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REVIEW ESSAYS

Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct

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Based on extensive archival research, this article offers a political account of the six-year process in which the ABA developed its latest ethics code for lawyers, the Model Rules of Professional Conduct. The article casts doubt on the validity of several functionalist and critical theories about the provenance and significance of professional ethics codes generally and the ABA's codes in particular. It evaluates the Model Rules process as an instance of de facto law making by a private group. And it identifies a lawyer's "professionalism-in-fact"—a set of common themes in the way lawyers currently think about the field of legal ethics. At the same time, however, the article stresses the ethical pluralism and structural differentiation of today's legal profession and roots the ethical preoccupations of various types of lawyers in the circumstances of their particular practices.

In 1977, the president of the American Bar Association, William B. Spann, Jr., asked Omaha lawyer Robert Kutak to chair a special committee to review "all facets of legal ethics."[1] Six years later the ABA House of

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1. William B. Spann, Jr., "The Legal Profession Needs a New Code of Ethics," *Bar Leader*, Nov.–Dec. 1977, at 2, 3.

Delegates approved a comprehensive new ethics code,[2] completing the process Spann and Kutak had set in motion. As if to underscore the length and intricacy of that process, both men had died in the interim.

However applicable Robert Michels's famous "iron law of oligarchy"[3] may be to the organized bar in other respects, it does not describe the ABA's production of the Model Rules of Professional Conduct, which amounted to the most sustained and democratic debate about professional ethics in the history of the American bar. Compared to the making of the ABA's earlier codes—the Canons of Professional Ethics (CPE)[4] and the Code of Professional Responsibility (CPR),[5] adopted in 1908 and 1969, respectively—the Model Rules process was an extravaganza. The Kutak Commission alone cost the ABA nearly $700,000.[6] Other ABA entities, along with over a hundred state, local, and specialty bar associations, spent considerably more to participate in the process.[7] Two specialty groups, the Association of Trial Lawyers of America (ATLA) and the National Organization of Bar Counsel (NOBC), prepared full-blown codes of their own as rivals to the Model Rules.[8] And two published drafts of the Model Rules—the Discussion Draft[9] and the Proposed Final Draft[10]—each triggered hundreds of written comments and scores of articles in law reviews, bar journals, and newspapers.

Because it is so rich in primary sources, the Model Rules process offers a rare opportunity to study the internal politics of the bar.[11] This article tries to exploit the opportunity. It gives a political account of the

2. American Bar Association, *Model Rules of Professional Conduct* (1983) (cited below as *Model Rules*).

3. Robert Michels, *Political Parties* 401 (Glencoe, Ill.: Free Press, 1949).

4. American Bar Association, *Canons of Professional Ethics* (1969) (cited below as *CPE*).

5. American Bar Association, *Model Code of Professional Responsibility* (1979) cited below as *CPR*).

6. Telephone conversation with Jeanne Gray, Director of the ABA National Center for Professional Responsibility (Mar. 9, 1985).

7. The Wisconsin State Bar, representative in this respect of many state and metropolitan bar associations, spent $20,000 to have a committee analyze Kutak Commission proposals and suggest changes. Letter to the author from Stephen Smay, Executive Director of the State Bar of Wisconsin (July 30, 1985).

8. See Commission on Professional Responsibility, Roscoe Pound–American Trial Lawyers Foundation, *The American Lawyer's Code of Conduct* (Public Discussion Draft, June 1980) (cited below as *ACC Discussion Draft*); National Organization of Bar Counsel, *Proposed Amended Disciplinary Rules to the ABA Model Code of Professional Responsibility* (Aug. 8, 1981) (cited below as *NOBC Proposed Amended Rules*).

9. American Bar Association, *Model Rules of Professional Conduct* (Discussion Draft Jan. 30, 1980) (cited below as *Model Rules Discussion Draft*).

10. American Bar Association, *Model Rules of Professional Conduct* (Proposed Final Draft May 30, 1981) (cited below as *Model Rules Proposed Final Draft*).

11. There have been surprisingly few studies of the internal politics of private associations. Two of the best are Seymour M. Lipset, Martin A. Trow, & James S. Coleman, *Union Democracy: The Internal Politics of the International Typographical Union* (Glencoe, Ill.: Free Press, 1956); Oliver Garceau, *The Political Life of the American Medical Association* (Hamden, Conn.: Archon, 1961).

Model Rules process based on news articles; early drafts of the Model Rules; Kutak Commission correspondence, memoranda, agenda books and journals; comments submitted to the commission or the House of Delegates; and several interviews.[12]

One of my aims is to advance an ongoing policy debate on the extent to which courts and administrative agencies should defer to the ABA when they adopt rules to govern the lawyers practicing in their jurisdictions. A majority of the state supreme courts have already adopted the Model Rules (usually with amendments).[13] Others may follow suit. As they did with the CPR and to a lesser extent the CPE, the courts appear to be treating the ABA not as a private pressure group but as the "preliminary arena . . . of public government" in which the law of lawyering is "first formulated."[14] Whether this deference is wise depends at least in part on how open the ABA's process was to public opinion and to the views of all segments of the bar. By describing the process in some detail, this article may not only show how open it was but, more generally, help to inform judgments about the merits of a surprisingly common phenomenon: de facto delegation of public lawmaking to private groups.[15]

My more fundamental aim is to contribute to the sociology of the legal profession. The article tries to do so in four ways. It weighs the influence of various bar groups on the Model Rules and examines how they wielded their power. It briefly compares the Model Rules process with the production of the two earlier ABA codes in order to highlight changes that have occurred over the century in the structure of the organized bar. While not trying to measure the Model Rules against any objective standard of professionalism, the article also uses the Model Rules debate to sketch a lawyer's "professionalism-in-fact"—a set of values and styles of ethical reasoning which, for better or worse, lawyers today appear to have in common.

At the same time, however, the article tries to demonstrate the *range* of ethical opinion—the ethical pluralism—that presently exists in the bar

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12. Outside comments and internal ABA documents pertaining to the Model Rules were collected by Kutak Commission reporter Geoffrey Hazard and placed on file at the American Bar Foundation in Chicago. Comparable documents from the process that led to ABA adoption of the CPR in the late 1960s were deliberately destroyed. Olavi Maru, *Annotated Code of Professional Responsibility* xi (Chicago: American Bar Foundation 1979). The nondestruction of Model Rules documents suggests that ABA leaders may now accept a greater degree of public accountability than they did for the earlier ABA codes and their preparation.

13. American Bar Association/Bureau of National Affairs, *Lawyers' Manual on Professional Conduct* 01:3, 01:4 (No. 75, Mar. 15, 1989) (cited below as *Lawyers' Manual*).

14. Corine L. Gilb, *Hidden Hierarchies: The Professions and Government* 140 (New York: Harper & Row, 1966).

15. See Louis L. Jaffe, "Law Making by Private Groups," 51 *Harv. L. Rev.* 201 (1937); Stewart Macaulay, "Private Government" 3–10 (University of Wisconsin Disputes Processing Research Program, Working Paper 1983-6, 1983).

and to suggest how the distinctive ethical concerns and views of certain subgroups may relate to their work settings, political environment, or clientele. This pluralism is not always apparent from reading the Model Rules, which like all codes strives for at least a surface coherence, but it would be a mistake to view the ABA's final product as its only product. Tentative drafts, as well as comments submitted to the ABA during the Model Rules process, remain in the profession's ethical stockpile, as is clear from the frequency with which state supreme courts, in adopting the Model Rules, have rejected some of the ABA's final provisions in favor of earlier versions.[16]

To identify the range of ethical views within the bar, I compare the positions that various specialty groups took in the Model Rules debate (e.g., ATLA, which consists mainly of plaintiffs' personal injury lawyers; and NOBC, which consists of lawyers who investigate and prosecute other lawyers in disciplinary cases). Assuming, as I do, that these positions accurately reflect the views of group members,[17] one can use them not just to sketch an ethical picture of "the bar" or "the average lawyer," but to paint a whole gallery of professional sensibilities.

The article begins with a critique of the existing literature on professional ethics codes. The critique identifies the theoretical issues that motivated and helped frame the research reported here.

My account of the Model Rules process follows in two parts. Part I, in narrative form, divides the Model Rules story into three stages. The first stage ranges from the ABA decision in 1977 to form the Kutak Commission to the publication of the Discussion Draft in early 1980. Here the commission focuses on the ABA's "foreign relations." It tries to promote lay participation, respond to scholarly criticism of the earlier ABA codes, and garner favorable press coverage, while paradoxically using secrecy to stave off pressures from within the bar. The second stage ranges from early 1980 to shortly after the publication of the Proposed Final Draft in May 1981. Central here are the intense hostility within the bar to early drafts of the Model Rules, and the resulting shift in Kutak Commission rhetoric. In the final stage, which culminates in ABA adoption of the Model Rules in August 1983, the spotlight shifts from the Kutak Commission (a drafting body) to the relatively faceless House of Delegates (a voting body of nearly four hundred). This stage features backstage negotiations between commission leaders and various bar groups, many of them con-

16. *Lawyers' Manual* 01:11–01:30 (No. 75, Mar. 15, 1989).

17. For the contrary view that professional ethics codes are primarily addressed to the public, express values professionals think the public will accept, and may not be reliable evidence of professionals' own views, see Lisa Newton, "Professionalism: The Intractable Plurality of Values," in Wade L. Robinson et al., eds., *Profits and Professions: Essays in Business and Professional Ethics* 23, 32 (Clifton, N.J.: Humana, 1983).

cerned not with the overall tenor of the Model Rules but with rules that would particularly affect them.

Part II explores some pervasive themes in the Model Rules process. These include the constant resort to "legalism" as an idiom for ethical debate, the persistence and centrality of the concept of role in lawyers' ethical thought; the stress lawyers place in policy debate on their perceptions of comparative institutional competence (what the Model Rules should address, what should be left to other regulatory techniques); and the widespread fear among lawyers that acknowledging ethical duties in a code would expose them not just to professional discipline but to malpractice liability and other legal fallout.

The conclusion briefly ties the details of the Model Rules account to the theoretical issues identified in the introductory critique.

INTRODUCTION

My focus on the formulation rather than the content of the Model Rules is intended to supplement and challenge other scholarship on professional ethics generally and the ABA codes in particular, scholarship that focuses on the content of the codes. To identify the methodological and theoretical niche that I hope to fill, I begin with a critical review of that literature.

Scholars in many fields have been interested in professional ethics codes since the remarkable flowering of those codes at the turn of the century.[18] Until the late 1960s, most saw the codes and other specialized machinery for regulating the professions as a healthy development. Since society as a whole has no real interest in professional ethics, Durkheim held at the turn of the century, specialized bodies must adopt rules of ethics and see to it that they are observed. And these bodies "can only be formed by bringing together individuals of the same professions."[19] For Durkheim, neither the market, nor general morality, nor all-purpose legal institutions such as the criminal law could play superego to the practitioner's id;[20] only professional associations and their codes were up to the task.[21]

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18. See, e.g., "Symposium: The Ethics of the Professions and Business," 101 *Annals Am. Acad. Pol. & Soc. Sci.* 1–236, 254–300 (May 1922) (cited below as *Annals*).

19. Emile Durkheim, *Professional Ethics and Civic Morals* 7 (Glencoe, Ill.: Free Press, 1958).

20. *Id.* at 14–17.

21. Scholars today are apt to see things the other way around; many exhort professionals to rely on their own consciences and not to adhere slavishly to ethics codes, which are politically suspect *because* private professional associations produce them, and ethically suspect because they allegedly displace moral reflection or, at a minimum, promote reflection of a rulebound, legalistic sort. See, e.g., Alan Goldman, "Confidentiality, Rules and Codes of Ethics," *Crim. Just. Ethics*, Summer–Fall 1984, at 8, 10. (Ethics rules cannot "capture the

Economic conditions encouraged Durkheim's American contemporaries to see things his way. After 1870, as the economy grew more complex and the cities larger, expertise became more specialized and had to be marketed to strangers.[22] This was true not only in the older professions but in other occupations as well.[23] Whether on the stock exchanges,[24] for example, or at the bar, institutions that could vouch for a specific calling—licensing, ethics codes, ethics opinions, and specialized disciplinary bodies—became attractive. They amounted to institutional advertising, assuring the public that a calling was ready and able to shoulder its corporate duty to hold practitioners to standards.[25]

New York County Bar leader Julius Henry Cohen may have mixed his metaphors, but he caught the spirit of the times when he told fellow lawyers in 1916: "We are all in a boat. The sins of one of us are the sins of all of us. Come, gentlemen, let us clean house."[26] Cohen was influenced by Felix Adler, a philosopher and founder of the Ethical Culture Societies, who felt that ethical problems in industry, business, and the professions must be solved by the people who "live with those problems." It is not enough to have a general philosophy of ethics, Adler said; there must be daily application of philosophy to fact, and this "can best be done by the

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lawyer's moral duties in all the situations he might encounter.") My own view lies between Durkheim and the moderns. I think society stands to benefit from a dynamic process, if we can create it, in which professionals regularly test their subjective ethical judgments against an external, less idiosyncratic set of principles *and* test those principles against their own judgments.

The Kutak Commission never regarded the Model Rules as a complete moral roadmap for the perplexed lawyer. See *Model Rules* Scope (para. 2) (Rules do not "exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules"). Even if the Model Rules did short-circuit the moral thought of some who consulted them for guidance, on balance they might still promote ethical reflection. After all, they generated broad debate among lawyers during the drafting process and continued to do so in the local-adoption process. "Articulation of the professional ethic," as one philosopher puts it, is "what makes a profession a moral enterprise." Lisa H. Newton, "Lawgiving for Professional Life: Reflections on the Place of the Professional Code," 1 *Bus. & Prof. Ethics J.* 41 (Fall 1981).

22. Magali Sarfatti Larson, *The Rise of Professionalism: A Sociological Analysis* 6 (Berkeley: University of California Press, 1977).

23. See generally Robert H. Wiebe, *The Search for Order 1877-1920* (New York: Hill & Wang, 1967). On the development of trade associations, see Louis Galambos, *Competition and Cooperation: The Emergence of a National Trade Association* 11–85 (Baltimore: Johns Hopkins Press, 1966).

24. See Jonathan Lurie, *The Chicago Board of Trade 1859-1905: The Dynamics of Self-Regulation* (Urbana: University of Illinois Press, 1979).

25. A related idea, always popular with bar leaders, is that professional associations, by developing, publicizing, and fostering the enforcement of ethical standards, enhance their members' reputations or "human capital" and are thus entitled to their support. See, e.g., "Spirit of Integration Conspicuous in New Utah State Bar," 16 *J. Am. Judicature Soc'y* 6 (1932) (state bar president believes every lawyer has a duty to answer the association's call for committee service).

26. Julius Henry Cohen, *The Law: Business or Profession?* 109 (rev. ed. New York: G. A. Jennings Co. 1924).

experts in the line."[27]

Like Cohen and Adler, Herbert Harley, the reform-minded patriarch of the American Judicature Society, believed that by writing, interpreting, and enforcing ethics codes, professional associations were not usurping the role of the state or the market but were on the contrary filling a regulatory vacuum. Focusing on the legal profession, Harley wrote:

> There must be somewhere in the state or 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 honesty 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. . . . This is the situation in a measure with respect to all professions. Their practitioners deal in mysteries. They are not safely judged except by their colleagues.[28]

This functionalist analysis held sway for years, although the rationale for a professionalism package consisting of ethics codes and other self-regulatory machinery oscillated between two poles. Scholars such as Kenneth Arrow thought the package functioned to protect clients from experts who had the power to manipulate the demand for their services and who alone could judge the quality of those services.[29] Others, ranging from Progressives Herbert Croly and Louis Brandeis,[30] to sociologist Talcott Parsons,[31] to legal scholars Lawrence Friedman and Zigurds Zile in the mid-1960s,[32]

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27. *Id.* at 158 (quoting Adler). Adler's was a plea not just for ethics codes but for a casuistic ethics in which practitioners apply ethical norms to the difficult situations that arise in everyday practice. Insofar as legal ethics is casuistic, the key institution in the field may be the bar's interpretive ethics opinions rather than the codes they interpret. See Ted Finman & Theodore Schneyer, "The Role of Bar Association Ethics Opinions in Regulating Lawyer Conduct," 29 *U.C.L.A. L. Rev.* 67 (1981).

28. Herbert Harley, "Group Organization Among Lawyers," *Annals* at 33, 34, 39 (cited in note 18).

29. See Kenneth J. Arrow, "Uncertainty and the Welfare Economics of Health Care," 53 *Am. Econ. Rev.* 941 (1963). Other economists, however, have long questioned the benefit to society of professional licensing and rules of ethics. See, e.g., Milton Friedman, *Capitalism & Freedom* 137–60 (Chicago: University of Chicago Press, 1962); Reuben Kessel, "Price Discrimination in Medicine," 1 *J. Law & Econ.* 20 (1958).

30. See Louis D. Brandeis, *Business—A Profession* 319-24 (Boston: Small, Maynard & Co., 1914) (cited below as Brandeis, *Business*); Herbert D. Croly, *The Promise of American Life* 136 (Cambridge: Harvard University Press, Belknap Press, 1965).

31. See Talcott Parsons, "The Professions and Social Structure," *Essays in Sociological Theory* 38 (rev. ed. Glencoe, Ill.: Free Press, 1954).

32. Lawrence M. Friedman & Zigurds Zile, "Soviet Legal Profession: Recent Developments in Law and Practice," 1964 *Wis. L. Rev.* 32, 35–36 ("Since the state's control [over lawyers in the United States as opposed to the Soviet Union] is so weak, one danger is that lawyers will tend to neglect the interests of society in favor of the exclusive interests of clients. . . . Thus, in the United States, the urge to professionalize, to increase standards, to inculcate morality on the part of the lawyer, is necessary").

felt that at least in the bar's case the package functioned as a corrective to the practitioner's natural economic bias *in favor* of clients and against other interests.

Since the late 1960s, however, scholars have more often derided than defended professionalism, and the ABA ethics codes have been under constant attack. Yet the attacks vary so widely that they may say more about fashions in political criticism than about legal ethics.

Some critics of the ABA codes have emphasized the process and setting in which they were developed. Writing just as the Model Rules process began,[33] Jethro Lieberman acknowledged the need for a new code of legal ethics but argued on the basis of certain CPR provisions that the ABA could never overcome the "conflict of interest inherent in balancing self-interest against public and client interest."[34] Lieberman thought a more neutral body such as the Judicial Conference of the United States should draft the new code.[35] Three years later, Deborah Rhode likewise charged that the CPE and CPR "consistently resolved conflicts between professional and societal objectives in favor of those doing the resolving"[36] and inferred that any new ABA code would be tainted by the same bias. And Thomas Lumbard, a leader in ATLA's effort to derail the Model Rules project, argued at the same time that the process so far used to produce standards was grossly inadequate and should be superseded by a new agency "under judicial auspices."[37] Though these critics insisted on the importance of process, none looked in detail at how the ABA was developing the Model Rules or had developed its earlier codes. None compared the ABA process with a concrete alternative.

Other attacks focused even more exclusively on the substance of the ABA codes. The first wave of such attacks crested shortly before the CPR went into effect in 1970. Positing a sharp conflict between two lawyer classes, these critics read the CPE as a degradation ceremony enhancing the status of the elite corporate bar that allegedly controlled the ABA, at the expense of an underclass composed largely of urban, ethnic, solo practitioners.[38] "[W]hether by design . . . or mere peradventure," Philip

33. Jethro Lieberman, *Crisis at the Bar: Lawyer's Unethical Ethics and What to Do About It* (New York: W. W. Norton, 1978).

34. *Id.* at 217.

35. *Id.* at 216–17.

36. Deborah Rhode, "Why the ABA Bothers: A Functional Perspective on Professional Codes," 59 *Tex. L. Rev.* 689, 692 (1981).

37. Thomas Lumbard, "Setting Standards: The Courts, the Bar, and the Lawyers' Code of Conduct," 30 *Cath. U.L. Rev.* 249, 266–67, 271 (1981). See also Charles Wolfram, "Barriers to Effective Public Participation in Regulation of the Legal Profession," 62 *Minn. L. Rev.* 619 (1978).

