Fordham Law Review

Volume 76 | Issue 3 Article 5

2007

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Cover Page Footnote

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The author thanks Professor Bruce Green for reviewing an earlier draft of this essay and Dustin Baker and Kimber Williams for their diligent work as research assistants.

ARE EVIDENCE-RELATED ETHICS PROVISIONS "LAW"?

*Fred C. Zacharias**

INTRODUCTION

One issue raised, but not resolved, by the recent Restatement of the Law Governing Lawyers[1] is the extent to which state legal ethics codes are "law." The reporters for the Restatement refer to the codes as part of the construct of lawyer regulation.[2] But that conceptualization does not answer the question of the extent to which courts should, and do, recognize the codes as having force in litigation.[3]

A subset of this issue is the degree to which trial courts, in promulgating or implementing rules of evidence, ought to pay deference to professional rules that cover the same ground as evidentiary principles. A number of such professional rules exist, some of which will be identified below.[4] The most commonly discussed rules are those governing attorney-client confidentiality, which parallel evidentiary privilege principles. Numerous observers have noted the difference in the way courts and bar associations have protected attorney-client secrecy,[5] with most observers concluding that judges and rule-making bar associations simply have different, and

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1. Restatement (Third) of the Law Governing Lawyers (2000).

2. The Restatement purports to distinguish between principles of legal ethics, which it denies considering, and rules that are enforced through the disciplinary process, which it deems part of the law governing lawyers. *See id.* at xxi (discussing the relationship between the legal ethics codes as "statutory law" and "decisional law" regulating lawyers); *cf.* Charles W. Wolfram, *Legal Ethics and the Restatement Process—the Sometimes-Uncomfortable Fit*, 46 Okla. L. Rev. 13 (1993) (discussing the relationship between legal ethics codes' attempts to impose stylized morality and the law being addressed in the Restatement).

3. A separate and important threshold question is, what is law? Although this essay alludes to that issue, its focus is on the narrower topic of the interrelationship between ethics provisions and the "law" (whatever that may be) that judges implement in court. *See infra* text accompanying notes 96–98.

4. *See infra* Part I.

5. *See, e.g.*, Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 Cal. L. Rev. 1061, 1069–71 (1978) (discussing the distinct history of the privilege); Gilda M. Tuoni, *Society Versus the Lawyers: The Strange Hierarchy of Protections of the "New" Client Confidentiality*, 8 St. John's J. Legal Comment. 439, 452–54 (1993) (comparing privilege to confidentiality).

inconsistent, visions.[6] If that conclusion is true, it has important ramifications for the legal effect the code provisions should have.

This essay identifies pertinent code provisions, compares them to their counterparts in evidence law, and considers when and whether judicial and bar standards diverge.[7] To the extent they diverge, the essay attempts to identify the possible reasons why and the significance of those reasons for treating the codes' evidence provisions as law. Although on the surface the divide between the professional rules and evidence law seems wide, this essay suggests that the reasons have more to do with the context in which judges and bar associations establish standards than with a difference in normative outlook. Consequently, the decision of whether to allow particular code provisions to influence legal standards necessarily varies, making it impossible to categorically characterize the codes as legal or nonlegal in nature.

I. EVIDENCE-RELATED CODE PROVISIONS AND THEIR COUNTERPARTS IN EVIDENCE LAW

The professional codes influence legal standards in numerous ways. Conflict of interest rules strongly affect judges' views of when lawyers should be disqualified.[8] In legal malpractice cases, a lawyer's adherence to particular rules in a professional code may have a bearing on whether the lawyer has breached the duty of care.[9] Withdrawal requirements in the

6. *See, e.g.*, Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. Rev. 1389, 1427–47 (1992) (identifying the separate "nomos" of the bar and the centrality of confidentiality to the bar's separate vision); Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 Iowa L. Rev. 1091, 1159 (1985) (analyzing "[t]he coexistence of two disparate sets of confidentiality"); Fred C. Zacharias, *Harmonizing Privilege and Confidentiality*, 41 S. Tex. L. Rev. 69, 72 (1999) (noting the differences between privilege and confidentiality as well as the traditional view that they reflect different visions).

7. This essay limits its analysis to evidence rules, rather than addressing all legal standards that the codes may influence. For a broader discussion of the relationship between the codes and judicial regulation of lawyers, see Fred C. Zacharias & Bruce A. Green, Rationalizing Judicial Regulation of Lawyers (2007) (unpublished manuscript, on file with the Fordham Law Review).

8. *See, e.g.*, IBM Corp. v. Levin, 579 F.2d 271, 279 (3d Cir. 1978) (noting that it normally would be error for a court not to disqualify a practitioner who had violated the established rules and standards of professional conduct); United States v. Bullock, 642 F. Supp. 982, 984 n.4 (N.D. Ill. 1986) ("It is common lore that the Code, though it literally prescribes only the bases for lawyer discipline, is regularly used by courts in this Circuit to establish the criteria for lawyer disqualification as well."); State Farm Mut. Auto. Ins. Co. v. Fed. Ins. Co., 86 Cal. Rptr. 2d 20, 25 (Ct. App. 1999) (upholding disqualification and stating that a violation of a conflict of interest rule normally is grounds for automatic disqualification); McCourt Co. v. FPC Props., Inc., 434 N.E.2d 1234, 1237–38 (Mass. 1982) (requiring disqualification and citing as support the Massachusetts and American Bar Association [ABA] Rules of Professional Conduct governing conflicts of interest).

9. *See, e.g.*, Smith v. Haynsworth, Marion, McKay & Geurard, 472 S.E.2d 612, 614 (S.C. 1996) ("We concur with the majority of jurisdictions and hold that, in appropriate cases, the RPC may be relevant and admissible in assessing the legal duty of an attorney in a malpractice action."); *cf.* United States v. Cavin, 39 F.3d 1299, 1309 (5th Cir. 1994) (allowing a lawyer to rely upon legal ethics constraints to establish a lack of criminal intent);

codes are pertinent to whether and when courts will allow lawyers to resign from representing clients in the course of litigation.[10] Many other examples exist.[11]

Relatively few professional code provisions correspond directly to evidence law, however. By "correspond," this essay means provisions that (1) cover similar ground or address the same issues as evidence law, or (2) establish rules for what lawyers may say (or evidence they may introduce) in litigation or limit how lawyers may produce and present evidence. It is worth focusing on these provisions because they tend to be concrete and to adopt standards for litigation behavior that is the same behavior courts are directly charged with overseeing. Judges unquestionably control evidentiary decisions. To the extent that evidence-related ethics provisions make pronouncements about the same issues, the effect those pronouncements have on judicial decisions is a gauge of whether the professional codes should be considered tantamount to law.

The evidence-related rules in the professional codes generally fit into three categories. The first category (category 1) consists of provisions which set standards entirely consistent with evidentiary law. It may not be clear which set of standards preceded the other and which rule-making institution has deferred to the wisdom of the other. The second category (category 2) consists of the opposite: evidence-related professional rules which courts for the most part ignore. Even though rules in the second category appear to set standards for litigation behavior, courts implement their own views on the evidentiary issues at stake. The third category (category 3) consists of professional rules stating evidentiary principles that courts do not apply directly, but with which courts seem to agree. Courts may show deference to these principles by encouraging lawyers to obey them through sanctions or means other than exclusion of tainted evidence. Although this essay does not address every rule that fits into these three categories, it discusses each category in turn.

Note, *The Evidentiary Use of the Ethics Codes in Legal Malpractice: Erasing a Double Standard*, 109 Harv. L. Rev. 1102, 1104 (1996) (arguing that legal ethics codes should be deemed relevant to the malpractice standard of care).

10. *See, e.g.*, United States v. Lopez, 4 F.3d 1455, 1465 (9th Cir. 1993) (Fletcher, J., concurring) (suggesting that a lawyer may not withdraw without complying with the governing rule of professional conduct); Ashbrook v. Ashbrook, 366 N.E.2d 667, 671–72 (Ind. Ct. App. 1977) (citing satisfaction of the ABA Code of Professional Responsibility as good cause to allow withdrawal); Jones v. State, 548 S.W.2d 329, 333–34 (Tenn. Crim. App. 1976) (stating that the lower court erred in allowing an attorney to withdraw due to his workload because the state's code of professional conduct did not specify that as a grounds for withdrawal, but finding harmless error).

11. Courts, for example, sometimes look to the codes in determining whether to sanction a lawyer for contacting a represented party, award or refuse to award a lawyer legal fees, or sanction a lawyer for misconduct in representing his client too zealously.

