How Things Have Changed: Contrasting the Regulatory Environments of the Canons and the Model Rules

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Introduction

The Model Rules of Professional Conduct and the Canons of Professional Ethics bear a family resemblance but the two codes were born into different worlds. Since the ABA adopted the Canons in 1908, lawyers' work and workplaces, the structure of the organized bar, and the regulation of law practice have all changed enormously. This essay focuses on regulatory change. Taking account of changes in each of these domains, I hope to sharpen our sense of the place of the Model Rules (and the ABA itself) in today's complex and dynamic regulatory world, first by contrasting it with the Canons' place in the inchoate regulatory world of the early 1900s,[1] and then by suggesting some ways in which the Model Rules and comprehensive legal ethics codes in general are arguably becoming *less* important from a regulatory standpoint.

In my terms, regulating law practice means creating norms to govern lawyers' conduct, interpreting those norms, and promoting compliance (by enforcement or otherwise). The regulatory "framework" consists of the institutions that perform these tasks, and the processes and techniques they use in doing so.[2] Unlike the regulatory framework that existed in the early 1900s, today's framework consists of two robust sectors, one "internal," the other "external." In internal regulation (often called "professional self-regulation"), the bar, in tandem with the states'

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1. Focusing on the Canons and Model Rules limits the aspects of lawyer regulation I will discuss. For example, it excludes the regulation of bar admissions. Also, although the Model Code of Professional Responsibility, adopted by the ABA in 1969, is a vital bridge between the Canons and Model Rules, the Code gets short shrift here in order to emphasize the contrasting regulatory environments at the beginning and end of the twentieth century. The fact that the ABA adopted the Model Rules only thirteen years after the Model Code, which was adopted more than sixty years after the Canons, suggests that the pace of change in the regulation of law practice has been accelerating.

2. For some purposes, it is helpful to think of the "regulatory framework" in an extended sense in which the institutions may be public or private, and the relevant processes formal or informal. Malpractice litigation is public and formal, while a malpractice insurer's audit of a law firm is neither, but both promote compliance with the professional standard of care and are regulatory in that extended sense. *See* Anthony E. Davis, *Professional Liability Insurers as Regulators of Law Practice*, 65 FORDHAM L. REV. 209 (1996). The legal services market is also "regulatory" insofar as it gives lawyers incentives to behave properly. But this essay focuses chiefly on regulation in its narrower and more conventional sense.

highest courts, develops, interprets, and enforces practice norms. When the ABA drafts a model legal ethics code, bar associations or court-created agencies administer the disciplinary process, and bar or court-created committees render advisory ethics opinions, they engage in internal regulation.

The external sector consists of statutes, regulations, and judicial doctrines that are primarily interpreted and enforced outside the realm of professional discipline.[3] External law has been growing at an accelerating rate since 1970, both in the states and especially at the federal level. In some states, for example, lawyers' fees and other business practices must now comply with rules of legal ethics *and* consumer protection laws, and clients may sue lawyers under these laws just as consumers may sue car dealers.[4] As mandated in the Sarbanes-Oxley Act,[5] the SEC now regulates lawyers who "appear and practice" before the Commission on behalf of public corporations.[6] And federal prosecutors have recently used criminal law to police lawyers in fields such as bankruptcy,[7] securities class actions,[8] and mass tort litigation.[9]

Not all regulation is purely internal or external. There are hybrids. For example, lawyers may be disciplined for statutory violations that bear adversely on their fitness to practice law. Although juries in legal malpractice cases are external decision makers, they must apply a professional (i.e., an internal) standard of care, which may be evidenced by professional custom and, sometimes, legal ethics

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3. Legislatures in recent decades have become more active in regulating law practice, though usually in piecemeal fashion. *See* James M. Fischer, *External Control over the American Bar*, 19 GEO. J. LEGAL ETHICS 59, at 98-100, 107-08 (2006). Professor Wolfram speculates that law practice is destined to become "even more thoroughly regulated by external law." Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics—II The Modern Era*, 15 GEO. J. LEGAL ETHICS 205, 208 (2002). Lawyers' statutory violations are sometimes enforced in the internal sector, of course, such as when a lawyer is disbarred for filing fraudulent personal income tax returns.

4. *See* Fischer, *supra* note 3, at 97-98 (discussing cases); David L. Hudson, Jr., *Professional Judgment: Courts Are Pondering Whether Consumer Fraud Laws Apply to Lawyers and Doctors*, 89 A.B.A. J., July 2003, at 14 (same).

5. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002). Section 307 of the Act, *codified at* 15 U.S.C. sec. 7245, mandates that the SEC set minimum standards for lawyers "appearing and practicing" before the agency on behalf of public corporations. This includes not only lawyers who represent public companies in formal SEC proceedings, but also those who advise such companies on their disclosure obligations or prepare documents that will be incorporated in disclosure statements filed with the SEC. *See* Roger C. Cramton *et al, Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILL. L. REV. 725, 741-46 (2004).

6. Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer, 17 C.F.R. sec. 205.2(a)(1).

7. *E.g.*, United States v. Gellene, 182 F.3d 578 (7th Cir. 1999) (affirming conviction of debtor's counsel in a Chapter 11 proceeding for filing a materially false declaration and falsely swearing that his firm had no relationships with creditors).

8. *See, e.g.*, John C. Coffee, Jr., *Securities Law: Milberg Weiss Indictment*, NAT'L L. J., June 19, 2006, at 18.

9. *See* Jonathan D. Glater, *Lawyers Challenged on Asbestos*, N.Y. TIMES, July 20, 2005, at C1 (reporting that federal prosecutors were investigating three law firms that represent a great many asbestos claimants).

rules.[10] These and other hybrids notwithstanding, the internal/external distinction is vital in understanding the place of the Model Rules—and the ABA—in today's regulatory environment.

Since at least the mid-1970s, just before the ABA began to draft the Model Rules, the relationship between the internal and external sectors has been an uneasy one. On one hand, the sectors can be complementary,[11] as they are when courts look to "prevailing professional norms" to decide Sixth Amendment claims of ineffective assistance of counsel;[12] when the Model Rules incorporate external law by reference;[13] or when external law governs an issue not addressed in the Model Rules but vital in applying them, such as whether on certain facts a client-lawyer relationship exists.[14]

On the other hand, the sectors are in considerable tension, so much so that Susan Koniak has argued that the "bar's law" (internal) and the "state's law" (external) are grounded in very different conceptions of the lawyer's proper role.[15] This may be an exaggeration,[16] but frequent wrangling between the organized bar and external regulators suggests that it contains more than a grain of truth. Bar associations attack external law and enforcement measures they consider inconsistent with ethics rules or core professional values;[17] external regulators try to trump

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10. *See* Restatement (Third) of the Law Governing Lawyers sec. 52(2)(c) (2000).

11. *See* Ted Schneyer, *The ALI's* Restatement *and the ABA's Model Rules: Rivals or Complements*?, 46 Okla. L. Rev. 25 (1993) (describing complementarities and tensions between the Model Rules and the Restatement (Third) of the Law Governing Lawyers).

12. *See* Strickland v. Washington, 466 U.S. 668, 688 (1984) (O'Connor, J) (citing ABA ethics rules and stating that Sixth Amendment jurisprudence "relies…on the legal profession's maintenance of standards" and that the measure of defense counsel's performance is reasonableness under "prevailing professional norms.").

13. *E.g.*, Model Rules of Prof'l Conduct R. 3.4(a) (2007) (forbidding lawyers to "*unlawfully* obstruct another party's access to evidence or *unlawfully* alter, destroy, or conceal…material having potential evidentiary value.") (emphasis added). The incorporated external law includes obstruction of justice laws.

14. *See id.*, Scope cmt. [17] (stating that "for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists."). *Cf.* Restatement, *supra* note 10, sec. 14 (stating the law governing formation of client-lawyer relationships).

15. Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. Rev. 1389, 1409-27 (1992) (arguing that the "bar's law" exalts the lawyer's duties of confidentiality and loyalty (or zealous advocacy)—duties running to clients—over public and third-party interests, while the "state's law" does not). As Koniak describes it, the "bar's law" consists chiefly of ethics rules and ethics opinions. Neither the Model Rules nor advisory ethics opinions are law in the strict sense, but they have regulatory significance and can be regarded as law for my purposes here. *See* Ted Finman & Theodore J. Schneyer, *The Role of Bar Association Ethics Opinions in Regulating Lawyer Conduct: A Critique of the Work of the ABA Committee on Ethics and Professional Responsibility*, 29 UCLA L. Rev. 67, 68-92 (1981).

16. *See* Susan P. Koniak, *When the Hurlyburly's Done: The Bar's Struggle with the SEC*, 103 Colum. L. Rev. 1236, 1244 n.27 (2003) (conceding the point).

17. Recently, for example, after the SEC issued a rule allowing lawyers for public corporations in some circumstances to disclose confidential information about client wrongdoing to the agency,

ethics rules they consider unwise,[18] or justify their own regulations on the ground that the corresponding ethics rules are not adequately enforced in the disciplinary process.[19] In this climate, the question arises whether the Model Rules and their state equivalents are losing ground in their skirmishes with external law.

The primacy of the Model Rules *within* the internal sector is also in question today. True, the Rules have had no serious rival as a comprehensive ethics code since the ABA adopted them in 1983. Law students all study them. Bar applicants are tested on them in the Multistate Professional Responsibility Exam. Ethics committees parse them (or state analogs) in influential ethics opinions.[20] And they remain the template for nearly every state's professional conduct rules.[21] Yet their salience in internal regulation may be diminishing in other respects as a result of trends in law practice and changes in the structure of the bar.

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two state bars protested that the rule conflicted with their state's ethics rules on lawyer confidentiality, and announced that lawyers in their states who made disclosures permitted by the SEC but not by state ethics rules would remain subject to discipline. *See* Ted Schneyer, *An Interpretation of Recent Developments in the Regulation of Law Practice*, 30 OKLA. CITY U. L. REV. 559, 569 n.39 (2005) (citing sources). *See also* Am. Bar Ass'n v. Fed. Trade Comm'n, 430 F.3d 457, 471 (D.C. Cir. 2005) (upholding an ABA challenge to the FTC's claim that the Gramm-Leach-Bliley Act of 1999 authorized the agency to regulate law firms as "financial institutions"). Much more broadly, the ABA House of Delegates baldly resolved in 1989 to oppose "regulation of the practice of law by executive or legislative bodies, whether national, state, or local." Report 103 to the House of Delegates (Feb. 1989) (presented by the ABA Special Coordinating Committee on Professionalism).

