidentiality (Model Rule 1.13); four involved candor to the tribunal; four addressed lawyer as witness, three addressed fees. Only one
It should not be surprising that most problems arising in the context of litigation in a federal district court call into question the integrity of the trial process in the particular case before the court. Conflicts of interest, for example, presumably raise a significant question about the lawyer's ability to be an effective advocate in the case before the court. Issues of communication with represented parties and lawyer as witness raise similar adversary system concerns. In all of these instances, an adversary has an incentive to bring the issue to the attention of the district court for the express purpose of seeking a remedy that will benefit the adversary's client—disqualification, exclusion of evidence, etc. While litigation-based questions provide a clear context in which to evaluate a lawyer's conduct, the possible tactical use of conduct rules requires that district courts be measured and careful in their response. The district court must figure out which rule applies (no easy task) and then interpret the often ambiguous rule. This litigation context also means that the judge need only consider the perspective of the parties before the court; non-litigants who also might be affected by the interpretation of the rule do not have any input.\textsuperscript{45}

The district court judge, in theory, could refer an errant lawyer to the state disciplinary process or could even invoke an independent disciplinary mechanism.\textsuperscript{46} Federal district courts judges, however, have been very cautious about serving as general overseers of lawyer conduct.\textsuperscript{47} Even the preliminary question of eligibility to practice in federal court is contingent, in most district courts, on being a member of a state bar.\textsuperscript{48} District court judges appear content to focus their attention primarily on the behavior of lawyers in the cases before them. As discussed below, however, they still wish to retain residual power to provide a more serious sanction in egregious cases.

The Supplemental Report analyzed only reported cases. It is likely that a greater number of disputes never result in a reported decision. An issue of lawyer conduct is almost always ancillary to the merits of a case. Courts have to

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\textsuperscript{45} Green, \textit{supra} note 2, at 170.
\textsuperscript{46} \textit{Id.} at 161-64.
\textsuperscript{47} \textit{Id.} at 163; Richardson, \textit{supra} note 8, at 148-151. See generally ABA Center for Professional Responsibility and Standing Committee on Professional Discipline, \textit{The Judicial Response to Lawyer Misconduct} (1984).
\textsuperscript{48} Marie Cordisco, \textit{Eligibility Requirements For, and Restrictions On, Practice Before the Federal District Courts} (Federal Judicial Center Nov. 7, 1995) (59% of the federal district courts limit membership in its Bar to lawyers who are members of the bar in the state or territory where the district court is located; remaining require some sort of eligibility or admission to practice in courts or membership in state bar).
\end{flushleft}
make measured decisions not only about how much time and effort must be invested to develop a detailed written analysis, but also about whether the issue is of sufficient precedential value to publish the ruling.49 Some significant issues also may be resolved via preliminary motions that, depending on the procedural posture, are not ripe for challenge.

The picture of the regulation of lawyer conduct in federal courts, and the district courts in particular, is not pretty. The Rules Committee study sets out the contours of the problem and the Rules Committee now must decide what path to recommend to the Judicial Conference.

II. THE RANGE OF SOLUTIONS: FINDING A CURE

The Rules Committee reports identify a range of options in response to this plethora of existing approaches to the regulation of lawyer conduct in federal court.50 The options include maintaining the status quo; urging uniform local rules; or mandating a national rule or rules that apply in every district. Each of these options is debated in the dual shadow of unstated philosophical differences and immediate practical concerns. Before discussing the various options in detail, it is helpful to clarify further some of these underlying issues.

A. PHILOSOPHICAL DIFFERENCES AND PRACTICAL CONCERNS

1. More History and Context: Narrowing the Question

We have had federal courts since the beginning of the Republic, yet controversy concerning disparate rules of lawyer conduct is fairly recent.51 This phenomenon may be attributed to several factors. Until quite recently, we had at least a “semblance of uniformity” in the rules of lawyer conduct “because of the virtually unchallenged universality” of the 1908 ABA Canons of Ethics.52 Courts may not have been entirely happy with the content of the uniform rules before the 1970s, but we can infer that judges generally did not confront problems arising out of the diversity of rules. The Canons, which were for the most part not adopted by the states, became increasingly unhelpful in guiding lawyers in the modern practice of law. In 1969, the ABA promulgated its Model Code

49. Many court opinions appear in unpublished slip opinions. See, e.g., Coquillette Report, supra note 4, at 9, 10, 12, 16.
50. The options discussed here are not mutually exclusive.
51. See Burton C. Agata, Admissions and Discipline of Attorneys in Federal District Courts: A Study and Proposed Rules, 3 HOFSTRA L. REV. 249, 252 (1975) ("[s]poradic, perhaps, is the most apt description of the attention paid by the federal judicial system to the regulation of attorneys practicing in federal courts").
52. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 50 (1986).
of Professional Responsibility with relatively little controversy, and sent it on to
the states for their consideration.\textsuperscript{53} Initially embraced by the vast majority of
states, the Model Code was amended by the ABA frequently in the 1970s. With
each amendment came increasing differences as some states embraced the
changes and others rejected them.\textsuperscript{54} The Model Code generated significant dis-
cussion, which culminated in a decision to redraft it in its entirety.\textsuperscript{55} By 1983,
when the Model Rules of Professional Conduct appeared, individual states were
even more apt to shape the proposed model to their own vision of proper con-
duct (or at least proper regulation). The Model Rules were not accepted with
the open arms that had greeted the Model Code.\textsuperscript{56} The result has been increas-
ing diversity among the state codes regulating lawyers,\textsuperscript{57} with a clear trend
toward an increasing "legalization" of the legal profession.\textsuperscript{58} In this evolution
we have moved from "canons" to "codes" to increasingly specific "rules," and
from "ethics" to "professional responsibility" to "conduct."\textsuperscript{59}

Just as we have increasing diversity and legalization in the codes, we also
have an increasing number of lawyers and greater public consciousness about
and criticisms of what lawyers do.\textsuperscript{60} The nationalization and internationaliza-
tion of practice adds to the complexity.\textsuperscript{61} In addition, lawyers are now subject
to a wide range of regulation. Lawyers now face tort liability, procedural rules
such as Rule 11 of the Federal Rules of Civil Procedure, governmental agency
rules, and legislation that explicitly directs their conduct.\textsuperscript{62}

We add to this mix awareness of the historic problems within the discipli-
nary systems run by lawyers. In 1970, the ABA Special Committee on
Evaluation of Disciplinary Enforcement, chaired by former Justice Tom C.
Clark, found the paucity of lawyer disciplinary actions "a scandalous situation

\begin{enumerate}
\item Id. at 56 (preliminary draft presented in January 1969, adopted with some amendments
      in August 1969). In contrast, the Model Rules generated significant controversy during the drafting
      process. Id. at 61-62.
\item Id. at 56-57.
\item Id. at 60-61.
\item Id. at 62-63.
\item See ABA/BNA LAW. MAN. ON PROF. CONDUCT 01:11-01:46 (July 24, 1996).
\item Id. at 1249.
\item Id. at 1239.
\item See Symposium, supra note 30.
\end{enumerate}
that requires the immediate attention of the profession.\textsuperscript{63} The primary focus of the Clark Report was on the enforcement process, and not on the content of the rules governing lawyers.\textsuperscript{64} In 1970, the ABA established the National Discipline Data Bank to provide a central depository for state disciplinary actions to help prevent lawyers from simply moving to the next state to practice after disbarment.\textsuperscript{65} Soon thereafter, the ABA issued uniform rules for disciplinary enforcement.\textsuperscript{66} During this process of examining disciplinary structures, the ABA began to focus its attention on federal courts. Inspired in part by Watergate, the ABA in 1978 recommended Suggested Guidelines for Uniform Federal Rules of Disciplinary Enforcement.\textsuperscript{67} The focus, again, was primarily on process.