38. See Jerome E. Carlin, *Lawyers' Ethics—A Survey of the New York City Bar* ch. 3 (New York: Russell Sage Foundation, 1966). More recently, a legal historian took much the same position. See Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (New York: Oxford University Press, 1976).

Shuchman wrote, the Canons outlaw the tactics "Little Lawyers" must use to drum up business (solicitation, personal loans to clients, fee-splitting, below-minimum fees, etc.), yet tolerate and thus legitimate the tactics of "Big Law Firms" (intrafirm referrals and meeting prospective clients at the country club).[39] These conflict critics had little to say about the many CPE provisions that were unrelated to business-getting. Nor did they come to grips with the possibility that some restrictions on Little Lawyers' tactics actually *benefited* those lawyers at consumers' expense by restraining competition among them.[40]

Other critics, riding the same wave of consumerism that swept Ralph Nader into prominence, viewed the ABA codes not as arenas of intraprofessional conflict but rather as the Shavian conspiracy of a monolithic profession against an uninvolved public. Some faulted the codes for doing too little to correct the maldistribution of legal services. Marna Tucker argued, for example, that although the ABA supported federally funded legal services for the poor, unmet needs remained so great that CPR treatment of the lawyer's duty to do pro bono work as an unenforceable aspiration was an indefensible bow to self-interest.[41] Others focused on all-too-enforceable CPR duties that arguably distorted the market for middle-class legal services. Thomas Morgan claimed in 1972, for example, that the CPR regularly placed lawyers' economic interests above client and public interests.[42] Morgan saw this pattern not just in CPR rules on fees, advertising, and group legal services—matters that clearly implicate lawyers' pocketbooks—but even in strict limits on representing clients with potentially conflicting interests. Morgan regarded such limits as featherbedding, requiring two lawyers when one might well suffice.[43]

Besides its arguable inconsistency with Shuchman's intraprofessional conflict critique, Morgan's lawyers-versus-consumers analysis shares with all the criticisms a weakness stemming from its exclusive focus on code text. Morgan never makes it clear whether he means to criticize the CPR's *effects* on legal services, the *aims* of those who produced the CPR, or both.

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39. Philip Shuchman, "Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code," 37 *Geo. Wash. L. Rev.* 244, 268 (1968).

40. Ironically, one neo-conflict theorist recently suggested that court decisions in the 1970s hurt the "hemisphere" of lawyers who represent individual clients by *striking down* minimum fee schedules and restrictions on advertising and solicitation, and also suggested that the courts may have rendered those decisions because the elite corporate bar provided no interhemispheric support. See John P. Heinz, "The Power of Lawyers," 17 *Ga. L. Rev.* 891, 907 (1983).

41. Marna Tucker, "*Pro Bono* ABA?" *in* Ralph Nader & Mark Green, eds., *Verdicts on Lawyers* 20, 27–28 (New York: Crowell, 1976).

42. Thomas Morgan, "The Evolving Concept of Professional Responsibility," 90 *Harv. L. Rev.* 702 (1977).

43. *Id.* at 727–28. At the same time, Morgan gave little attention to (concededly few) CPR rules that seem pro-competitive. See, e.g., *CPR* DR 2-108(A) (lawyer may not join in a partnership or other employment agreement that restricts her right to practice after the professional relationship created by the agreement ends).

In either case, he offers and perhaps could offer no corroborating evidence from outside the CPR itself—no data on the impact of ethics rules on lawyers and nothing about the CPR's legislative history (information the CPR drafting committee had largely destroyed).

More recently, moral philosophers and some legal scholars have mounted a third and quite different attack.[44] They argue that the CPR coheres around a Standard Conception of the lawyer's role.[45] This brand of "role morality" boils down to two principles: Neutrality and Partisanship. The first requires the lawyer to practice without regard to her own views concerning a client's character or aims. The second commits the lawyer to pursue client aims using every effective tactic within the law. The philosophers find the Standard Conception or "hired-gun" ethic unacceptable because it prompts lawyers to disregard their own off-the-job values and the welfare of third parties. Their proposed remedy is "deprofessionalization"[46] (a term whose meaning can be no clearer than that of the endlessly contested term, "professionalism") or at least the abandonment of an ethics code in which lawyers' duties are "fixed" or "entirely predetermined."[47]

This criticism is marred by the existence of CPR provisions that do not square with the Standard Conception. The CPR permits lawyers to decline cases they find morally objectionable[48] and to forgo the use of "offensive" but otherwise lawful tactics in a client's behalf.[49] In many cases, it also allows lawyers to withdraw from representing a client who refuses to take their advice, including moral advice.[50] These counterexamples suggest

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44. This attack may be an example of a broader criticism of the organized bar's role in lawmaking, namely that lawyers use the bar as a "front" to pursue client objectives at societal expense, even in the face of the traditional exhortation, embodied in CPR EC 8-1, to work through the bar to improve the law "without regard to the general interests or desires of clients." See, e.g., Albert P. Melone, *Lawyers, Public Policy, and Interest Group Politics* (Washington: University Press of America, 1977); Elizabeth Drew, "The Rule of Lawyers," *N.Y. Times*, Oct. 7, 1973, at 16 (Magazine); John Payne, "The Weakness of Bar Associations," 2 *J. Legal Prof.* 55 (1977).

45. See, e.g., Alan H. Goldman, *The Moral Foundations of Professional Ethics* ch. 3 (Totowa, N.J.: Rowman & Littlefield, 1980); David Luban, "The Adversary System Excuse," *in* David Luban, ed., *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* 83 (Totowa, N.J.: Rowman & Allanheld, 1983).

46. See William Simon, "The Ideology of Advocacy: Procedural Justice and Professional Ethics," 1978 *Wis. L. Rev.* 29; Richard Wasserstrom, "Lawyers as Professionals: Some Moral Issues," 5 *Hum. Rts.* 1, 23 (1975).

47. Gerald Postema, "Moral Responsibility in Professional Ethics," 55 *N.Y.U. L. Rev.* 63, 82 (1980). The very fact that the CPR *is* a code seems to me to undermine the argument that it completely "fixes" or "predetermines" a lawyer's role. Each rule in a code must be understood in the context of all the others. This inevitably gives the addressee some leeway; the text being interpreted is always richer and more complex than any one rule. See George P. Fletcher, "Two Modes of Legal Thought," 90 *Yale L.J.* 970 (1981).

48. *CPR* EC 2-26. True, the CPR exhorts lawyers not to refuse cases "lightly," *id.*, EC 2-29, but rejecting a case on grounds of conscience hardly seems like whimsy.

49. *Id.*, DR 7-101(A)(1).

50. *Id.*, DR 2-110(C)(1)(e); EC 7-8.

that the Standard Conception is a *mis*conception; it represents a major theme in the bar's ethical tradition but cannot fully account for the content of the ABA codes. They also suggest that legal ethics may be a discipline with no paradigm, only fragmentary conceptions of the lawyer's role continually vying for dominance: the lawyer as client's "hired gun," yes, but also as "officer of the court," "lawyer for the people" or "counsel for the situation,"[51] "friend,"[52] and "minister."[53]

The view that the CPR rests on a Standard Conception of the lawyer's role is also at odds with the final systematic attack on the ABA codes. Critical legal scholar Richard Abel, among others, argues that the ABA codes are "amorphous," "virtually meaningless," too vague and inconsistent to constrain lawyers or give them any real guidance.[54] Because the codes are in critical legal studies parlance "indeterminate," Abel considers them merely a tool to legitimate the bar's relative freedom from outside control.[55] He thus criticizes as providing *no* guidance or restraint the very rules philosophers have lately criticized for "entirely predetermin[ing]" the lawyer's role! That critics can view the same rules at the same time in such contradictory ways suggests how little we really know about the link between ethics rules and professional conduct.

For all their disagreements, the early supporters and the later critics of professional ethics codes all search for the deep function, overarching theme, or grand design of the codes. They all jump quickly from modest evidence to broad political or sociological conclusions. And they all take their evidence primarily from the codes themselves; even the critics who question on procedural grounds the ABA's legitimacy as a source of ethics rules fail to examine just how the ABA has produced its codes, who was involved in the process, what the participants thought they were doing, and why they said they were doing it.

It is time to look closely at the Model Rules process and take seriously the views of those who participated in it, in hopes of answering some of the questions the existing literature raises but does not fully answer. Was the process impervious to public opinion and to scholarly criticism of the earlier ABA codes? If public opinion and scholarly criticism were brought to bear on the Model Rules, at what stage and through what channels did this happen? Did lawyers view the Model Rules as a public relations stunt, with no regulatory significance? Were there intraprofessional conflicts in

51. See Brandeis, *Business* 319–24 (cited in note 30); John Frank, "The Legal Ethics of Louis D. Brandeis," 17 *Stan. L. Rev.* 683, 698 (1965).

52. See Charles Fried, "The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation," 85 *Yale L. Rev.* 1060 (1976).

53. See Thomas L. Shaffer, *On Being a Christian and a Lawyer* 35–104 (Provo, Utah: Brigham Young University Press, 1981).

54. Richard Abel, "Why Does the ABA Promulgate Ethical Rules?" 59 *Tex. L. Rev.* 639, 642 (1981).

55. *Id.* at 667.

the Model Rules process and, in particular, did an elite corporate bar try to distance itself from other lawyers by labeling their practices unethical? Did lawyers approach the issues in terms of "role morality," and if so, did they agree that the Standard Conception defines the lawyer's proper role?

I. A CHRONOLOGICAL ACCOUNT OF THE MODEL RULES PROCESS

A. The Decision to Develop a New Code

The Kutak Commission was created only a few years after the CPR went into effect. Although Robert Kutak publicly hedged at first about his mission, telling state and local bar presidents that the commission might decide to "leave well-enough alone,"[56] it seems clear that he and ABA President William Spann were out from the beginning to produce a new code.[57] This poses an immediate question: Why the haste to replace a 7-year-old code that had not come into being itself until 62 years after its predecessor?

In part the impetus was, as Richard Abel suggests, a felt need to shore up the profession's public image in the wake of the Watergate scandal, in which many lawyers were implicated. Spann's charge to the commission says as much.[58] But it also suggests that the project had much to do with shoring up among lawyers and regulators the ABA's image as lawgiver for the practice of law.

The ABA's primacy in this respect, established by 1920,[59] was confirmed as recently as 1972. By then, most of the state supreme courts had adopted the CPR, often verbatim, to govern the lawyers in their jurisdictions.[60] But by 1977, two developments had thrown the ABA's primacy into doubt. First, the Supreme Court narrowed on free speech grounds the permissible scope of bans on lawyer advertising[61] and banned on antitrust grounds the use of ethics rules and professional discipline to enforce

56. Remarks of Robert Kutak to the National Conference of Bar Presidents, ABA Annual Meeting, Aug. 1978.

57. See William Spann, Jr., "The Legal Profession Needs a New Code of Ethics," *Bar Leader*, Nov.–Dec. 1977, at 2.

58. *Id.* On the use of other bar projects and programs to shore up the legal profession's public image, see Terence C. Halliday, *Beyond Monopoly: Lawyers, State Crises, and Professional Empowerment* 92–93 (Chicago: University of Chicago Press, 1987) (cited below as Halliday, *Beyond Monopoly*).

59. By 1920, all but 13 states had adopted the CPE but in most cases only by bar association resolution. Walter P. Armstrong, Jr., "A Century of Legal Ethics," 64 *ABA J.* 1063, 1064–65 (1978).

60. See ABA Special Comm. to Secure Adoption of the Code of Professional Responsibility, "Report," 97 *ABA Rep.* 268, 268–72 (1972).

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

local minimum-fee schedules.[62] These rulings, along with earlier ones protecting group legal services plans,[63] federalized issues lawyers had long considered to be within the preserve of the ABA and the reliably deferential state supreme courts. Second, while the state supreme courts had swiftly adopted the CPR, neither the ABA's subsequent amendments to the CPR nor its ethics opinions construing the CPR were faring nearly as well. This was notably the case with respect to two issues prominently mentioned in Spann's charge, issues well below the threshold of public consciousness but of great interest to elite law firms.

One of these issues involved the "revolving door" through which lawyers move in and out of government. Read literally, the CPR seemed to say that when a government lawyer went into private practice, neither she *nor* her new partners and associates could participate in a matter she had worked on while in government.[64] This ripened into a serious problem for firms that recruit government lawyers: Reading the CPR literally, some courts and agencies were barring entire firms from cases in which one lawyer was disqualified by virtue of her former government service.[65] This threatened to make former government lawyers Typhoid Marys in firms with substantial administrative practices. And so, in a strained 1975 ethics opinion, the ABA Standing Committee on Ethics and Professional Responsibility (CEPR) rejected a literal reading of the CPR, holding that if the disqualified lawyer was properly screened, others in her firm could handle the matter she had worked on in government.[66] The trouble was that the ABA could not assure law firms that courts and local disciplinary bodies would accept this reading. While the ABA had formed a special committee to lobby for local adoption of the CPR,[67] there was no committee to lobby for local adoption of ABA ethics opinions or piecemeal code amendments.[68]

The other exotic issue mentioned in Spann's charge to the Kutak Commission was of special concern to securities lawyers. The CPR's Disciplinary Rule (DR) 7-102(B)(1) originally required a lawyer whose client has used her services to defraud others to take steps to rectify the fraud, if necessary by "blowing the whistle" on the client. The SEC used this rule in 1972 to bolster its complaint in the *National Student Marketing* case against

62. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

63. United Trans. Union v. State Bar of Michigan, 401 U.S. 576 (1971); United Mineworkers of America, Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); Bhd. of R.R. Trainmen v. Virginia State Bar, 377 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415 (1963).

64. *CPR* DR 9-101(B) prohibits former government lawyers from working on matters they had worked on in government; DR 5-105(D) prohibits all lawyers in a firm from taking cases that other DRs prohibit any lawyer in the firm from handling.

65. See, e.g., RKO General, Inc., 58 F.C.C.2d 435, 437 (1976).

66. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975).

67. See ABA Special Committee to Secure Adoption of the Code of Professional Responsibility, "Report," 97 *ABA Rep.* 268 (1972).

68. On the balkanization of CPR provisions on lawyer advertising after the *Bates* decision, see Wolfram, 62 *Minn. L. Rev.* 619, 635 n.65 (cited in note 37).

two leading law firms that failed to notify shareholders or the SEC when they got wind of fraud in the merger transaction they were working on.[69] In 1974, the ABA House of Delegates countered by amending the CPR to subordinate the whistleblowing duty to the lawyer's duty of confidentiality.[70] As CEPR later construed the amendment,[71] it gutted the disclosure duty. The trouble was again that a large majority of states never got around to adopting the amendment.[72]

The Model Rules eventually solved the revolving-door and whistleblowing problems to the satisfaction of the elite firms that cared about them.[73] But the question remains: Why were ABA leaders so responsive to the corporate bar's immediate ethical "needs," and why did they care enough about reasserting the ABA's primacy on such rarefied matters to commit the organization to producing a new code? A new code, after all, was not only expensive but risky. The uncertain factors that had kept piecemeal CPR amendments from being widely adopted might doom a new code as well. Perhaps the state supreme courts were now taking their regulatory duties so seriously that they would no longer buy ABA rules at retail *or* wholesale;[74] if so, the Model Rules, though intended to restore uniformity in legal ethics, might end up balkanizing the field even more. Moreover, if a new code turned out to restrict lawyer competition in some way, that might expose the ABA or the participants in the drafting process to antitrust liability.[75] And there was always the risk that the Model Rules project would prompt other bar entities, unhappy with the ABA's approach

69. SEC v. Nat'l Student Mktg. Corp. 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).

70. See CPR DR 7-102(B)(1).

71. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975).

72. Victor Kramer, "Clients' Frauds and Their Lawyers' Obligations: A Study in Professional Irresponsibility," 67 *Geo. L.J.* 991 (1979).

73. See *Model Rules* 1.11(a); 4.1(b).

74. On the gradual opening up of state judicial rulemaking proceedings to interest groups other than the organized bar, see Charles W. Grau, *Judicial Rulemaking: Administration, Access and Accountability* 49-70 (Chicago: American Judicature Society, 1978) (cited below as Grau, *Judicial Rulemaking*). Until recently, the Wisconsin supreme court expressly delegated authority to the ABA to make ethics rules governing law practice in Wisconsin. *Wis. S. Ct. Rules* Rule 10.14 (1980) (rules of professional conduct set forth "from time to time" by the ABA shall be the standards governing the practice of law in Wisconsin).

75. See Indian Head, Inc. v. Allied Tube & Conduit Corp., 108 S. Ct. 1931 (1988) (effort to influence professional association safety standards that are routinely adopted by state and local governments not immune from antitrust scrutiny); American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982) (restrictive professional code provisions actionable under federal antitrust law).

In 1976, the Justice Department sued the ABA for conspiracy to restrain trade by adopting, distributing, and (through ethics opinions) aiding in the enforcement of the CPR, which severely restricted lawyer advertising and solicitation. The suit was dropped in 1978, but only after the ABA promised no longer to promote or aid in the enforcement of the CPR. See "Justice Department Charges Code Advertising Provisions Violate Federal Antitrust Laws," 62 *ABA J.* 979 (1976); "Justice Department Dismisses Antitrust Suit Against American Bar Association," 64 *ABA J.* 1538 (1978).

or hoping to increase their own visibility at ABA expense, to produce a rival code and seek its adoption at the state level—to work, one might say, to "decertify" the ABA as the de facto ethical voice of the bar.[76]

To understand why the ABA went forward in the face of these risks, one must understand the link between the making of professional ethics codes and the making and maintenance of professional associations. Organization is not, as Durkeim supposed, essential to systematic ethical thought; American doctors knew the Hippocratic Oath and read Thomas Percival's medical ethics treatise well before the AMA existed.[77] When a professional association is born, however, promulgating an ethics code is often its first order of business. The AMA, for example, turned Percival's treatise into a code in its first year.[78] Unlike a treatise or an oath, a code takes collective effort to produce and thus helps to justify the association's existence; it is also enforceable, if only by ousting violators from the association.[79]

Like the AMA in 1847, young bar associations at the turn of the century began to spin ethics treatises into codes. Some state bar associations did so before 1908,[80] when the ABA adopted the CPE, which eventually preempted the field. The ABA president in 1908, Jacob Dickinson, had high hopes for the CPE. He hoped the CPE would apply not just to present ABA members (then only about 3% of the bar)[81] but to the whole profession.[82] He hoped the Canons would swell ABA membership by providing a set of principles lawyers could rally around. And he hoped the added membership would in turn enable the ABA, whenever it became embroiled in a political "contest," to "mobilize a formidable array of earnest and aggres-

76. This risk materialized in 1979, when ATLA decided to draft a rival code. See *infra* notes 193-220 & accompanying text. In most states, however, the ATLA code has never received serious consideration as a comprehensive alternative to the Model Rules.

77. See, e.g., Jeffrey Berlant, *Profession and Monopoly: A Study of Medicine in the United States and Great Britain* 64–127 (Berkeley: University of California Press, 1975).

78. *Id.* at 69.

79. In medicine, ouster from the AMA and local societies could have real economic consequences; for many years membership was a prerequisite for hospital privileges. Paul Starr, *The Social Transformation of American Medicine* 168 (New York: Basic Books, 1982).

80. Armstrong, 64 ABA J. 1063, 1064 (cited in note 59).

81. James Willard Hurst, *The Growth of American Law: The Lawmakers* 289 (Boston: Little, Brown & Co., 1950).

82. Jacob M. Dickinson, "President's Address," 33 *ABA Rep.* 341, 356 (1908). See also Jacob M. Dickinson, Remarks Introducing the Report of the ABA Committee on Canons of Ethics, *id.* at 55, 56. Dickinson's interest in formal adoption of the CPE *as law* throws into doubt the thesis advanced by some scholars that the ABA ethics codes have evolved from wholly unenforceable moral norms to wholly enforceable law. See, e.g., Murray Schwartz, "The Death and Regeneration of Ethics," 1980 *ABF Res. J.* 953, 953–54. While the CPE certainly became law in fewer jurisdictions than its successor code, the CPR, the reason may have nothing to do with the tenor of the two codes. It may simply be that early in the century state supreme courts were much less apt to recognize or use their rulemaking power. See Grau, *Judicial Rulemaking* (cited in note 74).

sive members, who will give it loyal support."[83] In other words, ABA leaders regarded the CPE at least in part as a tool of institutional maintenance, a device to make the ABA so prestigious and attractive to lawyers that they would support its efforts generally.