18. In 1983, for example, after the ABA House voted to narrow the Kutak Commission's proposed exceptions to the duty of confidentiality so that Model Rule 1.6 would continue to bar lawyers from disclosing confidential information in order to prevent a client from committing economic crimes, Senator Arlen Specter introduced a bill in Congress that would have turned the rejected proposal to *permit* disclosure into a *duty* to disclose under federal criminal law. The ABA successfully opposed the bill. *See* Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677, 713 (1989).

19. In 2002, when Congress passed the Sarbanes-Oxley Act mandating direct SEC regulation of lawyers practicing before the agency on behalf of public companies, then chairman Harvey Pitt stated at a meeting of the ABA Section of Business Law that he was "not impressed, or pleased, by the generally low level of effective responses we receive from state bar committees when we refer possible disciplinary proceedings to them." Harvey L. Pitt, Chair, Sec. Exchange Comm'n, Remarks Before the Annual Meeting of the American Bar Association Business Law Section (Aug. 12, 2002), http://www.sec.gov/news/speech/spch579.htm (last visited Aug. 23, 2006).

20. Opinions of the ABA Standing Committee on Ethics and Professional Responsibility ("SCEPR") interpret the ABA's current ethics rules. The opinions, though only advisory, play an important role in the regulation of law practice, both by guiding lawyers directly and by influencing other decision makers. *See* Finman & Schneyer, *supra* note 15, at 71, 73-92 (documenting the influence of SCEPR opinions).

21. As of 2004, every state had adopted the Model Rules (with local amendments) or was considering adoption. GEOFFREY C. HAZARD, JR. *et* al, THE LAW AND ETHICS OF LAWYERING 16 (2005). Most of the ABA's amendments stemming from the Ethics 2000 project are also being well received. *See* Lucian T. Pera, *Grading ABA Leadership on Legal Ethics Leadership: State Adoption of the Revised ABA Model Rules of Professional Conduct*, 30 OKLA. CITY U. L. REV. 637, 814 (2005) (concluding on the basis of survey evidence that the ABA campaign for state adoption is largely succeeding).

Part I of the essay compares the 1908 Canons and the Model Rules in respects that could shed light on the regulatory status of the Rules today.[22] It compares (a) the state of law practice, the structure of the bar, and the robustness of external regulation in the eras in which the two codes were adopted, (b) the degree of consensus lawyers and bar entities displayed in producing them, (c) the legal status and intended functions of the codes, and (d) the extent to which the codes distinguish between practice contexts. The contrasts that emerge from this exercise are sharp.

With those contrasts in mind, Part II suggests that the Model Rules are becoming a less important feature of the regulatory framework. Part II.A illustrates the complex and sometimes confusing relationship that now exists between internal and external law, and examines the influence those two bodies of law have on one another. It reviews some of the interplay that has occurred between the ABA and the Model Rules, on one hand, and external regulators, on the other, and suggests that the direction of influence is shifting in favor of external law. Part II.B suggests that lawyer specialization and other trends in law practice and bar structure are making the Model Rules less salient within the internal sector as well.

Finally, a brief Conclusion identifies some possible implications of my analysis for the ABA's priorities in trying to maintain its leading role in shaping the regulation of law practice under present conditions.

I. Regulatory Contrasts Between The Canons and Model Rules

A. Law Practice, the Bar, and Lawyer Regulation when the Codes Were Born[23]

1. *The Canons*

Roscoe Pound dismissed much of the nineteenth century as an unruly and disorganized "Era of Decadence" for the American legal profession.[24] Yet small-town lawyers at the time were often "regulated" effectively by informal means. Willard Hurst explains:

> Each little county seat did not yet offer enough business to support . . . any sizable number of lawyers; hence the same group of men . . . was likely to

22. The ABA ethics codes can also be profitably studied for their ethical, historical, and jurisprudential significance. For important recent studies of the Canons in these respects, *see* James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 Fordham L. Rev. 2395 (2003); Susan D. Carle, *Lawyers' Duty to Do Justice: A New Look at the History of the 1908 Canons*, 24 Law & Soc. Inquiry 1 (1999).

23. When I speak of the Canons I generally mean the thirty-two original canons. Canons 33-45 were added in 1928; Canon 46, in 1933; and Canon 47 in 1937. Seven of the original Canons were later amended, but only Canons 11 and 27 were changed in substance. Some of the added Canons were also amended before the Canons were supplanted in 1970. *See* Altman, *supra* note 22, at 2396 n.9 (2003).

24. Roscoe Pound, The Lawyer From Antiquity to Modern Times 223-42 (1953) (referring to lax bar admission standards and a dearth of active bar associations).

> do most of the law business through the circuit. [U]nder these conditions there grew a substantial corporate sense of the local bar . . . . There was not only professional fellowship, but also a sense of what was done and what was not done. If there was little formal discipline, there was nonetheless pressure to conform to group standards—pressure that . . . was expressed through the mock courts that were held . . . to call one of the brethren to account . . . .[25]

By the early 1900s, however, many more lawyers, from diverse backgrounds, were practicing in the cities. In those settings, purely informal controls would not do,[26] clients could not as reliably select lawyers by reputation, and few lawyers were any longer serving apprenticeships in which they could learn "what was done" and become socialized to behave accordingly.[27] New regulatory approaches were needed to promote and vouch for the competence and trustworthiness of lawyers *generally*.[28] "We [lawyers] are all in a boat," wrote Julius Henry Cohen. "The sins of one of us are the sins of all of us."[29]

Reform-minded leaders converged on two ideas. The first was to "crystallize" from general ethical principles a comprehensive set of practice norms for all lawyers.[30] The second was for the bar associations that began to form after 1870[31] to establish those norms and promote compliance.[32] These ideas reflected the broader view at the time that the ethical problems each profession encountered in daily

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25. JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 286 (1950).

26. In New York and other big cities, as one bar leader put it, "[t]here is no professional brotherhood; the Bar is too numerous and too heterogeneous." Charles A. Boston, *A Code of Legal Ethics*, 20 THE GREEN BAG 224, 227 (1908).

27. *See* Altman, *supra* note 22, at 2414.

28. *See* MAGALI SARFATTI LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS 6 (1977).

29. JULIUS HENRY COHEN, THE LAW: BUSINESS OR PROFESSION 109 (rev. ed. 1924).

30. Altman, *supra* note 22, at 2415, *quoting* Report of the Comm. on Code of Professional Ethics, 29 A.B.A. Rep. 600, 603 (1906).

31. *See* HURST, *supra* note 25, at 285-89. Early membership rates were very low. In 1910, over thirty years after the ABA was founded, only 3% of the lawyers in the U.S. were ABA members. *Id.* at 289.

32. Indeed, there was growing interest in the potential of professional associations to be a force for good in many fields, in part because the emerging national economy was eroding a strong sense of local community and encouraging people to define themselves by occupation more than locale. *See* ROBERT H. WIEBE, THE SEARCH FOR ORDER 1870-1920, at xiii (1967). Under similar economic circumstances in Europe, sociologist Emile Durkheim argued that neither the marketplace, nor general morality, nor criminal law was adequate to govern business and professional work; only membership associations for each profession were up to the task. EMILE DURKHEIM, PROFESSIONAL ETHICS AND CIVIC MORALS 7, 14-17 (1958). Durkheim hoped that professional associations would regulate not only by drafting standards and seeing to their enforcement, but also through socialization. So, too, did Julius Henry Cohen, who argued that individuals become true professionals only by "subordinating [their] inclination, appetites, and ambitions [as] individuals to . . . an organization which has as its object to promote the performance of a [social] function." COHEN, *supra* note 29, at 333.

practice had to be solved "by those who encountered them."[33] Practice norms had to be specific to, and developed by, the profession itself. (These, of course, are the basic tenets of internal regulation.) Herbert Harley, the prominent leader of the American Judicature Society, reasoned that

> [t]here must be somewhere in . . . society power to establish standards of professional conduct with responsibility for enforcing them. It is easy to understand the practical failure of the courts in this field. And it is too delicate a matter for legislative control. . . . The public generally is most concerned with mere dishonesty and wants only to hold the lawyer to the standard for the lay fiduciary. . . . But the public suffers a thousand times more from less conspicuous infractions than from plain dishonesty. . . .[34]

By this process of elimination, Harley concluded that only the bar could formulate and enforce the necessary standards. Skeptics today might read this as a pitch for professional self-regulation at the expense of more demanding external regulation. But there *was* no significant external regulation of lawyers at the time and none on the horizon. Instead, leaders like Harley wanted the organized bar to formulate and enforce practice norms because the only existing regulatory tools—sporadic disciplinary proceedings and occasional criminal prosecutions under laws of general application[35]—had a negligible impact on professional conduct.[36] The point was to fill a regulatory vacuum.[37]

But why was this a job for the ABA? After all, lawyers were licensed by the states, the Alabama State Bar Association had adopted a pioneering ethics code in 1887, and ten more state associations had followed suit by 1907. One answer, surely, is that ABA leaders believed their national association was best positioned to produce a code that could be adopted in every state, making ethical standards uniform and all the more authoritative for being so.[38] More broadly, the ABA used

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33. Cohen, *supra* note 29, at 158 (quoting Felix Adler, founder of the Ethical Culture Societies). Adler believed professional ethics called for constant application of norms to difficult but concrete situations. On this view, advisory ethics opinions that interpreted and applied ethics rules might be more important than the rules themselves. Others have occasionally expressed the same idea, which made sense especially in the days of the relatively vague Canons. *E.g.*, Barlow Christensen, Group Legal Services (Tent. Draft 1967) (stating that ethics opinions have "perhaps more . . . to do with determining the conduct of . . . lawyers than the rules themselves").