The question of lawyer conduct in federal courts arises out of these rapid changes in the legal profession, and its spotty record of self-enforcement, over the last 30 years. Part of the problem with self-enforcement is the legal profession's understandable confusion about what we seek to do with lawyer regulation. We seek demonstration of competence from the flawed process of the bar exam. Yet we also sometimes make unabashedly moral judgments about good character. To implement the regulatory function, however, we take these concerns and select out standards and rules that allow at least the appearance of objectivity and the opportunity for neutral enforcement.\textsuperscript{68}

Because various entities in the legal process have divergent interests, crafting a standard of conduct that meets with everyone's approval can be an impossible task. As stated above, the organized bar has a strong regulatory interest. The courts have a slightly different interest. Both state and federal courts wish

\textsuperscript{63} ABA Special Commission on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement 797 (1970) (commonly known as the Clark Report after its chair). The Clark Report noted that Government lawyers, house counsel for corporations and others often practice in jurisdictions in which they are not licensed, and consequently are not subject to discipline. \textit{Id.} at 863-67.

\textsuperscript{64} \textit{Id.}

\textsuperscript{65} \textit{Agata, supra} note 51, at 281-82.


\textsuperscript{67} These Guidelines are discussed in more detail at § B(2). \textit{See also} Wolfram, \textit{supra} note 52, at 143, n. 23 (states that ABA promulgated Suggested Guidelines for Uniform Federal Rules of Disciplinary Enforcement as a “preemptive move” to avoid Congressional imposition of a system of disciplining federally admitted lawyers).

to control the conduct of lawyers appearing before them and to protect the integrity of the adversarial process. However, what weight a state court gives a particular issue—for example, implementing conflict rules—may differ greatly from that of a federal court. Clients have a third interest; they want, among other things, competence and loyalty. Clients harmed by lawyer wrongdoing typically use the tort system through malpractice claims. The standard of conduct for malpractice claims may be different from that desired by the organized bar or the courts.

Recognizing that different interests exist, both the ABA Model Rules and Model Code expressly attempt to limit their own impact to the regulatory process. Yet even if we acknowledge and accept differing interests, they often cannot be implemented because different regulations may seek to regulate the same conduct. Few wish a system in which court rules require one form of conduct, malpractice standards a second, and state bar regulation a third. Consequently, some form of reconciliation is needed. Because most courts and bar counsel are reasonable, in many cases they have reconciled their differences. In most jurisdictions, for example, a state rule of professional conduct is admissible in a malpractice action. Reconciliation of different interests is not mandated, however, and inevitably one interest will refuse to bow to another. For example, there currently is no reconciliation (although perhaps a quiet truce) among the Department of Justice, state disciplinary bodies and courts concerning the no contact rules.

We end up with an on-going tension among multiple entities with legitimate differing interests who wish to have a say about the substance of the ethics rules. We also have a strong tension between the desire for ethics and the practical need for rules. While there might be no "one august corpus" of true law in matters of contracts or torts, one pines for notions of right and wrong in ethics. The very nature of the subject matter makes the disparate rules all the

69. See generally John S. Dzienkowski, Legal Malpractice and the Multistate Law Firm: Supervision of Multistate Offices; Firms as Limited Liability Partnerships; and Predispute Agreements to Arbitrate Client Malpractice Claims, 36 S. TEX. L. REV. 967 (1995).

70. Model Rule, Scope 16 (1983) ("[v]iolation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached"); Model Code, Preliminary Statement (the Model Code does not "undertake to define standard for civil liability of lawyers for professional conduct").

71. See Geoffrey C. Hazard, J., Lawyers and Client Fraud: They Still Don't Get It, 6 GEO. J. LEGAL ETHICS 701 (1993).

72. See Dzienkowski, supra note 69, at 976 and note 46.

73. See supra note 33.

more remarkable. All of these forces push us to seek clarity and consistency. When the crucial question ultimately becomes a very practical concern for clarity and consistency, we find ourselves in familiar territory. The next step is to ask who should regulate. This naturally leads to questions of federalism and separation of powers.

2. Federalism and Separation of Powers

Federalism lurks throughout the discussion of lawyer conduct. No one suggests that federal courts cannot adopt their own rules to govern lawyer conduct. Whether drawing on the Judiciary Act of 1789 or the inherent power of the courts to regulate lawyer conduct, the federal courts have independent power to regulate the conduct of lawyers appearing before them. One court articulated this authority as "an absolute and unfettered power of the district court to admit and to discipline members of its bar independently of and separately from admissions and disciplinary procedures" of the state court and of the federal court of appeals. In fact, that power is circumscribed by an abuse of discretion standard and by constitutional limitations, but the core power of the district court to establish lawyer standards is not challenged by commentators or by state bar counsel.

But what is it that federal courts should decide? In Selling v. Radford, the Supreme Court envisioned two conditions for membership to the U.S. Supreme Court bar: membership in the Bar of the highest court in the state and "fair private and professional character." That latter criterion involves an independent assessment and is infused with meaning by the federal courts. Consequently, the Supreme Court has made clear that federal district courts cannot automatically disbar a lawyer from practice from federal courts based solely on disbarment from the state. In making this independent assessment of whether a lawyer

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75. The literature cited in this article reflects very little concern about the style, quality or actual ethics of lawyers engaged in multijurisdictional practice. The discussion is dominated by this desire for clarity and consistency, with content a distant second.


77. See generally In re Snyder, 472 U.S. 634, 645, note 6 (1985); Theard v. United States, 354 U.S. 278 (1957); Ex parte Burr, 22 U.S. 529 (1824); Wolfram, supra note 52, at 32.


79. See, e.g., id. at 1103-04 (must follow precedent and own procedural rules).

80. See supra notes 2, 8 & 30.

81. 243 U.S. 46, 49 (1917).

82. Theard v. United States, 354 U.S. 278 (1957), relying on Selling v. Radford, 243 U.S. 46 (1917). In Theard, the petitioner forged a promissory note in 1935. He was "committed to an
possesses the requisite "fair private and professional conduct"\textsuperscript{83} to practice in federal court, the state determination is entitled to "high respect."\textsuperscript{84} The district court, however, has a duty not to accept that judgment if there is a "grave reason" in light of "the principles of right and justice" not to disbar.\textsuperscript{85}

Federal courts have been told by the U.S. Supreme Court that they must retain the power to determine character and fitness, but it is apparent that federal courts do not wish to set up an investigatory system parallel to the state systems. In most circumstances they are quite willing to simply rely on the state system. There is a basic prudential concern: because states traditionally have set standards for admission and licensing, and in that process have articulated the rules of lawyer conduct, a federal court should defer to the careful assessment of a state.\textsuperscript{86} It is also clear, however, that federal courts have the blessing of the U.S. Supreme Court not to defer when they disagree substantively with the state determination.

