The Evolving Regulation of the Legal Profession: The Costs of Indeterminacy and Certainty*

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I. Introduction

All normative systems incorporate norms of varying strength, and establish incentives with a range of costs and benefits. This point is true for both the 1908 Canons of Professional Ethics and the Model Rules of Professional Conduct. An examination of the approach of these two systems of lawyer regulation reveals significant differences in orientation and incentives. The differences are worth understanding because the Canons' approach continues to have force today via common law rules applicable to lawyers. Focusing on the differences between the expression of norms of the 1908 Canons and the reorientation of incentives under the Model Rules, this Article explores discontinuities between today's dual system of lawyer regulation under the Model Rules and common law actions. It describes the modern structure of lawyer regulation from the lawyer's perspective, noting the mixed messages and uncertainty of the dual system.

The approach of the Canons emanates from the common law tradition. The Canons rejected hard and fast rules and trusted in the gradual evolution of norms through decisional law that relied on the rule of reason to apply general standards to particular cases. The approach lacked clear guidance regarding what conduct was prohibited. Its after-the-fact determination of whether conduct was reasonable or culpable and subject to sanctions was marked by indeterminacy—the absence of certainty. The unfortunate result from the perspective of lawyers is that the nebulous standard of a duty of reasonable conduct necessarily creates the risk of discipline or liability for lawyers, even though the standards they are judged by are diffuse and lacking in clarity. The cost of the indeterminacy of the common law approach of the Canons thus fell on lawyers.

By contrast, the Model Rules emphasize certainty. This rules-based approach employs a statutory orientation. Emphasizing clear notice and due process, the system presents an approach reminiscent of criminal statutes. The result of the

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rules-based approach is a more limited potential for imposition of sanctions. Only those cases adverted to or within the specific ambit of the rules are subject to sanctions. The result is a reduced likelihood of unjust or unexpected sanctions on lawyers. Compared with the common law choice of indeterminacy, the modern regulatory regime of disciplinary actions affords fuller process and fuller protection to lawyers. The Rules move from a standard of sanctions for unreasonable conduct with the background of reasonableness formed by centuries of law, to a closed-end standard of sanctions for violation of stated norms only. Thus, the Rules lessen the costs to lawyers of imposition of sanctions in situations of uncertainty. They impose an additional cost, however. They enhance uncertainty when combined with the continued force of common law rules, which are applicable to lawyers just as they are to others. Enhanced protection against unfair sanctions may also carry costs as well. To the extent that public confidence in the system of justice is compromised, protection of lawyers may be seen as unduly protective of lawyers, resulting in public cynicism.

Part II of this Article examines in detail sanctions for violations of legal norms and, additionally, the comparative force of types of norms in the U.S. legal system. Part III describes the history of the development of the rules of legal ethics, exploring the orientation of the Canons of Professional Ethics and the Model Rules. It considers the rationale for indeterminacy in the common law and compares the costs of the common law system with the greater specificity achieved by the Model Rules. As a way of plumbing the different orientations of the common law and the Model Rules, Part IV examines the lawyer's duty of truthfulness to others set forth in Model Rule 4.1 and the common law. It contrasts the apparent clarity of the Model Rule with the more nebulous approach of the common law of misrepresentation, concluding that the apparent clarity of the Rule may be illusory and may give lawyers a false sense of certainty and security that is incompatible with the reality of legal duty under the law of misrepresentation. Part V explores the costs of the different normative approaches detailed here, including the costs of confusion inherent in today's system of dual standards. Part VI concludes by questioning whether the Model Rules achieve their purpose of clear guidance and noting the costs and benefits of incentives of the current system of lawyer regulation.

II. The Structures of Normative Systems

The law can be understood as a system of norms created to influence the behavior of individuals and groups in society. The law "exerts influence through its effects on social norms, the market, or other circumstances that people consider when deciding how to behave."[1] Considerations of proportionality and the gravity of the interests at stake lead to a natural hierarchy of sanctions. For example, the social norms of protecting the safety and physical integrity of members of society inform both common law and statutory law standards.

1. Richard A. Primus, *Bolling Alone*, 104 COLUM. L. REV. 975, 1016 (2004).

A. A Continuum of Legal Sanctions

The legal norms imposed by law are not uniform. Rather, the law employs varying degrees of protection for interests of different levels of significance. The severity and stigma of criminal sanctions reveals a judgment by society that the interests protected by such laws are more deserving of protection than the interests protected by civil remedies. Moreover, they also reveal a judgment about the culpability of the violations. Put another way, violations of the public norms of criminal law are regarded as more blameworthy than violations of other law. The judgment that conduct is blameworthy bears a relation to the interest harmed. The culpability of the conduct has independent significance as well. This point is clear from the fact that conduct that cuts off an individual's interest in life gives rise to harsher punishment when the conduct is intentional rather than merely negligent. Likewise, a breach of contract results in more limited damages than interference with contract even though the interest harmed is the same.[2]

While the sanctions of tort law are not as severe as those of criminal law, they are significantly more severe than contract damages. Criminal law and tort law involve breaches of public norms. By contrast, except in extraordinary cases, the breach of a contract involves generally a breach of a private norm created by the parties.[3] Although the term "private law" often refers to law that "traditionally encompassed the common law of contract, torts, and property that regulate relations among individuals,"[4] the public-private dichotomy also distinguishes between norms individuals choose and those that society imposes.[5] While a person can choose not to enter a contract, he cannot opt out of the norms imposed by tort and criminal law. Everyone is subject to the public norms against creating unreasonable risks of harm to others.[6]

The comparative force of legal remedies and sanctions is by no means the only structural consideration of importance in legal systems. In order to further the incentive systems it establishes, the law employs a variety of structural devices

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2. *See* Texaco v. Pennzoil, 729 S.W.2d 768 (Tex. App. 1987) (holding Texaco interfered with hand-shake contract between Pennzoil and Getty Oil and imposing verdict of $10.5 billion); *See* Carvel Corp. v. Noonan, 818 N.E.2d 1100, 1103 (N.Y. 2004) (noting that plaintiff may recover damages for tortious interference with contract even if defendant's conduct was lawful where defendant deliberately interfered with existing, enforceable contract).

3. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 351 (1981).

4. Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 404 (2006) (noting that "all legal regimes, even if ostensibly private at common law, are in some sense public.").

5. A court may displace this general norm of expectancy damages under contract law with a more generous measure when the court finds conduct violates a public norm such as the obligation of good faith. *See* Nicholson v. United Pac. Ins. Co., 710 P.2d 1342, 1348 (Wyo. 1985) (noting obligation to act reasonably in exercising approval and holding that deceit can give rise to punitive damages resulting from a breach of the implied covenant of good faith and fair dealing).