34. Herbert Harley, *Group Organization Among Lawyers, in* Symposium: The Ethics of the Professions and Business, 101 Annals Am. Acad. Pol. & Social Sci. 33, 34, 39 (May 1922).

35. Altman, *supra* note 22, at 2500.

36. *Id.*

37. *Id.*

38. Report of the Comm. on Code of Professional Ethics, 29 A.B.A. Rep. 600, 603 (1906). In other words the ABA's national status at the time was an advantage, not because the ABA was better positioned than state and local bars to deal with federal regulation (which hardly existed), but because of its opportunity to coordinate regulation in the states. Today, of course, federal regulation of law practice is extensive and the ABA devotes substantial attention to trying to shape—or forestall—federal initiatives. *See* note 17 *supra*.

the Canons and other initiatives to gain recognition as a national resource for the development of internal regulation in the states.[39] By 1924, nearly every state and local bar association in the country had adopted the Canons with no more than minor changes.[40] What legal or regulatory status this conferred on the Canons was far from clear, however.

2. *The Model Rules*

In 1977, just seven years after the Code of Professional Responsibility ("CPR") supplanted the Canons, ABA President William Spann, Jr. launched the Model Rules project and appointed the Kutak Commission as the drafting body.[41] As recently as 1972, this would not have been expected. The internal sector seemed healthy. State supreme courts were adopting the CPR with only minor changes[42] and, disciplinary systems were improving in the wake of the ABA's Clark Report.[43] What prompted Spann's actions?

Supreme Court "intrusions" into the internal domain were one factor. In 1977, the Court, on free speech grounds, struck down ethical bans on lawyer advertising,[44] just as the Court had held in 1975 that using ethics rules and threats of discipline to enforce bar association minimum-fee schedules violated the antitrust laws.[45] These decisions federalized matters that had been the preserve of the bar and the state supreme courts. The antitrust decision also served notice that, although the bar and the state supreme courts had long been the frontline regulators, lawyers were not exempt from federal regulation.[46] The landscape was changing.[47]

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39. Harley supported the creation of "unified" (i.e., mandatory membership) state bars. He thought the states were the key units for bar activity because they "established almost all the body of laws which concern the average practitioner." Herbert Harley, *State and Local Bar Associations*, 13 J. AM. JUDICATURE SOC'Y 45 (1929). The ABA recognized that lawyers would be regulated chiefly by the states. Through the Canons project as well as efforts to upgrade legal education and bar admission standards, the ABA positioned itself as an expert body on the development of internal regulatory systems for the states.

40. Altman, *supra* note 22, at 2396, *quoting* Report of the Standing Comm. on Prof'l Ethics and Grievances, 49 A.B.A. Rep. 466, 467 (1924).

41. William B. Spann, Jr., *The Legal Profession Needs a New Code of Ethics*, BAR LEADER, Nov.-Dec. 1977, at 2.

42. A.B.A. Special Committee to Secure Adoption of the Code of Prof'l Responsibility, Report, 97 A.B.A. Rep. 268, 268-72.

43. A.B.A. Special Committee on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement 1 (Final Draft 1970) (stating that "[a]fter three years of studying lawyer discipline throughout the country, this Committee must report the existence of a scandalous situation that requires the immediate attention of the profession").

44. Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

45. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). Earlier Supreme Court decisions had also struck down ethics rules barring lawyers from participating in group legal services plans.

46. *Id. at* 787-88 (holding that "learned professions" are not exempt from antitrust liability).

47. *See* Schneyer, *supra* note 18, at 688-89 (citing sources). This and other parts of the essay draw on my study of the six-year political process in which the ABA drafted the Model Rules. *Id.* I am not suggesting that there was no significant federal regulation of law practice in 1977, only

Second, some of the original CPR rules, CPR amendments, and ABA ethics opinions construing the CPR were not faring well. In response to the Court's advertising decision, for example, states were scrambling to amend their advertising rules, but doing so in divergent ways at the expense of national uniformity.[48]

In addition, external regulators had begun to use CPR provisions in ways that troubled certain ABA constituencies. Spann's charge to the Commission mentioned two problems in particular.[49] The first worried law firms that heavily recruited lawyers from government. CPR rules clearly provided that if a lawyer moved from a government agency to a private firm, neither she nor her firm could participate, even with the agency's consent, in matters she had worked on at the agency. [50] Those rules were very rarely invoked in disciplinary proceedings, but federal tribunals were looking to the CPR for guidance when deciding motions to disqualify an ex-government lawyer's firm from litigation and administrative proceedings.[51] A strained ABA ethics opinion[52] had declined to read the CPR literally, holding instead that, if the lawyer was screened and her firm obtained the agency's consent, others in the firm could participate in matters the ex-government lawyer had worked on. But the ABA could not assure firms that the courts would follow an ethics opinion rather than the literal terms of the CPR.[53]

The other problem Spann cited worried the corporate bar. The CPR's DR 7-102(B)(1) as originally adopted appeared to require a lawyer who learns that a client has used the lawyer's services to perpetrate a fraud to take steps to rectify the fraud and, if necessary, to do so by "blowing the whistle" on the client. In 1972, the SEC cited that rule to bolster its complaint in the *National Student Marketing* case, a judicial enforcement action against two large firms that failed to notify

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that what existed was quite modest compared to what exists now. Among other things, the Treasury Department and the PTO had their own rules of practice. Circular 230 Regulating Practice Before the Treasury, 31 C.F.R. sec. 10.3; Practice Rules for Representatives of Patent Applicants, 37 C.F.R. sec. 10.14. But those rules closely paralleled the ABA rules and were thought necessary since nonlawyers as well as lawyers practice before the agencies.

48. *See* Charles W. Wolfram, *Barriers to Effective Public Participation in Regulation of the Legal Profession*, 62 Minn. L. Rev. 619, 635 n.65 (1978).

49. Spann, *supra* note 41, at 2-3. Spann's charge also suggested the Model Rules project was undertaken in hopes of shoring up the profession's image after the "bad press" the bar had received due to the highly publicized involvement of President Nixon's lawyers in the Watergate scandal. *Id*.

50. *See* Model Code of Prof'l Responsibility, DR 9-101(B); DR 5-105(D) (1977).

51. *E.g.*, Kesselhaut v. United States, 555 F.2d 791 (Ct. Cl. 1977); Armstrong v. McAlpin, 606 F.2d 28 (2d Cir. 1979), *vacated on rehearing en banc*, 625 F.2d 433 (2d Cir. 1980), *vacated and remanded to dismiss appeal*, 449 U.S. 1106 (1981). In RKO General, Inc., 58 F.C.C.2d 435 (1976), the challenger in an FCC license renewal proceeding sought to disqualify RKO's law firm because a partner had worked on the matter at the FCC. The FCC staff recommended disqualification, citing the CPR rules, but the FCC, citing an ABA ethics opinion, construed the rules not to require disqualification. *Id.* at 439-40.

52. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 342 (1975).

53. For a fuller account, *see* Schneyer, *supra* note 18, at 689. The Model Rules describe disqualification from litigation as a "nondisciplinary remedy," and in that sense it is an external regulatory technique. *See* Model Rules of Prof'l Conduct, Scope cmt. [20] (2007).

shareholders or the SEC when they learned of fraud in a merger transaction they were working on.[54] In response, the ABA amended the CPR to clearly subordinate the whistle-blowing duty to the lawyer's duty to protect confidential client information.[55] But only a minority of states adopted the amendment.[56] The corporate bar wanted the amendment incorporated in a new code that was more likely to be adopted by the states than an isolated amendment to the CPR.

Why did Spann single out such narrow issues for attention? By the late 1970s, the ABA's ethics rulemaking was becoming an exercise in interest group politics. Lawyers had become highly specialized; the organized bar, more fragmented. Established specialty bar associations were thriving and new ones were forming.[57] The ABA had formed sections for members interested in specific fields, and the sections were gaining influence in ABA politics, perhaps at the expense of state and local bar associations. The Section of Administrative Law and Regulatory Practice and the Section of Business Law (as they are now called) were interested in the revolving door and whistle-blowing problems, respectively, and actively pursued their interests in the Model Rules drafting process.[58] As adopted in 1983, the Rules allayed both sections' concerns–at least for the time being.[59]

Thus, whereas the Canons were a response to a regulatory vacuum by a homogeneous ABA and an organized bar that otherwise consisted solely of general-purpose state and local associations, the Model Rules were a response to Supreme Court "intrusions" into the internal sector and to the fact that external decision makers had begun to invoke CPR provisions in ways that worried particular ABA constituencies.

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54. SEC v. Nat'l Student Mktg. Corp., Civil Action no. 225-72 [1971-72 Transfer Binder] Fed. Sec. L. Rep (CCH) para. 93,360 (D.D.C. Feb. 3, 1972). *See also* Roberta Karmel, *Attorneys' Securities Law Liabilities*, 27 BUS. LAW. 1153 (1972) (discussing the case).

55. The amendment purported to protect only "privileged information" but the ABA ethics committee quickly construed that term to refer to all confidential information, whether protected by the attorney-client evidentiary privilege or not. *See* Schneyer, *supra* note 18, at 690 & nn.71 and 72 (citing sources).

56. *See id.*, at 689-90 (citing sources).

57. *See* Judith Kilpatrick, *Specialty Lawyer Associations: Their Role in the Socialization Process*, 33 GONZ. L. REV. 501, 508 (1997-1998) (reporting that by the mid-1990s there were over 1,000 specialty bar associations in the U.S., many of recent origin). In 1982, for example, corporate (i.e., "in-house") counsel broke off from the ABA Business Law Section to form what is now the Association of Corporate Counsel. Since roughly 10% of American lawyers are in-house corporate counsel and their views are not always aligned with those of corporate lawyers practicing in private law firms, this was a significant restructuring of the organized bar. *See* Schneyer, *supra* note 18, at 716-17.

58. *Id*. at 698, 705-06, 716 & n.227. From the outset, the Kutak Commission thought the business law section would be a vital ally when the Model Rules eventually went to the House of Delegates for a vote. *Id*. at 698-99.