This discussion also triggers separation of powers issues. The very confidence—some might even say occasional arrogance\textsuperscript{87}—that federal courts exhibit in asserting their own power to control lawyer conduct is threatened by the possibility of other branches of the federal government intervening. As noted above, the Department of Justice articulated rules of lawyer conduct concerning contact with witnesses and currently asserts that the DOJ rule trumps local district court rules. Executive rumblings are not the only source of concern. The Judicial Conference in earlier times could be fairly certain that its recommen-

\begin{itemize}
  \item \textsuperscript{83} 243 U.S. at 50.
  \item \textsuperscript{84}  Theard, 354 U.S. at 282. The federal court's local rule expressly provided that disbarment from a state court results in suspension from federal practice, with an opportunity to show good cause why the lawyer should not be disbarred.
  \item \textsuperscript{85} 243 U.S. at 51.
  \item \textsuperscript{86} The National Conference of State Chief Justices strongly urges this deference. \textit{Cf.} Middlesex County Ethics Commn v. Garden State Bar Assn, 457 U.S. 423, 434 (1982) (federal court should exercise discretion to abstain from enjoining pending state disciplinary proceeding because states have an "extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses"); In Re Cook, 49 F.3d 263, 265 (7th Cir. 1995) (court traditionally refers matters to state bar because of its investigatory abilities, superior perspective in observing entire practice, and "cooperative federalism").
  \item \textsuperscript{87} See, e.g., supra note 78.
\end{itemize}
dations would be accepted without congressional intervention, but that time clearly has passed. In recent years, Congress has been quite willing to overrule or even bypass Judicial Conference recommendations. Increasing openness of the rulemaking process also increases the opportunity for politicizing that process.

What is wrong with Congress developing the rules of lawyer conduct in federal court? National legislation is an obvious cure to disuniformity. Arguably, placing the issue in an overtly political context sheds light on the covertly political process that some assert is on the rise in the judicial rule-making process.

Not surprisingly, neither the Rules Committee nor the ABA is actively encouraging a Congressional cure. Congressional involvement requires that the constituents in the federal court debate—states, lawyers, ABA, federal judges—give up power without assurance that their concerns will be reflected in a political forum. (The Department of Justice is the one entity that might welcome congressional involvement because of the DOJ's close relationship to Congress and its ability to sell its position as an effort to fight crime.) The fear that legitimate concerns will be swept up into political factionalism is quite justified. Because "complex technical issues of judicial practice cannot sustain attention through the political process," it is easy to envision Congress using the political process to score political points rather than to develop thoughtful rules. When coupled with the traditional power of judges to control the proceedings before them, courts understandably cry separation of powers (even if they cannot use it as a trump card) in urging that Congress not attempt universal regulation.

3. The Enforcement Concern: Clarifying the Goals of Federal Court Enforcement

89. Id.
90. Mullenix, supra note 8.
91. Felleman, supra note 41, at 1521-22 (discusses Congressional power).
94. Some states have used a state separation of powers argument as a trump card in declaring exclusive authority to define the practice of law. See Wolfram, supra note 52, at 23 (most state courts assert a "negative inherent powers doctrine" that allows only the courts to regulate the practice of law).
Another related, very practical concern involves enforcement. Two basic forms of enforcement come into play. The first involves a judge directly sanctioning a lawyer for misconduct in connection with a proceeding before the judge. This derives from the inherent power to control the proceeding before the court. That sanction might involve an order to disqualify counsel, imposition of a fine, denial of a fee, or a contempt citation. The court also may, at its discretion, refer the conduct to the state disciplinary authority for possible sanctions by the state in which the lawyer is licensed to practice.

In complex cases, and in cases in which there is more than a single lawyer of record, the court has an interesting challenge when it attempts to control the conduct of lawyers who may be working behind the scenes on discovery and investigatory matters but who are not admitted in the particular federal district court. It is quite common to have an associate of a large firm take or defend a deposition without being admitted to the district court. In such cases, the judge is likely to exert pressure through the lawyer of record. It is less clear how far the court can reach if it observes misconduct in a deposition in which the defendant is a third party who has retained local counsel. If that local counsel is not otherwise admitted to the federal district court, the sanction will likely be referral to the state in which that lawyer practices. As Professor Mary Daly notes, "[f]rom the perspective of the courts . . . the participation of a nonadmitted attorney interferes with their authority to regulate lawyer conduct" and "holds

95. ABA Model Rule of Professional Conduct 8.5, entitled "Disciplinary Authority; Choice of Law," distinguishes between conduct "in connection with a proceeding in a court" and "for any other conduct." At first glance "in connection with" seems self-evident, but it has some crucial ambiguities. See, e.g., Edward A. Carr & Allan Van Fleet, Professional Responsibility Law in Multijurisdictional Litigation: Across the Country and Across the Street, 36 S. Tex. L. Rev. 859, 892-93 (1995) (discussing the meaning of "in connection with"); Daly, supra note 39, at 759-60.

96. See supra notes 77-94 and accompanying text.

97. See, e.g., General Mill Supply Co. v. SCA Services, Inc., 697 F.2d 704 (6th Cir. 1982) (disqualification by district court affirmed).

98. See, e.g., In Re Cook, 49 F.3d 263 (7th Cir. 1995) (contempt fines imposed by district court; disciplinary proceedings initiated by court of appeals after state disciplinary officials failed to take action; two year suspension imposed).


100. See generally ABA Center for Professional Responsibility and Standing Committee on Professional Discipline, supra note 47.

101. This idea for this issue comes from Professor Mary Daly. See supra note 39, at 718 and 778 (in context of Model Rule 8.5).
the complaining courts captive to out-of-state disciplinary authorities." ¹⁰² This problem arises in both federal and state courts.¹⁰³

A second, distinct form of enforcement occurs when a federal court sanctions a lawyer by suspending or disbarring the lawyer from practice in that particular federal court. This imposes a sanction that reaches beyond the current case. If federal district courts wish to consider behavior that occurs outside a pending proceeding, or impose a sanction beyond a single case, some enforcement mechanism is needed. This approach ought to entail procedures for identifying the charge, giving notice and an opportunity to be heard, finding a prosecutor or counsel to build the case, identifying a fact-finder, perhaps setting up an appeal process, and stating the possible sanctions in advance. Typically the sanction involves suspension and disbarment from practice in that district court.¹⁰⁴ Again, this sanction has no bite in federal courts if the lawyer is not admitted to the court or has been admitted pro hac vice for the particular proceeding. In all likelihood, the lawyer would be prohibited from future pro hac vice admissions, but otherwise not sanctioned by the federal court.¹⁰⁵

Both forms of enforcement—sanction in the proceeding before the judge and prospective sanctions limiting future practice—force us to consider the court’s particular interest. The interest in controlling the proceeding before the court is self-evident. The broader interest in protecting against future misconduct by limiting or prohibiting the lawyer’s practice in federal court is more complex. Because courts, by their very authority, “hold out to the public that individuals are competent to represent clients” it follows that “it is the judges who shoulder the burden when the regulatory system fails to protect the public.”¹⁰⁶ This latter interest seems stronger for state courts than federal courts.

¹⁰². Id. at 778.