6. *See* Irma S. Russell, *The Logic of Legal Remedies and the Relative Weight of Norms: Assessing The Public Interest in the Tort Reform Debate*, 39 AKRON L. REV. 1053 (2006).

such as specific and general rules, burdens of proof, and choices regarding levels of indeterminacy and certainty in legal tests. The fluidity of the concept of negligence is a prime example of indeterminacy in the law. The concept of negligence utilizes intentional indeterminacy to encourage non-negligent conduct. This point is often expressed in terms of a "line." Lawyers talk about coming close to the "line." They debate whether conduct "crosses a line." When it is less than certain where the "line" of a rule lies, parties are well-advised to act with caution. Accordingly, actors in the real world are likely to give a "wide berth" to the rule on negligence. In the process, they act more carefully and less negligently. Thus, indeterminacy pushes parties away from "the line" of harmful conduct, enlarges the sphere of non-negligent conduct, and creates a safer world for society in the process.[7] One dimension of indeterminacy from the common law is the place of general (and less than fully articulated) principles in the common law. The orientation of a ubiquitous requirement of reasonableness versus a showing of intentional wrongdoing—like the default of general principles versus clear-cut rules—is foundational, as basic as a view that a chessboard is a black background with white squares superimposed, or, alternatively, that it is a white background with black squares superimposed.[8]

B. Indeterminacy and the Common Law

Indeterminacy permeates the common law tradition. The common law employs general concepts of rights and obligations, growing by analogy to encompass new examples of harm. While the common law approach carries the benefit of enhancing reasonable conduct in the real world, it may carry a cost of liability for people who lack clear notice.

One might ask why the common law would intentionally create a situation of indeterminacy rather than establish clear norms. Even though parties subject to regulation yearn for certainty and people generally prefer definite rules and expectations, the common law and even statutes often intentionally opt for indeterminacy. Taking seriously the effects of legal doctrine provides a clear-cut answer for this lack of clarity. General standards may encourage reasonable conduct precisely because of their lack of clarity. If norms are assumed to intend their natural results, such standards encourage reasonable and non-negligent conduct. For example, the doctrine of material breach in contract law makes it difficult for a party assessing a situation to determine whether or not the other party is in material breach.[9] Thus, the extreme remedy of terminating the contract is only

7. *Id.*

8. A slight reconfiguration of norms can have dramatic effects. In the book "How to Rig an Election: Confessions of a Republican Operative" Allen Raymond argues that techniques to undermine opponents, such as interfering with phone service to disrupt polling, are permissible unless a statute or case prohibits directly the conduct. This approach ignores the common law duty of reasonable conduct.

9. Restatement (Second) of Contracts § 241 summarizes the test for material breach. It states:

241. Circumstances Significant In Determining Whether A Failure Is Material

available in extraordinary situations, making it more likely that the parties will work out disputes and go forward with performance.

Courts often celebrate the indeterminacy of the common law. The Supreme Court has eulogized the "'flexibility and capacity for growth and adaptation'" as the "'peculiar boast and excellence of the common law.'"[10] "[T]he Equal Protection Clause does not demand a surveyor's precision" in fashioning classifications.[11] Courts often note the benefit of flexible rules. "The common law is not rigid and inflexible."[12] For example, in explaining the scope of the concept of the traditional police power in *Hawaii Housing Authority v. Midkiff*, the Supreme Court noted: "'An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts.'"[13] In *Lucas v. South Carolina Coastal Council*, the Supreme Court noted the vague yet workable test for a regulatory taking in "the oft-cited maxim that, 'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.'"[14] The Court did not attempt to draw a bright line regarding what it intended by "too far." Rather it noted that it has "generally eschewed any 'set formula' for determining how far is too far, preferring to 'engag[e] in . . . essentially ad hoc, factual inquiries.'"[15] Similarly, while courts occasionally endorse bright line rules, they generally favor

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> In determining whether a failure to render or to offer performance is material, the following circumstances are significant:
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> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
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> (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
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> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
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> (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
>
> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Both this provision, and the decisional law it embodies, encourage parties to stay in the contract they have formed together to work out their disputes rather than "calling the whole thing off." While it may be clear that a party is in breach of the contract entitling the injured party to damages, the doctrine embraced by the doctrine of material breach makes it unlikely that the injured party can rightly withhold his own performance except in cases of a certain breach by the other party.

10. Colgrove v. Battin, 413 U.S. 149, 162 (1973) (citing line of cases celebrating flexibility and capacity for growth and adaptation of the common law).

11. Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 814 (1976).

12. Oppenheim v. Kridel, 140 N.E. 227, 230 (N.Y. 1923).

13. Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 239 (1984) (quoting Berman v. Parker, 348 U.S. 26, 31, 32 (1954)) (internal citations omitted).

14. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1014-15 (1992) (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)) (internal citations omitted).

15. Lucas, 505 U.S. at 1015, (quoting Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978)).

flexible tests, "designed to account for factual nuances."[16] Courts typically reject simple "mathematically precise" tests,[17] and "mathematical certainty,[18] reminding readers that legal principles are "not susceptible to reduction to a mathematical formula."[19] Likewise, the Supreme Court has noted its rejection of *per se* rules except in clear cut cases such as physical takings.[20] In areas of difficulty, such as regulatory takings, the courts favor ad hoc, "factual inquiries designed to allow careful examination and weighing of all relevant circumstances."[21] In *Gideon v. Wainwright*, the Court explained that due process is "'a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights.'"[22] The common law is "not a compendium of mechanical rules, written in fixed and indelible characters."[23] Courts praise its dynamic nature.[24] "The common law is fluid and responsive."[25] Indeed, the common law default is acceptance of flexibility. Although indeterminacy is often associated with the flexible approach of the common law, statutory law often includes indeterminate standards as well.

The type of test used in deciding disputes is another significant structural device of the law. The level of specificity required to satisfy a test has great significance in resulting incentive structures. A test can require a series of elements, with the result of difficult barriers for the person asserting an actionable claim under the law. Such a test sets radically different incentives than a test that employs general factors or a totality of the circumstances inquiry. The fact that the law employs a general standard does not always result in heightened burdens on the actors in the real world, however. General standards may either enhance or reduce real world risks. While the general standard of negligence enhances the risks for those who might want to come close to the "line," the general and indeterminate test of consideration in contract law insulates the determination of parties to a contract from

16. Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1181 (D.C. Cir. 1994).

17. Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 898 (1985) (noting that rational basis scrutiny does not require classification be mathematically precise). *See also* Idaho *ex rel*. Evans v. Oregon 462 U.S. 1017, 1025-26 (1983) (holding that apportionment is based on broad, flexible, equitable concerns rather than precise legal entitlements, and, thus, decree may not always be "mathematically precise").

18. Grayned v. City of Rockford, 408 U.S. 104, 110 (1972).

19. Gibbs v. Burke, 337 U.S. 773, 780 (1949).

20. *See e.g.*, Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978); Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002).

21. Brown v. Legal Foundation of Washington, 538 U.S. 216, 217 (2003) (citing Tahoe-Sierra Preservation Council, Inc., 535 U.S. at 322).

22. Gideon v. Wainwright, 372 U.S. 335, 339 (1963) (quoting Betts v. Brady, 316 U.S. 455, 462 (1942).

23. Oppenheim v. Kridel, 140 N.E. 227, 230 (N.Y. 1923).

24. Hay v. Medical Center Hosp., 496 A.2d 939, 945 (Vt. 1985).

25. Reben v. Ely, 705 P.2d 1360, 1365 (Ariz. App. 1985).

judicial scrutiny.[26] Similarly, the business judgment rule uses a presumption to insulate business decisions from criticism.[27]

The uncertainty of the common law is enhanced by the fact that the common law does not require advance notice of the norm to justify enforcement of the norm. Thus, in a case of first impression a court may find conduct unreasonable and negligent although no court or legislature has previously announced the rule. One can incur liability under the common law despite the fact that the case imposing liability is one of first impression.[28] This is the natural consequence of a system that imposes a general background standard of reasonable conduct and sanctions unreasonable conduct.[29] In other words, because the background of the chess board of this incentive system is set on a default of a requirement of reasonable action, no specific law is necessary to charge an individual with violation of a norm such as negligence. By creating the possibility of liability without clear warning, the common law incentivizes caution. Staying well away from "the line" of questionable tactics is "good business" in a common law system.