A. *Category 1: Evidence-Related Code Provisions that Are Consistent with Evidentiary Rules*

Although it is difficult to tell which came first, certain well-established evidentiary principles seem to stem directly from professional standards. Courts routinely prevent lawyers from making arguments that appeal to juries' prejudices,[12] introducing evidence designed to inflame juries,[13] and alluding to lawyers' personal knowledge.[14] Some of these prohibitions can be justified in terms of due process requirements, especially in the criminal context,[15] but not all behavior violating the professional standards undermines the fairness of a trial.[16] Nevertheless, courts typically

12. *See, e.g.*, Dawson v. State, 734 P.2d 221, 223 (Nev. 1987) (affirming but remanding for resentencing because of a criminal prosecutor's appeal to racial prejudice); LeBlanc v. Am. Honda Motor Co., 688 A.2d 556, 560–61 (N.H. 1997) (ordering a new trial, in part, because an attorney's summation appealed to the racial and national prejudice of the jury); *see also* Joseph A. Colquitt, *Evidence and Ethics: Litigating in the Shadows of the Rules*, 76 Fordham L. Rev. 1641 (2007) (discussing two scenarios in which an attorney attempts to exploit the jury's prejudices).

13. *See, e.g.*, State v. Jones, 49 P.3d 273, 282 (Ariz. 2002) (stating that a number of autopsy photographs should have been excluded from evidence because they were cumulative or were "offered in an attempt to incense the jurors"); Miss. State Highway Comm'n v. Hall, 174 So.2d 488, 493 (Miss. 1965) (reversing a civil verdict, in part, because an attorney's argument to the jurors as taxpayers "could not have been uttered except for the purpose of inflaming the jury"); Ritchie v. State, 632 P.2d 1244, 1246 (Okla. Crim. App. 1981) (reversing a conviction because enlarged photographs of the victim prior to the murder that were displayed throughout the trial were meant to arouse the passions of the jury and should have been excluded).

14. *See, e.g.*, DeJesus v. Flick, 7 P.3d 459, 464 (Nev. 2000) (overturning a civil verdict based on an attorney's summation expressing his personal opinion of the virtue of the plaintiff's case); Binegar v. Day, 120 N.W.2d 521, 526–27 (S.D. 1963) (reversing because counsel repeatedly made statements in summation regarding facts not in evidence based on his personal knowledge and experience); Lorenz v. Wolff, 173 N.W.2d 129, 138–39 (Wis. 1970) (ordering a new trial because defense counsel interjected his personal opinion and knowledge into the questioning of a witness and closing arguments); *cf.* United States v. Lamerson, 457 F.2d 371, 372 (5th Cir. 1972) (reversing a criminal conviction on the grounds that "the prosecutor said: 'I know it is the truth,' the inference being that he had outside knowledge"); State v. Banks, No. W2005-02213-CCA-R3-DD, 2007 WL 1966039, at *40 (Tenn. Crim. App. July 6, 2007) (describing two of five "generally recognized areas of prosecutorial misconduct in closing argument" as being when the prosecutor "expresses his or her personal opinion on the evidence or the defendant's guilt [and when the prosecutor] uses arguments calculated to inflame the passions or prejudices of the jury").

15. *See, e.g.*, Spears v. Mullin, 343 F.3d 1215, 1227–28 (10th Cir. 2003) (overturning a conviction on due process grounds, in part due to the introduction of bloody photos during capital sentencing); Romine v. Head, 253 F.3d 1349, 1370–71 (11th Cir. 2001) (overturning the imposition of the death penalty because of the prosecutors' inflammatory remarks, including biblical references to murder and punishment); McFarland v. Smith, 611 F.2d 414, 419 (2d Cir. 1979) (reversing a conviction on due process grounds, because of a summation which included an "illogical" invitation to deliberate based on racial considerations); *see also* Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 Tex. L. Rev. 629, 642 (1972) (cataloging due process decisions concerning inflammatory prosecutorial arguments); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 Vand. L. Rev. 45, 95–102 (1991) (discussing improper argumentation by criminal prosecutors).

16. Often, overzealous argument will constitute harmless error. *See, e.g.*, Darden v. Wainwright, 477 U.S. 168, 179–81 (1986) (noting that a prosecutor's closing argument

implement the prohibitions as absolute principles of evidence, even in the absence of specific evidence rules codifying them.

The prohibitions do, however, appear in many professional codes. Model Rule of Professional Conduct 3.4(e), for example, provides,

> A lawyer shall not . . . (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused . . . .[17]

Judicial enforcement of the same standards reflects one of two realities. Courts may be treating the professional code provisions as law, enforcing them in the absence of contrary judge-made evidentiary rules.[18] More likely, however, the judicial approach simply suggests that the judicial vision of appropriate behavior in this context is identical to that of the bar, with the result that courts have adopted common law evidence principles that are coextensive with those in the professional codes. Because the bar's vision of appropriate professional conduct was codified late—no earlier than 1887[19] and not seriously until 1969[20]—one cannot determine whether

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"deserve[d] . . . condemnation," but declining to reverse a conviction because the argument did not "infect[] the trial" (citing Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974))); State v. Smith, 599 N.W.2d 344, 355 (S.D. 1999) (holding that a prosecutor's inflammatory comments in summation "border[ed] on the outrageous," but ultimately were not sufficiently prejudicial to warrant reversal). Likewise, the mere fact that a lawyer expresses his own opinion about the evidence does not mean that the jury will believe him. *See, e.g.*, United States v. Young, 470 U.S. 1, 8–9, 16 (1985) (noting that both prosecutors and defense counsel "must refrain from interjecting personal beliefs into the presentation of his case" but concluding that prosecutor's remarks did not "undermine the fundamental fairness of the trial").

17. Model Rules of Prof'l Conduct R. 3.4(e) (2002).

18. *See* Commonwealth v. Smith, 385 A.2d 1320, 1323 (Pa. 1978) (finding ineffective assistance of counsel in the failure to raise an appellate claim of misconduct stemming from the prosecutor's statements of personal opinion in summation, and noting that "[a] prosecutor's expression of his personal belief as to a defendant's guilt clearly violates professional standards of conduct").

19. The first formal legal ethics code was adopted in Alabama in 1887. *See* Carol Rice Andrews, *The Lasting Legacy of the 1887 Code of Ethics of the Alabama State Bar Association*, *in* Carol Rice Andrews et al., Gilded Age Legal Ethics: Essays on Thomas Goode Jones' 1887 Code and the Regulation of the Profession 7, 7 (2003) (noting that the Alabama code "was the first code of its kind").

20. The ABA adopted its first code of professional responsibility, the Canons of Ethics, in 1908 and many states adopted the Canons. However, the Canons provided mainly idealistic and generalized provisions. *See* James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 Fordham L. Rev. 2395, 2401 (2003) (analyzing the Canons). It was not until the 1969 Code of Professional Responsibility that the ABA for the first time promulgated specific and enforceable rules. *See* Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 Yale L.J. 1239, 1249–60 (1991) (discussing the legalization of the professional codes). Before and after the Canons, however, lawyers governed themselves according to professional norms and understandings about their role and the propriety of particular types of behavior. *Id.* at 1249 ("The content of the legal profession's narrative and core ethical rules, as pronounced in the 1908 Canons, has been preserved largely unchanged in today's Rules of Professional Conduct. . . . What were fraternal norms issuing from an autonomous

the bar's vision or the judicial vision developed first, and which influenced the other. Nevertheless, with respect to this category of evidence-related ethics rule, it is clear that courts and the bar are currently in full accord.

B. *Category 2: Evidence-Related Code Provisions that Are Inconsistent with Evidentiary Standards*

As already noted, there is a school of thought suggesting that judges and the bar have different visions of law.[21] The bar's vision is said to emphasize the importance of maintaining the attorney-client trust relationship,[22] while the judicial vision focuses more on preserving the truth-seeking aspects of litigation.[23] These supposedly independent visions clash when litigants invoke the principles underlying particular professional rules to oppose the introduction of potentially useful and accurate evidence, which courts are loath to exclude. In this context, judges typically rely on independent evidence law that seems to contradict the professional rules, disregarding the ethics codes as having legal effect.