¹⁰³. This problem can be cured by a jurisdictional statement that a lawyer who delivers legal services in a proceeding before a federal court in which he or she is not admitted submits to the authority of the court. This is a modification of Professor Daly’s suggestion concerning choice of law issues among states. Daly, id. at 787. The range of sanctions may be reduced but, if supplemented with vigorous referrals to state disciplinary bodies, this approach provides the court with greater control.

¹⁰⁴. See, e.g., In Re Cook, supra note 98. In Cook the Seventh Circuit referred the wrongdoing to the Illinois Attorney Registration and Disciplinary Commission, which declined to proceed because the district court judge refused to testify beyond the statements in her opinions about the misconduct. The Seventh Circuit then instituted its own disciplinary action in the Court of Appeals and suspended the lawyer from practice in the court of appeals for two years. Judge Easterbrook expressed clear dismay at the failure of the state disciplinary body to proceed, noting that state boards have a “superior perspective.” 49 F. ³d at 265.

State courts typically have undertaken the responsibility to set up a comprehensive scheme for admissions and for establishing ethical standards and disciplinary enforcement systems.\(^{107}\) As noted above, federal courts typically have relied on the comprehensive state systems for initial screenings (bar examinations, etc.). Although there is considerable variety among the federal courts, the majority of federal district courts still rely on the states, at least formally, to articulate the standards of lawyer conduct by incorporating state standards.\(^ {108}\) To my knowledge, no Article III court has a full-time staff comparable to a state bar counsel’s office to monitor lawyer conduct, or staff identified to provide advisory opinions on the meaning of professional conduct standards. Given this absence of a federal advisory and enforcement structure, lawyers confronted with questions about ethics in federal court are likely either to go to their state ethics committees or the ABA for advice,\(^ {109}\) or to “resolve the issue on their own or in the privacy of their offices.”\(^ {110}\)

In the late 1970s, the Judicial Conference attempted to address some basic enforcement issues in federal courts. They focused on the second form of enforcement in which the court wishes to sanction the lawyer beyond the pending case or for conduct that did not occur in a pending proceeding. A special committee of the Judicial Conference headed by Judge Ainsworth found that there was no uniformity of practice in enforcement. In the majority of cases the federal courts relied on the state bar machinery. Some jurisdictions appointed a special committee, typically underfunded and understaffed, to investigate. Three jurisdictions used the U.S. Attorney to investigate claims of inappropriate conduct.\(^ {111}\) The Judicial Conference approved a proposal to submit a bill to Congress to have the Department of Justice investigate and prosecute claims of lawyer misconduct.\(^ {112}\) No bill was passed. By 1978, the complexities of uniform enforcement had become more obvious. Judge Ainsworth’s committee ultimately proposed a soft approach, recommending that the Judicial Conference

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106. ABA Center for Professional Responsibility and Standing Committee on Professional Discipline, supra note 47, at ii.

107. Id. at ii.

108. See supra note 12 and accompanying text (62 federal district courts incorporate state standards).

109. See, e.g., ABA Comm. on Ethics and Professional Responsibility, Formal Op. 360 (1991) (discusses application of District of Columbia rule permitting practice in partnership with non-lawyers as applied to lawyers admitted both in D.C. and in another jurisdiction that prohibited the practice). This opinion is discussed in Daly, supra note 39, at 767-68.

110. Daly, supra note 39, at 766 (quote in context of how uncertainty in choice of law concerning lawyer ethics “prompts avoidance and nondisclosure”).

first approve the Model Federal Rules of Disciplinary Enforcement for lawyers in federal court and then urge each of the federal courts to adopt them. The Model Federal Rules of Disciplinary Enforcement consisted of 15 model local rules. They addressed issues such as how to proceed against a lawyer convicted of a crime, the effect of discipline imposed by other courts, independent disciplinary proceedings, and the like. Almost all of the 15 rules focused on process and enforcement. Despite this significant effort, the Model Federal Rules met with minimal success, as only a third of the federal district courts adopted them.

The supporting documents accompanying these model local rules make clear that the Judicial Conference had a very broad view of its goal—which was no less than a shoring up of the integrity of the legal profession. Admission to the bar, a Conference committee explained, is a privilege that requires the lawyer "to conduct himself at all times in conformity with the standards imposed upon members of the Bar as conditions for the privilege to practice law." In turn, "[i]t is the duty of the Court to supervise the conduct of the members of its Bar in order to assure the public that those standards are scrupulously adhered to." This duty cannot be delegated to the states. Broad language such as this justifies federal court sanctions when a federal court sees fundamental values undermined by a particular lawyer. It reinforces the visceral power the federal courts feel toward the issue of lawyer regulation. Yet, the experience with the Model Federal Rules of Disciplinary Enforcement also...
makes clear how difficult it can be to impose uniformity on the federal courts. Despite this rhetoric, federal courts are not willing to undertake comprehensive oversight of lawyer regulation.

The enforcement issue clarifies three points in the current discussion. First, federal courts retain the power to set standards, but in practice often rely on the states. Second, the federal courts wish to retain the power to impose sanctions beyond the pending case—including disbarment from practice in the federal court—in egregious circumstances. Third, federal courts are not eager to be told how to structure this power.

With these underlying concerns in mind, we now turn to some of the specific current proposals.

B. THE SOLUTIONS AND CHALLENGES PRESENTED BY THE SOLUTIONS

1. Do Nothing

The Rules Committee might do nothing. The current situation might be deemed a tolerable cacophony that has some benefits. The fluid situation allows district courts to reflect local values in their assessment of lawyer conduct. Values derived from diversity arguably exist even among federal courts. Local dialogue may be enhanced by developing rules on a case-by-case basis with specific facts presented to a judge. The Model Rules or Model Code or state versions would serve merely as a starting point for analysis, allowing district courts flexibility and thereby increasing the chances that the widest range of values will be reflected in the outcome. In other words, rules on lawyer conduct should have the same flexibility as any area of common law. Lawyers frequently counsel clients that they have no choice but to deal with the uncertainty of the changing common law or unpredictable interpretations of statutes. If clients have to cope with indeterminacy in assessing their conduct, what is wrong with asking lawyers to cope with indeterminacy in evaluating the lawyer's conduct?119 Lawyers seem to want greater certainty in the realm of ethics than in other areas of law. Perhaps we are seeking greater certainty than the subject matter will allow. We might learn from ethicists, who are "less passionate about the mess their discipline is in than we lawyers are likely to be about our messes."120

While this argument has some force, the common law itself recognizes the need for guidance and predictability in human interactions. Judges and acade-

119. What's good for the goose is good for the gander. Cf. Kathleen Clark, Is Discipline Different? An Essay on Choice of Law and Lawyer Conduct, 36 S. Tex. L. Rev. 1069, 1073 (1995) ("even if we assume that choice of law principles are unduly confusing, it seems ironic that lawyers, who are entrusted to further their clients' interests, have attempted to reduce the confusion that they themselves face, while not reducing the confusion that their clients face").

omics have spent considerable effort to clarify whether federal or state procedural rules apply in diversity cases.\textsuperscript{121} That same concern applies in the closely related area of lawyer conduct.