C. The Goal of Certainty in Criminal Law

By contrast, in the criminal area, the norms set by law establish the strongest standards. The need for certainty in this area has more than one motivating factor. The stakes are high for all concerned in this area of the law. First, the public desires strong punishment when the conduct at issue carries significant risks, such as those to loss of life and bodily integrity.[30] It is likely that the deterrent effect will be achieved only when the law presents a strong and certain risk to those considering criminal activity.[31] Second, the severity of criminal sanctions, which include loss of liberty and even loss of life, means that clear standards are necessary. Thus, strong prohibitions against crimes are needed to protect the public, and the severity

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26. The social utility of contract law resides in giving the force of law to private ordering to encourage commercial activity within the sphere defined by the concept of consideration. Accordingly, contract law does not judge the content of the bargain: a peppercorn will do. The test of consideration insulates the decision making of parties who enter a contract, establishing judicial restraint for a free market approach.

27. The business judgment rule is "[t]he presumption that in making business decisions not involving direct self-interest or self-dealing, corporate directors act on an informed basis, in good faith, and in the honest belief that their actions are in the corporation's best interest. The rule shields directors and officers from liability for unprofitable or harmful corporate transactions if the transactions were made in good faith, with due care, and within the directors' or officers' authority." BLACK'S LAW DICTIONARY (8th ed. 2004). *See also* Aronson v. Lewis, 473 A.2d 805, 812 (Del. Supr. 1984); *In re* Caremark Intern. Inc. Derivative Litigation, 698 A.2d 959 (Del. Ch. 1996).

28. *See, e.g.*, Tarasoff v. Regents of University of California, 551 P.2d 334 (Cal. 1976) (imposing duty to warn third persons on psychiatrist in extreme cases).

29. *See e.g.*, Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).

30. *See, e.g.*, Davis v. State, 103 P.3d 70 (Okla.Crim.App. 2004) (finding state showed defendant acted with deliberate intention to take life of victim without justification).

31. Of course rules and norms have impact primarily on conscious action. Even certain punishment is not likely to deter someone acting in an insane rage. The insanity defense recognizes this reality.

of criminal sanctions requires strong checks on process and proof in order to insure that the punishment is just.[32]

The potential for severe sanctions in this area has motivated courts to devise special protections for the accused, both as a matter of due process and as a matter of interpretation of the law. The concept of due process generally has strongest force in criminal law because of the significant interest at stake.[33] Among other protective mechanisms, criminal law includes provisions that enhance certainty by insuring that individuals detained are informed of their rights,[34] receive a speedy trial,[35] receive assistance of counsel,[36] and are judged pursuant to the rigorous burden of proof standard of "beyond a reasonable doubt."[37] Many examples make the point in criminal law, although the force of the point has diminished in some of these rules. The doctrine of lenity requires that the court construe the statute strictly against the government when its language is unclear or ambiguous.[38] The doctrine developed in response to the perception of a "vast and irrational" expansion of capital offenses in 18th Century England.[39] The doctrine has lost force over time.[40] Similarly, the doctrine of fair notice requires that "legislative enactments give fair warning of their effect."[41] This doctrine and the Constitution's prohibition against "ex post facto laws"[42] protect against punishment for conduct committed before a law came into effect. It thus allows "individuals to rely [on the law's] meaning until explicitly changed."[43] For example, in *City of Chicago v. Morales*, the Supreme

32. *See In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (noting "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.").

33. *See, e.g.*, People v. Olivas, 551 P.2d 375, 383 (Cal. 1976) (reasoning that due process expresses "fundamental respect for the concept of personal liberty."); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring) ("[T]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.").

34. Miranda v. Arizona, 384 U.S. 436 (1966).

35. U.S. Const. amend. VI; Smith v. Hooey, 393 U.S. 374 (1969).

36. Gideon v. Wainwright, 372 U.S. 335 (1963).

37. Victor v. Nebraska, 511 U.S. 1, 5, 14 (1994).

38. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 5.04 (LexisNexis 3d ed. 2001).

39. *See Id.*; John Calvin Jeffries, Jr. *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 198 (1985).

40. The Supreme Court has strictly construed the doctrine. *See* Reno v. Koray, 515 U.S. 50, 65 (1995) (noting that statute is considered ambiguous only if "after seizing everything from which aid can be derived, [the] Court can make no more than a guess as to what Congress intended."). Some states have abolished the doctrine. *See* DRESSLER, *supra* note 38, at § 5.04, 48; John Calvin Jeffries, Jr. *supra* note 42. The Model Penal Code has softened the rule, requiring that courts construe criminal statutes according to their "fair import." Model Penal Code, § 1.02(3).

41. DRESSLER, *supra* note 38, at § 5.01 (citing Dan M. Kahan, *Some Realism About Retroactive Criminal Lawmaking*, 3 ROGER WILLIAMS U. L. REV. 95, 100 (1997)).

42. U.S. Const. art. I, § 9, cl. 3.

43. Weaver v. Graham, 450 U.S. 24, 28-29 (1981) (citing Dobbert v. Florida, 432 U.S. 282, 298 (1977) and other cases).

Court invalidated a loitering ordinance on the ground that it was unconstitutionally vague and failed to provide fair notice of prohibited conduct.[44] The Court stated that "When vagueness permeates the text of such a law, it is subject to facial attack."[45] Similarly, syntax difficulties in statutes can result in unclear prohibitions and consequent judicial reluctance to impose criminal sanctions.[46]

The need for certainty in the criminal context appears to be related to the severity and stigma of the sanctions imposed for violation of criminal law. Importation of the requirements of certainty from criminal law into areas that do not impose such serious sanctions raises questions of proportionality—especially from the public's viewpoint. The sanctions available to disciplinary boards are significant to lawyers appearing before them. Such sanctions include suspension and even disbarment. They are not comparable to the sanctions of criminal law, however, which include imprisonment and capital punishment.

III. The History of the ABA Rules of Ethics

The historical motivations for the move to a rules-based approach for disciplinary actions are not fully ascertainable by reference to historical evidence. Definitive judgments regarding the motivation behind the evolution of the Model Rules are necessarily speculative.[47] Nevertheless, a comparison of the operation of the common law norms and the modern rules can be detailed with confidence by relying on the language of the different rules.

As part of its role as the most influential non-governmental source of model standards governing the legal profession, the ABA adopted the Canons of Professional Ethics at its annual meeting on August 27, 1908, as its first official statement of ethical practices.[48] Not surprisingly, the Canons reflected the historical period of their genesis and the perspectives of the time, "the Progressive era."[49] It is also not surprising that diverse views abound regarding the goals of the period and the

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44. City of Chicago v. Morales, 527 U.S. 41 (1999). The ordinance required a police officer, upon observing a person whom he or she reasonably believed to be a criminal street gang member loitering in a public place with one or more persons, to order all such persons to disperse. Failure to obey such an order was a violation of the ordinance.

45. *Id.* at 55.