Thus, for example, rules of civil procedure or judicial mandates sometimes supersede attorney-client confidentiality rules, requiring attorneys to disclose information or documents which would otherwise be protected by confidentiality. The justification for the disclosure requirements simply reflects judicial power: once litigation commences, attorney-client secrecy is controlled by evidentiary privilege law rather than the professional rules.[24] Although the bar construes confidentiality broadly and exceptions narrowly, courts construe privilege in the opposite way because of its potential negative impact on truth seeking.[25]

Other evidence-related professional rules are treated equally rudely. When litigants have sought to exclude evidence on the basis that it was obtained in violation of professional rules forbidding communications with represented persons, courts often have recognized the applicability of the rules but then found ways to nullify them. Thus, in the seminal case of *United States v. Hammad*,[26] the U.S. Court of Appeals for the Second Circuit acknowledged that criminal prosecutors had violated the applicable professional rule through their use of an undercover agent who had met

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professional society have now been transformed into a body of judicially enforced regulations.").

21. *See supra* text accompanying notes 5–6.

22. *See* Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 Geo. Wash. L. Rev. 1, 57 (2005) (discussing the view that the bar's "belief in the overriding importance of the attorney-client relationship is inconsistent with the judiciary's more practical determination to resolve cases in a fair way, based on the fullest possible evidentiary record").

23. *See* Zacharias, *supra* note 6, at 73–75 (describing the judicial vision).

24. *See* Koniak, *supra* note 6, at 1412 ("[F]ederal and state courts often state that the only instances in which they are bound to treat the [professional] rules as binding precepts are in disciplinary proceedings against lawyers.").

25. Zacharias, *supra* note 6, at 73–74 (comparing the competing visions of attorney-client secrecy protections).

26. 858 F.2d 834 (2d Cir. 1988).

with a represented party and that courts might sometimes rely on the rule as a theoretical basis for excluding evidence.[27] The court, however, interpreted the rule's exception for communications "authorized by law" to encompass and exempt most law enforcement activities, an interpretation that essentially swallowed the rule.[28] Courts in the civil context have found other ways to minimize or enhance the no-communication rules' effects.[29] As in the secrecy arena, the courts arguably have implemented their separate vision of the degree to which the interest in protecting attorney-client relationships should be allowed to interfere with identifying relevant evidence and obtaining accurate verdicts.

The same phenomenon is evident with respect to the professional codes' expectations that lawyers should act aggressively on behalf of clients, leaving it to other actors (e.g., adversaries, fact-finders) to pierce any obfuscation that aggressiveness produces. The codes, for example, authorize lawyers to make all nonfrivolous legal arguments.[30] Courts implement evidentiary and procedural rules that may limit lawyers' arguments (for example, based on their purposes) and require lawyers to certify arguments as having factual and legal bases.[31]

Similarly, many practicing lawyers have interpreted the professional codes' loyalty requirements as obliging lawyers to take the fullest possible advantage of mistakes by their adversaries,[32] including inadvertent disclosure of information that fits within an evidentiary privilege.[33] Courts,

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27. *Id.* at 837–38 ("This circuit conclusively established the applicability of DR 7-104(A)(1) to criminal prosecutions in *United States v. Jamil*, 707 F.2d 638 [(1983)].").

28. *Id.* at 840 ("[T]he use of informants by government prosecutors in a preindictment, non-custodial situation, absent the type of [egregious] misconduct that occurred in this case, will generally fall within the 'authorized by law' exception . . . ."); *see* Andrew L. Kaufman, *Who Should Make the Rules Governing Conduct of Lawyers in Federal Matters*, 75 Tul. L. Rev. 149, 152 (2000) (noting that the U.S. Department of Justice used the court's holding in *Hammad* and the "authorized by law" provision to assert broadly that federal prosecutors are exempt from both state and federal anticontact rules); Robert Sneed, *The "No-Contact" Rule and Prosecutorial Misconduct*, 47 S.C. L. Rev. 130, 134 (1995) (arguing that too broad an interpretation of "authorized by law" would exempt all federal prosecutorial law enforcement activities because they are technically authorized by federal law).

29. In Niesig v. Team I, 558 N.E.2d 1030, 1032 (N.Y. 1990), for example, the New York Court of Appeals applied the rule against communicating with represented parties to communications with corporate employees, but also recognized exceptions for "former employees" and employees who are independently represented, even though such communications arguably interfere with the represented party's (i.e., the corporation's) relationship with its attorney as much as communications with current employees and employees represented only by corporate counsel. *Cf.* United States v. Hous. Auth., 179 F.R.D. 69, 72 (D. Conn. 1997) (suggesting a judicial exception to the local professional rule permitting communications with former employees); Morrison v. Brandeis Univ., 125 F.R.D. 14, 18 (D. Mass. 1989) (authorizing communications that seemed to be forbidden by the prevailing professional rule).

30. *E.g.*, Model Rules of Prof'l Conduct R. 3.1 (2002).

31. *E.g.*, Fed. R. Civ. P. 11(b).

32. *See* Zacharias & Green, *supra* note 22, at 46 (discussing the client-oriented gloss that lawyers place on the codes).

33. *See, e.g.*, Am. Express v. Accu-Weather, Inc., No. 91 Civ. 6485, 1996 U.S. Dist. LEXIS 8840, at *3–7 (S.D.N.Y. June 25, 1996) (criticizing a lawyer for rejecting opposing

for the most part, have treated the latter issue primarily as legal and fact-sensitive in nature; in other words, lawyers should be governed by whether an inadvertent disclosure constitutes a waiver of the privilege under evidence law,[34] an issue about which American courts have varying views.[35] In recognition of the disparate positions adopted throughout the United States, the recently revised Model Rules now provide explicitly that a lawyer who receives a potentially inadvertently disclosed document must advise the adversary, leaving the issue of what further obligations the lawyer has to each jurisdiction's judge-made evidentiary law.[36]

The connection between conflict of interest rules and attorney disqualification is beyond this essay's scope because lawyer disqualification generally is not an "evidentiary" issue.[37] However, the

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counsel's request that he return an unopened inadvertently disclosed package); Aerojet-Gen. Corp. v. Transport Indem. Ins., 22 Cal. Rptr. 2d 862, 867–68 (Ct. App. 1993) ("Once [the lawyer] acquired the information in a manner that was not due to his own fault or wrongdoing, he cannot purge it from his mind. Indeed, his professional obligation demands that he utilize his knowledge about the case on his client's behalf."); Monroe H. Freedman, *Erroneous Disclosure of Damaging Information: A Response to Professor Andrew Perlman*, 14 Geo. Mason L. Rev. 179, 181–82 (2006) ("[W]eighty reasons strongly support the use of an erroneous disclosure for the benefit of one's client . . . . [I]f the client's decision is to use the information to its greatest effect, the lawyer should not say anything about the information to the other side until it is tactically desirable to do so."); *cf.* Andrew M. Perlman, *Untangling Ethics Theory from Attorney Conduct Rules: The Case of Inadvertent Disclosures*, 13 Geo. Mason L. Rev. 767, 770 (2005) (arguing for a change in legal ethics codes to require lawyers sometimes to return inadvertently disclosed documents).

34. *See* Trina Jones, *Inadvertent Disclosure of Privileged Information and the Law of Mistake: Using Substantive Legal Principles to Guide Ethical Decision Making*, 48 Emory L.J. 1255, 1272 (1999) (stating that courts "focus almost exclusively on the legal question of whether inadvertent disclosure waives the attorney-client privilege").

35. Some courts take the position that an inadvertent disclosure always constitutes a waiver of privilege. *See, e.g.*, Texaco Puerto Rico, Inc. v. Dep't of Consumer Affairs, 60 F.3d 867, 883–84 (1st Cir. 1995); Chubb Integrated Sys. Ltd. v. Nat'l Bank of Wash., 103 F.R.D. 52, 66–68 (D.D.C. 1984); State v. Szemple, 640 A.2d 817, 823–24 (N.J. 1994). Others suggest that if the disclosure truly is inadvertent, it never rises to the level of a waiver. *E.g.*, Redland Soccer Club, Inc. v. Dep't of the Army, 55 F.3d 827, 856 (3d Cir. 1995); Van Hull v. Marriott Courtyard, 63 F. Supp. 2d 840, 840 (N.D. Ohio 1999); Berg Elecs., Inc., v. Molex, Inc., 875 F. Supp. 261, 263 (D. Del. 1995); Corey v. Norman, Hanson & DeTroy, 742 A.2d 933, 941 (Me. 1999). Most modern courts apply some form of multifactor balancing test. *E.g.*, *In re* Grand Jury, 138 F.3d 978, 981 (3d Cir. 1998); Alldread v. City of Grenada, 988 F.2d 1425, 1434–35 (5th Cir. 1993); State *ex rel.* Allstate Ins. Co. v. Gaughan, 508 S.E.2d 75, 94–96 (W. Va. 1998); *see* Restatement (Third) of the Law Governing Lawyers § 79 cmt. h (2000) (discussing the modern approach). The issue of when inadvertent disclosure by the lawyer constitutes, or should constitute, an evidentiary waiver of a legal privilege is discussed in Perlman, *supra* note 33; Audrey Rogers, *New Insights on Waiver and the Inadvertent Disclosure of Privileged Materials: Attorney Responsibility as the Governing Precept*, 47 Fla. L. Rev. 159 (1995); Joshua K. Simko, *Inadvertent Disclosure, the Attorney-Client Privilege, and Legal Ethics: An Examination and Suggestion for Alaska*, 19 Alaska L. Rev. 461 (2002); Note, *Inadvertent Disclosure of Documents Subject to the Attorney-Client Privilege*, 82 Mich. L. Rev. 598 (1983).