Maybe "ethics" needs fluidity, but evaluating and sanctioning lawyer conduct is an area in which relatively clear rules are appropriate and desirable. Challenges to lawyer conduct involve not just "make whole" relief to someone who claims to have been harmed, but also a potentially devastating censure of the lawyer. The lawyer has engaged in "unethical" or "unprofessional"\textsuperscript{122} or even "immoral" conduct.\textsuperscript{123} That evaluation, which is often made public, strikes at the very essence of the professional identity of the lawyer. In the context of sanctions, ethics is not an academic argument. Frankly, ethicists can afford to be less passionate because "they have less at stake than we do."\textsuperscript{124} As Arvid Roach, who assisted in drafting the new ABA Model Rule concerning choice of law, put it: "[a]ttorneys should not have to 'bet their licenses' on such uncertain gambles."\textsuperscript{125} Even the courts recognize that when the sanction is disbarment, it "has consequences which remove it from the ordinary run of civil case[s]."\textsuperscript{126}

Some suggest that variability in rules is not significant because the lawyer can avoid problems by adhering to the strictest rule. For example, only a handful of jurisdictions state expressly that a lawyer commits professional misconduct by having a consensual sexual relationship with a client.\textsuperscript{127} (Most lawyers, and every bar counsel, will tell you that having a sexual relationship with a client

\textsuperscript{121} This is the Erie morass. \textit{See generally} Joseph W. Glannon, \textit{Civil Procedure: Examples and Explanations} 131-195 (2d ed. 1992).

\textsuperscript{122} \textit{See}, \textit{e.g.}, \textit{In re Beck}, 902 F.2d 5, 6 (7th Cir. 1990) ("unprofessional preparation" of two page appellate brief in criminal case justified one year suspension because it raised "a substantial question whether he is capable of doing more good than harm for a client using his services").

\textsuperscript{123} \textit{See}, \textit{e.g.}, \textit{Kimball v. Florida Bar}, 537 F.2d 1305 (5th Cir. 1976) (abstention proper because under Florida law a lawyer could be disbarred for immoral conduct unrelated to the practice of law).

\textsuperscript{124} Shaffer, \textit{supra} note 120.

\textsuperscript{125} Arvid E. Roach II, \textit{The Virtue of Clarity: The ABA's New Choice of Law Rule for Legal Ethics}, 36 S. Tex. L. Rev. 907, 923 (1995). \textit{See also id. at} 922 ("[p]ractitioners must make ethics decisions on a short time frame, and rarely have the luxury of obtaining formal bar opinions").

\textsuperscript{126} Matter of Abrams, 521 F. 2d. at 1099 (also quotes approvingly that disbarment "is a punishment or penalty imposed on the lawyer").

\textsuperscript{127} \textit{See}, \textit{e.g.}, Minnesota Rule 1.8(k). Depending on the circumstances, a lawyer can be disciplined for having sexual relations with a client even in the absence of a per se prohibition. \textit{See}, \textit{e.g.}, Office of Disciplinary Counsel v. Booher, 75 Ohio St. 3d 509 (1996); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-364. But absent a clear prohibition, the client may
is a terrible idea, but it is not per se sanctionable in most jurisdictions.\textsuperscript{128} The Minnesota Rules of Professional Conduct, however, expressly prohibit a lawyer from engaging in sexual relations with a current client unless a consensual sexual relationship existed between them before the lawyer-client relationship commenced.\textsuperscript{129} If a lawyer is unclear whether the Minnesota Rules or the Model Rules apply, for example, the lawyer simply should not sleep with the client. By adhering to the strictest standard, we enhance the standards of legal professionals and encourage prudential conduct. (Almost) everyone benefits.

In some circumstances, however, the lawyer may be placed in situations in which one set of possibly-applicable rules calls for conduct directly in conflict with a second set of possibly-applicable rules. For example, the rules for the Northern District of Illinois allow lawyers to advance money to indigent clients, but the Illinois state rules prohibit the practice.\textsuperscript{130} A lawyer who is uncertain whether the case will be filed in state or federal court (or be removed after suit is commenced) must guess which rule will ultimately apply. This type of rule may never ever come to the attention of the federal court or end up in a reported decision, but it poses real problems for a lawyer preparing a case.\textsuperscript{131} This example is also problematic because good moral arguments can be made both for allowing and for prohibiting the advancement of funds. One cannot simply assume that all rational lawyers would find such conduct wrongful.\textsuperscript{132}

\textsuperscript{128} For one analysis of why sexual relations between a lawyer and client is a bad idea, see Davis & Grimaldi, \textit{id}.

\textsuperscript{129} Minnesota Rule 1.8(k).

\textsuperscript{130} \textit{Cf.} N. D. Ill. Gen. R. 39 with Ill. Rules of Prof. Conduct 1.8(d).

\textsuperscript{131} ABA Model Rule 8.5 states that the court's rules would govern for activities "in connection with a proceeding in the court." This leaves a significant question about whether this language covers pre-filing activity, particularly for a corporate lawyer whose transaction may end up in court. Carol A. Needham, \textit{The Multijurisdictional Practice of Law and the Corporate Lawyer: New Rules for a New Generation of Legal Practice}, 36 S. Tex. L. Rev. 1075, 1094 (1995).

\textsuperscript{132} Mark H. Aultman, \textit{Moral Character and Professional Regulation}, 8 Geo. J. Legal Ethics 103, 105-06, 108 (1994). For a discussion of the complexities in class actions, see Rand v. Monsanto Co., 926 F.2d 596 (7th Cir. 1991) (majority and concurrence). For a second example, consider criminal defendants who have been arrested for less serious crimes who may also have claims (or assert a claim) of police misconduct in the arrest. By either filing a 42 U.S.C. § 1983 claim or threatening to present such a claim, potentially conflicting duties emerge. Prosecutors
In addition, clients who directly or indirectly pay for the litigation and delays in the case while the issue of lawyer conduct is litigated would also be unlikely to call this situation tolerable. Even if the lawyer absorbs the cost of litigating the challenge to the lawyer's conduct (a point not governed by any written rule), the client can be profoundly affected by the delay and distraction.

Concluding that the status quo is not a good situation is only half of the task. The status quo, with all of its flaws, may be better than the alternatives. To evaluate that claim, we need to consider the range of additional options.

2. Model Local Rule Incorporating State Standards

The least intrusive method of change is for the Rules Committee to propose a "uniform model local rule" incorporating the state standard in each federal district court. Under this plan the Judicial Conference would send a proposed model rule to the 94 district courts and encourage and exhort them to adopt it as the local rule. Just like other model code projects, the local authority would retain power over the content. The district court could decide simply to ignore the model rule and proceed as it had been doing, or adopt the model with whatever variation the district court wishes.