All this was before bar leaders grasped what economist Mancur Olson was later to prove[84]—that organizations recruit members less effectively by pursuing common goals than by offering glossy monthlies, favorable life insurance terms, and car-rental discounts as perquisites of membership.[85] Today's ABA leaders presumably understand this. Yet the ABA's primacy in formulating the rules of legal ethics remains an important factor in maintaining its authority, if not its membership. Why? Because the American polity is not based on corporatist principles.[86] State supreme courts have no obligation to follow ABA rules, and the federal government has never designated the ABA (or any other body) as the official voice of the bar.[87] True, the ABA has special ties with the government in its role as screener of nominees for the federal bench.[88] And no bar organization has effectively challenged the ABA's preeminence at the national level.[89] Yet the ABA's position is never completely secure. It has never been able to claim more than half the country's lawyers as members, and new specialty groups have increasingly become self-aware and spun off their own organizations, frag-

83. Jacob M. Dickinson, "President's Address," 33 *ABA Rep.* 356 (1908). For a similar account of the ABA leadership's motives in waging a campaign in the 1910's against Progressive legislation calling for judicial recall, see Stephen Botein, " 'What We Shall Meet Afterwards in Heaven': Judgeship as a Symbol for Modern American Lawyers," *in* Gerald L. Geison, ed., *Professions and Professional Ideologies in America* (Chapel Hill: University of North Carolina Press, 1983).

84. See Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Cambridge: Harvard University Press, 1965).

85. Some bar leaders did, however, grasp the point intuitively before Olson's book. In 1938, the American Judicature Society pointed out that "the bar associations which are vigorous and growing are the associations which have newsy journals." "State Bar Associations Need Members," 22 *J. Am. Judicature Soc'y* 41 (1938).

86. Robert H. Salisbury, "Why No Corporatism in America?" *in* Philippe C. Schmitter & Gerhard Lehmbruch, eds., *Trends Toward Corporatist Intermediation* 213 (Beverly Hills, Cal.: Sage Publications, 1979).

87. Curiously, there are such organizations at the *state* level in the 33 jurisdictions that have a unified bar. See Theodore J. Schneyer, "The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case," 1983 *ABF Res. J.* 1.

88. See Joel B. Grossman, *Lawyers and Judges: The ABA and the Politics of Judicial Selection* (New York: John Wiley, 1965). See also Public Citizen v. United States Dep't of Justice, 109 S. Ct. 2558 (1989) (despite semiofficial status of ABA Standing Committee on the Federal Judiciary, Federal Advisory Committee Act construed not to require open meetings). On the ABA's vigorous campaign to maintain its role in federal judicial selection in the face of sharp criticism of its allegedly politicized 1987 evaluation of Supreme Court nominee Robert Bork, see Terence Morgan, "For ABA Judges Panel, Time of Reckoning Nears," *Legal Times*, Feb. 20, 1989, at 5, col. 1.

89. Since 1936, the ABA has been organized partially as a federation of state, local, and some specialty bars. To this extent the ABA is at the apex of the bar structure in the United States. Quintin Johnstone & Dan Hopson, Jr., *Lawyers and Their Work: An Analysis of the Legal Profession in the United States and England* 38 (Indianapolis: Bobbs-Merrill, 1967).

menting not only professional loyalties and resources, but ethical and political perspectives as well.[90] To maintain its authority inside as well as outside the bar, the ABA must in a time of professional ferment display its authority. One way to do so is to refurbish its image as lawgiver for the entire profession.

B. The First Stage: Responsiveness to Lay Opinion and Scholarly Criticism

Was the Model Rules process open to lay opinion and responsive to criticism of the earlier ABA codes? Or was it impervious to outside opinion? The answer depends on the stage of the process one focuses on. The first stage, from the creation of the Kutak Commission in 1977 to the circulation of its Discussion Draft in January 1980, was surprisingly sensitive to public opinion and scholarly criticism, surprisingly closed to bar insiders.

1. Makeup of the Kutak Commission

In weighing the ABA's responsiveness to outside opinion and criticism, consider first the makeup of the Kutak Commission. While all nine charter members were lawyers, only three were private practitioners—Kutak himself, a partner in a rapidly expanding Omaha law firm; Robert Meserve, a member of the prestigious American College of Trial Lawyers (ACTL) and former ABA president; and Richard Sinkfield, a lawyer in a large Atlanta firm. This was in sharp contrast to the committee that drafted the CPR in the late 1960s. Nine members of that committee were in private practice and six were ACTL fellows.[91] If the ACTL—indeed, the private bar generally—was to have an impact on the Model Rules, it was not going to come through any stacking of the commission in their favor.

Some of the Kutak Commission's charter members, though lawyers, were either on record as critics of the earlier ABA codes or had special ties to a lay constituency. Judge Marvin Frankel was an outspoken critic of the client-above-all mentality he found common among trial lawyers and embodied in the CPR but inconsistent with the truth-finding function of the courts.[92] Jane Lakes Frank worked in the Carter White House and had been counsel to a Senate subcommittee that investigated the impact of legal fees on the availability of legal services. She was a staunch consumer

90. In 1982, for instance, corporate house counsel formed their own professional organization. See *infra* notes 230–36 & accompanying text.

91. Edward L. Wright, "The Code of Professional Responsibility: Its History and Objectives." 24 *Ark. L. Rev.* 1, 2 (1970).

92. See, e.g., Marvin Frankel, "The Search for Truth: An Umpireal View," 123 *U. Pa. L. Rev.* 1031 (1975).

advocate, on record as a critic of CPR restrictions on lawyer advertising and group legal service plans.[93] Tom Ehrlich, a former law school dean and then president of the Legal Services Corporation, also wanted to draw new attention to problems in the delivery of legal services to the poor. And Kutak himself was on the board of the Legal Services Corporation.[94,95]

The very first meetings considered how to inject lay opinion into commission deliberations. A subcommittee recommended that three nonlawyers be added as voting members.[96] Mr. Meserve dissented on the ground that an already low and now dwindling percentage of private practitioners on the commission would make for rough sailing when the time came to navigate the commission's product through the House of Delegates. It was decided to add two nonlawyers but also another practitioner. President Spann had no objection to adding "public" members as long as they did not represent any particular constituency.[97] According to Kutak Commission reporter Geoffrey Hazard, Spann wanted a critical and outward-looking drafting committee in order to counteract the narrower and more

93. See Jane Lakes Frank, "Legal Services for Citizens of Moderate Income," *in* Murray Schwartz, ed., *Law and the American Future* 116 (Englewood Cliffs, N.J.: Prentice-Hall, 1976).

94. Being so well represented, the legal services community was able for the first time to place language in an ABA ethics code responsive to its distinctive problems. It is now clear, for example, that a lawyer may pay litigation costs for an indigent client without looking to the client for reimbursement. Compare *Model Rules* Rule 1.8(e)(2) with CPR DR 5-103(B). Early Model Rules drafts contained a "good samaritan" rule that would have allowed lawyers to provide service, "despite limitations" on their competence, in situations of "emergency or special [client] need." Legal services lawyers succeeded in removing the term 'special need," fearing that administrators in legal services offices might use it to force them to provide second-class representation. See Kutak Commission Journals, Aug. 25, 1978 [cited below as Journals]. (These journals contain the "minutes" of commission meetings, but they rarely show who on the commission favored or opposed particular positions, and do not always indicate the precise date on which a meeting was held.) See also *Model Rules* Rule 1.1 comment para. 3.

95. Other charter members included Robert McKay and Samuel Thurman, law professors who (like Ehrlich and Hazard) may have exposed the commission to the charge of being too "academic," and Howell Heflin, just off the Alabama supreme court and well enough connected in Democratic politics to leave the commission in a few months for the U.S. Senate. Heflin was replaced by Arno Deneke of the Oregon supreme court. Having a state supreme court "seat" on the commission was perhaps a concession to the ultimate goal of getting the Model Rules adopted at the state level.

Other lawyer-members added later were William Spann, from the end of his ABA presidency till he died in 1981; Robert Hetlage, an ABA leader and private practitioner who was appointed along with two nonlawyers; and L. Clair Nelson, house counsel for a large company.

96. Journals, Feb. 24, 1978. This meant that what had so far been an ABA committee had to be reconstituted as a commission. Under ABA by-laws nonmembers could not serve on ABA committees.

97. *Id.* Adding public members to its committees has become the bar's preferred way to bring lay opinion into bar deliberations. The practice is open to the charge of "tokenism" precisely because the lay members, in addition to being far outnumbered, typically have no clear constituency to represent. See generally Henry S. Kariel, *The Decline of American Pluralism* 264–65 (Stanford, Cal.: Stanford Univ. Press, 1961).

traditional views that would prevail in the House of Delegates.[98] In other words, Spann expected the Model Rules to be forged in something akin to an adversary proceeding between two ABA entities.

Some names bandied about as potential lay members of the Commission were David Cohen of Common Cause, anthropologist Laura Nader (but not her brother Ralph), Bess Myerson, McGeorge Bundy of the Ford Foundation, and philosopher Charles Frankel.[99] The nonlawyers finally added were Lois Harrison, active in the League of Women Voters, and Alan Barth, an editor of the *Washington Post*. Mr. Barth died in 1979 and was not replaced, but his selection was a sign of the ABA leadership's interest in the press as an audience for the Model Rules project. Ms. Harrison's only discernible impact was to keep alive for several drafts a requirement that lawyers' fee agreements be in writing.[100] This was later watered down to a "preferably in writing" standard.[101]

The lawyers' group most dissatisfied with the makeup of the Commission was probably NOBC, the emergent association of lawyers who investigate and prosecute disciplinary cases. NOBC lawyers felt they had a new and important enforcer's perspective to bring to the Model Rules deliberations. But the Commission refused to add an NOBC member, since the addition would further dilute the private practitioners' strength.[102] This may be why NOBC eventually prepared its own code as an alternative to the Model Rules[103] rather than working solely within the Model Rules process.

2. *Playing to the Press*

Not only did the public members on the commission prove inconsequential, but lay groups completely ignored the series of public hearings the commission held in 1980.[104] Yet there was a mechanism that brought lay opinion more effectively into play. The commission's early work, culminating in the publication of its Discussion Draft in January 1980, was designed to garner favorable reviews from the lay press.

There is considerable evidence of the Kutak Commission's interest in press coverage and, less directly, of its vision of the Model Rules as a professional covenant with the public, not simply a covenant among lawyers. Believing it would "send a message" to the public, the commission put its client-protection rules concerning lawyers' fees, competence, promptness,

98. Interview with Geoffrey Hazard (Indianapolis, Mar. 30, 1985).
99. Journals, Feb. 24, 1978.
100. Interview with Geoffrey Hazard (cited in note 98).
101. See *Model Rules* Rule 1.5(b).
102. Journals, Feb. 23, 1979.
103. *NOBC Proposed Amended Rules* (cited in note 8).
104. At a public hearing in Atlanta on March 3, 1980, there were more members of the commission present than witnesses to testify, and all the witnesses were lawyers. Scott Slonim, " 'Lawyer as Cop' Rule May Face Trimming," 66 *ABA J.* 438 (1980).

and communication with clients right up front where reporters and consumer advocates could see them; it also banished to the rear what was left of traditional bans on lawyer ads and solicitation[105]—bans once considered consumer protections but now under a constitutional cloud and widely regarded as self-serving restraints on competition. Moreover, Hazard and Kutak talked in 1980 about hiring a public relations consultant. "If we could get key elements of the news media and corporate and civic leadership to understand what this is all about," Hazard wrote to Kutak, "we might create a climate in which the proposal could be given the kind of serious consideration it deserves."[106]

Finally, the commission ruminated in early 1979 on what its product would say to the "larger public," and more pointedly, to the *New York Times*. Some hoped the *Times* would call the Model Rules an authoritative statement that lawyers are responsible to demands "beyond those of their immediate clients." Others hoped the *Times* would stress the seriousness with which the ABA was approaching the task of regulating a private profession in the public interest. Still others hoped the *Times* would stress the shift in legal ethics from a preoccupation with the courtroom lawyer to a recognition of lawyers' other "functions and roles." All hoped the press would regard the commission's product as a significant departure from the earlier ABA codes.[107]

When the Discussion Draft was published, the press reacted largely as hoped. The *Times* welcomed the draft as a proposal "fundamentally to alter" the lawyer's relationship with clients by requiring lawyers to weigh client obligations "against the duty to be fair and candid toward all other participants in the legal system, even adversaries."[108] The *Times* also supported the Draft's unprecedented attention to lawyers' out-of-court roles such as adviser, negotiator, and intermediary.[109] The Discussion Draft also played to favorable reviews in the *Washington Post*.[110]

Not every review was favorable, however, suggesting that nonlawyers may be no less divided on issues in legal ethics than the bar is. A critical *Wall Street Journal* editorial[111] homed in on proposed Model Rule 1.13, a

105. Journals, June 29, 1979.

106. Letter from Geoffrey Hazard to Robert Kutak (Dec. 23, 1980).

107. Journals, Feb. 23, 1979.

108. Linda Greenhouse, "Lawyers' Group Offers a Revision in Code of Ethics: Draft Says Client Interests Could Be Placed Second," *N.Y. Times*, Feb. 2, 1980, at 6, col. 1 (late city edition).

109. *Id.*

110. See Timothy Robinson, "Proposed Ethics Code Gives Clients a Break," *Washington Post*, Feb. 4, 1980, sec. C, at 1, col. 1 (emphasizing, however, unlike the *Times*, the draft's positive treatment of consumer protection issues).

111. "A License to Squeal?" *Wall St. J.*, Feb. 11, 1980, at 20, col. 1. Otis Smith, vice-president and general counsel to General Motors took the similar position that Model Rule 1.13 was crossing over the line between legal ethics and corporate governance. In his view the proper relationship between company and counsel is a matter for each company and its

rule addressed to lawyers representing corporations and other organizations. The proposal made it clear that such lawyers represent an entity, not its management. The point had already been made in the CPR,[112] but proposed Rule 1.13 elaborated on it in a way that ruffled the *Journal*'s pro-management feathers. The rule contemplated situations in which a lawyer who reasonably believes it would serve the company's interests could blow the whistle on managerial wrongdoing, not just by going to higher-ups in management or to the company board, but if necessary even to outsiders like, say, the Securities and Exchange Commission.[113] The *Journal* called the proposal an effort to usurp management's role in defining the corporate interest and a wedge that would drive management and legal counsel apart. The bad press prompted Kutak to send the *Journal* a four-page response.[114]

3. *The Uses of Secrecy*

During the nearly two and a half years before the Discussion Draft was published, the commission was outward-looking not only in its concern about press reaction but in another sense: It sought out the opinions of some of the profession's harshest critics. For instance, the commission invited Mark Green to its February 1978 meeting.[115] Green had recently co-edited with Ralph Nader a muckraking book about the bar and especially the ABA.[116] In April 1978, the commission hosted Jethro Lieberman,[117] whose recent book *Crisis at the Bar* had not only attacked the CPR but called the ABA an inappropriate forum for devising a legal ethics code.[118] The Commission also welcomed comments on its "pre-circulation" drafts from a committee of the Society of American Law Professors (SALT).[119] The SALT committee was in sympathy with the scholarly critics who considered the CPR too client-oriented and too little concerned with the lawyer's fidelity to his or her personal values and to the legitimate interests of third parties. It proposed that lawyers be permitted to limit the scope of their undertaking for a client in order to avoid legal tasks inconsistent with their own values, and be permitted also to withdraw

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counsel to work out. Smith, "The Proposed Model Rules of Professional Conduct" (Oct. 8, 1980) (speech to the 19th Annual Corporate Counsel Institute).

112. *CPR* EC 5-18.

113. *Model Rules Discussion Draft* Rule 1.13.

114. Letter from Robert Kutak to the editors of the *Wall Street Journal* (Feb. 20, 1980).

115. Journals, Feb. 1978.

116. R. Nader & M. Green, eds., *Verdicts on Lawyers* (New York: Crowell, 1976).

117. Journals, Apr. 1978.

118. See *supra* note 33 & accompanying text.

119. Memorandum from the Society of American Law Teachers' Liaison Committee to the ABA Commission on the Evaluation of Professional Standards (Dec. 1, 1978).

from representing a client whose position they find repugnant.[120] These proposals found their way into the final version of the Model Rules.[121]

While the Commission was reaching out to the ABA's sharpest critics, its early relations within the bar were standoffish. In an October 1977 letter, Robert Kutak told bar leaders that the commission was open to "any and all suggestions."[122] Yet Kutak cautioned commission members not to show early drafts to others.[123] There was a select list of 42 readers inside and outside the ABA to whom early drafts were sent for comment;[124] but half of those readers were academics, not practitioners, and few could keep pace with the completely revised drafts Geoffrey Hazard was cranking out for commission meetings every other month.[125]

In this climate of secrecy few bar entities were able to form or press their positions before the Discussion Draft was published. The only group to hit the ground running was a special committee created by the ABA's 40,000-member Corporation, Banking and Business Law Section in response to the *National Student Marketing* case. Donald Evans, chair of that committee, attended the Kutak Commission's December 1977 meeting[126] and offered in February 1978 to have his committee draft the rules that would address issues of special interest to the corporate bar.[127] While Kutak never took Evans up on the offer, his committee, and especially Loeber Landau of Sullivan & Cromwell, came to play a major role in the Model Rules process because of their persistence and the technical quality of their submissions.

Kutak Commission member Robert McKay, attesting to the corporate bar's perceived clout, reports that there was a "felt need" on the commission to have the ABA Corporation section as an ally when the time came to move the Model Rules through the House of Delegates.[128] The Evans committee was interested above all in the provisions that would deal with the representation of a corporation or other organization. Though not completely satisfactory, the whistleblowing provisions of Discussion Draft Rule 1.13[129] were more acceptable to the Evans committee than to

120. *Id.* at 2.

121. See *Model Rules* Rules 1.2(c), 1.16(b)(3).

122. Letter from Robert Kutak to Members of the ABA House of Delegates (Oct. 31, 1977).

123. Letter from Robert Kutak to Members of the Kutak Commission (Nov. 30, 1978). See also "Lawscope," 65 *ABA J.* 887 (1979).

124. Letter from Robert Kutak to Selected Readers of the Commission's first complete "precirculation" draft and List of Readers (Aug. 2, 1979).

125. Letter from Robert Kutak to commission members (Feb. 19, 1979) (noting the "lag" problem).

126. Journals, Dec. 1977.

127. Letter from Donald Evans to Robert Kutak (Feb. 16, 1978).

128. Interview with Robert McKay (Indianapolis, Mar. 30, 1985).

129. The Discussion Draft provided that if the highest authority in an organization insists upon action or a refusal to act that is "clearly a violation of law and is likely to result in substantial injury to the organization," the lawyer may take further remedial action, in-

the *Wall Street Journal*, at one extreme, or, at the other, to the Georgetown Institute for Public Representation,[130] a pro-whistleblowing public-interest law firm. The Evans committee and the Corporation Section were never absolutists on questions of confidentiality, as trial lawyer groups proved to be. They recognized, according to Geoffrey Hazard, that in extreme cases corporate lawyers might need discretion to disclose otherwise confidential information in order to protect themselves from liability and "beat their client into rectitude."[131] Over breakfast at the August 1980 ABA meeting in Honolulu, Hazard, Kutak, and the Evans committee began to fine-tune Rule 1.13 so that it would still permit whistleblowing outside the company, but only if the board of directors' handling of corporate improprieties is based on personal interests at odds with company interests,

> since it is presumptuous and inappropriate to permit the lawyer to override the judgment of the duly constituted highest authority of the organization if they make a good faith (though perhaps incorrect) assessment of the best interests of the corporation. The possibility of personal conflict between directors . . . and the organization itself is the only unique attribute of the organization client warranting a special disclosure rule. . . .[132]

What can we make of the curious combination of openness and secrecy in the Kutak Commission's initial work? One critique of private lawmaking is that it often violates the norms of openness and accountability we associate (perhaps naively) with public lawmaking. And the commission's early proceedings could certainly have been more open.[133] Yet the secrecy here was not meant to shut out lay interest groups or the press, secrecy's putative victims. It let the commission consider their task from a

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cluding disclosure of confidential information as necessary, if the lawyer reasonably believes such action will be "in the best interest of the organization." *Model Rules Discussion Draft* Rule 1.13(c).