59. *See* MODEL RULES OF PROF'L CONDUCT, R. 1.11 (permitting screening); R. 4.1(b) (1983) (subordinating the duty to rectify client fraud to the duty of confidentiality). In 2003, the addition of new exceptions to the duty of confidentiality in Model Rule 1.6(b)(2) and (b)(3) reversed this subordination in part. *See infra* note 115 and accompanying text.

B. Consensus, Conflict, and Special Pleading in the Drafting Processes

1. *The Canons*

By today's standards, a remarkable consensus was achieved in drafting the Canons.[60] The drafting committee solicited comments from all ABA members and every state and local bar association in the country and received over 1,000 responses,[61] yet only the treatment of contingency fees sparked controversy.[62] To some extent, the Canons consensus was probably an artifact of the ABA's membership policies and the drafting process itself. Less than 3% of the country's lawyers were ABA members and, since the ABA was selective in choosing members at the time, most (including the drafting committee members) were elite lawyers.[63] This may explain why the committee deemed any views held by a substantial minority of its own members "too respectable" to condemn.[64]

2. *The Model Rules*

By contrast, the Model Rules process was fraught with conflict and special pleading. President Spann appears to have appointed the Kutak Commission members with a view to forging the Model Rules in something like an adversary process.[65] The State Bar of California and the New York State Bar Association, both with huge memberships, categorically opposed the Model Rules until it became clear that some version would be adopted. Two specialty bars—the American Trial Lawyers' Association (now the American Association for Justice) and the National Organization of Bar Counsel—were so displeased with an early draft that they proceeded to draft rival codes. When Commission chair Robert Kutak suggested that no specialty bar could draft a comprehensive ethics code for all lawyers that would be widely adopted and enforced, an ATLA leader chided him for presuming that

60. With respect to deep values underlying the Canons, however, Susan Carle has uncovered archival evidence of unresolved disagreements about whether lawyers should refuse to do a client's lawful bidding for reasons of conscience. Carle, *supra* note 22.

61. *See* Altman, *supra* note 22, at 2416 (citing sources). Although ABA leaders hoped the Canons project would elevate the status of lawyers in the public's eyes, *id*. at 2467 n.427, they made no systematic effort to obtain lay views on the content of the Canons.

62. *See* Final Report of the Comm. on Code of Prof'l Ethics, 33 A.B.A. Rep. 560, 570-71 (1908). There were apparently no specialty bar associations of note at the time.

63. Hurst, *supra* note 25, at 286-89. In 1910, the ABA had 3,690 members. Because some state and local bar associations also had selective membership policies, and lawyers of the day were not enthusiastic joiners, the membership of all state bar associations as late as 1915 included no more than 20% of the country's lawyers. *Id*. at 289.

64. *See* Altman, *supra* note 22, at 2482-83 n.463 (citing sources).

65. According to Commission reporter Geoff Hazard, Spann wanted a critical and outward-looking drafting body to offset the narrower and more traditional views that were expected to predominate in the House. Author's interview with Geoffrey Hazard, Jr. (Mar. 30, 1985).

all 50 states would "bow down before the infallible pope of legal ethics and adopt what he says ought to be the rules."[66]

Comments on early drafts of the Model Rules came from many sources, including public interest groups, government agencies, and business.[67] Some came from individual lawyers, but the bar had become so institutionalized by 1980 that the vast majority of lawyers' views were channeled to the Commission through other bar entities. A partial but representative list of commentators had 129 entries; 76 were organizations and 34 were specialty groups, including a number of ABA sections.[68] Specialty groups sometimes disagreed sharply on specific rules,[69] and more often resorted to special pleading, pressing for rules that addressed their own parochial concerns.[70]

Seen against the backdrop of the Canons drafting process,[71] the Model Rules drafting process shows how much more fractious and diverse in ethical outlook lawyers were becoming and how much more differentiated in structure the bar had become.

C. Legal Status and Regulatory Functions

1. *The Model Rules*

Both the Canons and the Model Rules are expressly intended to provide guidance to lawyers.[72] Unlike the Canons, however, the Model Rules also elaborate at length on their place in the broader regulatory framework that existed by the late

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66. *See* Stephen Pressman, *Trial Lawyers not Highlighting Their Own Code of Conduct*, DAILY REPORTER, Aug. 11, 1980, at 1 (quoting Thomas Lumbard). When it became clear that the ABA would adopt some version of the Model Rules, the same ATLA leader, in a letter to an NOBC officer, lamented the fact that their organizations had not succeeded in holding back "the great sea of crap coming out of [ABA headquarters in] Chicago." Letter from Thomas Lumbard to Charles Kettlewell (May 25, 1982). Of course, the disciplinary counsel who belonged to the NOBC and the plaintiff's personal injuries lawyers in ATLA did not necessarily oppose the Model Rules for the same reasons. The former were chiefly upset because the Model Rules were abandoning the CPR format with which they had become familiar. The latter wanted a more absolute statement of the duty of confidentiality than the Commission proposed. *See* Schneyer, *supra* note 18, at 709-14.

67. *See id*. at 694-97. The Commission also hoped its Discussion Draft would garner favorable reviews in the national press, which it did. *Id*. at 695-97.

68. ABA Comm'n on Evaluation of Prof'l Standards, Report to the House of Delegates (App. D) (June 30, 1982).

69. *See* Schneyer, *supra* note 18, at 717-23 (citing examples).

70. *See supra* notes 49-59 and accompanying text (providing examples). *See also* Schneyer, *supra* note 18, at 714-16 (citing further examples).

71. When the ABA amended the Canons in the 1930s, there was more disagreement. *See* Benjamin H. Barton, *The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 N. C. L. REV. 411, 433 n.84 (2005).

72. The Canons stated that "[n]o code or set of rules can . . . particularize all the duties of the lawyer" and that they were intended as "a general guide." ABA CANONS OF ETHICS, Preamble (1908), *reprinted in* Altman, *supra* note 22 (Appendix). The Model Rules are "designed [in part] to provide guidance to lawyers." MODEL RULES OF PROF'L CONDUCT, Scope cmt. [20] (2007).

1970s. Several provisions are designed purely for that purpose.[73] For example, comment [20] in the Scope section, states that the Rules are intended "to provide a structure for regulating conduct through disciplinary agencies," but not to be "a basis for civil liability."[74] It was understood by the 1970s that disciplinary rules must be positive law, and the ABA expected the Rules to be adopted as such, but *only* for disciplinary purposes. Accordingly, Comment [20] adds that "violation of a Rule does not necessarily warrant any . . . *non*disciplinary remedy, such as disqualification of a lawyer in pending litigation."[75] Yet the Model Rules (and the CPR) have been cited as persuasive authority in a host of nondisciplinary proceedings.[76] And, although the ABA officially does not "intend" for the Rules to be used that way, it would be unrealistic to suppose that particular bar constituencies never seek to shape the Rules in hopes of influencing external regulators.[77] The overlap between the two sectors has become so extensive that the incentives to try to use internal rulemaking to influence external law are very great.

A close reading of two Comments in the current Model Rules reveals how intertwined the internal and external law have become. Comment [15] in the Scope section acknowledges that the Model Rules "presuppose a larger legal context shaping the lawyer's role," including "laws defining specific obligations of lawyers and substantive and procedural law in general." It also states that "Comments are sometimes used to alert lawyers to their responsibilities under such other law."[78] But the overlap between internal and external law make it hard to determine which Comments those are.

Take Comment [22] to current Model Rule 1.7, a rule governing concurrent conflicts of interest. Comment [22] concerns advance conflict waivers. The first

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73. *See, e.g. id.*, R. 8.5(a) (identifying the circumstances in which a lawyer is subject to a state's disciplinary authority); R. 8.5(b) (providing a choice of law rule for disciplinary authorities).

74. *Id.*, Scope cmt. [20]. In addition, "failure to comply" with the Rules is to be "a basis for invoking the disciplinary process." *Id.*, Scope cmt. [19].

75. *Id.*, Scope cmt. [20] (emphasis added).

76. On the many types of nondisciplinary cases that cited ABA ethics rules during the CPR era, see Charles W. Wolfram, *The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation*, 30 S.C.L. Rev. 281, 303-19 (1979).

77. For example, a comment to Model Rule 1.6 as adopted in 1983 (but later dropped) was almost certainly included in hopes of influencing external decision makers. The comment addressed the problems of interpretation that arise when statutes that require disclosures arguably trump the lawyer's duty of confidentiality. The comment provided that "[w]hether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, *but a presumption should exist against such a supersession.*" Model Rules of Prof'l Conduct, R. 1.6 cmt. [20] (2001) (emphasis added). The general counsel of the SEC saw this for what it was: "[F]ederal securities laws may impose disclosure responsibilities on lawyers which transcend the requirements of confidentiality imposed by ethical rules," he wrote. "That the lawyer must obey the law where the law requires disclosure should be noncontroversial; a 'presumption' to the contrary seems inappropriate." Letter from Daniel Goelzer to Special Committee of the D.C. Bar Studying the Model Rules of Professional Conduct (Jan. 25, 1984).

78. Model Rules of Prof'l Conduct, Scope cmt. [15] (2007).

sentence states that "[w]hether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b)."[79] The regulatory implications of this sentence seem purely internal. If a lawyer sought an advance waiver in circumstances that did not meet the test of Rule 1.7(b), it is hard to imagine the lawyer being held legally accountable for that alone in anything but a disciplinary proceeding.

But the rest of Comment [22] seems to veer off in another direction. It describes circumstances in which an advance waiver is likely or unlikely to be "effective."[80] The effectiveness of a waiver is an issue that would ordinarily arise in external matters, such as when courts decide whether a lawyer who obtained an advance waiver should nonetheless be disqualified from representing another party in subsequent litigation against the client, or be liable to the client for breaching a fiduciary duty by doing so. Because advance waivers can have internal as well as external implications, one wonders what purpose or purposes the "effectiveness" discussion is meant to serve. Is it meant to "alert" lawyers to issues of external law? To influence the development of external law? To encourage disciplinary bodies to keep internal and external law aligned by considering the effectiveness of a waiver when deciding whether a lawyer violated Rule 1.7(b)? Or simply to suggest when a lawyer should have an "effective" defense if charged in a disciplinary proceeding with improperly requesting an advance waiver?