46. United States v. Bass, 404 U.S. 336, 347 (1971) (overruling conviction under federal statute prohibiting convicted felon from receiving, possessing, or transporting any firearm "in commerce or affecting commerce" on basis that statute failed to make clear whether the phrase "in commerce or affecting commerce" applied to the words "possesses" and "receives" as well as to "transports").

47. The Reporter's notes provide limited explanations. For example, *see* http://www.abanet.org/cpr/e2k/070700mtg.html.

48. The Canons of Ethics for Lawyers Adopted by the American Bar Association *Annals of the American Academy of Political and Social Science*, 101 The Ethics of the Professions and of Business 254 (May 1922) (noting that the adoption followed a declaration that "the stability of the Courts and of all departments of government rests upon the approval of the people.").

49. *See* Kenneth M. Rosen, *Lessons on Lawyers, Democracy, and Professional Responsibility*, 19 GEO. J. LEGAL ETHICS 155, 184 (2006).

purposes of the Canons. One description of this era is that leaders "sought to raise professional standards, to bring stability to the profession, and to protect the public."[50] Additionally, however, lawyers "increasingly faced intense scrutiny by social critics."[51] In his article *Race, Class, and the Regulation of the Legal Profession in the Progressive Era: The Case of The 1908 Canons*, Professor Alfred Brophy notes the Canons' goal of protecting consumers but also depicts the "pernicious connection between talent and business interests" during the period.[52] We can only speculate about whether Holmes's "bad man" thesis had taken root in the profession.[53] Indeed, it seems equally plausible that the Progressive Era produced the Canons out of a belief that lawyers—and people generally—would abide by their obligations and conform to rules explained to them. Perhaps most important, the view of the lawyer as one small cog in a giant machine of the justice system and the corollary presumption that justice would result when everyone abided by his assigned role had attained significant currency.

> Influenced by new jurisprudential models that began to replace a religiously motivated jurisprudence, legal ethics thinkers began to endorse the view that justice would emerge as a matter of course from the working of the system, and that the lawyer, as one player in this system, should concern himself solely with playing his role as an advocate in order for this process to work effectively.[54]

The Canons served as the official statement of ethics norms of the ABA for a comparatively long period, until the ABA superseded the Canons in 1969 with its adoption of the Code of Professional Responsibility. In 1978, the ABA added the designation "Model" to the title of the Code in compliance with a settlement agreement with the Department of Justice resolving antitrust charges.[55] After lengthy study and debate, the ABA adopted the Model Rules of Professional Conduct in 1983, changing the format of the standards to articulated rules. In 2002, after another lengthy, comprehensive review of the rules, the ABA adopted extensive amendments to the Model Rules as a whole, having previously amended rules intermittently on an individual basis. Less than a year later, the Securities and Exchange Commission issued proposed rules to comply with Section 307 of the Sarbanes–Oxley Act of 2002. The ABA amended Model Rules 1.6 and

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50. Alfred L. Brophy, Race, Class, and the Regulation of the Legal Profession in the Progressive Era: The Case of the 1908 Canons, 12 CORNELL J.L. & PUB. POL'Y 607 (2003).

51. Rosen, supra note 49, at 184.

52. Brophy, *supra* note 50, at 610.

53. *See* David Luban, *The Bad Man and the Good Lawyer: A Centennial Essay on Holmes's The Path of the Law*, 72 N.Y.U. L. REV. 1547, 1571 (1997) (explaining Justice Holmes's thesis that claims that to know the law "you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict") (quoting Holmes, THE PATH OF THE LAW).

54. Susan D. Carle, *Lawyers' Duty to Do Justice: A New Look at the History of the 1908 Canons*, 24 LAW & SOC. INQUIRY 1, 13 (1999).

55. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 6.7.3, at 57 (1986).

1.13, adopting exceptions to those rules it had rejected only months earlier.[56] The amended Model Rules provide the current legal policy of the ABA regarding the ethical obligations of lawyers.

A. Common Law Approach and the 1908 Canons

The first sentence of the Preamble to the 1908 Canons emphasizes the lawyer's role in preserving the public's confidence in the administration of justice:

> "In America, where the stability of Courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing Justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration."[57]

The Preamble presents a corollary to the point: that the Canons present a general guide rather than exhaustive rules. "No code or set of rules can be framed, which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life."[58] The Preamble underscored this point by expressly stating that the Canons of ethics are "a general guide."[59] The absence of a reference in the Canons does not mean that a professional duty does not exist. "[T]he enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned."[60] This provision is reminiscent of the Ninth Amendment to the U.S. Constitution, which expressly reserves unenumerated rules: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[61] In implementing the approach to inspire public confidence, the Canon Preamble also expanded the scope of the lawyer's duty, emphasizing that the Canons are not exhaustive. Canon 15, "How Far a Lawyer May Go in Supporting a Client's Cause," [62] dealt in a straight forward manner with the issue of line drawing. It made clear the lawyer's duty to society and the system as well as to the client—drawing the line in favor of a duty to the system of justice. In introducing the issue, Canon 15 laid out the problem of the loss of public esteem for the legal profession when lawyers act in "defense of questionable transactions."[63] The Canon stated: "Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full

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56. Irma S. Russell, *Client Confidences and Public Confidence in the Legal Profession: Observations on the ABA House of Delegates Deliberations on the Duty of Confidentiality*, 13 No. 3 PROF. LAW 19 (2002).

57. CANONS OF PROF'L ETHICS, Preamble (1908).

58. *Id.*

59. *Id.*

60. *Id.*

61. U.S. Const., amend. IX.

62. CANONS OF PROF'L ETHICS, Canon 15 (1908).

63. *Id.*

measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause."[64] The conclusion of the Canon is straightforward although, like other rules, it cannot dictate the result in diverse cases. A rule or norm can set the tone and the test although the circumstances of future events are impossible to categorize thoroughly. "The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane."[65]

Similarly, Canon 16, "Restraining Clients from Improprieties," imposed on lawyers the obligation to monitor their clients, a role that is generally rejected by today's legal scholars on the basis that acting as a "watchdog" or "policeman" undercuts the lawyer's advocacy role. It states: "A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do."[66] Canon 22 followed the same theme: "The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness."[67] Rather than imposing a prohibition against false statements, Canon 22 pitched the rule broadly: "It is unprofessional and dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes."[68] Canon 29, "Upholding the Honor of the Profession," also focused on the public regard for our system of justice. "Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession."[69] Canon 32, "The Lawyer's Duty in Its Last Analysis," affirmed the lawyer's duty to the law itself with strong language: "No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive nor should any lawyer render, any service or advice involving disloyalty to the law whose ministers we are."[70]

The 1908 Canons adopted the common law model, particularly on issues of the lawyer's role in protecting third parties from client wrongdoing. While the duty of confidentiality under the Canons protected lawyers from the wrongful conduct of unworthy clients, allowing disclosures to prevent a crime or to protect third parties,[71] the Model Rules employ hard-edged categories, limiting lawyer discretion and requiring an element-by-element analysis.[72] For example, the exceptions to

64. *Id.*
65. *Id.*
66. CANONS OF PROF'L ETHICS, Canon 16 (1908).
67. CANONS OF PROF'L ETHICS, Canon 22 (1908).
68. *Id.*
69. CANONS OF PROF'L ETHICS, Canon 29 (1908).
70. CANONS OF PROF'L ETHICS, Canon 32 (1908).
71. CANONS OF PROF'L ETHICS, Canon 37 (1908). *See also* ABA Comm. on Professional Ethics and Grievances, Formal Op. 143 (1936).
72. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2007).