130. See Letters from Charles Halpern, Director of the Georgetown Institute, to Robert Kutak (Feb. 26, 1979; Dec. 14, 1979). In the late 1970s the Institute proposed that the SEC adopt rules requiring corporate counsel to (among other things) report company illegalities to the agency. In 1980, the SEC rejected the Institute's proposals pending ABA adoption of ethics rules on the subject. Bill Winter, "Whistleblowing Rule Rejected by SEC," 66 ABA J. 704 (1980); Ruth Marcus, "SEC: Ethics Dilemma a Bar Issue," *Nat'l L.J.*, May 12, 1980, at 3, col. 1.

The Kutak Commission always took Rule 1.13 as a statement of duty to organizational *clients* which, because they are artificial entities acting solely through agents, sometimes present difficulties analogous to those lawyers face in representing incompetent clients whose guardians may be acting against their interests. Compare *Model Rules Discussion Draft* Rule 1.13 with *id.*, Rule 1.14 (client under a disability). The Georgetown Institute, on the other hand, sought to impose disclosure duties on corporate lawyers in order to protect the investing *public* and perhaps the general public from corporate wrongdoing.

131. Interview of Geoffrey Hazard (cited in note 98).

132. Letter from Donald Evans to Robert Kutak (Aug. 27, 1980).

133. See Mark Aultman, "Legal Fiction Becomes Legal Fantasy," 7 *J. Legal Prof.* 31, 44 (1982).

lay or critic's perspective before being overwhelmed by pressures from within the bar.

4. *Homage to the Critics*

To see how the Kutak Commission's makeup and receptivity to critical opinion colored its early drafts, one need only examine a few provisions. The commission's January 25, 1979 draft provided that a lawyer presenting a case to a tribunal must disclose facts adverse to her client's case if "disclosure . . . would probably have a substantial effect on the determination of a material issue of fact."[134] This departed from the traditional view that lawyers should inform a tribunal of adverse legal authority, but not of adverse evidence, which may be left to one's adversary to present.[135] The departure was sure to be unpopular with the trial bar, but was precisely the position commission member Marvin Frankel had taken before the Model Rules process began.[136]

The same draft (and later ones) revived Louis Brandeis's famous concept of the "lawyer for the situation,"[137] allowing lawyers to act as "intermediaries" between clients, even at some risk that a conflict might later materialize.[138] This reflected substantial commission "hesitation" about rules that "might seem chiefly designed to make more work for lawyers by drawing the strictures on independence and candor too tightly,"[139] precisely the criticism consumer-oriented critics had leveled at CPR rules on conflict of interest.[140]

The August 1979 draft barred lawyers from drafting or negotiating for a client an agreement containing terms a reasonable lawyer would know to be unconscionable as a matter of law.[141] This duty to third par-

134. *Model Rules* Rule 3.2(a)(3)(iii) (Jan. 25, 1979 draft).

135. See, e.g., CPR DR 7-106(B).

136. See Frankel, 123 *U. Pa. L. Rev.* 1031, 1057 (cited in note 92). Signs of Frankel's influence in the final version of the Model Rules are few: a novel but specialized adverse disclosure duty for lawyers in *ex parte* proceedings, *Model Rules* Rule 3.3(d), and perhaps a negative pregnant in the Preamble statement that "when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done." *Id.*, Preamble para. 7.

137. See Frank, 17 *Stan. L. Rev.* 683, 698 (cited in note 51).

138. *Model Rules* Rule 5.1 (Jan. 25, 1979 draft).

139. Journals, Aug. 27, 1978.

140. See *supra* notes 42–43 & accompanying text. Comments in the January 1979 draft made a crucial reference to uncontested divorce as an area in which an intermediary would sometimes be appropriate. The intermediary concept survived the Model Rules process; the divorce reference did not. See *Model Rules* Rule 2.2 & comment. It was opposed by the NOBC on the ground that it would complicate enforcement of the conflict-of-interest rules, and by divorce lawyers in the ABA Family Law Section on the ground that it is nonsense to speak of "representing" two clients in their dealings with one another if they are at least formally adversaries. Letter from Richard Crouch to Robert Kutak (July 7, 1981).

141. *Model Rules* Rule 4.4 (Aug. 1979 draft).

ties went well beyond the CPR rule that lawyers may not counsel or assist a client in conduct they know is criminal or fraudulent.[142] The extension was responsive to the general criticism that the CPR unduly subordinated third-party to client interests[143] and responsive specifically to legal scholar Murray Schwartz's criticism that the CPR unwisely extended to office work the courtroom lawyer's unaccountability to adversaries.[144]

Finally, there was the matter of mandatory pro bono. The Model Rules process gave little attention at any stage to the distribution of legal services. But, responding to critics such as Marna Tucker,[145] the August 1979 draft did require lawyers to devote 40 hours a year, or the dollar equivalent, to improving the legal system or providing legal services to those who cannot afford them.[146] (A pro bono requirement with teeth soon proved to be an idea on which commission members, relatively sensitive to public opinion, were way out in front of the rank and file.)[147]

B. Stage II: The Retreat to Legalism

In early 1979, though its drafts were still under wraps, the commission began to map its strategy for moving the Rules through the House of Delegates. The formulation of an ABA ethics code was too rare an event for anybody to have a clear idea about how to proceed. But as a first step, Kutak set up a "showcase" program for the ABA meeting in August. The idea was not to unveil a Model Rules draft; that was scheduled for January 1980. Rather, the idea was to familiarize bar leaders with the project and

142. CPR DR 7-102(A)(7).

143. See *supra* notes 45–47 & accompanying text.

144. See Murray Schwartz, "The Professionalism and Accountability of Lawyers," 66 *Cal. L. Rev.* 669 (1978). The counselor's and negotiator's stepped-up duty to third parties was dropped by 1981 on the ground that unconscionability is so vague a standard that its use in a disciplinary rule might chill appropriate conduct and give lawyers too little notice of what could subject them to discipline. Letter from Geoffrey Hazard to Robert Kutak (Jan. 12, 1981).

145. See *supra* note 41 & accompanying text.

146. *Model Rules* Rule 9.1 (Aug. 1979 draft).

147. Many lawyers considered the proposal a misguided effort to turn professional virtue into necessity. Others saw the shortage of legal services to the poor as a social, not a professional, problem; they thought lawyers had no greater duty to represent the needy than grocers have to feed them. Some even said mandatory pro bono was unconstitutional peonage. See John H. Humbach, "Serving the Public Interest: An Overstated Objective," 65 *ABA J.* 564 (1979). And so, when the August 2, 1979 draft was leaked and published in the trade press (see "The Record: Text of Initial Draft of Ethics Code Rewrite Committee," *Legal Times*, Aug. 27, 1979, at 26 col. 1), the reaction within the bar was dramatic. By the January 1980 Discussion Draft, the mandatory rule had been watered down to require only an annual report of one's pro bono work, with no clear definition of what counted and no floor on the time to be given. *Model Rules Discussion Draft* Rule 8.1. When it became clear that many lawyers were still "furious" about the rule (Journals, June 28, 1980), even the reporting requirement was dropped. See *Model Rules* Rule 6.1 & Comment.

make the case in principle for a new code. The absurdity of a "showcase" with nothing to display seems not to have been considered.

Commission consultant Ray Patterson urged that the program not only kick off the campaign for a new code, but also celebrate the CPR's tenth birthday by praising it as a "landmark" in legal ethics. "The main idea we want to get across," Patterson wrote, "is that the new code is not to be a radical document, but a product that is grounded in the same basic ideas as the current code."[148] The strategy, in other words, was to introduce the Model Rules to the bar in terms quite different from the "significant departure" rhetoric that was being used to tout the Model Rules to the public and to bar critics. The new rhetoric would not necessarily make the Model Rules a conservative code; but it did mean that any reforms would have to be grounded on traditional principles.[149]

1. *The Bar Reacts*

Among those invited to review the August 1979 draft and discuss the Model Rules at the showcase program was legal scholar Monroe Freedman, long-time advocate of a nearly absolute duty of confidentiality running from lawyer to client. Just before the program, Kutak asked Freedman not to disclose the details of the August draft. This turned the program into a fiasco. Because he had not agreed to keep anything confidential when he was invited to be on the panel, Freedman (in his words) "declined to follow Mr. Kutak's instructions that the bar and the public be kept in ignorance of what the commission had wrought after two years of intensive, secret deliberations."[150] At the program, Freedman called the draft "radical and radically wrong" and disclosed some of the "disclosure" rules to illustrate his point.[151] He also gave the draft to the press. Trade journals quickly published it.[152] Many lawyers were outraged both by the substance of the draft and by the secrecy in which it was developed.[153]

Amid the uproar, ABA leaders wondered whether to keep the Model Rules project alive or wind up the commission's affairs. President-Elect David Brink agreed to continue the project only if Kutak would slow

148. Memorandum from L. Ray Patterson to Robert Kutak (Jan. 30, 1979).

149. Philosopher Michael Walzer argues that effective social or political criticism typically avoids novel arguments and "external" norms and relies instead on reinterpreting the texts and principles of the community being criticized, as when Martin Luther King, Jr., invoked the Christian principles of whites and blacks alike in calling for desegregation. Michael Walzer, *Interpretation and Social Criticism* (Cambridge: Harvard University Press, 1987).

150. Letter from Monroe Freedman to the editor of the *National Law Journal* (Sept. 2, 1979).

151. "Ethics Draft Ignites Uproar," *Nat'l L.J.*, Aug. 27, 1979, at 1 col. 1.

152. See *supra* note 147.

153. "Ethics Draft Ignites Uproar," *Nat'l L.J.*, Aug. 27, 1979, at 1, col. 1.

things down so bar groups could digest the Discussion Draft and make their views known.[154] The commission shut down for nine months and solicited comments on the Discussion Draft.

Those comments, and the later ones on the Proposed Final Draft, were voluminous. They varied widely in subject and point of view. Some came from public interest groups, government agencies such as the Justice Department and the SEC, and companies like General Motors with large in-house legal staffs. Most came from individual lawyers and bar groups in roughly equal numbers, which meant that the vast majority of lawyers' views were channeled through groups. One very partial but representative list of commentators on the Proposed Final Draft had 129 entries, of which 76 were organizations. Twenty-five of those were ABA subunits; 34 were specialty groups like the ABA Patent Law Section.[155]

The comments reflected a bar vastly more organized and differentiated than the bar that responded in 1908 to an ABA call for comments on the proposed CPE. That call produced a few hundred responses, but most were brief letters from ABA members, and the remainder were from general-purpose state and local bar associations; specialty groups did not exist.[156] The sentiments expressed in those early comments were remarkably uniform; only the treatment of contingent fees engendered any serious disagreement.[157] It appears that in 1908 the chief issue was whether lawyers were going to join the professional bandwagon and "get" ethics; the precise content of the CPE seemed secondary.

2. *"Dear Colleagues"*

In December 1980, after the initial comment period was over, Kutak, in an effort to win back support, sent bar leaders a "Dear Colleagues" letter.[158] The letter offered Kutak's assurances that the commission had no radical agenda and would weigh all the comments received, even at the cost of delaying the project. It also identified recurrent themes in the comments, including fears that the Discussion Draft could destroy both the adversary system and traditional norms of confidentiality in lawyer-client relations.[159]

"Dear Colleagues" was written in an idiom known as legalism. The idiom addresses in purely legal terms issues that might instead be consid-

154. Interview with Geoffrey Hazard (cited in note 98).

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

156. See Comm. on Code of Professional Ethics, *Final Report*, 33 *ABA Rep.* 567, 570–71 (1908).

157. *Id.*

158. Letter from Robert Kutak to bar leaders (Dec. 5, 1980).

159. *Id.* at 3–5.

ered ethical or political.[160] Philosopher Judith Shklar, who describes legalism as "[t]he tendency to think of law as 'there,' as a discrete entity, discernibly different from morals and politics," regards it as the "operative outlook of the legal profession."[161]

To many outsiders the lawyer's tendency to be "legalistic" is not endearing. Yet legalism has its uses. Sociologist Terry Halliday has shown, for example, how the shared idiom of legalism enabled liberal and conservative Chicago lawyers to join ranks against certain legislative excesses in the McCarthy era. They did so on the ground that the excesses were unconstitutional, not that they were bad policy. Conservative lawyers would not have joined a campaign based on policy arguments, and the public would have been less apt to accept such arguments as within the bar's expertise.[162]

"Dear Colleagues" encouraged lawyers to rally around commission proposals by presenting them as necessary concessions to the existing law. Thus, in response to the charge that his commission was out to destroy the adversary system, Kutak observed that some lawyers believe they owe their clients a legal duty not to reveal "a client's surprise perjury, a client's concealment of material evidence, or an opposing advocate's failure to apprise the court of legal authority directly adverse to a client's position." In fact, Kutak asserted, lawyers have no such duty. But he did not assert that the law left the commission with *discretion* to accept or reject such nondisclosure duties; that would have forced the commission to make overt policy judgments. He insisted instead that the existing law gave the commission no choice but to recognize *disclosure* duties in these areas. The commission's hands were tied, Kutak, said, because the "great weight" of legal authority "makes it clear that lawyers have traditionally been required by the courts to speak truthfully and to bring to the court's attention any false or misleading facts or law that have been knowingly or unwittingly presented to it."[163]

Kutak cited no legal authority to support these assertions, and unless one adopts a circular definition of legal authority—one that counts the earlier codes and bar association ethics opinions as law—there was little authority to cite, none with respect to the duty to disclose adverse legal authority.[164] Kutak was presumably aware of this. One might infer that his legalism was a rhetorical move, not a fully internalized ideology.

As for confidentiality, Kutak used a similar argument to defend a Dis-

160. See Judith N. Shklar, *Legalism* (Cambridge: Harvard University Press, 1964).

161. *Id.* 1–2, 8.

162. Halliday, *Beyond Monopoly* 227–45 (cited in note 58); Terence Halliday, "The Idiom of Legalism in Bar Politics: Lawyers, McCarthyism, and the Civil Rights Era," 1982 *ABF Res. J.* 911.

163. Letter from Robert Kutak to bar leaders, at 3–5 (Dec. 5, 1980).

164. See *CPR* DR 7-106(B)(1).

cussion Draft rule not only allowing but requiring lawyers to reveal confidential information when it "appears necessary to prevent the client from committing an act that would result in death or serious bodily harm."[165] Kutak claimed that judicial "pronouncements"[166] supported this unprecedented ethical duty.[167] The key pronouncement he had in mind was probably the well-known *Tarasoff* case, which holds that, notwithstanding the social value of professional confidentiality, tort law sometimes requires therapists to warn the known targets of their patients' violent threats.[168] It is far from clear, however, that *Tarasoff* would extend to the lawyer-client relationship.[169] Besides, the *Tarasoff* court justified its imposition of a tort duty by citing a rule in the AMA *Principles of Ethics* which permits the disclosure of otherwise privileged information in order to protect the welfare of the community; since disclosure was ethically permitted, the court saw no reason not to make it a tort duty.[170] This points up the "mirrors within mirrors" relationship that often exists between rules of professional ethics and other law.[171]

Though Kutak's legalism may have won back some support, it also ran into a fascinating obstacle: His brand of legalism regarded other law as cause and legal ethics as effect, but the lawyers most passionately interested in the Model Rules often saw things the other way around. Their approach to legal ethics was as focused on law as Kutak's, but they rejected his characterization of the Model Rules as a codification of the preexisting "law of lawyering." For them, the law of lawyering was largely inchoate and the Model Rules process was either an opportunity to shape that law or, more often, a dangerous breeding ground for new malpractice theories, new grounds for disqualification and denial of legal fees, new liability under the securities laws, etc.

Part II will discuss the negative side of this mentality under the heading "Defensive Ethics." But, to illustrate the affirmative use of the Model Rules process to shape other law, consider the strategy of the ABA Corporation Section, and especially the Evans committee, for whom the Model Rules process was often SEC politics by other means.

The Evans committee was created, remember, in response to the SEC's use of a CPR provision, DR 7-102(B)(1), to bolster its *National Student Mar-*

165. *Model Rules Discussion Draft* Rule 1.7(b).

166. Letter from Robert Kutak to bar leaders, at 5 (Dec. 5, 1980).

167. The CPR permitted but did not require lawyers to disclose a client's intention to commit any crime. CPR DR 4-101(C)(3).

168. Tarasoff v. Regents of Univ. of California, 17 Cal. 3d 425, 551 P.2d 334 (1976).

169. For one decision relying on *Tarasoff* to support a lawyer's duty to disclose, see Hawkins v. King County, 24 Wash. App. 338, 602 P.2d 361 (1979).

170. 17 Cal. 3d 425, 442–43, 551 P.2d 334, 347. See *AMA Principles of Medical Ethics* sec. 9 (1957) (doctor may disclose patient confidences when necessary "in order to protect the welfare of the individual or of the community").

171. Cf. Comment, "*Evans v. Jeff D.* and the Proper Scope of State Ethics Decisions," 73 *Va. L. Rev.* 783 (1987).

keting complaint against two law firms that learned the merger documents they had drafted were fraudulent but let the merger close without telling stockholders or the SEC what they knew. In 1980, the SEC tabled a proposal that the agency codify the theory of the *National Student Marketing* complaint. The SEC found the proposal premature because the ABA was then considering the same issues in the Model Rules process.[172]

This meant that the ABA—the Corporation Section's home court—was where the action would be. An Evans committee memorandum in 1978 had pointed out that ethics rules no longer served simply as a guide to lawyers and a basis for professional discipline. The memo declared that the CPR had become "the basic *source of law*" from which courts and agencies "draw the responsibilities of lawyers."[173] Armed with this insight, the Evans committee sought ABA whistleblowing rules for corporate lawyers which would be tough enough to convince the SEC to back off, yet hedged enough to keep lawyers' relations with management comfortable.[174]

Whistleblowing was not the only matter on which the Evans committee tried to use the Model Rules to influence other law. In January 1982, committee member Loeber Landau indicated in a memo to Robert Kutak that the Corporation Section would support the commission's recommendation that the Model Rules be written in a Restatement format, a matter on which the ABA House of Delegates was about to vote.[175] Making what was perhaps a tacit request for a quid pro quo, Landau enclosed a Corporation Section report on the impact of *Garner v. Wolfinger*[176] in shareholder derivative suits.[177] *Garner* holds that although the lawyer-client evidentiary privilege applies to relations between corporations and their counsel, courts in shareholder derivative suits may order counsel to disclose otherwise confidential information to the plaintiffs, even over the objection of management, whenever "good cause" can be shown.[178]

Landau was disturbed that nothing in the CPR discouraged the *Garner* court from reaching this conclusion. The CPR merely notes that the lawyer for a company represents the entity itself, not its officers or other constituents.[179] Since management was not the client, and shareholders no less than management were constituents, the CPR left the *Garner* court free to decide that the policies supporting the attorney-client privilege did not

172. See *supra* note 130 & accompanying text.

173. Gordon Cooney, Memorandum to Committee on Counsel Responsibility and Liability, ABA Section of Corporation, Banking and Business Law 6–7, 38-40 (Aug. 4, 1978) (emphasis added).