36. *See* Model Rules of Prof'l Conduct R. 4.4(b) (2002) ("A lawyer who receives a document . . . and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.").

37. The decision primarily reflects implementation of the court's supervisory authority over lawyers. *See* Fred C. Zacharias & Bruce A. Green, *Federal Court Authority to Regulate*

related ethics rules governing a lawyer's decision to represent a client if the lawyer may become a witness has an evidentiary aspect. Courts must determine how to treat the ethics rules when the client or adversary seeks to introduce the lawyer's testimony.

Courts ordinarily have looked to the professional codes on the questions of whether to disqualify the attorney-witness and whether the lawyer's testimony is admissible. In the end, however, the courts typically have adopted their own standards.[38] As an evidentiary matter, courts often allow lawyers to testify even though the professional rules might seem to preclude the simultaneous representation-testimony.[39] On other occasions, courts have prevented counsel from calling an opposing attorney to the stand where the rules might instead call for the courts to disqualify the attorney and order him to appear as a witness.[40] In short, the judicial vision of the appropriate evidentiary standards has trumped the applicable ethics code provision.

C. *Category 3: Code Provisions Stating Evidentiary Principles that Courts Do Not Apply Directly, but Which Courts Rely Upon in Other Ways*

Perhaps the most interesting of the three categories of code provisions includes those which establish principles of professional behavior that courts do not enforce through evidence law, but which courts nevertheless

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Lawyers: A Practice in Search of a Theory, 56 Vand. L. Rev. 1303, 1311–13 (2003) (describing the supervisory authority in the context of the federal courts).

38. *See, e.g.*, Weigel v. Farmers Ins. Co., 158 S.W.3d 147, 151 (Ark. 2004) ("The Model Rules of Professional Conduct are applicable in disqualification proceedings. However, a violation of the Model Rules does not automatically compel disqualification; rather, such matters involve the exercise of judicial discretion."); Klupt v. Krongard, 728 A.2d 727, 739 (Md. Ct. Spec. App. 1999) ("[E]ven after the court's finding of an ethical violation, it remains within the discretion of the court whether to impose the sanction of disqualification.").

39. *See, e.g.*, Thompson v. Goetz, 455 N.W.2d 580, 588 (N.D. 1990) (upholding a decision to allow plaintiff's attorney to testify because it would have been a substantial hardship on the client to find other counsel at that late date); Orangeburg Sausage Co. v. Cincinnati Ins. Co., 450 S.E.2d 66, 75 (S.C. Ct. App. 1994) (upholding a decision to allow defendant's attorney to remain as counsel and testify because he was the only available witness to rebut other testimony); *cf.* Giraldi *ex rel.* Giraldi v. Cmty. Consol. Sch. Dist. No. 62, 665 N.E.2d 332, 337 (Ill. App. Ct. 1996) ("If an attorney has been handling a case for a long period of time and an unanticipated development or surprise makes the attorney's testimony necessary, it is not improper for the trial court to allow counsel to testify.").

40. *See, e.g.*, Zurich Ins. Co. v. Knotts, 52 S.W.3d 555, 558 (Ky. 2001) (noting first that the professional lawyer-as-witness rule is "an ethical rule without an evidentiary counterpart [and that] [c]ourts routinely decide evidentiary questions and usually leave ethical matters to the bar," and then concluding that the adversary in the case could not disqualify a lawyer who had already filed an affidavit or call him to testify so long as his information might be otherwise available); DiMartino v. Eighth Judicial Dist. Court *ex rel.* County of Clark, 66 P.3d 945, 946–47 (Nev. 2003) (overturning disqualification of an attorney the opposing side sought as a necessary witness because the trial court did not consider the availability of other sources of evidence that would have been equivalent to the attorney's testimony); Harter v. Plains Ins. Co., 579 N.W.2d 625, 632 (S.D. 1998) (upholding a trial court's refusal to disqualify the attorney as a necessary witness where documentary evidence could have established the same facts sought to be established through the testimony).

recognize as valid and obligatory on the part of lawyers. Consider, for example, a typical professional rule that forbids an attorney to offer false evidence.[41] If an opposing lawyer objected to the admission of particular evidence during trial on the ground that "counsel is attempting to introduce evidence that is false," a trial judge ordinarily would not dignify the objection. The judge would neither consider sustaining the objection nor holding an in limine hearing to assess the quality of the evidence. As an evidentiary matter, the judge typically would admit the testimony if it is relevant and allow the jury to determine its truth or falsity. At the same time, the judge probably would be willing to impose sanctions on the offending lawyer if opposing counsel could subsequently prove the falsity of the evidence that is introduced.

How can courts justify this dual reaction to the professional rule—seemingly rejecting it as a rule of evidence but enforcing it (or a judicial corollary) as a supervisory matter? Again, there are two possible responses. Courts may indeed accept the standards in the professional rules as having legal effect (or at least as being correct), yet for practical reasons not feel capable of enforcing those standards in the midst of litigation.[42] Alternatively, judges may see themselves as wearing two hats—the first when overseeing trials and the second when supervising lawyers—and be willing to enforce the professional standard in the latter, but not the former context.

If the latter reasoning is operative, however, what is the justification for imposing sanctions if the evidence technically was admissible? Arguably, if the lawyer is obliged to put on the client's best case, he should not be subject to punishment for doing so.

The answer may lie in the separate professional rules (and judicial concurrence with the rules) that give lawyers discretion to control tactical decisions in litigation, including evidentiary choices.[43] The judicial decision to sanction a lawyer after the fact, and thereby deter similar behavior by other lawyers, is justifiable if the court can conclude that the lawyer had an option not to introduce the offensive evidence or testimony, an option that depends entirely on the lawyer's professional role and obligations. Under this syllogism, courts are not rejecting the influence of the professional codes when they apply different evidentiary law in the trial context. The courts instead are treating the codes as a supplement to evidence law—a supplement that enables courts to regulate the evidence that is introduced indirectly through a deterrent mechanism.

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41. *E.g.*, Model Rules of Prof'l Conduct R. 3.3(a)(3) (forbidding a lawyer to "offer evidence that the lawyer knows to be false"), R. 3.4(b) (forbidding a lawyer to "falsify evidence, counsel or assist a witness to testify falsely").

42. This may be because the constraints of judicial efficiency in litigation prevent enforcement. *See generally* Zacharias & Green, *supra* note 7 (discussing the ways in which considerations of judicial administration make courts hesitate to enforce the professional codes in the trial context).

43. *See, e.g.*, Model Rules of Prof'l Conduct R. 1.2(a) (assigning clients control over the objectives of representation and lawyers at least initial control over the means).

II. EXPLAINING DIVERGENCES IN THE EVIDENCE-RELATED CODE PROVISIONS AND EVIDENCE LAW

The category 1 examples illustrate that there are instances in which the code drafters and judges share a normative vision regarding appropriate behavior. But clearly that is not always the case. Categories 2 and 3 demonstrate that numerous evidentiary standards would be different if courts felt entirely bound by the terms of the codes. To assess what that means for the question of whether the professional codes are law, it is necessary to consider the possible explanations for the discrepancies between the codes and judicial standards.