Model Rule 1.6 require the lawyer to establish difficult elements before gaining the right to exercise her discretion. Under the new exceptions for injury to a property or financial interest, the lawyer is not released from the general prohibition of silence unless she establishes that a crime or fraud is "reasonably certain to result in substantial injury to the financial interests or property of another," and the client used the lawyer's services in the crime or fraud.[73]

B. The Rules-Based Approach of the Model Rules

The system of the Model Rules presents a statutory approach to norms. This observation is by no means novel. Many scholars have noted this fact, including Professors Hazard,[74] Zacharias,[75]and others.[76] While scholars question the effectiveness of a statutory approach to regulation, they do not support a common law approach to lawyer regulation, despite the continuing existence of common law norms of contract, tort, and agency law applicable to lawyers generally. Indeed, notable scholars criticize the Model Rules approach as continuing the vague standards found in the common law.[77]

The rules-based approach seeks to protect lawyers against imposition of penalties in situations of uncertainty. The Preamble to the Model Rules recognizes that courts have the power to sanction lawyers. It states that "ultimate authority over the legal profession is vested largely in the courts."[78] The Introduction also notes that the "Model Rules represent a responsible approach to the ethical practice of law and are consistent with professional obligations imposed by other law, such as constitutional, corporate, tort, fiduciary and agency law."[79] Although focusing on hard-edged rules rather than principles can suggest a closed-end system, the Model Rules clearly ascribe to supplement rather than supplant the common law. Such a closed system would present a simpler regulatory structure than a system of dual norms.

IV. An Example of Dual Norms: Model Rule 4.1 and the Law of Misrepresentation

Although the focus of the Model Rules presents a significant departure from the norms of the 1908 Canons, the force of the precepts represented by the Canons

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73. MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2) (2007).

74. *See* Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239 (1991).

75. *See* Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 224 (1993) (arguing that modern trend toward specific rules may "go too far.").

76. *See* Samuel J. Levine, *Taking Ethics Codes Seriously: Broad Ethics Provisions and Unenumerated Ethical Obligations in a Comparative Hermeneutic Framework*, 77 TUL. L.Rev. 527 (2003) (summarizing modern conceptualization of ethics codes as a legislative form of law).

77. *Id.*

78. MODEL RULES OF PROF'L CONDUCT, Preamble [10] (2007).

79. Model Rules of Prof'l Conduct Commission on Evaluation of Professional Standards, Chair's Introduction (1983).

continues in common law norms. Model Rule 4.1 provides an apt example of the interaction of regulatory rules and the common law. The Rule suggests certainty for lawyers who provide information to third parties. Its comments dispel the illusion that lawyers can rely on the exceptions set forth in the rule. Model Rule 4.1 explains the lawyer's obligation of truthfulness, setting an apparently clear-cut standard: a prohibition against knowing misrepresentations. Model Rule 4.1 leaves open questions, however, such as what constitutes a false statement of material fact or law. The Rule states in toto: "In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."[80] A comparison of this approach with Canon 41 reveals dramatic differences. Canon 41 created the expectation that the lawyer's role included preventing or rectifying client fraud. It stated that a lawyer who discovers a fraud or deception by his client "should endeavor to rectify it."[81] The Canon states that the lawyer should first advise the client of the wrongful result. If the client refuses to remedy the situation, the Canon holds that the lawyer "should promptly inform the injured person or his counsel, so that they may take appropriate steps.[82]

The comments to Model Rule 4.1 connect the term of art "statement of material fact" to the meaning of the term in the common law and give fuller meaning to the universe of the conduct prohibited. By linking the prohibition of Model Rule 4.1 to the common law, the comments make the standard less categorical and more dependent on significant circumstances in the judgment of the fact-finder (more like a common law standard). For those who prefer a clear-cut rule, the impact of the comments may seem an annoyance, muddying the water of a crystalline rule and burdening lawyers with uncertainty. Comment 2 states that the Rule refers to statements of fact. "Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact."[83] The comment indicates that estimates of price or the value of the subject of negotiations and a party's intentions regarding a settlement are not usually regarded as facts. Likewise, the existence of an undisclosed principal is not considered a "material fact" except where nondisclosure of the principal would constitute fraud.[84] "Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation."[85]

80. MODEL RULES OF PROF'L CONDUCT R. 4.1 (2007).
81. CANONS OF PROF'L ETHICS Canon 41 (1908).
82. *Id.*
83. MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt 2 (2007).
84. *Id.*
85. *Id.*

Significantly, Comment 2 uses the term "ordinarily" to set up a diffuse and intentionally ill-defined exception to the general rule. Thus, the comment links the rule to the law of misrepresentation, giving greater content to the limits and purposes of the Rule. This approach is not sloppy drafting. Rather, it is a clear incorporation of the (unclear) law of misrepresentation. This reference pulls into the Rule's analysis the rich, textured, and indeterminate analysis of the common law tort of misrepresentation.

Some lawyers interpret the Rule to allow statements to third parties that are not entirely accurate as long as they are "subjective" and "non-verifiable."[86] It makes sense that lawyers reading this Rule might conceptualize the exceptions as safe harbors. Such a reading undervalues the indeterminacy of the categories incorporated from the common law, however. The comment ultimately serves the interest of lawyers by reminding them of the continuing application of positive law to lawyers. Indeed, the common law (with its messy complexity) would continue to apply to lawyers in civil suits, even if the rules expressly claimed to displace application of the law to lawyers. It would create an anomalous result to believe that even without this reference, a legal ethics rule could obviate the otherwise applicable rules of tort law. Creating a rule of ethics that actually displaced the law of misrepresentation would have startling and unsupportable consequences; creating a disjuncture between ethics duties and legal duties.

Although Model Rule 4.1 coalesces with the common law rule of misrepresentation, as it must do, the approach of apparent clarity and hard-edged categories is not without effect. Subjective intent is a primary element in all intentional torts. Additionally, the law does not take at face value the assertions of a party regarding her mental state or non-verifiable information. These factors are subject to proof. Indeed, many cases hold that something that appears to be non-verifiable is an issue of credibility. Circumstances may be sufficient for a jury or court to disagree with a party's testimony regarding his own state of mind. In other words, a jury may find the party's statement of his subjective state of mind not to be credible.[87]

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86. Legal scholarship on negotiation includes ongoing debates concerning deception. *See, e.g.*, James J. White, *Machiavelli and the Bar: Ethical Limits on Lying in Negotiations*, 1980 A.B.F. RESEARCH J., 926, 927 ("On the one hand the negotiator must be fair and truthful; on the other he must mislead his opponent. Like the poker player, a negotiator hopes that his opponent will overestimate the value of his hand. Like the poker player, in a variety of ways he must facilitate his opponent's inaccurate assessment. The critical difference between those who are successful negotiators and those who are not lies in this capacity both to mislead and not to be misled."); Alvin B. Rubin, *A Causerie on Lawyers' Ethics in Negotiation*, 35 LA. L. REV. 577, 586 (1975) ("To most practitioners it appears that anything sanctioned by the rules of the game is appropriate . . . [b]ut gamesmanship is not ethics.").