The biggest strike against this process is that it was tried before and failed, at least in its previous incarnation. As noted above, in 1978 the Committee on

and defense lawyers often negotiate an agreement in which the prosecutor dismisses the criminal charges on condition that the defendant not pursue civil claims. Both lawyers likely believe that this agreement is required under the duty to represent one's client zealously within the bounds of the law. Yet many versions of the Model Code and at least one state's modification of the Model Rules provide that a lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter. Model Code of Professional Responsibility DR 7-105(A) (1981); Louisiana Rule of Professional Conduct 8.4(h). Here the lawyer representing the state cannot "cure" the problem by selecting the rules that satisfies all the potentially applicable standards. To represent the client zealously under one standard may encourage prosecutors to hold open the criminal charges as a bargaining chip in the civil case. Under the Mode Code requirements such conduct is prohibited. If the lawyer is unclear which rules apply, the client might reasonably state that the lawyer has a duty to comply with the rules that favor the client if there is an arguable basis to do so. For a very good development of the idea that lawyer codes and rules are interpreted for adversarial advantage, see David B. Wilkins, Legal Realism for Lawyers, 104 HARV. L. REV. 469 (1990). Professor Seth Kreimer provides a very fine analysis of the use of release-dismissal agreements under §1983. See Seth Kreimer, Releases, Redress, and Police Misconduct: Reflections on Agreements to Waive Civil Rights Actions in Exchange for Dismissal of Criminal Charges, 136 U. PA. L. REV. 851 (1988). See also J. McMorrow, Who Owns Rights: Waiving and Settling Private Rights of Action, 34 VILL. L. REV. 429 (1989).

133. See generally Richardson, supra note 8, at 176-77 (discusses unfairness to lawyers, clients, increased burdens on federal courts, and hindering progress towards an ideal law of lawyer ethics); Zacharias, supra note 2, at 357-65 (discusses effect on clients' perception of lawyers).

134. As Reporter to the Committee on Rules of Practice and Procedure, Professor Coquillette has urged the Judicial Conference to reject this option.
Court Administration and Case Management of the Judicial Conference proposed the "Model Federal Rules of Disciplinary Enforcement." 135 These 15 model local rules focused almost entirely on process. The exception was Model Rule 4, which set out the “Standards for Professional Conduct.” It provides a good example of the choices available:

A. For misconduct defined in these Rules, and for good cause shown, and after notice and opportunity to be heard, any attorney admitted to practice before this Court may be disbarred, suspended from practice before this Court, reprimanded or subjected to such other disciplinary actions as the circumstances may warrant.

B. Acts or omissions by an attorney admitted to practice before this Court, individually or in concert with another person or persons, which violate the Code of Professional Responsibility [or Rules of Professional Conduct] adopted by this Court shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship. The Code of Professional Responsibility [or Rules of Professional Conduct] adopted by this Court is the Code of Professional Responsibility [or Rule of Professional Conduct] adopted by the highest court of the state in which this Court sits, as amended from time to time by that state court, except as otherwise provided by specific Rule of this Court after specific consideration of comments by representatives of bar associations within the state.

The Judicial Conference distributed the Model Rules of Disciplinary Enforcement to all circuit and district courts "with a recommendation that they be adopted by these courts on an optional basis." 136 Approximately one third of the district courts adopted the Rules of Disciplinary Enforcement. 137 It is unclear whether this tepid acceptance was due to concerns about enforcement, the substantive provisions, or other issues.

As a matter of process, therefore, the model local rule system cannot be said to have a good track record. Perhaps the Judicial Conference would achieve better results if it sent out a model local rule with a signal that "we really mean it." They have no authority, however, beyond moral suasion and perhaps the threat of more intrusive action in the future. If this approach is to work, all or at least most of the 94 district courts need to be persuaded. It would take a lot of telephone calls and meetings to achieve such a result.

135. ABA/BNA LAW. MAN. ON PROF. CONDUCT 01:701.
137. Id. at 41.
The ABA's recent experience in urging states to adopt the revised choice of law rule, Model Rule 8.5, underscores the problem. In 1993, the ABA amended the previous version of its Model Rules to clarify what rules a state should look to when evaluating multijurisdictional practice. To date the states have largely ignored the new proposed rule.\textsuperscript{138} The lack of enthusiasm by the states for Model Rule 8.5 stems in part from problems in both substance and drafting.\textsuperscript{139} Ironically, the very freedom of each state to establish rules of conduct has led to the need for a choice of law provision. The Judicial Conference does have a more captive audience than does the ABA, but both state supreme courts and federal judges have similar habits of independence that make them skeptical of uniformity.\textsuperscript{140}

Despite a negative track record, there is some political value to attempt a model local rule approach before moving to a more intrusive option. It would require local district court discussion of the content and arguably is more democratic. Local conversation about what rules should apply at least increases the opportunity for input.\textsuperscript{141} This process might reveal factors that the Rules Committees has not yet considered. This approach also encourages dialogue on an important issue of how we view the role of lawyers.\textsuperscript{142}

On a substantive level, Model Rule 4 resolves several problems, but it leaves others unaddressed. By incorporating a state standard, the rule provides vertical uniformity (between federal and state courts within a district court's jurisdiction) but it does not alter multidistrict concerns. The rule clarifies where to look once jurisdiction is known. (A choice-of-law rule for multidistrict litigation would clarify the multidistrict issue.) This model rule also provides for automatic updating: if a state amends its standard after the local rule is adopted, that change is incorporated by reference. A federal district court may like the ease of that rule, but dislike the loss of control that will occur, particularly if the federal court does not monitor state changes carefully.


\textsuperscript{139} Model Rule 8.5 is exhaustively analyzed in the symposium issue on \textit{Ethics and the Multijurisdictional Practice of Law}, 36 S. TEX. L. REV. 657 (1995). Model Rule 8.5 does not fare well when exposed to the judgment of the 17 commentators. \textit{See also} Mullinex, \textit{supra} note 8.

\textsuperscript{140} Gregory B. Adams, \textit{Reflections on the Reaction to Proposed Rule 8.5: Consensus of Failure}, 36 S. TEX. L. REV. 1101, 1105 (1995) ("[t]he ABA's proposed modification of Rule 8.5 is itself an admission by the ABA of its loss of hegemony in the prescription of lawyer regulations").

\textsuperscript{141} Fed. R. Civ. Pro. 83 (requires "appropriate public notice and an opportunity to comment" before amending local rules); Carl Tobias, \textit{Suggestions for Circuit Court Review of Local Procedures}, 52 WASH. & LEE L. REV. 359 (1995).

\textsuperscript{142} For more discussion on the importance of dialogue, see Judith A. McMorrow, \textit{Rule 11 and Federalizing Legal Ethics}, 1991 B.Y.U. L. REV. 959.
Most important to those district courts who may disagree with a particular state standard, however, is the fact that the model rule provides for an opt out procedure. Opting out enhances local control and increases the odds of acceptance by the federal district court, but it also sets the seeds for the kind of disuniformity that plagues the current system. If opt out jurisdictions are not vigilant, in a few years we might well find ourselves back to high levels of disuniformity. There is reason to think courts will not periodically reconsider local rules. The federal system is in its current state of serious disuniformity in part because no jurisdiction has a crushing problem regarding its ethics rules. The situation is more like a low-grade fever for which no single district has sufficient incentive to spend time and resources until the issue rises to the top of the district’s “urgent” list. With the press of other business, a district court may not consider subsequent amendments to local rules until confronted with a particular case. It is then too late to apply a new or revised rule to the pending action.