2. *The Canons*

Perhaps because the Canons were silent about their intended legal status, contained many provisions that did not "read" like positive law, and were never effectively enforced, some contemporary scholars have concluded that they were only intended to be "fraternal admonitions,"[81] rather like a nineteenth-century treatise on lawyer deportment except that they were a product of collective effort. But the reasons the Canons did not state that they were meant to be enforceable may have been more practical than philosophical.

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79. Model Rule 1.7(b) provides in pertinent part that, "[n]otwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation; . . . and (4) [the] client gives informed consent confirmed in writing."

80. The Comment states that a "general and open-ended" consent "ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation." *Id.*

81. Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1249-60 (1991). *See also* Murray L. Schwartz, *The Death and Regeneration of Ethics*, 1980 AM. B. FOUND. RESEARCH J. 953, 953-54 (1980) (describing the evolution of ABA ethics rules as a shift from "professional standards, suffused with ideas of morality and ethics, and enforced if at all by informal sanctions and peer pressure, to comprehensive and explicit legislation attended by formally imposed sanctions for breach").

Some bar leaders wanted the Canons to be more than fraternal admonitions. Jacob Dickinson, the ABA President in 1908, hoped and *expected* that many states would "enact" the Canons into law.[82] Charles Boston, a prominent New York lawyer and later ABA President, wanted provisions in the Canons that would "insure the enforcement of [their] principles in practice."[83] And Justice David Brewer of the United States Supreme Court proposed that professional norms "be given operative and binding force by legislation or action of the highest courts of the states."[84] But the ABA, as a private association, could not make the Canons enforceable by fiat.

Herbert Harley of the American Judicature Society thought he knew how to make ethics rules enforceable without formal adoption by court or legislature. In 1914, Harley touted the Law Society of Upper Canada as a model for the "unified" (i.e., compulsory membership) state bars, which began to be formed after 1920. The Law Society was an official but remarkably autonomous organization to which all the lawyers in Ontario had to belong and pay dues. It formulated standards for law practice, legal education, and bar admissions; administered the admissions and disciplinary processes; and even ran its own law school. Harley dubbed this arrangement the "self-governing bar" and promoted state bar unification as the way to achieve it.[85] But although bar unification brought modest improvements in the disciplinary process in some states by increasing bar revenues, it never proved to be necessary or sufficient to make ethics rules legally enforceable.[86]

It was unclear at the time whether the Canons could become positive law by judicial rulemaking or only by legislation. Today, of course, it is the courts that promulgate legal ethics rules, and most lawyers would probably be opposed to state legislatures doing so instead. But the bar's ideological commitment to regulation by the judiciary did not harden until well after the Canons were adopted. Moreover, judging by the history of bar unification, few state supreme courts were confident

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82. Jacob M. Dickinson, *Address of the President*, 33 A.B.A. Rep. 341, 356 (1908).

83. Altman, *supra* note 22, at 2493 (quoting Boston). With remarkable prescience, Boston called for bar associations to establish standing disciplinary committees and described their function and proceedings in detail. *Id.* at 2493 & n.519. Boston was ABA President in 1930-1931. *Id.* at 2414 n.123.

84. *Id.* (quoting Justice Brewer and noting that he was referring to the enactment of Lawyer's Oaths as a basis for discipline).

85. Herbert Harley, *A Lawyer's Trust*, 29 J. Am. Judicature Soc'y 50, 52-54 (1945) (reprinting a speech Harley gave to the Lancaster County (Nebraska) Bar Association in 1914).

86. *See* Theodore J. Schneyer, *The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case,* 1983 Am. B. Research J. 1, 18-24. Interestingly, when the California State Bar Act of 1927 created a unified bar, the legislature delegated plenary disciplinary power to that entity. But the state supreme court soon construed the Act not to authorize state bar disbarments and suspensions, only "investigations" of grievances and "recommendations" of discipline. *See In re* Herron, 298 P. 474, 480 (Cal. 1931); Lowell Turrentine, *May the Bar Set Its Own House in Order?*, 34 Mich. L. Rev. 200, 202 (1935).

before the 1940s that they had state constitutional authority to promulgate *any* rules governing law practice without a specific delegation of legislative authority.[87]

In addition to these constitutional uncertainties, the ABA had another reason not to declare that the 1908 Canons were intended to be enforceable, namely, the manifest incapacity of the fledging state and local bar associations to fund, structure, and administer a disciplinary system that would be taken seriously. Disciplinary proceedings modeled after proceedings in the English bar were not unheard of, but there were no standing grievance committees, few lawyers were disciplined without first being convicted of crimes, some courts believed they were powerless to impose disciplinary sanctions short of disbarment, the disciplinary process was largely unknown to the public, specialized bar counsel were unheard of, and there was no funding and no clear authority for courts to tax lawyers to support disciplinary enforcement.[88] Many states only began to develop an effective disciplinary system after 1970, when the CPR supplanted the Canons and the ABA published the Clark Report.

D. Distinctions Between Practice Contexts

The Canons and Model Rules also differ in the extent to which they distinguish between practice contexts. Because the Model Rules are not nearly as contextualized as the practice guidelines that specialty bars are increasingly creating for practice in particular fields,[89] we may underestimate how contextualized they are compared to the Canons. But the difference is dramatic.

Consider three context-sensitive variables that play a prominent role in the Model Rules. The first is role. In the 1970s, critics charged that the lawyer's ethical duties rested far too heavily on the concept of the lawyer as zealous advocate, bound to do anything lawful to achieve client objectives whatever the consequences for others.[90] Insofar as the Model Rules responded to such criticism, it did so not by abandoning role ethics in favor of "ordinary morality" as some critics proposed,[91] but by distinguishing between the roles lawyers play. There are now Model Rules focusing on the lawyer as advisor, evaluator, third-party neutral, and negotiator, as

87. Until 1937, unified state bars were always created by legislation or after legislative delegation of authority to the courts. In that year, Nebraska became the first state to unify its bar purely by court rule and this soon became the preferred method. *See* Schneyer, *supra* note 86, at 43 n.246 (citing sources). In a fairly typical sequence, the Wisconsin Supreme Court recognized the Canons as "guidelines" in matters of professional responsibility in the mid-1920s, Hepp v. Petrie, 200 N.W. 857 (Wis. 1924), but did not adopt the Canons as rules of court until 1956, when it also created the unified Wisconsin State Bar.

88. *See* Altman, *supra* not 22, at 2491. Also, if the relatively vague Canons were to be enforced, it would have been important to give lawyers interpretive guidance. But no bar associations rendered advisory ethics opinions until the New York County Bar began to do so in 1912. *See* Charles Boston*, Practical Activities in Legal Ethics*, 62 U. PA. L. REV. 103, 111 (1913).

89. *See* notes 131-34, 136 and accompanying text *infra.*

90. *E.g.*, Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 5 (1975).

91. *Id.*

well as advocate.[92] Even within the advocate's domain, the Rules distinguish between advocacy in civil and criminal litigation,[93] ordinary and ex parte judicial proceedings,[94] and legislative and adjudicative proceedings.[95] By contrast, although some Canons were litigation specific, none focused on a non-litigation role.[96]

A second important variable in the Model Rules is client status. The Model Rules detail the lawyer's duties to current clients,[97] former clients,[98] organizational clients,[99] clients with diminished capacity,[100] and prospective clients.[101] For limited purposes, they also distinguish between sophisticated and unsophisticated clients.[102] The Canons, by contrast, make almost no reference to distinct client-types.[103]

The third variable is the lawyer's workplace. Unlike the 1908 Canons, the Model Rules include provisions addressed to lawyers working in government agencies.[104] More importantly, the Rules impose workplace governance duties on partners, managers, and supervisory lawyers who practice in law firms, legal services offices, or corporate legal departments.[105] They also identify the duties of subordinate lawyers in those settings.[106] The 1908 Canons did not distinguish between workplaces or refer to workplace governance. Indeed, before Canon 33 was

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92. *See e.g.*, Model Rules of Prof'l Conduct R. 2.1 (Advisor); R.2.3 (Evaluator); 2.4 (Third-Party Neutral); 3.1-3.6 (Advocate); 4.1 (Negotiator) (2007). As adopted in 1983, the Model Rules also recognized the lawyer's role as an "intermediary" assisting multiple clients to "establish or adjust a relationship . . . on an amicable and mutually advantageous basis"—e.g., to form a business. Model Rules of Prof'l Conduct R. 2.2 (2001). This rule was deleted in 2002, not because the role of intermediary was repudiated, but because of confusion about how the rule squared with general rules governing conflicts of interest.

93. See *id.*, R. 3.1; R. 3.3(a)(3).

94. *See id.*, *R.* 3.3(d) (imposing special disclosure duty on lawyers in ex parte judicial proceedings).

95. *See id.*, R. 3.9 (duties of lawyers representing clients in legislative or administrative proceedings).

96. Canon 31 referred to the lawyer's "responsibility for advising [clients] as to questionable transactions," but did nothing to flesh out that responsibility. Canon 5 contains three sentences on "the defense or prosecution of those accused of crime."

97. Model Rules of Prof'l Conduct R. 1.7 (2007).

98. *Id.*, R.1.9.

99. *Id.,* R.1.13.

100. *Id.*, R.1.14.

101. *Id.*, R 1.18.

102. *Id.*, R.1.7 cmt. [22] (making client sophistication a relevant factor in determining the propriety of seeking an advance waiver of future conflicts of interest).

103. Canon 32 did refer to corporate and individual clients but only to assert that "[n]o client, corporate or individual," is entitled to service or advice involving "disloyalty to the law."

104. Model Rules of Prof'l Conduct R. 1.11 (Special Conflicts of Interest for Government Lawyers); *id.*, Scope cmt. [18] (noting that government lawyers are often authorized to make decisions that in private client-lawyer relationships are for the client to make). In addition, Model Rule 3.8 deals at length with the special responsibilities of prosecutors, a topic given only two sentences in Canon 5.

105. *Id.*, R. 5.1, 5.3.

106. *Id.*, R. 5.2.

added in 1928, the Canons made *no* references to law firms at all,[107] though sizable firms (as well as legal aid offices and corporate legal departments) existed in the big cities by 1908. The only relevant unit of analysis for purposes of legal ethics was the individual lawyer.