87. In one memorable case, a party declared he was not satisfied with the cherries delivered. The trier of fact held against this party, noting the price of the product had fallen precipitously and ruling that the purchaser wanted to escape a contract that cost more than a purchase on the spot market. Mirski v. Chesapeake & O. Ry. Co. 202 N.E.2d 22 (Ill. 1964).

A subjective state of mind is an element in an array of legal tests.[88] It is an element in intentional torts and, additionally, in cases involving a condition of satisfaction in which a subjective standard was bargained for. The fact that a party's subjective intent is at issue does not mean that the party asserting his mental state is the final arbiter of this fact. Nor does it mean that the party seeking to establish guilty knowledge or intent must find some separate verifiable source of that information. Rather, the vehicle of credibility allows the finder of fact to determine intent.[89] Accordingly, a person who misrepresents his own subjective position—for example, by asserting that he is not satisfied with goods subject to a condition of satisfaction—does not control the decision even when the contract expressly includes a subjective satisfaction clause.[90] One court made the point in a memorable way by declaring that "determination of 'intent does not invite a tour of Walter's cranium with Walter as the guide.'"[91]

The exception to the strong norm of truthfulness is found in the concept of puffery. Black's Law Dictionary defines "puffing" as: "The expression of an exaggerated opinion—as opposed to a factual misrepresentation—with the intent to sell a good or service. Puffing involves expressing opinions, not asserting something as a fact."[92] This definition lumps puffery with the "statements of opinion" exception to liability for fraud. Of course, there are opinions and opinions. No one suggests that a lawyer could successfully defend against a client's claims for a false assertion about the law by claiming that they were merely his opinion. A client is entitled to rely on his lawyer's opinion regarding the law. Indeed, the lawyer's independent professional opinion is the very reason the client hired the lawyer. The puffery exception is not clear cut; it depends on circumstances, including the reasonableness of the plaintiff's asserted belief. The Restatement of the Law Governing Lawyers and Comment 2 to Model Rule 4.1 both indicate the circumstantial nature of the exception of puffery. Although estimates of price or value are typically not regarded as statements of fact, courts may deem such statements actionable when the circumstances establish that the other party was

88. A famous case on this point is *Lucy v. Zehmer* in which a party alleges that the sale was not effectuated because he was joking. The reviewing court reversed the trial court and found an enforceable sale, noting that a party's "undisclosed intention is immaterial except when an unreasonable meaning which he attaches to his manifestations is known to the other party." 84 S.E.2d 516, 522 (Va. 1954).

89. *See* Laserage Technology Corp. v. Laserage Laboratories, Inc., 972 F.2d 799 (7th Cir. 1992).

90. A trier of fact will determine the state of the party's mind. If the trier of fact finds that the buyer who rejected goods was in fact satisfied with the goods but invoked the satisfaction clause as a way of escaping the deal (i.e., he was dissatisfied with the deal, not the goods), he has breached the contract by refusing the goods. Evidence of a person's mental intent is discoverable and determined by the finder of fact. Although subjective intent is not "verifiable" in the ordinary meaning of the word, the test of credibility applies.

91. See Laserage Technology Corp., 972 F.2d at 802 (quoting Skycom Corp. v. Telstar Corp., 813 F.2d 810, 814 (7th Cir. 1987).

92. BLACK'S LAW DICTIONARY (8th ed. 2004).

justified in relying on the statements.[93] Neither the Restatement of Torts nor the Restatement of Contracts uses the term "puffery" in its black letter statements. The treatment of the concept in the Restatement of Contracts indicates that the issue is whether the party relying on a misstatement was justified in so relying, given all of the circumstances.[94] The Restatement of Torts sets forth the substance of this limitation by its focus on reliance. Section 541 focuses on the plaintiff's reliance: "The recipient of a fraudulent misrepresentation is not justified in relying upon its truth if he knows that it is false or its falsity is obvious to him."[95] The comment to Section 541 makes clear that the relevant inquiry is not whether a plaintiff pressing a charge of misrepresentation could have discovered the falsity but rather whether plaintiff relied blindly, i.e., was unreasonable in relying on the statement.[96]

Considering the law of misrepresentation, lawyers should be wary of seeking a safe harbor in the exceptions to Model Rule 4.1 and should realize that what counts as meeting the exception will be based on the court's judgment of the reasonableness of the other party's reliance not on the lawyer's own subjective view.[97] A formal opinion issued by the ABA Standing Committee on Ethics and Professional Responsibility in 2006 illustrates how the apparent clarity of Model Rule 4.1 may be misleading to lawyers. Entitled "Lawyer's Obligation of Truthfulness When Representing a Client in Negotiation: Application to Caucused Mediation,"[98] the opinion extended the analysis of Model Rule 4.1 to the setting of negotiations, including caucused mediations.[99] The opinion reasoned that despite the distinctions

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93. Silence rather than statements may be actionable when a court believes the party had a duty to speak. *See, e.g.*, Hess v. Chase Manhattan Bank, 220 S.W.3d 758 (Mo. 2007) (holding bank liable for fraudulent nondisclosure when bank failed to reveal contamination and EPA investigation to purchaser of residential property contaminated though sales contract included "as is" clause).

94. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981), citing Ott v. Target Corp., 153 F.Supp.2d 1055, 1077 (D. Minn. 2001) (holding vice president's alleged promises to aggressively promote and advertise plaintiff's dolls not sufficiently clear and definite and "too subjective and vague to have any specific meaning,' and plaintiff considered the bold statements about promotion of the dolls to be mere puffery); Pancakes of Hawaii v. Pomare Properties, 944 P.2d 97, 108 (Haw. 1997) (holding parol evidence admissible to show fraud in the making of the lease agreement; that material factual issues existed as to whether defendants' comments about available space and occupancy rates constituted fraud, rather than mere puffery).

95. RESTATEMENT (SECOND) OF TORTS § 541 (1977).

96. "Although the recipient of a fraudulent misrepresentation is not barred from recovery because he could have discovered its falsity if he had shown his distrust of the maker's honesty by investigating its truth, he is nonetheless required to use his senses, and cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation." *Id.* cmt. a.

97. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 20, 201 (1981).

98. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-439 (2006). A caucused mediation is different from a mediation in that the mediator "meets privately with the parties, either individually or in aligned groups" for confidential sessions.

99. The Opinion noted that mediation is "a consensual process in which a neutral third party, without any power to impose a resolution, works with the disputants to help them reach agreement as to some or all of the issues in controversy." *Id.* at 7.

between the practices of negotiations, mediation, and caucused mediations "the ethical principles governing lawyer truthfulness do not permit a distinction to be drawn between the caucused mediation context and other negotiation settings."[100] Opinion 06-439 gives cautionary advice for lawyers who might rely on Model Rule 4.1.