As an alternative, the Rules Committee could craft a local rule that directs the federal courts to look at the ABA Model Rules of Professional Conduct instead of to the state standard. This provides horizontal uniformity among the federal courts, but disunity between federal and state courts. Incorporating the Model Rules would be a harder sell, and appropriately so. The Model Rules have been controversial. Some of the controversy has been worked out at the state bar level, where states consider the range of possibilities and determine for themselves the difficult policy balances. Many federal court judges have been active in their state bars before their appointment to the federal bench. They are likely to feel loyalty to the state bar and to its efforts to articulate standards of conduct. The Conference of Chief Justices, which represents the interests of state courts, has strongly urged that incorporation of state standards be the norm. Factors such as these are likely to make federal district court judges more comfortable referring to the state codes rather than the ABA Model Rules. Moreover, it is philosophically troublesome to delegate final drafting power for court rules to a voluntary professional organization.


The Rules Committee might recommend a national rule, similar to a rule of civil procedure, stating that federal courts always look to the state standards in which a federal district court is located. The substantive content of the rule might be the same as a model local rule, but the authority behind it would be much stronger. Because of requirements under the Rules Enabling Act, a national rule would also be more difficult to get passed.

143. Coquillette Report, supra note 4, at 33.

144. Green, supra note 8, at 158-60.
This approach plunges into a vastly nuanced area of law. As a general rule, substantive law in federal courts is governed by the state law absent applicable federal law. Recognizing that federal courts need rules of practice, Congress passed the Rules Enabling Act. The Rules Enabling Act authorizes the Supreme Court to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts and courts of appeals.

The Act expressly provides that "[s]uch rules shall not abridge, enlarge or modify any substantive right." This directly raises the issue of whether the rules regulating lawyer conduct in federal court are substance or procedure within the meaning of the Rules Enabling Act. Rules of lawyer conduct are not directed toward the litigants. They do not affect the court's evaluation of the plaintiff or defendant's out-of-court conduct. They are not core to the underlying dispute.

Given the Supreme Court's liberal interpretation of "procedure," and the traditional inherent power of courts to regulate the practice of law before them, it is not surprising that the Rules Committee does not even question the legitimacy of establishing standards for lawyer conduct.

The real force within the Rules Enabling Act comes from its supersession clause, which provides that "[a]ll laws in conflict with such rules shall be of no further force or affect after such rules have taken effect." The supersession clause makes clear that a federal rule of lawyer conduct will trump any Department of Justice or other executive branch rule, and gives strong notice to federal judges that they must look to the content of the rule passed under the power of the Rules Enabling Act. The power behind the Rules Enabling Act has the potential to curb the free interpretive process that has emerged in many federal courts when they consider local rules of lawyer conduct.

145. See generally The Rules of Decision Act of 1789, 1 Stat. 92 (1789), 28 U.S.C. §1652 ("The laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply").


148. Cf. Mullinex, supra note 8, at 128-29 (defining core and collateral professional responsibility issues).


150. Mullinex, supra note 8, at 128-29.

151. See, e.g., Hanna v. Plumer, 380 U.S. 460, 472 (1965) (Congress has constitutional authority to "make rules governing the practice and pleading in courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either"); Green, supra note 8, at 154.

152. 28 U.S.C. §2072(b). See also Carrington, supra note 88; Burbank, supra note 149.
This greater power comes at a price. The Rules Enabling Act establishes a procedure for developing and amending rules.\textsuperscript{153} The nine-step process can take anywhere from three to eight years, or more. The Judicial Conference and the appropriate advisory committee must go through the requisite steps of notice, opportunity to be heard, and approval before sending the rule to the Supreme Court.\textsuperscript{154} This process also may trigger Congressional involvement.

Assuming a new federal rule directs federal courts to look to state rules, this approach retains the inherent inconsistencies of the state rules, but at least it gives notice to lawyers about where to look for regulation of their conduct. Unless expressly allowed, federal district courts cannot "opt out" of this rule, closing that avenue for lack of uniformity. Like the model local rule, a national rule promotes consistency between state and federal practice, but occurs "at the expense of inter-district practice" and leaves in place the continued possibility of divergent interpretations of similar language.\textsuperscript{155}

Either the softer model local rule or the stronger national rule are compromise positions that give greater respect to the states' traditional role in setting standards for lawyer conduct. The next two options involve a more proactive stance.

4. Establishing a Full Set of Professional Conduct Rules for Federal Court Practice

A special Act of Congress or the Rules Enabling Act could be used to establish a uniform set of rules governing lawyer conduct in federal courts, similar to the Federal Rules of Civil Procedure. Such an approach invokes the supremacy clause and makes clear that the federal rules trump any inconsistent state law or federal agency rule. While there surely would be unexpected glitches, developing rules to govern lawyer conduct through the Rules Enabling Act would achieve several distinct goals. This would create dispositive, uniform rules that federal courts could ignore only at the significant risk of being overturned on appeal. This would also achieve "horizontal uniformity" at the expense of vertical uniformity.

Substantively, this result could be achieved through a simple national rule that either incorporates the ABA Model Rules of Professional Conduct into the uniform federal rules or adopts them as an "appendix" to the federal rules.\textsuperscript{156} This approach poses serious issues both about the relative comfort level regula-

\textsuperscript{153} 28 U.S.C. §2074.

\textsuperscript{154} Carrington, \textit{supra} note 88, at 164-65.

\textsuperscript{155} Green, \textit{supra} note 2, at 167 (calls federal-state consistency "illusory" because judicial interpretation will continue to reflect different interests).

\textsuperscript{156} Coquillette Report, \textit{supra} note 4, at 38.
tors have with the Model Rules and about whether such power should be delegated to the ABA. In addition, the Model Rules are drafted to apply to a wide range of practice settings. They are not tailored to the types of questions that are frequently raised in multidistrict practice.\textsuperscript{157}

To cure these problems, Professor Bruce Green suggests that the Judicial Conference adopt a new code, independent of the Model Rules.\textsuperscript{158} This option provides uniform rules drafted by a more neutral body than either the administrative or legislative branches. Professor Fred Zacharias recommends a more far-reaching solution through the development of uniform national rules of lawyer conduct that would apply to both federal and state courts.\textsuperscript{159} A uniform set of national rules, through whatever option, has the obvious advantage of uniformity.

A system of national rules of ethics goes too far, too fast. Both political and practical concerns militate against this approach. From the point of view of state judges, this option encroaches too much on the states' legitimate interests. States have played the dominant role in regulating lawyer conduct. They see the practice of law in a wide range of settings, including litigation, general advising, transactional matters, legislative work, and law reform. States are closest to the day-to-day practice of law and, arguably, to the clients that lawyers serve—a perspective often neglected in these debates.\textsuperscript{160} As a practical matter, efforts to create national and uniform rules is working against the national political trends to decentralize.\textsuperscript{161}

The data compiled in the Supplemental Report also indicates that a global solution would be overkill. The reported decisions focus on four main areas of concern: conflict of interest; contact with represented parties; lawyer as witness; and fees. Why put time and effort into a broader document than needed to cure the most common reported problems? The time may come when we need national rules, but the data indicates that time has not yet arrived.

The federal government is also unlikely to create an infrastructure to replace the regulatory mechanisms within the states or even to help the federal courts take on more rigorous enforcement. Fewer than half of the federal districts courts even adopted the Model Rules of Disciplinary Enforcement. Those

\textsuperscript{157} Green, supra note 2, at 158.

\textsuperscript{158} Green, supra note 2.