If commentators are correct that the key divergences between the professional codes' evidence-related provisions (e.g., confidentiality) and parallel evidence law (e.g., privilege) are directly attributable to a difference in vision—in part a different vision of the purpose of law[44]—that undermines the Restatement's premise that the professional codes are law. Courts have no right to ignore and depart from "law" simply because they disagree with it. The decision to treat relevant provisions as inapplicable because of their normative substance essentially treats those provisions as nonbinding recommendations, rather than as important and potentially accurate statements of legal principle.[45]

Close scrutiny of the provisions that fit within category 2, however, suggests a different explanation for the lack of judicial deference. Ethics provisions are adopted in the abstract, covering a general range of cases. Evidence law, in contrast, focuses on specific cases; judges must identify the correct outcome in the particular circumstances that face them. If one can conclude that the ethics code drafters would not actually disagree with the judicial resolutions of the evidentiary issues, then arguably there is no real divergence between the laws and codes.[46]

How is that possible, though, when the codes' language seems inconsistent with the evidence rules that courts develop? A legal realist's answer would be that code drafters, in stating broad principles of behavior, often expect that those principles will not be enforced in situations in which judicial enforcement makes no sense. Even with respect to a professional rule that establishes an obligation or prohibition, the violation of which might theoretically produce disciplinary sanctions, the drafters could be

44. *See* Koniak, *supra* note 6, at 1450 (describing legal ethics as being based on the legal profession's perception of a "world in which the bar is independent from government control [and] preceded, helped bring about[,] and is necessary to maintaining the nation's material and normative existence").

45. Of course, the professional codes may be law in a different sense. Courts can enforce them against lawyers in disciplinary proceedings regardless of the codes' force in other contexts. The codes, therefore legally bind lawyers to the extent the lawyers wish to avoid sanctions. Courts also often allow juries to consider the codes in determining malpractice issues. *See supra* text accompanying note 9. In this context, the codes have evidentiary value, which might be deemed to be "legal" in one sense of the term.

46. *See generally* Zacharias & Green, *supra* note 7 (discussing conceptualizations that can reconcile the professional codes and judicial regulation of lawyers at the trial level).

relying upon disciplinary authorities not to enforce the rule.[47] Alternatively, the ethics principle may itself contain exceptions or defer resolution of particular issues, leaving it to disciplinary agencies and courts to define how lawyers should behave in concrete cases.[48] If the drafters do not intend an evidence-related provision to bind lawyers or courts in certain hard cases, one cannot conclude that the drafters have expressed a vision inconsistent with that of the courts.

The category 2 examples all reflect this kind of drafting ambivalence. It is, for example, easy to say that the bar interprets attorney-client confidentiality more liberally than courts interpret privilege. In reality, however, the code provisions contain significant exceptions[49]—ever-increasing exceptions as the bar considers compelling cases more closely.[50] Moreover, although local ethics committees have occasionally issued nonbinding opinions reaffirming the most extreme readings of confidentiality principles,[51] there have been virtually no reported disciplinary decisions enforcing the professional confidentiality rules in a situation in which courts enforcing privilege law would reach a different conclusion.[52]

Likewise, although segments of the bar have fought mightily to maintain the applicability of the rules against communications with represented parties to undercover investigations (and to other instances in which courts might demur), the reality is that criminal prosecutors have almost never been sanctioned for targeting represented persons.[53] Indeed, many legal

47. Indeed, some ethics provisions are routinely underenforced or not enforced at all. *See* Fred C. Zacharias, *What Lawyers Do When Nobody's Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules*, 87 Iowa L. Rev. 971, 997–1001 (2002) (discussing a series of rules that are underenforced).

48. *See generally* Zacharias & Green, *supra* note 7 (discussing the possibility that code-drafting courts expect their positions to be fleshed out subsequently).

49. *See, e.g.*, Model Rules of Prof'l Conduct R. 1.6(b) (2002) (delineating exceptions to confidentiality).

50. The newly adopted Model Rules, for example, significantly expand the exceptions to confidentiality found in the previous version. *Compare* Model Rules of Prof'l Conduct R. 1.6(b)(1)–(4) (2002), *with* Model Rules of Prof'l Conduct R. 1.6(b)(1)–(2) (1983). Even California, which previously purported to insist on absolute confidentiality, recently adopted an exception for future crimes. Cal. Rules of Prof'l Conduct R. 3-100 (2007). California may recognize other exceptions implicitly. *See* San Diego County Bar Ass'n Legal Ethics Comm., Formal Op. 2007-02 (2007) (noting numerous implicit exceptions to confidentiality even in California, which traditionally has implemented rules that are on their face nearly absolute).

51. *See, e.g.*, San Diego County Bar Ass'n Legal Ethics Comm., Formal Op. 1990-1 (1990), http://www.sdcba.org/ethics/ethicsopinion90-1.html (holding, before recent amendment to the California confidentiality rule, that a lawyer may not reveal a client's threat to kill a codefendant).

52. *Cf.* San Diego County Bar Ass'n Legal Ethics Comm., Formal Op. 2007-02 (2007) (attempting to reconcile California's judicial retaliatory discharge decisions with confidentiality rules that forbid lawyers to disclose any information relating to, or gained in the course of, the representation).

53. *See, e.g.*, United States v. Balter, 91 F.3d 427, 436 (3d Cir. 1996) ("[W]ith the exception of the Second Circuit, every court of appeals that has considered a similar case has held . . . that [no-contact] rules such as New Jersey Rule 4.2 do not apply to pre-indictment

ethics codes leave it open for courts to circumvent the rules through vague language, such as the "authorized by law" exception.[54] The rhetoric concerning the applicability of the codes promotes a public perception that the bar's vision contradicts the courts' vision. However, if the courts were to enforce the bar's vision so as to foreclose undercover activities, one can easily imagine a quick amendment of the professional rules.[55]

Perhaps the most poignant illustration of this is the way the code drafters have dealt with inadvertent disclosures by attorneys. The strongest proponents of the codes' purported "vision" of client-centered lawyering assume that loyalty obligations in the codes require attorneys to take full advantage of inadvertently disclosed documents.[56] As courts, deciding cases as a matter of evidence law, have highlighted the complexity of the issues,[57] bar associations have not pressed this vision.[58] To the contrary,

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criminal investigations by government attorneys."); United States v. Ryans, 903 F.2d 731, 739 (10th Cir. 1990) ("DR 7-104(A)(1) was not intended to preclude undercover investigations . . . merely because [the suspects] have retained counsel."); Jennifer Blair, Comment, *The Regulation of Federal Prosecutorial Misconduct by State Bar Associations: 28 U.S.C. Sec. 530B and the Reality of Inaction*, 49 UCLA L. Rev. 625, 638–39 (2001) ("[H]ave state bar associations actually taken up the enforcement of state professional rules against unethical federal prosecutors? An exploration of the punishment rendered by ten state bar associations since the April 1999 effective date of [the McDade Amendment shows that] . . . [o]f 1767 lawyers seriously disciplined by the examined state bar associations from April 1999 to December 2000, only one was a federal prosecutor."); *see also* William H. Edmonson, *A "New" No-Contact Rule: Proposing an Addition to the No-Contact Rule to Address Questioning of Suspects After Unreasonable Charging Delays*, 80 N.Y.U. L. Rev. 1773, 1781 (2005) ("Notwithstanding Congress's efforts through the McDade Amendment to prevent one particular narrow interpretation of the no-contact rule, most courts have tended to interpret the rule narrowly in the criminal context."); Kathryn Keneally & Kenneth Breen, *White Collar Crime*, Champion, Apr. 2007, at 60, 60 ("In People v. Kabir, [822 N.Y.S.2d 864 (Sup. Ct. 2006)], the prosecutor discouraged the witness from contacting counsel and proceeded with an interview in the absence of counsel, and the court saw nothing wrong with this conduct."); *cf.* United States v. Ferrara, 54 F.3d 825 (D.C. Cir. 1995) (involving an attempt to enjoin disciplinary proceedings instituted in New Mexico against a federal prosecutor employed in the District of Columbia).

54. *See, e.g.*, *supra* text accompanying notes 26–28.

55. A few courts seem to have been willing to implement the rule. *See, e.g.*, *In re* Doe, 801 F. Supp. 478, 493 (D.N.M. 1992) (allowing New Mexico disciplinary committee to proceed with charges against a federal prosecutor); *cf.* United States v. Lopez, 4 F.3d 1455, 1464 (9th Cir. 1993) (finding that a prosecutor violated the state no-contact rule but also that the resulting dismissal of an indictment was an abuse of discretion).

56. *See supra* note 33 and accompanying text.