In attending to workplace governance, the Model Rules represent a dramatic departure from the Canons. They reflect the modern idea that lawyers' compliance with ethical standards can often depend as much on the governance of their workplace as on the content of their character. Law firms, regulators, and malpractice insurers now devote enormous energy to the creation and maintenance of an appropriate "ethical infrastructure" in the legal workplace.[108] To that end, New Jersey[109] and New York[110] have gone so far as to provide for "law firm discipline" in cases of supervisory breakdowns or certain other deficiencies. But the Model Rules have not taken this step and there is considerable resistance to the idea in the profession.[111] So far, external regulators have shown more interest than the bar and the state supreme courts in sanctioning law firms for misconduct that might have been prevented by appropriate firm governance.[112]

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107. Belatedly, Canon 33 stated that "[p]artnerships among lawyers for the practice of their profession are very common and are not to be condemned," but made no mention of any distinctive ethics issues that might arise for lawyers who practice as a partnership.

108. *See* Fischer, *supra* note 3, at 185.

109. N.J. RULES OF PROF'L CONDUCT R. 5.1 (2007).

110. N.Y. JUDICIARY LAW, DR 1-104(A) (2007) (requiring firms to make reasonable efforts to ensure that all their lawyers conform to disciplinary rules); DR 1-104(C) (requiring lawyers to adequately supervise their lawyers and other employees); DR 5-105(E) (requiring firms to keep records of past engagements and have a system that effectively assists their lawyers in complying with rules governing conflicts of interest).

111. For interesting criticism of law firm discipline by an SEC commissioner, see *In re* Keating, Muething & Klekamp, Exchange Act Release No. 15,982 [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) para. 82,124, at para. 81,981 (July 2, 1979). In that matter, the SEC used its own disciplinary authority to sanction a law firm that had prepared and filed SEC disclosure statements for their chief client that omitted material facts. The lawyer who had prepared the statements claimed to have no knowledge of the facts omitted, but those facts were known to others in the relatively small firm. The SEC disciplined the firm for its "lack of comprehensive internal procedures . . . to gather and evaluate" the facts. *Id* at para. 81, 988. In a stinging dissent, Commissioner Roberta Karmel described the SEC's order as "tantamount to setting [and enforcing] professional standards, characterized such standards as "peculiarly personal," and argued that "a law firm should not be held liable in a disciplinary proceeding (as it could in a damage action) for the conduct of its partners." *Id.* at paras. 81,995, 81,996-97. Legal ethics may have been "peculiarly personal" in the Canons' day, but the attention to issues of firm governance in the Model Rules suggests that that is no longer the case.

112. *E.g.*, FED. R. CIV. P. 11(c) (1993) (giving judges discretion to sanction a law firm for filing a frivolous pleading, not just the lawyer who signed it); American Jobs Creation Act of 2004 sec. 822, *codified* at 31 U.S.C. sec. 330(b) (authorizing the Secretary of the Treasury to sanction a firm when a lawyers in the firm violate practice rules in the Department's Circular 230).

II. Are The Model Rules Becoming Less Important?

With the contrasts drawn in Part I in mind, I now want to suggest that although the Model Rules play a more active role in the regulation of law practice than the Canons did, they are becoming less important than they once were in both the external and the internal sectors of the regulatory framework.

A. Interplay Between the Internal and External Sectors in the Model Rules Era

Bar leaders sometimes complain that the regulation of law practice, at least in fields of federal interest, is irretrievably "slipping away from the bar and into the hands of agencies and courts."[113] A sampling of three rounds in the ongoing interplay between the internal and external sectors in the Model Rules era, events involving the Rules themselves, suggests that this is true.

In the first round, the bar was on the offensive, albeit for defensive purposes. In 1978, as the Kutak Commission started its work, an ad hoc committee of the ABA Section of Business Law (with the *National Student Marketing* case freshly in mind) observed that ABA ethics rules were not only used in disciplinary proceedings, but had become "*the basic source of law* from which courts and agencies draw the responsibilities of lawyers."[114] Accordingly, the committee pressed the Kutak Commission for rules tough enough to convince the SEC to defer to internal law in regulating the corporate bar, but hedged enough to keep lawyers' relations with the management of corporate clients workable from the corporate bar's standpoint.[115] In 1980, the SEC responded as hoped, tabling a proposal to codify the agency's position in *National Student Marketing* pending ABA consideration of rules on the subject.[116]

The second round was a standoff. In the early 1990s, the savings and loan crisis prompted federal banking regulators, notably the Office of Thrift Supervision ("OTS"), to institute administrative enforcement actions and file lawsuits against

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113. Dennis E. Curtis, *Old Knights and New Champions: Kaye, Scholer, the Office of Thrift Supervision, and the Pursuit of the Dollar*, 66 S. Cal. L. Rev. 987, 1017 (1993). *See also* Jack Bierig, *Whatever Happened to Professional Self-Regulation*?, 69 A.B.A.J. 616, 617 (1983).

114. *See* Schneyer, *supra* note 18, at 706 & n.173 (emphasis added) (citing source). The fear that external regulators could use the Model Rules as a basis for new lawyers' liabilities was widely recognized during the drafting process. For example, the ABA Committee on Professional Liability was preoccupied with weeding out provisions that could be used in this way. *See id*, at 724-28.

115. *Id.* In contrast to this offensive strategy by the Section of Business Law, Robert Kutak tried to encourage bar groups critical of the Commission's early drafts to rally behind the Commission by suggesting that controversial proposals were necessary concessions to developments in external law. *See* Schneyer, *supra* note 18, at 703-05.

116. *See* Bill Winter, *Whistleblowing Rule Rejected by SEC*, 66 A.B.A.J. 704 (1980); Ruth Marcus, *SEC: Ethics Dilemma a Bar Issue*, Nat'l L.J., May 12, 1980, at 3 col. 1. *See also* Edward F. Green, *Lawyer Disciplinary Proceedings Before the Securities and Exchange Commission*, 14 Sec. Reg. & L. Rep. (BNA) 168 (Jan. 3, 1982) (remarks of an SEC commissioner assuring the bar that the SEC intended to leave lawyer regulation chiefly to the state supreme courts).

law firms that had represented soon-to-fail thrift institutions. The OTS alleged that lawyers in those firms had violated the Model Rules, not just arcane banking laws. In response, the ABA created the Working Group on Lawyers' Representation of Regulated Clients, an ad hoc task force. The Working Group prepared a report sharply disagreeing with the government's interpretation of the Rules.[117] The issues in dispute included (1) how far banking lawyers may go in limiting the scope of their engagements, (2) how far they must inquire into the factual underpinnings of their legal advice, (3) how extensive their duty of candor to bank examiners is, and (4) whether and if so under what circumstances lawyers who learn of possible wrongdoing in a client company must climb the corporate ladder to get the matter resolved.[118] Because none of the pertinent Model Rules clearly resolved these issues, neither side was incontrovertibly right or wrong.[119]

This led to an inconclusive battle between the ABA and the OTS for "home field advantage." The Working Group proposed that any banking agency that disagreed with the bar's interpretation of the Model Rules "seek an authoritative ruling from the ABA [ethics committee] before seeking to use its own interpretation as the basis for an enforcement action."[120] But in its settlement with Kaye Scholer, the OTS required the firm not to omit material facts from future submissions to a banking agency when the firm regards those facts as irrelevant under its theory of the law but "knows that the agency may have a different view of the law."[121] What little guidance for the future emerged from this standoff was a product of bilateral negotiations between the Working Group and banking regulators.[122]

In the most recent round, the bar was decidedly on the defensive. There were tensions between the Model Rules as of late 2002 and the rules the SEC was proposing in order to implement Congress's mandate to regulate lawyers who appear and practice before the agency on behalf of public companies. Two Model Rules were implicated–Rule 1.13 on a lawyer's duties in representing an organization and Rule 1.6(b) on exceptions to the lawyer's duty of confidentiality. The ABA amended both rules in August 2003, on the recommendation of the ABA Task Force on Corporate Responsibility, another ad hoc body appointed by the ABA President, this time to examine "the systemic issues relating to corporate

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117. Am. Bar Ass'n Working Group on Lawyers' Representation of Regulated Clients, *Laborers in Different Vineyards? The Banking Regulators and the Legal Profession* (Discussion Draft Jan. 1993) [hereinafter cited as *Vineyards*].

118. *See* Ted Schneyer, *From Self-Regulation to Bar Corporatism: What the S&L Crisis Means for the Regulation of Lawyers*, 35 S. TEX. L. REV. 639, 650-64 (1994).

119. *See* Howell E. Jackson, *Reflections on Kaye Scholer: Enlisting Lawyers to Improve the Regulation of Financial Institutions*, 66 S. CAL. L. REV. 1019, 1020) (1993) (stating that "[t]he substantial ambiguity inherent in current standards of professional conduct makes it all but impossible to resolve retrospectively the disputes between the government and defenders of the private bar").

120. *Vineyards, supra* note 117, at 222.

121. *In re* Fishbein, OTS AP-92-24, para. 12(d) (Mar. 11, 1992).

122. *See* Schneyer, *supra* note 18, at 671-74 (discussing the negotiations).

responsibility" that had arisen out of the Enron bankruptcy and similar scandals.[123] The changes brought the Model Rules into closer, though not complete, alignment with the more stringent "up-the-ladder reporting duty" and the more broadly permissive "reporting out" rule the SEC had just adopted.[124] However, the ABA and other bar groups were able to temper the regulations the SEC had initially proposed.[125]

Thus, while the Model Rules were being drafted, the ABA was able to forestall the SEC's development of more demanding external law. But roughly twenty-five years later, in the most recent skirmish, influence appears to have run at least as much in the other direction. Of course, this reversal may not typify internal/external relations today or for the future. But it does suggest that the ABA and the state supreme courts can no longer rely on external deference to the internal law, at least at the federal level where much of the action is today, and where the courts, unlike state courts, do not claim "final-word" authority to regulate law practice. The ABA (and the highest state courts) may increasingly have to adapt their rules of legal ethics to developments in the external sector. At the same time, the ABA may find that it can better influence the development of external law through direct lobbying, bilateral negotiations, comments submitted in administrative rulemaking proceedings, and participation as a party or an amicus in cases concerning the validity and application of external law.