174. See *supra* notes 127–32 & accompanying text.

175. Letter from Loeber Landau to Robert Kutak (Jan. 18, 1982).

176. Garner V. Wolfinger, 430 F.2d 1093 (5th Cir. 1970), *cert. denied* 401 U.S. 974 (1971).

177. Report of Comm. on Corporation Law Departments, ABA Section of Corporation, Banking and Business Law (n.d.) (enclosed with the letter cited in note 175).

178. 430 F.2d at 1104.

179. *CPR* DR 5-18.

necessarily apply to derivative suits. The Corporation Section hoped to trump *Garner* with Model Rules commentary to the effect that the lawyer for a corporation may not reveal privileged information to shareholders in derivative suits.[180] Although the Section never got quite those words, the final Comments to Model Rule 1.13 do provide that the lawyer for an organization "may not disclose to constituents information relating to the representation" unless disclosure is "authorized by the organizational client."[181]

3. *Legalism and the "Standard Conception"*

The Kutak Commission did not use legalism merely to justify its rules. The idiom came increasingly to be reflected in the rules themselves. By the time the Proposed Final Draft was published in May 1981, several provisions in the Discussion Draft had turned into rules expressly defining a lawyer's ethical duties in terms of other law. For example, Rule 3.7(b) in the Discussion Draft forbade lawyers to seek "improperly" to influence a judge or a witness, but Rule 3.5(a) of the Proposed Final Draft barred attempts to influence a judge "by means prohibited by law" and Rule 3.4(b) barred the offering of inducements to a witness which are "prohibited by law." And whereas Discussion Draft Rule 3.2(b) forbade lawyers to "improperly" obstruct another party's access to evidence, the Proposed Final Draft's Rule 3.4(a) forbade them to "unlawfully obstruct another party's access to evidence"[182] (or to "alter, destroy or conceal" documents relevant to a judicial proceeding).

With each of these changes, the later rule permits a lawyer to go to the "limits of the law" for her clients. For that reason and because the Proposed Final Draft is more likely than the Discussion Draft to reflect practitioners' views, one might interpret the changes as expressions of the so-called Standard Conception of legal ethics, discussed in the Introduction. Yet if one looks beyond the rules themselves, one finds that lawyers usually pressed for the changes on grounds other than duty to client. Take, for example, a committee report from the Association of the Bar of the City of New York (ABCNY) that criticized Rule 3.4(a) of the Proposed

180. Report of the Committee on Corporation Law Departments (cited in note 177).

181. *Model Rules* Rule 1.13 Comment para. 3. *Garner*, however, has received a vote of confidence in early drafts of a proposed Restatement on the law of lawyering. See American Law Institute, *Restatement of the Law Governing Lawyers* sec. 134 & Comments (Tentative Draft No. 2, Apr. 7, 1989) (cited below as *ALI Restatement*). If this holds up in later drafts, it may suggest either that the ALI drafting process is significantly different from the ABA's, or that power in the ABA and ALI is distributed differently, with the ALI perhaps relying more heavily on legal scholars. Either hypothesis, if correct, might have policy implications for how and where lawyers' ethics codes should be prepared in the future.

182. "Unlawful obstruction" here presumably referred to laws on obstruction of justice as well as the rules of civil discovery. See *Model Rules* Rule 3.4 Comment 2.

Final Draft for not adding a *second* "unlawfully" before the words "alter, destroy or conceal." Whether and when documents must be retained, the report noted, is already a complex legal question. Even the hint of an "additional standard will exacerbate the complexity that already exists and distract the lawyer's attention from the need to consider the applicable law."[183] In other words, the ABCNY committee defends the equating of ethical with legal duty not by appealing to client interests, as the Standard Conception would dictate, but on the basis of clarity and fair notice to lawyers.

Another example from earlier in the Model Rules process: Legal services lawyers and some members of the Kutak Commission argued that if lawyers were to have an ethical duty to "expedite litigation," then the law of civil procedure should define that duty. The legal services lawyers who opposed any duty to expedite that was stricter than the duty embodied in the rules of civil procedure did seem to be in thrall to the Standard Conception, perhaps because, lacking any fee nexus with their clients, their greatest professional problem is to convince skeptical clients and others of their adversary zeal.[184] The commissioners, on the other hand, did not argue that clients are entitled to lawyers who will do anything for them within the bounds of the law of civil procedure. Their argument was based on perceptions of institutional competence: Ethics rules on this point, though desirable in order to emphasize its importance, should track the rules of civil procedure because "delay and burden are uniquely amenable to regulation by court rule and judicial oversight, without the mischief of interjecting into the adversarial process the invitation to file a grievance with disciplinary authorities in the course of a trial."[185]

4. Work from Within or Go Outside?

Once the Discussion Draft was published, bar groups had to decide how to respond. They could try to influence matters directly by participating in the ABA process, thereby confirming the ABA's status as an ethics fountainhead; or they could react through other channels. Groups working within the ABA process but unhappy with the Discussion Draft had to

183. Ass'n of the Bar of the City of New York, Executive Committee, Statement Concerning the Substance of the Model Rules of Professional Conduct 22 (Mar. 3, 1982). The extra "unlawfully" found its way into the final version. See *Model Rules* Rule 3.4(a).

184. The power to expedite, wrote one legal services lawyer, must never be used to "expedite a disadvantageous result for the client." Letter from Alan Houseman, Director of the Legal Services Corporation Research Institute, to Geoffrey Hazard 5 (Nov. 29, 1979). Overall, legal services lawyers were as committed as any interest group within the bar to the Standard Conception. They argued, for example, that lawyers for a defendant in a civil action (say, a suit for back rent) should have as much latitude to put plaintiffs to their proof as criminal defense lawyers have to put prosecutors to theirs. *Id.* at 5.

185. Journals, Dec. 15, 1978.

decide whether to oppose the Model Rules outright or chip away at specific rules. As a matter of organizational courtesy, ABA committees and sections could neither "go outside" nor oppose the Model Rules in toto. State and local bars that are directly represented in the ABA House of Delegates (organized partly as a federation) also felt obliged to work from within but, as happened with the California State Bar and New York State Bar Association,[186] could work to defeat the Model Rules in toto.[187]

The most important decisions to "go outside" were those of ATLA and the NOBC, organizations fairly new to bar politics and anxious to become more visible. Like other specialty groups, they found it easier to reach a consensus on ethics than the general-purpose state and local bars did. But neither had a strong voice in the ABA House of Delegates.

NOBC members thought the Discussion Draft contained many standards that would let lawyers "equivocate [enforcers] to tears."[188] Also, since NOBC lawyers constantly used the CPR, they had invested more time than most lawyers in learning it and were afraid of losing their expertise. Their chief complaint was that the Discussion Draft used an untried Restatement format (black-letter rules and explanatory comments), not the CPR's three-part structure (basic Canons; aspirational Ethical Considerations, or ECs; and enforceable Disciplinary Rules, or DRs.) They doubted that the new format would catch on and, so, worried that the Model Rules would promote less rather than more uniformity among the states. Reluctant for all these reasons to junk the CPR and the extensive body of cases and ethics opinions interpreting the CPR, they drafted a new version of the CPR as an alternative to the Model Rules, using some of the Kutak Com-

186. See Phillip Carrizosa, "Kutak Rules are Totally Rejected at Bar Convention," *L.A. Daily J.*, Sept. 30, 1980, at 1, col. 2; Letter from Board of Governors, State Bar of California to ABA House of Delegates (June 8, 1982); Angel Castillo, "New York Bar Group Rejects Overhaul of Ethics Code," *N.Y. Times*, Nov. 2, 1980, at 45, col. 4 (late city edition).

187. Government agencies had to make similar decisions. A few including the U.S. Department of Justice filed comments on the published Model Rules drafts, but none made a sustained effort to influence the development of the Model Rules. The Antitrust Division of the Justice Department and the Federal Trade Commission had a special interest in rules on fees, advertising, solicitation, group legal services, and law firm ownership, yet they did little lobbying. But see Letter from Ass't Attorney General Jonathan Rose to Robert Kutak (July 23, 1984). Perhaps reluctant to participate in making rules it might later have to challenge, the Antitrust Division saved its criticisms for a 1984 letter to the state supreme courts, which were then considering the Model Rules for local adoption. See Stuart Taylor, Jr., "U.S. Criticizes ABA's Lawyer Code," *N.Y. Times*, Sept. 25, 1984, sec. D, at 17, col. 1 (late city ed.). The letter expressed concern about Model Rule 1.5, which requires legal fees to be "reasonable." The division thought the Rule might stifle price competition. When an ABA ethics opinion read Rule 1.5 to impose a fee ceiling but no floor, the division withdrew its criticism. See "News and Background: Antitrust Division, ABA Move Toward Agreement on Rules," 1 *Lawyers' Manual* 612 (Current Reports No. 27, Jan. 23, 1985) (cited in note 13).

188. Scott Slonim, "Kutak Commission Ethics Draft Draws Early Fire," *Bar Leader*, Mar.–Apr. 1980, at 2. For one such standard, see *supra* note 134 & accompanying text.

mission's substantive ideas.[189]

When the ABA House of Delegates in early 1982 approved the Kutak Commission's Restatement format, NOBC was able to shift gears and work within the ABA to shape the rules of special concern to enforcers.[190] Though it failed in its efforts to save a proposed requirement that all lawyers' fee agreements be in writing,[191] it successfully argued that the Model Rules should retain the vague CPR "catch-alls" proscribing illegal conduct involving "moral turpitude" and conduct involving "dishonesty, fraud, deceit or misrepresentation."[192]

ATLA's decision to go outside was more momentous. Founded in 1946, ATLA consists mostly of plaintiffs' personal injury lawyers, a substantial percentage of whom are the urban, ethnic, solo, and small-firm practitioners that the conflict critics of earlier ABA ethics codes considered a professional underclass. Though its present membership of more than sixty thousand is only about a sixth of the ABA membership, ATLA is the second largest national bar organization and has been growing lately at a faster rate than the ABA.[193] Its decision to draft a rival code undoubtedly reflected real ideological differences with the Kutak Commission,[194] but ideology was not the only motivation. ATLA leaders apparently felt that the hostility of many lawyers to early drafts of the Model Rules gave ATLA a chance to increase its stature at ABA expense. Announcing in September 1979 that ATLA would draft its own code, president Theodore Koskoff likened the ABA to a dinosaur, pointing out that a bar association's size "doesn't guarantee survival."[195]

ATLA had not gone outside at first. Legal scholar Richard Lempert arranged with Hazard to read and comment on early Kutak Commission drafts on ATLA's behalf.[196] But as soon as the commission's August 1979 draft was leaked and stirred up a fuss, Koskoff seized the opportunity.

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189. See *NOBC Proposed Amended Rules* (cited in note 8). See also National Organization of Bar Counsel, Report on a Study of the Proposed ABA Model Rules of Professional Conduct with Recommendation (Aug. 2, 1980) (critique of Model Rules Discussion Draft).

190. See National Organization of Bar Counsel, Report of the Special Review Committee on the Proposed Final Draft of the Model Rules of Professional Conduct 1 (June 4, 1982).

191. *Id.* at 3.

192. *Id.* at 15.

193. Association of Trial Lawyers of America, "Join the Most Effective Lawyers' Association Bar None" (n.d.) (promotional brochure).

194. But not the sharp differences over business-getting activities such as solicitation that the "conflict" critics of the earlier ABA codes might have predicted. See *supra* notes 38–40 & accompanying text.

195. "Trial Lawyers Group Parts Company with ABA on Ethics Code, Specialization," 65 *ABA J.* 1299 (1979). Through the 1970s ATLA and the ABA had often disagreed on another political front—how to respond to calls for federal no-fault automobile legislation. See Philip B. Heymann & Lance Liebman, *The Social Responsibilities of Lawyers: Case Studies* 309–35 (Westbury, N.Y.: Foundation Press, 1988).

196. See Letter from Richard Lempert to Geoffrey Hazard (June 25, 1979).

Monroe Freedman was named reporter for the ATLA project. By June 1980, ATLA published a discussion draft of the American Lawyer's Code of Conduct (ACC).[197]

Kutak tried to nip ATLA's rebellion in the bud by publicly welcoming ATLA's ideas but dismissing ATLA's perspective as too narrow to yield a comprehensive and balanced code. ATLA must remember, Kutak said, that "trial is an adjective before lawyer and the ABA is working to write not just a code for a specialized area, but a code for all lawyers." "Writing a code is easy," Kutak added; "I'm only perplexed at how they [ATLA] would enforce it."[198] Kutak's arrogance on this point was repaid by Thomas Lumbard, Director of the National Board of Trial Advocacy and co-reporter on a later draft of the ACC.[199] Lumbard chided Kutak for presuming that all 50 states would "bow down before the infallible pope of legal ethics and adopt what he says ought to be the rules."[200]

ATLA's code and its critique of the Model Rules are of special interest because ATLA brought a conscious ideology to the subject. Its creed has two tenets. One is consumerism—the customer is always right. (The ACC Discussion Draft, for example, abandoned the traditional rule allowing lawyers to use client confidences to recover a fee.)[201] Consumerism does more than subordinate lawyer interests to client interests. It equates client interests with the public interest; each citizen's interest in the legal system is solely a matter of how the system treats him or her as a present or potential client.[202] Describing the views of the nonlawyers who served on the committee that drafted ATLA's code, Koskoff said:

> They were shocked by the concept that a lawyer would reveal a client's secrets except in the most extreme circumstances. They reminded us . . . that what we were writing was not just a Code of Conduct for lawyers, but a Bill of Rights for clients. As one of the nonlawyers . . . put it, "When I need a lawyer, I need him to be *my* lawyer. And if he isn't going to be *my* lawyer, I don't need him."[203]

The second tenet in the ATLA creed, suggested by the description of a

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197. *ACC Discussion Draft* (cited in note 8).

198. "Trial Lawyers Group Parts Company with ABA on Ethics Code, Specialization," 65 *ABA J.* at 1300 (1979). Kutak was implying that only the ABA could successfully promote an ethics code for adoption by the state supreme courts.

199. Commission on Professional Responsibility, Roscoe Pound–American Trial Lawyers Foundation, *The American Lawyer's Code of Conduct* (Revised Draft, May 1982).

200. Steven Pressman, "Trial Lawyers not Highlighting Their Own Code of Conduct," *Daily Reporter*, Aug. 11, 1980, at 1.

201. *ACC Discussion Draft* 106 (cited in note 8).

202. See *id.*, Preamble at 3 (defining the public as "the actual and potential clients whom we serve").

203. Theodore J. Koskoff, "Introduction to the *American Lawyer's Code of Conduct*," *Trial*, Aug. 1980, at 46, 47 (emphasis added).

legal ethics code as a clients' "bill of rights," is (liberal) constitutionalism, that form of legalism which grounds the lawyer's ethical duties in clients' (generously defined) constitutional rights. This tenet extends the imagery and values associated with criminal defense work to other forms of law practice, especially civil litigation. Thus, Koskoff invokes as an appropriate ethic for *all* lawyering Lord Brougham's famously exorbitant statement in his criminal defense of Queen Caroline: "an advocate, by the sacred duty which he owes his client, knows, in the discharge of that office, but one person in the world, that client and none other."[204] And the ACC Preamble supports the adversary system by appealing to the rights to counsel, trial by jury, and due process.[205]

Reviewing the Model Rules Discussion Draft from ATLA's perspective, Koskoff gave it two thumbs down for embracing the "essentially totalitarian view, now popular with many who strangely call themselves liberals, that the public interest is best served by serving the public wholesale, and by making lawyers servants of the system, rather than the bulwark between organized power and the individual."[206]

There was no greater gulf between the discussion drafts of the Model Rules and the ACC than on the issues of confidentiality. For example, the Model Rules draft *required* lawyers to disclose a client's confidences to prevent him from killing or seriously injuring someone,[207] and *permitted* disclosure to prevent, or rectify the consequences of, a client's "deliberately wrongful act."[208] The ACC offered two alternatives on the subject; even the one tilting more toward disclosure never required it, and allowed it only to avoid imminent loss of human life.[209]

With time, the Model Rules moved close to ATLA's position on this aspect of confidentiality.[210] Yet ATLA leaders never reconciled themselves to the Model Rules or to the ABA's primacy in matters of legal ethics. Thomas Lumbard suggested in 1981 that the ABA abandon the Model Rules project and get out of the business of producing ethics codes. He proposed that a code be drafted instead by a new interstate agency controlled by "the courts."[211]

This suggests how badly ATLA leaders wanted to decertify the ABA as the unofficial voice of the legal profession on matters of ethics. It is judges, after all, who run the courts; and judges, interested in getting at the truth and not being trifled with, are as hostile as any interest group in the legal

204. *Id.* at 46.
205. ACC *Discussion Draft* at 5.
206. Theodore J. Koskoff, "President's Page," *Trial*, Jan. 1980, at 4, 6.
207. *Model Rules Discussion Draft* Rule 1.7(b).
208. *Id.*, Rule 1.7(c)(2).
209. ACC *Discussion Draft* Rules 1.2, 1.4 (Alternative "A").
210. See *Model Rules* Rule 1.6.
211. Lumbard, 30 *Cath. U.L. Rev.* 249, 271 (cited in note 37).

profession to the nearly absolute protection of confidentiality which ATLA favors. If Marvin Frankel's role on the Kutak Commission is not enough to prove the point,[212] then consider this: as state supreme courts adopt the Model Rules, the rules they most commonly amend are those protecting client confidences almost absolutely.[213] Consider also Monroe Freedman's experience after he argued in a 1966 speech that criminal defense counsel, in order to avoid using a client's confidences against him, may have to put the client on the witness stand and permit the client to commit perjury. Several judges, including former Chief Justice (then Judge) Warren Burger, sought to have Freedman suspended or disbarred for even expressing such ideas.[214]

A more bizarre sign of ATLA's interest in decertifying the ABA came in the final phase of the Model Rules process. At the February 1983 ABA meeting where the black-letter Model Rules (but not the Comments) were finalized, the House of Delegates voted 207–129 to amend the Commission's proposed Rule 1.6.[215] The amendment narrowed the cases in which a lawyer may reveal her client's confidences in order to prevent the client from committing a crime. As amended, the rule allowed disclosure to prevent a crime likely to result in imminent death or substantial bodily harm, but not to prevent or mitigate the effects of economic or property crimes.[216] Believing the amendment created a haven for white-collar criminals, Senator Arlen Specter, a former prosecutor, introduced a bill in Congress[217] that would turn the preamendment disclosure standards of Rule 1.6 into lawyers' duties under federal criminal law. Even the bar leaders who had opposed the amendment to Rule 1.6 in the ABA House of Delegates opposed the Specter bill, arguing that lawyers are and should be regulated at the state level and by courts, not legislatures.[218]

Given the importance they attach to confidentiality, one might have expected ATLA leaders to mount an even more ferocious attack on the

212. For an attack on Frankel and his disclosure-oriented influence on early drafts of the Model Rules, see Milton V. Freeman, "Lawyer's Duty Should Be to Client, not Government," *Legal Times*, Aug. 25, 1980, at 11, col. 1.

213. Remarks of Kutak Commission member Robert Hetlage on the Acceptance of the Model Rules around the Country (ABA National Conf. on Prof'l Responsibility, May 31, 1985). See also L. J. Pendlebury, "ABA Model Conduct Rules Rejected by New York Bar," *Legal Times*, Nov. 11, 1985, at 3, col. 1.

214. Monroe H. Freedman, "Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions," 64 *Mich. L. Rev.* 1469 n.1 (1966). See also "The Professor and the Judge," *Cal. Lawyer*, July 1986, at 57.

215. "Midyear Meeting of American Bar Association," 51 *U.S. Law Week* 2488, 2489 (Feb. 22, 1983) (cited below as "Midyear Meeting").

216. *Id.*

217. S. 485, 98th Cong., 1st Session (1983).

218. See *The Lawyer's Duty of Disclosure Act: Hearings on S. 485 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 98th Cong., 1st sess. (Apr. 28, 1983) (statement of Kutak Commission member Robert Hetlage); *id.* (statement by George Bushnell on behalf of the ABA).