57. *See* Sampson Fire Sales, Inc. v. Oaks, 201 F.R.D. 351, 359–62 (M.D. Pa. 2001) (discussing cases on both sides and recognizing a "continued lack of clarity" by courts and the ABA); *In re* Polypropylene Carpet Antitrust Litig., 181 F.R.D. 680, 697–99 (N.D. Ga. 1998) (distinguishing the issue of whether privilege was waived from the issue of whether an ethical duty to return the documents arose); *cf.* Gloria A. Kristopek, *To Peek or Not to Peek: Inadvertent or Unsolicited Disclosure of Documents to Opposing Counsel*, 33 Val. U. L. Rev. 643, 644 (1999) ("With the arrival of new technology such as fax machines and increasingly complex litigation, inadvertent and unsolicited disclosures of confidential or privileged documents present emerging legal issues that bar associations and courts struggle to address.").

58. *See, e.g.*, ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-368 (1992) (stating that recipients of an inadvertently disclosed fax should notify the sender and abide by his instructions), *withdrawn in part*, ABA Comm. on Ethics and Prof'l

the American Bar Association (ABA) recently modified its Model Rule in a way that requires lawyers to bring inadvertent disclosures to light, which in turn will instigate judicial resolution of the question of whether the lawyers should return the documents.[59] In other words, confronted with the hard cases that courts have to decide, the bar has acknowledged that its vision of appropriate behavior in this context is not as rigid as observers first assumed—that the broad principles stated in the codes leave room for massaging when countervailing principles come into play.

The point here is simply this: many of the situations in which professional responsibility theorists might proclaim an irreconcilable divide between the professional codes' evidence-related provisions and evidence law do not really reflect such a divide. The code drafters may indeed be relying on a broad principle, but not necessarily in a way that would prevent them from agreeing with judicial resolutions in cases in which judges seem to have applied inconsistent reasoning. In some of our examples, the code drafters may actually have incorporated language that forecasts departures from the governing principle. In others, the drafters have avoided addressing an issue or relied on situational nonenforcement of the professional rules. The long and the short of the matter is that sometimes the code drafters hope, intend, or expect to influence the substantive judge-made law, sometimes they do not.[60]

Let us assume, therefore, that discrepancies between the evidence-related code provisions and evidence law cannot be explained—at least, cannot always be explained—on the basis of a unique vision. What other than a normative disagreement might prompt a court to adopt different standards than the code drafters have suggested? Why do the courts sometimes defer to the codes, and sometimes not?

One explanation is that, contrary to popular belief, the professional codes are not comprehensive. On the surface, they seem to adopt a broad set of

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Responsibility, Formal Op. 05-437 (harmonizing Op. 92-368 with new Model Rule 4.4 by no longer requiring a receiving lawyer to abide by the sender's instruction); Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 99-150 (1999) (imposing a broad duty to honor the adversary's right to the return of the documents, which was subsequently modified by the adoption of a new professional rule); *cf.* D.C. Bar Legal Ethics Comm., Op. 256 (1995), http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion256.cfm (stating that when a "receiving lawyer in good faith reviews the documents before the inadvertence of the disclosure is brought to that lawyer's attention, the receiving lawyer engages in no ethical violation by retaining and using those documents" but that "when the receiving lawyer knows of the inadvertence of the disclosure before the documents are examined, . . . the receiving lawyer [should] return the documents to the sending lawyer").

59. Model Rules of Prof'l Conduct R. 4.4(b) (2002) (requiring lawyers to "promptly notify" senders of inadvertently disclosed documents).

60. *See* Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 Minn. L. Rev. 265, 297–98 (2006) (noting, with respect to permissive ethics rules, that "[c]ode drafters sometimes adopt rules that accord lawyers discretion because they . . . hope that other law makers will agree with, or accede to, the drafters' normative judgment. In other instances, the drafters anticipate . . . that external lawmakers may reach different conclusions about the appropriate rule").

principles establishing, or at least outlining, a general role for lawyers.[61] In reality, however, the codes are only one aspect of the regulation of lawyers.[62] Even in the areas that the codes purport to regulate, they are not definitive; courts have consistently acknowledged the existence of noncodified supplemental professional norms, which judges have enforced interstitially in exercising supervisory functions.[63]

The limitations of the professional codes help explain the judicial response to evidence-related code provisions. The code drafters are in a position to state broad principles that are meaningful in the sense that they ordinarily are true and are helpful to the targets of the codes—lawyers—in identifying how they might distinguish among obligations to potentially conflicting constituencies.[64] For example, a lawyer's duty to the court prevents the introduction of false evidence. The duty to help the legal system obtain evidence generally abjures the acceptance of cases in which the lawyer may need to testify.

When, however, courts face the same set of issues, they do not have the luxury of focusing exclusively on the lawyer's role. They supervise lawyers and insist upon the authority to supplement the codes. In doing so, they incorporate a larger set of considerations into their decisions—including the practicalities of the trial process, the effect of their rulings on the litigants, and the system's interest in achieving appropriate results.[65] The broad principles stated in the codes may need to be refined or give way to factors that may seem less important in the broad theoretical scheme but take on significance in individual cases.[66] Thus, a court may allow a lawyer to put on false evidence—even if the court is not pleased about it—because preventing the lawyer from doing so would interfere with the jury's

61. *See, e.g.*, William H. Simon, The Practice of Justice 7 (1998) (describing "the prevailing approach to lawyers' ethics . . . [as] this: the lawyer must—or at least may—pursue any goal of the client through any arguably legal course of action and assert any nonfrivolous legal claim").

62. As I have discussed elsewhere, the codes reflect rules that govern lawyers in conjunction with external law, including criminal law, agency law, and contract law. A professional code should be drafted with a view to how it meshes with external constraints. *See* Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 Notre Dame L. Rev. 223, 251–52 (1993) [hereinafter Zacharias, *Specificity*] (discussing code drafting). Likewise, the professional regulators should welcome outside enforcement of external constraints against lawyers, because that frees the bar and disciplinary agencies to do the work for which they are particularly well suited. *See* Fred C. Zacharias, *The Humanization of Lawyers*, 2002 Prof'l Law. 9, 28–31 (2002) (discussing deference to external regulators).

63. *See* Zacharias & Green, *supra* note 22, at 60–64 (discussing judicial regulation of lawyers).

64. These constituencies may include clients, third parties, courts, society, and themselves.

65. *See generally* Zacharias & Green, *supra* note 7 (discussing the different considerations that various judicial regulators must address).

66. *See, e.g.*, Green & Zacharias, *supra* note 60, at 303 ("[T]he [ethics code] drafters' conclusion that only a permissive standard can adequately address the plethora of potential cases is perfectly consistent with the expectation that other lawmakers may adopt mandatory rules for subcategories of cases in which concrete standards make sense.").

function. A court might allow a lawyer to remain in a case and testify because it would be unfair to the client to force him to hire a new lawyer. The court might prevent an adversary from calling a lawyer to the stand because the value of the testimony is less significant than the harm disqualification might cause.

The point goes beyond the notion that courts sometimes refuse to follow evidentiary standards in the codes because courts must decide difficult cases.[67] The point is that, when the codes express a principle that might be deemed "law," the codes often are just *part* of the law governing the issue. Courts not only have the authority to supplement the codes' pronouncements, they frequently are in a position to take more considerations into account than the codes do—which puts them in a better position than the code drafters to resolve the issue. Courts which resolve the issues in apparent conflict with the professional codes are not rejecting the influence of the codes but rather are reconsidering the codes' conclusions based on fuller information.[68] Their decisions may accept the codes' principles but narrow their application, may create exceptions for specific situations, or may (sometimes) reject the principles as being too narrowly conceived. Any of these can be legitimate given the circumstances. Only the last is tantamount to a rejection of the codes as law; in the last context, the court is concluding that the bar's focus on the lawyer's role is a "vision" that the court cannot implement under any circumstances.

This essay has alluded to another, related, explanation for the courts' intermittent rejection of evidence-related ethics provisions; namely that, to some extent, the judiciary and code-drafting bodies operate in different spheres, and therefore their pronouncements—even if governing the same subject matter—may not be designed as rules for the other institution.[69] The professional codes largely are intended to provide guidance to lawyers and help them make choices. Almost by definition, courts in the litigation context in which evidence rules apply are forbidden to guide the lawyers; the adversary system contemplates a neutral arbitrator.[70] This explains the category 3 phenomenon. A judge may agree with the vision of the bar—for example, lawyers have an obligation not to introduce false evidence—and even enforce the vision through posttrial sanctions or discipline, yet the

67. *See supra* text accompanying note 47.

68. How trial and lower appellate courts can best implement their reconsideration of the codes in light of their inability to rewrite the codes is a question for another day. *See generally* Zacharias & Green, *supra* note 7 (discussing possible approaches).