The opinion notes that parties "often understate their willingness to make concessions to resolve the dispute."[101] It focuses on Model Rule 4.1 as the applicable rule on the lawyer's obligation of truthfulness, stating the general rule that "a lawyer representing a client may not make a false statement of material fact to a third person."[102] The definition of the term "material fact" in Model Rule 4.1 opens the possibility of providing inaccurate information in limited circumstances: "[S]tatements regarding a party's negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation 'puffing,' are ordinarily not considered 'false statements of material fact' within the meaning of the Model Rules."[103] The opinion explains the exception of "puffing," defining it as a statement "upon which parties to a negotiation ordinarily would not be expected justifiably to rely."[104] The opinion gives two examples of statements that violate Model Rule 4.1:

> An example of a false statement of material fact would be a lawyer representing an employer in labor negotiations stating to union lawyers that adding a particular employee benefit will cost the company an additional $100 per employee, when the lawyer knows that it actually will cost only $20 per employee. Similarly, it cannot be considered "posturing" for a lawyer representing a defendant to declare that documentary evidence will be submitted at trial in support of a defense when the lawyer knows that such documents do not exist or will be inadmissible. In the same vein, neither a prosecutor nor a criminal defense lawyer can tell the other party during a plea negotiation that they are aware of an eyewitness to the alleged crime when that is not the case.[105]

Opinion 06-439 emphasizes the indeterminacy of the common law exception of puffing: "Whether a particular statement should be regarded as one of fact can depend on the circumstances."[106] Opinion 06-439 reaffirms a Formal Opinion issued in 1993, stating that "although a lawyer may in some circumstances ethically decline to answer a judge's questions concerning the limits of the lawyer's settlement authority in a civil matter, the lawyer is not justified in lying or engaging in

100. *Id.* at 8.
101. *Id.* at 1.
102. *Id.*
103. *Id.* at 8.
104. *Id.* at 2.
105. *Id.*
106. *Id.* at 3.

misrepresentations in response to such an inquiry."[107] Opinion 06-439 makes clear that statements of goals or willingness to compromise, "ordinarily are not considered statements of material fact within the meaning of the Rules."[108] The opinion provides examples:

> [A] lawyer may downplay a client's willingness to compromise, or present a client's bargaining position without disclosing the client's "bottom line" position, in an effort to reach a more favorable resolution. Of the same nature are overstatements or understatements of the strengths or weaknesses of a client's position in litigation or otherwise, or expressions of opinion as to the value or worth of the subject matter of the negotiation.[109]

The opinion also explores the other side of the continuum, reaffirming Formal Opinion 94-387, which indicated that a "lawyer representing a claimant in a negotiation has no obligation to inform the other party that the statute of limitations has run on the client's claim, but cannot make any affirmative misrepresentations about the facts."[110] Most important, the opinion stresses the difficult factual line-drawing in this area, emphasizing that, "whether in a direct negotiation or in a caucused mediation, care must be taken by the lawyer to ensure that communications regarding the client's position, which otherwise would not be considered statements 'of fact,' are not conveyed in language that converts them, even inadvertently, into false factual representations."[111] The cautionary note of this point should dispel misperceptions that Model Rule 4.1 creates definite carve-outs from the duty of truthfulness.[112]

Lawyers may be disciplined and, additionally, held liable for misrepresentations and for rescinded contracts and other damages to their clients. Indeed, a misrepresentation that is based on a subjective belief or non-verifiable fact may, nevertheless, provide a basis for the remedies of rescission and damages.[113] Ethics

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107. *Id.* at 4, discussing ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-370 (1993). *See also* Fire Ins. Exchange v. Bell by Bell, 643 N.E.2d 310 (Ind. 1994) (holding that where defendant's counsel misrepresented limits on insurance policy, the plaintiff's attorney had a right to rely upon opposing counsel representations in negotiations though he could have learned the policy limits himself through discovery).

108. ABA Formal Ethics Op. 06-439 at 6.

109. *Id.*

110. *Id.* at 5 citing ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-387 (1994).

111. *Id.* at 8.

112. The difficulty of determining what must be disclosed and what can be withheld in negotiations should not be underestimated. *See, e.g.*, Hess v. Chase Manhattan Bank, 220 S.W.3d 758 (Mo. 2007) (holding bank liable for fraudulent nondisclosure for failing to reveal contamination to purchaser of residential property on which mortgagor was convicted of illegally dumping paint and solvent wastes even when sales contract included "as is" clause on ground that bank had "pre-contractual duty to speak.").

113. *See* Nathan M. Crystal, *The Lawyer's Duty to Disclose Material Facts in Contract or Settlement Negotiations*, 87 KY. L.J. 1055 (1999).

rules do not toll or neutralize tort law as it applies to lawyers. There is no precedent for the idea that the lawyer gets a "free card" based on his status as a lawyer.

V. The Costs of Certainty and Indeterminacy

Scholars sometimes speak of certainty as if it constitutes an unquestionable benefit, a quality the law should foster consistently.[114] While certainty is often accompanied by benefits, it also carries costs. For example, a clear-cut rule with only hard-edged exceptions may lack needed flexibility, and such an inflexible rule approach may be incompatible with fundamental fairness of the common law chess board of reasonable conduct. Such costs are amplified when the certainty of categorical rules creates a conflict with the common law. The common law continues to have force in the context of lawyer conduct.

The contest between the view of enumerated rules and general norms appears in numerous aspects of the Model Rules. Even the description of the jurisdiction of the ABA Standing Committee on Ethics and Professional Responsibility reflects the persistent opposing views of whether the unarticulated general concepts of the common law approach or the exhaustive approach of the enumerated rules of the Model Rules should control the deliberation.[115] Rule 1 of the Rules of Procedure states: "The Committee may express its opinion on questions of proper professional and judicial conduct. The Model Rules of Professional Conduct and the Code of Judicial Conduct, as they are amended or superseded, contain the standards to be applied."[116] The formulation of Rule 1 includes a basis for arguing for either view. The first sentence indicates that the Committee's role includes expressing its opinion on "questions of proper professional and judicial conduct."[117] The second sentence couches the range of the Committee's charge in the statement of the rules as they are formulated at the time the Committee issues an opinion. This sentence appears to limit the role of the Committee to consideration of the

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114. *See e.g.*, Clayton P. Gillette, *Harmony and Stasis in Trade Usages for International Sales*, 39 VA. J. INT'L L. 707 (1999) (arguing that custom is superior to United Nations Convention on Contracts for the International Sale of Goods (CISG) and Uniform Commercial Code (UCC) provisions in providing certainty to contract parties); Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1189, 1193-94 (1999) (arguing that greater certainty in property law would better delineate the boundaries of private property).

115. While the general charge of the Committee is to interpret the Model Rules, the Rules of Procedure refer to other products of the Committee's process, including policy statements in addition to formal and informal opinions. ABA Model Rules, Appendix C, ABA Standing Committee on Ethics and Professional Responsibility, Rules of Procedure, Rule 9. Although the statement of the Standing Committee's work has not changed, the Committee no longer routinely issues informal opinions. The most recent informal opinion was issued in 1989. *See* Subject Matter of Opinions available at: http://www.abanet.org/cpr/pubs/ethicopinions.html.

116. MODEL RULES, Appendix C, ABA Standing Committee on Ethics and Professional Responsibility, Rules of Procedure, Rule 1.