Specter bill. Yet Koskoff merely sent a letter to other opponents of the Model Rules suggesting that Robert Meserve, who replaced Robert Kutak as commission chair when Kutak died in January 1983, might have put Specter up to introducing the bill in order to instigate an ABA reconsideration of the House of Delegates' amendment to Rule 1.6.[219] And Monroe Freedman, the ACC reporter and long-time champion of confidentiality, testified in *support* of the Specter bill! He did so not because he favored the bill on the merits (he didn't), but because ABA "efforts at self-regulation of the legal profession through a comprehensive code" have "failed consistently." Freedman wanted Congress to govern the conduct of lawyers before federal courts and agencies.[220]

D. Stage III: Endgame

It was clear by fall 1982 that the Model Rules process would produce a new code. Those on record as opposing the Model Rules in toto began to speak wistfully about what might have been. In a May 25, 1982 letter to NOBC's Charles Kettlewell, ATLA's Thomas Lumbard complained that their organizations lacked the money to produce the materials needed to combat "the great sea of crap coming out of [ABA headquarters in] Chicago."[221] A self-styled "consortium" of Model Rules opponents tried to coordinate their efforts to amend the rules that most concerned them, but there was little talk now about sinking the whole project. Kurt Melchior, an ABA delegate from the California State Bar, urged leaders from other disenchanted groups—the ABA General Practice Section, NOBC, ATLA, the New York State Bar Association, and ACTL—to seek authorization from their organizations to be flexible at the February 1983 ABA meeting in New Orleans, where the House of Delegates would debate and vote on the Model Rules, rule by rule. "Clearly," Melchoir wrote, "some form of new rules will be adopted. Let's try to make these rules of a kind that our profession and the public we serve can live with."[222]

1. *Behind-the-Scenes Negotiation*

Since the House of Delegates meets only twice a year, it was an awk-

219. Letter from Theodore Koskoff to Ellen Dreibilbus (Mar. 24, 1983). Meserve denies this. Interview with Robert Meserve (Chicago, May 2, 1986). Koskoff charged in the same letter that the Kutak Commission regularly tried to get ABA delegates to accept its positions by arguing that failure to do so would invite outside intervention in the regulation of the bar.

220. Statement of Monroe Freedman, *Hearings on the Lawyer's Duty of Disclosure Act* (cited in note 218).

221. Letter from Thomas Lumbard to Charles Kettlewell (May 25, 1982).

222. Letter from Kurt Melchior to various bar leaders (Jan. 10, 1983).

ward forum in which to debate a proposal as complex as the Model Rules. The commission forwarded its Final Draft to the House for consideration at the August 1982 meeting, but when that meeting adjourned, the House had only discussed and acted on one of 50 rules![223] The House had much better luck at its February 1983 meeting, when it acted on all the other rules. Still, this final stage necessarily featured behind-the-scenes negotiation. Hazard, Meserve, and Kutak (until his death in January 1983) sought support in the House by accommodating a number of "special interests."

A seemingly key accommodation involved Rule 1.13, on which the commission had been negotiating with the Evans committee from the beginning. In announcing the Corporation Section's endorsement of the Rules in August 1982, Loeber Landau of the committee called Rule 1.13 one of the "most important rules our Section had a hand in shaping."[224] He was pleased with the Rule's new attention to the special problems of representing organizations, with its clear statement that the lawyer for an organization represents the entity and not its various constituents, and with its careful hedging in, but not complete removal, of the lawyer's discretion to blow the whistle outside the corporation on managerial wrongdoing that jeopardizes company interests. Rule 1.13 had been honed, Landau said, to the point where the lawyer's relations with management would be comfortable, yet in an extreme case involving both managerial wrongdoing *and* an inadequate response occasioned by conflicts of interest on the board of directors, the lawyer could "go outside," if need be, to protect the company. Calling proposed Rule 1.13 a sensible "resolution of questions which the SEC and others have raised in recent years," Landau added that if the bar did not provide such a resolution, the SEC would fill the void, and the result was not likely to be as "considered and desirable as proposed Rule 1.13."[225]

Negotiations produced language responsive to the special pleading of many other groups, some of them quite small. All this made for a code that in the end had little more coherence than its predecessors but, unlike those codes, had words added or removed to accommodate lawyers practicing in almost every imaginable setting. In the ten years between the drafting of the CPR and the Model Rules, practice setting, field of specialization, and clientele had become, along with lawyer's role, crucial variables in ethics rulemaking.

A few examples of negotiated language: An organization of state attorneys general got language making it clear that government lawyers are

223. ABA Center for Professional Responsibility, *The Legislative History of the Model Rules of Professional Conduct: Their Development in the ABA House of Delegates* 1 (Chicago: American Bar Association, 1987) (cited below as *Legislative History*).

224. W. Loeber Landau, "Section Supports Adoption of Proposed Model Rules of Professional Conduct," *Business Law Memo*, Nov.-Dec. 1982, at 1.

225. *Id.* at 2.

often authorized to make choices that in private practice must be left to the client—whether to sue, for example, or when to accept a settlement offer.[226] The ABA Administrative Law Section negotiated more latitude in case selection for former government lawyers and their private firms.[227] The ABA Judicial Administration Division got language encouraging lawyers to maintain their efforts to defend judges who have been unjustly criticized.[228] And an ABA Standing Committee on Clients' Security Funds got language urging lawyers to support their local fund.[229]

Though an in-house lawyer became a Kutak Commission member in late 1980,[230] the only perceptible impact of house counsel on the Model Rules came in this final frenzy of special pleading. House counsel appear to have convinced the commission to abandon a new requirement that lawyers who work on salary for organizations other than law firms extract from their employers a written commitment to respect their independent professional judgment.[231] They argued that however sensible the rule might be for legal services lawyers, to prevent their superiors from driving undesirable wedges between them and their clients, it made no sense for lawyers whose employers *are* their clients.[232] Besides, as a matter of professional status, house counsel wanted to be lumped with outside corporate counsel, not with lawyers in government agencies and legal services offices.[233]

Since over 10% of the bar are now house counsel,[234] their relative uninvolvement in the Model Rules process calls for an explanation. Before 1982, house counsel had neither an ABA section nor an association of their own. This was a substantial liability in an era in which the organ-

226. See letter from Hector Reichard de Cardona, Att'y Gen'l of Puerto Rico, to Robert Meserve (Feb. 10, 1983); Letter from Robert Meserve to Geoffrey Hazard (Feb. 17, 1983) ("I think we are going to have to do something for our friends who are attorneys general, etc. I would be glad to have your ideas as to how we can keep them happy"); *Model Rules*, Scope para. 4.

227. See Letters from Antonin Scalia, Section Chair, to Robert Kutak (May 28, 1982); to Judith Smith of the ABA staff (June 9, 1982).

228. See ABA Judicial Administration Division, Report to the ABA House of Delegates 1 (June 1982); *Model Rules* Rule 8.2 Comment.

229. See Letter from R. Amster to Robert Kutak (Dec. 2, 1981); *Model Rules* Rule 1.15 Comment.

230. See note 95 *supra*.

231. See *Model Rules Proposed Final Draft* Rule 5.4 (cited in note 10).

232. See C. Barry Schaefer, "Proposed Model Rule 5.4: Is It Necessary for Corporate Staff Counsel?" 15 *Creighton L. Rev.* 639 (1982); Letter from William Beringer, vice-president and general counsel of Siemens-Allis, Inc., to ABA (Oct. 30, 1981). The rule was also opposed by the ABA Patent Law Section, many of whose members are in-house lawyers.

233. Schaefer, "Proposed Model Rule 5.4," *passim* (cited in note 232). See also Ted Schneyer, "Professionalism and Public Policy: The Case of House Counsel," 2 *Geo. J. Leg. Ethics* 449, 481–83 (1988) (pointing to signs of status anxiety and heightened status consciousness among today's house counsel).

234. Barbara A. Curran, Katherine Rosich, Clara Carson, & Mark Puccetti, *Lawyer Statistical Report: A Statistical Profile of the U.S. Legal Profession in the 1980s* 19 (Chicago: American Bar Foundation, 1985).

ized bar is so structurally differentiated and influence comes through organizational channels. Recognizing this too late to have much impact on the Model Rules, house counsel in 1982 formed the American Corporate Counsel Association (ACCA). Leaders of the ABA Corporation, Banking and Business Law Section reportedly greeted this development "with dismay"; they considered their section the "proper and logical home" for lawyers in corporate law departments.[235]

Since one of house counsel's most important duties is to monitor the work of outside counsel and keep legal expenses down, ACCA is likely to become a strong voice for tighter controls on frivolous actions, dilatory tactics, discovery abuse, and other practices that run up corporate legal fees. If so, ACCA may find itself in the future at ethical odds with trial lawyers. There are already signs of this. In 1985, an ACCA committee developed litigation guidelines that corporations can adopt to govern their inside and outside lawyers alike. Among other things, the guidelines bar the inclusion of any cause of action in a civil complaint which would not itself be an adequate basis for a lawsuit.[236] Outside firms, which still take the lion's share of corporate litigation, may be discomfited by such restrictions.

The ACCA litigation guidelines represent yet another instance of a fledgling professional association developing a set of ethical principles as one of its first orders of business.[237] They also fit a bar trend that might be termed "ethical proliferation"—the movement from a single set of ethics rules for the profession at large to many sets, mostly unenforceable, promulgated by different organizations, each addressed to lawyers in a particular specialty field or practice setting.[238] This development may eventually have a substantial impact on the ABA's primacy in legal ethics, but the direction of the effect is hard to predict. It could reduce the ABA's role, much as new cable TV channels have cut deeply into the major networks' audience share. Or, it might strengthen the ABA's role by heightening the profession's need for an ethical arbiter, mediator, and clearinghouse.

2. *Strange Bedfellows*

Not all the commission's last-stage efforts consisted of accommodating groups through changes nobody else cared about. There were issues so contested that they could only be resolved by a formal vote in the House

235. Deborah Graham, "Corporate GC's Consider Group," *Legal Times*, Feb. 8, 1982, at 3.

236. Mary Billard, "Inside Moves," *Am. Law.*, May 1985, at 30.

237. See text accompanying notes 77–83 *supra*.

238. For brief discussions of this phenomenon and its possible implications, see Charles W. Wolfram, *Modern Legal Ethics* 59–60 & nn.62–66 (St. Paul, Minn.: West Publishing Co., 1986); Schwartz, 1980 *ABF Res. J.* 953 (cited in note 82).

of Delegates. The first of these matters was the writing requirement for lawyers' fee agreements. The commission's Proposed Final Draft required the basis or rate of every fee to be explained to the client in writing. Commission member Lois Harrison supported the requirement as a way to protect consumers; NOBC, as a way to avoid lawyer-client misunderstandings and make a record in case a fee dispute should later arise.

The requirement was opposed by two groups who seem light-years apart in other respects. The ABA General Practice Section opposed it on behalf of small-town and rural lawyers reluctant to formalize their relations with clients by putting things in writing.[239] The Corporation Section saw it as an affront to sophisticated business clients,[240] and was aware that large law firms make some fee arrangements not easily reduced to writing.[241] By House vote, the general writing requirement soon became a mere "preference."[242] Critics who view the formulation of legal ethics codes as an arena of conflict between Big Law Firms and Little Lawyers, or between the two "hemispheres" of lawyers representing companies and individuals, respectively, could not have predicted the alignment of bar interests on this issue.

3. *Showdown with the American College of Trial Lawyers*

There were still other issues, touching on confidentiality, which not only had to be decided by House vote but also set up a showdown between the Kutak Commission and the group that ultimately emerged as its most formidable antagonist—the American College of Trial Lawyers (ACTL). The showdown came at the February 1983 New Orleans meeting where the black-letter portions of the Model Rules were debated, amended, and approved.

ACTL membership is by invitation, and none is extended until one's reputation is secure. The average ACTL member is thus older than the average lawyer. Most ACTL members concentrate on civil litigation, where they often represent insurers and other companies and lock horns with ATLA lawyers. Though ACTL has no direct representation in the ABA House of Delegates, Robert Meserve, himself an ACTL fellow, estimates that one-sixth of the delegates are ACTL fellows.[243] He also thinks the House defers

239. Journals, October 26, 1979; *Legislative History* at 40 (cited in note 223); Comments by Frederick Fisher for the ABA General Practice Section at Kutak Commission public hearing on the Model Rules Discussion Draft (Honolulu, July 5, 1980).

240. Comments on the Proposed Final Draft by Loeber Landau of the Committee on Counsel Responsibility and Liability of the ABA Corporation, Banking and Business Law Section (Sept. 21, 1981).

241. See James B. Stewart, *The Partners: Inside America's Most Powerful Law Firms* 23 (New York: Simon & Schuster, 1983).

242. *Legislative History* 42 (Rule 1.5(b))(cited in note 223).

243. Interview of Robert Meserve (cited note 219).

to the ACTL fellows far more than their numbers might suggest. ACTL members are something of an elite.

In April 1982, ACTL released a report highly critical of the Kutak Commission's Proposed Final Draft.[244] The report urged that the House of Delegates reject the Rules and resubmit them to the commission, and that the commission be reconstituted to increase the number of members with "a full appreciation of the realities and goals of legal practice."[245] Most criticism of the Rules by this stage was rule-specific; ACTL had broader concerns. It found the Rules "permeated by a philosophy that is inimical to the adversary system and to effective legal representation."[246]

Kutak was upset that ACTL was not "on board." In two letters to ACTL President Alston Jennings,[247] he carefully responded to each ACTL criticism, often conceding that they had force. He told Jennings that a few amendments could make the Model Rules satisfactory from ACTL's standpoint. While their differences with ACTL were too fundamental to iron out in negotiations, Kutak, Hazard, and Meserve convinced ACTL to think in terms of amendments, not outright rejection.

ACTL was worried about four rules above all, each touching on confidentiality. One was Rule 1.6. As proposed by the commission, Rule 1.6 allowed lawyers to disclose otherwise protected information to prevent a client from committing a crime or fraud likely to cause substantial bodily harm or substantial injury to financial interests or property; it also allowed lawyers to make disclosures to rectify the consequences of a crime or fraud that their services had been used to further.[248] ACTL argued that so broad a hedge on confidentiality would make clients less candid and thus reduce lawyers' opportunities to discourage client wrongdoing (an argument, notice, based on public rather than client interests). At the February 1983 ABA meeting, ACTL proposed an amendment allowing disclosure only to prevent crimes likely to cause "imminent death or substantial bodily harm"[249] (crimes ACTL lawyers apparently do not *want* a chance to discourage!). The House adopted the amendment 207 to 129.[250]

While some opponents called Proposed Rule 1.6 a "radical assault" on professional traditions,[251] the fact is that its CPR analogue, DR 4-

244. American College of Trial Lawyers, Report of the Legal Ethics Committee on the May 30, 1981 Proposal Final Draft of the Model Rules of Professional Conduct (Apr. 2, 1982).

245. *Id.* at 7.

246. *Id.*

247. Letters from Robert Kutak to Alston Jennings (May 28, 1982; July 9, 1982).

248. *Legislative History* 47–48 (cited in note 223).

249. *Id.* at 50.

250. "Midyear Meeting" at 2489 (cited in note 215).

251. Monroe Freedman, "Lawyer-Client Confidence: The Model Rules' Radical Assault on the Traditional Role of the Lawyer," 68 *ABA J.* 428 (1982); Stuart Taylor, Jr., "Ethics and the Law: A Case History," *N.Y. Times* (Magazine), Jan. 9, 1983, at 31, 36 (quoting ACTL President-Elect John Elam).

101(C), permitted lawyers to disclose confidential information as needed to prevent a client from committing any crime, however trivial. And ironically, ACTL's amendment to Rule 1.6 was an assault on its own ethical tradition, which was quite in keeping with the Proposed Rule. As drafted in 1972, ACTL's Code of Trial Conduct, an early example of ethical proliferation, provided that a lawyer is not "bound to respect" confidences concerning his client's intention to commit *any* crime; on the contrary, the lawyer may make whatever disclosures are needed to prevent a crime and "should do so if injury to person or property is likely to ensue."[252]

ACTL's about-face here might reflect a shift in trial lawyers' values from a gentlemanly to a hired-gun ethic, perhaps occasioned (if one insists on materialistic explanations for ideological changes) by a new competitiveness for clients and thus a new urgency to reduce client fears of lawyer betrayal. But such a transformation of values in a mere decade seems unlikely. The change more likely reflects a fear that, unlike the earlier ABA codes or ACTL's own guidelines, the Model Rules were going to have real legal bite, so that ACTL could no longer afford the luxury of ethics rules that might sound good to outsiders but do not reflect the trial lawyer's practices and values. During the House of Delegates debate on Proposed Rule 1.6, one argument made in favor of ACTL's proposed amendment was precisely that courts today would be likely to turn any ethical right to disclose confidences into a legal duty to do so to protect third parties,[253] as the *Tarasoff* court did with the principles of medical ethics.[254] The counterargument, reflecting the Kutak Commission's brand of legalism, was that a tort duty to protect third parties already existed, and that it would be unwise to create ethical duties that lawyers would have to breach in order to comply with other legal duties.[255,256]

The second key Rule ACTL sought to amend was 1.13. As proposed after long negotiation between the Kutak Commission and the Evans committee, Rule 1.13 posed two problems for ACTL. Rule 1.13(c), discussed earlier, permitted a lawyer in unusual circumstances to reveal confidential information to outsiders, even over the objection of the organization's highest authority, in order to protect the organization. ACTL considered it presumptuous for lawyers ever to "play God" by disclosing information the highest authority in the corporation was determined to keep confidential. If counsel is troubled by the board's resolution of a legal problem,

252. American College of Trial Lawyers, *Code of Trial Conduct* sec. 5(b) (1972).

253. "Midyear Meeting," at 2489 (cited in note 215).

254. See *supra* notes 168–70 & accompanying text.

255. "Midyear Meeting," at 2489.

256. Model Rules reporter Geoffrey Hazard stresses the difference between the ACTL and the ABA Corporation Section perspective on issues of confidentiality. See note 131 & accompanying text *supra*.

ACTL argued, let her withdraw.[257]

The other troubling section was 1.13(a), which provided that the lawyer for an organization represents the organization "as distinct from" its directors, officers, employees, members, shareholders, or other constituents. ACTL considered "artificial" the distinction between the organizational client and its various constituents, especially management. Most lawyers who represent companies, after all, are retained by and work closely with management. Lawyers in this position are often pressured to treat management if not precisely as the client then at least as the most vivid embodiment of the client. That is precisely why the Evans committee welcomed proposed Rule 1.13(a). ACTL, however, sought to change "as distinct from" to "including,"[258] implying that the lawyer for an organization should normally think of herself as representing its various constituents as well.

The House adopted both ACTL amendments to Rule 1.13, this time by a vote of 185–113.[259] But after the February 1983 meeting, as Geoffrey Hazard worked with ACTL leaders to harmonize the Model Rules commentary with the amended Rules, he convinced ACTL leaders of something the Evans committee had understood all along: that if the lawyer representing a corporation also represents its constituents—including shareholders—that would support the *Garner v. Wolfinger* requirement that company lawyers reveal otherwise privileged information to the plaintiffs in some shareholders' derivative suits.[260] ACTL leaders, in whose hierarchy of values confidentiality was tops, saw the light and accepted a friendly amendment. As finally adopted, Model Rule 1.13(a) provides that the corporate lawyer represents "the organization acting through its duly authorized constituents."[261]

Until the final stage of the Model Rules process, Rule 1.13 was understood to be in the ABA Corporation Section's bailiwick. The Evans committee had worked and reworked the rule, largely in hopes of convincing the SEC not to revisit the issues involved. But in the end, ACTL came along, the proverbial bull in a china shop, and substantially changed the rule. ACTL's attention to a rule with only passing application to litigation suggests that it now sees itself as the steward of a confidentiality-centered ethic applicable not just to trial work but to all lawyering. And ACTL's power to remake a rule of such direct interest to another bar entity, especially one as powerful as the ABA Corporation Section, was remarkable.

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257. American College of Trial Lawyers, Report of the Legal Ethics Committee on the May 30, 1981 Proposed Final Draft of the Model Rules of Professional Conduct 25–26 (Apr. 2, 1982).