69. *See* Green & Zacharias, *supra* note 60, at 323 ("The mere fact that an ethics rule expresses a normative judgment . . . for disciplinary purposes does not signify that the drafters intended to foreclose complementary, supplemental, or even contradictory regulation.").

70. *See* Stephan Landsman, The Adversary System: A Description and Defense 2–4 (1984) (describing the neutrality and passivity of the arbiter as an essential element of the adversarial process).

judge may be unwilling to tell a lawyer what to do at trial through evidentiary rulings.

Instances do exist in which a court may reject the influence of an ethics-related provision on substantive grounds because of a normative disagreement with the whole principle that is expressed.[71] Often, however, judicial rejection is based less on a normative judgment regarding the bar's substantive vision than on the courts' sense that the ethics provision is illegitimate in its adoption. In the 1980s, for example, the ABA pressed an evidence-related rule that forbade prosecutors from subpoenaing attorneys to testify against their clients (e.g., before a grand jury) without first obtaining a judicial determination that no other means of obtaining pertinent evidence in the hands of the attorney was feasible.[72] The bar justified this rule on the basis that attorney subpoenas would chill attorney-client relationships because the client might believe his attorney had an interest in assisting the other side.[73]

For the most part, courts refused to apply the attorney subpoena provision during the period it was in force,[74] either in individual cases or in determining whether to adopt it as a rule of court.[75] Their reasoning, however, may not have been based on rejection of the bar's emphasis on

71. *See supra* text accompanying notes 7, 21.

72. Model Rules of Prof'l Conduct R. 3.8(f) (amended 1991). This provision is analyzed in Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies over the Anti-Contact and Subpoena Rules*, 53 U. Pitt. L. Rev. 291 (1992), and Fred C. Zacharias, *Who Can* Best *Regulate the Ethics of Federal Prosecutors; Or, Who Should Regulate the Regulators?*, 65 Fordham L. Rev. 429, 457 (1996).

73. ABA, Resolution on Attorney Subpoenas (1988), *reprinted in* Max D. Stern & David Hoffman, *Privileged Informers: The Attorney Subpoena Problem and a Proposal for Reform*, 136 U. Pa. L. Rev. 1783, 1853–54 (1988); ABA, Resolution on Subpoenaing Attorneys Before the Grand Jury (1986), *reprinted in* Stern & Hoffman, *supra*, at 1852; *see also* Fred C. Zacharias, *A Critical Look at Rules Governing Grand Jury Subpoenas of Attorneys*, 76 Minn. L. Rev. 917, 919–25 (1992) (discussing the rationales for Model Rule 3.8 (f)).

74. The Model Rules were amended in 1995 to eliminate the judicial approval provision. *ABA Amends Rules 4.2, 3.8; Moves on Internal Governance*, 11 Laws. Manual on Prof'l Conduct (ABA/BNA) No. 15, at 248, 249 (Aug. 23, 1995). The new Model Rules follow suit. *See, e.g.*, Model Rules of Prof'l Conduct R. 3.8(e) (2002).

75. *See, e.g.*, *D.C. Adopts New Ethics Rules, Permits Non-Lawyer Partners*, 6 Laws. Manual on Prof'l Conduct (ABA/BNA) No. 3, at 53, 55 (Mar. 14, 1990) (reporting the District of Columbia's judicial rejection of a proposed rule modeled on Model Rule 3.8(f)); *New York's Courts Adopt Changes to Ethics Rules*, 6 Laws. Manual on Prof'l Conduct (ABA/BNA) No. 9, at 172, 175 (June 6, 1990) (reporting rejection of Model Rule 3.8(f) by the New York Court of Appeals); *see also* Baylson v. Disciplinary Bd., 764 F. Supp. 328, 336–41 (E.D. Pa. 1991) (finding a state attorney subpoena rule to be inapplicable to federal prosecutions); *cf.* ABA Comm. on Ethics and Prof'l Responsibility, Report with Recommendation to the House of Delegates 7 (1995) [hereinafter ABA Report] (on file with author), *reprinted in pertinent part in* Stephen Gillers & Roy D. Simon, Regulation of Lawyers: Statutes and Standards 249, 250 (1996) (proposing deletion of the judicial supervision and noting "it has been considered and rejected by the bars and governing courts in a number of States . . . . This record reflects a fundamental and widespread doubt about the suitability of Rule 3.8(f) in its current form as a rule of ethics, a doubt that the Standing Committee has come to share."); Zacharias, *supra* note 73, at 917 (noting that, as of 1992, only six states had adopted the model rule).

maintaining attorney-client relationships so much as on a belief that the rule was self-serving on the part of the bar. It helped lawyers continue representation in cases in which they otherwise might be called to testify and enabled lawyers, uniquely among citizens, to avoid the inconvenience and unpleasantness of testifying.[76] The courts may have mistrusted the rule makers' motivations in adopting this standard and thus been less willing to defer to their normative judgment.

Institutional considerations might have played a part as well. Unlike other evidence-related provisions in the codes, this provision gave instruction to judges as well as lawyers. It required courts to hold hearings on attorney subpoenas and prescribed standards for judges to apply in those hearings.[77] As an institutional matter, the courts may have believed the bar had overstepped its bounds—that the bar's role in prescribing law was limited to (1) prescribing rules for discipline and (2) identifying principles for lawyer behavior that might influence judicial decision making but would not control it.[78]

The impact of evidence-related rules on law—i.e., whether courts will defer—may also depend in part on the timing of the rules within the development of the legal evidentiary standards. One function, or goal, of the professional rules is to influence substantive law.[79] The likelihood that the bar will succeed in convincing courts to take a particular position will be greater in instances in which the courts have not yet staked out a position, or in which established law is in flux, than in situations in which the courts have definitively spoken.[80]

Thus, for example, it is not surprising that the bar has been unsuccessful in convincing courts to adopt attorney-client confidentiality principles in the place of attorney-client privilege rules. Privilege has an equal, indeed older, pedigree than confidentiality.[81] Judges have not wavered in their belief that their safeguards of client secrecy suffice and should govern litigation. It is

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76. *See* Zacharias, *supra* note 72, at 458–59 ("[T]he original ABA provision was a bald attempt to create an advantage for criminal defendants and criminal defense lawyers unrelated to the 'ethics' policy concerns that purportedly drove the rule. Rather than tailor the rule towards protecting legitimate expectations in attorney-client relationships, the ABA sought to insulate unprivileged information from discovery and to protect defense lawyers from having to withdraw from cases.").

77. Model Rules of Prof'l Conduct R. 3.8(f) (amended 1991) ("The prosecutor in a criminal case shall . . . not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless [certain conditions are met and] . . . the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding.").

78. ABA Report, *supra* note 75, at 8 (noting that Model Rule 3.8(f)(2) is an "anomaly" because, "[r]ather than stating a substantive ethical precept, it sets out a type of implementing requirement that is properly established by rules of criminal procedure rather than established as an ethical norm").

79. *See* Zacharias, *Specificity*, *supra* note 62, at 232 (discussing the codes' goal of influencing substantive law).

80. *See* Green & Zacharias, *supra* note 60, at 308–10 (discussing the possible uses of professional code provisions when the law is "in flux").

81. *See generally* Hazard, *supra* note 5.

not surprising, therefore, that as the bar defined and tightened confidentiality provisions in 1969 and 1983,[82] attorney-client privilege doctrine did not change.

In contrast, when the bar takes a position at a time when the courts are struggling with an issue, the bar's standards may be treated as dispositive. In 1986, for example, the U.S. Supreme Court grappled with an unresolved evidence-related question that had long perplexed the courts: what lawyers should do about false testimony that their clients propose to offer, or have offered, in court.[83] The ABA's resolution of this issue was uncertain as well, until 1983.[84] The Model Rules, however, took the position that lawyers should remedy false testimony, even if doing so required disclosure of the client's confidences[85] and many states quickly adopted the same posture. The Supreme Court promptly agreed, citing the professional codes and treating them as largely determinative.[86]

III. PERSPECTIVES ON WHETHER ETHICS-RELATED CODE PROVISIONS ARE LAW

What conclusions can one draw from the above analysis for the question of whether the professional codes' evidence-related provisions should be conceptualized as law? Clearly, courts traditionally have not treated the provisions as law in the sense of being binding pronouncements that courts must enforce. Equally clearly, courts sometimes have rejected code pronouncements outright on the basis that the drafters' vision or approach is out of step or simply wrong.