117. *Id.*

articulated standards set forth in the rules "as they are amended or superseded."[118] Thus, the framework for the Committee's work is circumscribed by the closed-end standard of sanctions only for violation of articulated norms. However, the Rules of Procedure relate to the issuance of Opinions and are guided by the Model Rules of Professional Conduct and the Model Code of Judicial Conduct. Thus, this statement does not compromise the role of the Committee in recommending amendments as enunciated in paragraph 5 of the Composition and Jurisdiction statement.[119]

The Model Rules provide a case study in the confusion that may result from subjecting a regulated group to norms and standards with substantially different goals and incentives. In the Report of the Commission on Evaluation of Disciplinary Enforcement, Lawyer Regulation for a New Century, the Commission recommended expanding regulation to protect the public and assist lawyers, noting that the "existing system of regulating the profession is narrowly focused on violations of professional ethics."[120] The report also emphasized the need to increase public confidence in the lawyer disciplinary system and noted that the current system lacked a mechanism to handle other types of client complaints that did not allege disciplinary violations.[121] The report also noted that the disciplinary systems of the various states fail to address incompetence or negligence "except where the conduct was egregious or repeated."[122] The document suggests that low levels of enforcement and public dissatisfaction are costs of the inadequate rules. "Some jurisdictions dismiss up to ninety percent of all complaints. Most are dismissed because the conduct alleged does not violate the rules of professional conduct."[123] Problems with the enforcement of the Model Rules were apparent in the research of the Commission. "The way many disciplinary systems treat complainants does not inspire confidence in the process."[124]

Today's Model Rules interpose a brand of professionalism that insulates lawyers from the difficult tasks of informing injured parties of a client's wrongdoing. The philosophical orientation of the Model Rules reflects a hands-off, nonjudgmental approach that runs counter to the purposes of the Canons, and indeed,

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118. *Id.*

119. Model Rule 4.1 also provides an example of the debate. The rule does not address the lawyer's duty of truthfulness to clients. Its literal language speaks only to the lawyer's duty not to make a false statement "to third parties." The prohibition does not address communications to the client, however. Should the lawyer relying on the rules take it to mean that the lawyer may make false statement of material fact or law to his clients? Such a reading is anomalous and obviously would be out of step with agency law and tort law.

120. Lawyer Regulation for a New Century, Report of the Commission on Evaluation of Disciplinary Enforcement, February 1992, available at http://www.abanet.org/cpr/reports/mckay_report.html (visited 3/8/2008).

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

the common law. The lawyer's desire to stand apart from the client—providing advice but remaining aloof from the results of client actions is understandable. Nevertheless, such distance is ultimately impossible, even under the Model Rules. Model Rule 1.2(d) makes clear that the lawyer must judge the client's actions insofar as the lawyer must avoid complicity in a crime or fraud. The Rule states: "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."[125] Thus, the Rule requires lawyers to judge client actions in order to evaluate the propriety of their own actions, drawing a difficult (and indeterminate) line between providing a client with information and assisting a client in a crime or fraud. The modern lawyer cannot avoid making a judgment about the client's conduct when the lawyer is acting in the role of advisor rather than acting as an advocate. Rather than alleviating the need to judge the client, the Model Rules approach creates an ethos against judgment of the client while warning the lawyer that he must judge the client silently to protect himself. Even in extreme cases, the Model Rules do not counsel the disclosure that the Canons advocated. The lawyer knows from the tenor of the message that judging the client is an extraordinary step. Comment 9 to Model Rule 1.2, titled "Criminal, Fraudulent and Prohibited Transactions," discusses the point:

> Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.[126]

The problem with this language as an aid to interpretation arises from the meaning of "the actual consequences that appear likely to result from a client's conduct." Certainly it is appropriate for a lawyer to share his view with the client regarding how a court would likely rule. Further, it may be proper for a lawyer to share with the client his or her view of the likely consequences of prosecution. A discussion of the likelihood of *discovery* of unlawful conduct seems likely to "cross the line"

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125. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2007). The ABA Model Rules rightly take care to distinguish between the lawyer's representational role and endorsement of a client's views or actions. Model Rule 1.2(b) states: "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities."

126. MODEL RULES OF PROF'L CONDUCT R 1.2 cmt. 9 (2007).

into assisting the client in wrongful conduct. As noted above, lawyers do not receive a free card under the Rules to violate the law.

Certainty sometimes comes at a cost to the normative power of rules. The regulated party (in the context of professional responsibility, the lawyer) may bear the cost of sanctions imposed under the common law arising from lawyer conduct that may have seemed permissible under the hard-edged and limited categories of the Model Rules. The party wishing to "walk up to the line"—or come as close as possible to sanctionable conduct without incurring a sanction—may see himself as empowered to gain advantages while remaining immune to sanctions by virtue of the hard-edged nature of the rules. Such "close-to-the-line" conduct is precisely the type of action that a general rule of the common law seeks to discourage by its flexible, reasonableness-norms.

VI. Conclusion

The current state of regulation of the legal profession is an outgrowth of its history and the pressures of changing cultural and business norms. While the black letter approach of statutes and regulations suggests a higher level of certainty than the common law, hidden costs are often close at hand in the form of more complicated norms found in decisional law and the comments to the rules. Thus, the apparent certainty of rules carries the potential cost of misleading those who rely on them. In this way, clear-cut rules may be seen as a type of reverse puffery. Whereas puffery generally exaggerates, Model Rule 4.1 minimizes the risk of potential sanctions on lawyers. Its language suggests that lawyers can take the rule at "face value" and assume that they are not vulnerable to sanctions on the right side of an apparently clear line. Problems arise, however, when the line is not clear in practice. For example, reading Model Rule 4.1, the lawyer may feel she can speak about the client's intentions without risk because the rule says that intent is not ordinarily a material fact. Scrutinizing the commentary and case law relating to the Rule, however, reveals significant uncertainty inside even what appears on the surface to be a hard-edged legal rule.

Although the Rules seem to insulate the lawyer against sanctions in situations of uncertainty,[127] this result is often beyond the power of Rules because they cannot displace the common law. The continued application of civil liability standards to lawyers is virtually certain; lawyers are not above the law. Accordingly, the Rules of Professional Conduct must exist as a supplement to the common law rather than a force for displacing it. Discontinuities in the norms applicable to lawyers under the Model Rules and the common law result from the conflicting approaches to regulation of the legal profession in the form of lawsuits and disciplinary actions. Such discontinuities and the appearance of a closed-end system created by the Model Rules may create a level of uncertainty that surpasses that of either unified system if it were operating alone. Inconsistent norms and mixed messages

127. *See supra* notes 78-79 and accompanying text.

flow from the existence of two regulatory models that take markedly different approaches to regulation. The two systems raise questions about the message lawyers receive when assessing the norms and requirements that apply to them. In some cases, such as in Model Rule 4.1, clearer references to the scope and indeterminacy of the applicable common law could help lawyers assess and conform to the dual norms.

Public regard for lawyers and the legal system persists as an important factor in maintaining a self-regulated profession. Thus, the most telling cost of an apparently closed-end system may be the potential of a diminution of public respect for the legal profession. Because the sanctions available in disciplinary actions are far less dramatic than those employed by criminal law, the transport of protective principles from criminal law to the context of lawyer discipline raises questions of proportionality. Robert B. McKay has made the point: "If the disciplinary process does not meet that standard, a disaffected public is likely to impose limits upon the process."[128] Achieving and maintaining the balance of protection and regulation is crucial for protecting the equilibrium of the legal system and self-regulation of the legal profession. Indeed, the need to preserve public confidence in the administration of justice and the legal profession is no less intense today than in 1908. As the Preamble to the Canons noted 100 years ago, public confidence in the legal profession is "peculiarly essential"[129] to insuring stability of government and the rule of law.

128. Lawyer Regulation for a New Century, Report of the Commission on Evaluation of Disciplinary Enforcement, February 1992, available at http://www.abanet.org/cpr/reports/mckay_report.html (visited 3/8/2008).

129. CANONS OF PROF'L ETHICS, Preamble (1908).