\textsuperscript{159} Zacharias, supra note 2. Even Professor Zacharias became a "nouveau realist" when he acknowledged that the time may not yet have come to supplant the state rules entirely. Fred C. Zacharias, A Nouveau Realist's View of Interjurisdictional Practice Rules, 36 S. Tex. L. Rev. 1037, 1041-42 (1995) ("almost uniformly, the symposium participants dismiss as implausible the possibility of nationalizing state regulation").

\textsuperscript{160} Daly, supra note 39, at 793 ("[i]n all the discussions of multijurisdictional conflicts no mention is ever made of clients' interests").

\textsuperscript{161} See supra note 159.
rules set up processes, but not a machinery, for enforcement. There is no funding for review, investigations, or for setting up enforcement procedures.

In addition, establishing national rules of lawyer conduct through a forum that requires congressional involvement may well turn out to be a very slippery slope. Arguably, "[n]o matter how carefully the legislation was crafted, it would inevitably place lawyers under the thumb of Congress . . . ."¹⁶² This increases the chance of special interest capture. Why take such a risk if the problem can be largely cured by less risky measures?

5. The Tailored Approach: Small Set of Substantive Standards

A fifth option has emerged after analysis of reported federal cases: adopt uniform national federal rules for lawyer conduct only in certain key areas, with all other cases governed by state standards. This more limited approach would focus on areas of particular federal interest that consume the most judicial resources. It would require that all other issues be governed by the relevant state standard. The Rules Committee has identified the areas of most immediate federal interest (conflicts, contact with represented persons, lawyer as witness and fees). The reported cases show them the range of relevant fact-patterns that occur in federal court. They provide a rich body of data that the Rules Committee could use to tailor the specific rules to the kind of problems that emerge in a federal context. This narrower approach also reduces, but does not eliminate, the risk of congressional involvement.

More importantly, this approach strongly contextualizes the discussion and recognizes the "fact-contingent nature of applied ethics."¹⁶³ Different conflict problems arise in single versus multiple law offices (common in large multidistrict litigation) and in class actions. If we are compelled out of necessity to regulate lawyer conduct, we should at least know the context in which the regulation will occur and tailor the regulation to that context. Using tailored rules for the most common problems provides the body of rules necessary to resolve most common issues as they emerge in the proceedings before the court. When the court wishes to impose a broader sanction, such as disbarment from practice before the federal court, it would look to the specific rules. If no answer were found there, then the court would "default" to the state rules.

The push and pull of the varying interests also indicates that some form of a tailored approach addresses the widest range of interests. The state supreme court justices are interested in preventing a slippery slope of nationalization of legal practice. The executive branch, as exemplified by the Department of Justice rule, has an obvious self interest in clarifying the no-contact rule and a

¹⁶². Daly, supra note 39, at 784.

tailored approach would satisfy their concerns for uniformity. Federal courts need substantive rules that offer consistency and clarity and that would be achieved in the most common cases. These legitimate interests push toward the more cautious approach of drafting federal rules for those subjects in which there is a dominant federal interest. In other words, the rules of conduct would deal primarily with the subjects that have been the primary source of litigation.

D. THE WRONG QUESTION?

Several elements within the current debate suggest that the Rules Committee may be asking the wrong question. First, there is a separate, vigorous discussion about choice of law rules in multistate jurisdiction matters. The primary focus of that debate is to clarify how lawyers who cross state lines should be regulated by state bars. This debate seemingly has had only marginal influence on the Rules Committee discussion. Federal court judges are so used to being leaders, and they are so accustomed to the trump card of the supremacy clause, that they do not seem to have considered how the federal courts can structure their rules to achieve the larger goals of a well-regulated legal profession. Instead, the discussion is subtly but clearly shaped by the federal courts determining what is in their own best interests. Who can blame the federal courts, since states also will look at the issues from a similar perspective.

Arguably all procedural rules govern lawyer conduct. When determining how a particular lawyer should proceed in litigating the case before the court, the ethics question typically merges with the question of what achieves the fairest adversarial process in the federal courts. Consequently, perhaps the question of lawyer conduct is better framed as an issue of procedure. For example, if context is important, perhaps we would be better served by a specific rule of civil procedure governing conflicts of interests in civil cases and lawyer as witness. Perhaps problems with conflicts in representing class actions is better addressed directly under Rule 23 governing class actions. Each of these affects the integrity of the adversarial process, as much as failure to serve notice of the complaint. Criminal Procedure rules would focus on contact with represented parties (primarily a criminal law interest). We would separate out rules that may overlap with ethical concerns but are grounded in the need to protect the integrity of the judicial proceeding. This leaves to the bar the power to define, clarify and identify issues that procedure does not identify.

164. See Green, supra note 2, at 127-30. The DOJ would still need to persuade the Rules Committee and the Judicial Conference about the content of the rule.

165. This situation brings to mind the old joke, “Where does a 500 pound gorilla sit? Anywhere it wants to.”

166. See generally Mullenix, supra note 8, at 92-93.
CONCLUSION

The question of what rules should govern lawyer conduct in federal courts raises at least five distinct issues: structural concerns over inconsistency in a supposedly uniform system; procedural fairness in the ambiguity concerning which rules apply; institutional and separation of powers concerns over who should articulate the rules of lawyer conduct; enforcement concerns; and finally—and most importantly—the substantive content of the relevant rules. Identifying the rules that apply to lawyer conduct in federal court is an exercise in law-making. Litigants, judges and the Rules Committee are seeking reasonably clear rules to be enforced meaningfully in the judicial context. Given the pull of this range of legitimate policy concerns, the best approach is one that clearly identifies the federal interest in a well-functioning adversarial process and pursues that interest.

To determine the rules for federal courts is an extraordinarily important task, but it is not the complete picture of proper lawyer conduct. The Reports to the Rules Committee, as well as recent influential articles by academics, notably avoid any significant use of the term lawyer “ethics.” Instead, they emphasize lawyer conduct. Following the evolution of language in the ABA efforts at self regulation, we have moved from Canons of Ethics, to Codes of Responsibility, to narrower Rules of Conduct.\footnote{167} Identifying standards for lawyer conduct in federal court is an extremely important enterprise. Yet we should not assume that we therefore are identifying lawyer ethics. That is a much larger task.

A second important caveat is appropriate. We are not yet ready for national rules for admission and practice of law. The hydraulic pressure toward national standards for lawyers, however, is likely to continue beyond the current concern for practice in federal courts. Law firms have been offering services through national and regional advertisements that cross state lines. The use of the Internet to offer legal services has spurred a vigorous conversation on the Internet among practitioners and legal ethics professors about whether current rules on unauthorized practice, prohibitions on false and misleading advertising, and consumer protection laws are sufficient to protect consumers.\footnote{168} The North Atlantic Free Trade Agreement (NAFTA) has spurred significant interest in cross-boundary practice of law among Canada, the United States, and Mexico. Nationalization and internationalization is likely to create pressure to create a national licensing scheme at least for some forms of practice. The question of the moment, however, involves lawyer conduct in federal court. There is currently no strong push to create a national bar with national standards for

\footnote{167} Hazard, \textit{supra} note 58.

\footnote{168} This listserv is maintained by Washburn University, Topeka, Kansas.
admission that would allow a lawyer to practice in any court—state or federal. Our current discussion focuses on what rules should govern lawyer conduct in federal court, but how we answer this current question and the content of the rules that ultimately emerge surely will influence any future nationalization.