Nevertheless, the analysis suggests that judicial failure to apply particular evidence-related rules is less frequently attributable to a clash of visions than commentators have assumed. There are numerous other explanations

82. *See* Model Rules of Prof'l Conduct R. 1.6 (1983); Model Code of Prof'l Responsibility DR 4-101 (1980).

83. Nix v. Whiteside, 475 U.S. 157 (1986). The issue was most clearly debated in 1965, before the adoption of the modern legal ethics codes. *Compare* Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469 (1966) (advocating a client-oriented position), *with* John T. Noonan, Jr., *The Purposes of Advocacy and the Limits of Confidentiality*, 64 Mich. L. Rev. 1485 (1966) (advocating a model more oriented to producing truthful testimony).

84. The Model Code of Professional Responsibility included a permissive exception to confidentiality for clients' statements of an intention to commit a crime, but did not explain how liberally the exception should be construed. Model Code of Prof'l Responsibility DR 4-101(C)(3). Simultaneously, while forbidding the use of false evidence, the Code did not specify an exception to confidentiality covering perjury which a lawyer learns of after the fact. *Id.* DR 7-102(A)(4) (forbidding lawyers to "[k]nowingly use perjured testimony").

85. Model Rules of Prof'l Conduct R. 3.3(b) (1983). The Model Rules, however, included no confidentiality exception covering the client's statements of intent to commit perjury. *See* Model Rules of Prof'l Conduct R. 1.6(b) (allowing disclosure only to prevent future crimes involving physical harm).

86. *Nix*, 475 U.S. at 168. Interestingly, on the question that the 1983 Model Rules did not answer—whether lawyers may disclose, or threaten to disclose, the client's intention to commit perjury in advance—the Court assumed inaccurately that the professional codes would require such behavior, leading the Court to approve of the lawyer's threats in *Nix*.

for judges' decisions to depart from the principles espoused by the codes which are consistent with the proposition that the codes have significant legal effect. Indeed, judges often explicitly rely on the codes in forming evidence law—or at least consider deferring to the factors (and vision) that the codes emphasize. In the cases involving communications with represented persons, for example, courts ultimately have applied exceptions to the underlying ethics principles,[87] but only after acknowledging the importance of the principles themselves.

In the end, courts sometimes reject the codes' pronouncements on evidence law, sometimes defer to them (usually through adoption of parallel common law), and sometimes agree with them but do not treat them as legal gospel. Does that make the codes law, quasi-law, law within their own sphere, or simply the distillation of ideas?

One of the catalysts for the courts' reactions to legal ethics codes is the perception that the codes are the creation of the bar, while evidence rules are the products of judicial lawmaking. At first glance, that perception is surprising because, in most jurisdictions, the codes do not become effective until state supreme courts adopt them.[88] State supreme courts also are ultimately responsible for supervising professional discipline.[89] Nevertheless, it appears that many judges approach the codes with the assumption that the supreme courts simply rubber-stamp what local bar associations or committees provide them.[90] On this view, it seems appropriate to treat the codes differently than ordinary mandates of the highest state court.

One can argue about the validity of the assumption that state supreme courts do not take code drafting seriously.[91] Clearly, however, that does not need to be—and arguably should not be—the case. The more state supreme courts actively participate in the formulation of the professional rules and the more lower courts are prompted to accept the legal ethics codes as supreme court mandates, the likelier it is that the discrepancies between ethics and evidence law, and the sense that the professional codes and judge-made law represent distinct visions, will disappear.

The lower courts' varied responses to pronouncements in the professional codes exacerbate the problem. Because judges typically have not explained their reasons for diverging from the codes, the cases mislead other courts into underestimating the force of the codes as supreme court mandates,

87. *See supra* text accompanying notes 26–28.

88. *See generally* Zacharias & Green, *supra* note 7 (discussing state supreme courts' role in promulgating legal ethics codes).

89. *See generally id.* (discussing the role of state supreme courts in rendering disciplinary decisions).

90. *See* Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 Ga. L. Rev. 1167, 1185–1210 (2003) (discussing reasons why state supreme courts promulgating professional rules tend to be captured by the bar).

91. *See generally* Zacharias & Green, *supra* note 7 (arguing that state supreme courts can and should take their function of writing the rules seriously).

which in turn leads to even more haphazard or idiosyncratic decision making. Whatever the status of the professional codes, lower courts should not assume they have free rein to implement or disregard the codes' mandates on a whim. Precisely how lower courts should respond to the codes is a question for another day,[92] but the need for a consistent approach seems clear.

This essay's analysis of the use of ethics-related code provisions and evidence law suggests that the Restatement of the Law Governing Lawyers is justified in referring to the professional codes as a form of law. The codes clearly bind lawyers in some contexts and influence the courts in others. The Restatement also is correct in treating the codes as a significant part of the law governing lawyers. But to the extent the Restatement drafters mean to suggest that the professional codes (or those parts of the professional codes that are enforced through discipline) are law like any other law, that conclusion does not appear to be true under the status quo. The codes, at best, are a peculiar type of law that courts only sometimes deem effective.[93]

There are three possible responses to this state of affairs. First, society (or individual jurisdictions) could decide to recognize the professional codes as full law and identify their place in the hierarchy, or construct, of legal rules. As this essay's analysis suggests, this would require a significant change in the way state supreme courts participate in code drafting and the way all courts deal with code pronouncements.

A second approach would be to acknowledge explicitly the limits of professional regulation as law. Under this approach, there is significant risk that the codes will lose their effect on lawyers, who will tend to obey them only when significant risk of discipline is apparent. It thus would become important for some institution—the code drafters, the state supreme court, or the lower courts—to specify the proper uses and limits of the codes and the relationship between code requirements and external law.[94] Those specifications should be made clear to the lawyers and courts that must implement the distinctions.[95]

The final option is for society to give up the pretense that the codes and other law, including evidence law, operate on equivalent planes. There is a plausible argument that the legal ethics codes should be abandoned as an

92. *See id.* (focusing on how lower courts should use and respond to professional rules adopted by the state supreme courts).

93. The chief reporter for the Restatement recognized as much. *See* Wolfram, *supra* note 2, at 20 (discussing "the uncomfortable fit between law and legal ethics").

94. *See* Fred C. Zacharias, Integrity and Role Ethics (2007) (unpublished manuscript, on file with the Fordham Law Review) (discussing the value of the professional codes in reinforcing external constraints on lawyers, including universal moral principles).

95. *See* Fred C. Zacharias, *The Purposes of Lawyer Discipline*, 45 Wm. & Mary L. Rev. 675, 682–93 (2003) (distinguishing the goals of professional discipline from those of criminal law and discussing what that might mean for disciplinary courts).

unnecessary and unsuccessful venture.[96] If courts are unwilling to accept the code mandates and feel free to overrule them whenever the courts disagree with the outcomes they produce, then perhaps the existence of the codes is counterproductive. Their main practical effect arguably would be to mislead lawyers into obeying the rules in situations in which courts subsequently may deem the lawyer to have acted inappropriately.[97] In situations in which statutory or judge-made law corresponds to the codes, the codes seem duplicative.

CONCLUSION

Analyzing and ranking the three possible approaches to reconciling the professional codes and other law is beyond the scope of this essay. The topic this essay has addressed, however—the relationship between ethics-related code provisions and evidence standards—is a good vehicle for beginning the analysis. In this area, the overlap between the codes and judge-made law is clear and code provisions explicitly intrude on areas traditionally subject to judicial supervision. Judges have the power to establish the rules governing litigation. If law is conceptualized as simply being the exercise of coercive power by the state, then the judge-made rules rather than the codes represent "the law." If law refers to something more—to official mandates that have influence and an effect upon the regulated (i.e., lawyers) or the regulators (i.e., judges)—then the codes have a place in the legal hierarchy. The project that remains is to define some understanding of what "law is"[98] and to locate the codes within that understanding.

96. Arguably, agency, fiduciary, and contracts law provide many of the same constraints on lawyer conduct as the legal ethics codes without producing the externality of lawyers' beliefs that their role somehow places them outside the bounds of universal morality.

97. *See generally* Zacharias & Green, *supra* note 7 (discussing situations in which lawyers who follow the codes nonetheless might find themselves subject to judicial sanctions).

98. That, in part, was Susan Koniak's project when claiming that the bar and the courts have different visions. Koniak, *supra* note 6, at 1402 (describing the vision of the bar and the state as "two competing and sometimes conflicting normative systems, each claiming to legitimate action in accordance with its norms and thus each worthy of the name of 'law'").