258. *Legislative History* 89–90 (cited in note 223).

259. "Midyear Meeting" at 2490 (cited in note 215).

260. Interview with Geoffrey Hazard (cited in note 256).

261. *Legislative History* 89–92.

The other two provisions of special interest to ACTL were proposed Rules 3.3 and 4.1. These rules concerned the lawyer's rights and duties upon learning that her client has used her services in perpetrating a fraud on a person (4.1) or a tribunal (3.3). The CPR treated these situations in DR 7-102(B)(1), which required lawyers to take steps to remedy both kinds of fraud. As first promulgated, DR 7-102(B)(1) did not indicate how the duty to rectify squared with the duty under DR 4-101 to keep a client's confidences. A 1974 ABA amendment (adopted in only a minority of states) made it clear that confidentiality overrode the duty to rectify.

The Kutak Commission addressed the problem in two separate rules because it was committed to structuring the Model Rules according to the lawyer's various roles, something the CPR had only begun to do. Fraud on a tribunal involved the lawyer's duties as advocate (Rule 3.3); fraud on a person, duties as drafter or negotiator (Rule 4.1). In each case, the commission proposed that the duty to rectify frauds should override the duty of confidentiality as defined by Rule 1.6. And in both cases, ACTL members or their allies proposed amendments subordinating the duty to rectify to the duty of confidentiality. The commission won by a 209 to 101 vote on Rule 3.3 (duty to the tribunal)[262] but lost by a 188 to 127 margin on 4.1 (duty to a third person).[263]

Why the different outcomes on such similar issues? One answer is the continued resonance among lawyers of the notion that as "officers of the court" they owe a special duty of candor to judges, a duty unmatched by any responsibility to a client's out-of-court victims. The officer-of-the-court argument was raised in the floor debate on Rule 3.3,[264] and raised with particular force by William Erickson of the Colorado Supreme Court.[265] ACTL may have been able to hold its own against the Kutak Commission and the ABA Corporation Section, but the judiciary is an interest group of a different stripe.

Another explanation for the Rule 3.3 outcome has been suggested, namely, that ACTL members in the House were actually split on their own amendment: Some wanted, like ATLA lawyers, to privilege confidentiality over the duty to rectify; others were attracted to the Rule as proposed, for reasons having to do with their particular caseload and clientele. They considered personal injury plaintiffs more likely to commit perjury (i.e., fraud on a tribunal) than the insurers and other business clients they usually represent. On their view, if proposed Rule 3.3 did reduce perjury or

262. "Midyear Meeting" at 2491.

263. *Id.* at 2492.

264. *Id.*

265. Interview with Geoffrey Hazard (cited in note 256); Remarks of Robert Hetlage at ABA National Conference on Professional Responsibility (May 31, 1985) (cited in note 213).

mitigate its effects, that would work to the advantage of ACTL clients.[266]

4. *The House of Delegates Fails to Read the* Times

Only a month or so before the showdown in New Orleans, *The New York Times* and *Wall Street Journal* printed stories about a multimillion-dollar business fraud involving a computer-leasing firm (OPM).[267] Among other things, OPM used the same computers as collateral on different bank loans. Perhaps unwittingly, a New York law firm—Singer Hutner, Levine and Seeman—had helped OPM close many fraudulent deals, so many that for several years OPM accounted for 60% of the firm's billings.[268] Eventually, the firm came to suspect fraud and withdrew from further representation. But it did not tell OPM's next law firm why it had withdrawn.

The news stories dwelt on Singer, Hutner's seemingly willful blindness to fraud and its refusal to share its concerns with the successor firm. Ethical questions were raised: When is a law firm on notice of a client's wrongdoing? To what lengths should it go to monitor a client's conduct? At what point should it resign? When should it blow the whistle on a client who has used the firm's services to perpetrate frauds? The *Times* indicated that the ABA was in the throes of an "acrimonious debate" on these issues and would take action at an upcoming meeting.[269]

In its response to the ACTL amendments in New Orleans, the Kutak Commission was as sensitive to the press coverage of the OPM scandal as it had been to coverage in the first stage of the Model Rules process. It supported on the House floor an amendment to its proposed Model Rule 1.16 which made it clear that a lawyer may withdraw from representing a client who has used his services to carry out a crime or fraud.[270] And reporter Geoffrey Hazard drafted comments that weakened the thrust of the ACTL amendments to Rules 1.6 and 4.1, respectively.[271] Those amendments, remember, took away the lawyer's *right* to disclose confidences in order to rectify a fraud in which his services had been used, and subordinated the lawyer's *duty* to rectify a client's out-of-court fraud to the duty of confidentiality. Hazard's commentary permits a lawyer, when he withdraws from representing a client who has used his services for purposes of fraud, to publicize the withdrawal and "disaffirm" any opinion or

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266. Interview with Geoffrey Hazard (cited in note 98).

267. Paul Blustein & Stanley Penn, "OPM Fraud Raises Questions About Role of a Criminal's Lawyer," *Wall St. J.*, Dec. 31, 1982, at 1; Stuart Taylor, Jr., "Ethics and the Law: A Case History," *N.Y. Times* (Magazine), Jan. 9, 1983, at 31.

268. Robert P. Gandossy, *Bad Business: The OPM Scandal and the Seduction of the Establishment* 221 (New York: Basic Books, 1985).

269. Taylor, *N.Y. Times* (Magazine), at 36 (cited in note 267).

270. *Legislative History* 102–3 (cited in note 223).

271. Interview with Geoffrey Hazard (cited in note 98).

document he prepared for the client.[272] In the words of one commentator, although the lawyers for future OPMs could not blow the whistle on their clients, they could "wave the red flag."[273]

The House of Delegates, on the other hand, responded to the OPM publicity with indifference, adopting the ACTL-sponsored amendments to Rules 1.6 and 4.1 by a substantial margin. "Forced to choose starkly between models of the lawyer as client's mouthpiece and as caretaker of the law," barked a follow-up *New York Times* editorial, the ABA House of Delegates "has opted for mouthpiece."[274] Robert Meserve, the former ABA president who became commission chair when Robert Kutak suddenly died two weeks before the New Orleans meeting, reacted more poignantly. Meserve was upset about the amendments to Rules 1.6 and 4.1 because they seemed to ratify much of what Singer, Hutner had done. "Whatever our opinion of the ultimate result of [Robert Kutak's] work," Meserve said, Kutak "had no doubt, nor do I, that it was a most important endeavor to set the lawyer right before the court of public opinion."[275] The trouble was that although that court had jurisdiction over the commission, it could not reach the House of Delegates, which in the final stage of the Model Rules process was the more important body.

The different sensitivities of the commission and the House to the press may have had something to do with the personalities and backgrounds of those who served in the two bodies. But the structural differences were surely as important. Other things being equal, it appears that a small, highly visible bar committee responsible for a specific task of public concern will be more attuned to the press and less attuned to the bar rank and file than a large, permanent, multipurpose, elective body representing many bar constituencies. In the drafting of the Model Rules, press coverage was the chief mechanism by which public opinion came into play. Since the House of Delegates, one of the two key institutions in the process, was insensitive to the press, the ultimate impact of lay opinion on the Model Rules could only be modest.

II. PROFESSIONALISM-IN-FACT: SOME PERVASIVE THEMES

The account to this point has stressed the variety of ethical perspectives and concerns that came into play in the Model Rules process. When

272. *Model Rules* Rule 1.6 Comment (withdrawal, para. 3).

273. Ronald Rotunda, "The Notice of Withdrawal and the New Model Rules of Professional Conduct: Blowing the Whistle and Waving the Red Flag," 63 *Ore. L. Rev.* 455 (1983).

274. "Lawyers for Hire for Anything?" *N.Y. Times*, Feb. 11, 1983, sec. A, at 26 (final city edition).

275. David Margolick, "Reporter's Notebook: Law's Majesty v. Mardi Gras," *N.Y. Times*, Feb. 11, 1983, sec. A, at 8, col. 3 (final city edition).

one attends to trial lawyers for plaintiffs and defendants, to in-house and outside corporate lawyers, to legal services lawyers, to ethics code enforcers, to judges, to law professors, and to other lawyer "types," it becomes apparent that the bar is far from univocal. Still, many lawyers at all stages of the Model Rules process shared certain values and styles of ethical argument. One of these, the idiom of legalism, has already been discussed. Three more will now be considered: the bar's preoccupation with what I call "defensive ethics," its penchant for arguments based on notions of institutional competence, and its persistence in addressing ethical issues in terms of role. These themes add up to a professionalism-in-fact, a mind-set that for better or worse animates American lawyers today.

A. Defensive Ethics

The least attractive of these themes is a preoccupation with matters of self-protection. Insofar as lawyers design the rules of legal ethics to protect themselves from *legal* mishaps, "defensive ethics" is a species of legalism. It is also the flip side of a pattern some critics thought they saw in earlier ABA codes. That pattern involved the use of ethics rules to aggrandize lawyers at the expense of their clients. In the Model Rules process, there is little sign of lawyers pressing for rules that serve their own interests in this positive sense, and some evidence of forbearance,[276] even in documents lawyers would not have expected to come under public scrutiny. But if self-aggrandizement was out, self-defense, as Deborah Rhode has observed,[277] was in. The process was rife with pleas for rules that would curb or at least not foster malpractice claims, motions to disqualify, denials of legal fees, exposure under the securities laws.

One manifestation of this defensiveness was the ABCNY view that the Model Rules Comments should identify "safe harbors"—courses of action that would "avoid any question as to whether there has been compliance with the Rule."[278] Taken very far, safe harbors could transform a code of lawyers' duties into a bill of lawyers' rights. Perhaps this is why Geoffrey Hazard did not draft the Comments with the safe-harbor function foremost in mind. But Hazard displayed considerable sympathy for the argument that the Model Rules should, above all, give lawyers fair notice of

276. Thus, in response to the criticism that some CPR restrictions on representing clients with potentially conflicting interests amounted to featherbedding, the Model Rules expressly permit lawyers to serve at times as "intermediaries" between two or more clients. See *Model Rules* Rule 2.2.

277. Deborah Rhode, "Ethical Perspectives on Legal Practice," 37 *Stan. L. Rev.* 589, 616 & n.97 (1985).

278. Comments of the ABCNY Executive Committee on the Proposed Final Draft (Nov. 4, 1981).

what they may or may not do.[279] One of the few unsympathetic groups on this point was NOBC, whose members apparently hoped that the *in terrorem* effects of including some vague catch-alls[280] in the Rules (e.g., forbidding "dishonest" conduct) would nicely supplement their meager enforcement budgets.

Another instance of defensive ethics involved Model Rule 1.6, defining the lawyer's duty of confidentiality. That duty sometimes collides with disclosure duties embodied in laws aimed at a far broader class than the bar—laws, for example, requiring professionals to report instances of child abuse[281] or large cash transactions with clients.[282] Such laws are typically silent about how they should be reconciled with confidentiality duties. Hoping to convince judges to relieve lawyers of duties under these general laws whenever the issue should arise, the liability-averse got Hazard to insert this sentence in a Rule 1.6 Comment: "Whether 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.*" (Emphasis added.) The general counsel of the SEC quickly 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," wrote Daniel Goelzer. "That the lawyer must obey the law where the law requires disclosure should be noncontroversial; a 'presumption' to the contrary seems inappropriate."[283]

The Kutak Commission was less sympathetic than most bar entities to the use of the Model Rules for defensive purposes. Yet defensive ethics found a place even in their deliberations. At their August 25, 1978 meeting, for example, the commission debated the merits of a rule requiring lawyers to communicate with their clients at reasonable intervals and to convey all the information their clients need to make the decisions that are rightfully theirs. Commission members saw the merit of such a rule, which responded to a very common complaint about lawyers. But they worried that by creating such a rule with the intention that it be enforced through the disciplinary process they might "unwittingly be writing a negligence

279. See Geoffrey Hazard, "The Legal and Ethical Position of the Code of Professional Responsibility," *in* 5 L. Hodges, ed., *Social Responsibility: Journalism, Law, Medicine* (Lexington, Va.: Washington & Lee University, 1979).

280. See National Organization of Bar Counsel, Report of the Special Review Committee on the Proposed Final Draft of the Model Rules of Professional Conduct 15-16 (June 4, 1982) (calling for reinstatement in the Model Rules of CPR rules sanctioning: "illegal conduct involving moral turpitude"; conduct involving "dishonesty, fraud, deceit or misrepresentation"; and conduct "prejudicial to the administration of justice").

281. E.g., New Mexico Childrens' Code sec. 32-1-15 (Michie 1986); Okla. Crim. Code sec. 846 (v. 21 West Supp. 1985-86).

282. 26 U.S.C.A. sec. 6050 I (1984).

283. Letter from Daniel Goelzer to Special Committee of the D.C. Bar Studying the Model Rules of Professional Conduct (Jan. 25, 1984).

per se standard for some future civil claim."[284]

No provision was more closely examined for its potential legal fallout than Model Rule 1.1, which deals with lawyer competence. As a result of efforts to weed out all the language that could create new liabilities, Rule 1.1 never came to say much more than that a lawyer must be competent. For example, the Discussion Draft version of Rule 1.1 permitted a lawyer to work only on matters in which she "can act with adequate competence," i.e., the competence displayed in "acceptable practice by lawyers undertaking similar matters." On the ground that it might imply that general practitioners are incompetent to handle some tasks, this language was dropped. The Commission feared that the provision would invite malpractice litigation, and wanted especially to protect sole practitioners and small-town lawyers, who are not apt to specialize. In this and other matters, according to Geoffrey Hazard, the commission was solicitous of Little Lawyers,[285] despite its relatively elite composition and the social gulf that continues to exist between the "hemispheres" of the bar.[286]

On the ground that specificity breeds liability, commentators also criticized the commission's effort to spell out in Rule 1.1 the elements of lawyer competence. Thus, the Proposed Final Draft listed "efficiency" as an aspect of competence. But when the ABA Standing Committee on Lawyers' Professional Liability complained that "efficiency" was not a phrase of legal art and was therefore likely to produce "unproductive malpractice litigation,"[287] the term was very efficiently dropped.

The emphasis on defensive ethics gave the Committee on Professional Liability more than a cameo role in the Model Rules process. The committee went through the Proposed Final Draft with a risk manager's fine-tooth comb and found a number of disturbing provisions. For example, on the ground that it "invit[ed] lawyers and the courts to use the Rules for civil liability purposes,"[288] the committee disapproved of this already guarded language in the introductory "Scope" section: "Violations of the Rules should not necessarily result in civil liability, which is a matter governed by general law. The Rules . . . may have relevance in determining civil liability, but they should not be uncritically incorporated into that

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284. Journals, Aug. 25, 1978. The rule was ultimately adopted. See *Model Rules* Rule 1.4.

285. Interview with Geoffrey Hazard (cited in note 98). The solicitude may have been unnecessary. Working through the ABA General Practice Section, sole practitioners and small-firm lawyers had enough clout to kill a proposed rule to facilitate the delivery of legal services by allowing lawyers for the first time to form law partnerships with nonlawyers. They did so by raising the specter of department store lawyers replacing the traditional forms of small-firm practice. "Midyear Meeting" at 2493 (cited in note 215).

286. See John P. Heinz & Edward O. Laumann, *Chicago Lawyers: The Social Structure of the Bar* (New York: Russell Sage Foundation; Chicago: American Bar Foundation, 1982).

287. ABA Standing Committee on Lawyers' Professional Liability, Comments on the Proposed Final Draft 6 (Jan. 20, 1982).

288. *Id.* at 3.

context."[289]

In a similar vein, the Scope section was amended to provide that a lawyer's "exercise of discretion not to disclose information under Rule 1.6 should not be subject to reexamination."[290] This language was meant to protect a lawyer from civil liability when, say, a client tells him she is about to shoot T, the lawyer stays mum about it, the client shoots T, and T sues the lawyer for failure to warn. It was inserted simply to discourage judge or jury from second guessing the lawyer's failure to warn in the very rare case in which Model Rule 1.6 gives a lawyer the discretion to warn—when the crime is "likely" to cause "imminent death or bodily harm."

Defensive ethics is a clear concession to self-interest, but can it be justified as responsible self-interest? There has certainly been an increase in the past decades in malpractice claims and insurance premiums, but its magnitude and the significance of ethics code rules as cause or cure are far from clear. Bar defensiveness in the absence of data on these matters seems no more responsible than the defensiveness doctors have displayed in pressing for "good samaritan" laws relieving them of liability for negligence in providing voluntary assistance in an emergency; apparently, no doctor has ever been successfully sued for such a thing.[291]

In any event, the defensiveness that lurks behind so much Model Rules maneuvering takes us far indeed from the purely ethical merits of rules on, say, confidentiality and disclosure. Perhaps lawyers would accept broader ethical discretion to protect third parties through disclosure if they could be sure that nondisclosure would not then result in tort claims against them. That this and many other Model Rules debates turned on defensive considerations thus raises an issue of public policy: In the interest of promoting the development of sound ethical standards, should the law prohibit the use of professional ethics rules to establish malpractice liability, just as in personal injury cases it excludes evidence of subsequent repairs and settlement negotiations in order to promote desirable negotiation and repairs?[292]

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289. *Legislative History* 20–21 (cited in note 223). The final version provides that the Model Rules "are not designed to be a basis for civil liability. . . . [N]othing in the Rules should be deemed to augment any substantial legal duty of lawyers or the extra-disciplinary consequences of violating such a duty." *Model Rules* Scope para. 6.

290. See ABA Commission on Evaluation of Professional Standards, Report to the House of Delegates 6 (Jan. 30, 1982) (commission revised "Scope" section in response to suggestions by the Standing Committee and the New York State Bar Ass'n).

291. See United States Dep't of Health, Education & Welfare, *Report of the Secretary's Commission on Medical Malpractice* 15–16 (1973) (fears of physicians about their potential liability for rendering emergency aid are "undoubtedly real" but "appear to be based on little more than rumor or hearsay").

292. Cf. Peterson v. City of Long Beach, 24 Cal. 3d 238, 155 Cal. Rptr. 360, 594 P.2d 477 (1979) (sued for wrongful death on theory that policeman who shot deceased violated rules in the police manual, city argued unsuccessfully that manual should not be used to set standard of care since that would deter police departments from making rules).

B. Arguments Based on Institutional Competence

Another striking feature of the Model Rules process is the frequency with which lawyers grounded their arguments on comparisons of institutional competence. Such arguments downplay the substantive merits of a rule and focus instead on which of two or more institutions should take the lead in making and enforcing rules on the subject at hand.

Trivial examples of this phenomenon are Kutak Commission decisions not to delve into subjects being addressed by other ABA entities. The commission spent relatively little time on lawyer advertising and solicitation because another special ABA commission was looking into that subject in the wake of the *Bates* case.[293] The commission did grapple with the criminal defense lawyer's perennial problem of how to deal with a client who intends to commit or does commit perjury, because other ABA bodies expected it to.[294] But it spent little time on other issues that arise in criminal practice, issues already addressed in ABA Criminal Justice Standards. And when it did look at such issues, its proposals were derived from those standards:[295] Comments to Model Rule 3.8 on the Responsibilities of a Prosecutor treat the ABA Standards Relating to the Prosecution Function as the final word on the subject, since those standards came after "prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense." In other words, it was on grounds of relative competence that the commission and the House of Delegates left the ethics of criminal practice largely to the more specialized Standards. But the commission never considered similarly deferring to ATLA or ACTL on the ethical questions that arise in civil litigation. It is not clear whether this was because of the perceived demerits of ATLA and ACTL positions, because those associations are not ABA entities, because there was no balance of plaintiff and defense lawyers in either association, or all the above.

Other arguments based on perceptions of institutional competence were mentioned earlier. When the Evans committee pressed for a detailed rule on the duties of the lawyer for a corporation, it did so on the ground that an alternative regulator, the SEC, would be too apt to design and enforce lawyering standards that promote agency goals at the expense of the rights of the parties being represented.[296] And when ABA officials went to

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293. Journals, Oct. 1, 1977.