B. The Diminishing Salience of the Model Rules in the Internal Sector

Although the Model Rules remain the template for nearly every state's rules of professional conduct, there are also respects in which their importance in the internal sector may be diminishing. First, a growing number of lawyers appear to be insulating themselves from the threat of professional discipline for ethics violations by holding themselves out not as lawyers, but as "consultants" who provide

123. Report of the ABA Task Force on Corporate Responsibility 2 (Mar. 31, 2003).

124. For a concise summary and analysis of the changes and the corresponding SEC regulations, *see* M. Peter Moser, *The Need for Model Rules Changes in a New Regulatory Environment*, Prof'l Law. 7-9 (Symposium Issue 2003). I characterize the 2003 amendments to Model Rules 1.6 and 1.13 as a significant concession to the primacy of external law because the ABA House had declined to adopt almost identical changes to Rule 1.6(b) shortly before the SEC adopted its rules. *See* Regulation of Lawyers: Statutes and Standards 85 (Stephen Gillers & Roy Simon eds., 2008).

125. John C. Coffee, Jr., Gatekeepers: The Professions and Corporate Governance 221-23 & n.90 (2006) (noting that the SEC backed off from its "noisy withdrawal" proposal, which would have required lawyers to withdraw from representing a public corporation if the client did not respond appropriately to the lawyer's reports of evidence of internal wrongdoing, to notify the SEC of the withdrawal and the fact that it was based on "professional considerations," and to disaffirm any of the lawyer's work that the lawyer reasonably believes may be materially false or misleading). *See also* Koniak, *supra* note 16, at 1238 (arguing that as a result of the corporate bar's influence the regulations the SEC did adopt in 2003 would have little effect on practice).

"law-related" services such as regulatory compliance advice to business.[126] This phenomenon could snowball because the Model Rules themselves acknowledge that a lawyer providing law-related services is not subject to most of the Rules governing client-lawyer relationships so long as the lawyer provides those services in a manner that is distinct from her provision of legal services to clients and takes steps to ensure that the recipient knows that the protections of the client-lawyer relationship do not apply.[127]

Second, because the Model Rules address lawyers generally, they (and their state analogues), though clearer and more detailed than the Canons, are nonetheless short on rules tailored for particular practice fields or settings.[128] Trends in law practice and bar structure, some more apparent and profound than others, are creating unprecedented lawyer demand for more contextualized practice norms. Relentless growth in lawyer specialization is the clearest and most profound of these trends.[129] Specialization begets specialty bar associations and bar sections, many of which have issued guidelines for practice in their fields. In 1991, for example, the American Academy of Matrimonial Lawyers published *The Bounds of Advocacy*, a set of non-binding guidelines for family law practitioners.[130] The Academy did so because, "with rare exceptions, issues relevant to only a specific area of practice cannot be dealt with in detail or cannot be addressed at all [in the Model Rules] and many Fellows [of the Academy] have encountered instances where the [Model Rules] provided insufficient or even undesirable guidance."[131]

Some specialty guidelines purport to be mere elaborations on the Model Rules[132] and, for that reason, might be thought to *enhance* the influence of the

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126. *See* Tanina Rostain, *The Emergence of "Law Consultants,"* 75 FORDHAM L. REV. 1397 (2006).

127. MODEL RULES OF PROF'L CONDUCT R. 5.7(a) (2007). "Law-related services" are services "that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer." *Id.*, R. 5.7(b).

128. *See* Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 224, 300-02 (2003) (noting a modest drift toward specificity in the ABA ethics codes over time, but finding few provisions, even in the Model Rules, that address practice in specific fields). Professor Zacharias infers that the codes have mostly had *nonregulatory* aims, such as promoting lawyer introspection and professional cohesion. *Id.* at 231-39. I have heard ABA leaders express reluctance to load the Rules up with highly contextualized provisions because doing so would be like weighing down a Christmas tree with too many ornaments.

129. For evidence that a large and growing number of lawyers are confining their practices to a single, narrowly defined field, see JOHN P. HEINZ *ET AL*, URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 37 (2005).

130. AM. ACAD. OF MATRIMONIAL LAW, THE BOUNDS OF ADVOCACY: STANDARDS OF CONDUCT (1991). *See also* AM. COLL. OF TRIAL LAWYERS, CODE OF PRETRIAL CONDUCT (2002); ABA Ethical Guidelines for Settlement Negotiations (2002) (developed by the ABA Section of Litigation); *ACTEC Commentaries on the Model Rules of Professional Conduct*, 28 REAL PROP. PROB. & TR. J. 865 (1994).

131. AM. ACAD. OF MATRIMONIAL LAW, *supra* note 130, Preliminary Statement.

132. *E.g.*, *ACTEC Commentaries, supra* note 130, at 865.

Model Rules. On balance, however, I think this trend is reducing the salience of the Model Rules in the internal sector and decentralizing the process of formulating the legal profession's practice norms. Of course, state ethics codes based heavily on the Rules are adopted as positive law, at least for disciplinary purposes, while specialty guidelines are formally unenforceable.[133] But this is not a reliable measure of relative influence on lawyers' conduct. Whereas the Model Rules are addressed to all lawyers—i.e., a "community" whose bonds have frayed considerably with the specialization trend—specialty guidelines are addressed to relatively cohesive subgroups bound together by "linkages based on function, context, and status" rather than geography.[134]

Moreover, some specialty guidelines are not mere elaborations; they appear to be in considerable tension with the Model Rules. For example, under the Model Rules lawyers must permit their clients to choose the objectives of the representation,[135] yet the 2000 edition of *The Bounds of Advocacy* urges divorce lawyers to "consider the welfare of, and seek to minimize the adverse impact of the divorce on, the minor children."[136]

Other trends that could throw the centrality of the Model Rules into further doubt may now be emerging. One is the inclination to engineer new roles for lawyers in response to unmet needs and perceived problems. These roles are not contemplated by the Model Rules and their appropriateness under the Model Rules is murky, but they are already being legitimated by other means. The Collaborative Law Movement has spawned one such role in response to the perception that divorce litigation has become unduly rancorous. In a divorce collaboration, the spouses each retain a lawyer and the four participants commit themselves to negotiating in good faith in an effort to avoid litigation. To reinforce this commitment, each lawyer promises the other spouse not to continue his or her engagement if litigation proves necessary.[137] Uncertainty about the propriety of the collaborative lawyer's role under the prevailing rules of legal ethics was highlighted in 2007 when the ABA and Colorado State Bar Association ethics committees rendered

133. However, there have been calls for binding ethics codes that are tailored for specific fields of practice. *See, e.g.*, Nancy B. Rapoport, *Our House, Our Rules: The Need for a Uniform Code of Bankruptcy Ethics*, 6 Am. Bankr. Inst. L. Rev. 45, 46-48 (1998); Stanley Sporkin, *The Need for Separate Codes of Professional Conduct for the Various Specialties*, 7 Geo. J. Legal Ethics 149, 149-50 (1993).

134. Murray L. Schwartz, *Death and Regeneration of Ethics*, 1980 Am. B. Found. Research J. 953. With a growing percentage of lawyers more involved with a specialty group than with general purpose bar associations organized on geographical lines, the profession in the aggregate may also be less committed than in the past to the traditional primacy of regulation by the highest state courts.

135. Model Rules of Prof'l Conduct R. 1.2(a) (2007).

136. Am. Acad. of Matrimonial Lawyers, The Bounds of Advocacy sec. 6.1 (2000).

137. For a rich account of the process and the collaborative lawyer's role, see Pauline H. Tesler, Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation (2001).

diametrically opposed opinions on the subject.[138] But some state statutes have already approved the use of the collaborative law process to resolve divorce and other family law disputes,[139] and the National Conference of Commissioners on Uniform Laws ("NCCUSL") is in the process of drafting a uniform statute on the subject for state adoption.[140]

Another recently "engineered" role for lawyers is that of a "best interests attorney," whom a judge might in some circumstances appoint instead of a guardian ad litem or a traditional lawyer-advocate to represent children in abuse, neglect, or custody cases and, in doing so, pursue their "best interests" rather than their stated objectives. In another uniform act, NCCUSL recently delineated the role of the "best interests attorney" and approved the appointment of lawyers to play that role in certain cases.[141] That Act, and its endorsement of the concept of the "best interests attorney," were to be considered for approval by the ABA House of Delegates in February 2008,[142] but the matter has proven controversial and no action will be taken before the ABA Midyear Meeting in February 2009.[143] Proponents of the Act, including the ABA Section of Family Law, argue that the role of the "best interests attorney" is consistent with Model Rule 1.14, which concerns the duties of a lawyer when representing a client with "diminished capacity."[144] Opponents, including the ABA Section of Litigation, disagree.

Finally, two other developments that I believe are gaining steam could also make the Model Rules less important, at least in their current form. The first is an interest in placing greater reliance on contract terms and less on unwaivable ethics rules to govern client-lawyer relationships. There is growing scholarly support for the idea[145] and, in the field, the Collaborative Law Movement has developed a set

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138. The Colorado ethics committee found the arrangement unethical per se on the ground that it creates an unwaivable conflict because the lawyer's commitment to a third party inevitably and materially interferes with the lawyer's ability even to consider the alternative of litigation. Colo. Bar Ass'n Ethics Comm., Formal Op. 115 (Feb. 24, 2007). The ABA committee characterized the arrangement as a presumptively permissible limitation on the scope of representation under Model Rule 1.2(c). ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-447 (Aug. 20, 2007).

139. CAL. FAM. CODE sec. 2013 (West 2007); N.C. GEN. STAT. secs. 50-70 to 50-79 (2007); TEX. FAM. CODE ANN. Sec. 6.603 (Vernon 2006).

140. NCCUSL, Collaborative Law Act (Discussion Draft) (Oct. 2007).

141. Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act (rev. 2007), *reprinted at* 42 FAMILY L.Q. 1 (2008).

142. Report 110B to the House of Delegates (Midyear Mtg. 2008).

143. *Compare, e.g.*, Memorandum Re: The "Best Interests Attorney" and the Model Rules from Martha L. Walters, NCCUSL President, to the ABA Standing Comm. on Ethics and Prof'l Responsibility (Mar. 31, 2008) (defending the concept) *with* ABA Section of Litigation, Summary of Opposition to NCCUSL Act on Representation of Children (Jan. 2008) (criticizing the concept). For a concise discussion of the controversy, see Barbara Ann Atwood, *The Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act: Bridging the Divide Between Pragmatism and Idealism*, 42 FAM. L.Q. 63, 90-100 (2008).

144. MODEL RULES OF PROF'L CONDUCT R. 1.14 (2007).

145. *See, e.g.*, William H. Simon, *Who Needs the Bar?: Professionalism Without Monopoly*, 30 FLA. ST. U. L. REV. 639, 657 (2003); Scott R. Peppet, *Lawyers' Bargaining Ethics, Contract,*

of agreements to govern the roles of lawyers *and* clients in the collaborative law process.[146] The second development is the growing thirst among lawyers for "best practices" or "protocols" that are too specialized or detailed for inclusion in the Model Rules but definitive enough to provide not only guidance, but also perhaps "safe harbor" from legal risks that for many lawyers are much more daunting than the risk of professional discipline.[147]

Conclusion

If, as I have suggested, the internal sector is losing ground to external regulation and the Model Rules are becoming less important within the internal sector, what should be the ABA's priorities as it tries to maintain a leadership role in shaping the regulation of law practice? For reasons not explored in this article the ABA is already taking an interest in the development of transnational regulatory regimes and in international trade agreements that could have major implications for the regulation of legal services.[148] What seems most portentous for the ABA in the

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and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism, 90 Iowa L. Rev. 475 (2005); Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 Va. L. Rev. 1707, 1752-58 (1998); Richard W. Painter, *Game Theoretic and Contractarian Paradigms in the Uneasy Relationship Between Regulators and Regulatory Lawyers*, 65 Fordham L. Rev. 149 (1996).

146. *See* Tesler, *supra* note 137, at 121-22, 143-51 (providing samples of the agreements). Since collaborative law was conceived in the early 1990s, the Movement has quickly become institutionalized in nearly 200 local practice groups around the country and an umbrella organization, the International Association of Collaborative Professionals ("IACP"). A distinctive feature of these bodies is that membership is often open not only to lawyers but also to other professionals who participate in collaborations as neutral experts. These groups are interested in the governance of a *process*, not a profession. And whereas the ABA develops ethics codes for adoption as state rules of professional conduct, a top-down approach, the local collaborative law groups sometimes develop protocols that are adapted and disseminated by the IACP, a bottom-up approach. For more description of their work, see Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 Ariz. L. Rev. 289, 329-34 (2008). As the roles of lawyers and other professionals converge in additional fields, more lawyers may become members of interdisciplinary associations like the collaborative law groups or the National Association of Drug Court Professionals. The implications for traditional bar associations are worth considering.

147. *See* Mona L. Hymel, *Controlling Lawyer Behavior: The Sources and Uses of Protocols in Governing Law Practice*, 44 Ariz. L. Rev. 873 (2002). For example, some law firm policies or procedures are adopted in response to new or newly perceived civil liabilities. *See* Harvey L. Pitt et al, *Law Firm Policies Regarding Insider Trading and Confidentiality*, 47 Bus. Law. 235, 240 (1991) (reporting on a survey showing that a large percentage of corporate law firms adopted policies and procedures to prevent and detect insider trading by firm lawyers and employees in the wake of new legislation imposing heavy penalties on firms whose personnel engage in such trading). *See generally* Steven R. Volk et al, *Law Firm Policies and Procedures in an Era of Increasing Responsibilities: Analysis of a Survey of Law Firms*, 48 Bus. Law. 1567, 1568 (1993).

148. *See* Martha Neil, *Gearing up for GATS: International Trade Agreement Could Prompt Changes in MJP* Rules, A.B.A. J., Sept. 2003, at 18; Laurel S. Terry, *U.S. Legal Ethics: The Coming Age of Clobal and Comparative* Perspectives, 4 Wash. U. Global Stud. L. Rev. 463 (2005); Laurel S.

developments emphasized in this article is the growth of external regulation, especially at the federal level, and the complexity of internal/external relations which that growth has occasioned. To assess the implications for the ABA of the shift in the regulatory center of gravity toward Washington, D.C., where legislative and administrative initiatives predominate over judicial regulation, one must consider what is distinctive about those initiatives. Four features come to mind.

First, much of the ABA's effort in the field of lawyer regulation over the years has been devoted to lengthy and increasingly fractious political processes initiated by the ABA to produce comprehensive ethics codes. But the most prominent federal initiatives proposed in recent decades have been limited in scope and require relatively rapid responses from the bar. For these external initiatives, various ABA sections, small ad hoc task forces, and the ABA's government affairs office in Washington are often best equipped to be "first responders."

Second, federal deference to regulatory programs designed in tandem by the ABA, state and local bar associations, and the highest state courts can no longer be routinely expected. Consequently, the ABA must be now be prepared to help shape, not simply oppose, external initiatives, as it tried unsuccessfully to do in lobbying against the Sarbanes-Oxley Act.[149]

Third, many of the recent federal initiatives lump lawyers together with other service providers in a larger class of regulatees, such as "bill collectors,"[150] "financial institutions,"[151] "debt relief agencies,"[152] and "material tax advisers."[153]

Terry, *GATS' Applicability to Transnational Lawyering and Its Potential Impact on U.S. State Regulation of Lawyers*, 34 VAND. J.TRANSNAT'L L. 989 (2001)

149. *See* JOHN C. COFFEE, JR., *supra* note 125, at 217 (stating that the ABA was "caught flat-footed" by the introduction of section 307, mandating SEC regulation of lawyers "appearing and practicing" before the Commission on behalf of public companies)

150. In 1986, Congress eliminated an exemption for lawyers from the detailed restriction imposed on bill collectors under the Fair Debt Collection Practices Act, 15 U.S.C. sec. 1692c. In Heintz v. Jenkins, 514 U.S. 291 (1995), the Supreme Court construed the amended Act to reach even lawyers who collect bills for their clients in state litigation.

151. *See supra* note 17 (referring to the ABA's successful challenge to the FTC's position that lawyers constitute "financial institutions" under the Gramm-Leach-Bliley Act of 1999).

152. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), 11 U.S.C. sec. 101 (12A) (defining a "debt relief agency" as "any person who provides any bankruptcy assistance to an assisted person in return for the payment of money . . . , or is a bankruptcy petition preparer"); *id*. sec. 101 (4A) (defining "bankruptcy assistance" as the provision of information, advice, counsel, document preparation, document filing, or "legal representation" with respect to a proceeding under the Bankruptcy Code); *id.* sec. 101(8) defining "assisted person" as someone with "consumer debts" and "non-exempt assets worth less than $150,000"). At the instance of the bankruptcy committee of the ABA Division of General, Solo and Small-Firm Practice, the ABA unsuccessfully lobbied against the provisions treating lawyers as debt relief agencies. However, some federal courts have construed the term "debt relief agency" not to apply to lawyers. *See,e,g, In re* Attorneys at Law and Debt Relief Agencies, 332 B.R. 66 (Bankr. S.D. Ga. 2005); Milavetz, Gallop & Milavetz, P.A. v. United States, 355 B.R. 758 (Bankr. D. Minn. 2006), *rev'd*, No.07-2405 (8th Cir. Sept. 4, 2008).

153. To make questionable transactions more transparent in an effort to deter abusive tax shelters, the American Jobs Creation Act of 2004 ("AJCA") imposes duties on "material tax

Congress's recognition in 1998 of an accountant-client privilege for tax advice purposes in order to level the playing field on which lawyers and tax accountants compete[154] is a related phenomenon. This flattening of occupational distinctions can be galling to a profession that has long prided itself on its own internal regulation. The ABA has resisted the inclusion of lawyers in larger regulatory classes, sometimes successfully,[155] sometimes not,[156] but this pattern of occupational "flattening" appears not to be an ephemeral development and cannot be effectively opposed in every case.

Finally, several of the most significant federal initiatives in recent years bear out Professor Koniaks's view that the balance of values that informs external regulation—the "state's law"—is often different from the balance that informs "the bar's law."[157] The initiatives in question all impose "gatekeeping" duties on lawyers, i.e., duties to monitor their clients for the sake of other interests. They impose duties on consumer bankruptcy lawyers for the protection of creditors and the bankruptcy process;[158] on tax lawyers for the sake of deterring tax abuse;[159] and on lawyers who advise public corporations, for the benefit of the investing public.[160] Here again, the ABA would be well advised to pick its fights rather than oppose every gatekeeping initiative. But if an agency becomes so preoccupied with its enforcement mission that it proposes practice rules and sanctions for noncompliance that would leave lawyers with too little independence to protect their clients' legitimate interests,[161] it would be the ABA's responsibility to strenuously oppose those rules and sanctions.

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advisers" and defines such adviser in a manner that includes tax lawyers). AJCA, 26 U.S.C. sec. 6111(b)(1)(A).

154. Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 (1998).

155. *See supra* note 151.

156. *See supra* note 152.

157. *See supra* note 15 and accompanying text.

158. *E.g.*, BAPCPA, 11 U.S.C. sec. 527(a), (b) (requiring debt relief agencies to warn clients about the consequences of concealing assets, swearing a false oath, and failing to provide requested information); *id.* sec. 526 (a)(4) (barring debt relief agencies from advising an assisted person to incur more debt in contemplation of filing for bankruptcy).

159. *E.g.*, 26 U.S.C. secs. 6111, 6112 (requiring material advisers to inform the IRS when they have advised a client regarding a "reportable transaction" and to maintain for possible government inspection a list of advisees who have engaged in such transactions).

160. *E.g.*, 17 C.F.R. sec. 205.3 (2007) (detailing the lawyer's "ladder-climbing" duties when the lawyer has credible evidence of material violations of law or fiduciary duty within a client company).

161. *See, e.g.*, Roberta S. Karmel, Regulation by Prosecution: The Securities and Exchange Commission Versus Corporate America 173-83 (1982).