294. In early 1979, the chair of the ABA Standing Committee on Association Standards for Criminal Justice informed Hazard and Kutak that his committee would propose no changes in Defense Function Standard 4.7-7, dealing with the problem of client perjury, until the commission had time to tackle the problem. Letter from Ken Hodgson to Geoffrey Hazard (Jan. 1979). For the commission's solution to the problem see *Model Rules* Rule 3.3(a), (b).

295. American Bar Association, *Standards Relating to the Administration of Criminal Justice* (2d ed.; Tentative Draft approved Feb. 12, 1979, Boston: Little, Brown & Co. 1982).

296. See *supra* notes 172–74 & accompanying text.

Washington to testify against the Specter bill, they spent little time on the merits of the bill's disclosure standards, arguing instead that a state supreme court, not Congress, is the appropriate institution to regulate the bar.[297] On the other hand, when the Kutak Commission considered how, if at all, to address the problem of dilatory and harassing tactics in litigation, a majority took the position that Model Rules on these subjects should simply track the pertinent rules in the Federal Rules of Civil Procedure. This again was not so much a debate about what the rules should be as about which institution should be the frontline rulemaker or enforcer in a given area.[298]

In these arguments there is a pattern. Bar self-regulation and regulatory alternatives that rely heavily on the judiciary (as in the formulation and enforcement of rules of civil procedure) are favored; alternatives that involve legislative or administrative oversight, as with the SEC and the Specter bill, are not.[299] The disfavor with which so many lawyers look upon regulation by Congress, state legislatures, and public agencies like the SEC has itself given rise to a common phenomenon in bar politics: liberal bar leaders trying to cajole the rank and file to accept an unpalatable ethical duty such as mandatory pro bono by suggesting that if the bar does not impose the duty, then less reasonable regulators will impose a less palatable duty.[300] Robert Kutak sometimes used this tactic in the Model Rules process. After the bar's hostile reaction to the Discussion Draft, Kutak told the *Wall Street Journal:* "If we don't get our house in order, . . . somebody is going to write our rules for us. . . . I don't think anybody wants that."[301]

Finally, let me mention a matter that considerations of institutional competence encouraged the ABA to address in the Model Rules process for the first time. The dramatic increase in the number, size, and organizational complexity of law firms (and other law offices) appears to have gotten the Kutak Commission thinking about the relative competence of the individual lawyer and the law firm *as a collectivity* in maintaining ethical

297. See *supra* notes 215–18 & accompanying text.

298. See *supra* note 185 & accompanying text.

299. This general bias became quite explicit at the ABA's Midwinter 1989 meeting, when the House of Delegates approved a resolution sponsored by the ABA Special Coordinating Committee on Professionalism. The ABA resolved to oppose "all regulation of the practice of law by executive or legislative bodies, whether national, state or local." See "American Bar Association Midwinter Meeting," 57 *U.S. Law Week* 2478, 2480 (Feb. 21, 1989).

300. In 1976, the ABA president crusaded for a bar-administered mandatory pro bono program. His pitch for the program ended this way: "[T]imely actions by the organized bar recognizing that each and every lawyer must do some public service are essential if substantial self-regulation by lawyers is to continue." Chesterfield Smith, "Lawyers Who Take Must Put—At Least a Bit," 1 *J. Legal Prof.* 27, 31 (1976).

301. John Curley, "Lawyers Squabble about a New Code of Ethics," *Wall St. J.*, Feb. 6, 1981, at 44, col. 1.

standards in law firm practice. In drafting and adopting Model Rules 5.1 through 5.3, the commission and the House, respectively, acknowledged the ethical significance of a law firm's "culture" and structure, if only by directing senior lawyers to put proper procedures into place and to supervise subordinate lawyers and lay employees. They did not, however, make a centralized decision as to the structures and monitoring procedures that firms must adopt (e.g., new-business committees, to guard against conflicts of interest). Perhaps again on grounds of institutional competence, they left that to the experimentation of individual firms. Whether this development ultimately leads to rules subjecting law firms *qua* firms to professional discipline for structural shortcomings remains to be seen.

C. The Persistence of Role Morality

As discussed in the Introduction, one criticism of legal ethics in recent years has been the moral philosopher's claim that ethics codes instill in lawyers an overly deterministic "role morality." The role supposedly embodied in the rules is that of the lawyer as an advocate committed to do anything that is legal to achieve her client's objectives. This role is said to require lawyers to disregard nonclient interests and thus to work at odds with their own off-the-job values.

Evidence from the Model Rules process suggests that the bar responded to this criticism, but not by abandoning a role-based ethic in favor of "ordinary morality," as some of the critics had prescribed.[302] The response was rather to develop a more elaborate set of lawyers' roles and subroles in order to make role morality more wholesome. The bar's faith in ethical progress through role differentiation goes back to a 1958 ABA/AALS report that distinguished between the lawyer's roles as advocate and counselor,[303] a distinction recognized though not emphasized in the CPR.[304] In the Model Rules, lawyers took the faith to new lengths.

The Kutak Commission wanted from the beginning to build the Model Rules around an elaborate set of roles. By August 25, 1978, the commission had

> arrived at a working hypothesis that the requirements of professional responsibility in the rendering of legal services vary with the particular roles in which the lawyer is acting. That is, the . . . rules of the attorney-client relationship should reflect whether the lawyer is acting as adviser, advocate, negotiator, intermediary, legal auditor, or admin-

302. See, e.g., 5 *Hum. Rts.* 1, 5 (cited in note 46).

303. "Report of the Joint Conference of the American Bar Association and the Association of American Law Schools on Professional Responsibility," 44 *ABA J.* 1159 (1958).

304. See CPR ECs 7-3, 7-5.

istrator—those being the general role categories which previous Commission sessions have identified as significant.[305]

Besides attempting to specify the proper conduct of the lawyer as advocate,[306] counselor,[307] intermediary[308] (e.g., between two would-be partners trying to work out a partnership agreement), and evaluator or auditor[309] (e.g., preparing for a corporate client a prospectus on which third parties are likely to rely), the commission also recognized subroles within the traditional role of advocate. Rule 3.3(d), for instance, differentiates between the advocate's role in *ex parte* matters and in other cases; the *ex parte* advocate must disclose all material facts to the tribunal, including facts adverse to the client's position. And Model Rule 3.9 lays out the advocate's duties in legislative and administrative, as opposed to adjudicative, proceedings.

Several commentators objected to the commission's plan to flesh out the Model Rules on a skeleton of lawyers' roles.[310] But their objection was not the philosophers' view that role morality unduly narrows one's ethical perspective. Rather, it was practical: that the Model Rules would be unwieldy if separate rules on general matters had to be provided for each role; that the Model Rules would be difficult to enforce and useless to consult for guidance if they involved a complex grid of lawyers' roles; that lawyering involves frequent, imperceptible role shifts; and that it is too difficult to draft rules that demarcate the various lawyers' roles from one another.[311]

The commission heeded these criticisms, making the final product a less dramatic departure from the earlier codes than it might have been. On grounds of drafting economy, it developed rules on competence, confidentiality, and conflict of interest which apply to all client relationships,[312]

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305. Journals, Aug. 25, 1978. See also L. Ray Patterson, "Wanted: A New Code of Professional Responsibility," 63 *ABA J.* 639 (1977); Geoffrey Hazard, Memorandum to the Kutak Commission regarding Basic Problems for a Code of Professional Responsibility (Mar. 10, 1978).

306. *Model Rules* Rules 3.1–3.9.

307. *Id.*, Rule 2.1.

308. *Id.*, Rule 2.2.

309. *Id.*, Rule 2.3.

310. See, e.g., Andrew Kaufman, "A Critical First Look at the Model Rules of Professional Conduct," 66 *ABA J.* 1074, 1076 (1980); Letter from Professor Thomas Morgan to Geoffrey Hazard (Oct. 8, 1979) (tentative division of lawyer's role into a set of specific functions not proving to be successful).

311. The commission itself recognized the drafting problem even before its Discussion Draft was completed. See Journals, Apr. 27, 1979. They wondered, for example, whether a lawyer negotiating a personal injury settlement is like the negotiator of business contracts or should instead be considered an advocate since the matter has already ripened into a lawsuit. *Id.*

312. Journals, Oct. 27, 1979 (commission decided to "retreat from its functional analysis" to the extent of consolidating the rules on conflict of interest). See *Model Rules* Rules 1.1 (competence), 1.6 (confidentiality), 1.7 (conflicts).

and gave up on separate rules for the lawyer as negotiator and as administrator.[313] But it refused to retreat to the point where no legal work would be ethically distinguishable from advocacy. Retreat would have left the advocate's role too dominant, and left the commission unable to portray the Model Rules as a conceptual advance.[314]

CONCLUSION

This article has not primarily addressed policy issues, but it has some implications for whether and how greatly state supreme courts should defer to the ABA when they adopt disciplinary rules to govern the lawyers in their jurisdictions.

If one's basis for such a judgment is the degree to which the ABA was open to the full range of *professional* opinion in the Model Rules process, then deference makes considerable sense, particularly if the alternative is a process in which the courts, ill-equipped to legislate from scratch, would take the lead. True, some bar entities had more influence on the Model Rules than others, perhaps even disproportionate influence, but a broad enough array of lawyers' groups participated to ensure that the Kutak Commission and the House of Delegates heard counteropinion on the big issues. Trial lawyers took a near-absolute position on confidentiality, for example, but judges, many law professors, and the commission itself took a contrary view. The trial lawyers often "won" at the ABA, but the expression of opposing views in comments and early drafts paved the way for adoption of less absolute provisions when the Model Rules were considered in the states.[315] It is not a monolithic or bottom-line ABA to which today's courts are deferring.

It is likely of course that different bar entities, differently structured from the ABA, would produce different rules. ATLA did, and there are signs today that the American Law Institute may soon produce a *Restatement of the Law Governing Lawyers* that diverges from the Model Rules in important respects.[316] This, however, does not imply that the ABA's process was deficient in eliciting a cross-section of professional opinion.

If one's basis for judging the wisdom of state court deference to the

313. Compare *Model Rules Discussion Draft* 86–93 with *Model Rules Proposed Final Draft* Rules 4.1–4.4.

314. Journals, Apr. 27, 1979 (commission reluctant to abandon completely its "functional approach").

315. See *ALI Restatement* sec. 117 Comment b para. 2 (cited in note 181); *Lawyers' Manual* 01:11–01:30 (No. 75, Mar. 15, 1989) (cited in note 13).

316. Compare, e.g., *Model Rules* Rule 1.13 Comment 3 with *ALI Restatement* sec. 134 & Comment (role of attorney-client evidentiary privilege in shareholder derivative suits); *Model Rules* Rule 1.6(b)(1) with *ALI Restatement* secs. 117A–117B (scope of permission to use confidential information to prevent client crimes).

ABA is instead the degree to which the Model Rules process was open to *lay* opinion, the evidence is much more equivocal. The lay press emerged as an importance source though never a galvanizer of public opinion, and the Kutak Commission was quite sensitive both to the press and to scholarly criticism of earlier ABA codes. The House of Delegates, however, seemed impervious to these forces.

If one believes (as I do not) that no private bar association could be a legitimate code-giver unless legal ethics were a purely technical subject—one the public finds uninteresting and impenetrable, but on which lawyers widely agree—then the ABA's legitimacy is doubtful indeed. Two of the most salient features of the Model Rules process were the attention it received from the lay press and the range of professional opinion that surfaced, a range comparable to what one might expect with any controversial piece of legislation.

Finally, if one considers the ethical debate that goes hand-in-hand with producing a professional code as a good in itself, and thus as a criterion for judging the wisdom of deferring to the ABA as code-giver, as I confess I do, then the Model Rules story again supports deference. One cannot imagine American lawyers participating as extensively in an ethics debate conducted under other auspices. And if lawyers had not expected the ABA's product to be adopted as law, they would surely have been less motivated to participate in the Model Rules process.

Policy matters aside, what does this detailed account of the Model Rules process tell us about the values and structure of today's legal profession? For one thing, it shows that at the collective level no less than in individual practice the profession has become vastly more differentiated than it was when the ABA adopted its first ethics code in 1908. Most lawyers' views are now transmitted to the ABA drafting body or House of Delegates through mediating organizations. Moreover, specialty groups like the ABA's Corporation, Banking and Business Law Section (recently renamed the Section of Business Law) or the ACTL, nonexistent when the ABA first produced an ethics code, now seem to have more influence on the ABA's product than the older, general-purpose state and local bar associations, perhaps because the latter find it harder to achieve a consensus among their members.[317]

317. See, e.g., Murray L. Schwartz, "Death and Regeneration of Ethics," 1980 *ABF Res. J.* 953 (noting the modern proliferation of specialty bar organizations, and their relative advantiage in achieving ethical comsensus among members). Of course, when it comes to adoption of the Model Rules at the state level, the support of the state bar association remains crucial. The ABA was able to produce the Model Rules despite full-scale opposition from the California State Bar and the New York State Bar associations, but the Model Rules are unlikely to be adopted in California and New York. See "Model Rules Jolted: New York Rejects ABA Proposal," *ABA J.*, Jan. 1986, at 18. In 1982, when the Board of Governors of the California State Bar resolved to oppose the Model Rules in toto and forwarded their resolution to the ABA House of Delegates, they assumed that without State Bar ap-

For another thing, this study shows that while the lawyers participating in the Model Rules process shared certain values and styles of ethical discourse—legalism, defensive ethics, a preoccupation with institutional competence, and a commitment to role morality—they also differed on many central issues in legal ethics. Taking trial lawyers, corporate counsel, legal services lawyers, code enforcers, judges, private practitioners in large and small firms, law professors, and others properly into account, and considering how divided the House votes were on key issues, one is struck by the heterogeneity of ethical views in today's profession.

One is struck also by how often the ethical concerns and viewpoints of bar groups can be traced to the peculiarities of their workplace, clientele, or political environment. Legal services lawyers want rules that guarantee their zealous commitment to clients, and want special attention to the problem of advancing litigation expenses for the indigent and the problems of maintaining professional independence from lay employers. Securities lawyers want ethics rules that buffer them from an aggressive SEC. Small-town lawyers do not want to formalize their ongoing client relationships by putting fee agreements in writing. Bar counsel want the easiest rules to enforce. Trial lawyers want to minimize the perception that they might have to betray their clients' trust, even at the risk of having to blink at perjury. And so on.

Finally, this account shows that none of the substantive criticisms scholars leveled at earlier ABA ethics codes accounts well for the Model Rules process. First, the process was in no sense an arena of conflict between powerful law firms and powerless "Little Lawyers." ABA leaders did show special concern for issues of interest to elite law firms, such as the revolving door and the duty to blow the whistle on (or for) a corporate client, indicating that elite firms may have special power to mobilize the ABA for particularistic purposes; these matters, though, were simply of no concern to the rest of the bar. Small-town practitioners and lawyers from elite urban firms were allied in opposing a requirement that all fee agreements be in writing. The Kutak Commission and the House of Delegates showed sensitivity to "Little Lawyers" by ensuring that the Model Rules did not imply that general practitioners were incompetent to handle matters in which other lawyers specialized. And small-firm and solo practitioners working through the ABA General Practice Section displayed considerable clout of their own, killing a rule that would have facilitated the growth of new group legal services plans by allowing nonlawyers to own an interest in law offices.[318]

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proval California would never adopt the Model Rules. They purportedly took an interest in the Model Rules only because "such rules will have an impact upon the California lawyer who practices in other state jurisdictions and in federal courts." Letter from Mary Wailes, Secretary of the State Bar of California, to the ABA House of Delegates (June 8, 1982).

318. See *supra* note 285.

Second, although defensive exercises of self-interest were common, one cannot fairly describe the Model Rules process as a collective effort to aggrandize lawyers at their clients' expense. True, the House of Delegates rejected the rule that would have spurred competition by allowing lawyers for the first time to work for firms in which nonlawyers are investors.[319] The House also approved an anticompetitive rule barring solicitation of new clients even through the mail.[320] But there was no concerted push for rules restraining competition among lawyers, if only because Supreme Court decisions had federalized the law on group legal services, lawyer advertising, and minimum fee schedules, taking those subjects largely out of bar hands.[321] One large bar group, ATLA, even purported to treat consumer interests as an ethical cornerstone. And though the upper limit on lawyers' fees remained vague, the Model Rules made a shallow bow to consumer interests by lowering the CPR's "clearly excessive" ceiling to one of "reasonableness."[322]

Third, the moral philosophers' "hired-gun" criticism of the earlier ABA codes seems largely inapplicable to the Model Rules. That criticism asserted that legal ethics rules have forced lawyers into an advocate's role that places client interests above all others, and have done so by forbidding lawyers to let their own values or the interests of third parties affect their decisions about whom to represent and how to represent them. Yet the Model Rules recognize that lawyers play several roles, not just that of advocate. They also invite lawyers in *any* role to take their own values into account. They permit lawyers to refuse on moral grounds to represent would-be clients;[323] authorize lawyers to "limit the objectives" of representation by excluding client aims they find "repugnant or imprudent":[324] and in a remarkable concession to lawyers' sensibilities allow them to withdraw whenever "a client insists upon pursuing an objective the lawyer considers repugnant or imprudent"—even if the client's interest will be "adversely affected" by the withdrawal![325] These rules are meant precisely to resolve the "potential conflict between the lawyer's conscience and the lawyer's duty to vigorously represent a client."[326]

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319. *Id.*

320. *Legislative History* 182–88 (Model Rule 7.3) (cited in note 223). The Supreme Court has struck down on First Amendment grounds the Model Rules restriction on direct-mail solicitation of clients known to have specific legal needs. Shapero v. Kentucky Bar Association, 108 S. Ct. 1916 (1988).

321. See Richard Abel, "Why Does the ABA Promulgate Ethical Rules?" 59 *Tex. L. Rev.* 639, 649 (1981) (criticizing the ABA for making an organized-bar virtue of the Supreme Court–dictated necessity not to restrict lawyer advertising, fee arrangements, and group legal services).

322. See *Model Rules* Rule 1.5(a).

323. See *id.*, Rule 6.2 Comment (no duty to represent any particular client).

324. *Id.*, Rule 1.2(c).

325. *Id.*, Rules 1.16(b)(3), 1.16(c).

326. *Legislative History* 103 (cited in note 223).

One other point about the moral philosophers' critique: When lawyers sought Model Rules language that was consistent with the so-called Standard Conception of legal ethics, they often gave reasons that had nothing to do with that conception. Instead, rules that permit lawyers to go to the limit of the law for their clients were defended on grounds of fair notice to lawyers or, in the case of the ethics of civil litigation, on grounds of institutional competence.

Fourth and finally, however indeterminate or "amorphous" the Model Rules might seem to Professor Abel and other critical scholars, participants in the Model Rules process did not understand themselves to be engaged in a public relations charade that would legitimate the bar's tradition of self-regulation but have no regulatory bite. True, the Kutak Commission and other ABA leaders were vitally interested in the public reaction to the Model Rules. But if one starts not with Professor Abel's reifying question, "Why Does the ABA Bother?," and asks instead why the participants in the Model Rules process bothered, then one must conclude that lawyers expected the Model Rules to have real significance as a guide to lawyers with ethical questions, as enforced in the disciplinary process and, perhaps especially, as a source of other law. Ironically, the group that fought hardest to insert intentionally vague provisions in the Model Rules was NOBC, whose members were bent on making enforcement easier.

The fact that no criticism of the earlier ABA codes accounts well for the motives and discourse of those who participated in the Model Rules process does not mean, of course, that the older, functionalist theories of professional ethics codes are more satisfactory. As with the critical theories, there is little evidence that the participants in the Model Rules process generally saw themselves as the functionalists might have supposed—protecting an unsophisticated clientele from professional exploitation and incompetence, or protecting society from the overzealous pursuit of client aims. In short, if one looks closely enough at the process in which the Model Rules were developed, no grand theory, critical or functionalist, comes close to accounting for it. Detailed study of the making of a professional code may thus be a useful corrective to the soaring theories scholars have so far brought to the subject.